National Consumer Bankruptcy Rights Center

Cases in Review
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"Cases in Review" highlights recent cases that may be of particular interest to consumer bankruptcy practitioners. It is brought to you by Consumer Bankruptcy Abstracts & Research (www.cbar.pro) and the National Consumer Bankruptcy Rights Center (www.ncbrc.org).

Authority of the court—Imposition of sanctions—On creditor: Concluding that the "better-reasoned authorities" favored a narrower construction of a bankruptcy court's punitive sanctions power under Code § 105(a) and the court's inherent authority, the district court reversed a bankruptcy court decision imposing sanctions totaling $375,000 on a mortgage creditor in three Chapter 13 cases for failing to comply with Bankruptcy Rule 3002.1 and the court's prior orders declaring the debtors' mortgages current. *PHH Mortgage Corporation v. Sensenich*, 2017 WL 6999820 (D. Vt. Dec. 18, 2017) (case nos. 5:16-cv-256, 5:16-cv-257, 5:16-cv-258), appeal filed, *In re Beaulieu*, Case No. 18-147 (2nd Cir. filed Jan. 16, 2018).

Chapter 13—Confirmation of plan—Good faith under Code § 1325(a)(3): The Chapter 13 debtor's plan, under which he would make $268 monthly contributions to his retirement plan once he completed repayment of a loan from the retirement plan, was proposed in good faith for the purpose of Code § 1325(a)(3), although the debtor was not making contributions to the retirement plan when he filed his petition. The debtor testified that he had contributed to his retirement plan monthly since the year 2000, stopping only because he was temporarily suspended from doing so after taking out retirement loans. Moreover, the debtor's proposed annual contribution of approximately $3,200 was well below the maximum allowable contribution of $18,000, and the debtor had no other retirement benefits. *Gorman v. Cantu*, --- Fed. Appx. ----, 2017 WL 6422351 (4th Cir. Dec. 18, 2017) (case no. 17-1034).

Chapter 13—Confirmation of plan—Treatment of secured claims—Permissibility of modification: In a 2-1 panel decision in which both the majority and the dissent wrote detailed and spirited opinions, the Eleventh Circuit Court of Appeals held that a Chapter 13 plan may not provide for the payment, over the term

of the plan, of the redemption amount for property pawned prepetition where the redemption is governed by Georgia law and the redemption deadline, as extended under Code § 108(b), has expired before confirmation of the plan. "Mindful of the deference owed to state-law definitions and regulations of property rights," the majority held that the Bankruptcy Code did not forestall the automatic operation of Georgia's pawn statute, so that the pawned property "dropped out of the bankruptcy estate (and vested in the pawnbroker) when the prescribed redemption period lapsed," and, accordingly, that, with respect to that property, Code § 1322(b)(2), permitting the modification of secured claims, "had no field of operation." Simply put, the majority said, following the expiration of the grace period, the pawnbroker did not have a mere claim on the pawned property, it was the owner of the property, in this case the debtor's car. The dissent contended that Congress had conclusively defined the creation and scope of a bankruptcy estate and had given bankruptcy judges vast authority to alter the rights of those with claims against this estate. Federal bankruptcy law thus controlled, and state law could not operate to alter the bankruptcy estate after its creation--and it certainly could not serve to dispossess the bankruptcy estate of property. *In re Northington*, 876 F.3d 1302 (11th Cir., Dec. 11, 2017), petition for reh'g en banc filed (Jan. 2, 2018) (case nos. 16-17467, 16-17468).

Chapter 13—Eligibility—Debt limits: Code § 109(e), which provides that [o]nly an individual ... that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725 ... may be a debtor under chapter 13 of this title," does not provide authority for the court to dismiss a case; rather, the provision only defines who may be a debtor under Chapter 13. Code § 1307(c) provides authority for the court to dismiss a case for cause, but the express language of § 1307(c) does not require the court to dismiss a case in which a debtor exceeds the § 109(e) unsecured debt limit. Nor does case law suggest that the court must dismiss every case in which a debtor exceeds the limit. Here, the debtor exceeded the unsecured debt limit solely as a result of his educational debt. Dismissing his case would not advance the Congressional intent behind the debt limits, and doing so would hinder the principal purpose of the Bankruptcy Code--to grant a fresh start to the honest but unfortunate debtor. Accordingly, the court denied the Chapter 13 trustee's motion to dismiss a Chapter 13 case filed by a debtor with a modest income but $568,671 in student loan debt. *In re Pratola*, 578 B.R. 414 (Bankr. N.D. Ill., Dec. 27, 2017) (case no. 1:17-bk-11668), appeal filed, *Stearns v. Pratola*, Case No. 1:18-cv-213 (N.D. Ill., filed Jan. 11, 2018).

