Florida Bankruptcy Case Law Update

November 2015 Cases

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Eleventh Circuit Opinions

United States v. Freeman

--- Fed.Appx. ----, 2015 WL 7171131 (11th Cir. Nov. 16, 2015)

- Section/Rule/Keywords: statute of limitations, 18 U.S.C. § 152(a), newly discovered evidence, *Daubert*

- Summary: A criminal defendant appealed a conviction for concealment of assets in a bankruptcy proceeding, under 18 U.S.C. § 152(a). The basis for the conviction was premised on the defendant's (a forensic certified public account) sale of real property (which the defendant co-owned with his mother) one day prior to the petition date, and use of those sale funds during the course of the defendant's bankruptcy case without ever disclosing such proceeds to the trustee or on bankruptcy schedules. The defendant appealed the conviction based on three theories: (1) the indictment was barred by the five-year statute of limitations; (2) the evidence presented at trial was insufficient for conviction; and (3) newly discovered evidence warranted a new trial. With regard to the statute of limitations, the Court held that the limitations period begins to run when the debtor is discharged, or, when a discharge is no longer possible, when the discharge became impossible. Because the defendant voluntarily dismissed his underlying bankruptcy case, the calculation date was not based on the day the defendant filed his notice of voluntary dismissal, but instead the day the bankrupt tcy court entered its written order of dismissal on the docket. As to the sufficiency of evidence, the Court found that to prove concealment of assets, there must be proof of a knowing and fraudulent concealment from a trustee, *inter alia*, of any property belonging to the debtor's estate. Given the aforementioned facts, it was reasonable for the jury to conclude the defendant

knowingly concealed assets of the estate. Lastly, the fact that the defendant suffered a brain tumor, which his expert testified likely affected his judgment, was insufficient to warrant a new trial as there was no evidence the tumor existed at the time of the concealment, or that the tumor affected his judgment. In addition, the doctor's conclusions regarding the defendant's condition did not satisfy *Daubert* in that the conclusions were based entirely on reports from the defendant and his friends and family, instead of based on scientific evidence.

Tobkin v. Calderin (In re Tobkin)

--- Fed.Appx. ----, 2015 WL 7144748 (11th Cir. Nov. 16, 2015)

- Section/Rule/Keywords: Fla. Stat. § 222.11, business proceeds, res judicata

- Summary: Debtor appealed bankruptcy court order requiring turnover of funds to Chapter 7 trustee, as he claimed the funds were "earnings" under Fla. Stat. § 222.11. Debtor also claimed the trustee failed to properly object to his exemption of the funds. Debtor is an attorney who ran his own law practice, and filed for relief under Chapter 13. The funds that debtor claimed exempt as earnings were contingency fees he was expecting to receive after the petition date. The Chapter 13 trustee timely objected to the debtor's exemption, and then the case was converted to Chapter 7. Post-conversion, debtor filed a motion to deem the funds exempt as earnings, which the bankruptcy court denied. The bankruptcy court found the funds were proceeds from debtor's business, which, in accordance with Florida law, do not constitute earnings absent an arms-length employment agreement, which debtor did not have. Debtor appealed that decision, which was eventually dismissed for want of prosecution. As to the Chapter 7 trustee's failure to timely object to debtor's exemption, the Court found res judicata barred such argument because debtor's original appeal was dismissed for want of prosecution. Because that argument was originally presented then, the dismissal of the appeal constitutes a decision on the merits.

Pro Finish, Inc. v. Moffa
(In re All American Trailer Manufacturers, Inc.)

