1.7.11

1st Circuit

U.S. v. Callahan (In re Callahan), 2010 U.S. Dist. Lexis 130272 (D. Mass. 12/8/2010)(William G. Young, District Judge).
District Court affirmed the Bankruptcy Court's ruling denying an IRS tax lien on the debtor's property (wife) due to her husband's tax debt, while reviewing the respective burdens of proof on the lien and examination of the nominee theory of title and application of resulting trusts with marital presumption. Government failed to show that the husband made a single payment towards the property at issue with encumbered funds; the government could not trace tax liens on encumbered funds to the real property.

In re Luquillo Plaza Corp., 2010 Bankr. Lexis 4534 (Bankr. D.P.R. 12/8/2010)(Brian K. Tester, Bankruptcy Judge).
Purchaser properly forfeited its $50,000 deposit when it failed to close on sale of the bankruptcy estate assets it contracted for, pursuant to 11 U.S.C. §363(b), the Court finding purchaser's theories under state law non-persuasive.

Am. Fleet Servs. v. Budget Rent-A-Car Sys., 2010 U.S. Dist. Lexis 134434 (D. Mass. 12/20/2010) (Nathaniel M. Gorton, District Judge).
District Court had administratively dismissed, without prejudice, pending litigation before it due to litigant's bankruptcy petition, with leave to reopen if the matter was not resolved during the bankruptcy case. During the bankruptcy case, certain liabilities were assumed by another entity, including those of the dismissed District Court litigation, and the bankruptcy case subsequently was closed. Plaintiff's motion to reopen the District Court case more than seven years later was denied, the plaintiff having failed to either diligently monitor its claim in the bankruptcy case or timely move to reopen the District case.

Marley v. Bank of Am., 2010 U.S. Dist. Lexis 133202 (D. Mass. 12/16/2010)(George A. O'Toole, Jr., District Judge).
Pro se litigant filed multiple claims, which the defendants argued he could not bring as they were not scheduled in his now-closed Chapter 7 case, or alternatively that the claims were property of the bankruptcy estate. District Court stayed the matters for 90 days to give the plaintiff the opportunity to move before the Bankruptcy Court to reopen the case to schedule the claims, which would also give the Chapter 7 trustee a chance to either assert or abandon the claims if the case was reopened.

In re Montalvo, 2010 Bankr. Lexis 4536 (Bankr. D.P.R. 12/6/2010)(Enrique S. Lamoutte, Bankruptcy Judge).
Unclaimed funds (un-cashed creditor payments under the confirmed plan)after conclusion of Chapter 13 case do not revert to the debtor; 28 U.S.C. §§2042 and 2042 govern their disposition.

Bueno-Irizarry v. Advanced Cardiology Ctr. Corp., 2010 U.S. Dist. Lexis 129807 (D.P.R. 12/7/2010)(Jose Antonio Fuste, Chief District Judge).
Court denied defendant's motion for summary judgment finding that diversity in the action was not destroyed when the plaintiff filed for Chapter 7 bankruptcy relief, since the Court looks to the domicile of the bankruptcy petitioner, not his Chapter 7 Trustee, for diversity purposes; and, since the cause of action could now be pursued by the Chapter 7 Trustee, the District Court ordered that the estate show cause why the Trustee should not be substituted as party plaintiff.

Supplies & Servs. V. NACCO Indus. (In re Supplies & Servs.), 2010 Bankr. Lexis 4535 (Bankr. D.P.R. 12/10/210)(Brian K. Tester, Bankruptcy Judge).
Parties filed motions for summary judgment, to determine as a matter of law the creditor's security interest in the debtor's assets pursuant to a security agreement, for which the Court determined the creditor was not secured since the creditor failed to file a continuation statement after the expiration of 5-years (contract provision required that the substantive law of North Carolina, not Puerto Rico, apply).

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In re: MARCIA L. CALLAHAN, Debtor; UNITED STATES OF AMERICA, Defendant-Appellant v. MARCIA L. CALLAHAN, Plaintiff-Appellee

CIVIL ACTION NO. 10-10924-WGY

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 130272

December 8, 2010, Decided
December 8, 2010, Filed

PRIOR HISTORY: Callahan v. United States (In re Callahan), 425 B.R. 728, 2010 Bankr. LEXIS 1112 (Bankr. D. Mass., 2010)

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff debtor, a taxpayer's wife, filed an adversary proceeding, contending that certain tax liens, which were based on the taxpayer's unpaid tax liens and filed against real property that had been owned by the debtor, were invalid. Defendant, the United States of America, appealed the **bankruptcy** court's order holding that the tax liens were invalid because the government could not trace tax liens on encumbered funds to the real property.

OVERVIEW: The government alleged that the **bankruptcy** court erred in finding that the debtor did not hold title to the property as the taxpayer's nominee. The **bankruptcy** court determined that the tax lien could not reach the property because the taxpayer had no interest in the property under Massachusetts law. Based on evidence showing that the debtor had been the one who had repeatedly leveraged the real property and had been in control of it at all times, the **bankruptcy** court found that the government could not reach the property through a nominee theory. The court held that the **bankruptcy** court did not clearly err in finding that the taxpayer had no interest in the property under Massachusetts law and that the taxpayer did not have nominal control of the property. The **bankruptcy** court's finding that the government failed to trace encumbered funds from the taxpayer to the property was not clearly erroneous because there was no evidence that the taxpayer made a single payment on the property with encumbered funds. A resulting trust in favor of the taxpayer was not created because the government failed to prove that the taxpayer paid a specific and definite amount towards the purchase price.

OUTCOME: The court affirmed the **bankruptcy** court's judgment.

CORE TERMS: nominee, mortgage payments, tax liens, beneficiaries, burden of proof, trace, state law, plain error, encumbered, distinctly, mortgage, federal law, resulting trust, tax claim, purchase price, clarification, individually, refinancing, titleholder, tax liabilities, burden of proving, taxing authority, contributed, persuasive, claimant, titled, bankruptcy petition, dollar, government's claim, property interest

LEXISNEXIS® HEADNOTES ?? HYPERLINK

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

HN1 On appeal from a judgment in an adversary proceeding, the district court reviews the **bankruptcy** court's factual findings for plain error and conclusions of law de novo. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. More Like This Headnote

Real Property Law > Ownership & Transfer > General Overview

Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Liens (IRC secs. 6320-6327) > General Overview

HN2 A nominee is one who holds bare legal title to property for the benefit of another. The government may collect a taxpayer's unpaid tax liabilities out of property held by a nominee of the taxpayer. More Like This Headnote

Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Liens (IRC secs. 6320-6327) > General Overview

HN3 Generally, courts employ one of two approaches to the nominee theory with respect to taxpayer liability; both approaches employ the well-known principle that federal tax law cannot create a property interest that otherwise does not exist under state law. Some courts expressly recognize that whether a titleholder is a nominee of a taxpayer ought be determined under state law. Other courts, while not expressly acknowledging that state law is applicable, include an additional step in the nominee determination which requires first an examination of state law to determine whether the taxpayer held some interest in the property. Under either approach, property titled to the purported nominee cannot be reached for tax liability purposes unless the taxpayer has some property interest cognizable under state law. More Like This Headnote

Tax Law > Federal Tax Administration & Procedure > Tax Credits & Liabilities > Liens (IRC secs. 6320-6327) > Property & Rights Subject to Lien

HN4 Once a tax lien attaches to property, the lien reattaches to the thing and to whatever is substituted for it. The owner and the lien holder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. More Like This Headnote

Evidence > Inferences & Presumptions > Creation of Presumptions

Real Property Law > Deeds > Types > Gift Deeds

Real Property Law > Trusts > Resulting Trusts

HN5 A resulting trust is generally presumed when one party pays the purchase price of property, but title is placed in the name of another. In contrast when, the transfer is between spouses the presumption is that the payor intended the title holder to take the property by way of a gift, rather than holding it in a resulting trust. Either presumption may be rebutted by a showing of clear evidence of contrary intent. More Like This Headnote

COUNSEL: **[*1]** For United States of America, Appellant: Julie C. Avetta, U.S. Department of Justice, Tax Division, Washington, DC; Lisa L. Bellamy, U.S. Department of Justice, Civil Trial Section, Northern Region, Washington, DC.

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JUDGES: WILLIAM G. YOUNG, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM G. YOUNG

OPINION

MEMORANDUM AND ORDER

YOUNG, D.J.

1. INTRODUCTION

The government appeals the March 18, 2010 Order of the United States **Bankruptcy** Court (the "Clarification"), Callahan v. United States (In re Callahan II), 425 B.R. 728 (Bankr. Mass 2010), which amended the **Bankruptcy** Court's opinion of November 2, 2009 (the "Decision"), Callahan v. United States (In re Callahan I), 419 B.R. 109 (Bankr. Mass. 2009), pursuant to an Order of Remand from this Court, United States v. Callahan (In re Callahan), No. 09-12129, 2010 U.S. Dist. LEXIS 36771, 2010 WL 1170112 (D. Mass. Feb. 11, 2010). In the Decision, the **Bankruptcy** Court ruled that certain federal tax liens assessed against James C. Callahan ("Callahan"), the non-debtor spouse of Marcia L. Callahan (the "Debtor"), and recorded against property in Falmouth, Massachusetts **[*2]** ("Falmouth Property"), were invalid because the government could not trace tax liens on encumbered funds to the Falmouth Property.

A. Procedural Posture

The **Bankruptcy** Court entered the Decision against the government and in favor of the Debtor after a one-day bench trial. The government timely filed notice of appeal in accordance with Federal Rules of **Bankruptcy** Procedure 8001(a) and 8002(a). This Court heard the government's appeal and remanded the matter to the **Bankruptcy** Court for clarification. Order, Feb. 10, 2010, No. 09-CV-12129, ECF No. 12. This Court

specifically requested that the **Bankruptcy** Court clarify whether it intended to make the factual finding that Callahan had made all the mortgage payments. This Court noted that the government did not necessarily need to produce cancelled checks for each mortgage payment made by Callahan in order distinctly to trace encumbered funds to the Falmouth Property; testimony or other evidence would suffice. After the **Bankruptcy** Court issued its Clarification, [1] the government again timely appealed in accordance with Federal Rules of **Bankruptcy** Procedure 8001(a) and 8002(a).

