Florida Bankruptcy Case Law Update

November 2014 Cases

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Eleventh Circuit Opinions

Hill v. Suwanee River Water Mgmt. District (In re Hill),

583 Fed. Appx. 894 (11th Cir. Nov. 19, 2014).

- Section/Rule/Keywords: 11 U.S.C. § 1208

- Summary: A chapter 12 debtor, proceeding *pro se*, pursued an appeal of the bankruptcy court's order dismissing his bankruptcy case, which had been affirmed by the district court. Prior to the petition date, the Suwanee River Management District (the "District") obtained judgments in Florida state court against El Rancho No Tengo, Inc. ("El Rancho"), an entity for which the debtor is the president, for civil penalties and attorney's fees and costs arising from El Rancho's modification of a dam without obtaining the necessary permits. In response to the state court's issuance of writs of execution, the debtor transferred 71 acres of land owned by El Rancho to himself. The sheriff scheduled a public auction, and on the morning of the sale, the debtor sought relief under chapter 12. The bankruptcy court granted the District's motion to dismiss the case because the plan proposed by the debtor was not feasible and did not satisfy the District's liens. The bankruptcy court determined it had no ability to relitigate the merits of the state court judgments. The debtor raised no arguments on appeal, except that the state court judgments against El Rancho were not properly obtained, and the Eleventh Circuit affirmed.

Bank of America, N.A. v. Lakhani (In re Lakhani),
583 Fed. Appx. 896 (11th Cir. Nov. 19, 2014)

- Section/Rule/Keywords: 11 U.S.C. § 506(d), lien stripping, strip off

- Summary: Chapter 7 debtor sought to "strip off" an underwater second mortgage pursuant to section 506(d). The bankruptcy court granted the debtor's motion based on the Eleventh Circuit's decision in *In re McNeal*, and the district court affirmed. In affirming the decisions of the lower courts, the Eleventh Circuit reaffirmed the controlling precedent established in *Folendore v. United States Small Business Administration* and *In re McNeal*, holding that notwithstanding the Supreme Court's ruling in *Dewsnup v. Timm*, *Folendore* remained controlling precedent as *Dewsnup* was "not clearly on point" in that it did not address a "strip off" of a wholly unsecured lien.

Bank of America, N.A. v. Corrad (In re Corrad),
583 Fed. Appx. 904 (11th Cir. Nov. 26, 2014)

- Section/Rule/Keywords: 11 U.S.C. § 506(d), lien stripping, strip off

- Summary: Chapter 7 debtor sought to "strip off" an underwater second mortgage pursuant to section 506(d). The bankruptcy court granted the debtor's motion based on the Eleventh Circuit's decision in *In re McNeal*, and the district court affirmed. In affirming the decisions of the lower courts, the Eleventh Circuit reaffirmed the controlling precedent established in *Folendore v. United States Small Business Administration* and *In re McNeal*, holding that notwithstanding the Supreme Court's ruling in *Dewsnup v. Timm*, *Folendore* remained controlling precedent as *Dewsnup* was "not clearly on point" in that it did not address a "strip off" of a wholly unsecured lien.

U.S. v. Coulton,
---Fed. Appx.---, 2014 WL 6655435 (11th Cir. Nov. 25, 2014)

- Section/Rule/Keywords: 11 U.S.C. 362(b)(4), automatic stay

- Summary: Emmanuel Roy represented Patrick Coulton in connection with drug and money-laundering offenses, and accepted compensation from Coulton's family members who were unaware of payments Roy received from Coulton's wife. Roy failed to comply with a district court order disgorging the fee and

requiring Roy to submit personal and business financial affidavits, and Coulton moved to hold Roy in contempt. Roy sought relief under chapter 7 of the Bankruptcy Code before a final hearing on the contempt motion. The magistrate judge and the district court concluded that the contempt proceeding was not subject to automatic stay by virtue of section 362(b)(4), and in adopting the magistrate judge's report and recommendation, the district court found Roy in contempt and imposed a monetary sanction. Roy appealed this order. Although Coulton initiated the contempt proceeding, in affirming the district court's order, the Eleventh Circuit determined that contempt proceeding was an action or a proceeding by a governmental unit under section 362(b)(4) because the contempt proceeding was essentially an action by the court to ensure compliance with its orders. However, the Eleventh Circuit remanded the action to the district court with instructions to stay the execution of the money judgment against Roy until the dissolution of the automatic stay, as the enforcement of money judgments and orders by a governmental entity remains subject to the automatic stay.

