<u>4.15.11</u>

<u>First Circuit</u>

Green Tree Servicing, LLC v. USA, 2011 DNH 56; 2011 U.S. Dist. Lexis 35997 (D.N.H. April 1, 2011)(Joseph N. Laplante, District Judge)(unpublished). The case raised several questions about the availability of equitable relief to restore a mistakenly discharged mortgage to a position of priority over subsequent federal tax liens, the mortgagee seeking to restore its mortgage to its original priority. Green Tree moved for summary judgment to restore its lien which was denied. While the First Circuit has rejected the argument that federal law bars the equitable reinstatement of a mortgage to a position of seniority over federal tax liens, Green Tree had not conclusively shown that it was entitled to that relief as a matter of New Hampshire law, which, though not as circumscribed as the IRS argued, "views claims to circumvent the established order of priority, through resort to equity, with trepidation."

<u>Furlong v. Donarumo</u> (In re Furlong), 2011 U.S. Dist Lexis 36077 (Bankr. D. Mass. 4/1/11)(Patti B. Saris, District Judge).District Court affirmed the Bankruptcy Court's determination that the Chapter 7 Trustee properly abandoned legal claims against a creditor, which the debtors pursued once abandonment occurred. The case turned on whether the scheduling of one claim, subsumed the other claims related to cause of action pursued, which it did.

<u>Fundacion v. Fundacion</u>, 2011 Bankr. Lexis 953 (1st BAP March 22, 2011)(unpublished)(Before Judges Hillman, Kornreich and Bailey, opinion by Bailey).Bankruptcy Appellate Panel affirmed the Bankruptcy Court's order denying the appellant's request for immediate payment of its allowed administrative claim and ruling that payments would be made in accordance with the confirmed plan. Prior to confirmation of the Chapter 11 plan, the creditor was accustomed to being paid within 30 days, but the terms of the confirmed plan superceded this arrangement.

<u>Roggio v. City of Gardner</u>, 2011 U.S. Dist Lexis 34731 (D. Mass. March 30, 2011)(F. Dennis Saylor, IV, District Judge). Defendants, amongst other grounds, moved to dismiss on grounds that one of the plaintiffs lacked standing, as her claims were property of her Chapter 7 bankruptcy estate, and as such could not have been abandoned to her as the claims were not scheduled in her bankruptcy schedules. The District Court stayed that portion of the motion, in the interests of justice and the bankruptcy estate's creditors, referring the matter to the bankruptcy court to determine if the case should be reopened to have a trustee appointed/re-appointed to administer such claim or abandon it.

<u>In re Concepcion</u>, 2011 Bankr. Lexis 2018 (Bankr. D.P.R. March 10, 2011)(Brian, K. Tester, Bankruptcy Judge). Ruling upon remand from the 1st Circuit BAP, to determine whether excusable neglect existed for a late proof of claim filing, finding it did.

<u>In re Miranda and Santiago</u>, 2011 Bankr. Lexis 1007 (Bankr. D.P.R. March 9, 2011)(Enrique S. Lamoutte, Bankruptcy Judge). Chapter 13 Trustee's objection to confirmation of Chapter 13 plan sustained as it must include the debtors' Christmas bonuses in their projected disposable income (PDI) as per 11 U.S.C. 1325(b)(1)(B) in the income funding the plan, and denied as to the above median debtor's use of statutory expenses listed in the means test i.e. The debtors did not overstate their income, because as above median debtors they were entitled to take the full amount of certain specified expenses under the Standards per Section 1325(b)(3) and 707(b)(2)(A) and (B) irrespective of whether their actual expenses were above or below the expenses used in the Standards. Also, the debtors did not show they were entitled to take more for food and clothing than the Standards.

***Altman v. Johnson (In re Johnson),* 2011 BAnkr. Lexis 1055 (Bankr. D. Mass. March 21, 2011)Joan N. Feeney, Bankruptcy Judge).** The adversary proceeding presented the issue of whether a debtor's obligation, pursuant to a probate court judgment, to pay his former spouse's attorney fees for defending a complaint for modification of child support is excepted from discharge under 11 U.S.C. 523(a)(5), (a)(15) or (a)(6). Court found is was a DSO (domestic support obligation) under (a)(5) and as such, was not a lien that could be stripped from the debtor's home under the impairment to homestead exemption. The lien was non-avoidable in bankruptcy. In so finding, the court reviewed a split of authority in bankruptcy courts, finding support in First Circuit precedent.

***Martin v. TD Bank,N.A.,* 2011 U.S. Dist. Lexis 28716 (D. Mass. March 21, 2011)(Rya W. Zobel, District Judge).** Debtor sued the bank under TILA, amongst other statutes. The District Court granted summary judgment in the bank's favor, noting the debtor had released all such claims in a prior stipulation approved between the parties before the bankruptcy court.

***Schwartz v. Deutsche Bank*, 2011 Bankr. Lexis 885 (March 14, 2011)(Melvin S. Hoffman, Bankruptcy Judge).** Chapter 7 debtor filed an action against the pre-petition bank for wrongful foreclosure, amongst other things. On the eve of trial, the bank moved to dismiss, alleging the debtor lacked standing and that the Chapter 7 trustee should be bringing the action. The bankruptcy court did not tolerate the eleventh hour maneuvering, and allowed the trial to move forward, reserving for another day as to whom any damages would be awarded if the debtor prevailed.

***Franklin v. Franklin*, 2011 Bankr. Lexis 867 (Bankr. D. Mass. March 15 2011)(Joan N. Feeney, Bankruptcy Judge)**(discharge complaint dismissed as cause of action not pled with the requisite elements, and upon reconsideration still failed to do so making amending futile).

***Lussier v. Sullivan (In re Sullivan),*2011 Bankr. Lexis 871 (Bankr. D. Mass. March 7, 2011)(Joan N. Feeney Bankruptcy Judge).** Creditor who succeeded in obtaining an exception to discharge for its debt under 727(a)(4)(A) not entitled to attorney fees, under the American Rule. This did not fall under the "consumer debt" award under 523(d).

***Sarner v. Dean Cooperative Bank*, 2011 U.S. Dist. Lexis 32063 (Bankr. D. Mass. March 28, 2011) (Joseph L. Tauro, District Judge).** Bankruptcy Court had granted stay relief to bank, allowing it to foreclose and sell the debtor's home to a third party, thus mooting any stay pending appeal before the District Court.

Riga v. Deutsche Bank (In re Riga), 2011 Bankr. Lexis 1051 (Bankr. D. Mass. March 25, 2011)(Frank J. Bailey, Bankruptcy Judge)(debtor's claims against bank as to TILA dismissed as barred by the statute of limitations.

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In re: MICHAEL G. FURLONG and JOANN FURLONG, Debtors, MICHAEL G. FURLONG and JOANN FURLONG, Appellants, v. ANDREW DONARUMO and MURRAY SUPPLY CORPORATION, Appellees.

Case No. 4:10-cv-40231-PBS,Case No. 4:10-cv-40222-PBS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 36077

April 1, 2011, Decided
April 1, 2011, Filed

PRIOR HISTORY: [*1]
Chapter 7. Case No. 06-42851-HJB.

CORE TERMS: automatic stay, notice, abandoned, abandonment, abandon, stock, scheduled, bankruptcy petitions, bankruptcy case, estate property, child support, scheduling, causes of action, breach of contract, infliction of emotional distress, course of business, administered, rescission, formally, listing, state law, bankruptcy estate, personal injury, intent to abandon, investigate, shareholder, stockholder, ex-husband's, equitable, ownership

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For Michael Furlong, JoAnn Furlong, Appellees: Jeffrey B. Renton, Gilbert & Renton LLC, Andover, MA; Michael B. Feinman, Law Offices of Michael B. Feinman, Andover, MA.

United States **Bankruptcy** Court, District of Massachusetts, Notice, Pro se, Worcester, MA.

Asst. U.S. Trustee Richard King, Notice, Pro se, Worcester, MA.

JUDGES: PATTI B. SARIS, United States District Judge.

OPINION BY: PATTI B. SARIS

OPINION

MEMORANDUM AND ORDER

Saris, U.S.D.J.

I. INTRODUCTION

On December 19, 2006, Michael and JoAnn Furlong (the "Furlongs") filed Chapter 7 **bankruptcy** petitions on behalf of themselves (the "personal **bankruptcy**") and their company, Drew's Plumbing & Heating II, Inc. ("Drew's Plumbing"). The **Bankruptcy** Court issued an opinion on September 28, 2010, which all the **[*2]** named parties here have appealed. See In re Michael G. Furlong and JoAnn Furlong, 437 B.R. 712 (Bankr. D. Mass. 2010). Andrew C. Donarumo ("Donarumo") and Murray Supply Corporation ("Murray") appeal the rulings of the **Bankruptcy** Court that certain causes of action against Donarumo were abandoned pursuant to 11 U.S.C. § 554 and that the assignment of Drew's Plumbing's claims to the Furlongs did not violate the automatic stay under 11 U.S.C. § 362. The Furlongs appeal the **Bankruptcy** Court's ruling that stock in Drew's Plumbing, property of the personal estate, entitles the Trustee to the value of these claims. The rulings of the **Bankruptcy** Court are **AFFIRMED**.

II. FACTUAL BACKGROUND

On January 14, 2005, the Furlongs purchased Drew's Plumbing & Heating Company, Inc. from Donarumo and formed Drew's Plumbing. The Furlongs claim that the business failed as a result of Donarumo's efforts to compete against the newly formed Drew's Plumbing by poaching his former customers. Whatever the reason, Drew's Plumbing was not successful, and in December 2006 the Furlongs and Drew's Plumbing filed Chapter 7 **bankruptcy** petitions.

A Trustee was then appointed for both the Furlongs' **bankruptcy** and the corporate **[*3] bankruptcy.** In a meeting held on January 17, 2007, the Furlongs and the Trustee discussed the Furlongs' claims against Donarumo, and the Furlongs showed the Trustee letters and emails substantiating their claims, as well as a draft complaint. The claims were listed as property of the estate in Schedule B of the Furlongs' **bankruptcy** schedule as "Claims for Breach of Contract (Andrew Donarumo et al.)." The same item was listed in the Drew's Plumbing **bankruptcy** schedule. The Trustee was unable to find an attorney willing to bring the claims on terms acceptable to the Trustee, and the Furlongs became concerned that the statute of limitations would run before they would be able to bring their claims against Donarumo.

The Furlongs asked the Trustee to formally abandon the claims as property of the estate, so that the Furlongs could bring suit themselves. At this time, however, the Trustee and the Furlongs were in a dispute over $5,000 in the Furlongs' bank account, and whether that sum was exempt in their personal **bankruptcy** case. The Trustee and the Furlongs reached an agreement that the $5,000 would be turned over to the Trustee if he agreed to abandon the claims against Donarumo in both **[*4]** the personal and the corporate **bankruptcies.** On November 6, 2007, the Trustee filed his Notice of Intention to Abandon ("Notice") in the personal **bankruptcy** case only. The Notice stated that the Trustee wished to abandon claims "based upon the Debtor's allegation that certain misrepresentation and other business related tort cause of action arose from the purchase of a business known as Drew's Plumbing & Heating, Inc. II." [1] The **Bankruptcy** Court endorsed this notice on November 30, 2007. The Trustee also filed a No Asset and No Distribution Report with the court in the Drew's Plumbing **bankruptcy,** and that case was closed on December 28, 2007. Donarumo never filed any objections to these actions.

FOOTNOTES

1 The **Bankruptcy** Court pointed out that, while the Notice was "drafted in gross violation of several well-settled rules of English grammar," In re Furlong, 437 B.R. at 720, use of the term "'sic' in the myriad of locations where it would have been appropriate" would only "further obfuscate the language" of the Notice. Id. at 715 n.4.

On January 10, 2008, the Furlongs filed suit against Donarumo in Massachusetts Superior Court for breach of contract, deceit, breach of fiduciary duty, Chapter 93A **[*5]** violations, interference with advantageous business relationships, infliction of emotional distress, rescission, and other equitable remedies.

To backtrack, on June 30, 2006, Drew's Plumbing had surrendered certain business assets to its secured lender, Key Bank; Key Bank, in turn, sold that collateral to a third party, Gem Plumbing. On January 13, 2010, after the state court suit was filed, Gem Plumbing assigned rights or interests for claims held against Donarumo to Drew's Plumbing. The Furlongs then held a meeting of the board of directors of Drew's Plumbing (consisting solely of themselves), and assigned Drew's Plumbing's claims to themselves in their personal capacities. The Trustee, despite his ownership of the Furlongs' 100% share in Drew's Plumbing, was not invited to this board meeting.

In its September 28, 2010 opinion, the **Bankruptcy** Court found that "the claims held by the Furlongs and Drew's Plumbing were duly abandoned, pursuant to 11 U.S.C. § 554; and . . . the stock in Drew's Plumbing owned by the Furlongs remains property of the estate, vested in the Trustee." Furlong, 437 B.R. at 721. The **Bankruptcy** Court also held that the transfer of the claims by Drew's Plumbing **[*6]** to the Furlongs personally did not violate the automatic stay. Donarumo appeals the **Bankruptcy** Court's rulings on abandonment and the automatic stay, and the Furlongs appeal the **Bankruptcy** Court's ruling on the stock ownership issue.

V. DISCUSSION

A. Standard of Review

This Court reviews the **Bankruptcy** Court's findings of fact for clear error and its conclusions of law de novo. Davis v. Cox, 356 F.3d 76, 82 (1st Cir. 2004).

B. Abandonment

Bankruptcy, as defined by 11 U.S.C. § 541 (a)(1), includes "all legal or equitable interests of the debtor in the property as of the commencement of the case." The language of the statute has been construed very broadly. See In re Lalchandani, 279 B.R. 880, 883 (1st Cir. BAP, 2002) ("The scope of § 541 is broad and includes in the estate all kinds of property, including tangible and intangible property."); see also Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008) (per curiam) ("[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, derivative, is within reach of § 541." (quoting In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993))). These interests include causes of action "owned by the debtor **[*7]** or arising from the property of the estate." Chartschlaa, 538 F.3d at 122. It is the debtor's obligation to disclose all interests at the beginning of the **bankruptcy** proceedings. Id.

The issue of abandonment in **bankruptcy** cases is governed by 11 U.S.C. § 554:
(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.
It is well-established that "abandonment presupposes knowledge." Guaranty Residential Lending, Inc. v. Homestead Mortg. Co., L.L.C., 463 F. Supp. 2d 651, 661 (E.D. Mich. 2006) **[*8]** (citing Collier on **Bankruptcy** ¶ 554.03 (15th rev. ed. 2006)). Further, property must be formally scheduled in order to be subject to abandonment under § 554(c). See Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995). Intent to abandon estate property must be unambiguous. See Chartschlaa, 538 F.3d at 124 ("Absent an unambiguous intent to abandon estate property, the proposed abandonment is not effective.").

The **Bankruptcy** Court held that the claims against Donarumo were properly abandoned under § 544(c) in the corporate **bankruptcy** and § 544(a) in the personal **bankruptcy.** Donarumo argues here that the **Bankruptcy** Court erred in these rulings.

1. The Corporate **Bankruptcy**

Because there was no notice of abandonment in the Drew's Plumbing **bankruptcy** case, the abandonment issue is governed by § 554(c), under which scheduled property not otherwise administered in the course of the proceeding reverts to the debtor at the close of the case. Donarumo argues that because the Schedules in these cases listed only "Claims for breach of contract," only breach-of-contract claims could have been abandoned at the close of the case under § 554(c); all other claims, such as those sounding in tort, would **[*9]** remain property of the estate under § 554(d).

The legal question is whether the scheduling of one type of claim suffices to disclose other related claims, where the Trustee is aware of those other claims. The case law does not reveal a clear answer to this question. Donarumo contends that the debtors' discussions with the Trustee about legal claims did not qualify those claims for abandonment under § 554(c) because the claims were never scheduled. In Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995), the First Circuit held that discussions with the Trustee about a state law claim did not result in abandonment of that claim absent formal scheduling thereof. The court emphasized that there is "no such concept of 'assumed abandonment,'" and that the failure to formally schedule the claim was dispositive of the abandonment issue. Id. at 186. Jeffrey does not squarely address the question at hand, however, since the debtors in that case failed to schedule any claims at all; here, the Furlongs did schedule their breach of contract claims, and their other claims arise within the same lawsuit. See also Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 526 (8th Cir. 1991) (finding **[*10]** that unscheduled claim cannot be abandoned pursuant to § 554(c), even where discussed with trustee); Graupner v. Town of Brookfield, 450 F.Supp.2d 119, 125 (D. Mass. 2006) (holding that claims were not abandoned where Graupner did not list any of his claims in different cases on the schedule during the original **bankruptcy** proceeding.)

Closer to the mark are three cases in which the debtors scheduled something to indicate the existence of a cause of action, but not the specific claims that they sought to prosecute post-**bankruptcy.** The **Bankruptcy** Court relied primarily on In re Bonner, 330 B.R. 880, 2005 WL 2136204 (6th Cir. BAP, 2005). In that case, the court found that
the debtors' scheduling of 'Auto Accident Claim' plainly and unambiguously included any claim that the debtors may have had for any personal injury arising out of the automobile accident. . . . By listing 'Auto Accident Claim,' the debtors gave the Trustee sufficient information alerting him to the possible existence of a personal injury claim and the need for further investigation. . . . A debtor involved in an automobile accident might have claims for pain and suffering, loss of income, medical expenses, loss of consortium, **[*11]** property damage and any other expenses incurred as a result of the accident. Under the Trustee's reasoning, each of these claims would have to be specifically delineated in the schedules in order for the debtors to sufficiently satisfy their 11 U.S.C. § 521(1) obligation. Clearly, the Code does not require detail of this degree.

Id. at *4.

Donarumo, however, points to two other cases that found debtors' scheduling to be inadequate. In Tennyson v. Challenge Realty, the plaintiffs filed suit alleging that their mortgage was void due to violations of the Truth in Lending Act and the Home Ownership and Equity Protection Act of 1994. 313 B.R. 402, 404 (Bankr. W.D. Ky. 2004). They also sought rescission of the mortgage on unconscionability grounds. The defendant, Challenge Realty, argued that plaintiffs had no standing to pursue their claims because they had not been listed in plaintiffs' **bankruptcy** schedule, and therefore remained property of the estate. Id. In the plaintiff's original **bankruptcy** schedules, there was no listing of claims or counterclaims, but the Schedule B was amended to include the TILA claim. Id. The rescission claim was known to the plaintiffs at the time their **bankruptcy** **[*12]** petition was filed, but was not included in the amendment to the Schedule B. Id. at 406. The Trustee had no notice of the rescission claim. Id. The court found that the scheduling of the real property underlying the plaintiffs' claims was insufficient notice to the Trustee of the unscheduled claims, and that the claims were therefore not abandoned at the close of the case under § 554. Id.

In Tilley v. Anixter Inc., the plaintiff filed for **bankruptcy** after getting divorced. 332 B.R. 501, 504 (D. Conn. 2005). In her **bankruptcy** petition, she included a "claim against her ex-husband and her ex-husband's employer for back child support." Id. at 507. She also included this claim on her Schedule C list of exempt property pursuant to 11 U.S.C. § 522(d)(10)(D), which provides an exemption for alimony and child support. In her Schedule B, the plaintiff failed to also list a claim for intentional infliction of emotional distress deriving from the ex-husband's alleged deceptive withholding of child support. Id. The defendant argued that the tort claim for intentional infliction of emotional distress was not properly scheduled and remained the property of the plaintiff's **bankruptcy** estate. Id. The **[*13]** court ruled that

the fact that the instant plaintiff's claim for intentional infliction of emotional distress may have arisen out of the defendant's failure to pay adequate child support did not absolve her of her duty to schedule it separately from a claim of back child support. Whereas "it is common knowledge" that an "Auto Accident Claim" is likely to result in a personal injury claim, Bonner, 2005 WL 2136204 at *4, a claim "for back child support" does not similarly inform a trustee of the need to investigate whether the plaintiff had a claim for intentional infliction of distress arising out of fraud in connection with the reporting of Mr. Tilley's income. The present emotional distress claim existed while the plaintiff was in **bankruptcy,** and the trustee lacked the information he needed to determine whether to pursue it. Thus, it should have been scheduled separately on the plaintiff's **bankruptcy** petition.

Id. at 510-511.

The thread running through each of these cases is the courts' concern that the Trustee must be given sufficient information to determine whether to pursue the claim. Cusano v. Klein, 264 F.3d 936, 946 (9th Cir. 2001) ("Cusano's listing was not so defective that **[*14]** it would forestall a proper investigation of the asset."). Indeed, in Tilley, the court emphasized the need to inform a Trustee of the need to investigate additional claims. Id. at 511. Critically, in both Tilley and Tennyson, the Trustee had no knowledge of the additional claims. Here, by contrast, the Furlongs informed the Trustee of the nature of their claims, even going so far as to present him with a draft complaint. Their tort claims and Chapter 93A claims are closely related both legally and factually to their breach of contract claims, and as such the scheduled claim was sufficient to inform both the Trustee and any potential creditors of the need to investigate the issue. Particularly in these circumstances, where the Trustee was fully aware of each claim, the Furlongs' Schedule B listing exhibited reasonable particularity and all of the claims at issue were consequently abandoned under § 554(c) at the close of the case.

2. The Personal **Bankruptcy**

Donarumo also argues that the **Bankruptcy** Court erred in finding that the Furlongs' personal claims against Donarumo were abandoned pursuant to § 554(a) in the personal **bankruptcy.** As noted above, the Trustee filed a "Notice of Intent **[*15]** to Abandon" in the personal **bankruptcy** case on November 6, 2007, based on his determination that "pursuing this litigation would not be cost effective for the estate." The notice stated that "the Trustee of the [Furlongs'] estate intends to abandon a cause of action against Andrew Donarumo. . . . The claim is based upon the Debtor's allegation that certain misrepresentation and other business related tort cause of action arose from the purchase of a business known as Drew's Plumbing & Heating, Inc. II." Donarumo argues that the notice was so unclear that it lacked the requisite "clear and unequivocal" intent to abandon estate property. Chartschlaa v. Nationwide, 538 F.3d 116, 123 (2d Cir. 2008) (per curiam).

While the notice was certainly not a paragon of grammatical beauty, this Court agrees with the **Bankruptcy** Court that the Trustee's intent to abandon all of the claims arising from the purchase transaction was clear.

C. The Automatic Stay

Donarumo's appeal challenges the **Bankruptcy** Court's determination that the Furlongs' transfer of the Drew's Plumbing claims from the corporation to themselves did not violate the automatic stay. [2] Under 11 U.S.C. § 362(a)(3), the filing of a **bankruptcy** **[*16]** petition serves as an automatic stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." The automatic stay imposed under § 362 is lifted when the case is closed or dismissed. Under § 362(c),

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2) the stay of any other act under subsection (a) of this section continues until the earliest of—
(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied[.]

11 U.S.C. § 362(c).

FOOTNOTES

2 Donarumo argues that any claims not properly abandoned in the Drew's Plumbing **bankruptcy** remain property of the estate and subject to the automatic stay. Because I have found that all of the claims were abandoned at the closing of the Drew's Plumbing case, this argument is moot.

Donarumo argues that the Furlongs' transfer of the Drew's Plumbing claims to themselves violated the automatic stay **[*17]** in the personal **bankruptcy.** The automatic stay prevents anyone but the Trustee from "exercis[ing] control over property of the estate," 11 U.S.C. § 362(a)(3). Donarumo argues that the transfer required voting the Drew's Plumbing shares, which remain property of the personal estate, and that this action constituted an "exercise of control" over the shares in violation of the automatic stay. Voting shares that are estate property constitutes "use" under § 363. See In re Consolidated Auto Recyclers, Inc., 123 B.R. 130, 140 (Bankr. D. Me. 1991).

Under state law, the transfer of "all, or substantially all, of [a corporation's] property, otherwise than in the usual and regular course of business," requires a shareholder vote. See M.G.L. Chapter 156D, § 12.02(a). Both sides agree that the claims were the only remaining assets of Drew's Plumbing. Therefore, the Furlongs' transfer, which Donarumo argues was not in the usual course of business, purportedly required the Trustee's approval as the 100% shareholder of Drew's Plumbing. Donarumo contends that by effecting the transfer without that approval, the Furlongs "exercised control" over the stock shares in violation of the automatic stay. He **[*18]** further argues that the Trustee could not have approved the transfers in any event. In support of this argument, Donarumo cites 11 U.S.C. § 363(b)(1), under which the Trustee may only "use" estate property "other than in the ordinary course of business" with the consent of the **bankruptcy** court. Because the transfers were outside the ordinary course of business, says Donarumo, even the Trustee's approval as shareholder required court approval.

The **Bankruptcy** Court seems to have taken a different approach to this issue. The court found that the claims were transferred solely by the board of directors, without the consent of the stockholder trustee, and thus the transfer did not implicate the stock. It concluded that the transfer could not have violated the automatic stay. 437 B.R. at 721. The court noted that while transferring the claims did not involve "using" the stock in violation of the automatic stay, the transfer might nonetheless create liability under state corporations law:

. . . the stockholder of Drew's Plumbing (the Trustee) may have a derivative claim against the Furlongs on the basis that the Furlongs received a fraudulent transfer from Drew's Plumbing under state law. In **[*19]** addition, there remain important questions under state law as to the voidability of the transfer of what appears to have been Drew's Plumbing's only remaining interest (the claims against Donarumo) without stockholder (the Trustee's) consent.

Id.

With regard to the transfer itself, as the **Bankruptcy** Court noted, the automatic stay "does not extend to the assets of a corporation in which the debtor has an interest, even if the interest is 100% of the corporate stock." Furlong, 437 B.R. at 721; see also Kreisler v. Goldberg, 478 F.3d 209, 213-14 (4th Cir. 2007); In re Winer, 158 B.R. 736, 743 (N.D. Ill. 1993); Personal Designs, Inc. v. Guymar, Inc., 80 B.R. 29, 30 (E.D. Pa. 1987).

Because Donarumo's argument depends on the legally untenable premise that the Furlongs utilized their shares in Drew's Plumbing to effectuate the transfer of the claims, the **Bankruptcy** Court did not err in concluding the transfer did not violate the automatic stay.

D. The Drew's Plumbing Stocks

The Furlongs appeal the **Bankruptcy** Court's ruling that the Drew's Plumbing shares remain property of the personal **bankruptcy** estate. The Furlongs do not challenge the finding that the Drew's Plumbing stock "technically" remains **[*20]** within the personal **bankruptcy** estate, but contend instead that the intent of the Trustee was to abandon all rights and interests to the claims. The Furlongs argue that, in reliance on the Trustee's abandonment of the claims, they have invested substantial time, effort, and resources into the litigation of those claims in state court. They therefore request that this Court utilize its equitable powers to order the Trustee to abandon the Drew's Plumbing shares. The Trustee has not taken a position on the matter in this appeal, but the Furlongs' anxiety is well founded, as Donarumo has offered $5,000 to the Trustee in exchange for these shares. The Furlongs' concerns notwithstanding, the Drew's Plumbing shares were never formally abandoned, and therefore the **Bankruptcy** Judge properly concluded they remain property of the personal estate.

VI. CONCLUSION

The ruling of the **Bankruptcy** Court is **AFFIRMED**.