FOOTNOTES

1 In the Clarification, the **Bankruptcy** Court stated that the use **[*3]** of the word "all" on the first line of page nine of the Decision was "an error and should instead have read 'contributions in an unproven number and amount towards.'" In re Callahan II, 425 B.R. at 728 . The testimony indicated that the Debtor had contributed some undetermined amount towards the mortgage payments on the Falmouth Property between 1989 and 2001. Id. at 729 .

B. Facts[2]

FOOTNOTES

2 The facts are taken from the Decision issued by the **Bankruptcy** Court. In re Callahan I, 419 B.R. at 114-123 .

The Debtor is the wife of taxpayer Callahan. At the time of their marriage Callahan owned substantial assets; the Debtor in contrast entered the marriage with only a few thousand dollars. Callahan testified [3] that it was always their intention that the Debtor would acquire assets "as soon as reasonably possible, meaning houses and real estate."

FOOTNOTES

3 The **Bankruptcy** Court concluded that both the Debtor and Callahan testified credibly. It stated:

In particular, both the Debtor and Callahan were calm and forthright. Any minor discrepancies in their testimony were attributable to simple memory lapses caused by the passage of time. I further note that the United States provided no witnesses to contradict or rebut **[*4]** either the Debtor's or Callahan's testimony.

Id. at 114 n.2 .

In 1989, the Debtor proposed to purchase the Falmouth Property as a second residence for her family. At the time the Debtor already owned property at 269 Chapman Street in Canton, Massachusetts (the "Chapman Street Property"), which was used as the family's primary residence. Callahan was consulted, but the Debtor made the decision on her own to purchase the Falmouth Property.

On June 20, 1989, the Debtor settled the 121 Westwood Road Realty Trust to take title to the Falmouth Property and named herself trustee. Although the trust instrument references a schedule of beneficiaries executed on the same date, no such schedule was ever prepared or executed. On the same date, the Debtor took title to the Falmouth Property as trustee of the 121 Westwood Road Realty Trust.

The $50,000 down payment for the Falmouth Property came from the sale of stock of a company doing business as Strawberries Records. Neither Callahan nor the Debtor could recall in whose name the stock was owned or who contributed to the initial investment. The Debtor, as trustee of the 121 Westwood Road Realty Trust, granted a first mortgage on the Falmouth Property **[*5]** in favor of Bay State Federal Savings Bank. Both Callahan and the Debtor, individually and in her capacity as trustee, signed the note as borrowers. On the same date, the Debtor executed a note and second mortgage in favor of the Crowleys, the sellers of the Falmouth Property. Only the Debtor signed that note.

The Debtor earned no salary from 1990 through 2000. During this period, approximately 1989 to 2001, Callahan made mortgage payments on both the Chapman Street Property and Falmouth Property and paid various other bills. At trial, Callahan explained that he was happy to pay the mortgages from "monies we had" for the benefit of the Debtor and their children. The Debtor later testified that despite all these payments, there was never any understanding or agreement that Callahan would own any interest in either the Chapman Street Property or the Falmouth Property.

On November 2, 1994, the Debtor and Callahan filed a joint voluntary **bankruptcy** petition under Chapter 11. The Schedule A filed in that case stated that they held "a one hundred percent beneficial interest in the 121 Westwood Road Realty Trust."

On August 30, 2001, the Debtor, as trustee of the 121 Westwood Road Realty Trust, **[*6]** deeded the Falmouth Property to herself individually for the stated consideration of one dollar for the purpose of refinancing the mortgage that property. The Debtor used funds from the refinancing to pay off the mortgage on her Chapman Street Property, and for school tuition for her children, mortgage payments, and property maintenance costs.

On June 28, 2002, Andrew Callahan, the Debtor's son, settled the A.J. Financial Trust naming himself as the trustee. Less than two months later, by deed dated August 8, 2002, the Debtor transferred the Falmouth Property to Andrew Callahan, as trustee of the A.J. Financial Trust.

On April 1, 2004, Andrew Callahan, as trustee of the A.J. Financial Trust, reconveyed the Falmouth Property to the Debtor for the stated consideration of one dollar. She then again refinanced the mortgage on the Falmouth Property. The Debtor loaned funds received from refinancing to the Blue Hill, a new restaurant primarily run by Callahan. She explained that she "believed in the business and hoped that it would one day provide employment for all

four members of her family." **[*7]** A mere fifteen days later, the Debtor conveyed the Falmouth Property to the A.J. Financial Trust.

Based upon Callahan's unpaid tax obligations from 1991 to 2001, federal tax liens were recorded on October 7, 2005 against "A.J. Financial Trust, and/or, Nominee of Transferee of James C. Callahan" and "Marcia Callahan Nominee and/or, Nominee of Transferee James C. Callahan" on both the Chapman Street Property and the Falmouth Property.

The Debtor filed a voluntary **bankruptcy** petition under Chapter 11 on October 5, 2006. On March 21, 2007, she filed the present adversary proceeding seeking a determination that those tax liens were invalid.

II. ANALYSIS

HN1 On appeal from a judgment in an adversary proceeding, this Court reviews the **Bankruptcy** Court's "factual findings for plain error . . . and conclusions of law de novo." In re Indus. Commer. Elec., Inc., 319 B.R. 35, 46 (D. Mass. 2005). The Supreme Court explained the plain error or clearly erroneous standard:

"[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.". . . . If the [trial] court's **[*8]** account of the evidence is plausible in light of the record viewed in its entirety, the [appellate court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

A. Nominee Theory

HN2 A nominee is one who holds bare legal title to property for the benefit of another. BLACK'S LAW DICTIONARY 1076 (8th ed. 2004). The government may collect a taxpayer's unpaid tax liabilities out of property held by a nominee of the taxpayer. See G.M. Leasing Corp. v. United States, 429 U.S. 338, 350-51, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728-29 (11th Cir. 1989).

The government alleges that the **Bankruptcy** Court erred in concluding that the Debtor, the 121 Westwood Road Realty Trust, and the A.J. Financial Trust did not hold the title to the Falmouth Property as Callahan's nominees. Specifically, it claims the court incorrectly applied the nominee standard as a two-step process looking first to state and then to federal law. The government argues that instead of this **[*9]** two-step test, federal nominee law alone should have been determinative.

The **Bankruptcy** Court expressed concern that the government had the cart before the horse and rejected the government's argument that United States v. Kimbell Foods, Inc., 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), mandates the application of federal standard to tax collection cases. See In re Callahan I, 419 B.R. at 125 & n.140. Instead, the **Bankruptcy** Court insisted on the two-step approach to nominee analysis. First, as a threshold matter, the court had to determine whether, under Massachusetts law, Callahan held an existing interest or right in the Falmouth Property, and only then would the court apply the factors developed by federal law to determine whether this interest could be reached for purposes of tax liability. Id. at 126.

At the first step, the **Bankruptcy** Court relied on two Supreme Court cases and explained that when looking to state law, courts must "consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them." [4] In re Callahan I, 419 B.R. at 125 (quoting United States v. Craft, 535 U.S. 274, 279, 122 S. Ct. 1414, 152 L. Ed. 2d 437 (2002) (emphasis added)); see also id. **[*10]** (citing Drye v. United States, 528 U.S. 49, 59-61, 120 S. Ct. 474, 145 L. Ed. 2d 466 (1999)). The court concluded that Callahan held no interest in the Falmouth Property under Massachusetts law, so the tax lien could not reach that property.

FOOTNOTES

4 *Drye* further explained the relationship between state and federal law and their role in the analysis of tax lien controversies and reaffirmed the two-step approach: "[W]e look initially to state law to determine what rights the taxpayer has in the property the Government seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights of property' within the compass of the federal tax lien legislation." 528 U.S. at 58 .

The **Bankruptcy** Court proceeded to the second step of the analysis even though its decision at the first step was fatal to the government's claim. After correctly listing the factors relevant to the nominee inquiry under federal law, [5] the court considered the government's assertions that Callahan had nominal control over the Falmouth Property. It found them unpersuasive, however, due to evidence adduced at trial that showed that the Debtor had been the one who had repeatedly leveraged the Falmouth Property **[*11]** and had been in control of it at all times. Accordingly, the **Bankruptcy** Court concluded that, even applying the federal factors, the government's attempt to reach the Falmouth Property through a nominee theory failed.

FOOTNOTES

5 In federal tax lien cases, courts usually consider the following factors: the lack of consideration paid by the titleholder; a close relationship between the taxpayer and the titleholder; the control exercised over the property by the taxpayer while title is held by another; the use and enjoyment by the taxpayer of the property titled to another; lack of interference in taxpayer's use of property by the titleholder; the use of property or funds titled to another to pay the taxpayer's personal expenses; whether the taxpayer exercises dominion and control over the property, or treats it as if it belongs to him; whether title was placed in the record owner's name as a result of or in anticipation of the taxpayer's liability. See, e.g., Oxford Capital Corp. v. United States, 211 F.3d 280, 284 n.1 (5th Cir.

2000) .

The government's argument that this analysis of the nominee issue was erroneous is not persuasive. HN3 Generally, courts employ one of two approaches to the nominee theory **[*12]** with respect to taxpayer liability; both approaches employ the well-known principle that federal tax law cannot create a property interest that otherwise does not exist under state law. See Craft, 535 U.S. at 278-79; Drye, 528 U.S. at 58. Some courts expressly recognize that whether a titleholder is a nominee of a taxpayer ought be determined under state law. See, e.g., United States v. Stinson, 386 F. Supp. 2d 1207, 1218 (W.D. Okla. 2005); Cody v. United States, 348 F. Supp. 2d 682, 694 (E.D. Va. 2004); United States v. Snyder, 233 F. Supp. 2d 293, 296 (D. Conn. 2002). Other courts, while not expressly acknowledging that state law is applicable, include an additional step in the nominee determination which requires first an examination of state law to determine whether the taxpayer held some interest in the property. See, e.g., Holman v. United States, 505 F.3d 1060, 1067-68 (10th Cir. 2007); Spotts v. United States, 429 F.3d 248, 251 (6th Cir. 2005). Under either approach, property titled to the purported nominee cannot be reached for tax liability purposes unless the taxpayer has some property interest cognizable under state law.