--- Fed. Appx. ----, 2015 WL 6848033 (11th Cir. Nov. 9, 2015)

- Section/Rule/Keywords: *nunc pro tunc*, subject matter jurisdiction, standing, injury in fact

- Summary: This case involved an appeal from a bankruptcy court judgment affirming an order of dismissal *nunc pro tunc*. Debtor filed for relief under

Chapter 11, and plaintiff was debtor's largest creditor. The US Trustee moved to dismiss or convert the case, and nine months later, at a hearing on the Trustee's motion, at which plaintiff was present, debtor and the Trustee presented an agreement to dismiss the case. Later that same day, an issue arose as to whether all creditors received proper notice of the hearing. Subsequently, the bankruptcy court re-noticed the hearing. A day after the re-notice of the second hearing was filed, plaintiff recorded a judgment lien on all of debtor's assets. Several days after the recording of the judgment lien, debtor assigned its assets to defendant, who then filed a state court petition for assignment for the benefit of creditors. Plaintiff objected to the petition, and the state court dismissed the petition. Plaintiff then terminated its judgment lien. The next month, at the second hearing on the motion to dismiss, the bankruptcy court agreed to make its order *nunc pro tunc* to the initial dismissal date. However, the order did not include the *nunc pro tunc* language, and defendant moved to correct the bankruptcy court's order, which the bankruptcy court did. Plaintiff claimed on appeal that the bankruptcy court did not have authority to issue the second order. The Eleventh Circuit held plaintiff did not have standing to challenge the second order, as there was no injury in fact. At the time of issuing the second order, the state court had already dismissed the assignment petition. Any injury plaintiff suffered was due to its own actions of terminating the lien, and not due to the entry of the order.

District Court Opinions

Zaychick v. Bank of America, N.A.

--- F. Supp. 3d ----, 2015 WL 7077371 (S.D. Fla. Nov. 13, 2015) (Rosenberg, J.)

- Section/Rule/Keywords: RESPA, 12 U.S.C. § 2605, subject matter jurisdiction, *Rooker-Feldman*

- Summary: Before the court was a second motion to dismiss as filed by defendant. A state court foreclosure was initiated, and two years later, plaintiff filed a loss-mitigation application to save her home. Her application was denied, and her subsequent appeal was also denied. Thereafter, a final judgment of foreclosure was entered and plaintiff's home was sold. Defendant initiated eviction proceedings, which plaintiff defended. During the course of the eviction proceedings, plaintiff sent a letter to defendant seeking more specific information as to why her loss-mitigation application was denied. Upon receiving defendant's response, plaintiff initiated this case, claiming violations of the Real Estate

Settlement Procedures Act, 12 U.S.C. § 2605, specifically, "Regulation X", with violations as to 12 C.F.R. § 1024.41 and 12 C.F.R. § 1024.36. Under the first code provision, plaintiff claimed defendant failed to properly evaluate plaintiff for all loss mitigation options, and that the specific reason for the denial was not stated. The court found it lacked subject matter jurisdiction due to application of the *Rooker-Feldman* doctrine. To wit, plaintiff was merely using the RESPA violations in an effort to overturn the state court's final judgment of foreclosure by claiming wrongful foreclosure. Because the state court had already heard arguments relating to the loss-mitigation issue, the presentment of that argument at the federal court level was to allege error with the state court's refusal to cancel the foreclosure sale. Litigants cannot use federal courts to overturn decisions – only appellate courts and the US Supreme Court have that ability. As to the second code provision, the response provided by defendant was accurate, and plaintiff lacked damages because her home had already been sold. Any damages were not caused by any RESPA violation, but by the alleged wrongful foreclosure, which was already addressed by the state court.

Kapila v. Militzok

2015 WL 7272761 (S.D. Fla. Nov. 18, 2015) (Lenard, J.)

- Section/Rule/Keywords: FDUTPA, Fla. Stat. § 501.201, trade or commerce

- Summary: A Chapter 7 trustee initiated an action against a lawyer and his law firm for legal malpractice on behalf of debtor. Defendants moved to dismiss three counts of the complaint: (1) breach of contract; (2) constructive fraud; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. 501.201. The court found that the statement in the complaint that the attorney-client relationship created a binding contract between the parties was sufficient to avoid dismissal. The court also found that the complaint sufficiently stated a claim for constructive fraud in that a fiduciary relationship was alleged, which was breached by the lawyer in nine different ways. However, as to the FDUTPA claim, the court dismissed this count with prejudice, as the rendering of legal advice does not constitute trade or commerce as envisioned to protect consumers, which is consistent with the majority of jurisdictions that have decided this issue.