/s/ Patti B. Saris

PATTI B. SARIS

United States District Judge

FUNDACIÓN DR. MANUEL DE LA PILA IGLESIAS, INC., d/b/a Hospital Dr. Pila, d/b/a Villa Ponce Housing, Debtor. CESAR CASTILLO, INC., Appellant, v. FUNDACIÓN DR. MANUEL DE LA PILA IGLESIAS, INC., Appellee.

BAP NO. PR 10-041

UNITED STATES **BANKRUPTCY** APPELLATE PANEL FOR THE FIRST CIRCUIT

2011 Bankr. LEXIS 953

March 22, 2011, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Puerto Rico. (Hon. Brian K. Tester, U.S. **Bankruptcy** Judge). **Bankruptcy** Case No. 07-04459-BKT.

CASE SUMMARY
PROCEDURAL POSTURE: Appellant creditor sought review of an order of the U.S. **Bankruptcy** Court for the District of Puerto Rico denying appellant's request for immediate payment of its allowed administrative claim for goods sold to debtor postpetition and ruling that payments would be made in accordance with the confirmed plan. At issue was whether the 30-day payment term included on each invoice superseded the schedule for payment contained in the confirmed plan.

OVERVIEW: Prior to plan confirmation, debtor apparently paid for each shipment within 30 days, but court approval of the arrangement was never sought. After debtor’s Chapter 11 plan was confirmed, debtor then advised appellant, who in fact had voted for confirmation, that it would not pay current or future invoices in accord with the 30-day prior practice but that such invoices would be paid as administrative expenses through the plan. When the lower court allowed the amount then owed as an administrative expense but refused to order immediate payment, appellant sought review of that order. The panel affirmed. First, per 11 U.S.C.S. § 1141, the confirmed plan superseded any alleged agreement with debtor. Because the plan did not provide that appellant’s claim would be payable immediately instead of in tandem with all other administrative expenses, appellant was not entitled to such treatment. Next, though appellant had waived any claim that its “agreement” with debtor controlled under language in the plan, even if that argument had not been waived, it lacked merit. Nor was relief merited on claims based upon a perceived defect in the disclosure statement or upon debtor’s alleged bad faith.

OUTCOME: The panel affirmed the ruling below.

CORE TERMS: administrative claim, confirmation, immediate payment, disclosure statement, confirmed, administrative expense, liquidation, holder, invoice, postpetition, confirming, binding, rem, bad faith, notice, final order, res judicata, postconfirmation, consummation, allowance, timing, creditors' claims, unimpaired, claimants, entity, credit agreement, oral argument, underlying agreement, reorganization plan, interlocutory orders

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Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 The U.S. **Bankruptcy** Appellate Panel has jurisdiction to hear appeals (1) from final judgments, orders, and decrees and (2) with leave of court, from certain interlocutory orders. 28 U.S.C.S. § 158(a). More Like This Headnote

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

HN2 A decision is considered "final" for the purposes of 28 U.S.C.S. § 158(a) if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment whereas an interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

HN3 An order of a **bankruptcy** court allowing a claim is "final" for the purposes of 28 U.S.C.S. § 158(a) where all aspects of the claim have been determined. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

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

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

HN4 Appellate courts generally apply the "clearly erroneous" standard of review to findings of fact and the de novo standard of review to conclusions of law. More Like This Headnote

Bankruptcy Law > Claims > Allowance

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion

HN5 The U.S. **Bankruptcy** Appellate Panel reviews a **bankruptcy** court's decision to allow a claim for abuse of discretion. More Like This Headnote

Bankruptcy Law > Claims > Types > Unsecured Priority Claims > Administrative Expenses > General Overview

Bankruptcy Law > Reorganizations > Plans > Confirmation > Prerequisites > Administrative & Gap Claims

Bankruptcy Law > Reorganizations > Plans > Contents > Mandatory Provisions

HN6 Per the **Bankruptcy** Code, a Chapter 11 plan is to provide for the payment in full of administrative expenses. 11 U.S.C.S. § 1129(a)(9)(A). Such a plan, and the order confirming it, are dispositions in rem. More Like This Headnote

Bankruptcy Law > Claims > General Overview

Bankruptcy Law > Claims > Proof > General Overview

Bankruptcy Law > Practice & Proceedings > Jurisdiction > General Overview

HN7 **Bankruptcy** jurisdiction, at its core, is in rem. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. More Like This Headnote

Bankruptcy Law > Reorganizations > General Overview

Bankruptcy Law > Reorganizations > Plans > Confirmation > General Overview

Bankruptcy Law > Reorganizations > Plans > Contents > General Overview

Bankruptcy Law > Reorganizations > Plans > Postconfirmation > Effects of Confirmation

HN8 An order of a **bankruptcy** court confirming a Chapter 11 plan is a judgment in rem in the sense that it is a determination of the rights and liabilities created by the plan, binding upon all parties in interest, whether or not they have chosen to appear in the case. In this sense, the plan is binding on the world, to the extent it touches the debtor, its rights, assets or obligations as of the confirmation date. This is true of any **bankruptcy** plan but especially of a liquidating plan. In accordance with this in rem nature, upon a plan's confirmation, it becomes binding on all concerned parties, including, among others, the debtor and all creditors. More Like This Headnote

Bankruptcy Law > Reorganizations > Plans > Confirmation > General Overview

Bankruptcy Law > Reorganizations > Plans > Postconfirmation > Effects of Confirmation

HN9 11 U.S.C.S. § 1141(a) provides that the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor. More Like This Headnote

Bankruptcy Law > Reorganizations > Plans > Postconfirmation > General Overview

Bankruptcy Law > Reorganizations > Plans > Postconfirmation > Effects of Confirmation

HN10 As to the treatment of claims it addresses, including administrative expense claims, and the disposition of estate assets to satisfy those claims, a confirmed Chapter 11 plan is res judicata. That is, federal preclusion principles apply to **bankruptcy** court's plan confirmation order. It has long been settled that an order confirming a plan is to be given res judicata effect; plan confirmation is a final order, with res judicata effect, and is imbued with the strong policy favoring finality. More Like This Headnote

Bankruptcy Law > Reorganizations > Plans > Postconfirmation > Effects of Confirmation

HN11 As to any claim that is treated by a confirmed **bankruptcy** plan, the plan essentially substitutes a new claim for the old. Under a confirmed reorganization plan former legal relationships between a debtor and its creditors are extinguished and replaced by new commitments binding in law. Except to the extent that a plan provides that the original rights of a creditor are unimpaired, a confirmed plan gives a creditor new rights that replace and supersede the original characteristics of its claim. That is, a confirmed Chapter 11 plan defines the creditors' claims and any pre-confirmation rights of the creditors exist only to the extent that they are accounted for in the plan. Thus, a plan is, in effect, a new contract between the debtor and its creditors. It dictates the extent, source, priority, manner, and timing of payment on creditors' claims. More Like This Headnote

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Reviewability > Preservation for Review

HN12 Absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal. More Like This Headnote

Bankruptcy Law > Reorganizations > Plans > Disclosure Statements

HN13 Pursuant to 11 U.S.C.S. § 1125, a debtor is prohibited from soliciting acceptances of a plan until the **bankruptcy** court approves a disclosure statement containing "adequate information." The **Bankruptcy** Code defines "adequate information" as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." 11 U.S.C.S. § 1125(a)(1). Whether or not the information provided in the disclosure statement is adequate is determined by the **Bankruptcy** Code and is not governed by any otherwise applicable nonbankruptcy law, rule or regulation. 11 U.S.C.S. § 1125(d). More Like This Headnote

Bankruptcy Law > Reorganizations > Plans > Disclosure Statements

HN14 A Chapter 11 plan must provide for the payment of claims in existence as of its confirmation, and a disclosure statement must set forth adequate information about this subject matter. A disclosure statement need not also supply notice to trade creditors with whom debtor anticipates doing business after confirmation about the trade terms under which that postconfirmation business will be transacted. More Like This Headnote

COUNSEL: Daniel Molina López, Esq., on brief for Appellant.

Rafael A. González Valiente, Esq., on brief for Appellee.

JUDGES: Before Hillman, Kornreich, and Bailey, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Bailey

OPINION

JUDGMENT

This cause came to be heard from the United States **Bankruptcy** Court for the District of Puerto Rico. Upon consideration whereof, and in accordance with the Opinion entered of even date, it is now hereby **ORDERED AND ADJUDGED** that the **bankruptcy** court's order denying the Appellant's request for immediate payment of its allowed administrative claim and ruling that payments would be made in accordance with the confirmed plan is **AFFIRMED**.

Dated: March 22, 2011

Bailey, U.S. Bankruptcy Appellate Panel Judge.

Cesar Castillo, Inc. ("Castillo"), appeals from the **bankruptcy** court's June 16, 2010 order (the "Order") denying its request for immediate payment of its allowed administrative claim and ruling that payments would be made in accordance with the confirmed plan. For the reasons set forth below, we **AFFIRM**.

BACKGROUND

Fundación Dr. **[*2]** Manuel de la Pila Iglesias, Inc. (the "Debtor"), filed a chapter 11 petition on August 9, 2007 (the "Petition Date"). From the Petition Date through the effective date of its confirmed chapter 11 plan, a liquidating plan, the Debtor operated its business and managed its affairs as a debtor-in-possession pursuant to §§ 1107 and 1108. [1] On August 31, 2007 and pursuant to § 1102, the U.S. Trustee appointed an official committee of unsecured creditors (the "Creditors Committee"). Castillo, one of the Debtor's largest trade creditors, was a member of the Creditors Committee.

FOOTNOTES

1 Unless expressly stated otherwise, all references to " **Bankruptcy** Code" or to specific statutory sections shall be to the **Bankruptcy** Reform Act of 1978, as amended by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

The Debtor's main business was the operation of a primary care hospital known as Hospital Dr. Pila (the "Hospital") located in Ponce, Puerto Rico, which provided services mainly to indigent and low-income patients. To continue its operations and properly reorganize, the Debtor needed to purchase large amounts of prescription **[*3]** drugs and over-the-counter products for its patient services.

After the Debtor's **bankruptcy** filing, Castillo continued to supply pharmaceutical products to the Debtor. Castillo claims that it entered into a postpetition credit agreement with the Debtor under which Castillo would continue to sell goods to the Debtor and that the Debtor would pay for those goods within 30 days of receipt rather than by cash on delivery. The parties did not seek court approval of the alleged postpetition credit agreement. Castillo contends that from the Petition Date to March 23, 2010, the Debtor paid each of Castillo's postpetition invoices by the due date set forth in the invoice.

After a protracted negotiation with creditors, the Debtor and the Creditors Committee jointly filed, in December 2009, an amended plan of reorganization ("Plan") and a disclosure statement ("Disclosure Statement") with respect thereto. The Plan provided for the liquidation of the Debtor's assets. The proposed liquidation included the sale of the Hospital, but the Plan did not determine the precise manner in which the Hospital would be sold - not the price, the buyer, the time, or even the manner of sale - or even that it would **[*4]** necessarily be sold at all, as the Plan reserved to the Debtor the option of converting to chapter 7 if no satisfactory sale could be achieved. The Plan, however, did commit the Debtor to pursuing several outlined sale options [2] and specified that consummation of the first and preferred option would occur no sooner than 60 days after confirmation of the Plan. Pending consummation of the sale, the Plan contemplated that the Debtor would continue to operate the Hospital as a going concern, at least until the effective date of the Plan. The effective date of the Plan was defined as the 30th day after the confirmation order becomes a "Final Order"; and by definition, the Confirmation Order would become a Final Order "when the time has expired within which a proceeding for review (whether by way of rehearing, appeal, certiorari or otherwise, but not pursuant to **Bankruptcy** Code section 1144 or **Bankruptcy** Rule 9024) may be commenced, without any such proceeding having been commenced."

FOOTNOTES

2 Under the Plan, the Debtor would first attempt to complete a sale of the Hospital to an entity known as Metro Pavia Health System, Inc.. If that sale could not be consummated, then the Debtor would attempt to **[*5]** sell to a second suitor, Servicios de Salud Episcopales, Inc. ("Servicios"); and if a sale to Servicios could not be consummated, then the Debtor would proceed with a "lease and purchase proposal," also with Servicios, involving a two-year lease with an option to purchase. If this did not result in a sale, the Debtor would attempt to sell the Hospital through a public sale. Finally, if the public sale did not produce a successful bidder, the Debtor and Creditors Committee would confer about other sale options, with the Debtor reserving the further option of conversion of the case to one under chapter 7.

With respect to administrative expense claims, the Plan stated:
[s]ubject to the allowance procedures herein, unless otherwise agreed by the holder of an Allowed Administrative Expense Claim (in which event such other agreement shall govern), each holder of an Allowed Administrative Expense Claim other than Fee Claims, shall receive on the Distribution Date or, if later, on the 30th (thirtieth) Business Day after such claim becomes Allowed, Cash in an amount equal to such Allowed Administrative Expense Claim.
"Distribution Date" was, "as to each claim entitled to a Distribution, the later **[*6]** to occur of (i) the Effective Date or (ii) thirty (30) calendar days after the date on which the Claim becomes an Allowed Claim." The Plan also identified the funds from which administrative claims would be paid: they would be paid from the funds generated by the sale of the Hospital, from other funds deposited in an escrow account for the benefit of creditors, such as from liquidation of accounts receivable, and from the net proceeds of a litigation trust. The Plan promised the same treatment—payment in full from the same sources of funds—to priority tax claims and other priority claims, but, except with respect to distributions from the litigation trust, the Plan does not appear to have specified the priority in which these three types of claims would be paid if the sale proceeds and other sources of funding proved insufficient to pay them all in full. [3] The Plan does not create levels of priority among administrative claims. [4]

FOOTNOTES

3 The Disclosure Statement indicated that the Plan proposed to pay claims in the order of their priority under the **Bankruptcy** Code. Disclosure Statement, p. 11 ("From the proceeds of the sale of the Hospital and at the end of a payment plan period contemplated **[*7]** in the offer, creditors will be paid in accordance with the Code."). The Plan itself includes no such language.

4 The Plan does recognize a category of claims known as Post-Effective Date Consummation Expenses, defined as "the sum of these reasonable and necessary expenses of the Plan Administrator incurred after the Effective Date that are necessarily incidental to implementation of the Plan, in an amount to be determined at the Confirmation Hearing." Castillo does not argue that its claim is such an Expense. These are to be paid by the Plan Administrator from an Operating Account. The Plan does not indicate how the Operating Account is to be funded and appears to be silent as to the relative priority of Post-Effective Date Consummation Expenses and administrative expense claims.

Castillo voted in favor of the Plan. After notice and a hearing held on February 9, 2010, the **bankruptcy** court, on February 17, 2010, entered an order confirming the Plan. Pursuant to the Plan, the confirmation order became a Final Order on March 3, 2010, and the effective date of the Plan was April 2, 2010.

After confirmation of the Plan and continuing after its effective date into May 2010, the Debtor continued **[*8]** to purchase goods from Castillo. However, Castillo states that in May 2010, the Debtor informed Castillo that it would not pay invoices received during the months of March, April, and May 2010 according to the 30-day terms set forth in the invoices; rather, payment of these invoices would be made by the Plan Administrator pursuant to the terms of the confirmed Plan.

On June 10, 2010, Castillo filed a motion requesting an order allowing an administrative claim for products sold on credit from March 23, 2010 to May 12, 2010 in the amount of $329,795.04 and directing the Debtor to pay that amount immediately. Castillo argued that immediate payment was required because (i) the goods were purchased under a contractual agreement to pay within 30 days of delivery, (ii) the Debtor did not prior to May 2010 indicate to Castillo that it would not abide by the 30-day credit terms, and (iii) the Plan and Disclosure Statement contained no provision alerting Castillo that its credit terms would be altered after confirmation of the Plan. In its response to Castillo's motion, the Debtor did not dispute that Castillo was entitled to an administrative claim in the amount requested, but the Debtor objected **[*9]** to immediate payment, arguing that the claim should be paid with all other administrative claims when the funds to do so became available. In support of its opposition to immediate payment, the Debtor argued (i) that Castillo's administrative claim had no priority over any other, no postpetition credit agreement with Castillo having been filed with or approved by the court, (ii) that the confirmed Plan provided for payment of administrative claims in the order prescribed by the **Bankruptcy** Code, meaning that Castillo's administrative claim would be paid with all other administrative claims when the funds to do so became available, and (iii) that Castillo was aware of the risks involved in providing credit to a debtor in **bankruptcy** and of the treatment it would eventually receive as part of that process.

On June 16, 2010, the **bankruptcy** court, without a hearing, entered an order allowing Castillo's administrative claim but also directing that "payment will be in accordance with the confirmed plan payment schedules." Both parties construe this order as requiring that Castillo's claim be paid on a pro rata basis with all other administrative claims as and when distribution is required to **[*10]** be made on those claims; we concur in that construction. The court issued no findings, rulings, or memorandum of decision in support of this order. Castillo appealed from that part of the order that denied immediate payment of its administrative claim.

On appeal, Castillo argues, first, that as a simple matter of contract law, the Debtor must pay Castillo's invoices in accordance with the 30-day payment term on which the parties agreed, even where the timing of payment would effectively give Castillo's claim priority over similarly-situated administrative claims. Second, Castillo argues that the Debtor has acted in bad faith by ordering supplies for which it did not intend to pay within the 30 days required by each invoice, especially where, the Debtor contends, the Disclosure Statement and Plan did not put Castillo on notice of any change in the parties' agreement. In response to these arguments, the Debtor simply reiterates the arguments it made below.

At oral argument, Castillo advanced an argument that it had not advanced either in the **bankruptcy** court or in its brief on appeal: that the Plan itself included an exception to the treatment for administrative claims, under which, if **[*11]** the Debtor and an administrative creditor agreed on a different treatment than that prescribed by the Plan, the agreed terms would govern, and therefore the 30-day agreed payment term governs and requires immediate payment. Also at oral argument, the Debtor reported that, in accordance with the Plan, the Debtor in fact sold the Hospital in June 2010 and that, in accordance with the terms of the sale, the buyer paid a down payment at the closing and will pay the balance of the sale price by deferred payments over five years. The Debtor further represented that the funds presently in the possession of the Debtor were, in part, subject to secured claims of third parties and that the balance was insufficient to pay administrative claims in full. The Debtor added that, until the purchase payments for the Hospital are complete, it will not be clear that the liquidation will yield sufficient funds to pay administrative claims in full. The Debtor also alleged that a number of other administrative claimants had agreements with the Debtor similar to Castillo's, for payment in full within 30 days.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, **[*12]** even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). *HN1* The Panel has jurisdiction to hear appeals (1) from final judgments, orders, and decrees and (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). *HN2* A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). *HN3* An order allowing a claim is final where all aspects of the claim have been determined. See Smith v. Pritchett (In re Smith), 398 B.R. 715, 720 (B.A.P. 1st Cir. 2008), aff'd, 586 F.3d 69 (1st Cir. 2009); Orsini Santos v. Lugo Mender (In re Orsini Santos), 349 B.R. 762, 768 (B.A.P. 1st Cir. 2006); **[*13]** see also Perry v. First Citizens Fed. Credit Union (In re Perry), 391 F.3d 282, 285 (1st Cir. 2004).

STANDARD OF REVIEW

HN4 Appellate courts generally apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). *HN5* The Panel reviews a **bankruptcy** court's decision to allow a claim for abuse of discretion. See In re Orsini Santos, 349 B.R. at 768 (citing In re Perry, 391 F.3d at 284).

DISCUSSION

Castillo argues that the **bankruptcy** court erred in denying its request for immediate payment of its allowed administrative claim because its postpetition credit agreement provided that the Debtor would submit payment within 30 days of receiving the goods, and the Debtor was not entitled to alter those terms without notifying Castillo of its intention to do so. Castillo's argument fails for two reasons: first, upon confirmation of a plan of reorganization, the plan governs the treatment of allowed administrative claims, and the Plan here gives no priority to Castillo's claim over other administrative claims; and second, the approved Disclosure Statement and confirmed Plan provided **[*14]** adequate information and notice as to the treatment of administrative claims.

As a preliminary matter, we note that the only matter before us is denial of the request for immediate payment and not also Castillo's request for allowance of its claim as an administrative expense. Despite the fact that a substantial portion of its claim arose not only after the Plan's confirmation but also after its effective date, Castillo moved for allowance of its entire claim as an administrative expense. The Debtor did not object to that treatment, the court allowed the claim as an administrative expense, and no appeal has been taken from that order. We therefore accept without deciding that the claim in its entirety is administrative in character. In doing so, we recognize that, as an administrative claim, this one is at best atypical. [5] Additionally, we recognize that the categorization of the claim as administrative will, in large measure, dictate the outcome of this proceeding, with results that will seem anomalous in comparison to the usual treatment of postconfirmation claims against a reorganized debtor.

FOOTNOTES

5 See, e.g., In re Pauling Auto Supply, Inc., 158 B.R. 789 (Bankr. N.D. Iowa 1993) (unless **[*15]** the plan provides for the continuation of the estate after confirmation, a postconfirmation creditor is unable to obtain administrative status for a postconfirmation claim because there is no estate to preserve). We are not asked to determine here whether the claim was properly characterized as administrative and therefore do not address such related issues as whether the estate continued in existence after confirmation.

I. The Plan Supersedes Castillo's Underlying Agreement with the Debtor as to the Treatment of its Administrative Claim.

Castillo seeks immediate payment of its claim as an administrative expense claim, and Castillo argues that it is entitled to immediate payment because the agreement between the parties provided for payment within 30 days of invoicing. Insofar as Castillo may be arguing that the timing of payments must, in the first instance, be dictated by the underlying agreement between the parties and not by the confirmed Plan, we disagree.

HN6 As the **Bankruptcy** Code required, the Plan provided for the payment in full of administrative expenses. 11 U.S.C. § 1129(a)(9)(A). The Plan and the order confirming it are dispositions *in rem*. Central Virginia Community College v. Katz, 546 U.S. 356, 362, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006) **[*16]** (HN7 "**Bankruptcy** jurisdiction, at its core, is *in rem*."). That is, the confirmed Plan is a binding determination as to all potential claimants of the liquidation and distribution of a res comprised of the property of the Debtor's **bankruptcy** estate. Gardner v. New Jersey, 329 U.S. 565, 574, 67 S. Ct. 467, 91 L. Ed. 504 (1947) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*."); 8 Collier on **Bankruptcy**, ¶ 1141.02 (Alan N. Resnick and Henry J. Sommer eds.,16th ed. 2010) (HN8 "[A]n order confirming a plan is a judgment *in rem* in the sense that it is a determination of the rights and liabilities created by the plan, binding upon all parties in interest, whether or not they have chosen to appear in the case. In this sense, the plan is binding on the world, to the extent it touches the debtor, its rights, assets or obligations as of the confirmation date."). This is true of any **bankruptcy** plan but especially of a liquidating plan. In accordance with this *in rem* nature, upon the Plan's confirmation, it became binding on all concerned parties, including, among others, the Debtor and all creditors. HN9 11 U.S.C. § 1141(a) ("Except as provided in subsections (d)(2) **[*17]** and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor"). HN10 As to the treatment of claims it addresses, including administrative expense claims, and the disposition of estate assets to satisfy those claims, the Plan is *res judicata*. Stoll v. Gottlieb, 305 U.S. 165, 170, 59 S. Ct. 134, 83 L. Ed. 104 (1938) (**bankruptcy** court order confirming reorganization plan entitled to *res judicata* effect); Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 978-79 (1st Cir. 1995) (federal preclusion principles apply to **bankruptcy** court's plan confirmation order); Ortega Calderon v. CitiMortgage, Inc., 437 B.R. 25, 30-31 (D.P.R. 2010) and cases cited ("It has long been settled that an order confirming a plan is to be given *res judicata* effect."); Factors Funding Co. v. Fili (In re Fili), 257 B.R. 370 (B.A.P. 1st Cir. 2001) ("Plan confirmation is a final order, with *res judicata* effect, and is imbued with the strong policy favoring finality.").

HN11 As to any claim that is treated by a confirmed plan, the plan essentially substitutes a new claim **[*18]** for the old. Dale C. Eckert Corp. v. Orange Tree Assocs., Ltd. (In re Orange Tree Assocs., Ltd.), 961 F.2d 1445, 1448 (9th Cir. 1992) (confirmation of chapter 11 plan substitutes the obligations imposed by the plan for preconfimation debt); DiBerto v. The Meadows at Marbury, Inc. (In re DiBerto), 171 B.R. 461, 471 (Bankr. D.N.H. 1994) ("Under a confirmed reorganization plan former legal relationships between a debtor and its creditors are extinguished and replaced by new commitments binding in law."). Except to the extent that a plan provides that the original rights of a creditor are unimpaired, a confirmed plan gives a creditor new rights that replace and supersede the original characteristics of its claim. In re Henderberg, 108 B.R. 407, 412 (Bankr. N.D.N.Y. 1989) ("[A] confirmed chapter 11 plan defines the creditors' claims and any pre-confirmation rights of the creditors exist only to the extent that they are accounted for in the plan."); Charles Jordan Taub, THE LAW OF **BANKRUPTCY**, 1098 (2d ed. 2009) ("Upon confirmation, all prior claims and interests against the debtor are replaced by the provisions of the plan."). A plan is, in effect, a new contract between the debtor and its **[*19]** creditors. Id. It dictates the extent, source, priority, manner, and timing of payment on creditors' claims. In sum, to determine whether Castillo was entitled to immediate payment, we must look in the first instance to the Plan and not to the agreement between the parties.

II. The Plan Does Not Preserve the Original Rights of Administrative Claim Holders

At oral argument, Castillo argued for the first time that its agreement with the Debtor should govern because the Plan itself so requires. Castillo here is relying on an exception in the Plan's treatment of administrative claims:

unless otherwise agreed by the holder of an Allowed Administrative Expense Claim (in which event such other agreement shall govern), each holder of an Allowed Administrative Expense Claim other than Fee Claims, shall receive on the Distribution Date or, if later, on the 30th (thirtieth) Business Day after such claim becomes Allowed, Cash in an amount equal to such Allowed Administrative Expense Claim.

Plan p. 10 (emphasis added). Castillo contends that the emphasized language essentially left unimpaired the agreement under which Castillo's administrative claim arose, including the 30-day payment term; by this **[*20]** interpretation of the language in question, any administrative creditor whose claim arose from an agreement would be deemed unimpaired and, after confirmation, would retain in full the rights it enjoyed before confirmation.

Castillo did not make this argument or cite to this language in his motion before the **bankruptcy** court. This argument and language are likewise wholly absent from the brief Castillo filed on appeal. HN12 "Absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time on appeal." Banco Bilbao Vizcaya Argentaria v. Wiscovitch-Rentas (In re Net-Velázquez), 625 F.3d 34, 40 (1st Cir. 2010). Especially where Castillo compounded its error by failing to brief the issue on appeal, we are aware of no extraordinary circumstances warranting relief from this rule. The argument is therefore deemed waived.

Nor do we see any evident merit to the argument. Language of the type Castillo here cites is common and generally intended to permit a debtor and a particular creditor, after confirmation, to negotiate more lenient payment terms—lenient, that is, to the debtor—than the treatment dictated by the plan. We know **[*21]** of no case in which it has been intended or construed as permission for a debtor and a creditor to make an agreement that, without notice to other creditors, effectively elevates the priority of that creditor's claim over that which it holds under the plan. This would clearly pose issues of due process.