In the case at bar, the **Bankruptcy** Court followed **[*13]** the two-step approach. The court determined that Callahan held no interest in the Falmouth Property under Massachusetts law and that even when considering the factors argued by the government, the evidence contradicted any finding of nominal control by Callahan. There is nothing in the record to indicate that this factual finding was plain error.

Since applying both approaches to the nominee inquiry led to the same conclusion, whether the **Bankruptcy** Court erred in choosing the two-step approach is hardly a question before this Court. Additionally, since there is no Massachusetts precedent or law on the application of the nominee theory that could guide the **Bankruptcy** Court in its analysis, and none was cited by either party, the **Bankruptcy** Court did not err in looking to other courts for guidance. Therefore, the **Bankruptcy** Court did not err in its application of nominee theory in this case.

B. Lien Tracing Theory

The government argues that the **Bankruptcy** Court, in the Decision, mistakenly concluded that the government failed to carry its burden distinctly to trace funds from Callahan to the Falmouth Property. It also argues that Callahan's testimony and corroborating evidence demonstrate **[*14]** that all mortgage payments between 1989 and 2001 came from Callahan.

HN4 Once a tax lien attaches to property, "[t]he lien reattaches to the thing and to whatever is substituted for it. . . . The owner and the lien holder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can *distinctly trace* them." Phelps v. United States, 421 U.S. 330, 334-335, 95 S. Ct. 1728, 44 L. Ed. 2d 201 (1975) (quoting Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 710, 8 L. Ed. 269 (1831)) (emphasis added).

It is undisputed that a tax lien attached to all of Callahan's property on January 1, 1996. It is also undisputed that Callahan made at least some mortgage payments on both the Chapman Street Property and the Falmouth Property. In re Callahan II, 425 B.R. at 728-29.

The government argues that all the mortgage payments from January 1, 1996 to August 30, 2001 were made by Callahan. After considering the evidence provided, the **Bankruptcy** Court made a finding of fact that the government failed distinctly to trace encumbered funds from Callahan to the Falmouth Property. It stated:
Not only did the Debtor dispute that premise by stating that she made mortgage payments from funds taken from the equity of the Falmouth Property and the Chapman **[*15]** Street Property, the United States was given [the] opportunity on June 20, 2009 and failed to show that Callahan made a single payment with encumbered funds.
In re Callahan I, 419 B.R. at 132-33. Moreover, the **Bankruptcy** Court noted that the government essentially conceded its failure of proof on this issue in its post-trial brief. Id. at 132.

After reviewing the record plus the supplemental briefs filed by the parties on March 11, 2010, the **Bankruptcy** Court concluded that Callahan's testimony indicated that the Debtor contributed some undetermined amount towards the mortgage payments between 1989 and 2001. In re Callahan II, 425 B.R. at 730. It also stated that the government "painted an incomplete portrait of the Debtor's and Callahan's financial history at trial." Id. at 731. In other words, there was no evidence about Callahan's or the Debtor's income or assets or about how they spent their income. The **Bankruptcy** Court noted that the government's burden distinctly to trace required "specificity and quantification" of Callahan's contribution, not "inferences and assumptions" that went against the parties' testimony. Id. at 731.

The government disagrees with the **Bankruptcy** Court's analysis **[*16]** of Callahan's testimony. The government's argument, however, is not persuasive. Callahan stated in his testimony that during that period he had made all the mortgage payments on the Chapman Street Property, id. at 730, but he never clearly testified similarly about the Falmouth Property. Id. Moreover, the **Bankruptcy** Court found that some mortgage payments came from the money received by the Debtor from refinancing her properties. In re Callahan I, 419 B.R. at 121.

The government also argues that it was reversible error for the **Bankruptcy** Court to impose on it the burden of proving that not a single mortgage payment came from the Debtor. The **Bankruptcy** Court explained that "[i]t is the burden of the United States as the party seeking to apply [section 6321 of the Internal Revenue Code] to prove a person or entity is in fact the nominee or alter ego of the taxpayer." In re Callahan I at 124. Because only the Debtor knows who made the mortgage payments, the government argues, she should have borne the burden on that issue.

This argument is flawed on both legal and factual grounds. The government relies on various cases stating that the taxpayer has the burden of proof in matters where she **[*17]** possesses the relevant evidence. See, e.g., United States v. Rexach, 482 F.2d 10, 17 (1st Cir. 1973) (holding that in a tax collection suit or government counterclaim to a taxpayer refund suit, the taxpayer bears the burdens of production and persuasion). None of the cases cited by the government are particularly persuasive, however, since they are all tax deficiency or refund cases, which implicate the presumption that the government determined the correct amount of tax owed such that the taxpayer bore the burden of proving otherwise.

Courts have disagreed over whether the government should bear the burden of proof when proving a tax claim in **bankruptcy.** This Court in Thinking Machines Corp. v. New Mexico Taxation and Revenue Dep't, 211 B.R. 426 (D. Mass. 1997) summarized the state of the law:

The **Bankruptcy** Code and the Federal **Bankruptcy** Rules of Procedure are silent, however, with respect to the proper allocation of the ultimate burden of proof when a tax claim is asserted in **bankruptcy,** and indeed with respect to the ultimate burden of proof for any claim asserted against the debtor. Although courts generally assume that this ultimate burden rests with the claimant, the federal **[*18]** circuit courts of appeals are split on the question of whether the ultimate burden falls upon the taxpayer or the taxing authority when a tax claim is asserted in the context of a **bankruptcy** proceeding. The Third, Fourth, and Seventh Circuits have held that the taxpayer-debtor bears the ultimate burden of proof, just as it does outside of **bankruptcy,** while the Fifth, Eighth, Ninth, and Tenth Circuits place the ultimate burden on the taxing authority. The First Circuit has yet to address this issue.
Id. at 429-30 (citations omitted). Another court has explained that usually "cases which have invoked [the general rule allocating the burden of proof to the moving party] even when the claimant is a taxing authority have done so on the basis that (1) the Code lacks any provision which distinguishes government claims from claims of private entities, and (2) the IRS should be 'treated like any other claimant under the **Bankruptcy** Code because the estate is a party in interest and not just a taxpayer.'" In re Premo, 116 B.R. 515, 523 (Bankr. E.D. Mich. 1990) (citations omitted) (quoting In re Brady, 110 B.R. 16, 18 (Bankr. D. Nev. 1990)).

Here, it is important to note that, although there is **[*19]** an underlying tax claim against Callahan, the issue is the validity of the tax lien against the Falmouth Property. The government has the burden of proving its right to a lien; had the government shown the existence of a valid tax lien, the Debtor would have had the burden of proof to discharge it. The government, however, failed to show that Callahan made a single payment to the Falmouth Property with encumbered funds, while the Debtor testified that she had made the mortgage payments. The **Bankruptcy** Court made a finding of fact that the government failed distinctly to trace encumbered funds from Callahan to the Falmouth Property; based on this evidentiary record, that finding was not plain error, so the judgment of the **Bankruptcy** Court must be affirmed.

C. 121 Westwood Road Realty Trust

The **Bankruptcy** Court held that the 121 Westwood Road Realty Trust failed for failure to execute a schedule of beneficiaries and that, as a result, the Falmouth Property was held by the Debtor individually. In re Callahan I, 419 B.R. at 127 (citing Arlington Trust Co. v. Caimi, 414 Mass. 839, 848, 610 N.E.2d 948 (1993)). The **Bankruptcy** Court made a factual finding that the Debtor had failed to prepare a schedule of **[*20]** beneficiaries. Since the Debtor failed to do what the declaration of trust required, the **Bankruptcy** Court concluded that the 121 Westwood Road Realty Trust failed and that the Debtor took title to the Falmouth Property in her individual capacity.

1. Failure of the 121 Westwood Road Realty Trust

The government argues that the 121 Westwood Road Realty Trust did not fail. It does not dispute the law laid out by the **Bankruptcy** Court, but argues that the court mistakenly found that the schedule of beneficiaries was not created. Specifically, it claims that Schedule A filed by the Debtor and Callahan in their 1994 joint Chapter 11 **bankruptcy** petition six years after the trust was created qualifies as the schedule of beneficiaries.

The **Bankruptcy** Court acknowledged the existence of the Schedule A described by the government. In re Callahan, 419 B.R. at 118. It noted, however, that very little information was offered at trial about the 1994 **bankruptcy** and that the Schedule A was never

introduced as an exhibit. Id. Though not explicit in the Decision, the **Bankruptcy** Court necessarily concluded that the Schedule A did not represent the missing schedule of beneficiaries referenced in the trust documents. **[*21]** See id. at 127 (holding that the 121 Westwood Road Realty Trust failed due to the lack of a schedule of beneficiaries). This finding was not plain error. The trust instrument references a schedule of beneficiaries executed on the same date; and the Schedule A in question was prepared six years later. The decision of the **Bankruptcy** Court on this matter must be affirmed.

2. Resulting Trust

Alternatively, the government argues that even if the 121 Westwood Road Realty Trust failed, the property right did not vest in the Debtor, but rather a resulting trust in favor of Callahan was created.

HN5 A resulting trust is generally presumed when "one party pays the purchase price of property, but title is placed in the name of another . . . ." Feinman v. Lombardo, 214 B.R. 260, 267 (D. Mass. 1997) (Collings, M.J.). "In contrast when, the transfer is between spouses the presumption is that the payor intended the title holder to take the property by way of a gift, rather than holding it in a resulting trust." Id. Either presumption may be rebutted by a showing of clear evidence of contrary intent. Ross v. Ross, 2 Mass. App. Ct. 502, 508, 314 N.E.2d 888 (1974).

The **Bankruptcy** Court held that a resulting trust in favor **[*22]** of Callahan was not created because the government failed to prove that Callahan provided either the entire purchase price for the Falmouth Property or that he paid a specific and definite amount towards the purchase price, or alternatively because the government failed to present evidence rebutting the marital presumption.

The government disputes both rulings simply restating arguments made at trial: that the Debtor earned no money and so the natural assumption is that the purchase price and all other mortgage payments were made by Callahan, and that the marital presumption does not apply because property was deeded to the trust, not to the Debtor individually. None of these arguments persuade this Court that the **Bankruptcy** Court committed plain error, so the judgment is affirmed.

D. CONCLUSION

For the above mentioned reasons this Court AFFIRMS the judgment of the **Bankruptcy** Court.

SO ORDERED.