Chapter 13—Employment of professional: Where the Chapter 13 debtor employed an attorney as special counsel to prosecute a cause of action, that attorney entered into fee-splitting agreements with two other attorneys that were not disclosed to the court, and the attorney later distributed portions of the settlement proceeds to the

other two attorneys, all three attorneys violated Code § 327(e) (employment of special counsel), Code § 329(a) (employment of attorneys), Code § 504(a) (prohibition on fee splitting), Code § 362(a) (violation of the automatic stay), Bankruptcy Rule 2014(a) (employment of professional persons requirements), and Bankruptcy Rule 2016(b) (disclosure of compensation requirements). Although some courts had found that Chapter 13 debtors did not have to seek court approval of the employment of special counsel, the present court was not persuaded by that reasoning. *In re Wright*, 578 B.R. 570 (Bankr. S.D. Tex., Dec. 1, 2017) (adv. proc. no. 1:16-ap-1004), appeal filed, Case No. 1:18-cv-18 (S.D. Tex., filed Jan. 23, 2018).

Dischargeability of debt—Statement regarding debtor's or insider's financial condition under Code § 523(a)(2): Statements to a potential client by the debtor, a partner in a company that refurbished business jets, that the company was in "very fine legally [sic] financial shape" and that the company had "plenty of cash to operate [the] business," pertained to the overall financial strength and stability of the company and therefore were "statement[s] respecting [the company's] financial condition" within the meaning of Code § 523(a)(2). Accordingly, since the statements were oral, they fell outside the scope of both § 523(a)(2)(A) and § 523(a)(2)(B). *In re Haler*, --- Fed. Appx. ----, 2017 WL 6729967 (5th Cir., Dec. 29, 2017) (case no. 17-40229).

Property of the estate—Exemptions—Under state law—Extraterritorial application: The Florida state homestead exemption found in Fla. Stat. § 222.05, which does not contain an express limitation to property located in Florida, may be applied extraterritorially, so that the debtors, who were required under Code § 522(b)(3)(A) to apply Florida exemption laws, could exempt a mobile home located in Massachusetts under the Florida statute. *In re Frost*, 2017 WL 6508965 (Bankr. D. Mass., Dec. 19, 2017) (case no. 1:17-bk-12779).

Sufficiency of notice: Affirming the bankruptcy court's decision declaring the Chapter 13 debtor's mortgage debt "extinguished and/or satisfied," the Eleventh Circuit Court of Appeals held that, although the debtor did not provide the mortgage creditor with "perfect" service of every document that he was required to send, the creditor was nonetheless provided with notice reasonably calculated under all the circumstances to apprise the creditor that its status as a secured creditor was being challenged. Accordingly, the creditor's due process rights were not violated when the bankruptcy court invalidated its mortgage lien. The Court of Appeals observed that the creditor provided its preferred addresses for all notices and filings in the bankruptcy proceeding through the BNC, and the creditor was served by the BNC with the proof of claim filed by the debtor on behalf of the creditor; the creditor conceded that it received service of the bankruptcy court's order sustaining the debtor's objection to the proof of claim filed on the creditor's behalf; and the creditor

never timely moved for reconsideration of the order or otherwise acted to protect its interests after it had actual notice that its status as a secured creditor was in dispute. *In re Iliceto*, 706 Fed. Appx. 636 (11th Cir., Dec. 11, 2017) (case no. 16-16815).

Violation of discharge injunction—Damages: The bankruptcy court's award of $119,000 in emotional distress damages to the Chapter 7 debtors for their mortgage creditor's violation of the discharge injunction was reasonable and supported by the evidence. The debtor husband testified that, as a result of the creditor's communications, he suffered from anxiety attacks and felt humiliated, tormented, and harassed. The debtor wife testified that she experienced severe stomach pains, and both debtors testified that the stress eventually made them contemplate divorce, although they managed to preserve their marriage. The bankruptcy court awarded $1,000 for each of the 119 communications violating the injunction, consisting of 19 letters and approximately 100 telephone calls. The bankruptcy court erred, however, in assuming that it could not award punitive damages, as a bankruptcy court has authority to award "relatively mild" noncompensatory fines or punitive damages. *In re Marino*, 577 B.R. 772 (9th Cir. B.A.P., Dec. 22, 2017) (case nos. 16-1229, 16-1238), appeal filed, Case No. 18-60005 (9th Cir. filed Jan. 23, 2018).

Violation of stay—Damages—Attorney's fees: The Bankruptcy Code authorizes payment of attorney's fees and costs incurred by the debtor in successfully pursuing an action for damages resulting from a violation of the automatic stay and in defending a damages award on appeal. Nothing in the text of Code § 362(k)(1) limits the scope of attorney's fees to solely ending the stay violation; Congress did not say those costs and attorney's fees were limited to ending the stay violation, but rather spoke to a full recovery of damages, including fees and costs incurred from violating the stay. This explicit, specific, and broad language permits the recovery of attorney's fees incurred in ending a stay violation, prosecuting a damages action, and defending those judgments on appeal. *In re Horne*, 876 F.3d 1076 (11th Cir. Dec. 5, 2017) (case no. 16-16789).