District Court Opinions

Langdale Capital Assets, Inc. v. Woodard (In re Synectic Asset Mgmt., Inc.),

2014 WL 6065770 (M.D. Fla. Nov. 12, 2014) (Bucklew, J.)

- Section/Rule/Keywords: Fla. Stat. §§ 726.105, 726.106, stay pending appeal, good faith transferee, reasonably equivalent value

- Summary: Craig Berkman, through his company Synectic Asset Management, Inc. ("SAM"), ran a Ponzi scheme through several funds (the "Synectic Funds"). The Synectic Funds filed an involuntary chapter 7 bankruptcy petition against Berkman and SAM. Berkman and SAM ultimately negotiated a settlement with the Synectic Funds and chapter 7 trustee. Berkman and SAM made payments to the chapter 7 trustee in accordance with the terms of the settlement of various contested matters and claims the trustee asserted on behalf of the estate. After the trustee distributed a portion of the settlement proceeds in the Berkman case, which included making distributions to the Synectic Funds, Berkman was charged with securities and wire fraud, which resulted in the revocation of his discharge. The chapter 7 trustee had not yet made distributions in the SAM case. The appellants asserted that they are victims of Berkman's latest fraud

and sought avoidance and recovery of the transfers made by Berkman to the trustee and the transfers made by the trustee to the Synectic Funds under Florida's Uniform Fraudulent Transfer Act ("FUFTA") and to enjoin the trustee from making distributions in the SAM case. The bankruptcy court granted summary judgment in favor of the chapter 7 trustee and the Synectic Funds on the appellants' FUFTA claims, concluding that the trustee acted in good faith and did not accept the settlement payment for less than reasonably equivalent value and that the Synectic Funds received distributions in Berkman's case on account of antecedent debt owed to them by Berkman and denied the appellants' request for injunctive relief. The district court denied the appellants' request for a stay pending appeal of the bankruptcy court's order granting summary judgment in favor of the chapter 7 trustee because the appellants failed to demonstrate a likelihood of success on the merits, but also noted that a stay was not warranted as the appellants did not show that they will suffer irreparable harm, that other parties would not be harmed, and that public interest will be served by delaying distributions to creditors in the SAM case. The district court upheld the bankruptcy court's findings that the trustee and Synectic Funds gave reasonably equivalent value because reasonably equivalent value does not require a dollar-for-dollar transaction. The district court also denied appellants' request to require the trustee to post a bond.

U.S. v. Halberstadt,

2014 WL 5780242 (M.D. Fla. Nov. 12, 2014) (Conway, C.J.)

- Section/Rule/Keywords: 11 U.S.C § 523, student loan debt, undue hardship

- Summary: In response to the United States' effort to recover under the note, the defendant asserted that his student loans obtained in 1974 were discharged through his 1978 bankruptcy filing. The defendant's bankruptcy attorney had since retired, and the debtor contended his records of the bankruptcy were destroyed. The district court denied the United States' motion for summary judgment because it was unclear whether the defendant had established the undue hardship exception resulting in a discharge of the student loan debt.

Bankruptcy Court Opinions

In re Guardia,

2014 WL 6704405 (Bankr. S.D. Fla. Nov. 25, 2014) (Mark, J.)

- Section/Rule/Keywords: 11 U.S.C. § 362(b)(4), automatic stay

- Summary: The State of Florida, Office of the Attorney General (the "Attorney General") sought a determination that the automatic stay did not apply or relief from the automatic stay to add debtor as defendant in a FDUPTA action seeking restitution, civil penalties, attorney's fees, and injunctive relief brought by the Attorney General in an effort to enforce its regulatory powers. The debtor asserted that the automatic stay precluded the Attorney General pursuing monetary relief. The bankruptcy court held that the prosecution of the FDUPTA action against the debtor through judgment was within the Attorney's General's police powers and was not subject to the automatic stay. The bankruptcy court instructed the Attorney General to file a claim for any judgment it may obtain in state court.

Kapila v. SunTrust Mortgage, Inc. (In re Pearlman),

2014 WL 6704405 (Bankr. S.D. Fla. Nov. 25, 2014) (Jennemann, C.J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 544(b), 548, 550, Fla. Stat. § 726, constructive fraudulent transfers

- Summary: The chapter 11 trustee sought to avoid four prepetition transfers made by one of the debtors to SunTrust as mortgage payments for the benefit of one of the sellers of the securities in connection with Pearlman's Ponzi scheme (the "Seller"). After receiving two of the transfers, SunTrust issued a satisfaction of the mortgage, and less than a year later, the Seller sold the real property and deposited the sale proceeds (which exceed the amount of the two transfers) into the debtor's account. The other two transfers were applied to a note and mortgage on a different piece of real property. The Seller then sold the property, and used the proceeds to acquire a new piece of real property through a 1031 exchange, which in turn was sold by the Seller to Perlman. The trustee sought summary judgment on all counts. SunTrust also sought summary judgment, essentially arguing that even if the transfers were avoidable, they were not recoverable based on the "single satisfaction" rule and defenses as a good faith transferee for value. The Court concluded that the transfers were avoidable as

constructively fraudulent transfers, but that two of the transfers were not recoverable based on the "single satisfaction" rule and factual issues precluded the judge from entering summary judgment on the remaining issues.