We conclude that the Plan alone, without reference to the underlying agreement between the parties, governs Castillo's right to payment as an administrative creditor. The **bankruptcy** judge was therefore correct in ruling that the Plan should govern the timing and priority of payment of Castillo's administrative claim. [6]

FOOTNOTES

6 Except to the extent that Castillo relies on the exception we have just addressed, we do not understand Castillo to argue that *the Plan* requires immediate payment. That issue is not before us. Accordingly, we take no position as to when and to what extent the Plan requires that payment be made on Castillo's administrative claim.

III. The Disclosure Statement and Plan

HN13 Pursuant to § 1125, a debtor is prohibited from soliciting acceptances of a plan until the **bankruptcy** court approves a disclosure statement containing "adequate information." The **Bankruptcy** Code defines adequate **[*22]** information as "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1). Whether or not the information provided in the disclosure statement is adequate is determined by the **Bankruptcy** Code and "is not governed by any otherwise applicable nonbankruptcy law, rule or regulation." 11 U.S.C. § 1125(d); see also Kaufman v. Public Serv. Co. of N.H. (In re Public Serv. Co. of N.H.), 43 F.3d 763, 766 (1st Cir. 1995); In re El Comandante Mgmt. Co., LLC, 359 B.R. 410, 415 (Bankr. D.P.R. 2006).

Castillo argues that the Disclosure Statement did not satisfy this requirement as it did not specifically warn Castillo that its debt would be paid outside the allegedly agreed-upon postpetition credit terms. Castillo also argues that the Plan failed to "state, warn or alert [it] that Debtor intended to alter or vary the post-petition credit terms agreed with [Castillo]. Nothing in the plan [] provided **[*23]** for the modification of post-petition or post-confirmation credit terms in order to implement it."

This argument has no merit. First, HN14 a plan must provide for the payment of claims in existence as of its confirmation, and a disclosure statement must set forth adequate information about this subject matter. A disclosure statement need not also supply notice to trade creditors with whom the Debtor anticipates doing business *after confirmation* about the trade terms under which that *postconfirmation business* will be transacted. Castillo has cited no authority to the contrary, and we are aware of none.

Second, with respect to the treatment of administrative claims, the provisions of the Plan are clear, and the information about that treatment in the Disclosure Statement is adequate. The Plan and Disclosure Statement both state, repeatedly, that administrative claims will be paid at least in part from proceeds from the liquidation of the Hospital and of accounts receivable and other assets. And neither gives cause to understand that Castillo, or any subclass of administrative claimants to which Castillo may belong, is entitled to payment sooner than, or with priority over, other administrative **[*24]** creditors. Moreover, while the Plan promises payment of each administrative claim on the later to occur of the effective date or 30 days after the date on which the claim becomes an allowed claim, both the Plan and the Disclosure Statement also make abundantly clear that the liquidation of the Hospital and other assets, from which payment was to be made, would not occur by the effective date, might not occur for years, and, at least as to the Hospital, was not certain to occur at all. Castillo cites no ambiguity or lack of disclosure in the relevant provisions. We find no inadequacy in the Disclosure Statement.

IV. Bad Faith

Castillo's last argument is that it was error to deny immediate payment where Castillo had alleged that the Debtor acted in bad faith by ordering products from Castillo without intent to honor their longstanding agreement to pay in full within 30 days and without notifying Castillo of any change in that arrangement. The **bankruptcy** judge made no findings of fact; for present purposes, we therefore accept this allegation as true. Still the argument is of no avail. Whatever the basis of its administrative claim, be it a simple breach of contract or a breach committed **[*25]** in bad faith, the resulting claim is still an administrative claim, and the treatment of administrative claims is governed by the confirmed Plan. This makes it not merely a two-party dispute between a debtor and its creditor but an *in rem* claim against the pool of assets whose distribution among numerous creditors is governed by the Plan. Castillo has not pointed to language in the Plan by virtue of which the claim's origination in bad faith would entitle that claim to immediate payment or priority over other administrative claims. Nor are we aware of any such language.

CONCLUSION

For the reasons set forth above, we conclude that the **bankruptcy** court correctly denied Castillo's request for immediate payment of its administrative claim and accordingly **AFFIRM**

VINCENT VICTOR ROGGIO and CALLIE LASCH ROGGIO, Plaintiffs, v. CITY OF GARDNER, WILLIAM J. GRASMUCK, EDWARD BASENER, HANNAFORD BROTHERS COMPANY, and JOHN DOES ONE through FIVE (representing unknown parties and entities), Defendants.

Civil Action No. 10-40076-FDS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 34731

March 30, 2011, Decided
March 30, 2011, Filed

CORE TERMS: criminal record, Privacy Act, conspiracy, co-defendant, privacy, unknown, offender, factual allegations, municipality, bankruptcy case, dissemination, supermarket, website, claims asserted, public domain, causes of action, telephone call, shoplifting, respondeat, amend, privacy rights, police department, legal conclusions, bankruptcy estate, citations omitted, judicial estoppel, subject to liability, vicariously liable, expectation of privacy, disseminated

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For Hannaford Brothers Company, Defendant: David A. Anderson, LEAD ATTORNEY, Pierce Atwood LLP, Portsmouth, NH.

JUDGES: F. Dennis Saylor IV, United States District Judge.

OPINION BY: F. Dennis Saylor IV

OPINION

MEMORANDUM AND ORDER ON HANNAFORD BROS., CO.'S MOTION TO DISMISS; CITY OF GARDNER AND WILLIAM J. GRASMUCK'S MOTION TO DISMISS AS TO CALLIE LASCH ROGGIO; AND CITY OF GARDNER'S MOTION FOR JUDGMENT ON THE PLEADINGS

SAYLOR, J.

This is a civil action involving alleged privacy rights violations. Plaintiffs Victor and Callie Roggio allege that defendants improperly conspired to access and disseminate Mr. Roggio's criminal record from a federal computer database. The named defendants are the City of Gardner, Massachusetts; **[*2]** William J. Grasmuck; Edward Basener; and Hannaford Brothers Company. Plaintiffs have asserted claims under (1) 42 U.S.C. § 1983; (2) the federal Privacy Act, 5 U.S.C. § 552a; (3) the Massachusetts Privacy Act, Mass. Gen. Laws ch. 214, § 1B; and (4) the Massachusetts Criminal Offender Record Information statute, Mass. Gen. Laws ch. 6, § 172.

Pending before the Court are (1) a motion to dismiss filed by Hannaford as to all claims; (2) a motion to dismiss filed by Grasmuck and the City of Gardner as to the claims brought by Callie Roggio; and (3) a motion for judgment on the pleadings filed by the City as to all claims. For the reasons stated below, the motions will be granted in part and denied in part.

I. Background

For the purpose of deciding the motions, the Court accepts as true all well-pleaded facts in the complaint.

Plaintiffs Victor and Callie Roggio are business owners and residents of Rumson, New Jersey. (Compl. ¶¶ 4, 5). In 1987, Mr. Roggio was convicted on several counts of mail fraud and making false statements in the United States District Court for the Southern District of Florida. (*Id.* ¶ 10). He served seven years in prison for these crimes. (*Id.* ¶¶ 10, 11).

After his release **[*3]** from prison in 1994, he and Mrs. Roggio established construction, real estate, manufacturing, and interior remodeling businesses in New Jersey. (*Id.* ¶ 11). Mrs. Roggio was also an independent video producer. (*Id.*). The Roggios' business contacts and relationships apparently were not aware of Mr. Roggio's criminal record. (*Id.* ¶¶ 13, 16).

Defendant Hannaford Brothers Co. is a corporation headquartered in Maine that operates supermarkets in several states, including Massachusetts. (*Id.* ¶ 8). Defendant Edward Basener, a resident of Massachusetts, was employed by the Hannaford supermarket in Gardner, Massachusetts, as a security officer. (*Id.* ¶ 9). He was also employed as a court officer in the Gardner District Court. (*Id.* ¶ 25(i)).

Plaintiffs allege that sometime in January 2006, an unknown representative or employee of Hannaford called Basener while he was working at the Gardner District Court. (*Id.*). According to the complaint, this unknown person asked Basener to access a criminal records database and obtain a copy of Mr. Roggio's criminal record. (*Id.*). Plaintiffs allege that on the morning of January 11, 2006, Basener called defendant William Grasmuck, who was employed by the City **[*4]** of Gardner Police Department as a detective. (*Id.* ¶¶ 7, 25(i)). Basener allegedly told Grasmuck, falsely, that Mr. Roggio was at the Hannaford supermarket in Gardner and was suspected of shoplifting. (*Id.* ¶ 25(ii)). He then requested a copy of Mr. Roggio's criminal record. (*Id.*). A few minutes later, Grasmuck allegedly went to the Gardner police dispatcher and asked her to download a copy of Mr. Roggio's criminal record. (*Id.* ¶ 25(iii)). She complied and gave the criminal record to Grasmuck. (*Id.* ¶¶ 25(iv)).

Around this time, Mr. Roggio was involved in an acrimonious relationship with a former business partner, Zachary Emmanouil, who was contemplating filing a separate action against him. (*Id.* ¶ 25(v)). Plaintiffs allege that one of the co-defendants in this case sent Mr. Roggio's criminal record to Emmanouil, who forwarded it to his attorneys. (*Id.*). The remainder of the complaint alleges that defendants were engaged in a conspiracy with Emmanouil or his attorneys to publicize and distribute Mr. Roggio's criminal record. (*See id.* ¶¶ 25(vi)-(x)).

Beginning in March 2006, the criminal record appeared in the public filings in a separate case in the United States District Court for the **[*5]** District of New Jersey, as well as on the Internet. (*Id.* ¶ 25(vi)). It was also sent to banks with which the Roggios had a business relationship. (*Id.*). [1] Plaintiffs allege that on or about October 6, 2006, defendants or other co-conspirators distributed the copy of Mr. Roggio's criminal record to his lender banks, business associates, his attorney, and his family. (*Id.* ¶ 25(vii)). On October 9, the same parties allegedly created a website that posted his criminal history; the information on the website was apparently obtained from the criminal record printout. (*Id.* ¶ 25(viii)). It was also printed from the website and given to more of plaintiff's lender banks, business associates, landlords, vendors, and customers. (*Id.* ¶ 25(x)).

FOOTNOTES

1 The complaint states that his criminal record was sent to banks and filed in public legal papers in March 2007. (*See* Compl. ¶ 25(vi)). Given the timeline described in the remainder of the complaint, the Court assumes that this is a typographical error, and that plaintiffs intended to allege that the criminal record was disseminated in March 2006.

Mr. Roggio found out about the website in November 2006. (*Id.*). Plaintiffs allege that they did not know how Mr. **[*6]** Roggio's criminal record was obtained until October 16, 2009. (*Id.* ¶ 27). At that time, they were involved in separate lawsuit with the Federal Bureau of Investigation ("FBI") arising out of these facts, and learned through discovery that Mr. Roggio's criminal record had been requested and obtained by the defendants in this matter. (*Id.*). According to the complaint, federal records revealed that Mr. Roggio's criminal record was downloaded once before the website was posted in October 2006; that download came at the request of the Gardner Police Department. (*Id.* ¶ 25(viii)).

Plaintiffs allege that as a result of the dissemination of Mr. Roggio's criminal record, their lending banks called in their business loans, and one business is now in **bankruptcy.** (*Id.* ¶ 26). In addition, two of plaintiffs' properties are in foreclosure and Mr. Roggio's credit score has been negatively impacted. (*Id.*). The complaint also asserts that the copy of criminal record obtained by defendants contained inaccuracies and information that should have been expunged. (*Id.* ¶ 25(ix)).

Plaintiffs filed this action on April 23, 2010. The complaint alleges four counts against all defendants: (1) a claim under 42 U.S.C. § 1983 **[*7]** for an alleged conspiracy to violate plaintiffs' due process and privacy rights; (2) a claim under the federal Privacy Act, 5 U.S.C. § 552a; (3) a claim under the Massachusetts Privacy Act, Mass. Gen. Laws ch. 214, § 1B; and (4) a claim under the Massachusetts Criminal Offender Record Information ("CORI") statute, Mass. Gen. Laws ch. 6, § 172. They seek compensatory and punitive damages and attorney's fees.

Hannaford has filed a motion to dismiss as to all claims. The City of Gardner and Grasmuck have filed a motion to dismiss as to all claims brought by Mrs. Roggio. The City subsequently filed a motion for judgment on the pleadings as to all claims.

II. Standard of Review

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court "must assume the truth of all well-plead[ed] facts and give the plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (citing *Rogan v. Menino*, 175 F.3d 75, 77 (1st Cir. 1999)). To survive a motion to dismiss, the plaintiff must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). That is, "[f]actual allegations must be enough **[*8]** to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if plaintiff's well-pleaded facts do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (quotations and original alterations omitted). "The standard for evaluating a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is essentially the same as that for deciding a Rule 12(b)(6) motion." *Mongeau v. City of Marlborough*, 462 F. Supp.2d 144, 148 (D. Mass. 2006) (citing *Pasdon v. City of Peabody*, 417 F.3d 225, 226 (1st Cir. 2005)).

III. City of Gardner and Grasmuck's Motion to Dismiss as to Callie Roggio

The City of Gardner and Grasmuck have jointly moved to dismiss all claims brought by Mrs. Roggio on the ground that she has no standing to **[*9]** pursue those claims. Attached to defendants' motion are exhibits indicating that Mrs. Roggio filed for Chapter 7 **bankruptcy** in the District of New Jersey on October 2, 2009. She did not list on her schedule of assets and liabilities in that proceeding any claims against the City or Grasmuck. (*See* Mot. to Dismiss as to Callie Roggio, Ex. A). She did, however, list a defamation claim against the FBI that was, at the time, pending in the United States District Court for the District of New Jersey. (*See* Needle Decl., Ex. 1). The filings indicate that Mrs. Roggio's Chapter 7 case was closed and the trustee was discharged on February 2, 2010. (*See* Pl.'s Opp. at 3).

Under 11 U.S.C. § 541(a)(1), all claims and causes of action of a debtor in **bankruptcy** that have accrued as of the filing of a **bankruptcy** case become property of the **bankruptcy** estate. *See In re Rare Coin Galleries of America, Inc.*, 862 F.2d 896, 900-01 (1st Cir. 1988); *Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996). A debtor seeking shelter under the **bankruptcy** laws is obligated to disclose all assets to the **bankruptcy** court, including contingent claims. 11 U.S.C. § 521(a)(1). Once listed on the schedule of assets, **[*10]** the trustee is responsible for asserting or maintaining the listed claims. *Rare Coin Galleries*, 862 F.2d at 901.

If the trustee chooses not to pursue properly-scheduled claims before discharge, the claims may be deemed abandoned and revert to the debtor. *See* 11 U.S.C. § 554(c). However, in order for property to be legally abandoned by operation of § 554(c), the debtor must "formally schedule the property" pursuant to § 521(a)(1). *Jeffrey v. Desmond*, 70 F.3d 183, 186 (1st Cir. 1995). Moreover, "the law is abundantly clear that the burden is on the debtor[] to list the assets and/or amend the[] schedules." *Id.* If a claim is not properly scheduled prior to the close of the **bankruptcy** case, it "remains the property of the bankrupt estate, and the debtor loses all rights to enforce it in [her] own name." *Id.* at 186 n.3 (citing *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991)); *see also* 11 U.S.C. § 554(d).

The City and Grasmuck contend that because Mrs. Roggio did not list the claims she has filed against them on her schedule of assets, they remain the property of the **bankruptcy** estate, and she has no standing to pursue them. Alternatively, they contend that **[*11]** the doctrine of judicial estoppel should be invoked to bar the claims.

Mrs. Roggio maintains that she made a proper disclosure of the claims on her schedule of assets. She notes that she listed a defamation claim against the FBI, and contends that this item is in fact the same claim as four privacy claims that she has asserted in this matter. Mrs. Roggio contends that the privacy claims arose out of the same transaction as the defamation claim, but, at the commencement of her **bankruptcy** case, she was not aware of the underlying facts surrounding the alleged privacy breach or of the identities of the defendants in this action. She admits, however, that she did not amend her schedule of assets when she learned these relevant facts on October 16, 2009, fourteen days after filing her **bankruptcy** case but while the case remained pending.

"The duty to disclose [under § 521] is a continuing one that does not end once the forms are submitted to the **bankruptcy** court; rather, a debtor must amend [her] financial statements if circumstances change." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002); *see also Ajaka v. BrooksAmerica Mortg. Corp.*, 453 F.3d 1339, 1344 (11th Cir. 2006); **[*12]** *Jeffrey*, 70 F.3d at 186. It is undisputed that Mrs. Roggio learned of the underlying facts in this matter and the defendants' identities two weeks after she filed her case in the **Bankruptcy** Court. The fact that she learned the existence of those potential claims after the filing surely constitutes changed circumstances. It is also undisputed that Mrs. Roggio did not list these causes of action on the schedule of assets during the pendency of the **bankruptcy** proceeding. Furthermore, she has offered no explanation justifying her failure to amend her schedule of assets after she discovered the underlying facts.

Because the claims in this case were never scheduled, either in the initial schedule of assets or through subsequent amendment, the **Bankruptcy** Court did not receive notice of the claims, and therefore could not have evaluated their likelihood of success or estimated their value. Throughout the proceeding, it was "left with the false impression that there was a single claim," when in fact Mrs. Roggio was well aware of the possibility of filing four new claims against four new defendants. *Graupner v. Town of Brookfield*, 450 F. Supp. 2d 119, 126 (D. Mass. 2006). As Mrs. Roggio failed **[*13]** to properly schedule the claims she has pursued in this matter, the claims were not abandoned through operation of § 554(c) when the **bankruptcy** case was closed in February 2010. *Jeffrey*, 70 F.3d at 186 & n.3; *In re Rothwell*, 159 B.R. 374, 377 (D. Mass. 1993). The claims do not belong to her, but rather, pursuant to 11 U.S.C. § 554(d), they remain the property of the estate. *See Jeffrey*, 70 F.3d at 186; *Graupner*, 450 F. Supp. 2d at 125; *In re Capozzi*, 229 B.R. 250, 251-52 (Bankr. S.D. Fla. 1999).

Mrs. Roggio thus does not have standing to assert her claims, and the City and Grasmuck accordingly request that this Court dismiss those claims. To the extent, however, that any of the claims have merit, dismissal would be potentially unfair to her creditors, who are entitled to apply any proceeds of the claims toward satisfying her debts. The **Bankruptcy** Court should have an opportunity to determine whether the estate has any interest in those claims. The claims of Mrs. Roggio in this matter will accordingly be stayed for a reasonable period of time so that the **Bankruptcy** Court can determine whether to reopen the case, and, if so, whether to appoint (or reappoint) a trustee, who may pursue **[*14]** the claims on behalf of the estate. [2]

FOOTNOTES

2 The City and Grasmuck also contend that the equitable doctrine of judicial estoppel should bar all of Mrs. Roggio's claims. Generally, the doctrine "precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another." *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987). In the **bankruptcy** context, courts have held that the doctrine bars claims brought by debtors who had been discharged of their debts through **bankruptcy** proceedings but had failed to list the claims on their schedule of assets. *See, e.g., Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993); *Howell v. Town of Leyden*, 335 F. Supp. 2d

248, 250-52 (D. Mass. 2004) ; *Welsh*, 199 B.R. at 229 . Because the Court has determined that the more prudent path in this case is to permit the **Bankruptcy** Court to consider Mrs. Roggio's claims, it will not consider the merits of the judicial estoppel argument at this time.

Because Mr. Roggio did not file for **bankruptcy,** the Court will consider the merits of the remaining motions as to his claims.

IV. Hannaford's Motion [*15] to Dismiss

Plaintiff's theory of the case is that the defendants conspired to access his criminal record unlawfully and to disseminate it in violation of his constitutional and statutory rights to privacy. In order for Hannaford to be found liable, plaintiff must establish that a conspiracy existed and that Hannaford can be held responsible, under the doctrine of *respondeat superior*, for the acts of its employees or agents in furtherance of that conspiracy.

Hannaford attacks the sufficiency of the factual allegations in the complaint supporting both of these requirements. First, it contends that the pleadings are insufficient to allege a plausible conspiracy to invade plaintiff's privacy rights. Second, it contends that even assuming a conspiracy, the pleadings are insufficient to suggest that any of the participants in the conspiracy were agents or employees of Hannaford acting within the scope of their employment. As its second contention resolves the matter, the Court will address that argument first.

Under the doctrine of *respondeat superior*, an employer is subject to liability for the torts of its employees committed within the scope of their employment. *Lev v. Beverly Enters.-Mass., Inc.*, 457 Mass. 234, 238, 929 N.E.2d 303 (2010); **[*16]** *Mosko v. Raytheon Co.*, 416 Mass. 395, 399, 622 N.E.2d 1066 (1993); RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). The conduct of any employee is "within the scope of employment if it is of the kind that he is employed to perform, . . . if it occurs substantially within the authorized time and space limits, . . . and if it is motivated, at least in part, by a purpose to serve the employer." *Lev*, 457 Mass. at 238 (quoting *Mosko*, 416 Mass. at 399 (citations omitted); *see also* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

The Supreme Court has stated that on a motion to dismiss, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. Courts "are not bound to accept as true a legal conclusion couched as a factual conclusion." *Id.* at 1950 (quoting *Twombly*, 550 U.S. at 555). A complaint that simply contains conclusory recitations of causes of action or legal principles, but is unsupported by factual allegations, will not survive a motion to dismiss. *See id.* To that end, it is necessary to identify which allegations in the complaint concerning the relationship between Hannaford and its alleged agents are entitled **[*17]** to an assumption of truth. *See id.*

Only two paragraphs in the complaint relate to Hannaford. (*See* Compl. ¶¶ 25(i), (ii)). The first paragraph reads:

In or around January, 2006, a representative of defendant Hannaford, acting in the course and scope of his authority as an officer, agent or employee of Hannaford and at the request of and in concert with someone whose identity is not yet known, telephoned defendant Edward Basener, then both court officer in the Gardner District Court and a security officer at the Hannaford supermarket in Gardner, while Basener was at the Gardner District Courthouse, and requested him to cause and request the rap sheet of Vincent Roggio to be pulled from the federal computer system in which it was stored[.]

(Compl. ¶ 25(i)). The second paragraph asserts that Basener made a telephone call to Grasmuck, allegedly "while acting both in his capacity as a Gardner District Court Officer and a Hannaford Supermarket security officer." (Compl. ¶ 25(ii)). It was in this call that Basener allegedly stated that Mr. Roggio was at the Hannaford in Gardner and suspected of shoplifting. (*Id.*).

That is the entirety of the allegations concerning Hannaford and its relationship **[*18]** with Basener and the unknown representative. To the extent that the pleadings assert that the unknown representative and Basener were acting in the scope of their authority or in their capacity as agents of Hannaford, the statements are legal conclusions. Conclusory statements that a person was acting as an agent or within the scope of employment are not entitled to any assumption of truth. *See Iqbal*, 129 S. Ct. at 1951 ("[B]are assertions [that] . . . amount to nothing more than a 'formulaic recitation of the elements' of a . . . claim . . . are conclusory and not entitled to be assumed true." (quoting *Twombly*, 550 U.S. at 555)). An assertion that a co-defendant was acting within the scope of an agency relationship must be supported by factual allegations.

There are no factual allegations that plausibly suggest that Basener or the unknown representative were acting within the scope of their employment at Hannaford when they made the alleged telephone calls. The complaint does not allege that either of the calls were made while the caller was physically working at Hannaford, and no other facts are alleged that would suggest the co-defendants were operating within the "authorized time **[*19]** and space limits." *Mosko*, 416 Mass. at 399 (citing *Vallavanti v. Armour & Co.*, 260 Mass. 417, 419-20, 157 N.E. 527 (1927)). [3] The complaint does not allege that requesting criminal records from the police department is a task expected of or commonly performed by Hannaford employees, and no other facts suggest that the co-defendants' calls were "of the kind [of work they are] employed to perform." *Id.* (citing *Douglas v. Holyoke Mach. Co.*, 233 Mass. 573, 576, 124 N.E. 478 (1919)). And the complaint does not allege facts suggesting that anyone at Hannaford assigned the co-defendants the task of making the calls or that the calls were otherwise subject to the direction or control of Hannaford. [4] Accordingly, there are no factual allegations from which the Court could infer that the co-defendants were "motivated, at least in part, by a purpose to serve the employer." *Id.* (citing *Donahue v. Vorenberg*, 227 Mass. 1, 5, 116 N.E. 246 (1917)).

FOOTNOTES

3 Indeed, as to Basener, the complaint is most plausibly read to allege that he was working at his job at the Gardner District Court when the telephone calls were made. (Compl. ¶ 25(i)). At a minimum, the complaint alleges that Basener was at the court when he received the call from the unknown representative. **[*20]** Whether he telephoned Grasmuck immediately after he received that call is not clear.

4 The complaint alleges that the unknown representative made the call "at the request of and in concert with someone whose identity is not yet known." (Compl. ¶ 25(i)). There is no allegation that the person requesting the alleged call was a supervisor at Hannaford or had any relationship whatsoever to Hannaford.

As there are no factual allegations that could suggest that Basener or the unknown representative were agents of Hannaford acting within the scope of their employment when they made the allegedly harmful telephone calls, Hannaford cannot be held vicariously liable for their actions. There is simply no plausible basis for establishing any of the elements of *respondeat superior.* Setting aside the matter of whether the complaint plausibly alleges a conspiracy, plaintiff has failed to sufficiently meet the pleading requirements of the federal rules to suggest a plausible basis for vicarious liability. For that reason alone, Hannaford's motion to dismiss must be granted as to all of Mr. Roggio's claims. [5]

FOOTNOTES

5 The Court also notes that plaintiff's § 1983 claim against Hannaford is vulnerable on other grounds. **[*21]** Most obviously, the factual basis for meeting the "state action" requirement of § 1983 is dubious. In addition, most circuit courts have held that, just as municipalities cannot be vicariously liable for the actions of their employees, *see* *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), private corporations also are not subject to liability on a *respondeat superior* theory for the constitutional torts of their employees. *See, e.g.*, *Rojas v. Alexander's Dep't Store, Inc.*, 924 F.2d 406, 408-09 (2d Cir. 1990); *Powell v. Shopco Laurel Co.*, 678 F.2d 504, 506 (4th Cir. 1982); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128-29 (7th Cir. 1982); *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975-76 (8th Cir. 1993); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992). The Court, however, does not reach those issues here.

V. City of Gardner's Motion for Judgment on the Pleadings

A. Section 1983 Claim

Plaintiff concedes in his opposition memorandum that he has failed to plead a § 1983 claim against the City because he did not allege that a policy or custom of the City caused his injuries. *See* *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-92, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). **[*22]** The City's motion for judgment on the pleadings as to Mr. Roggio's § 1983 claim will therefore be granted.

B. Federal Privacy Act Claim

The City contends that plaintiff cannot state a claim under the federal Privacy Act, 5 U.S.C. § 552a, because the statute only provides a cause of action against federal agencies. The City is correct; the private right of action contained in the statute is specifically limited to civil suits against agencies of the United States government. *See* 5 U.S.C. § 552a(g); *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624, 370 U.S. App. D.C. 275 (D.C. Cir. 2006); *Burns v. Potter*, 334 F. Supp. 2d 13, 21 (D. Mass. 2004). The statute does not provide a right of action against private individuals, private entities, or municipalities. *See, e.g., Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999). As the City is not a federal agency, its motion to for judgment on the pleadings will be granted as to Mr. Roggio's federal Privacy Act claim.

