
Florida Bankruptcy Case Law Update

October 2015 Cases

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Eleventh Circuit Opinions

Miller v. Miller (In re Miller)

618 Fed. Appx. 654 (11th Cir. Oct. 7, 2015)

- Section/Rule/Keywords: lien stripping, strip off
- Summary: Bank appealed from a bankruptcy court order voiding the bank's junior lien on the debtor's real property in a chapter 7 bankruptcy proceeding. Based upon the Supreme Court's decision in *Bank of America v. Caulkett*, — U.S. —, 135 S.Ct. 1995, 192 L.Ed.2d 52 (2015), the Eleventh Circuit vacated the district court's judgment and remand for further proceedings consistent with *Caulkett*.

In re McFarland

619 Fed.Appx. 962 (11th Cir. Oct. 16, 2015)

- Section/Rule/Keywords: 11 U.S.C.A. § 548(a)(1), constructive trust
- Summary: Chapter 7 trustee brought adversary proceeding to set aside, as fraudulent transfer, prepetition deed by which debtor-husband conveyed one-half interest in real property to his non debtor-wife, and debtor and wife defended on theory that wife always had one-half equitable interest in property, and that deed conveyed only bare legal title and no "interest of the debtor in property." The Eleventh Circuit found that the bankruptcy court had correctly determined, (a) that a purchase money resulting trust in favor of wife for a one-half interest in

property was not created; (b) debtor received less than reasonably equivalent value for executing deed of gift to his non-debtor wife; and (c) debtor believed he would incur debts beyond his ability to pay.

Horne v. Horne (In re Horne)

--- Fed. Appx. ----, 2015 WL 6500754 (11th Cir. Oct. 28, 2015)

- Section/Rule/Keywords: Fla. Stat. § 726.105, FUFTA, homestead
- Summary: This case involved an appeal from a bankruptcy court decision granting summary judgment under Florida's Uniform Fraudulent Transfer Act imposing an equitable lien on the defendant's homestead property. The defendant argued that questions of fraud are fact specific and the bankruptcy court erred by granting summary judgment. The Eleventh Circuit found that the bankruptcy court had correctly determined, (a) that the defendant was the "functional equivalent" of an insider, based on her long term relationship and cohabitation with the debtor; (b) the debtor continued to exercise control over the property; (c) the timing of the transfer from the debtor to the defendant was suspect; and (d) the defendant provided no consideration in exchange for the deeds. These factors constituted four "badges of fraud" and established a *prima facie* case. Because the defendant presented no evidence to the contrary, summary judgment was proper. Funds from the fraudulent transfers were used to purchase the homestead property and, under Florida law, the homestead property is not exempt from equitable liens.

Lang v. Lang (In re Lang)

620 Fed.Appx. 883 (11th Cir. Oct. 15, 2015)

- Section/Rule/Keywords: unsecured second priority lien
- Summary: In light of *Caulkett*, the Eleventh Circuit vacated the district court's judgment, and remanded the case for further proceedings consistent with *Caulkett*.

District Court Opinions

Florida Agency for Health Administration v. Bayou Shores (In re Bayou Shores)

2015 WL 6502704 (M.D. Fla. Oct 27, 2015) (Moody, J.)

- Section/Rule/Keywords: Stay pending appeal
- Summary: Debtor filed a motion for stay pending appeal. Debtor presented sufficient evidence to demonstrate that absent a stay it and its patients, employees, and staff will suffer irreparable damage and therefore the court granted the stay during the pendency of the appeal.

Reverse Mortgage Solutions, Inc. v. Inmon

2015 WL 6124049 (M.D. Fla. Oct. 16, 2015) (Honeywell, J.)

- Section/Rule/Keywords: Rules 8018(a), 9006(b)
- Summary: Appellant's filed an Amended Motion for Extension of Time to File and Serve Appellant's Brief on the basis that its counsel was relying on an old version of the Bankruptcy Rules and miscalculated the deadline and needed more time. After the Clerk of the Bankruptcy Court filed a notice of transmittal of the record to the District Court and the Clerk of the District Court electronically filed the Bankruptcy Record on Appeal no record activity occurred for two months. The court determined that Appellant failed to show excusable neglect for its failure to timely file the initial brief.

United States v. Switlyk

--- F. Supp. 3d ---- , 2015 WL 6468047 (M.D. Fla. Oct. 25, 2015) (Covington, J.)