Failla v. Citibank, N.A.

--- B.R. ----, 2015 WL 7422337 (S.D. Fla. Nov. 23, 2015) (Marra, J.)

- Section/Rule/Keywords: 11 U.S.C. § 521, surrender, abandonment

- Summary: This appeal of the bankruptcy court order granting an amended motion to surrender real property was based on the failure of debtors to surrender their homestead to the bank after the property was abandoned by the Chapter 7 trustee. The bank initiated a foreclosure, which debtors opposed before filing for relief under Chapter 7. In their schedules, debtors stated they owned real property encumbered by a mortgage, that the mortgage was a valid first mortgage representing an undisputed, non-contingent, liquidated and secured claim, and that the loan amount exceeded the value of the property. In their statement of intention, debtors claimed an intent to surrender the property, which debtors untimely sought to amend. The Chapter 7 trustee then abandoned the property, debtors received their discharge, and the bank continued the foreclosure, which debtors fought. The bank moved the bankruptcy court to compel debtors to surrender the property to the bank. Debtors then claimed that they effectively surrendered the property to the Chapter 7 trustee, who then abandoned it, reverting the property back to debtors. The court found that while a debtor may surrender property to a trustee (on which the court did not take a position), and not necessarily the lienholder, the subsequent abandonment by the trustee only reverts title to the debtor, and the original lien passes through the bankruptcy. Thus, the return of the pre-petition status quo, as the result of the abandonment, would mean that while debtors obtained a discharge of their personal liability on the note, they could retain title to the property, but the bank would also have an unsatisfied lien on the property as well, which the bank was permitted to satisfy through *in rem* means. Unless debtors chose to reaffirm the valid mortgage, they would have no right to defend the foreclosure.

Stranger v. Ross

2015 WL 7351389 (M.D. Fla. Nov. 20, 2015) (Chappell, J.)

- Section/Rule/Keywords: Rule 8018(a), dismissal of appeal, sufficient indifference, consistent dilatory conduct

- Summary: Appellant's appeal was dismissed for failure to file an initial brief within thirty (30) days, failure to request an extension of time, and failure to inquire in any way as to the status of the appeal. The court found appellant's actions,

coupled with his actions in the underlying adversary proceeding, demonstrated a sufficient indifference and consistent dilatory conduct, warranting dismissal.

Mears v. LVNV Funding, LLC

--- B.R. ----, 2015 WL 7067856 (M.D. Fla. Nov. 5, 2015) (Schlesinger, J.)

- Section/Rule/Keywords: FDCPA, FCCPA, preemption, stale debt, 11 U.S.C. § 502

- Summary: In the wake of the Eleventh Circuit decision of *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), the district court had to decide whether summary judgment was warranted as to plaintiffs' two-count complaint for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55, for the filing of a time-barred debt, or stale debt. At issue was whether the FDCPA claims were preempted by the Bankruptcy Code. In reviewing the Code's procedure for filing and objecting to proofs of claim, and the legislative intent of the FDCPA, the court had to decide if one federal statute was precluded by another. Finding that only an irreconcilable conflict between statutes or clear legislative intent would warrant repeal, the court held that due to the irreconcilable conflict between the ability to file a stale debt pursuant to the mandates of 11 U.S.C. § 502(a) (which a debtor can refute via objection under 11 U.S.C. § 502(b)) and that pursuing time-barred debts irrefutably consists of a FDCPA violation, it was clear the FDCPA must yield to the Code. As such, the FDCPA claim was denied as a matter of law. Without supplemental jurisdiction, the court then also granted summary judgment as to the FCCPA claim as well.

Bankruptcy Court Opinions

Gulf Coast Endoscopy Center of Venice, LLC v. DeMasi, M.D. (In re DeMasi)

--- B.R. ----, 2015 WL 7180725 (Bankr. M.D. Fla. Nov. 13, 2015) (Williamson, C.J.)