C. Massachusetts Privacy Act Claim

The Massachusetts Privacy Act establishes "a right against unreasonable, substantial or serious interference with . . . privacy." Mass. Gen. Laws ch. 214, § 1B. The statute protects individuals from "disclosure of facts **[*23]** . . . that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest." *Dasey v. Anderson*, 304 F.3d 148, 153-54 (1st Cir. 2002) (quoting *Bratt v. International Bus. Mechs. Corp.*, 392 Mass. 508, 518, 467 N.E.2d 126 (1984) (citations omitted)). Generally, the statute is concerned with the dissemination of information that is actually private. *See* *Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 409 Mass. 514, 517 n.4, 567 N.E.2d 912 (1991); *Cefalu v. Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 77-78, 391 N.E.2d 935 (1979). Courts therefore recognize that the right does not extend to matters that are a part of the public domain or to matters of public concern. *See, e.g., Taylor v. Swartwout*, 445 F. Supp. 2d 98, 103 (D. Mass. 2006) ("[T]here can be no invasion of privacy where the facts, though highly personal, are already in the public domain."); *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 612, 737 N.E.2d 859 (2000) ("When the subject matter of the publicity is of public concern, . . . there is no invasion of privacy.").

The City contends that because Mr. Roggio's criminal record and the fact of his conviction have been a part of the public domain since 1987, the Massachusetts Privacy Act affords **[*24]** him no protection against the dissemination of that information. Plaintiff has admitted in the complaint that his criminal record was publicly accessible. (Compl. ¶ 15). And, as he was convicted following a trial by jury, his trial proceedings presumably occurred in open court. *See* U.S. Const. amend. VI (guaranteeing criminal defendants the right to a public trial). The Supreme Judicial Court has recently reaffirmed the public nature of criminal records, observing that "records of conviction are public records that are constitutionally required to be public." *Roe v. Attorney General*, 434 Mass. 418, 435, 750 N.E.2d 897 (2001); *see also* *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996) (explaining that criminal defendants should have "virtually no expectation of privacy" in events or facts arising out of a criminal conviction).

The Court agrees that plaintiff can have no reasonable expectation of privacy in his criminal record because it is already a part of the public domain. *See* *Philbrook v. Perrigo*, 637 F. Supp. 2d 48, 55 (D. Mass. 2009) (granting summary judgment on a claim under the Massachusetts Privacy Act, because "the fact of [plaintiff's] arrest is part of her criminal offender record, [so] **[*25]** she should not have had an expectation of privacy"). Accordingly, the City is entitled to judgment on the pleadings for Mr. Roggio's Massachusetts Privacy Act claim.

D. Violation of Criminal Offender Record of Information Statute Claim

The Massachusetts Criminal Offender Record Information statute, Mass. Gen. Laws ch. 6, § 172, restricts public access to criminal records under some circumstances. The statute provides that criminal offender record information shall be disseminated only to "(a) criminal justice agencies; (b) such other agencies and individuals required to have access to such information by statute . . . and (c) any other agencies and individuals where it has been determined that the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy." Plaintiff alleges that one or more of the co-defendants infringed the CORI statute when they accessed his criminal record and when they disseminated it to Emmanouil. (*See* Compl. ¶¶ 35, 36).

The City makes two principal arguments in its motion for judgment on the pleadings. First, analogizing to the *Monell* jurisprudence in the § 1983 context, it contends that a municipality **[*26]** cannot be vicariously liable for the CORI violations of its employees absent an allegation that a policy or custom of the municipality led to the CORI violation. *See* *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-92, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In support of its argument, the City cites to a footnote in a federal court decision that speculates that a municipal co-defendant in a CORI claim was "presumably named on a theory of municipal liability patterned after *Monell.*" *Galvin v. Town of Yarmouth*, 470 F. Supp. 2d 10, 11 n.1 (D. Mass. 2007). The Court is aware of no other case law—and, notably, no case law from Massachusetts courts—holding that a municipality may not be vicariously liable for the CORI violations of its employees. Although the analogy to *Monell* has some appeal, nothing in the CORI statute suggests that the principles of *Monell* are necessarily transferable. The Court is not prepared, at least at this stage in the proceedings, to hold that there is no possibility of recovery against a municipality on such a theory.

The City's second argument is that even if it is subject to liability under the CORI statute for Grasmuck's actions, Grasmuck believed that he was disseminating Mr. Roggio's **[*27]** criminal record in response to a criminal shoplifting investigation. (Compl. ¶ 25(ii)). If this is so, as the City maintains, dissemination of the record was proper under prong (c) of § 172 and 803 Code Mass. Regs. § 2.04(5)(a). [6] The City further contends that even if distributing the record was not proper, Grasmuck is entitled to qualified immunity. These arguments, however, misapprehend the thrust of plaintiff's complaint. Plaintiff alleges that Grasmuck participated in a conspiracy to send the criminal record to Emmanouil—surely not someone who would have been involved with any shoplifting investigation at Hannaford. (Compl. ¶ 25(v)). If these allegations are true, then the dissemination of plaintiff's criminal record can hardly be viewed as furthering the public interest or responding to a pending criminal investigation. Officer Grasmuck's actions therefore would not be authorized by the CORI statute or 803 Code Mass. Regs. § 2.04(5)(a).

FOOTNOTES

6 The relevant regulation, 803 Code Mass. Regs. § 2.04(5)(a), provides that "[a] criminal justice agency with official responsibility for a pending criminal investigation or prosecution may disseminate CORI that is specifically related to and contemporaneous **[*28]** with an investigation or prosecution." The regulation was upheld in *Bellin v. Kelley*, 435 Mass. 261, 265-69, 755 N.E.2d 1274 (2001).

Accordingly, the City is not entitled to judgment on the pleadings for Mr. Roggio's CORI claim.

VI. Conclusion

For the foregoing reasons,
1. The motion to dismiss of defendant Hannaford Brothers Company is GRANTED as to claims asserted by Victor Roggio, and DENIED without prejudice to its renewal as to claims asserted by Callie Roggio;

2. The motion to dismiss of defendants City of Gardner and William Grasmuck as to claims asserted by Callie Roggio is DENIED without prejudice to its renewal;

3. The motion for judgment on the pleadings of defendant City of Gardner is GRANTED as to Victor Roggio's claims under 42 U.S.C. § 1983; the federal Privacy Act, 5 U.S.C. § 552a; and the Massachusetts Privacy Act, Mass. Gen. Laws ch. 214, § 1B; DENIED as to Victor Roggio's claim under the Massachusetts Criminal Offender Record Information statute, Mass. Gen. Laws ch. 6, § 172; and DENIED without prejudice to its renewal as to claims asserted by Callie Roggio;

4. This proceeding is stayed for 60 days as to all claims filed by Callie Roggio;

5. The Clerk of the Court is directed to provide **[*29]** a copy of this Memorandum and Order to the United States **Bankruptcy** Court for the District of New Jersey; and

6. The claims of plaintiff Callie Roggio shall be dismissed 60 days after the date of this Memorandum and Order for lack of standing unless plaintiff Callie Roggio files appropriate pleadings with this Court demonstrating that she has authority from the **Bankruptcy** Court to pursue such claims, or unless a **bankruptcy** trustee, or other authorized representative of her **bankruptcy** estate, files appropriate pleadings requesting other relief.
So Ordered.

/s/ F. Dennis Saylor IV

F. Dennis Saylor IV

United States District Judge

Dated: March 30, 2011

IN RE: TOMAS IRIZARRY CONCEPCION XXX-XX-4891, Debtor(s)

CASE NO. 05-01282 MCF, Chapter 11

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

2011 Bankr. LEXIS 918

March 10, 2011, Decided
March 10, 2011, Filed and Entered

PRIOR HISTORY: Ferrer v. Concepción (In re Concepción), 2010 Bankr. LEXIS 2426 (B.A.P. 1st Cir., Aug. 10, 2010)

CORE TERMS: movant's, reconsideration, deadline, bankruptcy petition, excusable neglect, addressing, equitable, state action, bankruptcy proceedings, failure to file, formal notice, required notice, forever barred, statutorily, confirming, untimely, urgent

COUNSEL: **[*1]** For TOMAS IRIZARRY CONCEPCION, Debtor: RALPH VALLONE, JR, COND CONDADTOWER, SAN JUAN, PR.

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

OPINION BY: Brian K. Tester

OPINION

OPINION AND ORDER

This proceeding is before the Court upon the movant's urgent motion for reconsideration of order denying stay [Dkt No. 246], this Court's order denying the movant's urgent motion for reconsideration of order denying stay [Dkt. No. 319], the United States **Bankruptcy** Appellate Panel for the First Circuit's remand of this Court's order [Dkt. No. 368], the movant's memorandum of law addressing Pioneer framework [Dkt. No. 381], and the Debtor's brief in opposition to the movant's memorandum of law addressing Pioneer framework [Dkt. No. 387]. For the reasons set forth below, this Court grants the movant's motion for reconsideration.

I. FACTUAL BACKGROUND

The Debtor filed its Chapter 11 petition in the midst of litigation between the Debtor and the movant in the Commonwealth of Puerto Rico's Court of First Instance, Superior Court of Mayaguez ("the state action"). When the Debtor filed its **bankruptcy** petition on February 10, 2005, 11 U.S.C. § 362 stayed said litigation. On February 4, 2009, this Court entered an order confirming the **[*2]** Debtor's plan. That same day, the movant filed a claim against the estate and a motion requesting reconsideration of this Court's order confirming the plan, arguing that its failure to file its claim within the claims deadline was the result of excusable neglect, and thus should be considered timely under Fed. R. Bankr. P. 9006. This Court entered an order denying said claim and its corresponding motion as untimely on December 29, 2009. The movant then appealed to the United States **Bankruptcy** Appellate Panel for the First Circuit ("BAP"), which vacated and remanded the matter back to this Court to make findings and conclusions with respect to the equitable standards set forth in Pioneer Inv. Serv. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). The parties then filed briefs addressing the Pioneer framework, which have been submitted and are under advisement.

III. LEGAL ANALYSIS AND DISCUSSION

In drafting Fed. R. Bankr. P. 9006, Congress provided no guideposts for determining what sorts of neglect will be considered "excusable." Pioneer, 507 U.S. at 395. Thus the Supreme Court in Pioneer concluded that the determination is at bottom an equitable one, taking account of all relevant **[*3]** circumstances surrounding the party's omission. These include (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Id. Among the factors enumerated in Pioneer, by far the most critical is the asserted reason for the mistake. Dimmitt v. Ockenfels, 407 F.3d 21, 24 (1st Cir. 2005). Accordingly, this Court will address that factor first.

The movant claims that the reason it did not file its claim within the deadline established by Fed. R. Bankr. P. 3003(c)(2) was that it did not receive formal notice of the filing of the **bankruptcy** petition as required by Fed. R. Bankr. P. 1007, and that the Debtor did not disclose the movant as a known creditor pursuant to 11 U.S.C. § 521(a)(1)(A). The movant maintains that, regardless of a creditor's knowledge of a debtor's reorganization, the creditor has a right to assume that the statutorily required notice will be given before its claim is forever barred. In re Intaco Puerto Rico, Inc.,

494 F.2d 94, 99 (1st Cir. 1974). The Debtor responds **[*4]** that the movant had to have known that it filed a **bankruptcy** petition due to the effect of the automatic stay on the state action, which provided the movant with constructive notice of the Debtor's

bankruptcy. In support of its position, the Debtor cites Vicenty v. San Miguel Sandoval (In Re: San Miguel Sandoval), 327 B.R. 493, 510 (B.A.P. 1st Cir. 2005), which held that a claim remains untimely regardless of a creditor's knowledge of **bankruptcy** proceedings when the creditor's counsel knew of the proceeding. The case at hand differs from Vicenty, however, because in that case the creditor's counsel was properly served under the requirements of 11 U.S.C. § 521(1) and Fed. R. Bankr. P. 1007(a). In the present controversy, not even the attorney for the movant received formal notice of the **bankruptcy** proceeding.

If this Court allows the movant to file its claim, the Debtor will not be prejudiced because merely allowing a claim to be filed does not determine a claimant's entitlement thereto. The docket is still active with other creditors disputing and settling claims against the estate. Therefore, allowing the movant's claim to be filed will not significantly delay the administration of **[*5]** this case. While the movant may have had knowledge of the pendency of the Debtor's **bankruptcy,** its failure to file a claim within the bar deadline cannot be said to have been in bad faith, since it was entitled to assume that it would receive the statutorily required notice under Intaco before its claim was forever barred. Thus the equitable factors established by Pioneer suggest that the movant's failure to file its claim within the claims bar deadline was the result of excusable neglect.

Having found that the movant has met the standard for excusable neglect under Fed. R. Bankr. P. 9006 and Pioneer, this Court GRANTS the movant's motion for reconsideration [Dkt No. 246]. Claim number 20-1 will be considered as timely filed.

SO ORDERED.

San Juan, Puerto Rico this 10 day of March, 2011.

/s/ Brian K. Tester

Brian K. Tester

U.S. **Bankruptcy** Judge

IN RE: EDGAR O'NEILL MIRANDA AND NYDIA R. O'NEILL SANTIAGO, Debtors

CASE NO. 10-00641 (ESL), CHAPTER 13

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

2011 Bankr. LEXIS 1007

March 9, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: When debtors, a married couple, asked the court to confirm their proposed Chapter 13 plan, the trustee objected on a claim that the plan could not be confirmed because "projected disposable income" (PDI) as utilized in the plan had not been calculated in compliance with 11 U.S.C.S. § 1325(b)(1)(B).

OVERVIEW: The trustee argued that debtors' PDI had to be based on the difference between income and actual expenses to the extent that the latter items were less than the amounts provided by the applicable IRS National and Local Standards and that their failure to do so meant that the plan failed to devote all of their PDI to unsecured creditors. The trustee also challenged whether the plan was proposed in good faith per § 1325(a)(3) on a claim that debtors had overstated their expenses, thereby decreasing plan distributions. The court sustained the objection in part and denied it in part. First, as debtors were above-median income debtors, they were entitled to deduct the full amount of certain specified expenses under the Standards per § 1325(b)(3) and 11 U.S.C.S. § 707(b)(2)(A) and (B), irrespective of whether their actual expenses were above or below the expense used in the Standard. Second, the trustee was correct in insisting that their Christmas bonuses were "disposable income" per 11 U.S.C.S. § 101(10A) based on the role of Official Bankr. Form 22C. Last, debtors did not show that they were entitled to amounts for food and clothing exceeding the standards and the same were improper.

OUTCOME: The trustee's objection was granted in part and denied in part.

CORE TERMS: disposable income, monthly income, actual expenses, projected, monthly expenses, bonuses, confirmation, monthly, food, unsecured creditors, median income, clothing, good faith, expended, median, deduct, household, allowance, amounts reasonably, above-median, mortgage, reasonably necessary, calculation, conformity, combined, commitment period, line item, family income, amicus curiae, irrespective

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Nonconsensual Confirmations

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

Bankruptcy Law > Liquidations > Eligibility

HN1 A determination of the amounts that an above-median income Chapter 13 debtor must pay unsecured creditors under the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8,119 Stat. 37, has two basic components, income and expenses. Under 11 U.S.C.S. § 1325(b)(1)(B), if the trustee or an unsecured creditor objects to confirmation of the plan, the **bankruptcy** court may not confirm the plan unless the plan, provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan. 11 U.S.C.S. § 1325(b)(1). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Debtor Duties & Powers

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > General Overview

HN2 Debtors bear the burden of establishing that a proposed Chapter 13 plan is confirmable. More Like This Headnote

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN3 The **Bankruptcy** Code does not define "projected disposable income" as used in 11 U.S.C.S. § 1325(b)(1)(B). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN4 Under precedent established by the U.S. Supreme Court, a **bankruptcy** court must use the "forward looking" approach (rather than the mechanical approach) when calculating a Chapter 13 debtor's "projected disposable income" to account for changes in the debtor's income and/or expenses that are known or almost certain at the time of confirmation. The debtor's "projected disposable income" will be limited to his disposable income if there are no changes in debtor's income or expense that are known or virtually certain at the time of confirmation. A court using this approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court may go further and take into account other known or virtually certain information about the debtor's future income or expenses. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Nonconsensual Confirmations

HN5 See 11 U.S.C.S. § 1325(b)(1).

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

Bankruptcy Law > Liquidations > Eligibility

HN6 "Disposable income" for an above median income debtor is defined as debtor's current monthly income, minus the amounts reasonably necessary to be expended as determined pursuant to 11 U.S.C.S. § 707(b)(2)(A) and (B). 11 U.S.C.S. § 1325(b)(2) and (b)(3). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN7 11 U.S.C.S. § 101(10A) defines "current monthly income" as the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period. 11 U.S.C.S. § 101(10A). More Like This Headnote

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN8 The income component of "projected disposable income" as set forth in 11 U.S.C.S. § 1325(b)(1)(B) is the anticipated income of a Chapter 13 debtor during the applicable commitment period, including future annual bonuses. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

Tax Law > Federal Income Tax Computation > Compensation & Welfare Benefits > Tips, Wages & Other Compensation (IRC secs. 61, 3121, 3231) > Bonuses & Tips

HN9 Christmas bonuses fall under the definition of "gross income" under § 1031.01 of the Internal Revenue Code for a New Puerto Rico and the same are not exempted from income under § 1031.02 of the PR Code. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN10 11 U.S.C.S. § 1325(b)(2) defines the term "disposable income" as current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended. 11 U.S.C.S. § 1325(b)(2). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN11 Such "amounts reasonably necessary to be expended" within the meaning of 11 U.S.C.S. § 1325(b)(2) shall be determined in accordance with subparagraphs (A) and (B) of 11 U.S.C.S. § 707(b)(2), if the debtor has current monthly income greater than the highest median family income of the applicable state. 11 U.S.C.S. § 1325(b)(3). More Like This Headnote

Bankruptcy Law > Reorganizations > Means Testing

HN12 The so-called "means test" supplants the practice of calculating debtors' reasonable expenses on a case-by-case basis as prevailed prior to the enactment of the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8,119 Stat. 37, which led to varying and often inconsistent determinations. The "means test" formula for above-median-income debtors is reflected in a schedule (Official Bankr. Form 22C) that a Chapter 13 debtor must file. More Like This Headnote

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN13 11 U.S.C.S. § 707(b)(2)(A)(ii)(I) provides in part that a debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides. 11 U.S.C.S. § 707(b)(2)(A)(ii)(I). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN14 If an above-median income debtor will not have a particular kind of expense during the pendency of his Chapter 13 plan, an allowance to cover that cost is not "reasonably necessary" within the meaning of 11 U.S.C.S. § 1325(b)(2). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN15 If an above-median income debtor has some expense which is specified under the National Standards and Local Standards issued by the Internal Revenue Service for the area in which the debtor resides, the debtor is allowed to deduct the standardized amount even if the same exceeds his or her actual expense. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN16 An above-median income debtor who has expenses lower than the National Standards and Local Standards issued by the Internal Revenue Service for the area in which the debtor resides may claim the full amount specified in the standards. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN17 In order for a Chapter 13 plan to be confirmed, the same must be proposed in good faith. 11 U.S.C.S. § 1325(a)(3). The term "good faith" is not statutorily defined. Good faith is determined on a case by case basis employing the totality of the circumstances analysis to the facts of the case. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN18 Under Sixth Circuit precedent, **bankruptcy** courts consider the following non-exclusive factors as part of the totality of the circumstances analysis to determine whether a Chapter 13 plan was proposed in good faith: (1) amount of proposed payments and of the debtor's surplus; (2) debtor's employment history, ability to earn, and likelihood of future income increases; (3) probable or expected duration of the plan; (4) accuracy of plan statements of debts, expenses, and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) extent of preferential treatment between classes of creditors; (6) extent to which secured claims are modified; (7) type of debt sought to be discharged and whether the same is nondischargeable in Chapter 7; (8) existence of special circumstances such as inordinate medical expenses; (9) frequency with which debtor has sought relief per the **Bankruptcy** Reform Act; (10) motivation and sincerity of debtor in seeking Chapter 13 relief; (11) burden which plan administration would place on a trustee; and (12) whether debtor is attempting to abuse the spirit of the **Bankruptcy** Code. In employing this analysis, the trick seems to be not placing too much weight on any single factor, but in the court's looking at how a number of factors in any given case operate together to betray a plan proposed in bad faith. More Like This Headnote

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN19 For a plan to be filed in "good faith" within the meaning of 11 U.S.C.S. § 1325(a)(3), a Chapter 13 debtor does not need to contribute any more funds to pay unsecured creditors than required by § 1325(b)(1). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Eligibility > General Overview

Bankruptcy Law > Reorganizations > Means Testing

Bankruptcy Law > Individuals With Regular Income > Plans > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN20 11 U.S.C.S. § 707(b)(2)(A)(ii)(I) provides in part: In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service. 11 U.S.C.S. §707(b)(2)(A)(ii)(I). More Like This Headnote

COUNSEL: **[*1]** For EDGAR O'NEILL MIRANDA, Debtor: OTTO E LANDRON PEREZ, LANDRON & RODRIGUEZ LAW OFFICE, TOA BAJA, PR.

For NYDIA R O'NEILL SANTIAGO, Joint Debtor: OTTO E LANDRON PEREZ, LANDRON & RODRIGUEZ LAW OFFICE, TOA BAJA, PR.

For ALEJANDRO OLIVERAS RIVERA, Trustee: ALEJANDRO OLIVERAS RIVERA (DAT), ALEJANDO OLIVERAS, CHAPTER 13 TRUSTEE, SAN JUAN, PR; ROSAMAR GARCIA FONTAN, ALEJANDRO OLIVERAS, SAN JUAN, PR.

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 Chapter 13 Trustee's (the "Trustee") objection to the confirmation of Edgar O'Neill Miranda and Nydia R. O'Neill Santiago's (the "Debtors") amended plan dated March 30, 2010 arguing that the projected disposable income should be calculated based on the difference between Debtors' income and their actual expenses per Schedule J, if the same are less than the amounts provided by the IRS National and Local Standards. The Trustee, concludes that Debtors amended plan fails to devote all of their projected disposable income received during the commitment period to the unsecured creditors. The Trustee also asserts that Debtors' **[*2]** amended plan is not proposed in good faith in conformity with 11 U.S.C. §1325(a)(3) since the same overstates Debtors expenses, resulting in a significant decrease in the distribution to unsecured creditors under their chapter 13 amended plan. Debtors argue that since they are above median income debtors, they nay deduct the full amount of certain specified expenses under the IRS National and Local Standards n conformity with 11 U.S.C. §§1325(b)(3) and 707(b)(2)(A) and (B), irrespective of whether their actual expenses are above or below the IRS National and Local Standard amounts. Debtors also argue that their Christmas bonuses do not qualify as disposable income for **bankruptcy** purposes under 11 U.S.C. §101 (10A) because Form 22C starts with debtor's average monthly income over the six months prior to the **bankruptcy** filing. The Trustee argues that the Christmas bonuses constitute income, and as such should be included in the calculation of projected disposable income. For the reasons stated herein, the court denies in part and grants in part the Chapter 13 Trustee's objection to Debtors' amended plan confirmation.

Background

Debtors filed a **bankruptcy** petition under Chapter 13 of the **[*3] Bankruptcy** Code on January 31, 2010. Debtors filed their Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income-Official Form 22C ("Form 22C"). The Debtors' household consists of two (2) persons, and Debtors have a household income that is above the median for a household of two (2) persons in the Commonwealth of Puerto Rico. Debtors' Form 22C shows that Debtors have a current monthly income of $3,972.85 (line item #20 of Form 22C) and annualized income of $47,674.20 (line item #21 of Form 22C). Debtors' monthly disposable income, according to Form 22C, results in a deficit of ($444.51)(line item 59 of Form 22C), given that the total deductions allowed under 11 U.S.C. §707(b)(2) of the **Bankruptcy** Code as indicated in Form 22C amount to $4,417.36 (line item 58 of Form 22C). Debtors' Schedule I- Current Income of Individual Debtors (s) ("Schedule I") indicates that Debtors combined average monthly income is $3,247.77. Debtors' Schedule J- Current Expenditures of Individual Debtor(s) ("Schedule J") lists average monthly expenses of $2,897.77, which includes $157.77 for water and sewer, $120.00 for telephone, $95.00 for cable and internet **[*4]** service, $500 for food, $300 for food at work for two persons and $225.00 for clothing (Docket No. 19). Debtors' monthly net income as per Schedule J results in $350.00 (average monthly income from line 16 of Schedule I minus average monthly expenses from line 18 of Schedule J). Debtors Chapter 13 amended plan (Docket No. 20) proposes to make 57 monthly payments of $350.00 and 3 monthly payments of $430.00 and 5 yearly payments of $1,000 in the month of December from Debtors' Christmas bonuses for a proposed base of $26,240 over a sixty (60) month period.

On April 5, 2010 the Chapter 13 Trustee filed its Unfavorable Report on Confirmation on Debtors' Chapter 13 amended plan because they had not presented evidence for their electricity, water, cable and mobile expenses and of their 2009 income tax return. On April 7, 2010, the confirmation hearing was held, and the Chapter 13 Trustee opposed confirmation of Debtors' amended plan because certain expenses listed on Schedule J were not reasonable. Debtor and the Chapter 13 Trustee agreed that this court had adjudicated on this particular issue in the case of In re John A. Figueroa Padilla and Irma I. López Valentín (Case #07-07495, Docket **[*5]** No. 64). The court granted Debtors twenty-one days (21) to file a legal memorandum and twenty-eight (28) days to the Chapter 13 Trustee to reply to the same.

On May 5, 2010, the Debtors filed their legal memorandum arguing the following: (i) pursuant to Section 1325(b)(3), for above median debtors the "amounts reasonably necessary to be expended" shall be determined in accordance with subparagraphs (A) and (B) of Section 707(b)(2); (ii) Section 707(b)(2) mandates that certain of the debtor's expenses "shall be" the amounts specified under the National and Local Standards issued by the Internal Revenue Service for the area in which the debtor resides; (iii) for above median debtors, the means test formula is not representative of debtor's actual expenses since Section 707(b)(2) directs debtors to deduct the amounts permitted under the IRS guidelines, irrespective of whether debtors' actual expenses are above or below the guideline amounts; (iv) the BAPCPA amendments to Section 1325(b) limited judicial flexibility in **bankruptcy** proceedings by imposing objective standards on Chapter 13 determinations and thus, limited the **bankruptcy** court's discretion in reviewing the reasonableness of **[*6]** the expenses claimed by the above-median debtors which are mandated by Section 707(b)(2); (v) Kibbe v. Sumski (In re

Kibbe), 361 B.R. 302 (B.A.P. 1st Cir. 2007) does not resolve the issue of allowable expenses for above or below median debtors; (vi) this court in the case of In re John A. Figueroa Padilla and Irma I. López Valentín (Case No. 07-07495, Docket No. 64) recognized that the amounts reasonably necessary to be expended for the maintenance or support of an above median debtor and his family is determined pursuant to §707(b)(2)(A) and (B); and (vii) the Christmas bonus does not qualify as disposable income for **bankruptcy** purposes under Section 101(10A) because Form 22C starts with debtor's average monthly income over the six months prior to the **bankruptcy** filing (Docket No. 24).