/s/ William G. Young

WILLIAM G. YOUNG

DISTRICT JUDGE

IN RE: LUQUILLO PLAZA CORP XXX-XX5746 Debtor(s)

CASE NO. 07-04440 BKT, Chapter 7

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF PUERTO RICO

2010 Bankr. LEXIS 4534

December 8, 2010, Decided
December 8, 2010, FILED, ENTERED

CORE TERMS: buyer, purchase agreement, bankruptcy estate, binding, deposit, good faith, maximize, auction, bankruptcy law, estate's assets, contracting parties, notice, null, state law, sale of assets, real property, notice of sale, essential conditions, public order, purchasing, directing, complying, inscribe, signing, deem, reserved, railroad, adjacent, deed

COUNSEL: **[*1]** For LUQUILLO PLAZA CORP, Debtor: ROBERT MILLAN, MILLAN LAW OFFICES, SAN JUAN, PR.

For WILFREDO SEGARRA MIRANDA, Trustee: NOEMI LANDRAU RIVERA, SAN JUAN, PR.

U.S. Trustee: MONSITA LECAROZ ARRIBAS, OFFICE OF THE US TRUSTEE (UST), SAN JUAN, PR.

JUDGES: Brian K. Tester, U.S. **Bankruptcy** Judge.

OPINION BY: Brian K. Tester

OPINION

OPINION AND ORDER

At hearing held on September 22, 2010, this Honorable Court ordered parties to file motions on the legality of the Option to Purchase Agreement [hereinafter "Purchase Agreement] signed by Trustee and Mr. Pedro Umpierre Torregrosa [hereinafter "Buyer"]. The parties have complied and the matter is submitted. Buyer argues in his motion that the Purchase Agreement is null under Puerto Rico Law because it reserved Trustee's right to continue marketing the property to third parties, and to rescind the agreement should a better price be obtained for the same property. The trustee counters that the instant proceeding involves an agreement for the sale of estate's assets, thus it is a core proceeding governed by the **Bankruptcy** Code and under the authority of this Court. For the reasons stated below, this Court finds that the Purchase Agreement was a legally binding contract, in accordance **[*2]** with the Trustee's obligation under **bankruptcy** law, therefore the chapter 7 trustee's forfeiture of the $50,000.00 good faith deposit was proper.

BACKGROUND

Debtor, Luquillo Plaza Corp., filed a Chapter 7 petition for relief on August 8, 2007. Schedule A filed with Debtor's petition listed real property as follows: "Property Lot #3, Carr. No. 3, Kilometer 15.2, Luquillo, PR" with a scheduled value of $750,000.00. Upon inquiry and investigation Trustee initiated proceedings to administer this asset of the **bankruptcy** estate, described at the Registry of Property as follows:

"RUSTICA: Parcel of land located at Mata de Platano Ward within the municipality of Luquillo. It is bounded by the NORTH, with lot number 2 owned by the Puerto Rico Industrial Development Company; by the SOUTH, with lands owned by Sucesión Méndez Bás; by the EAST, with State Road #3; and by the WEST, with railroad owned by the Fajardo Development Railroad. It has an area of 4, 682.43 square meters, equivalent to one "cuerda" and one thousand nine hundred thirteen ten thousandths of another."
At the time of the filing, the deeds of purchase transferring property in favor of Debtor had been presented but not inscribed in **[*3]** the Registry of Property. Upon further investigation Trustee learned that the owner of the asset's adjacent lot was Mr. Pedro Umpierre Torregrosa. On December 4, 2007, four months after debtor's filing for relief, Trustee signed a Purchase Agreement with the owner of the lot immediately adjacent to the property, Buyer. Terms of the purchase agreement signed by the parties were the following:

a) The purchase price was $1,000,000.00. A good faith deposit of $50,000.00 was paid to the Trustee.

b) The sale of the property was subject to the filing of a notice of sale. The Trustee explicitly reserved his right to accept any better offer received on or before the date of closing, but subject to an auction between buyer and any additional interested parties.

c) The agreement explicitly states that the sale was subject to the **Bankruptcy** Court's entry of order directing the Registrar of Property to inscribe the asset in favor of Debtor. Thus, it was agreed that the sale would take place within 60 days after the entry of the court order.

d) If Mr. Umpierre failed to purchase the property then the good faith deposit would be forfeited by the Trustee.

e) The sale was to be made without warranty of **[*4]** any kind. To be purchased "as is, where is."

With the exception that the sale would be conducted free and clear of liens, a reading of the contract shows that aside from the aforementioned, Buyer made no other reservations or conditions for the purchase of the property.

In compliance with the terms of the purchase agreement and his duties pursuant to 11 USC § 704, on December 18, 2007, Trustee filed adversary proceeding number 07-00343, seeking declaratory judgment directing the Registrar of Property to inscribe the asset in favor of Debtor. On July 31, 2008, judgment was entered declaring the property part of the **bankruptcy** estate and ordering its inscription at the Registry of Property, Carolina Part, in favor of Debtor. On April 16, 2008, Trustee filed applications for employment of notary and realtor, both granted by the Court. Pursuant to the terms of the purchase agreement, Buyer was to purchase the property on or before September 29, 2008 (60 days after entry of the judgment dated July 31, 2008). On August 27, 2008, Trustee filed "Notice of Intent to Sell Property at Private Sale" wherein the Trustee gave notice of his intention to sell the property to Buyer as per the terms of **[*5]** the purchase agreement. An amended notice of sale was filed on September 15, 2008, upon request of secured creditor, LPP Mortgage Ltd.

Upon this Court's entry of judgment on July 31, 2008, the Trustee and the professionals hired by the estate notified Buyer, that the terms of the Purchase Agreement had been met by the Trustee and that he was ready for closing. Instead of purchasing the property, Buyer, through Carlos E. Rodríguez Quesada Esq., sent a letter to the Trustee dated September 18, 2008, requesting the return of the deposit based on the allegation that the property had a

billboard which is leased by a third party. A meeting was held by the parties and their counsel on October 15, 2008, where the Trustee agreed to grant an extension for the purchase of the property until November 20, 2008. Despite multiple calls to Buyer and Mr. Rodriguez Quesada, no answer was received and the terms of the contract, along with the extension, expired without Buyer signing the deed of purchase.

DISCUSSION

Article 1042 of the Puerto Rico Civil Code, 31 L.P.R.A. § 2992 states that obligations are created by law, by contracts, and quasi contracts, and by illicit acts and omissions in which a kind **[*6]** of fault or negligence occurs. Obligations arising from law are not presumed, and the provisions of the laws, which may have established them, shall govern them. Article 1043 of the Civil Code, 31 L.P.R.A. § 2993. It is for this reason that Courts may not relieve a party of its obligations to do whatever it was agreed to do by contract, provided said contract is legal, valid and without defect. Cerveceria Corona v. Commonwealth Insurance Co.,115 D.P.R. 342 (1986).

In Irizarry Lopez v. Garcia Camara, 2001 TSPR 161, 155 D.P.R. 713, 2001 Juris P.R. 164 (2001), the Supreme Court of Puerto Rico found that when interpreting a sales option contract it will hold to the literal meaning of its terms when these are clear and leave no doubts as to the intention of the parties. Article 1210 of the Civil Code establishes that "[c]ontracts are perfected by mere consent, and from that time are binding, not only in regard to the fulfillment of what has been expressly stipulated, but with regard to all consequences which according to their character, are in accordance with good faith, use, and law." 31 L.P.R.A. § 3375.

A contract is in existence between two parties when the following conditions are met (1) the consent of the contracting **[*7]** parties; (2) a definite object which may be the subject of the contract; and (3) the cause for the obligation, which may be established. **See**, Article 1213 of the Civil Code, 31 L.P.R.A. § 3391. Once the essential conditions required for their validity exist, contracts shall be binding between the parties. **See**, Article 1230, 31 L.P.R.A. § 3451. Parties are free to accord and contract all that they deem appropriate as long as it is not against the law, morals or public order. Mayra I. Velez Lopez, Peticionaria, Departamento de Asuntos del Consumidor Agencia, Peticionaria v. Frances Izquierdo Stella Recurrida, Jesus Cales Rivera, et al., Interventores-Recurridos, 2004 TSPR 92, 162 P.R. Dec. 88, 2004 Juris P.R. 98 (2004);Article 1207 of Puerto Rico Civil Code, 31 L.P.R.A. § 3372. Since the signing of a contract, parties are bound to comply with that which was expressly agreed. Article 1210 of the Civil Code, 31 L.P.R.A. § 3375.

Article 1044 of the Civil Code of Puerto Rico, 31 L.P.R.A. §2994 states that "[o]bligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations." Article 1207 of the Civil Code, 31 L.P.R.A. §3372 provides that:
"[T]he contracting parties may make the agreement and establish the clauses and conditions which they may deem advisable, provided that they are not in contravention **[*8]** of law, morals, or public order."
Once the essential conditions required for their validity exist, contracts shall be binding between the parties. *See*, Article 1230, 31 L.P.R.A. § 3451. The contractual provisions of the Purchase Agreement defined and controlled the legal relationship between the Chapter 7 trustee and Buyer.