- Section/Rule/Keywords: fraudulent misrepresentation, 11 U.S.C. § 523(a)(2)(A), Chapter 408, Florida Statutes

- Summary: Two medical practices filed suit against one of the debtors, a medical doctor and managing member of the medical practices, for fraudulent

misrepresentation, and non-dischargability of debt pursuant to 11 U.S.C. §523(a)(2)(A). At issue was whether debtor intentionally concealed the poor performance of an outside vendor because debtor had an undisclosed business interest in said vendor. The bankruptcy court synthesized highly disputed facts to determine that even if debtor had concealed his interest in the vendor, which he did not (if anything, he may have concealed the extent of his involvement, but plaintiffs knew he had some interest in the company), plaintiffs were not injured because any profits debtor made via his interest in such vendor would not have been to plaintiffs' detriment. To the contrary, the vendor's purpose was to increase collections for plaintiffs, of which debtor was a managing member. As such there was no injury or damages. In addition, the bankruptcy court found that even if debtor concealed some information as to the vendor's performance, which he did not (if anything, debtor may have concealed one out of three performance reports), not once in the course of seven years, did plaintiffs act on the poor performance of the vendor's collections activity. Because there were no fraudulent misrepresentations, plaintiffs failed to state a claim for non-dischargability under § 523(a)(2)(A). Lastly, debtor did not violate his fiduciary duties under Chapter 408, Florida Statutes, in that the operating agreement expressly provided that the members of the LLCs could hold interests in competing businesses.

In re Belmont

2015 WL 7717203 (Bankr. M.D. Fla. Nov. 24, 2015) (Jackson, J.)

- Section/Rule/Keywords: Fla. Stat. § 222.25(3), Earned Income Credit, commingled funds

- Summary: Debtor obtained a tax refund in the amount of $8,365, of which $4,619 (or 55.22%) was attributable to the Earned Income Credit. Debtor deposited the tax refund into a bank account, wherein the tax refund represented the entirety of funds. After depositing the tax refund, debtor made a single withdrawal in the amount of $3,000, to pay for bathroom repairs two weeks prior to the petition date. Therefore, on his bankruptcy schedules, debtor claimed $4,619 as exempt pursuant to Fla. Stat. § 222.25(3), and the remaining $746 as exempt under Fla. Stat. § 222.25(4). The Chapter 7 trustee objected, claiming that of the $3,000 spent, 55.22% was attributable to the Earned Income Credit, and therefore only $2,962.40 of the balance in the account is exempt. Debtor claimed the $3,000 came entirely from the non-exempt portion of the tax refund. The bankruptcy court held that because the exempt funds were commingled with the non-exempt

funds, there was no way to trace which portion of the funds were exempt. As such, the court utilized the "straight percentage" approach to find the trustee's argument correct.

Herendeen v. General Electric Credit Union (In re Hibbard)

2015 WL 7251535 (Bankr. M.D. Fla. Nov. 13, 2015) (May, J.)

- Section/Rule/Keywords: attorneys' fees, fees-on-fees

- Summary: After plaintiff successfully brought FCCPA adversary proceeding against defendant, on behalf of the debtor, plaintiff sought attorneys' fees pursuant to the FCCPA. Defendant attempted to reduce the attorneys' fees based on, *inter alia*, the amount of recovery in proportion to the amount of attorneys' fees. Consistent with Florida law, the court completely rejected this request as contrary to public policy. In addition, the court awarded attorneys' fees incurred in successfully defending the fee award as authorized by the language of the FCCPA.

In re Wells

2015 WL 8928332 (Bankr. S.D. Fla. Nov. 3, 2015) (Ray, J.)

- Section/Rule/Keywords: judicial estoppel

- Summary: A creditor originally agreed to the fair market value of real property owned jointly by debtor and her co-debtor husband. The Chapter 13 plan was confirmed, which included payment to the creditor in the amount of $74,060.60 in full satisfaction of the mortgage. A few years after the debtor began making payments under the plan, she and her husband began having marital issues and divorced. As part of the divorce, the husband quit-claimed the property to debtor, and debtor made all payments to the creditor in the amount of $74,060.60. Instead of satisfying the mortgage, the creditor sought to have the property owned one-half by debtor, and one-half by the husband, and sought payment for the remaining half of the property. The bankruptcy court ruled that judicial estoppel precluded the creditor from taking such an inconsistent position after taking payment in full based on the agreed valuation.