On August 17, 2010, the Chapter 13 Trustee filed his objection to confirmation and memorandum of law based on the following: (i) the monthly expenses for clothing ($225), combined food expense of $800, and water expense of $157.77 (the evidence provided by Debtors for the water expense was of $78.00), are not reasonable and should be reviewed and reduced by this court; (ii) the controlling force in determining **[*7]** debtor's projected disposable income should be the difference between debtor's income and actual expenses; (iii) "[i]t is the Trustee's position that the main discussion in the [Hamilton v. Lanning, 130 S. Ct. 2464,177 L. Ed. 2d 23 (2010)] decision is that the amendments introduced to BAPCPA did not eliminate or reduce the **bankruptcy** court's discretion at confirmation. The courts can review the debtor's current financial situation and adjust the expenses listed at schedule J. The court's discretion to review the reasonability of debtor's expenses has remained unaltered after BAPCPA;" (iv) Debtors are disclosing expenses for food (in excess of $101) and clothing (in excess of $190) which surpass the allowed deductions permitted under the National IRS Standards; (v) Debtors have failed to provide evidence to the court of the reasonability of their expenses given that, "debtors provided to the Trustee copies of some invoices of their utilities bills and, the approximate amount of water expense is $78.00 a month and not the $157.77 disclosed and have failed to amend schedule J and the plan accordingly;" (vi) Debtors' amended plan is not proposed in good faith in conformity with 11 U.S.C. §1325(a)(3) **[*8]** since the same overstates Debtors expenses which results in a significant decrease in the distribution to unsecured creditors under the plan; and (vii) Debtors' Christmas bonuses are additional income that must be accounted for at the time of proposing their Chapter 13 plan, as such it has been suggested that Debtors amend their plan to provide for periodic lump sumps consisting of half of their Christmas bonuses (Docket No. 44).

On August 24, 2010, Debtors filed their reply to the Chapter 13 Trustee's objection to confirmation and memorandum of law by which they presented the following arguments: (i) Hamilton Lanning, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010), is not applicable to Debtors because a significant change has not occurred in their current monthly income or in their Form 22C based expenses nor is this an unusual or exceptional case. The Supreme Court of the United States in Hamilton v. Lanning, "recognized that respondent Lanning had the stronger argument when she agreed that the mechanical method outlined by the trustee-petitioner should be determinative in most cases, but that in exceptional cases, where significant changes in a debtor's financial circumstances are known **[*9]** or virtually certain, a **bankruptcy** court has the discretion to make an appropriate adjustment;" (ii) under the means test formula enacted by Congress, the allowed expenses pursuant to Section 707(b)(2) for above median income debtors are not reflective of debtors actual expenses, irrespective of whether debtors' actual expenses are above or below the guideline amounts; (iii) this court in In re John A. Figueroa Padilla, recognized the following: (a) that the amounts reasonably necessary to be expended for the maintenance and support of an above median income debtor is determined pursuant to Section 707(b)(2)(A) and (B); (b) "the means test governs which expenses an above-median debtor may deduct in calculating disposable income;" (c) "pursuant to §707(b)(2)(A)(ii)(I), the debtor's monthly expenses 'shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides;'" (d) "the expense component is controlled by Form B22C, in part by National and Local Standards, **[*10]** and in part by actual expenses;" (iv) debtors are entitled to actual monthly expenses only as to Other Necessary Expenses; (v) Debtors reaffirm that their income and actual expenses reported in Form 22C have not changed since the petition filing date; (vi) the Chapter 13 Trustee's request of evidence for certain utility expenses are covered by the National and Local Standards of Form 22C that control the expense component; (vii) Debtors' Christmas bonuses are already included in their current monthly income in Form 22C; and (viii) the Christmas bonus does not qualify as disposable income.

On September 8, 2010 a hearing was held in which the court ordered the Debtors and the Chapter 13 Trustee to file a joint motion regarding the uncontested and contested issues of facts within thirty (30) days. On October 12, 2010 Debtors filed an amended Form 22C to delete mortgage payments on line items 25B and 47 of Form 22C. Subsequently, on October 29, 2010 Debtors and the Chapter 13 Trustee filed jointly the stipulated facts pertaining to the instant case.

Stipulated Facts

(1) Debtors were the owners of a residence located at Barrio Sabana Seca, F-12 Calle Camelia, Toa Baja, PR. Schedule of Real **[*11]** Property (Schedule A);

(2) Debtors could not pay the mortgage and moved out in December of 2008. Schedule A-Real Property;

(3) the person who rented the first floor did not pay on time and the property is being foreclosed;

(4) Debtors have provided a lift of the automatic stay in favor of Banco Popular de Puerto Rico ("BPPR") (Schedule A- Real Property);

(5) on June 4, 2010, BPPR filed a motion requesting relief of the automatic stay which was granted by this Court on June 29, 2010 (Docket #29 & 36);

(6) Debtors filed their voluntary petition on January 31, 2010;

(7) as of the date of the filing of the petition, and at all times relevant hereto, Debtors' street and mailing address is: Urb. Levittown FK 43 C Mariano Abril Toa Baja, PR;

(8) Debtors' Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, commonly referred to as the "Means Test" or Form B22C or Form 22C, dated November 13, 2009 reveals that Debtors are above the median income for a household of two;

(9) the applicable median family income for a household of two for this district is $20,384.00 (Form 22C, line #1);

(10) Debtors' average monthly income is $3,972.85 (Form 22C, line **[*12]** #11);

(11) Debtors' annualized current monthly income is $47,674.20 (Form 22C, line #15);

(12) Debtors took a mortgage expense deduction from their income in the amount of $1,078.00 at line 47 of Form 22C specifying it was in relation to Debtors' residence being the secured creditor BPPR;

(13) Line 47 of Form 22C reads: "Future payments on secured claims. For each of your debts that is secured by an interest in property that you own, list the name of the creditor, identify the property securing the debt, state the Average Monthly Payment, and check whether the payment includes taxes or insurance. The Average Monthly Payment is the total of all amounts scheduled as contractually due to each Secured Creditor in the 60 months following the filing of the **bankruptcy** case, divided by 60. If necessary, list additional entries on a separate page. Enter the total of the Average Monthly;"

(14) in their Form 22C, Debtors' ended with a monthly disposable income of negative $520.51;

(15) **[*13]** on October 12, 2010, Debtors' filed an amended Form 22C dated November 13, 2009 with the disclosed purpose of deleting from lines 25B and 47 the mortgage payment, now resulting in a negative disposable income of $444.51;

(16) the Debtors and the Trustee do not question the validity of the I.R.S. National and Local expense allowances contained on Form 22C;

(17) pursuant to Debtors' amended schedule of Income (Schedule I at Docket No. 19), joint debtor Edgar O'Neill works as an executive assistant with the municipality of Bayamon and joint debtor Nydia R. Oeill works as a secretary with Power Engineering at Catano, Puerto Rico;

(18) Debtors' amended Schedules of Income and Expenses (Schedules I & J) dated March 30, 2010 (Docket No. 19) show the following: (a) a combined gross monthly income of $3,972.85, the same as expressed in Form 22C; (b) a combined average monthly net income of $3,247.77; (c) average monthly expenses of $2,287.77; (d) a resulting $350.00 monthly net income; and (e) monthly expenses for clothing ($225.00), combined food expense of $800 for two persons;

(19) Debtors have provided the Trustee with evidence that their water expense was $82.03;

(20) Debtors in the present **[*14]** case are disclosing in Schedule J expenses for food and clothing in excess of $101 and $190 respectively a month from the National IRS Standards;

(21) the expense allowances claimed by the Debtors on Form 22C have not changed since filing the petition, except for the amount claimed for mortgage expenses in amended Form 22C;

(22) Debtors receive an approximate combined amount of $2,000.00 yearly in Christmas bonuses; and

(23) Debtors intend to spend the $2,000.00 on "clothes, toys, home appliances, electronic goods, services, etc." (Docket No. 48).

Applicable Law & Analysis

Income Side

HN1 A determination of the amounts that an above-median income Chapter 13 debtor must pay unsecured creditors under the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37 ("BAPCPA") has two basic components, income and expenses. Under Section 1325(b)(1)(B) [1] if the trustee or an unsecured creditor objects to confirmation of the plan, the **bankruptcy** court may not confirm the plan unless the plan, "provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the **[*15]** plan will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. §1325(b)(1); See In re Padilla, 2009 Bankr. Lexis 2701(Bankr. D.P.R. 2009). The HN2 Debtors bear the burden of establishing that their proposed plan is confirmable. See In re McCarty, 376 B.R. 819, 821 (Bankr. N.D. Ohio 2007). HN3 The **Bankruptcy** Code does not define projected disposable income. However, the Supreme Court, in Hamilton v. Lanning held that HN4 a **bankruptcy** court must use the forward looking approach (rather than the mechanical approach) when calculating a debtor's "projected disposable income," to account for changes in the debtor's income and/or expenses that are known or almost certain at the time of confirmation. Hamilton v. Lanning, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010). The debtor's "projected disposable income" will be limited to his disposable income if there are no changes in debtor's income or expense that are known or virtually certain at the time of confirmation. Id. The Supreme Court in Hamilton v. Lanning, specifically recognized that, "a court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is **[*16]** only in unusual cases that a court nay go further and take into account other known or virtually certain information about the debtor's future income or expenses." Id. at 2475. The Hamilton v. Lanning was an unusual case, as the debtor received a one-time buyout from her former employer in the six (6) months prior to filing for **bankruptcy** which greatly inflated Lanning's current monthly income as defined in 11 U.S.C. 101(10A).

FOOTNOTES

1 Section 1325(b) provides:

HN5 (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster **[*17]** care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has a current monthly income, when multiplied by 12, greater than—

(A) in the case of **[*18]** a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $575 per month for each individual in excess of 4." 11 U.S.C. §1325(b).

HN6 Disposable income for an above median income debtor is defined as debtor's current monthly income, minus the amounts reasonably necessary to be expended as determined pursuant to Section 707(b)(2)(A) and (B). 11 U.S.C. 1325(b)(2) & (b)(3). HN7 Section 101(10A) defines current monthly income as:
"... the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period." 11 U.S.C. §101(10A).

Debtors' Christmas bonuses fall into the definition of "income from all sources" pursuant to Section 101(10A) and the same are not excluded under **[*19]** Section 101(10A)(B). In the instant case, Debtors must include their regular Christmas bonuses as part of their CMI, since the same were received six (6) months prior to Debtors' **bankruptcy** filing. Moreover, even if Debtors had received their Christmas bonuses outside of the six (6) month period prior to their **bankruptcy** filing they would have had to include their Christmas bonuses as part of their "projected disposable income." See In re Arsenault, 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007)("Accordingly, the Court finds that HN8 the income component of projected disposable income as set forth in section 1325(b)(1)(B) is the anticipated income of the Debtors during the applicable commitment period, including future annual bonuses"). Furthermore, HN9 Christmas bonuses fall under the definition of gross income under Section 1031.01 of the Internal Revenue Code for a New Puerto Rico (the "PR Code") and the same are not exempted from income under Section 1031.02 of the PR Code, thus Debtors' Christmas bonuses are fully taxable.

Expense Side

HN10 Section 1325(b)(2) defines the term "disposable income" as "current monthly income received by the debtor (other than child support payments, foster care payments, **[*20]** or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended." 11 U.S.C. §1325(b)(2). HN11 "Amounts reasonably necessary to be expended" ... "shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income... greater than the highest median family income of the applicable State." 11 U.S.C. §1325(b)(3). For above median income debtors, the means test in Section 707(b)(2) is employed to determine the amounts "reasonably necessary" debtors may deduct in calculating disposable income. HN12 The means test, "...supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations." Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011) citing In re Slusher, 359 B.R. 290, 294 (Bankr. Ct. Nev. 2007). "The formula for above-median-income debtors is known as the 'means test' and is reflected in schedule (Form 22C) that a Chapter 13 debtor must file." Hamilton v. Lanning, 130 S. Ct. at 2470, fn. 2. **[*21]** HN13 Section 707(b)(2)(A)(ii)(I) provides in its pertinent part that, "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." 11 U.S.C. §707(b)(2)(A)(ii)(I).

The Supreme Court in Ransom v. FIA Card Servs., N.A., recently decided that an above-median income debtor who does not make loan or lease payments may not take the car ownership deduction, given that such deduction is not "applicable" to the debtor because she will not incur in that kind of expense during the life of the plan. As part of its analysis, the Supreme Court in Ransom v. FIA Card Servs., N.A., noted that, HN14 "[i]f a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not 'reasonably necessary' within the meaning of the statute." Id at 612. However, the Supreme Court in Ransom v. FIA Card Servs., N.A., particularly declined to resolve the issue before this court, that is whether an above median income debtor **[*22]** may claim the full amount of the deductions under the IRS's National and Local Standards when the debtor has expenses which are lower than the amounts listed in the Standards. [2] **Bankruptcy** courts are split on this particular provision regarding the expense component of the disposable income calculation. See In re Young, 392 B.R. 6, 15-23 (Bankr. D. Mass. 2008).

FOOTNOTES

2 Regarding this particular issue, the Supreme Court stated, "[t]he parties and the Solicitor General as *amicus curiae* dispute the proper deduction for a debtor who has expenses that are *lower* than the amounts listed in the Local Standards. Ransom argues that a debtor may claim the specified expense amount in full regardless of his out-of-pocket costs. Brief for Petitioner 24-27. The Government concurs with this view, provided (as we require) that a debtor has *some* expense relating to the deduction." Ransom v. FIA Card Servs., N.A., 178 L. Ed. 2d at 615, fn. 8.

The United States Government (the "Government") presented its position on this particular issue in its *Amicus Curiae* brief for the Ransom case and stated that HN15 if an above median income debtor has some expense which is specified under the IRS's National and Local Standards, **[*23]** the debtor is allowed to deduct the standardized amount even if the same exceeds his or her actual expense. See Brief for the United States as *Amicus Curiae* at 19-22, Ransom v. FIA Card Servs.N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011) (No. 09-907). One of the underlying reasons for the Government's position is that notwithstanding the fact that employing a debtor's actual expenses when the same are less than the National and Local Standards would accomplish Congress' purpose of ensuring that debtors who have the means to pay the most they can to unsecured creditors, this is not the best reading of Section 707(b)(2)(A)(ii)(I). The Government notes that Section 707(b)(2)(A)(ii)(I) , "...strikes a balance between precision and ease of administration by requiring a debtor who invokes the deduction to establish the existence, but not the exact amount" of a certain expense, in this particular case it was the vehicle ownership expense. Brief for the United States as *Amicus Curiae* at 20, Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011) (No. 09-907). This supports Congress' policy behind the means test which was the uniform application of a bright-line test, which was more important than accuracy and **[*24]** which limited judicial discretion in the application of the same. See In re Briscoe, 374 B.R. 1, 11-12 (Bankr. D.D.C.. 2007); In re Farrar-Johnson, 353 B.R. 224 (Bankr. N.D. 111. 2006) ("Allowing Schedule J back into the disposable income equation, as the trustee urges, would undo what Congress sought to accomplish in section 1325(b)(3). One of the aims of the means test was to limit judicial involvement— and also judicial discretion-by making mechanical the determination of abuse under section 707(b)); Hildebrand v. Kimbro (In re Kimbro), 389 B.R. 518, 525-528 (B.A.P. 6th Cir. 2008); In re Young, 392 B.R. 6, 22 (Bankr. D. Mass. 2008). Moreover, the Supreme Court in Ransom v. FIA Card Servs., N.A., noted the following regarding Congress' adoption of a bright line test, "[in] eliminating the pre-BAPCPA case-by-case adjudication of above-median-income debtors' expenses, on the ground that it leant itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces." Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 at 616-617.

The Government's second reason for its position is that, "Section 707(b)(2)(A)(ii)(I) does not incorporate **[*25]** by reference every feature of the IRS's tax collection methodology, but rather allows the debtor to deduct his 'applicable monthly expense amounts specified under the National and Local Standards. Although the IRS in collecting delinquent taxes considers the taxpayer's actual loan or lease payments, those actual 'expense amounts' are not 'specified' either in the Local Standards themselves or in any accompanying statements, but are instead derived from evidence unique to the particular debtor involved." Brief for the United States as *Amicus Curiae* at 21, Ransom v. FIA Card Servs.N.A., 131 S. Ct. 716, 178 L. Ed. 2d 603 (2011) (No. 09-907). The Government compared the language in Section 707(b)(2)(A)(ii)(I) with the IRS's statement regarding the allowed deductions which specifically stated that, "the taxpayer is allowed the amount actually spent or the standards, whichever is less" and noted that the IRS's statement, "supports this reading of the **Bankruptcy** Code, since that statement contrasts the 'standard' with the 'amount actually spent' and presumes that the former term refers to the standardized amounts set out in the IRS tables. Id. at 21. This court finds that this analysis is consonant with the **[*26]** Supreme Court's statement in Ransom v. FIA Card Servs., N.A., explaining that, "[a]lthough the statute does not incorporate the IRS's guidelines, courts may consult this material in interpreting the National and Local Standards; after all, the IRS uses those tables for a similar purpose-to determine how much money a delinquent taxpayer can afford to pay the Government. The guidelines of course cannot control if they are at odds with the statutory language."Ransom v. FIA Card Servs., N.A., 131 S. Ct. 716, 178 L. Ed. 2d at 613. Furthermore, the Government citing In re Briscoe, 374 B.R. at 6-7, noted that its reading of Section 707(b)(2)(A)(ii)(I) is in conformity with the consensus [3] view among the **bankruptcy** courts and with the view of the Advisory Committee on the Federal Rules of **Bankruptcy** Procedure. Id. at 21; See also; Keith M. Lundin & William H. Brown, Chapter 13 **Bankruptcy**, 4th ed, §476.1 at ¶ , Sec. Rev. Mar. 19, 2009, www.Ch13online.com ("A significant number of courts have recognized that a Chapter 13 debtor with CMI greater than applicable median family income is allowed the Local Standards Housing and Utilities Expense amount without regard to whether the debtor's actual **[*27]** rent or mortgage is less than the Local Standards amount. Many of these courts acknowledge that the Internal Revenue Manual limits the Local Standards Housing and Utilities expense amount to the lesser of a taxpayer's actual rent or mortgage or the allowance in the tables. These courts appropriately refuse to apply the Internal Revenue Manual interpretation of the Local Standards Housing and Utilities because to do so would be inconsistent with §707(b)(2)(A)(ii)(I)").

FOOTNOTES

3 In In re Rezentes, 368 B.R. 55, 59-62 (Bankr. D. Haw. 2007) the court adopting the Internal Revenue Manual, held that Congress intended debtors to repay the maximum they could afford to their unsecured creditors, given that Section 707(b)(2)(A) and (B) functions as a screening mechanism to achieve this objective and as such above median income debtors may deduct the lesser of the IRS Local Standard housing expense or their actual housing expense.

The Trustee argues that in In re Kibbe, 361 B.R. 302 (B.A.P. 1st Cir. 2007), the court concluded that "projected disposable income" is determined outside of Form B22C. The controversy in the In re Kibbe case was whether the term "projected disposable income differs from the term **[*28]** "disposable income" as defined in Section 1325(b)(2) and particularly whether the income side of the equation should be rooted in the calculation of "current monthly income" set forth in Form 22C. The court held that the income component of "projected disposable income" under Section 1325(b)(1)(B) was the anticipated actual income of the debtor subject to the income exclusions during the plan commitment period. In re Kibbe, 361 B.R. at 314. However, In re Kibbe is not on point with the issue before this court because the expense side for an above-median income debtor which is statutorily determined by Section 707(b)(2)(A) and (B) was not before the court. The court expressly noted that, "[w]e further note that ambiguities, if any, in the calculation of allowable expenses for above or below-median debtors are not before us." In re Kibbe, 361 B.R. at 314 fn. 11.

The Trustee further argues that the Supreme Court's holding in Hamilton v. Lanning, did not limit the **bankruptcy** court's discretion to review the income and the expense side of the formula. The Trustee cites the following excerpts from the Hamilton v. Lanning decision as support for his position, "[w]e decline to infer from §1325's **[*29]** incorporation of §707 that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised when projecting disposable income to account for known or virtually certain changes." "[Thus] we hold that when a **bankruptcy** court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of conformation." (Docket No. 44, p.10). This court finds that the Trustee's reliance on the Hamilton v. Lanning decision is misplaced. The holding of the Supreme Court in Hamilton v. Lanning was that in most cases the mechanical approach pursuant to Section 1325(b)(1)(B) should be determinative, but in unusual cases where significant changes in a debtor's financial circumstances are known or virtually certain, the **bankruptcy** court has discretion to make appropriate adjustments. The Hamilton v. Lanning decision dealt with the income side of the formula, not the expense side.

The Trustee also states that this court in the case of In re Padilla, 2009 Bankr. Lexis 2701 (Bankr. D.P.R. 2009) resolved a similar legal issue as the instant case whereby this court adopted the forward **[*30]** looking approach of In re Kibbe by concluding as follows: "[t]he debtors approach to calculate projected disposable income is rejected by this court. Projected disposable income is a forward looking concept based on reality and not controlled by Form B22C. On the other hand, the expense component is controlled by Form B22C, in part by the National and Local Standards, and in part by actual expenses. The debtors have failed to detail the applicability of each and all expenses controlled by Form B22C. Moreover, evidence of the reasonability of actual expenses, when applicable, has not been presented to this court." (Docket No. 44, pgs. 10-11). This court in the case of In re Padilla stated that for above-median income debtors, "the Local Standards 'shall be' the expense amounts specified under the National Standards and Local Standards, irrespective of whether those are the debtor's actual expenses. Id. citing In re Young, 392 B.R. 6, 22 (Bankr. Mass. 2008); Hildebrand v. Kimbro (In re Kimbro), 389 B.R. 518, 523 (B.A.P. 6th Cir. 2008). This court also stated that, "[d]ebtors are entitled to actual monthly expenses only as to Other Necessary Expenses. Id. citing In re Burbank, 401 B.R. 67 (Bankr. R.I. 2009). **[*31]** In In re Coffin, 435 B.R. 780 (B.A.P. 1st Cir. 2010) this judge also opined that an above median income Chapter 13 debtor may deduct the standard vehicle ownership expense on vehicles he owned outright. However, the Supreme Court in Ransom overruled said conclusion finding that in order for the expense to be applicable it must exist. The Supreme Court specifically declined to resolve the issue before the court, whether debtor may claim the specified expense amount in full, regardless of the actual costs, when the debtor has expenses that are lower than the amounts in the Local Standards. Ransom, 178 L. Ed. 2d at 615, fn. 8.

This court agrees with the rationale and analysis taken by the Government in Ransom and determines that *HN16* a debtor who has expenses lower than the Local Standards may claim the full amount specified in the standards.

Good Faith

HN17 In order for a Chapter 13 plan to be confirmed, the same must be proposed in good faith. 11 U.S.C. §1325(a)(3). The term "good faith" is not statutorily defined. Good faith is determined on a case by case basis employing the totality of the circumstances analysis to the facts of the case. See In re Slade, 15 B.R. 910, 911 (9th Cir. B.A.P. 1981); In re Stitt, 403 B.R. 694, 703 (Bankr. D. Idaho 2008). **[*32]** *HN18* The Sixth Circuit has held that **bankruptcy** courts should consider the following non-exclusive factors as part of the totality of the circumstances analysis to determine whether a Chapter 13 plan was proposed in good faith, namely: (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn, and likelihood of future increase in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statements of the debts, expenses, and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of a preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (9) the frequency with which a debtor has sought relief under the **Bankruptcy** Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; (11) the burden which the plan's administration would place upon the trustee; and (12) **[*33]** whether the debtor is attempting to abuse the spirit of the **Bankruptcy** Code. In re Caldwell, 895 F. 2d 1123, 1126-27 (6th Cir. 1990); Smyrnos v. Padilla (In re Padilla), 213 B.R. 349, 352 (B.A.P. 9th Cir. 1997). In employing the totality of the circumstances analysis, "[t]he trick seems to be not placing too much weight on any single factor, but in the court's looking at how a number of factors in any given case operate together to betray a plan proposed in bad faith." In re

McLaughlin, 217 B.R. 772, 775-76 (Bankr. W.D. Tex. 1998) (citing L. Clark & S. Lane, *Having Faith in Good Faith Analysis*, 683 PLI/Comm.) (669 Practicing Law Institute 1994). This methodology is consonant with the purpose of the good faith analysis which centers on whether the debtor filed his proposed plan with "honesty of intention," namely in conformity with the spirit and purpose of the law or for debt avoidance purposes through manipulation of the Code. See In re Paley, 390 B.R. 53, 58 (Bankr. N.D. N.Y. 2008); In re Ochs, 283 B.R. 135, 137 (Bankr. E.D.N.Y. 2002).

In the instant case, the Chapter 13 trustee indicates that Debtors' amended plan is not proposed in good faith in conformity with 11 U.S.C. §1325(a)(3) **[*34]** since the same overstates Debtors expenses which results in a significant decrease in the distribution to unsecured creditors under the plan. This court agrees with the interpretation of various courts that have concluded that *HN19* for a plan to be filed in good faith the debtor does not need to contribute any more funds to pay unsecured creditors than required by Section 1325(b)(1). See In re Briscoe, 374 B.R. at 21-22.

Lastly, the Trustee requests that Debtors' may not deduct amounts for food and clothing that exceed the IRS's National Standards. At this juncture, Debtors' have not demonstrated to this court that the additional allowance of five percent (5%) for food and clothing is reasonable and necessary as established by Section 707(b)(2)(A)(ii)(I) [4]. Thus, Debtors are not entitled to the additional allowance for food and clothing.

FOOTNOTES

4 *HN20* Section 707(b)(2)(A)(ii)(I) provides in pertinent part; "[i]n addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service." 11 U.S.C. §707(b)(2)(A)(ii)(I) .

Conclusion

The **[*35]** Chapter 13 trustee's objection to confirmation is denied in part and granted in part. The court finds that Debtors pursuant to Section 707(b)(2)(A)(ii)(I) may deduct the full amount of applicable expenses under the IRS's National and Local Standards if they provide evidence to the Trustee that they have some expense for that particular category, irrespective of the fact that their actual expenses for certain categories are lower. Above-median income debtors are limited to the amounts allowed per the IRS's National and Local Standards even if their actual expenses for certain categories are higher or lower. This court finds that Debtors' Christmas bonuses are income pursuant to Section 101(10A) and the same are not excluded under Section 101(10A)(B) and as such form part of Debtors' disposable income. Lastly, this court concludes that Debtors are not entitled to the additional allowance for food and clothing pursuant to Section 707(b)(2)(A)(ii)(I) since they have not demonstrated that the same is reasonably necessary.

SO ORDERED.

In San Juan, Puerto Rico, this 9th day of March 2011.