The contract, which this Court finds was legally binding under state law, is also within the

ambit of **bankruptcy** law. Contracts for the sale of real property in **bankruptcy** are primarily governed by the **Bankruptcy** Code not by the Civil Code of Puerto Rico. In re Terrace Chalet Apartments, Ltd., 159 B.R. 821, (N.D. Ill. 1993); 11 U.S.C. § 363(b). A purchase-option agreement for the sale of estate property is a core proceeding governed by the **Bankruptcy** Code and Rules. Such a contract directly deals with the sale of estate's assets for distribution to creditors by a **bankruptcy** trustee. Pursuant to 28 U.S.C. § 157 (b)(1) and(2)(M) and (N) this Court has jurisdiction over sales of property of the **bankruptcy** estate. 11 U.S.C. § 541(a) provides that the commencement of a case filed pursuant to Chapter 7 of the **Bankruptcy** Code creates an estate. The **bankruptcy** estate is administered **[*9]** by the Chapter 7 Trustee who is the representative of the estate and must "collect and reduce to money the property of the estate [...], and close the estate as expeditiously as is compatible with the best interest of parties." 11 U.S.C. §§ 323, 704. Buyer's arguments in his motion ignore that the applicable law governing the contract before this Court is the **Bankruptcy** Code and Rules. He completely overlooks the provisions governing the sale of assets of the **bankruptcy** estate and cites local state case law which is inapplicable because in those cases the local courts were not entertaining issues regarding the sale of assets under the administration of a Chapter 7 Trustee. Section 363(b) of the **Bankruptcy** Code authorizes the Trustee to sell property of the **bankruptcy** estate. In re WHET, Inc., 12 B.R. 743 (Bkrtcy.Mass. 1981). **Bankruptcy** courts have found that in complying with his duties to maximize the return of assets of the estate, the Trustee may place conditions on the sale of estate assets. In re Spenlinhauer, 231 B.R. 429 (D.Me.1999); Joseph DeMarco, Inc. V. Campo, 163 B.R. 49 (S.D.N.Y. 1994); 11 U.S.C. § 363(e). This is necessary in order for the Trustee to comply with his obligation **[*10]** to maximize revenues for the **bankruptcy** estate. In re S.N.A. Nut Co.,186 B.R. 98 (Bkrtcy. N.D.Ill. 1995). Buyer fails to acknowledge that he was purchasing property of the **bankruptcy** estate subject to the administration of the Trustee and the provisions of the Code. Pursuant to 11 U.S.C. § 704 the Trustee has an obligation to maximize the return on the sale of the real property and thus accept a better offer and hold a public auction if necessary. The finality of sales of the assets of the estate is determined, not under state law, but under federal **bankruptcy** law. Joseph DeMarco, Inc. V. Campo, 163 B.R. 49 (S.D.N.Y. 1994); In re Allison Warehouse & Transfer, Inc., 145 B.R. 293 (Bkrtcy.E.D.Ark. 1992). It is important to note that in this case an auction was not necessary because no better offer was received.

The Buyer argues that the Purchase Agreement is null because it incorporates an auction clause recognizing Trustee's obligation. On the contrary, such a clause needs to be incorporated in order to comply with the **Bankruptcy** Code and assure a good faith negotiation where a purchaser is aware of the requirements of the Code, before he signs the agreement. To accept Buyer's argument **[*11]** that such a clause makes a purchase option agreement null would mean that the Trustee would be stripped of any authority to sell assets of the estate while, at the same time, complying with his duty to maximize distribution to creditors. The sale of the assets of the estate goes hand-in-hand with distribution to creditors.

CONCLUSION

The motion to set aside the notice of sale and return of the deposit filed by Buyer on December 4, 2008 [Dkt. No. 61] is hereby DENIED. The Court rules that the Chapter 7 trustee acted in accordance with state and federal law. The request for imposition of monetary sanctions and attorney's fees filed by the Chapter 7 trustee on December 26, 2008 [Dkt. No. 64] is hereby DENIED. Each party is to assume their legal costs and fees.

IT IS SO ORDERED.

San Juan, this 08 day of December, 2010.

/s/ Brian K. Tester

Brian K. Tester

U.S. **Bankruptcy** Judge

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*2010 U.S. Dist. LEXIS 134434, **

American Fleet Services, Inc., Plaintiff, v. Budget Rent-A-Car Systems, Defendant.

Civil Action No. 99-12450-NMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 134434

December 20, 2010, Decided
December 20, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by Am. Fleet Servs. v. Budget Rent-A-Car Sys., 2010 U.S. Dist. LEXIS 134443 (D. Mass., Dec. 20, 2010)

CORE TERMS: termination, notice, reopen, bankruptcy proceeding, year prior, period of time, diligently, diligence, restore, monitor, modicum, arbitration proceedings, received notice, completion, happened

COUNSEL: **[*1]** For American Fleet Services,Inc., Plaintiff: Edgar L. Kelley, LEAD ATTORNEY, Kelley Law Office, Boxford, MA; Karl F. Stammen, Jr, LEAD ATTORNEY, Stammen and Associates, Boston, MA.

For Budget Rent-A-Car Systems, Defendant: John A. Donovan, Jr., LEAD ATTORNEY, Donovan & Hatem, LLP, Boston, MA; Michael P. Giunta, LEAD ATTORNEY, LeClair Ryan, P.C., Boston, MA.

JUDGES: Nathaniel M. Gorton, United States District Judge.

OPINION BY: Nathaniel M. Gorton

OPINION

MEMORANDUM & ORDER

GORTON, J.

Before the Court is plaintiff's motion to reopen this case after it was procedurally dismissed in 2003 due to defendant's filing for **bankruptcy.**

I. Background

In November, 1999, plaintiff American Fleet Services, Inc. ("American Fleet") brought suit against defendant Budget Rent-A-Car Systems, Inc. ("Budget") for tortious interference with contractual relations, breach of contract and promissory estoppel arising out of repair services that the plaintiff performed on trucks owned by the defendant. The plaintiff subsequently amended its Complaint to allege unfair and deceptive business practices in violation of Mass. Gen. Laws ch. 93A.

In August, 2002, Budget filed a Suggestion of **Bankruptcy** and this case was stayed. The plaintiff filed a Proof **[*2]** of Claim in the **bankruptcy** matter in April, 2003. In the meantime, in January, 2003, Judge Morris Lasker of this Court issued a Procedural Order of Dismissal stating:
In order to avoid the necessity of counsel to appear at periodic status conferences, it is hereby Ordered that the above entitled action be and hereby is dismissed without prejudice to either party moving to restore it to the docket if any further action is required upon completion or termination of all **bankruptcy** or arbitration proceedings.

During the **bankruptcy** proceeding and before this case was closed, the defendant entered into an Asset and Stock Purchase Agreement ("the Agreement") with Cendent Corporation ("Cendent") and its subsidiary Cherokee Acquisition Group ("Cherokee"), under which Cherokee assumed responsibility for certain liabilities, including the claims asserted by the plaintiff here. Cherokee then changed its name to Budget Rent-a-Car System, Inc., distinguishing it from the originally-named defendant by dropping the "s" from "Systems".

In June, 2010, more than seven years after it was closed, the plaintiff moved to reopen this case. It contends that it failed to do so because it was not given notice of **[*3]** either Cherokee's assumption of responsibility for the plaintiff's claims or the termination of Budget's **bankruptcy.** Defendant maintains, to the contrary, that plaintiff received notice of the **bankruptcy's** conclusion in 2005 and, in any event, knew of the termination for at least one year prior to moving to reopen this case. The defendant protests that reopening the case nearly five years after the **bankruptcy** was closed would cause it extreme hardship because the case involves matters that occurred over 14 years ago.

II. Analysis

A. Legal Standard

The Court may use an administrative closing to remove a case from its active files without making a final adjudication where a case "is likely to remain moribund for an appreciable period of time," such as pending the lift of an automatic stay due to **bankruptcy.** Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 392 & n.3 (1st Cir. 1999). The Court or either

party may restore the action "upon an appropriate application." Id. Such a closing may, but is not required to, have a timetable under which it either automatically expires or matures into a final judgment. Id. at 392 n.4.

A litigant, however, "is charged with the responsibility to follow **[*4]** the progress of the litigation." MCA, Inc. v. Wilson, 425 F. Supp. 457, 459 (S.D.N.Y. 1977) (citing Nichols-Morris Corp. v. Morris, 279 F.2d 81 (2d Cir. 1960)). That includes an obligation "to diligently monitor" the docket for orders and judgments entered. Hudson v. Dipaolo, 179 F. App'x 705, 706 (1st Cir. 2006) (per curiam) (affirming denial of motion for leave to file late notice of appeal because appellant failed to fulfill that duty); Witty v. Dukakis, 3 F.3d 517, 520-21 (1st Cir. 1993) (rejecting appellants' "professed lack of awareness" of deadline because they would have known had they "exercised even a modicum of diligence"). Indeed, the "I didn't receive notice" defense does not work in federal court. In re Mayhew, 223 B.R. 849, 856 (D.R.I. 1998) (discussing lack of notice in context of excusable neglect).

B. Application

Perhaps on purpose, the plaintiff is ambiguous regarding when exactly it received notice of the subject assignment, claiming it was unaware of the status of its claims until many months/years after responsibility for those claims had been assumed by Cherokee, and Budget's **Bankruptcy** had closed.
Plaintiff admits that even after it determined the **bankruptcy** had **[*5]** concluded, "it took over a year to determine what had happened" to its claims. An affidavit of plaintiff's President states, however, that "it took several years...to identify what exactly had happened" to the plaintiff's claims. The defendant asserts that the plaintiff, in fact, had actual notice of the **bankruptcy's** termination at about that time but fails to provide proof of that assertion.

Nonetheless, it is undisputed that plaintiff knew for at least one year prior to the filing of the instant motion (i.e. since approximately June, 2009) that the **bankruptcy** had been closed. Moreover, since 2003, when the plaintiff filed its Proof of Claim in the **bankruptcy** matter and this case was dismissed upon specific conditions, it had a duty diligently to monitor the **bankruptcy** proceeding. See Hudson, 179 F. App'x at 706. Had the plaintiff "exercised even a modicum of diligence," it would have known that the **bankruptcy** proceeding concluded in 2005 (and probably also that its claims had been transferred to Cherokee in 2002). See Witty, 3 F.3d at 520-21.

If plaintiff's motion had been filed shortly after the **bankruptcy** proceeding was terminated, it would be more persuasive. Although the Order **[*6]** did not include a specific time frame, "upon completion or termination of all **bankruptcy** or arbitration proceedings" implies a reasonable period of time. Plaintiff's unexplained and inexcusable delay of more than four years since it purportedly knew or should have known of the **bankruptcy's** termination undermines its argument that the case should be reopened at this juncture. The Court will, therefore, deny the plaintiff's motion to reopen the case.

ORDER

In accordance with the foregoing, Plaintiff's Motion to Reopen the Case (Docket No. 35) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated December 20, 2010

ROBERT P. MARLEY, Plaintiff, v. BANK OF AMERICA, COUNTRYWIDE FINANCIAL, COUNTRYWIDE HOME LOANS, INC., (nominal defendant), JOHN DOES APPRAISAL SERVICES, JOHN DOE TITLE INSURANCE CORPORATION as Title Agent, Closing Agent, Title Insurance Carrier, and Nominal Trustee on Deed of Trust, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS), JOHN DOE REPORTING SERVICES, JOHN OR JANE DOES 1-1000, Unknown Investors, JOHN ROES 1-10, Being Undisclosed Mortgage Aggregators (Wholesalers), Mortgage Originators, Loan Seller, Trustee of Pooled Assets, Trustee for Holders of Certificates of Collateralized Mortgage Obligations, JOHN OR JANE DOES, as Investment Banker, et al., Individually, Jointly and Severally, Defendants.