Section/Rule/Keywords: Forfeiture judgment, 21 U.S.C. §853(p), liens

- Summary: The Debtor filed a Chapter 13 bankruptcy and failed to list a United States' Forfeiture Money Judgment as a debt. The debtor sought to extinguish the creditor's mortgage lien on the debtor's townhouse. If the debtor was successful in extinguishing the lien, then there would be equity in the townhouse. The Bankruptcy Court asked the District Court to determine whether if the creditor's mortgage on the townhouse was extinguished and the Debtor had equity in the townhouse, was the United States entitled to forfeiture of the townhouse. The District Court determined that the United States would be

entitled to the townhouse because 1) the debtor agreed to it in the plea agreement; and 2) the townhouse can be used as substitute collateral.

Lewis v. Lvnv Funding, LLC,

2015 WL 5819992 (S.D. Fla. Oct 5, 2015) (Bloom, J.)

- Section/Rule/Keywords: 15 U.S.C. § 1692(e), Fair Debt Collections Practices Act
- Summary: In this case, the court was required to interpret the interaction between the Bankruptcy Code, Bankruptcy Rules and the Fair Debt Collections Practices Act ("FDCPA"). Creditor filed a proof of claim after the applicable statute of limitations expired. Debtor claimed that the filing of the unenforceable proof of claim was "unfair," "unconscionable," "deceptive," and "misleading" pursuant to the FDCPA. The creditor claimed that the FDCPA was in direct conflict with the bankruptcy code and therefore could not be enforced. The court dismissed the complaint and held that while the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the bankruptcy code.

Cafaro v. Wells Fargo (In re Campbell)

2015 WL 5867098 (M.D. Fla. Oct. 5. 2015) (Covington, J.)

- Section/Rule/Keywords: 11 U.S.C. § 362(a), Rule 4001(a)
- Summary: Debtor filed for Chapter 7 bankruptcy and the bank moved for stay relief to foreclose on real property. The bankruptcy court lifted the automatic stay to obtain an *in rem* judgment against real property. An interested party filed various motions to vacate the order granting stay relief. However, the court found that the motions were all filed well beyond the time period prescribed in Rules 8002(a)(1), 8002(b)(1)(D), and 9023, even accounting for the extra 3 days under Rule 9006(f). The interested party did file a timely appeal regarding the stay relief order. The district court affirmed the bankruptcy court's order finding that property was not sought to be administered by the Chapter 7 Trustee, therefore the appropriate forum to raise issues relating to the foreclosure was in state court.

Bankruptcy Court Opinions

In re Kraz, LLC

539 B.R. 887 (Bankr. M.D. Fla. Oct 27, 2015) (Williamson, C.J.)

- Section/Rule/Keywords: proof of claim, interest, attorneys' fees
- Summary: The state court denied creditor's attempt to foreclose its mortgage on the debtor's property because the state court determined the creditor improvidently declared a default. The creditor sought to recover interest that accrued on its loan while its foreclosure action was pending, as well as attorney's fees and costs incurred after the adverse judgment but before the petition date. The court concluded that the creditor was not entitled to accrued interest or attorney's fees and costs as a matter of law because the state court judgment plainly provided that the loan would be reinstated nunc pro tunc to the day before the default was declared and that no "accrued principal and interest payments" would be due. And because the creditor orchestrated a default for its own benefit, it would be improper to award fees incurred in enforcing its promissory note in state court (even post-judgment). The court found that there was a question of fact whether the creditor's failure to provide an accurate estoppel letter prevented the debtor from tendering the actual amount due on the note or if the creditor would have accepted a tender of the correct amount due if the debtor could have raised the funds absent a proper estoppel letter.

In re Carter

2015 WL 6684795 (Bankr. M.D. Fla. Oct 5, 2015) (Jackson, J.)

- Section/Rule/Keywords: Bankr. Rule 9006(b)(1)
- Summary: Adversary plaintiff sought to reopen adversary case arguing that its failure to timely file the first amended complaint was the result of an administrative calendaring error, which constituted excusable neglect. The plaintiff filed its motion to re-open, six days after the deadline, and the amended complaint was filed the next day. The court allowed the amended complaint and found plaintiff's failure to timely file the amended complaint was simply an innocent oversight by counsel and constituted excusable neglect.