/s/ Enrique S. Lamoutte

Enrique S. Lamoutte

United States **Bankruptcy** Court

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*2011 Bankr. LEXIS 1055, **

In re STEVEN G. JOHNSON, Debtor; THE LAW OFFICES OF MIRIAM G. ALTMAN, P.C., Plaintiff v. STEVEN G. JOHNSON, Defendant

Chapter 7, Case No. 09-19214-JNF, Adv. P. No. 09-1387

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 Bankr. LEXIS 1055

March 21, 2011, Decided
March 21, 2011, Filed

CORE TERMS: probate, summary judgment, attorney fees, modification, former spouse's, divorce, fee award, child support, support obligation, partial, alimony, nondischargeable, contempt, spouse, separation agreement, collateral estoppel, clarified, excepted, domestic, adversary proceeding, clarification, divorce decree, reduction, owed, issue preclusion, fees incurred, intentionally, attachment, frivolous, weekly

COUNSEL: **[*1]** For Steven G. Johnson, Debtor: Mark L. Nestor, Mark L. Nestor, Esq., Gloucester, MA.

Assistant U.S. Trustee: John Fitzgerald, Office of the US Trustee, J.W. McCormack Post Office & Courthouse, Boston, MA.

For Mark G. DeGiacomo, Murtha Cullina LLP, Trustee: Murtha Cullina, LLP, Boston, MA; Taruna Garg, Murtha Cullina LLP, Boston, MA.

JUDGES: Joan N. Feeney, United States **Bankruptcy** Judge.

OPINION BY: Joan N. Feeney

OPINION

MEMORANDUM

I. INTRODUCTION

This adversary proceeding presents the issue of whether a debtor's obligation, pursuant to a probate court judgment, to pay to his former spouse's attorney fees for defending a complaint for modification of child support is excepted from discharge under 11 U.S.C. §§ 523(a)(5), (a)(15) or (a)(6). The issue arises in the context of the following matters which are before the Court: 1) the Plaintiff's Supplemental Motion for Summary Judgment as to Counts I and II of Its Amended Adversary Complaint (#39); 2) the Plaintiff's Second Supplemental Motion for Partial Summary Judgment as to Counts I, II and VI of Its Second Amended Adversary Complaint (#121); 3) the Defendant's Opposition and Motion to Strike Plaintiff's Supplemental Motion for Partial Summary Judgment as to Counts **[*2]** I and II of Its First Amended Adversary Complaint (#43); and 4) the Defendant's Supplemental Memorandum of

Law in Support of His Opposition to the Plaintiff's Motion for Partial Summary Judgment as to Counts I & II of Its First Amended Complaint and Motion for Partial Summary Judgment as to Counts I, III and IV [sic] of Its Second Amended Complaint (#141).[1] The Court consolidated resolution of two additional matters with the matters pending in the adversary proceeding: 1) the Debtor's "Motion to Avoid Judicial Lien on Debtor's Homestead Created by Judicial Lien by Creditor Suzanne Thatcher;" and 2) "Creditor the Law Offices of Miriam G. Altman, P.C.'s Motion for Ruling Concerning Its Status and Rights as a Domestic Support Obligation Creditor with a Judicial Lien." The Plaintiff's Second Supplemental Motion for Partial Summary Judgment as to Counts I, II and IV of Its Second Amended Complaint (the "Summary Judgment Motion") and the Defendant's Opposition to that Motion are the dispositive documents to resolve the specific issue of whether the Plaintiff, the Law offices of Miriam G. Altman, P.C. (the "Plaintiff"), has satisfied its burden of establishing the absence of any genuine issues **[*3]** of material fact with respect to the nondischargeability of the claims set forth in Counts I, II and VI of its Second Amended Complaint. The parties incorporated by reference the various affidavits and memoranda submitted in conjunction with the Plaintiff's original Motion for Partial Summary Judgment as to Count I and the Plaintiff's Supplemental Motion for Partial Summary Judgment as to Counts I and II of its Amended Complaint.

FOOTNOTES

1 The Plaintiff originally filed a Motion for Partial Summary Judgment as to Count I of Its First Amended Adversary Complaint (#16), supported by the Affidavits of Miriam G. Altman, Esq. and Suzanne Thatcher and a Memorandum of Law. The Defendant objected to that Motion (#35) and supported his Objection with his Affidavit and a Memorandum of Law. The Plaintiff supported its Supplemental Motion for Partial Summary Judgment as to Counts I and II of the First Amended Adversary Complaint with a Supplemental Affidavit and a Supplemental Memorandum of Law. The Defendant supported his "Opposition and Motion to Strike Plaintiff's Supplemental Motion for Partial Summary Judgment" **[*4]** (#43) and his Opposition (#64) with a Supplemental Memorandum and Supplemental Affidavit.

The Plaintiff's claims arise out of an award of legal fees to the Plaintiff in the amount of $138,720.41, which were set forth in a Judgment entered by the Middlesex Probate and Family Court, Department of the Trial Court (the "Probate Court"), on February 17, 2009. The award of attorney's fees followed a trial on the merits of a Complaint for Modification filed by Steven G. Johnson (the "Debtor"), in which he sought a reduction of his weekly child support which is payable to his ex-spouse. The Plaintiff claims that the fees awarded to it are nondischargeable pursuant to 11 U.S.C. § 523(a)(5) (Count I); 11 U.S.C. § 523(a)(6) (Count II); and 11 U.S.C. § 523(a)(15) (Count VI).

The Court finds that, despite the assertions of the Defendant to the contrary, the material facts necessary to resolve the Summary Judgment Motion are not in dispute, and the matter is ripe for summary judgment. *See* Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056. The Court has core jurisdiction to decide the Summary Judgment Motion pursuant to 28 U.S.C. § 1334 and § 157(b)(2)(I).

II. [*5] FACTS

Suzanne Thatcher, f/k/a/ Suzanne Thatcher-Johnson ("Thatcher"), is the former spouse of the Debtor. The background relating to the couple's divorce is set forth in an 18-page decision, captioned "Procedural History, Findings of Fact, Rationale, and Conclusions of Law," issued by the Probate Court on February 17, 2009 in conjunction with the Judgment pursuant to which the Plaintiff was awarded fees. Miriam G. Altman Esq., the principal attorney at the Law Offices of Miriam G. Altman, P.C. and an attorney specializing in family law, attached a copy of the decision to her Affidavit filed with this Court on April 7, 2010. Both parties attached numerous documents from the Probate Court proceeding, the authenticity of which is not in dispute.

A. The Probate Court's Decision

As determined by the Probate Court, Thatcher and the Debtor have two minor children. They were divorced pursuant to a Judgment of Divorce Nisi entered on December 4, 2006. The judgment incorporated a Separation Agreement, which obligated the Debtor to pay child support in the weekly amount of $485 to Thatcher. At the time of the divorce, Thatcher was employed as a Manager/Buyer for Russell's Garden Center with gross **[*6]** weekly income of approximately $1,000. The Debtor, while he was employed at Alpine Contractors, Inc., earned gross weekly income of $1,320 or $40.00 per hour.

In its decision, the Probate Court indicated that, following the divorce, the Debtor filed a Complaint for Modification of his child support obligation in which he alleged that he lacked the income and ability to pay child support at the current level. The Plaintiff represented Thatcher in the defense of the action.

On November 27, 2007, Thatcher, following the filing of an Answer to the Debtor's Complaint for Modification, filed a Complaint for Contempt of Judgment in which she alleged the Debtor was in arrears with respect to his child support obligations and had failed to comply with other provisions of the parties' Separation Agreement. The Debtor reciprocated on December 28, 2007 by filing a Complaint for Contempt of Judgment in which he alleged that Thatcher had failed to live up to her obligations respecting the Judgment of Divorce Nisi. The Probate Court noted that the Debtor's Complaint was dismissed on January 16, 2009 with prejudice.

According to the Probate Court, on July 1, 2008, Thatcher filed a Motion for Attorney[']s **[*7]** Fees pursuant to Mass. Gen. Laws ch. 208, § 38 in conjunction with her Complaint for Contempt regarding child support arrears. On July 10, 2008, the Probate Court allowed the Motion and awarded Thatcher attorney's fees in the sum of $25,000, payable by August 1, 2008. The Debtor failed to pay those fees by that date, and, on August 5, 2008, Thatcher filed another Complaint for Civil Contempt. That Complaint for Civil Contempt was consolidated with the Debtor's Complaint for Modification.

The Probate Court conducted a four-day trial, commencing in late September 2008 and concluding on January 8, 2009, issuing its decision and Judgment on February 17, 2009. As part of the rationale for its decision, the Probate Court determined that the Debtor, who was the majority owner of, and had been employed by, Alpine Contractors, Inc., "divested himself of a majority interest in what appears to have been a lucrative and viable company for no consideration" within approximately two months of the entry of the Divorce Judgment which incorporated the Separation Agreement; that the Debtor accepted employment at Lowe's Home Center, Inc. voluntarily and not in good faith; that the Debtor deliberately **[*8]** was underemployed; that the Debtor, deliberately and with premeditation, caused his termination from Lowe's; that the Debtor's reasons for the termination of his employment at Lowe's were not credible; that the Debtor purchased a 2003 Mini Cooper for cash after being fired from Lowe's and after filing the Complaint for Modification, thus demonstrating "flagrant disregard for the Divorce Judgment, Separation Agreement, and child support Order, as well as manipulation of the court process;" that the Debtor depleted his assets in a short period of time and not "solely or even principally to fulfill his child support obligation;" and that the Debtor's testimony during the trial was evasive. In refusing to modify the Debtor's child support obligation, the Probate Court found that the Debtor "disregard[ed] . .. his support obligation to the children" and that there were no material changes in his financial circumstances that would warrant a reduction in his child support obligation.

B. The Probate Court Judgment and Post-Judgment Events

On February 17, 2009, the same day the Probate Court issued its decision, it entered a judgment in which it ordered: "Husband shall pay counsel fees in the **[*9]** amount of $138,720.41 to Wife's counsel within one hundred eighty (180) days of the date of this judgment." It also endorsed Thatcher's "Motion for Attorney[']s Fees and Costs Pursuant to M.G. L. C. 208, § 38," in which Thatcher requested attorney's fees in the sum of $113,720.41, stating:

I find Husband's Complaint was frivolous and an effort to undermine the terms of the parties['] divorce agreement executed approximately 6 months before filing [the] complaint for modification. Wife has incurred significant counsel fees in defense of a baseless modification. Fees are allowed in the amount of $138,720.41.

I find based on the affidavit filed by Atty[.] Altman, the fees sought are fair & reasonable under all of the circumstances. The Debtor filed a notice of appeal of the Modification Judgment, but the appeal has not been adjudicated.
Thatcher filed a Complaint in Equity in the Probate Court for post-judgment security.

The Probate Court issued a writ of attachment and preliminary injunction restraining the Debtor from dissipating his assets. The sheriff recorded the attachment in the amount of $113,720.41 Middlesex South Registry of Deeds on February 24, 2009 against the Debtor's property **[*10]** located at 4 High Rock Road, Wayland, Massachusetts.[2] The amount of the attachment is $25,000 less that the attorney's fees awarded to Thatcher.

FOOTNOTES

2 The Debtor filed a Motion to Avoid Judicial Lien on Debtor's Homestead Created by a Judicial Lien by Creditor Suzanne Thatcher. He also filed an Objection to "Creditor the Law Offices of Miriam G. Altman, P.C.'s Motion for Ruling Concerning Its Status and Rights as a Domestic Support Obligation Creditor with a Judicial Lien." The Court heard these matters on January 28, 2010 and consolidated these matters with the Adversary Proceeding.

The Debtor failed to pay the total amount of the attorney's fees and costs awarded, and Thatcher filed a Complaint for Contempt on September 11, 2009. The Complaint for Contempt was scheduled for September 30, 2009, but the Debtor filed his **bankruptcy** petition on September 29, 2009, as well as a Suggestion of **Bankruptcy** and Motion for Stay in the Probate Court.

Pursuant to the Second Amended Adversary Proceeding, the Plaintiff alleges that it is owed $61,010.84. According to the Plaintiff, Thatcher has paid it $52,709.57 in connection with her defense of the Complaint for Modification. From the amount of the attachment **[*11]** and the sums requested by the Plaintiff, it is evident that the Debtor paid $25,000 to the Plaintiff in 2008 or 2009.

C. The September 21, 2010 Hearing and the Arguments of the Parties

On September 21, 2010, this Court conducted a hearing on Plaintiff's Supplemental Motion for Partial Summary Judgment as to Counts I and II of Its First Amended Adversary Proceeding. The Plaintiff, in its Supplemental Memorandum, argued that the decision of the Probate Court warranted a determination by this Court that there are no material facts in dispute as to exceptions to discharge for the fee award. According to the Plaintiff, the fee award is a nondischargeable domestic support obligation ("DSO") under 11 U.S.C. § 523(a)(5), or can be excepted from discharge under 11 U.S.C. § 523(a)(6) because the Debtor intentionally caused financial harm to the Plaintiff and Thatcher without just cause and excuse.

The Debtor objected to the Supplemental Motion for Partial Summary Judgment, arguing that the fee award was a sanction or punishment for pursuing the Complaint for Modification. He argued that a DSO is only applicable to a debt that is in the nature of alimony, maintenance, or support of a spouse, former **[*12]** spouse, or child of the debtor and that the award to the Plaintiff does not qualify under the definition set forth in the **Bankruptcy** Code. *See* 11 U.S.C. § 101(14A). Additionally, the Debtor complained that the Plaintiff had "failed to . . . produce any documentary evidence establishing a liability or contractual relationship between the Plaintiff and the former spouse which raises the question of what type, if any, fee arrangement existed between the Plaintiff and the former spouse which would preclude the former spouse [from] having any liability for the attorney's fees in question."

At the September 21, 2010 hearing, the Court directed that the parties obtain clarification of the Probate Court's Judgment entered on September 17, 2009. The parties agreed to proceed with a request for clarification in the Probate Court. Accordingly, following the hearing, the Court entered an order directing the parties to seek clarification from the Probate Court on the following issues:
1) Whether the Probate and Family Court justice intended the fee award to be in the nature of spousal or child support even though the fee award was made to counsel to Suzanne Thatcher? 2) Whether the Probate and Family **[*13]** Court Justice intended [that] the fee award to be recoverable by Suzanne Thatcher in the event she paid Altman's fees? 3) Whether the Probate and Family Court justice intended that the obligation of Steven G. Johnson to pay Altman's fees was a debt owed to Suzanne Thatcher even though the fees were awarded to Altman? 4) Whether in ordering Steven G. Johnson to pay Altman's fees the Probate and Family Court justice intended to compensate Suzanne Thatcher for injury occasioned by the defense of frivolous litigation, which was commenced by Steven G. Johnson intentionally and without just cause and with specific intent to injure Suzanne Thatcher?
The Court further directed the parties to file with the Court any order or transcript of the Probate and Family Court clarifying the above issues.

D. The Probate Court's Clarification of Judgment

On November 19, 2010, the Probate Court entered an order, captioned "Clarification of Judgment." The Order provided that Paragraph 2 of the Judgment[3] entered on February 17, 2009 with respect to the Debtor's Complaint for Modification was clarified as follows:
1. The award of attorney[']s fees and costs in the Judgment is in the nature of child support, even **[*14]** though the fee award is made to counsel;

2. The fee award is to reimburse Mother in the event she had paid the attorney's fees;

3. The obligation of the Father to pay the Mother's Counsel is a debt to the Mother, even though the fees are awarded to the Mother's counsel; and

4. The award of fees is to compensate the Mother for injury occasioned by the defense of frivolous litigation which was commenced by the Father intentionally and without just cause and with specific intent to injure the Mother.

FOOTNOTES

3 Paragraph 2 provides: "Husband shall pay $313.60 in child support arrears to Wife within thirty (30) days of the date of this Judgment."

Between this Court's September 21, 2010 order and the Clarification of Judgment entered by the Probate Court, the Plaintiff filed a Second Amended Adversary Complaint, adding Court VI under 11 U.S.C. § 523(a)(15). Following the Clarification of Judgment, the Plaintiff filed its Summary Judgment Motion, and the Debtor filed his Supplemental Memorandum in Support of His Opposition to that Summary Judgment Motion as well as to the Plaintiff's earlier motion for partial summary judgment.

III. APPLICABLE LAW

A. Applicable **Bankruptcy** Law

The Plaintiff seeks to except **[*15]** the award of attorney's fees under three subsections of 11 U.S.C. § 523. They provide in relevant part the following:
(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-- . . .
(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit . . . .

11 U.S.C. § 523(a)(5), (6), and (15). A domestic support obligation is defined as

[A] debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor **[*16]** or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

11 U.S.C. § 101(14A).

Because of the serious financial consequences of divorce, **bankruptcy** courts frequently have occasion to address issues under section 523(a)(5) and section (a)(15) and to interpret what is or what is not a DSO. **[*17]** In Gilman v. Golio (In re Golio), 393 B.R. 56 (Bankr. E.D. N.Y. 2008), the court observed that prior to the effective date of the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 11 U.S.C. § 523(a)(15) provided a debtor with statutory defenses to a former spouse's objection to the discharge of non-support type obligations based upon (1) whether the debtor has the ability to pay a debt relating to such obligation or (2) whether discharging such debt would result in a benefit to the debtor that would outweigh the detrimental consequences to the former spouse or child of the debtor.

As a result of BAPCPA, a property settlement obligation incurred pursuant to a divorce is unqualifiedly also nondischargeable under section 523(a)(15). In individual Chapter 7 and 11 cases, 'the distinction between a domestic support obligation and other types of obligations arising out of a marital relationship is of no practical consequence in determining the dischargeability of the debt. . . . The enactment of subsection 523(a)(15) and the increase in the scope of the discharge exception effected by the 2005 amendments, expresses Congress's recognition that the economic protection **[*18]** of dependent spouses and children under state law is no longer accomplished solely through the traditional mechanism of support and alimony payments. State courts do not always draw a sharp distinction between support and property division in providing for the post-divorce economic security of dependent family members. Property settlement arrangements are often "important components of the protection afforded individuals who, during the marriage, depended on the debtor for their economic well-being." 4 L. King, COLLIER ON **BANKRUPTCY,** ¶ 523.21 at 523-118 (15th ed. rev.2008). Therefore, this Court need not make a determination on whether the amounts awarded under the Judgments at issue constitute domestic support obligations under 11 U.S.C. § 523(a)(5) if the Plaintiff can demonstrate that the Judgments would be nondischargeable in any event under 11 U.S.C. § 523(a)(15) because each Judgment constitutes a debt (1) owed to or recoverable by "a spouse, former spouse, or child of the debtor" and (2) "is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record". In re Golio, 393 B.R. at 61-62. **[*19]** In Golio, the **bankruptcy** court rejected the debtor's argument that a judgment for attorney's fees payable to his former spouse's attorney directly should not be excepted from discharge. The court observed that the debtor's argument elevated form over substance and was inconsistent with the legislative purpose of 11 U.S.C. § 523(a)(5) and (a)(15). Id. at 63. As the court in Golio recognized, however, courts are divided as to whether an award of attorney's fees payable to an attorney rather than to a spouse, former spouse, or child of the debtor can constitute a DSO.[4]

FOOTNOTES

4 Similar issues have arisen in connection with guardian ad litem fees. *See* O'Brine v. Gove (In re Gove), 2011 WL 111155 (Bankr. D. Mass. Jan. 13, 2011) (finding that the debtor's obligation to pay GAL fees was a DSO and nondischargeable under 11 U.S.C. § 523(a)(5)).

Numerous courts have considered the issue of whether attorney's fees incurred in matrimonial disputes and made directly payable to the attorney are excepted from discharge under either § 523(a)(5) as a DSO or under § 523(a)(15). The weight of authority and the most recent decisions hold that attorney's fees payable directly to the attorney are nondischargeable **[*20]** under either 11 U.S.C. § 523(a)(5) as a DSO or under 11 U.S.C. § 523(a)(15) as having been incurred in connection with a separation agreement or divorce decree. *See* Prensky v. Clair Greifer LLP, 2010 WL 2674039 (D. N.J. June 30, 2010); Tarone v. Tarone (In re Tarone), 434 B.R. 41 (Bankr. E.D.N.Y. 2010); In re Andrews, 434 B.R. 541 (Bankr. W.D. Ark. 2010); Aldrich v. Papi (In re Papi), 427 B.R. 457 (Bankr. N.D. Ill. 2010); Howard v. Sullivan (In re Sullivan), 423 B.R. 881 (Bankr. E.D. Mo. 2010); Landau & Assocs. v. Fricke (In re Fricke), 2010 WL 5475808 (Bankr. N.D. Ill. Dec. 30, 2010). *But see* In re Jones, 2010 WL 4008155 (Bankr. W.D. La. Oct. 12, 2010) (penalty or civil penalty cost not a DSO); In re Spence, 2009 WL 3483741 (Bankr. S.D. Fla. Oct. 26, 2009) (sanctions for mediation violations not a DSO); In re Lopez, 405 B.R. 382 (Bankr. S.D. Fla. 2009) (award of attorney's fees did not constitute a DSO because fee award related to misconduct and not financial need). *See also* In re Kassicieh, 425 B.R. 467 (Bankr. S.D. Ohio 2010) (deferring determination of liability until the state court resolved issue of the parties' relative liability for the amount of guardian ad litem fees); Simon, Schindler & Sandberg, LLP v. Gentilini (In re Gentilini), 365 B.R. 251, 258 (Bankr. S.D. Fla. 2007) **[*21]** (holding in a pre-BAPCPA case that "Section 523(a)(5) of the **Bankruptcy** Code can and should be applied to debts in the nature of support payable to third parties if, and only if, at the time of the debtor's **bankruptcy,** the former spouse is also obligated to the third party.").

The United States **Bankruptcy** Appellate Panel for the First Circuit in Smith v. Pritchett (In re Smith), 398 B.R. 715 B.A.P. 1st Cir. 2008), *aff'd,* 586 F.3d 69 (1st Cir. 2009), considered the issue of whether a payment of $50 per day for every day that the debtor's alimony payment was late was a DSO or a penalty. In resolving the issue, the panel analyzed two decisions of the United States Court of Appeals for the First Circuit, namely Werthen v. Werthen (In re Werthen), 329 F.3d 269 (1st Cir. 2003), and Macy v. Macy, 114 F.3d 1 (1st Cir. 1997). The panel stated:

Whether a claim is in the nature of support is a question of federal **bankruptcy** law. In re Werthen, 329 F.3d at 272-73; In re Hale, 289 B.R. at 791. In broad terms, support payments "provide for the upkeep of the recipient spouse [. . .] while other divisions or payments serve other purposes." In re Werthen, 329 F.3d at 273. A state court's denomination **[*22]** of an award as something other than alimony, maintenance or support is not controlling. Id.; 11 U.S.C. § 101(14A). Instead, the critical issue is whether the state court which entered the divorce decree and the parties who entered into a divorce agreement intended the award to serve as support or as "something else," such as a division of jointly owned property. In re Werthen, 329 F.3d at 272-73. How the award in fact functioned does not necessarily reflect how it was intended to function, although it may be evidence of the court's or the parties' intent. In re Hale, 289 B.R. at 791 n. 4.

* * *

Courts have found two types of awards to be in the nature of support even though they were not labeled as such by the state court: obligations resulting from a failure to make timely alimony payments, and property awards intended to function as support. *See* In re Werthen, 329 F.3d at 274; Macy v. Macy, 114 F.3d 1, 2 (1st Cir.1997). *Obligations resulting from a failure to make timely alimony payments include attorneys' fees incurred by the recipient spouse in enforcing the alimony obligation and interest that accrues on the underlying debt.* 11 U.S.C. § 101(14A); In re Macy, 114 F.3d at 2. These obligations **[*23]** are compensatory in that they serve only to make the recipient spouse whole where costs have been incurred in enforcing the alimony obligation, namely the cost of retaining services and the cost of the lost use of the funds. *See* id.

In re Smith, 398 at 721-22 (emphasis supplied, footnote omitted). The analyses used by the panel in Smith and the First Circuit in Macy with respect to alimony or spousal support apply equally to child support obligations. Moreover, as this court recognized in the pre-BAPCPA case of Macy v. Macy (In re Macy), 200 B.R. 467 (Bankr. D. Mass. 1996), *aff'd,* 114 F.3d 1 (1st Cir. 1997),

Historically, the Courts and the Congress have tried to protect dependent spouses and children from the loss of alimony, support and maintenance owed them by a debtor who has sought refuge in **bankruptcy.** *See* Wetmore v. Markoe, 196 U.S. 68, 77, 25 S.Ct. 172, 176, 49 L.Ed. 390 (1904) ("Unless positively required by direct enactment the courts should not presume a design upon the part of Congress in relieving the unfortunate debtor to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate **[*24]** his children"). This policy of protecting those to whom alimony, support and maintenance is owed from spouses who file for **bankruptcy** is embedded in Section 523(a)(5). *See generally* Shine v. Shine, 802 F.2d 583, 585-588 (1st Cir.1986) (comprehensive discussion of Section 523(a)(5)'s legislative history before the **Bankruptcy** Reform Act). *See also* Forsdick v. Turgeon, 812 F.2d 801, 804 (2nd Cir.1987) (Section 523(a)(5) favors enforcement of familial obligations over general **bankruptcy** policy of discharging debt); Tilley v. Jessee, 789 F.2d 1074, 1077 (4th Cir.1986) (same); In re Kline, 65 F.3d 749, 751 (8th Cir.1995) (same); In re Sternberg, 85 F.3d 1400, 1405 (9th Cir.1996) (same); In re Miller, 55 F.3d 1487, 1489 (10th Cir.1995), *petition for cert. filed sub nom.,* Miller v. Gentry, 516U.S. 916, 116 S.Ct. 305, 133 L.Ed.2d 210 (1995) (same). This policy is also one of the stated purposes of the **Bankruptcy** Reform Act. H.R.Rep. No. 835, 103d Cong., 2nd Sess. 33, reprinted in 1994 U.S.C.C.A.N. 3340, 3341-*471 3342. Indeed, Congress considered the payment of family obligations to be of "paramount societal importance," and used the **Bankruptcy** Reform Act to expand the alimony, support and **[*25]** maintenance exception to the general **bankruptcy** practice of discharging debt so that debtors may have a "fresh start." Id. at 3342.

200 B.R. at 470-71. BAPCPA reinforced and expanded that policy. Indeed, DSO claimants' expanded rights are set forth in the following sections of the **Bankruptcy** Code:

1) § 362(b)(2)(B) [which] provides that the holder of a DSO claim may levy on non-estate assets without violating the automatic stay;
2) § 101(14A) provides an expanded definition for domestic support obligation;
3) §§ 523(a)(5) and 1328(a)(2) [which] provide that a discharge in chapter 7, 11, 12, or 13 does not discharge a debt for a DSO;
4) § 507(a)(1)(A) [which] creates a first priority for a DSO for distribution of estate assets by the trustee;
5) § 547(c)(7) [which] excludes payment of a DSO from a trustee's preference action; and
6) § 704(a)(10) [which] requires the trustee to provide notice to a DSO claimant of the claimant's rights to payment in the **bankruptcy,** information regarding assistance by government agencies in collecting child support during and after the **bankruptcy** case, and to provide other specified information.

See In re Ruppel, 368 B.R. 42, 44 n.4 (Bankr. D. Or. 2007). Moreover, **[*26]** because the term DSO is "derived from the definition of a nondischargeable debt for alimony, maintenance, and support contained in the former Section 523(a)(5)[,] . . . case law construing the former Section 523(a)(5) is relevant and persuasive." In re Johnson, 397 B.R. 289, 296 (Bankr. M.D.N.C. 2008). Accordingly, the decision of the United States Court of Appeals for the First Circuit in Macy teaches that attorney's fees incurred in protecting a child support award are nondischargeable under 11 U.S.C. § 523(a)(5).