Regions Bank v. MDG Lake Trafford, LLC (In re McCuan)

2015 WL 7717422 (Bankr. M.D. Fla. Nov. 30, 2015) (Delano, J.)

- Section/Rule/Keywords: proceedings supplementary, Fla. Stat. § 56.29, jurisdiction over foreign property, motion for reconsideration

- Summary: The bank obtained a judgment against debtor in excess of $4 million. The state court then entered an order permitting the bank to conduct proceedings supplementary under Fla. Stat. § 56.29 and to implead debtor's wife and family trust. Debtor then filed for relief under Chapter 7, and the Chapter 7 trustee removed the proceedings supplementary to the bankruptcy court. On the motion for reconsideration filed by the bank and the trustee, the bankruptcy court denied the motion. Instead, the court stated it agreed with its prior ruling that it lacked jurisdiction over property located in New Jersey, as proceedings supplementary is a state court remedy. With regard to the standard for motions for reconsideration, the litigant must ensure there is a clear error of law, and not simply a disagreement with the court's ruling.

O'Halloran v. Harris Corporation (In re Teltronics, Inc.)

540 B.R. 481 (Bankr. M.D. Fla. Nov. 3, 2015) (Williamson, C.J.)

- Section/Rule/Keywords: 11 U.S.C. §§ 544 and 550; constructive fraud, calculation of damages, insolvency analysis

- Summary: Trustee of liquidating trust created under Chapter 11 plan brought action under 11 U.S.C. §§ 544 and 550, seeking recovery of $12 million from sale of a patent portfolio owned by Harris Corporation, in which debtor had a blocking right to block such sale, which debtor sold to Harris Corp. for $5,000. The bankruptcy court found that the value of the blocking right could not be determined by the value of the patent portfolio, because the value of blocking such sale may not have been completely equivalent to the value of the portfolio itself. Instead, the blocking right should only be valued based on the amount a willing buyer would pay for such right. The trustee, who bore the burden of proof, failed to prove how much a willing buyer would pay, so the court could not conclude that $5,000 was not reasonably equivalent value. As far as the insolvency analysis, the court also found that the failure to include certain maintenance contracts on debtor's balance sheet was not appropriate to determine the insolvency of debtor, as the court found the testimony of the opposing expert more credible.

In re Mullen

2015 WL 8252928 (Bankr. M.D. Fla. Nov. 16, 2015) (Glenn, J.)

- Section/Rule/Keywords: Rule 3002(c), late filed claim

- Summary: While a secured creditor is not required to file a proof of claim in a Chapter 13 case, the failure to do so affects its right to receive payment under a Chapter 13 plan. Contrary to Rule 3002(c), the bank did not file a proof of claim until eighteen months after debtor's case had already been pending, and after debtor's plan had been confirmed. As such, the delay was not justified, and equity disfavored allowance of the claim, so the bank's late-filed claim was disallowed.

In re Arafa

2015 WL 7251317 (Bankr. M.D. Fla. Nov. 16, 2015) (Jackson, J.)

- Section/Rule/Keywords: 11 U.S.C. § 707(b)(3)(B), disposable income

- Summary: Debtor filed for relief under Chapter 7, and scheduled net monthly income in the amount of $8,768.24 for a family of four. Debtor also schedule total monthly expenses in the amount of $9,371, which included annual Disney passes in the amount of $179 per month, which debtor intended to renew in 2016, as well as payments on two luxury vehicles for debtor's non-filing spouse, which were purchased within two years prior to the petition date. Lastly, debtor scheduled $66,315 in general unsecured debt, of which $50,000 was the result of dishonored checks debtor issued in 2009, for which criminal charges resulted. After the charges were dismissed, debtor never attempted to make any payments toward the $50,000 debt. Under 11 U.S.C. § 707(b)(3)(B), the bankruptcy court found debtor's monthly expenditures far exceeded the allowable IRS National Standard for a household of six. Further, debtor's refusal to make any payment toward the $50,000 debt incurred more than five years ago, coupled with debtor's inflated living expenses, necessitated abuse under § 707(b)(3)(B), and the court dismissed the case.