In re Orlando

2015 WL 6684927 (Bankr. M.D. Fla. Oct 30, 2015) (Jackson, J.)

- Section/Rule/Keywords: Rule 60(b)(4), Rule 7004(h), lien stripping
- Summary: On negative notice, the debtor filed a verified motion to strip lien and determine secured status of creditor. When no party filed a timely response to the Lien Strip Motion within the thirty-day negative notice period, the court granted the debtor's motion. A creditor filed a motion to vacate the order on the grounds that creditor was not properly noticed under Rule 7004(h). The clerk's office scheduled a preliminary hearing on the 60(b)(4) motion and directed the creditor to prepare, file, and serve the notice of hearing on the 60(b)(4) motion within three days. The clerk's noticing instructions warned that failure to comply would result in cancellation of the hearing on the 60(b)(4) motion. The creditor failed to comply and the hearing was cancelled. Five months later, the creditor requested another hearing date. The creditor again failed to file the notice of hearing. The creditor requested a third time for a hearing and timely filed and served a notice of hearing.

Ultimately the court found that the creditor's lack of diligence in noticing the 60(b)(4) motion, and the debtor would suffer substantial prejudice if the lien strip order was vacated, which comprised an exceptional situation which requires denial of the 60(b)(4) motion.

In re E.C.J. Investments, Inc.

2015 WL 6437385 (Bankr. S.D. Fla. Oct. 22, 2015) (Isicoff, J.)

- Section/Rule/Keywords: Rule 7056, Rule 9014
- Summary: The court granted the United States' summary judgment. At issue was whether the debtor could claim a net operating loss that was sustained by another company created by certain members of the debtor ("NEWCO") for the purpose of entering into a Mexican real estate transaction. The debtor sought to carry back a net operating loss that it claimed to have sustained in tax year 2007. The bankruptcy court agreed with the United States and found that the loss was not sustained by the debtor, but instead by NEWCO, and therefore the debtor was not entitled to claim the net operating loss.

In re Narcisi

539 B.R. 385 (Bankr. M.D. Fla. Oct 8, 2015) (Delano, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(4)
- Summary: Judgment creditors filed adversary complaint, seeking determination that judgment debt arising from Chapter 7 debtor-auctioneer's breach of a consignment agreement for the sale of personal property at public auction was non-dischargeable under 11 U.S.C. § 523(a)(4) on the basis of fiduciary and larceny. The court held because neither the agreement nor Pennsylvania law imposed fiduciary duties upon defendant with respect to the actions about which plaintiffs complained, the Defendant was not acting in a fiduciary capacity for purposes of the allegations that support plaintiffs' § 523(a)(4) claim. Additionally, the defendant's action only amounted to breach of the agreement and did not rise to the level of fraud or larceny. Therefore, the court held that plaintiff' claims were dischargeable.

In re Kourogenis

539 B.R. 625 (Bankr. S.D. Fla. Oct 7, 2015) (Olson, J.)

- Section/Rule/Keywords: 11 U.S.C.A. § 521(a)(2)(B), laches
- Summary: More than five years after Chapter 7 case was closed, creditor filed motion to reopen case to compel surrender of real property as debtor had agreed to do in her statement of intention, seeking an order barring debtor from continuing to contest state-court foreclosure action. The court ruled that the creditor slept on its rights and the doctrine of laches barred the creditor from seeking the requested relief.

Smith v. Smith (In re Smith)

Slip Copy 2015 WL 6142959 (Bankr. M.D. Fla. Oct 16, 2015) (Jennemann, J.)

- Section/Rule/Keywords: 11 U.S.C. § 523(a)(6), 11 U.S.C. § 523(a)(2), 11 U.S.C. §727(c), (d), and (e)
- Summary: Prior to the debtor's chapter 7 bankruptcy, the adversary plaintiff obtained a judgment against the debtor for damaging their joint home. The plaintiff filed an adversary action alleging that the judgment in not dischargeable

under 11 U.S.C. § 523(a)(6), 11 U.S.C. § 523(a)(2). Additionally, the plaintiff claimed that the Debtor was “attempting to abuse the bankruptcy process to avoid payment of plaintiff’s judgment and therefore the debtor’s discharge should be revoked under 11 U.S.C. §727(c), (d), and (e). The court ruled that the plaintiff could not support claims under 11 U.S.C. § 523(a)(6), 11 U.S.C. § 523(a)(2) or 11 U.S.C. §727(c), (d), and (e) and that the debtor was entitled to her discharge.