B. Collateral Estoppel

"'Under the full faith and credit statute, 28 U.S.C. § 1738, a judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered.'" Silva v. Commonwealth of Massachusetts Land Court, 351 Fed. App'x. 450, 457-58 (1st Cir. 2009) (quoting Giragosian v. Ryan, 547 F.3d 59, 63 (1st Cir. 2008), cert. denied, U.S. , 129 S.Ct. 2020 (2009)). "'Massachusetts recognizes two distinct types of preclusion arising out of the maintenance of prior litigation: res judicata (claim preclusion) and collateral estoppel (issue preclusion)." Silva, 351 Fed. App'x. at 458 (quoting **[*27]** Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 52 (1st Cir. 2008)).

According to the First Circuit in Silva,

[T]he Supreme Judicial Court recently stated that issue preclusion applies when (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally, [4] the issue decided in the prior adjudication must have been essential to the earlier judgment. Massachusetts courts also require that [5] appellate review must have been available in the earlier case before issue preclusion will arise.

351 Fed. App'x. at 458-59 (citations omitted).[5] With respect to the final element, the Massachusetts Supreme Judicial Court in O'Brien v. Hanover Ins. Co., 427 Mass. 194 (1998), held:

The doctrine of issue preclusion requires a judgment to be "final" before that judgment can have preclusive effect. Cousineau v. Laramee, 388 Mass. 859, 863 n. 4, 448 N.E.2d 756 (1983). We have not yet decided whether a judgment by a lower court should be considered **[*28]** final for this purpose while it is on appeal. *See* Massachusetts Prop. Ins. Underwriting Ass'n v. Norrington, 395 Mass. 751, 754, 481 N.E.2d 1364 (1985) (assuming, without deciding, that although an appeal from an insured's conviction was pending in the Appeals Court, his conviction constituted final judgment for issue preclusion purposes). The Federal rule, followed by a majority of the States, is that a trial court judgment is final and has preclusive effect regardless of the fact that it is on appeal. *See, e.g.,* Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 1011, 1018-1019 (D.C. Cir. 1984); Bartlett v. Pullen, 586 A.2d 1263, 1265 (Me.1991). That rule is also favored by the Restatement (Second) of Judgments § 13 comment f (1982). *But see, e.g.,* Sandoval v. Superior Court, 140 Cal.App.3d 932, 936-937, 190 Cal.Rptr. 29 (1983); Petition of Donovan, 137 N.H. 78, 81, 623 A.2d 1322 (1993).

We are persuaded by the majority rule.

427 Mass. at 200-201.

FOOTNOTES

5 Under Massachusetts law, "[t]he operation of res judicata requires the presence of three elements: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) **[*29]** prior final judgment on the merits." Silva, 351 Fed. App'x at 7 (citations omitted). Res judicata is inapplicable because the Plaintiff was not party to the Probate Court action.

C. Analysis

Applying the foregoing principles to the Plaintiff's Summary Judgment Motion, the Court finds that collateral estoppel applies to resolve the issues in the Plaintiff's favor. For purposes of collateral estoppel, there exists a final judgment on the merits. On February 17, 2009, the Probate Court entered a Judgment on the Complaint for Modification filed by the Debtor for reduction of his child support. The Probate Court clarified its Judgment on November 19, 2010. The pendency of the Debtor's appeal does not alter the finality of the judgment for purposes of collateral estoppel.

The Debtor was a party to the Complaint for Modification in the Probate Court. Thatcher, the defendant in that action, was represented by the Plaintiff in this adversary proceeding. The Judgment of September 19, 2007 required the Debtor to pay "counsel fees in the amount of $138,720.41 to Wife's counsel." That same award, however, was entered as an endorsement order on Thatcher's Motion for Attorney[']s Fees and Costs pursuant **[*30]** to M.G.L. C. 208, § 38. The Probate Court clarified that the award of attorney's fees and costs in the Judgment was "in the nature of child support," adding that "the fee award [was] to reimburse Mother in the event she had paid the attorney's fees" and "was a debt to the Mother."

The issue that this Court must determine is whether that attorney's fee award is a DSO. The Clarified Judgment of the Probate Court makes that determination crystal clear. Thatcher was required to engage the Plaintiff to defend the Debtor's frivolous and intentionally injurious conduct in seeking to deprive his children of the support afforded them under the parties' Separation Agreement, which was incorporated in the Divorce Decree. Although the Debtor complains that an issue of fact exists as to whether the attorney's fees incurred by Thatcher were solely the result of the Plaintiff defending Thatcher and that neither the Plaintiff nor Thatcher submitted documentary proof to substantiate the fees, thereby creating a factual issue, the Court disagrees. The Probate Court, in its endorsement order of September 17, 2009, specifically found that the fees it awarded Thatcher in connection with the defense of the **[*31]** Complaint for Modification and the four-day trial were "fair and reasonable under all of the circumstances."

The award of attorney's fees to Thatcher was essential to the Judgment, and as noted above, appellate review was available, and the pendency of an appeal does not deprive the Judgment of its finality. The Debtor appealed the Probate Court's Judgment of September 17, 2009. The automatic stay of 11 U.S.C. § 362(a) did not bar him from prosecuting his appeal.

The issue in the Probate Court was whether the Debtor was entitled to a reduction in the amount of child support he was required to pay Thatcher for the children. The rejection of the Debtor's effort to seek a reduction in his child support required the Probate Court to determine the appropriate amount of such support. It did so and compensated Thatcher for her attorney's fees incurred in defending the Complaint for Modification and preventing the reduction in weekly support payments. First Circuit precedent compels this Court to evaluate substance over form. As noted by the First Circuit Court of Appeals in In re Werthen,

[t]he federal courts have been unwilling to treat the label applied by the divorce court as controlling **[*32]** for **Bankruptcy** Code purposes. Nominally, the critical issue is whether the divorce court judge "intended" a particular award to be for support or for something else. In practice, courts look at a range of factors, including the language used by the divorce court and whether the award seems designed to assuage need, as discerned from the structure of the award and the financial circumstances of the recipients.

329 F.3d at 273 (citations omitted); *see also* In re Golio, 393 B.R. at 63. The language used by the Probate Court in its Clarified Judgment is unequivocal. The Probate Court intended that the attorney's fee awarded to the Plaintiff was to reimburse Thatcher for the attorney's fees she incurred protecting her children from the Debtor's callous conduct in seeking to reduce their support.

The Court finds that the decisions of the First Circuit, and the unequivocal intention of and lanuguage used by the Probate Court compel the conclusion that the attorney's fees are a DSO. The numerous decisions recognizing that under BAPCPA the award of attorney's fees may be excepted from discharge as DSOs or under 11 U.S.C. § 523(a)(15) also support this conclusion. The award of the attorney's fees **[*33]** to the Plaintiff did not extinguish Thatcher's liability to the Plaintiff. Indeed, Thatcher has paid significant sums to the Plaintiff to satisfy her obligation to it. Under either subsection, collateral estoppel prevents the Debtor from raising issues that are tangential to the Judgment.

The Debtor's arguments as to the absence of a contract between Thatcher and the Plaintiff and the excessive nature of the fees do not constitute issues of material fact which preclude the allowance of the Summary Judgment Motion. Even were the Court to accept the Debtor's argument that the attorney's fee award is not a DSO and should be discharged because it was a sanction, the Probate Court's Clarified Judgment establishes that the attorney's fees would be nondischargeable under 11 U.S.C. § 523(a)(6) as a willful and malicious injury. As the Probate Court determined, Thatcher was injured by the need to defend "frivolous litigation which was commenced . . . intentionally without just cause and with specific intent to injure the Mother."

Because Thatcher's Complaint for Civil Contempt was consolidated with the Debtor's Complaint for Modification and the award of attorney's fees to the Plaintiff pertained **[*34]** to that action, as well as the Debtor's action, collateral estoppel precludes the Debtor from arguing that his conduct in causing Thatcher to needlessly incur attorney's fees is excepted from discharge because the amount of the fees would be nondischargeable under 11 U.S.C. § 523(a)(6). *See generally* Liddell v. Peckham (In re Peckham), 442 B.R. 62, 85 (Bankr. D. Mass. 2010) ("[I]n the absence of collateral estoppel, the contempt judgment must be based on conduct of the debtor that is both willful and malicious for that judgment to be nondischargeable under § 523(a)(6), and that the surrounding circumstances will determine the true nature of the debtor's conduct, without regard to whether the contempt order was compensatory or imposed to uphold the dignity of the court.").

In Peckham, this Court, citing Suarez v. Barrett (In re Suarez), 400 B.R. 732, 736-37 (9th Cir. BAP 2009), observed:

"Section 523(a)(6) does not make 'contempt' sanctions nondischargeable per se, and neither does any other subpart of section 523(a)." 400 B.R. at 737. . . "Whether contempt sanctions are nondischargeable accordingly depends not on whether they are labeled as 'contempt,' but on whether the conduct leading **[*35]** to them was 'willful and malicious.'"

Id. at 80 (footnote omitted). The Probate Court, in its decision and Clarified Judgment, made findings sufficient to collaterally estop the Debtor from arguing that the fee award is excepted from discharge as a sanction. Accordingly, the Court concludes that the fee award could be excepted from discharge under 11 U.S.C. § 523(a)(6).

D. The Debtor's Motion to Avoid Judicial Lien on Debtor's Homestead

Section 522(f)(1)(A) permits the avoidance of judicial liens that impair debtors' exemptions. It provides in pertinent part:

(f)(1) Notwithstanding any waiver of exemptions but subject to paragraph (3), the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is–

(A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523(a)(5) . . . .

11 U.S.C. § 522(f)(1)(A). Having found that the Debtor's obligations under the Probate Court Judgment, as clarified, is a DSO, the Debtor cannot avoid the judicial lien created by the writ of attachment against **[*36]** 4 High Rock Road, Wayland, Massachusetts. Accordingly, the exception set forth in subparagraph (A) is applicable, and the Debtor is precluded from avoiding the fixing of the lien.

IV. CONCLUSION

In view of the foregoing, the Court shall enter orders granting the Plaintiff's Second Supplemental Motion for Partial Summary Judgment, denying the Debtor's Motion to Avoid Judicial Lien. This decision establishes the Plaintiff's Status and Rights. Thatcher is a DSO creditor with a nonavoidable judicial lien against the Debtor's property in Wayland.

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States **Bankruptcy** Judge

Dated: March 21, 2011

*2011 U.S. Dist. LEXIS 28716, **

JOSHUA B.P. MARTIN v. TD BANK, N.A. and INFINITY MORTGAGE CO.

CIVIL ACTION NO. 10-10409-RWZ

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 28716

March 21, 2011, Decided
March 21, 2011, Filed

CORE TERMS: mortgage, summary judgment, foreclosure, bankruptcy petition, foreclosure sale, preliminary injunction, scheduled, attorney's fees, assessment of damages, relinquished, defaulted, sur-reply, binding, automatic stay, monthly

COUNSEL: **[*1]** For Joshua B.P. Martin, Plaintiff, Counter Defendant: James P. Long, LEAD ATTORNEY, Boston, MA.

For TD Bank, N.A., Defendant, Counter Claimant: Linda R. Sloan, Matthew J. McGowan, LEAD ATTORNEYS, Salter McGowan Sylvia & Leonard, Inc., Providence, RI.

JUDGES: RYA W. ZOBEL, UNITED STATES DISTRICT JUDGE.

OPINION BY: RYA W. ZOBEL

OPINION

MEMORANDUM OF DECISION

ZOBEL, D.J.

Plaintiff Joshua B. P. Martin ("Martin") brings this action against Defendants T.D. Bank, N.A., ("T.D. Bank" or "the Bank") and Infinity Mortgage Co. [1] ("Infinity Mortgage" or "Infinity"), alleging that the loan documentation for the mortgage he granted Infinity violated several consumer protection statutes, including the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., Unfair Debt Collection Practices in violation of 15 U.S.C. §§ 1692(a) et seq., along with state statutes Mass. Gen. Laws ch. 93A, and 140D, § 1. TD Bank has counterclaimed for the amount owing on the mortgage, along with interest and attorney's fees.

FOOTNOTES

1 Since Infinity Mortgage failed to answer the complaint, Plaintiff's motion for default judgment (Docket # 15) was allowed subject to an assessment of damages after resolution of the pending motions for summary judgment.

Now pending are the **[*2]** parties' cross-motions for summary judgment. For the reasons discussed below, defendant's motion is allowed and plaintiff's motion is denied.

I. Background

A. Mortgage

In November 2000, Martin applied to Infinity Mortgage for a mortgage, which was approved. Martin thereafter purchased property at 29 Laurel Road, Sharon, Massachusetts, where he and his family have resided since. On January 16, 2001, at the closing, he took title to the property, and executed and delivered to Infinity a promissory note in an amount of $204,250.00. Several years later, in 2005, Infinity assigned the note and mortgage to TD Bank.

B. First Bankruptcy Case

Martin fell behind on payments, and in 2007, was several months in arrears. The last payment Martin made to the Bank was on February 6, 2007. The Bank sought foreclosure. On May 30, 2007, Martin filed a Chapter 13 **bankruptcy** petition with the U.S. **Bankruptcy** Court for the District of Massachusetts, which resulted in an automatic stay of the foreclosure action.

The Bank filed a motion for relief from the automatic stay, which was denied. Thereafter, the parties entered into a comprehensive stipulation, whereby they agreed that Martin would pay the Bank for both **[*3]** his pre- and post-petition delinquent monthly arrearage amounts (then totaling $52,465.88) over time and in accordance with a Chapter 13 plan to be filed thereafter. (See Docket # 17-1, Exhibit G at ¶ 6; October 27, 2008 **Bankruptcy** Court "Stipulation Concerning Motion of TD Bank, N.A. for Relief From Stay and Related Matters" (the "Stipulation").) The Stipulation also required Martin to make all future monthly payments payable under the mortgage to the Bank when due. If Martin failed to make such payments, the Bank could exercise its rights against the property, including foreclosure.

In the Stipulation, Martin further agreed that he had "no claims of any nature against the Bank, or to whatever extent they exist, they are hereby fully and forever released, relinquished and extinguished." (Id. at ¶ 7a). The Stipulation was approved by the **Bankruptcy** Court on November 13, 2008. The **bankruptcy** petition was dismissed on March 30, 2009.

In violation of the Stipulation, Martin immediately defaulted on the payments, and the Bank re-initiated its foreclosure sale of the property scheduled for October 8, 2009.

C. Second Bankruptcy Case

Two days before the scheduled foreclosure sale, on October **[*4]** 6, 2009, Martin filed a second chapter 13 **bankruptcy** petition, which again halted the sale. The Bank filed a motion for in rem relief from the stay, which was allowed on January 7, 2010. In allowing the motion, the court noted that any claim Martin may have had against the Bank was waived when he entered into the Stipulation. On February 9, 2010, Martin moved to dismiss the second **bankruptcy** petition. In his motion, he stated: "I have come to agreements with my creditors and at this time, I will not be able to give the right and complete information to the chapter 13 trustee, to make the plan work[.]" Docket # 1-5 Defendant's Objection to Application for Preliminary Injunction, Ex. H ("Emergency Mot. to Dismiss Chapter 13 [] Case").

D. Massachusetts State Court Litigation

On February 19, 2010, Martin filed suit in Suffolk Superior Court in which he sought a preliminary injunction to enjoin the Bank's scheduled foreclosure sale of the property. After a hearing, the court denied his request. The Appeals Court affirmed the denial of a preliminary injunction on the day of foreclosure, and the property was sold on February 23, 2010. A foreclosure deed was recorded on March 26, 2010.

Martin **[*5]** has not vacated the property. The Bank has filed an action for eviction in a state court action.

E. Pending Motions

The Bank has moved for summary judgment on its counterclaim for the deficiency after foreclosure due on the note, together with interest and attorneys' fees in the total amount of $136,750.18. (Docket # 16.) Martin has cross-moved for summary judgment on his claims. (Docket # 26).

Two related motions require resolution. Plaintiff asks leave to file a sur-reply (Docket # 32) which is allowed. The Bank seeks entry of judgment under Fed. R. Civ. P. 54(b) (Docket # 20), as the claim against it is totally unrelated to the claim against the other defendant Infinity Mortgage Co. The motion is allowed for the additional reason that Infinity has been defaulted and there is no reason to defer judgment for the Bank pending an assessment of damages against Infinity.

II. Legal Analysis

Summary judgment is appropriate where "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 that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

The Stipulation agreed to by Martin relinquished **[*6]** all claims against the Bank. It is a binding contract entered into and agreed upon by both parties. As such, it has force and effect here. See In re Harry Silverman, 13 B.R. 72, 73 (Bankr. D. Mass. 1981) ("[t]his court is of the opinion that the debtor entered voluntarily a stipulation that had all of the essential characteristics of a mutual contract. The debtor has received the benefits conferred by the bank, and now balks at performing himself. *** Therefore, the stipulation which was approved by [the **bankruptcy**] court is binding on the parties." Id. at 74 (internal citations omitted)).

Here, Martin contends that the Stipulation has no effect because it does not contain his signature, only that of his attorney, who, he now claims, entered into the Stipulation improvidently. However, he does not contend that he was unaware that his counsel had entered into the Stipulation, nor does he appear to dispute the amount owed. TD Bank is therefore entitled to summary judgment.

III. Conclusion

TD Bank's Motion for Summary Judgment (Docket # 16) is ALLOWED. Martin's Motion for Summary Judgment is DENIED (Docket # 26). As the Bank's motion for separate judgment under Rule 54(b) is also ALLOWED **[*7]** (Docket # 20), judgment may be entered for the Bank. Martin's motion to file a sur-reply (Docket # 32) is ALLOWED.

March 21, 2011

DATE

/s/ Rya W. Zobel

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

In re: SIMA SCHWARTZ, Debtor. SIMA SCHWARTZ, Plaintiff v. DEUTSCHE BANK NATIONAL TRUST HOMEQ SERVICING CORP., Defendants.

Chapter 7, Case No. 06-42476-MSH, Adv. Pro. No. 07-4098

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS, CENTRAL DIVISION

2011 Bankr. LEXIS 885

March 14, 2011, Decided
March 14, 2011, Filed, Entered

PRIOR HISTORY: Schwartz v. Deutsche Bank Nat'l Trust, 2009 U.S. Dist. LEXIS 97309 (D. Mass., Oct. 15, 2009)

CASE SUMMARY
PROCEDURAL POSTURE: Pro se plaintiff **bankruptcy** debtor brought an adversary proceeding against defendant servicing agent for a mortgagee alleging that the agent wrongfully foreclosed against the debtor's property prior to her **bankruptcy** petition. The agent moved to dismiss the complaint on the ground that the debtor lacked standing to prosecute the claims which were property of the **bankruptcy** estate.

OVERVIEW: The agent contended that, although the period for filing dispositive motions expired, the debtor did not disclose her intent to claim a wrongful foreclosure and the agent only recently became aware of the debtor's lack of standing which could be raised at any time. The **bankruptcy** court held that the agent's dispositive motion was untimely. The pro se debtor's schedules and statement of financial affairs indicated that the debtor claimed an exemption in the property which had been foreclosed pre-petition, repeatedly referred to the foreclosure, and indicated the debtor's belief that she continued to own the property. Further, the debtor's failure to disclose the claim with specificity was inadvertent and based upon the debtor's lack of expertise or experience to allow her to articulate the claim. Also, the **bankruptcy** trustee took no action with regard to the adversary proceeding and took no position concerning the debtor's standing to assert the claim.

OUTCOME: The agent's motion to dismiss the complaint was denied.

CORE TERMS: adversary proceeding, prosecute, financial affairs, exemption, foreclosure, cause of action, belonging, mortgage, redeem, void, filing system, failure to disclose, received notice, pro se, response to question, indispensable, prepetition, inadvertent, electronic, foreclosed, scheduled, reaffirmation, declaration, prudential, servicing, monetary

LEXISNEXIS® HEADNOTES

Hide

Constitutional Law > The Judiciary > Case or Controversy > Standing > General Overview

HN1 Standing may be raised at any time in order to ensure that the case or controversy requirement of U.S. Const. art. III is satisfied. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Causes of Action

HN2 Generally a Chapter 7 **bankruptcy** debtor may not prosecute claims belonging to the **bankruptcy** estate. More Like This Headnote

Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements

Constitutional Law > The Judiciary > Case or Controversy > Standing > Third Party Standing

HN3 The inquiry into whether a party has standing has two levels of inquiry: first, whether the constitutional requirements are satisfied and, second, whether the party should be denied standing based on what are known as prudential limitations. These prudential limitations are self-imposed rules of judicial restraint which principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches. More Like This Headnote

Bankruptcy Law > Estate Property > Abandonment > Trustee Action

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Causes of Action

HN4 A **bankruptcy** debtor may not prosecute on his own a cause of action belonging to the **bankruptcy** estate unless that cause of action has been abandoned by the **bankruptcy** trustee. More Like This Headnote

Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties

Bankruptcy Law > Estate Property > Content

HN5 There are two circumstances under which a **bankruptcy** debtor's failure to disclose a cause of action in a **bankruptcy** proceeding might be deemed inadvertent. One is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment. More Like This Headnote

COUNSEL: **[*1]** For Sima Schwartz, aka Sima M Shwartz, Debtor: David G. Baker, Boston, MA.

For Anne J. White, Trustee: Anne J. White, Boston, MA.

JUDGES: Melvin S. Hoffman, United States **Bankruptcy** Judge.

OPINION BY: Melvin S. Hoffman

OPINION

ORDER DENYING MOTION TO DISMISS

Before me is the motion of the defendants to dismiss six of the seven counts of the adversary proceeding on the grounds that the plaintiff, who is a Chapter 7 debtor, lacks standing to prosecute the six counts at issue because these claims underlying them are property of the debtor's estate and may be prosecuted only by the Chapter 7 trustee.[1] The adversary proceeding, which was commenced on July 7, 2007, is scheduled to be tried on March 16, 2011. While the deadline for filing dispositive motions has come and gone, the defendants justify their last minute motion alleging that they only recently became aware of the debtor's lack of standing. This justification does not withstand scrutiny.

FOOTNOTES

1 The complaint requests damages for an allegedly wrongful prepetition foreclosure and a declaration that the defendants' mortgage is void. Although not expressly using the word "recission," it also appears to request rescission of the foreclosure sale. The defendants are moving **[*2]** to dismiss counts I (wrongful foreclosure), II (fraud, deceit and misrepresentation), IV (violation of Mass. Gen. Laws ch. 93A), V (unfair servicing practices), VI (intentional infliction of emotional distress), and VII (violation of Fair Debt Collection Practices Act). The defendants are not challenging the debtor's standing to prosecute count III, titled "void lien" by which the debtor seeks a declaration that the defendants' alleged mortgage lien is void.

The defendants cite to the debtor's schedule B of her schedules of assets and liabilities, both as originally filed on November 28, 2006 and as subsequently amended on January 26, 2007, as evidence that she failed to disclose the claims against them asserted in this adversary proceeding. Additionally they cite to her statement of intention in which she listed as property she intended to redeem a three family home in Worcester, Massachusetts upon which Deutsche Bank is listed as the secured creditor.[2] These matters entirely undercut the defendants' justification for not raising the debtor's standing sooner. The schedules and statement of intention clearly evidence that the defendants knew or should have known of the debtor's failure **[*3]** to list the asserted claims as property from the moment this adversary proceeding was initiated. In fact, by the time the debtor filed her amended schedule B, HomEq as servicing agent for Deutsche Bank had already filed a motion for relief from stay in order to evict the debtor from the Worcester property. Its counsel received notice of the amended schedule B by the Court's electronic filing system. Thus the motion to dismiss is untimely.

FOOTNOTES

2 I note that the defendants argue that the debtor stated her intention to redeem the property "even though no reaffirmation agreement was ever filed with the Court." Motion to Dismiss at ¶ 10. Redemption does not require the execution and filing of a reaffirmation agreement.

The defendants correctly observe that timeliness may not matter because *HN1* standing may be raised at any time in order to ensure that the case or controversy requirement of Article III of the United States Constitution is satisfied. *Sentinel Trust Co. v. Newcare Health Corp. (In re Newcare Health Corp.)*, 244 B.R. 167, 170 (1st Cir B.A.P. 2000) citing *U.S. v. AVX Corp.*, 962 F.2d 108, 116 n. 7 (1st Cir. 1992).[3] And, as the defendants argue, *HN2* generally a Chapter 7 debtor may not prosecute **[*4]** claims belonging to the estate. *Vreugdenhil v. Hoekstra (In re Vreugdenhil)*, 773 F.2d 213, 215 (8th Cir.1985);[4] *Robert v. Household finance Corp. II (In re Robert)*, 432 B.R. 464 (Bankr. D. Mass. 2010). Thus I turn to the merits of the motion.

FOOTNOTES

3 *HN3* The inquiry into whether a party has standing has two levels of inquiry: first, whether the Constitutional requirements are satisfied and second, whether a party should be denied standing based on what are known as prudential limitations.

These prudential limitations are self-imposed rules of judicial restraint ... principally concern *whether the litigant (1) asserts the rights and interests of a third party and not his or her own*, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches.

Newcare Health Corp., 244 B.R. at 170 .

4 The *Vreugdenhil* court noted that courts have used a variety of reasons for this conclusion.

Authorities have in general agreed (although on varying rationales) that *HN4* a debtor may not prosecute on his own a **[*5]** cause of action belonging to the estate unless that cause of action has been abandoned by the trustee. *Baker v. Data Dynamics, Inc.*, 561 F. Supp. 1161, 1165 (W.D.N.C.1983) (debtors lack capacity to maintain suit); *In re Homer*, 45 B.R. 15, 25 (Bankr.W.D.Mo.1984) (debtor has no standing); *Steyhr Daimler Puch of America Corp. v. Pappas*, 35 B.R. 1001, 1004 (E.D.Va.1983) (trustee must be joined if feasible; court reserves question of whether trustee is an indispensable party); *In re Leisure Dynamics, Inc.*, 33 B.R. 173 (Bankr.D.Minn.1983) (debtor lacks standing, and in absence of trustee, issues are not ripe or concrete); *In re Myers*, 17 B.R. 410, 411 (Bankr.E.D.Calif.1982) (debtor has no real interest in property of the estate); *In re Raymond Construction Co.*, 6 B.R. 793, 797 (Bankr.M.D.Fla.1980) (trustee is the real party in interest). *Cf.* *Management Investors v. United Mine Workers*, 610 F.2d 384, 390-93 (6th Cir.1979) ; *Burkett v. Shell Oil Co.*, 448 F.2d 59 (5th Cir.1971) ; *Dallas Cabana, Inc. v. Hyatt Corp.*, 441 F.2d 865, 867 (5th Cir.1971) ; *Moore v. Slonim*, 426 F. Supp. 524 (D. Conn.) , *aff'd*, 562 F.2d 38 (2d Cir.1977) (cases construing **Bankruptcy** Act). *But see* *Smith v. State Farm Fire and Casualty Co.*, 633 F.2d 401, 404-06 (5th Cir.1980) **[*6]** (trustee not an indispensable party where record showed he was willing to rely on efforts made by debtors to prosecute case, and where objection was not made on this ground until conclusion of expensive and lengthy trial).