CIVIL ACTION NO. 10-10885-GAO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2010 U.S. Dist. LEXIS 133202

December 16, 2010, Decided

CORE TERMS: bankruptcy proceedings, scheduled, lending, judicial notice, accrued prior, causes of action, estoppel, unfair, reopen, mortgage

COUNSEL: **[*1]** Robert P. Marley, Plaintiff, Pro se, Lynnfield, MA.

For Bank of America Corporation, Countrywide Home Loans, Inc., Mortgage Electronic Registration Systems, Inc., Defendants: Neil D. Raphael, Raphael LLC, Boston, MA.

For Countrywide Financial, Defendant: Neil D. Raphael, LEAD ATTORNEY, Raphael LLC, Boston, MA.

JUDGES: George A. O'Toole, Jr., United States District Judge.

OPINION BY: George A. O'Toole, Jr.

OPINION

OPINION AND ORDER

O'TOOLE, D.J.

The plaintiff, Robert P. Marley, acting pro se, filed suit in the Massachusetts Superior Court against the defendants, various financial institutions and unknown entities and individuals, who subsequently removed the case to this Court. He alleges that the defendants employed unfair and deceptive lending practices when the plaintiff financed his real property. The plaintiff asserts violations of Massachusetts General Laws chapter 93A, the Home Ownership Equity Protection Act, the Real Estate Settlement Procedures Act, the state and federal Truth in Lending Acts, the Fair Credit Reporting Act, the civil Racketeer Influenced and Corrupt Organizations Act, as well as claims of fraudulent misrepresentation, breach of fiduciary duty, unjust enrichment, civil conspiracy, and usury **[*2]** and fraud. The defendants have moved to dismiss the complaint.

I. Background

On December 3, 2004, the plaintiff executed an adjustable rate note in the amount of $468,000, and as security for the loan, executed and granted Omega Mortgage Corporation a mortgage on his property, 18 Lakeview Drive in Lynnfield, Massachusetts. [1]

FOOTNOTES

[1] According to the plaintiff, there were significant problems with the transaction that are now at issue in this suit. Although the Court accepts the plaintiff's allegations as true for the purposes of a motion to dismiss, see Doyle v. Hasbro, Inc., 103 F.3d 186, 190 (1st Cir. 1996), it is not necessary to recite the allegations in detail at this point.

In September 2008, the plaintiff, represented by counsel, filed for chapter 7 **bankruptcy.** [2] The plaintiff filed a schedule of assets and liabilities required by 11 U.S.C. § 521(a)(1). The filing did not refer to any claims against the defendants now named in this action. The plaintiff was granted a discharge on December 30, 2008.

FOOTNOTES

[2] The Court takes judicial notice of the **bankruptcy** proceedings. See Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of **[*3]** proceedings in other courts if those proceedings have relevance to the matters at hand.").

The plaintiff filed his present complaint on May 13, 2010. The defendants removed to this Court on May 26, 2010.

II. Discussion

In their motion to dismiss, the defendants argue that the plaintiff should be estopped from raising claims against them that he did not schedule in the **bankruptcy** proceedings. Admittedly, the plaintiff did not schedule any of the claims involved in this action with the **bankruptcy** court.

The defendants are correct that the plaintiff should have scheduled those claims which had accrued prior to his filing for **bankruptcy** pursuant to 11 U.S.C. § 541(a)(1). For instance, most of his claims appear to arise solely out of the lending transaction in which the plaintiff was involved in 2004, years before he filed for **bankruptcy.**

However, to apply the doctrine of judicial estoppel, an equitable device, would possibly paint with too broad a stroke at this stage. See Brooks v. Beatty, No. 93-1891, 1994 U.S. App. LEXIS 12425, 1994 WL 224160, at *2-3 (1st Cir. May 24, 1994). The defendant relies on Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.), Inc., 989 F.2d 570 (1st Cir. 1993), in support of its **[*4]** estoppel argument, but in that case, the plaintiff had engaged in a "palpable fraud" in its apparent strategy to "conceal [its] claims, get rid of [its] creditors on the cheap, and start over with a bundle of rights." Id. at 571. Here, there is no indication that the plaintiff is "playing fast and loose with the courts" or intentionally contradicted himself to gain an unfair advantage in **bankruptcy** court. See Patriot Cinemas, Inc. v. Gen. Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987).

Nevertheless, as the defendants note, the plaintiff lacks standing to prosecute causes of action which accrued prior to the filing of the **bankruptcy** petition as they should have been scheduled as assets in his chapter 7 **bankruptcy** proceeding. Those causes of action became the property of the chapter 7 estate, see Brooks, 1994 U.S. App. LEXIS 12425, 1994 WL 223160, at *3 (citing Carlock v. Pillsbury Co., 719 F. Supp. 791, 856 (D. Minn. 1989)), and, because of the plaintiff's failure to schedule them, were never abandoned by the trustee, see 11 U.S.C. § 554(c)-(d). Therefore, they are still property of the estate. See id. § 554(c)-(d); Jeffrey v. Desmond, 70 F.3d 183, 186 n.3 (1st Cir. 1995) ("[B]y operation of 11 U.S.C. § 554(c) **[*5]** and (d), any asset not properly scheduled remains property of the bankrupt estate, and the debtor loses all rights to enforce it in his own name.").

This is not necessarily a death knell for the plaintiff's ability to pursue his claims. Pursuant to Rule 5010 of the Federal Rules of **Bankruptcy** Procedure, the plaintiff may file a motion in the **bankruptcy** court to reopen his **bankruptcy** case so as to schedule his claims against the defendants. See Locapo v. Colsia, 609 F. Supp. 2d 156, 161 (D. Mass. 2008) (citing Brooks, 1994 U.S. App. LEXIS 12425, 1994 WL 233160, at *3). If the **bankruptcy** court allows the motion, the trustee can then determine the proper course with regard to the claims. See id. It is possible, for instance, for the trustee to abandon the claims to the plaintiff, who may then try to pursue them on his own.

In order to permit the plaintiff to attempt to reopen his **bankruptcy** proceeding and amend his schedule of assets to include claims that should have originally been disclosed, these proceedings shall be stayed for ninety (90) days. The defendants' Motion to Dismiss (dkt. no. 6) is DENIED without prejudice to renewal if the plaintiff is unsuccessful at opening his **bankruptcy** proceedings within ninety **[*6]** days or continues to assert claims that were not, but should have been, scheduled in **bankruptcy** court. The plaintiff's motions, including the Motion to Compel (dkt. no. 18), Motion for Leave to File Reply Brief (dkt. no. 20), Motion for Appointment of Counsel (dkt. no. 21), Motion for Permission to Use Electronic Filing System (dkt. no. 23), and Motion for Leave to File First Amended Complaint (dkt. no. 24) are similarly DENIED without prejudice at this time.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.

United States District Judge

IN RE: Luis Vidal Montalvo and Maribel Rivera Sanchez, Debtor(s)

CASE NO. 05-0006917ESL, Chapter 13

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF PUERTO RICO

2010 Bankr. LEXIS 4536

December 6, 2010, Decided

CORE TERMS: unclaimed, deposited, rightful owner, confirmed, registry, funds deposited, money deposited, claimant, consigned

COUNSEL: **[*1]** For LUIS VIDAL MONTALVO, Debtor: FELIX M ZENO GLORO, ARECIBO, PR.

For MARIBEL RIVERA SANCHEZ, aka MARIBEL RIVERA, Joint Debtor: FELIX M ZENO GLORO, ARECIBO, PR.

For ALEJANDRO OLIVERAS RIVERA, Trustee: ALEJANDRO OLIVERAS RIVERA (DAT), ALEJANDO OLIVERAS, CHAPTER 13 TRUSTEE; ALEJANDRO OLIVERAS RIVERA (ENO), CHAPTER 13 TRUSTEE - ALEJANDRO OLIVERAS; ALEJANDRO OLIVERAS RIVERA (LVB), ALEJANDRO OLIVERAS, CHAPTER 13 TRUS, SAN JUAN, PR; MARY ANN GANDIA, ALEJANDRO OLIVERAS CHAPTER 13 TRUSTEE.

U.S. Trustee: MONSITA LECAROZ ARRIBAS, OFFICE OF THE US TRUSTEE (UST), SAN JUAN, PR.

JUDGES: Enrique S. Lamoutte.

OPINION BY: Enrique S. Lamoutte

OPINION

OPINION AND ORDER

This case is before the court upon the petition for payment of unclaimed funds filed on October 12, 2010 and on November 30, 2010 (dkt. ## 28 and 33) by Luis Vidal Montalvo and Maribel Rivera Sanchez (collectively the "Debtors"). The Debtors allege that the unclaimed funds deposited with the clerk of the U.S. **Bankruptcy** court by the Chapter 13 trustee belong to them as the creditor has not claimed them. The court disagrees.

Background

The relevant facts are not in dispute. On July 28, 2005 the Debtors filed a chapter 13 petition and a chapter 13 plan dated May 5, 2005. On **[*2]** October 17, 2005 the court confirmed the plan. The chapter 13 trustee filed reports of unclaimed monies by creditor Associates Finance; on August 13, 2010 in the amount of $208.73 (dkt. # 20), on September 9, 2010 in the amount of $189.30 (dkt # 22) and on September 22, 2010 in the amount of $208.73 (dkt. #24). The creditor Associates Finance has not requested the payment of the moneys consigned in its name with the **bankruptcy** court. The debtors claim that the consigned funds be paid to them.