In re Turner,

519 B.R. 354 (Bankr. S.D. Fla. 2014) (Ray, J.)

- Section/Rule/Keywords: Bankruptcy Rule 9011, sanctions

- Summary: Bankruptcy court determined debtor was not eligible for relief under chapter 13 and dismissed the bankruptcy case, where the debtor's sole source of income was derived from monthly assistance from his partner, which the partner had no contractual or legal obligation to provide. The debtor sought reconsideration of bankruptcy court's dismissal order, and the court ordered the debtor to produce all documents showing the financial support from the debtor's partner. A creditor also noticed a deposition *duces tecum* of the debtor's partner, at which the partner appeared and refused to answer questions or produce the requested documents. Bankruptcy court denied the motion for reconsideration, and the creditor filed a motion for sanctions. Bankruptcy court determined that dismissal of chapter 13 bankruptcy case did not deprive the court of jurisdiction to enter sanctions under Bankruptcy Rule 9011 against both the debtor and his attorney.

Laudenslager v. Saia, (In re Laudenslager),

2014 WL 6544285 (Bankr. M.D. Fla. Nov. 19, 2014) (Glenn, J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 365, 727(b)

- Summary: The debtor sought a determination that a creditor's debt based upon an alleged breach of a prepetition contract for the sale of the debtor's residence was discharged in the debtor's chapter 7 case. The bankruptcy court determined that because the sales contract was not assumed by the chapter 7 trustee, the contract was deemed rejected as of the petition date, and the debt was discharged.

In re Jiangbo Pharmaceuticals, Inc.,

520 B.R. 316 (Bankr. S.D. Fla. 2014) (Ray, J.)

- Section/Rule/Keywords: Bankruptcy Rule 9019, approval of compromises, bar orders

- Summary: Prior to the petition date, certain shareholders of the debtor initiated a shareholder derivative action seeking damages from the debtor's officers and directors based on alleged acts and omissions and a separate class action lawsuit asserting violations of securities laws (the "Securities Action"). Following the commencement of the chapter 7 case, the chapter 7 trustee moved to intervene as plaintiff in the derivative action, to abate the case, and to enforce the automatic stay. The chapter 7 trustee sought approval of a settlement of breach of fiduciary duty claims against the debtor's officer for $900,000.00 to be paid by the D&O insurer. The settlement also contemplated the entry of a bar order to prevent the further prosecution of the Securities Action, as the D&O policy was a $3,000,000 "wasting policy" that would continue to be depleted as additional fees and costs incurred in connection with the defense of the pending litigation against the officer. In approving the settlement over the objection of the plaintiffs in the Securities Action, the court applied the four *Justice Oaks* factors and determined that the settlement was fair and equitable and did not fall below the lowest point in the range of reasonableness. The court also approved the bar order, finding that it was integral to the settlement and was necessary to accomplish a meaningful settlement for the benefit of the estate and creditors.

In re Nachon-Torres,

520 B.R. 306 (Bankr. S.D. Fla. 2014) (Isicoff, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1329; chapter 13 plan modifications

- Summary: The court addressed motions to modify confirmed chapter 13 plans that were pending in four cases. The court concluded that plan modifications are only appropriate if the plan modification was consistent with the statutory prerequisites provided in section 1329, was the result of significant and unanticipated change that was not known at the time of confirmation, and the circumstances warrant modification. Based on the majority approach, the legislative history, and Eleventh Circuit precedent, the court concluded that the best interest of creditor's test is calculated as of the date the modified plan is filed.

In re Pollitzer,

2014 WL 6612932 (Bankr. S.D. Fla. Nov. 12, 2014) (Isicoff, J.)

- Section/Rule/Keywords: 11 U.S.C. § 707(b)(1) and (3);

- Summary: The debtor converted his chapter 13 case to a chapter 7 case and checked the box on the Statement of Current Monthly Income and Means Test Calculation that the presumption of abuse arises under section 707(b). The U.S. Trustee moved to dismiss the case under section 707(b)(1) as an abuse under the totality of the circumstances based on an assertion that the debtor had monthly disposable income of at least $1,500 per month. The debtor took the position that that section 707(b)(1) does not apply in converted cases because the statute provides that the court "may dismiss a case filed by an individual under this chapter," and the case was not commenced as a chapter 7 case. The bankruptcy court rejected the debtor's argument and held that section 707(b)(1) was applicable regardless of under what chapter the case was initially filed.