In re England

2015 WL 6738627 (Bankr. M.D. Fla. Nov. 4, 2015) (Delano, J.)

- Section/Rule/Keywords: motion for reconsideration, new evidence

- Summary: Debtor's Chapter 13 case was dismissed, and debtor moved for reconsideration. The bankruptcy court found that since 2006, debtor has filed six Chapter 13 cases, and since 2008, debtor has been engaged in a protracted dispute with the Hillsborough County Tax Collector over taxes levied against real property owned by debtor. Given that Debtor's current bankruptcy case was filed on August 20, 2014, and debtor could not propose a plan that would pay the tax collector (her only creditor) due to her ongoing dispute, the bankruptcy court refused to reconsider the prior order dismissing the case. Debtor failed to present new evidence that the court committed manifest error of law or fact.

In re Hause

2015 WL 7251662 (Bankr. M.D. Fla. Nov. 13, 2015) (Jackson, J.)

- Section/Rule/Keywords: domestic support obligation, property settlement

- Summary: Debtor divorced his wife, and by marital settlement agreement, agreed to pay his wife $15,000 in non-modifiable alimony, plus $40,000 from the sale of real property, which was to be paid by the time the last alimony payment was to be paid. Debtor filed for relief under Chapter 13, and ex-wife filed a claim in the amount of $40,000 as a priority claim based on a domestic support obligation. Debtor objected and argued the claim was based on a property settlement, which is a general unsecured claim. Because the $40,000 was designated separately from the non-modifiable alimony, was linked to the sale of real property, and was listed in the martial settlement agreement under the section devoted to the division of real estate, the funds were of the nature of a property settlement and not a domestic support obligation.

In re Ford

Slip Copy, 2015 WL 7180270 (Bankr. M.D. Fla. Nov. 13, 2015) (Funk, J.)

- Section/Rule/Keywords: modify confirmed plan, res judicata

- Summary: Debtor filed for relief under Chapter 13, when he was employed as an airline pilot for a commercial carrier. At the time of filing, debtor's schedules

reflected monthly income of $15,510, and disposable income of $5,125.49. Debtor then proposed a plan that did not devote all of his monthly disposable income, but intended to pay unsecured creditors in full after 60 months. The Chapter 13 trustee did not object to the plan. A little over a year after debtor began making payments under the plan, he became disabled, and his monthly income was significantly reduced to $9,320, resulting in negative monthly disposable income in the amount of $266.86. Debtor sought to amend the confirmed plan based on a substantial, unanticipated change in circumstances, and the Chapter 13 trustee objected. The trustee claimed that if the debtor had paid all of his disposable income in to the plan as required, then the unsecured claims would have been paid almost in full. The bankruptcy court held that res judicata prevented the trustee from asserting this argument, since he did not raise the disposable income argument prior to confirmation.

In re Barhatkov

Slip Copy, 2015 WL 6834996 (Bankr. M.D. Fla. Nov. 3, 2015) (Jackson, J.)

- Section/Rule/Keywords: 11 U.S.C. § 727, revocation of discharge

- Summary: Debtor sought to revoke his own discharge in an effort to halt the foreclosure sale of a previously surrendered property. Given that six bankruptcy cases had been filed by the debtor and various related parties in an effort to halt foreclosure of the same property, and that debtor or members of his family have also filed an additional seven bankruptcy cases to stop other foreclosure sales of real property, and each case was dismissed for failure to file information or make plan payments, the bankruptcy court found a pattern of abuse of the bankruptcy process. In addition, the Bankruptcy Code makes no provision for the debtor to revoke his own discharge.