Applicable Law

Section 347 of the **bankruptcy** code, 11 U.S.C. § 347, governs unclaimed property, including funds distributed by a chapter 13 trustee pursuant to a confirmed chapter 13 plan and not cashed by the creditor. Fed. R. Bankr. P. 3011 complements section 347(a). See: 3 Collier on **Bankruptcy,** 16th Edition, ¶ 347.01-347.03, pgs. 347-3 to 347-10. The trustee shall stop payment of any check remaining unpaid ninety days after the final distribution under chapter 7, 12 or 13, and the amounts will be paid into the registry fund of the **bankruptcy** court as unclaimed funds, and shall be disposed of in accordance with 28 U.S.C. §§ 2041, 2042. 11 U.S.C. § 347(a). The payment of the property or unclaimed **[*3]** funds is governed by 28 U.S.C. § 2041, and the procedure for their withdrawal is set forth in 28 U.S.C. § 2042.

No money deposited under section 2041 of this title shall be withdrawn except by order of court.

In every case in which the right to withdraw money deposited in court under section 2041 has been adjudicated or is not in dispute and such money has remained so deposited **for at least five years unclaimed by the person entitled thereto**, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

28 U.S.C. 2042 (emphasis ours). Therefore, after five years of the trustee's deposit of the unclaimed funds with the registry fund have elapsed, any funds still unclaimed are deposited by the **bankruptcy** court in the U.S. Treasury in the name and to the credit of the United States. "Thereafter, the creditor entitled to any of the funds may file a claim with the **bankruptcy** court, and if the claim is approved, the Treasury issues a check to the **[*4]** creditor in the principal amount of his or her distributive share." Leider v. United

States, 301 F.3d 1290, 1293 (Fed.Cir.2002) Accordingly, the unclaimed funds deposited by the trustee in the court's registry fund are held in trust for the person legally entitled to the same. In re Parker, 400 B.R. 55, 59 (Bankr. E.D. Pa. 2009).

Applications for unclaimed funds are generally made ex parte. Thus, **bankruptcy** courts require exact compliance with the legal requirements for their disbursement and a clear showing that the claimant is actually entitled to the funds. In re Scott, 346 B.R. 557, 558 (Bankr. N.D. Ga. 2006). Unclaimed funds do not become "surplus funds" when they are not claimed by the creditor who did not cash the check. In re Bradford Production, Inc., 375 B.R. 356, 360 (Bankr. E.D. Mich. 2007). The creditor retains a property interest in the unclaimed funds. In re Applications for Unclaimed Funds Submitted in Cases Listed on Exhibit "A", 341 B.R. 65, 69 (Bankr. N.D. Ga. 2005). The creditor is the rightful owner of the funds when the trustee made the distribution based on a confirmed plan and an allowed proof of claim. In this case, the Debtors have failed to show that they **[*5]** are the rightful owners of the unclaimed funds and not the creditor Associates Financial.

Conclusion

In view of the foregoing, the court concludes that the Debtors are not the rightful owners of the unclaimed funds deposited by the chapter 13 trustee in the name and for the benefit of Associates Finance. Consequently, the petition for unclaimed funds filed by the Debtors is hereby denied.

SO ORDERED.

San Juan, Puerto Rico, this 6th day of December, 2010.

/s/ Enrique S. Lamoutte

Enrique S. Lamoutte

United States **Bankruptcy** Court

ALFREDO BUENO-IRIZARRY, Plaintiff, v. ADVANCED CARDIOLOGY CENTER CORPORATION, et al., Defendants.

Civil No. 09-1228 (JAF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

2010 U.S. Dist. LEXIS 129807

December 7, 2010, Decided
December 7, 2010, Filed

CORE TERMS: domicile, domiciled, cause of action, petitioned, diversity jurisdiction, summary judgment, subject-matter, diversity, federal law, condominium, bankruptcy

estate, paid rent, bank accounts, preponderance, determinative, citizenship, destroys, license, driver's, migratory, lifestyle

COUNSEL: **[*1]** For Alfredo J. Bueno-Irizarry, Plaintiff: Jose F. Velazquez-Ortiz, Velazquez Law Office, PSC, Caguas, PR.

For Advanced Cardiology Center Corporation, Defendant, Cross Claimant, Counter Defendant: Jose R. Ortiz-Velez, LEAD ATTORNEY, Ortiz Velez Law Office, San Juan, PR.

For Raul Garcia-Rinaldi, Defendant, Cross Defendant, Counter Defendant: Jose A. Miranda-Daleccio, Miranda Cardenas & Cordova, San Juan, PR.

For Carlos Delgado-Quinones, Defendant, Cross Defendant, Counter Defendant, Counter Claimant: Anselmo Irizarry-Irizarry, LEAD ATTORNEY, Matta & Matta PSC, Ponce, PR.

For Sindicato De Aseguradores Para La Suscripcion Conjunta De Seguro De Responsabilidad Profesional Medico Hospitalaria, Defendant, Cross Defendant: Anselmo Irizarry-Irizarry, LEAD ATTORNEY, Matta & Matta PSC, Ponce, PR; Jose A. Miranda-Daleccio, LEAD ATTORNEY, Miranda Cardenas & Cordova, San Juan, PR.

For Wanda Casiano-Quiles, Defendant, Cross Defendant, Counter Claimant, Counter Defendant: Jose A. Gonzalez-Villamil, LEAD ATTORNEY, Gonzalez Villamil Law Office, San Juan, PR.

JUDGES: JOSE ANTONIO FUSTE, Chief United States District Judge.

OPINION BY: JOSE ANTONIO FUSTE

OPINION

ORDER

On March 9, 2009, Plaintiff filed this suit in diversity under 28 U.S.C. § 1332, **[*2]** alleging medical malpractice in relation to medical treatment his mother received in Puerto Rico. (See Docket Nos. 1; 39.) Defendant Advanced Cardiology Center Corporation ("ACC") now moves for summary judgment, alleging a lack of diversity required for this court's subject-matter jurisdiction over the suit. (Docket No. 88.) Defendants Carlos Delgado-Quiñones and his insurer, Sindicato de Aseguradores para la Suscripción Conjunta de Seguro de Responsabilidad Profesional Médico Hospitalaria ("SIMED"), join that motion (Docket Nos. 92; 101), as does Defendant Wanda Casiano-Quiles (Docket Nos. 102; 107). Plaintiff opposes ACC's motion (Docket No. 98), and ACC replies (Docket No. 111).

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).[1] In evaluating a motion for summary judgment, we view the record in the light most favorable to the nonmovant. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

FOOTNOTES

[1] A revised Federal Rule of Civil Procedure 56 took effect December 1, 2010, but **[*3]** we apply Rule 56 in the form it took on the date this motion was filed, November 4, 2010 (Docket No. 88).

ACC challenges our subject-matter jurisdiction over this action, claiming that Plaintiff was domiciled in Puerto Rico at the time he filed this case and, therefore, is not diverse from Defendants, all of whom are domiciled in Puerto Rico. (Docket No. 88.) ACC also claims that Plaintiff lost standing to pursue this cause of action when he petitioned for **bankruptcy** under federal law. (Id.) That being the case, ACC argues, the cause of action belongs to the estate, domiciled in Puerto Rico, which destroys any diversity jurisdiction that may have existed in this case. (Id.) As explained briefly below, ACC's challenge fails on both grounds.

"For the purposes of diversity, a person is a citizen of the state in which he is domiciled." Padilla-Mangual v. Pavia Hosp., 516 F.3d 29, 31 (1st Cir. 2008). "A person's domicile is the place where he has his true, fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning." Id. (quoting Rodriguez-Diaz v. Sierra-Martinez, 853 F.2d 1027, 1029 (1st Cir. 1986)) (internal quotation marks omitted). **[*4]** In determining a party's intent to return, we consider "the place where civil and political rights are exercised, taxes paid, real and personal property (such as furniture and automobiles) located, driver's and other licenses obtained, bank accounts maintained, location of club and church membership and places of business or employment." Id. at 32 (quoting Bank One, Tex., N.A. v. Montle, 964 F.2d 48, 50 (1st Cir. 1992)).

"Domicile is determined as of the time the suit is filed." Id. at 31. "Once challenged, 'the party invoking subject matter jurisdiction . . . has the burden of proving by a preponderance of the evidence the facts supporting jurisdiction.'" Id. (quoting Bank One, 964 F.2d at 50).

In this case, Plaintiff claims that his domicile was Miami, Florida, until July 1, 2009, when he moved to Mayagüez, Puerto Rico, where he currently lives with his mother. (Docket No. 98-1.) In support of that claim, the record shows that Plaintiff paid rent for a condominium in Miami, where he had resided since 2001, through June 30, 2009 (Docket Nos. 98-4 at 22—23; 98-6; 98-7); maintained a driver's license in Florida until he replaced it in Puerto Rico in September of 2009 (Docket Nos. 88-6 **[*5]** at 4—5; 98-4 at 25; 98-8); kept a car in Florida (Docket No. 98-4 at 23—24); maintained a bank account in Florida (Docket No. 88-6 at 10); and was registered to vote, and voted, in Florida (Docket No. 98-4 at 4, 30). So long as Plaintiff was domiciled in Florida in March 2009, as he claims, we may exercise subject-matter jurisdiction over this matter despite his subsequent change in domicile. See, e.g., Rosado v. Wyman, 397 U.S. 397, 405 n. 6, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970) ("[A] federal court does not lose jurisdiction over a diversity action which was well founded at the outset even though one of the parties may later change domicile . . . .").

ACC argues that Plaintiff was domiciled in Puerto Rico as of March 2009, because Plaintiff (1) filed a lawsuit, related to this one, in Puerto Rico court in 2008; (2) claimed his residence as Puerto Rico when he petitioned for **bankruptcy** under federal law in August 2009; (3) maintained a migratory lifestyle that precluded him from having established a domicile outside his native home of Puerto Rico; and (4) is currently domiciled in Puerto Rico. (Docket No. 88.) We find each argument unavailing.

As to argument (1), ACC acknowledges, and we see from its exhibit, that **[*6]** Plaintiff never asserted domicile in Puerto Rico when he filed his complaint with the Puerto Rico court. (See Docket Nos. 88-3; 111 at 2.) Since ACC points to no requirement that a person be domiciled in Puerto Rico in order to file suit in its courts, we find Plaintiff's suit in Puerto Rico court lacking in probative value as to his domicile in March 2009. We find argument (2) similarly lacking. When Plaintiff petitioned for **bankruptcy** in August 2009, he stated that he had been domiciled or had resided in Puerto Rico for at least 91 of the prior 180 days. See 28 U.S.C. § 1408(1). To the extent that Plaintiff traveled frequently to Puerto Rico during those 180 days, to care for his mother (see Docket Nos. 88-6 at 8; 98-4 at 4; 98-5 at 3), we find that Plaintiff could properly claim two residences during that time, one in Florida and one in Puerto Rico. But maintenance of two residences does not preclude his domicile in Florida in March 2009. See Bank One, 964 F. 2d 48, 53 (noting that while a person can have only one domicile, he "may have more than one residence"); see also Lundquist v. Precision Valley Aviation, Inc., 946 F.2d 8, 11—12 (1st Cir. 1991) (recognizing that representation **[*7]** of residence, while "highly relevant," is not determinative on question of domicile).