In re Berry & Berry Wings, LLC,

2014 WL 6705779 (Bankr. M.D. Fla. Nov. 26, 2014) (Funk, J.)

- Section/Rule/Keywords: 11 U.S.C. § 1129(a)

- Summary: Orange Bank raised a number of objections to confirmation of a chapter 11 plan under section 1129(a)(1), (2), (4), (8), (10), and (11). The court determined that the debtor was not required to designate a separate class for the secured claims of the Citrus County Tax Collector or the IRS, and in fact that the better approach is to not to treat secured tax claims as a class. The court also found that the inadvertent inclusion of language from a prior version of the plan proposing liquidation did not prevent the court from finding that the amended plan provided adequate means for its implementation. The court also concluded that purported adequate protection and cash collateral violations, in addition to other procedural deficiencies were not a bar to confirmation. Based on the granting of a motion to allow a late filed ballot accepting the plan, the court was satisfied that the requirements of section 1129(a)(10) was met. While the court expressed some concerns about feasibility given that the debtor's budget, the court ultimately concluded that the plan had a reasonable probability of success. The court held that the plan satisfied all elements of section 1129(a), with the exception of section 1129(a)(8), as two impaired classes had not voted to accept the plan.

Aguiar v. Espirito Santo Bank,

2014 WL 5655025 (Bankr. S.D. Fla. Oct. 31, 2014) (Isicoff, J.)

- Section/Rule/Keywords: chapter 15 proceeding, disqualification, Florida Rules of Professional Conduct 4-4.2, 4-4.3, 4-4.4, 4-8.4(c), 4-3.4, and 4-4.1, privilege

- Summary: Vanio Cesar Pickler Aguiar filed a chapter 15 proceeding for recognition of the Brazilian bankruptcy proceeding of Banco Santos to investigate the transfer of Banco Santos assets in the United States, identify litigation targets, and evaluate and commence actions against those targets if necessary. In connection with the investigation, Aguiar served discovery on Espiritu Santo Bank ("ESB") (and ultimately initiated a lawsuit against ESB), and ESB retained counsel to represent it in the discovery process. Subsequent to ESB retaining counsel, counsel for Aguiar did not inform counsel for ESB of examinations and interviews of two former employees of ESB (the "Former Employees"). In response to the complaint filed by Aguiar, ESB filed a motion to disqualify Aguiar's counsel as a result of the examination of the Former Employees, asserting that Aguiar obtained privileged information and raised multiple arguments under the Florida Rules of Professional Conduct. The court concluded that testimony and information elicited from the Former Employees by Aguiar's counsel was not privileged under the Banking Examination Privilege provided under federal common law, Section 309.6 of Title 12 of the Code of Federal Regulations, or Sections 655.057(1) and (2) of the Florida Statutes. In finding that no privileged testimony was elicited by Aguiar's counsel, the court determined that Section 655.057(1) of the Florida Statutes was not applicable because the Florida investigation and associated report were completed, and that the Banking Examination Privilege, CFR 309.6 and the Florida Statutes were not applicable because no documents were produced by the Former Employees. The court found that under Florida Bar Rule 4-4.2(a), the Former Employees were not represented by counsel when Aguiar's counsel communicated with them, as a former employee is not considered the party for purposes of Rule 4-4.2(a). The court also rejected ESB's arguments under Rules 4-4.1 and 4-4.3 that Aguiar's counsel was required to disclose to the Former Employees that Aguiar's interests were adverse to ESB, particularly in light of the fact that Aguiar's interests were not adverse to ESB at the time of the examinations of the Former Employees. Florida Bar Rule 4-4.4 did not apply because no documents were produced. The court also declined to find that email miscommunications between counsel for Aguiar and counsel for ESB rose to misconduct under Rule 4-8.4(c) because Aguiar's counsel did not conceal its intentions to examine or interview the Former Employees. The court further concluded that Aguiar's

counsel had not violated Florida Bar Rule 4-3.4, which requires fairness to the opposing party and counsel, as the line of questioning at the examination and interview of the Former Employees was not objectionable, meaning that the problematic responses would have been elicited even if ESB had been present. In denying the motion to disqualify and declining to award sanctions, the court did note that the dispute was largely a result of miscommunications and that counsel for Aguiar could have taken further action to ensure greater transparency in its actions that may have eliminated much of the disputes that arose after the commencement of the lawsuit against ESB.