As to argument (3), we find that evidence that Plaintiff rented a condominium in Miami from 2001 to 2009 belies ACC's characterization of Plaintiff's lifestyle as consistently "migratory." While we recognize that Plaintiff has resided in several places since he first left Puerto Rico to begin college, the time period ACC cites spans twenty-four years. (See Docket Nos. 88-6; 98-4.) Plaintiff lived in some of these locations for several years, as a working adult. (Id.) Nothing on the record convinces us that his domicile did not move with him during that time. And finally, as to argument (4), Plaintiff's change in domicile, from Florida to Puerto Rico in July 2009, has no bearing on the question of where he was domiciled in March 2009.

In sum, we find that Plaintiff has shown by a preponderance of the evidence that he was domiciled in Florida in March 2009. We find particularly persuasive the fact that he paid rent at a condominium in Miami through June 2009, despite his very limited income. For the reasons articulated above, the circumstances ACC mentions do not disrupt this finding.

ACC's alternative **[*8]** argument is that Plaintiff lost standing to pursue this cause of action when he petitioned for **bankruptcy** under federal law, and that the subsequent assumption of the action by his estate and its trustee, both domiciled in Puerto Rico, destroys diversity jurisdiction. (Docket No. 88.) This argument is true in part but, ultimately, we are not deprived of subject-matter jurisdiction over this case. Plaintiff did lose standing to pursue this cause of action when he petitioned for **bankruptcy** under federal law; from that point on, the cause of action belonged to his estate, to be pursued by its trustee.[2] See 11 U.S.C.§ 541(a)(1) (stating that filing a petition for **bankruptcy** creates a **bankruptcy** estate that includes all the debtor's legal interests); id. § 704(a)(1) (charging trustee with collection of the property of the estate); see also, e.g., Cobb v. Aurora Loan Servs., LLC, 408 B.R. 351, 354 (E.D. Cal. 2009) (citing Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001)) (noting that causes of action are included in **bankruptcy** estate created upon petitioning for **bankruptcy)**. Regardless, under federal **bankruptcy** law, "it is the citizenship of the bankrupt rather than the citizenship of **[*9]** the trustee in **bankruptcy** that is determinative for diversity jurisdiction." 13E Charles Alan Wright, et al., Federal Practice and Procedure § 3606 (3d ed. 2010) (citing Bush v. Elliott, 202 U.S. 477, 26 S. Ct. 668, 50 L. Ed. 1114 (1906)). Therefore, diversity jurisdiction in this case was not destroyed when the non-diverse trustee assumed control of the cause of action.

FOOTNOTES

[2] The record shows that the trustee moved in **bankruptcy** court to appoint Plaintiff's counsel to continue and manage this case, under 11 U.S.C. § 327(a) , and that the court granted that appointment. (Docket Nos. 88-4; 98-9.)

For the foregoing reasons, we hereby **DENY** ACC's motion for summary judgment (Docket No. 88), joined by Defendants Carlos Delgado-Quiñones, SIMED, and Wanda Casiano-Quiles (Docket Nos. 92; 101; 102; 107). As we have found that Plaintiff lacks standing to maintain this suit, we **ORDER** the parties to **SHOW CAUSE** as to why the trustee of Plaintiff's estate should not substitute Plaintiff as the real party in interest, pursuant to Federal Rule of Civil Procedure 17(a)(3).

IT IS SO ORDERED.

San Juan, Puerto Rico, this 7 day th of December, 2010.

/s/ José Antonio Fusté

JOSE ANTONIO FUSTE

Chief U.S. District Judge

IN RE: SUPPLIES & SERVICES INC, Debtor(s); SUPPLIES & SERVICES INC, Plaintiff, NACCO INDUSTRIES, INC.; NACCO MATERIALS HANDLING GROUP, INC.; YALE MATERIALS HANDLING CORP., Defendant(s)

CASE NO. 10-07157 BKT, CHAPTER 11, ADVERSARY NO. 10-00162

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF PUERTO RICO

2010 Bankr. LEXIS 4535

December 10, 2010, Decided
December 10, 2010, Filed, Entered

CORE TERMS: summary judgment, security agreements, material fact, continuation, genuine, security interests, matter of law, governing law, choice of law, parties agreed, dispositive, expired

COUNSEL: **[*1]** For SUPPLIES & SERVICES INC, Debtor: CARMEN D CONDE TORRES, SAN JUAN, PR.

U.S. Trustee: MONSITA LECAROZ ARRIBAS, OFFICE OF THE US TRUSTEE (UST), SAN JUAN, PR.

JUDGES: Brian K. Tester, U.S. **Bankruptcy** Judge.

OPINION BY: Brian K. Tester

OPINION

OPINION AND ORDER

Before the court are the summary judgment motions filed by the Plaintiff, the Defendant and Banco Popular de Puerto Rico ("BPPR") as an allowed interventor [Dkts. No. 18, 19 and 21]. Having reviewed the motions filed and for the reasons set forth below, Plaintiff's and BPPR's motions for summary judgment are granted. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§1334 and 157(a) and the General Order of referral of Title 11 Proceedings to the United States **Bankruptcy** Court for the District of Puerto Rico dated July 19, 1984 (Torruella, C.J.).

BACKGROUND

Debtor Supplies and Services, Inc ("Plaintiffs") filed for relief under the provisions of Chapter 11 of the **Bankruptcy** Code. Shortly after the filing of the petition, creditor NAACO ("Defendants") claimed security interests on Debtor's assets by virtue of security agreements executed in 2002 and 2007. After several procedural actions related to the secured status of **[*2]** the Defendants in main **bankruptcy** proceeding 10-7157, Debtors/Plaintiffs filed the captioned adversary proceeding to determine the extent of Defendant's liens. At a hearing held on November 17, 2010, the parties agreed that the controversy is matter of law and were granted until December 7, 2010 to file dispositive motions in the form of summary judgment [Dkt. No. 13]. BPPR as a party in interest was also allowed to intervene and file the dispositive motion. The parties complied and the matter is submitted.

SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7056 of the Federal Rules of **Bankruptcy** Procedure, provides that summary judgment will be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See*, Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. *See also*, Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265, (1986). In viewing the facts, the Court must draw all reasonable inferences from them, in the manner most favorable **[*3]** to the nonmovant. Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 763 (1st Cir. 1994); Piccicuto v. Dwyer, 39 F.3d 37, 40 (1st Cir. 1994). "The summary judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved." 10 Wright and Miller, Federal Practice and Procedure § 2712 (3d ed. 1998). "Rule 56 provides the means by which a party may pierce the allegations in the pleading and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried." *Id*. Summary judgment is not a substitute for a trial of disputed facts; the court may only determine whether there are issues to be tried and it is improper if the existence of a material fact is uncertain. *Id*. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). A fact is considered material if it might affect the outcome of a case under **[*4]** the governing law. Morrisey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir. 1995). Therefore, a factual issue is material only if it is relevant to the resolution of a controlling legal issue raised by the motion for summary judgment.

United States Fire Ins. Co. v. Producciones Padosa, Inc., 835 F.2d 950, 953 (1st Cir. 1987).

ANALYSIS:

By agreement of the parties, the issue at hand is appropriate for summary judgment disposition as there are no material facts in dispute. The relevant undisputed facts are as follows:
1. On September 4, 1969, the parties entered into a Distribution Agreement of Yale's line of product. The agreement was executed through defendant's predecessor entity.

2. On November 6, 2002, the parties executed an agreement entitled "Dealer Financing Floor Plan Agreement ("the 2002 agreement").

3. In section 7 of the agreement, the parties agreed that the governing law in the interpretation or meaning of the agreement "shall be governed by the substantive law of North Carolina but not its choice of law rules". The clause reiterates the application of the North Carolina UCC law. [Section 7.01, Exh. 2, Dkt. No 21].

4. The parties concluded a security agreement and filed the same **[*5]** with the Puerto Rico Department of State on January 28, 2003 [Exh. 4, Dkt. No. 21]

5. The security agreement stipulates that "the validity, construction and enforcement of this Agreement are determined and governed by the laws of the State of North Carolina".

The Plaintiffs argue and BPPR agrees that North Carolina UCC Law controls the terms of the executed security agreement and because said law requires that in order for a security agreement to be valid for more than five years, the creditor had to file a continuation statement. That defendant failed to file the continuation statement and hence their security interest is no longer valid and expired prior to the filing of the **bankruptcy** petition.

Defendants argue that the perfection of the security agreement is governed by the laws of Puerto Rico and therefore, the Puerto Rico UCC law is applicable. We disagree, Defendants filed its security agreement in January 2003. Under North Carolina law this filed finance statement was valid for five years. According to N.C. Gen. Stat. § 25-9-515(d), Defendants had to file a continuation statement to preserve their security status. Defendant's failed to comply.

Having reviewed the motions filed **[*6]** by the parties, this court finds that pursuant to the terms of "choice of law" clause of the security agreement, Defendants were obliged to present the continuation statement pursuant to North Carolina Law. Accordingly, Plaintiff's motion for summary judgment, Dkt. No. 21 and BPPR's motion for summary judgment, Dkt. No. 19 are hereby GRANTED. NAACO's motion for summary judgment, Dkt. No. 18 is DENIED.

THEREFORE, this Court determines that Defendant's claimed security interest under the 2003 Financing Statement, the 2002 Floor Plan Agreement, and the 2002 Security Agreement is now expired, ineffective, unperfected and shall be considered a general unsecured claim. Accordingly, BPPR has a senior secured priority interest over Debtor's entire inventory of equipment and parts.

SO ORDERED.

San Juan, Puerto Rico, this 10 day of December, 2010.

/s/ Brian K. Tester

Brian K. Tester

U.S. **Bankruptcy** Judge