Id. at 215 .

In the defendants' view, the issue is straight-forward. The debtor did not list the claims on schedule B or amended schedule B and the Chapter 7 trustee has taken no steps to abandon these claims and thus they remain property of the estate.

The debtor filed her **bankruptcy** petition *pro se*. She was *pro se* at the time she filed her schedules of assets and liabilities, her statement of intention, her statement of financial affairs, and her amended schedules. Although she did not list any claims against the defendants as personal property, she listed HomEq on schedule D as a secured creditor for the two mortgages held on the Worcester property and listed HomEq again on schedule F as an unsecured creditor. On schedule C she claimed an exemption in the amount of either $340,000.00 or $390,000.00 in a "3 family house in Worcester, MA."[5] In response to question 4(b) of the statement of financial affairs the debtor identified the eviction action that Deutsche Bank **[*7]** had commenced against her and wrote "Deutsche Bank has purchased my house and evicting me from my apartment." [sic] At the time the statement of financial affairs was filed, the debtor resided in the Worcester property. She also disclosed the foreclosure in response to question 5 of the statement of financial affairs. Therefore the Chapter 7 trustee and parties in interest knew that the debtor was claiming an exemption in property which had been foreclosed prepetition. No objection to the exemption was filed. I find that the debtor's claimed exemption in the Worcester property constitutes an exemption in her claims in this adversary proceeding to recover that property. *Bottcher v. Emigrant Mortgage Co. (In re Bottcher)*, 441 B.R. 1, 3-4 (Bankr. D. Mass. 2011).

FOOTNOTES

5 The schedules are handwritten and the amount of the exemption is difficult to discern. It is either $340,000 or $390,000. The amount is not relevant to my decision.

Further I find that the debtor's failure to disclose with more specificity her claims against the defendants was inadvertent. HNS "[T]here are two circumstances under which a debtor's failure to disclose a cause of action in a **bankruptcy** proceeding might be deemed inadvertent. **[*8]** One is where the debtor lacks knowledge of the factual basis of the undisclosed claims, and the other is where the debtor has no motive for concealment." *Ullom v. Robbins (In re Robbins)*, 398 B.R. 442, 446 (Bankr. W.D.Ky. 2008). The debtor lacks the expertise or experience that would equip her to know how to articulate her claims against the defendants for damages. Moreover, she was not trying to hide the property she is seeking to recover. The schedules of assets and liabilities and statement of financial affairs are replete with references to the foreclosure. Furthermore, she exempted the Worcester property so anyone reading the schedules of assets and liabilities, the statement of intention and the statement of financial affairs knew or should have known that the Worcester property had been foreclosed upon but that the debtor thought she could nevertheless continue to own and redeem that property.

Moreover, the Chapter 7 trustee conducted the debtor's meeting of creditors under 11 U.S.C. § 341[6] and on April 10, 2007 filed a report that there were no assets available for distribution. On July 7, 2007, the debtor, now, represented by counsel, filed the instant adversary proceeding. **[*9]** The Chapter 7 trustee received notice of the filing through the Court's electronic filing system. To date, the Chapter 7 trustee has taken no action with respect to the adversary proceeding and, although on March 2, 2011 the defendants called the Chapter 7 trustee to bring the issue of standing to her attention, she has taken no position on this matter. *See* Motion to Dismiss.

FOOTNOTES

6 The § 341 meeting was scheduled for December 11, 2006 but there is no indication on the docket if the meeting was held that day.

Finally, courts have permitted creditor committees, individual creditors, or even debtors to pursue claims belonging to **bankruptcy** estates. *Official Committee of Unsecured Creditors v. Marathon Financial Insurance Co. (In re Automotive Professionals, Inc.)*, 389 B.R. 630, 634 (Bankr. N.D. Ill. 2008) (collecting cases).

As the Chapter 7 trustee has shown no inclination to prosecute these claims, I will permit the debtor to prosecute them, either in her own name or as a representative of the estate, and defer determining whether the estate has an interest in any monetary award if the debtor should prevail on those counts for which monetary damages are appropriate.

The motion to dismiss is **[*10]** therefore denied.

Dated: March 14, 2011

By the Court,

/s/ Melvin S. Hoffman

Melvin S. Hoffman

U.S. **Bankruptcy** Judge

In re GRASIELA FRANKLIN, Debtor; RBSF, LLC, Plaintiff v. GRASIELA FRANKLIN, Defendant

Chapter 7, Case No. 08-18756-JNF, Adv. P. No. 09-1065

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 Bankr. LEXIS 867

March 15, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff creditor filed a motion, pursuant to Fed. R. Civ. P. 60, made applicable to the adversary proceeding by Fed. R. Bankr. P. 9024, for reconsideration of a court order denying the creditor's motion for leave to amend its adversary complaint.

OVERVIEW: The creditor's original complaint purported to set forth a cause of action under 11 U.S.C.S. § 523(a)(4), although it was devoid of any allegations which would have permitted the court to have found a fiduciary relationship, larceny, or embezzlement. The court informed creditor's counsel that he conceivably was attempting to assert causes of action under § 523(a)(2)(B) or § 523(a)(2)(A). The creditor unsuccessfully attempted to cure the deficiencies by merely replacing the reference to § 523(a)(4) with a reference to § 523(a)(2). The amended complaint failed to plead the requisite elements of a cause of action under § 523(a)(2)(A). The creditor, despite the court's instructions to the creditor's counsel, failed to distinguish between the separate causes of action under § 523(a)(2)(A) and § 523(a)(2)(B). The court held that a review of the amended complaint revealed deficiencies that would make reconsideration futile. The creditor was afforded an opportunity to amend its complaint to state a cause of action under § 523(a)(2)(B). It chose not to do so, relying upon the provisions of "§ 523(a)(2)." The amended complaint failed to state a cause of action under § 523(a)(2)(A).

OUTCOME: The court denied the creditor's motion.

CORE TERMS: amend, deadline, reconsideration, adversary proceeding, cause of action, pretrial, misrepresentation, financial condition, monthly, financial statements, discovery, additionally, website, repay, good cause, justifiable, email, cash flow, false representations, scheduling, default, induce, empty, promissory note, fiduciary capacity, fiduciary relationship, discovered evidence, citations omitted, conversion, allowance

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN1 Fed. R. Bankr. P. 9024 makes Fed. R. Civ. P. 60 applicable to cases under the **Bankruptcy** Code. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > General Overview

HN2 See Fed. R. Civ. P. 60(b).

Civil Procedure > Pretrial Judgments > Default > Relief From Default

Civil Procedure > Judgments > Relief From Judgment > Extraordinary Circumstances

HN3 In the context of a motion to vacate a default judgment, Fed. R. Civ. P. 60(b)(6) is a catch-all provision and the decision to grant or deny such relief is inherently equitable in nature. It is the invariable rule that a litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise. Additionally, a variety of factors can help an inquiring court to strike the requisite balance. Such factors include the timing of the request for relief, the extent of any prejudice to the opposing party, the existence or non-existence of meritorious claims of defense, and the presence or absence of exceptional circumstances. This compendium is neither exclusive nor rigidly applied. Rather, the listed factors are incorporated into a holistic appraisal of the circumstances. In a particular case, that appraisal may-or may not-justify the extraordinary remedy of vacatur. Thus, the contours of a motion for reconsideration, determination of which is reviewed for abuse of discretion, is "peculiarly malleable" and hard-and-fast rules generally are not compatible with Rule 60(b)(6) determinations. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies

HN4 In **bankruptcy** cases, courts in the District of Massachusetts routinely hold that motions for reconsideration are not a means by which parties can rehash previously made arguments and that to succeed on motions to reconsider, the movant must show newly discovered evidence or a manifest error of fact or law. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Commencement

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

HN5 Fed. R. Civ. P. 15(a), which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7015, provides in part that a party may amend the party's pleading only by leave of court and leave shall be freely given when justice so requires. There is a "liberal" amendment policy applicable to Rule 15. However, although a district court's denial of a chance to amend may constitute an abuse of discretion if no sufficient justification appears, a district court need not grant every request to amend, come what may. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court

Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences

HN6 When a motion to amend is filed late in a case, Fed. R. Civ. P. 16(b) establishes a different standard from the normal "freely given" standard of Fed. R. Civ. P. 15(a). Rule 16(b) requires that the district court enter a scheduling order setting the deadlines for subsequent proceedings in the litigation, including amendment of the pleadings. Fed. R. Civ. P. 16(b)(1), (3)(A). One purpose of the rule is to assure that at some point the pleadings will be fixed. The deadlines established in the scheduling order may be extended on a showing of good cause. Case law clearly establishes that Rule 16(b)'s "good cause" standard, rather than Rule 15(a)'s "freely given" standard, governs motions to amend filed after scheduling order deadlines. More Like This Headnote

Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences

HN7 The Fed. R. Civ. P. 16(b) "good cause" inquiry must focus on prejudice to the defendant, the moving parties' diligence in satisfying the scheduling order's requirements, the promptness of the party in moving to amend when new information is gleaned during discovery, and delay in the proceedings. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

HN8 A **bankruptcy** court's power to manage a case does not depend upon the **Bankruptcy** Rules, but rather it arises from the court's inherent authority to issue pretrial case management orders and to enforce them by appropriate measures. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

U.S. **Bankruptcy** Court Motion(s)
U.S. **Bankruptcy** Court Pleading(s)

COUNSEL: **[*1]** For Grasiela C Franklin, aka Kitty Franklin, Debtor: Timothy M. Mauser, Law Office of Timothy Mauser, Esq., Boston, MA.

For Assistant U.S. Trustee: John Fitzgerald, Office of the US Trustee, J.W. McCormack Post Office & Courthouse, Boston, MA.

For Trustee: Joseph Braunstein, Riemer and Braunstein, LLP, Boston, MA.

JUDGES: Joan N. Feeney, United States **Bankruptcy** Judge.

OPINION BY: Joan N. Feeney

OPINION

MEMORANDUM

I. INTRODUCTION

The matter before the Court is "Plaintiff's Motion for Reconsideration or Rehearing Regarding Court's Order on Plaintiff's Motion for Leave to Amend the Adversary Proceeding Complaint" filed by RBSF, LLC (the "Plaintiff" or "RBSF"). Grasiela Franklin (the "Debtor" or the "Franklin") filed an Opposition to the Motion. The issue presented is whether the Franklin has satisfied the standard for relief from a judgment or order under Fed. R. Civ. P. 60, made applicable to this adversary proceeding by Fed. R. Bankr. P. 9024.

II. FACTS

A. Procedural Background

The Debtor filed a voluntary Chapter 7 petition on November 17, 2008. On Schedule F-Creditors Holding Unsecured Nonpriority Claims, the Debtor listed RBSF as the holder of a claim in the sum of $130,000 arising out of a judgment entered against **[*2]** her in January of 2008. She listed total unsecured debt in the amount of $434,769.71. On Schedule I-Current Income of Individual Debtor(s), the Debtor disclosed that she was self-employed in the field of "relocation management" with average monthly income of $2,600 and monthly net income of -$809.33. In her Statement of Financial Affairs, however, the Debtor disclosed that she had gross income of $41,791 in 2006 and had no income whatsoever in either 2007 or 2008. In the Statement of Financial Affairs, she also disclosed that the RBSF's judgment was obtained from the Suffolk Superior Court, Department of the Trial Court in Civil Action No. SUCV2008-04079. [1]

FOOTNOTES

1 The Plaintiff disclosed in its Motion for Reconsideration that the judgment was obtained by default.

On February 17, 2009, RBSF timely filed a "Complaint to Determine Dischargeability." Although the Chapter 7 Trustee had moved to extend the time period within which to object to the Debtor's discharge under 11 U.S.C. § 727(a), he never filed a a complaint. On July 14, 2009, the Chapter 7 Trustee filed a Report of No Distribution and, on July 27, 2009, the Debtor received a discharge. The adversary proceeding is the only matter preventing **[*3]** the closure of the Debtor's **bankruptcy** case.

B. RBSF, LLC's First Complaint

RBSF, in its original complaint, identified itself as a single-member California limited liability company with a principal place of business in San Francisco, California. It identified its Managing Member as Chong Kee Tan ("Tan"). It identified the Debtor as the owner of a business known as SeamlessTransition, whose website set forth its business as assisting executives and their families to relocate and to secure transitional housing in major metropolitan cities throughout the United States. [2] Additionally, it set forth the following allegations, which the Court, in large measure, has paraphrased. Notably, the Plaintiff referred to RBSF and Tan interchangeably.

FOOTNOTES

2 The Plaintiff did not elaborate on the nature of the Debtor's business and how exactly it operated. For example, it is unknown whether the Debtor maintained an inventory of properties for which leases had been executed or whether, once SeamlessTransition was approached by clients, the Debtor identified and leased specific properties for them.

The Plaintiff alleged that, in May of 2007, the Debtor approached Tan through an acquaintance named Greg Howell **[*4]** ("Howell"). The Debtor was seeking a $50,000 loan for a three month period and offered to pay an annualized interest rate of 60%. The Debtor prepared an interest only promissory note, which Howell and Tan amended. [3]

FOOTNOTES

3 The Plaintiff did not provide information about Howell or set forth his relationship to either the Debtor or the Plaintiff. The Plaintiff also did not allege that the note was executed. It did not provide the date the note was executed or explain why the Debtor would offer such an exorbitant and usurious rate of interest. Additionally, the Plaintiff did not identify the written materials, if any, submitted to RBSF by the Debtor to induce it to loan her $50,000, and it did not identify the time, place, and substance of any representations which she made to RBSF to induce it to make the loan. The Plaintiff did not attach a copy of the note or any loan documents or set forth the material terms of the loan. The Plaintiff did not indicate what Tan, on behalf of RBSF, relied upon in making the original $50,000 loan: statements made by the Debtor, written documents as to the Debtor's financial condition or a projection of the funds that the Debtor would generate from the loan **[*5]** proceeds, or some other materials or combination of materials. In a subsequent numbered paragraph, the Plaintiff stated that the Debtor provided Tan with financial statements but did not say when. It indicated that she provided him with "expense figures on or about June 1, 2008, which was after the execution of a second note.

On January 9, 2008, the Plaintiff alleged that Franklin emailed Tan seeking further funding to greatly expand her business and attaching a document purporting to show a positive cash flow for every month from April of 2007 through January of 2008. [4] It also alleged that Franklin telephoned Tan, seeking an additional $300,000 loan with a 23% interest rate. According to RBSF, Tan refused to make that loan, and Franklin, in response, represented that she had committed all her cash to business expansion and could not repay the original $50,000 loan.

FOOTNOTES

4 The Plaintiff did not attach the document as an exhibit to its Complaint.

The Plaintiff alleged that Franklin told Tan that the only way she could repay the original loan was to borrow an additional $100,000 and use $50,000 from the new loan proceeds to retire the first loan. Allegedly, she offered to increase the interest **[*6]** rate from 23% to 50% as an inducement.

On January 16, 2008, according to RBSF, Franklin executed and delivered to it a promissory note which she drafted in the principal amount of $100,000, and RBSF transferred $100,000 to Franklin's account. [5] The Plaintiff alleged that the note provided that Franklin initially was obligated to make monthly payments to RBSF in the form of pro rated interest payments. According to the Plaintiff, commencing on February 15, 2008, Franklin was obligated to make monthly interest-only payments for the first eight months in the amount of $4,166.66, for a total of $33,333.28. The note then provided that 50% of the principal balance was to be repaid over a period of six months commencing on October 15, 2008 in monthly installments of $9,598.91. The note also provided for a 30-day grace period, and contained provisions governing late charges, default, profit sharing, and legal expenses. [6]

FOOTNOTES

5 The Plaintiff did not allege that it relied on any representations or documents provided to it by the Debtor before making the first loan. Similarly, it did not allege that RBSF either reasonably or justifiably relied on statements of financial condition or representations **[*7]** made by the Debtor in executing the $100,000 note. It did not explain why it would be justifiable or reasonable to rely on the Debtor's words or documents to advance additional funds when the Debtor had defaulted with respect to the original loan.

6 The Plaintiff did not attach a copy of the note or explain why it advanced the Debtor $100,00. It did not indicate whether it relied upon statements relating to the Debtor's financial condition or her representations about her business and experience. It did not explain why its sole member, Tan, believed that she would be able to make the sizeable monthly payments called for under the note.

The Plaintiff alleged that Franklin failed to make the first payment due under the note. Tan, on behalf of RBSF, agreed to extend the due date for the first interest payment to March of 2008. The Plaintiff further alleged that Franklin tendered the March and April payments but failed to make the interest payment for May.

According to RBSF, Tan and the Debtor communicated by telephone about her failure to make payments. The Plaintiff alleged that Franklin claimed her revenue was increasing and that she was owed a large receivable. It asserted that Tan, on **[*8]** the one hand, repeatedly requested accurate expense figures from Franklin, while Franklin, on the other hand, represented that, if she did not receive $18,000 immediately, she would be forced to file a **bankruptcy** petition. The Plaintiff alleged that Franklin added that she did not have funds available in the approximate amount of $2,000 to pay her business insurance premium, and, according to RBSF, she falsely represented that she had made the May, 2008 payment.

The Plaintiff alleged that Tan and Franklin continued to communicate about the missed May payment. Thereafter, according to RBSF, Tan attempted to determine why Franklin was facing a cash shortfall, "particularly given that Franklin had previously delivered to RBSF financial statements reflecting a positive cash flow." [7] RBSF alleged that when Franklin finally delivered expense figures to Tan on or about June 1, 2008, Tan was able to perform his own calculations, discovering in the process that Franklin's "earlier representations about the health of her business, net of the $100,000 cash injection from Tan, [showed that] Franklin's cash flow was, in fact, almost-$77,000 [sic] in January 2008, the date of the inception of the **[*9]** Note." [8] The Plaintiff alleged that the Debtor's cash flow continued to be negative through May 2008, although Franklin provided Tan with projections showing a positive cash flow and profits for June, July and August 2008.

FOOTNOTES

7 The Plaintiff failed to identify when the Debtor provided it with financial statements, i.e., before the execution of the $50,000 note, after the execution of the $50,000 note and before the execution of the $100,000 note, or after the execution of the $100,00 note. Moreover, to the extent, she provided statements as to her financial condition or the financial condition of her business before the execution of the loans, the Plaintiff did not specifically set forth what specifically they contained.

8 The Plaintiff did not explicitly refer to the $100,000 note executed on January 16, 2008.

RBSF alleged that Tan insisted on speaking to the Debtor's accountant and that the Debtor represented that she would arrange for that to happen, but did not do so. In June of 2008, RBSF alleged that the Debtor suspended communications with Tan and failed to make the June payment.

RBSF asserted that on or about June 5, 2008, through Tan, it offered to convert the note to an interest-free **[*10]** loan and deem all interest payments previously received, including interest under the original note, as payments applied to principal, if Franklin resumed making the monthly payments of $4,166 in July and promised to repay the balance of $76,6678 in full in July of 2009. The Plaintiff alleged that its offer expired on June 10, 2008.

According to RBSF, Franklin requested a one-week extension of the conversion deadline, but she failed to contact Tan by June 17, 2008. The Plaintiff alleged that, in late June, however, Franklin contacted Tan seeking $15,000 for her business. When Tan, on behalf of RBSF, did not respond, Franklin asked him to restructure the note to one bearing interest at the rate of 23% payable in 36 equal installments of $3,817.82, commencing on July 15, 2008. She also asked for an additional $14,688. RBSF alleged that Franklin represented that she was making money again but needed a cash infusion to pay off "urgent debt." RBSF alleged that Franklin emailed Tan with a report listing monthly rental payments for the properties she purported to hold.

RBSF alleged that Franklin and Tan continued to communicate and that at one point Franklin claimed that she had $12,000 in **[*11]** cash in her account, although earlier on the same day she had stated that she had spent $11,742. The Plaintiff further alleged that Tan then determined that "Franklin had no intention of honoring her debt to RBSF." Nevertheless, RBSF alleged that it offered to restructure the note by advancing Franklin $5,000 in cash to cover her "urgent debt." Additionally, it offered to issue a new note in the amount of $105,000 with interest payable at the rate of 20% amortized over five years with monthly payments of $2,781.86 commencing on August 15, 2008. According to RBSF, Franklin rejected the offer because it did not provide for a $14,668 cash infusion.

The Plaintiff alleged that in a telephone conversation which took place on July 6, 2008, after the execution of the $100,000 note, Tan asked Franklin how much capital she had used to start her business. According to RBSF, Franklin's responses varied and her stories about loans from her sister were inconsistent.

The Plaintiff further alleged that Franklin asked Tan to lend her an additional $100,000 and initially "represented emphatically that revenue for SeamlessTransition was increasing even in 2008." At that point, Tan, on behalf of RBSF, insisted **[*12]** that it would not lend her additional monies without understanding her financial situation. The Plaintiff alleged that Franklin then provided Tan with a profit and loss statement for properties in Boston only, although her website listed rental properties in Atlanta, Chicago, Washington, D.C., New York and Florida. According to RBSF, Franklin refused to reveal an accurate statement of her assets or those of her company. RBSF asserted that Franklin's website contained a list of "many properties in Boston where the minimum stay is seven days or less," although Franklin acted as agent for potential renters of properties where the minimum stay was for 30 days or more. It added that there were more properties allowing for short-term stays listed on the website than disclosed on her financial statement.

According to RBSF, it delivered a notice of default to Franklin on July 10, 2008. The Plaintiff alleged that, in response, on July 11, 2008, Franklin emailed Tan as follows:

I am truly sorry that my frustration with my current situation created animus between us. I am sincerely appreciative of you [sic] support in the past and now.

However, I am only left with 2 choices.

Pay my short-term debts **[*13]** so I have the capacity to continuing [sic] earning and pay long-term debt, which requires an immediate cash infusion of $28,000; or, not pay debt current debt [sic] and default on both long and short-term owing, which includes your $100,000 investment.

Over the last 4-days, I have been looking for resolution to my short fall of $38,600 for July, while awaiting receipt of $15,873 in receivables (actual owing as of today). I have collected only $3, 300K [sic] since we last spoke.

With my attorney, Daniel Briansky's help, I have been working with, Data Management Real Estate Group and the best known real estate business consultant in the US, Jeff Kroger (Phoenix, AZ), whom I'm sure you know or have read his books to help me figure my way out of this cash flow crisis.

At the moment, I am overdrawn $2,8 [sic]

The Plaintiff alleged that Tan continued to communicate with Franklin and, in an email dated July 29, 2008, offered another amendment to the note, namely a new, interest free loan of $100,000 payable in the monthly amount of $1,666.67, beginning on September 1, 2008. According to RBSF, Franklin replied by email dated July 31, 2008, stating that without another $12,000 in the next 24 hours **[*14]** "SeamlessTransition is history." She added: "Mr. Tan, please, please, advance me this small sum to keep SeamlessTransition viable." The Plaintiff alleged that, on August 3, 2008, Franklin against requested additional funds and begged Tan for help.

According to the Plaintiff, it filed suit against Franklin approximately six weeks later in the Suffolk Superior Court, Department of the Trial Court, in which it asserted claims for breach of contract, breach of the covenant of good faith and fair dealing, misrepresentation/fraud, conversion, unjust enrichment, and violations of Mass. Gen. Laws ch. 93A. The Plaintiff alleged that the state court entered a preliminary injunction and granted a trustee process attachment freezing Franklin's account at Citizen's Bank "to the value of $125,000." According to RBSF, Citizen's Bank answered indicating that it was holding less than $50. Franklin filed a Suggestion of **Bankruptcy** on November 200, 2008.

Based upon the foregoing allegations, RBSF formulated one count under 11 U.S.C. § 523(a)(4) [sic]. It stated:

[T]he Debtor should not be granted a discharge [sic] in that she obtained money or property from Tan by false pretenses, false representations, **[*15]** or actual conversion and larceny, and/or because while acting in a fiduciary capacity, she committed larceny, fraud and conversion against Tan.

In addition, the Plaintiff sought damages for Tan, Relief from Stay to enable Tan" to pursue his remedies against Franklin in state court," and "a judgment for Tan [sic] and against the Franklin [sic] in an amount to be determined by the Court."

The Debtor answered the Complaint. She did not assert any affirmative defenses or counterclaims.

C. The Court's Pretrial Orders

On April 7, 2009, the Court issued a Pretrial Order, establishing 1) June 5, 2009 as the deadline for the submission of a certification that the parties held a Rule 26(f) conference, *see* Fed. R. Civ. P. 26(f), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7026; 2) July 19, 2009 as the deadline for the completion of discovery; and 3) August 12, 2009 as the deadline for the submission of a Joint Pretrial Memorandum. The parties submitted their Rule 26(f) certification, proposing a modification to the discovery deadline. In addition, they submitted a Joint Motion to Amend Scheduling Order. The Court granted the Motion, setting October 13, 2009 as the discovery **[*16]** deadline and November 13, 2009 as the deadline for the submission of the Joint Pretrial Memorandum. The parties moved numerous times to extend the applicable deadlines. [9] On February 27, 2010, the parties moved to extend the deadline to April 28, 2010, and the Court granted that motion.

FOOTNOTES

9 On October 15, 2009, the parties again sought modification of the discovery deadline. The Court granted that motion, establishing December 13, 2009 as the discovery deadline and January 13, 2010 as the deadline for filing the Joint Pretrial Memorandum. On January 12, 2010, the parties again moved to extend the deadline for submission of the Joint Pretrial Memorandum to February 28, 2010. The Court granted the Motion on the same day.

On April 28, 2010, the parties filed their Joint Pretrial Memorandum. The parties identified the issue as "[w]hether the defendant should be denied a discharge of the loaned funds due to fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny, pursuant to 11 U.S.C. § 523(a)(4)."

D. The Pretrial Conference

The Court conducted a pretrial conference on June 24, 2010 at which time it asked counsel for the Plaintiff to identify the specific facts in the **[*17]** Complaint which supported Count I pertaining to the Debtor's fraud or defalcation while acting in a fiduciary capacity. Counsel to the Plaintiff responded that "a series of promissory notes" resulted in a fiduciary relationship. The Court rejected the Plaintiff's assertion, noting that a debtor-creditor relationship such as that set forth in the Complaint does not give rise to a fiduciary relationship. [10] The Court ruled that "[t]he plaintiff fails to state a claim upon which relief can be granted." The Court directed the Plaintiff to file a Motion to Amend its Complaint by July 9, 2010.

FOOTNOTES

10 *See generally* Oak St. Funding LLC v. Brown (In re Brown), 399 B.R. 44, 46 (Bankr. N.D. Ind. 2008) (The "fiduciary capacity" required by § 523(a)(4) requires something more than a debtor-creditor relationship.").

E. Subsequent Procedural Events

On July 9, 2010, the Plaintiff filed a "Motion for Leave to Amend the Adversary Proceeding Complaint Objecting to Dischargeability by Restating the Subsection of Section 523 of the Code under which the Objection is Made." It moved to substitute the reference in the Complaint to § 523(a)(4) with a reference to § 523(a)(2) [sic], but **[*18]** it did not file an amended complaint.

The Plaintiff filed a Memorandum in support of its Motion for Leave to Amend. In its Memorandum, the Plaintiff cited Fed. R. Civ. P. 15, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7015, as well as cases, such as Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995), Palmacci v. Umpierrez, 121 F.3d 781, 786 n.3 (1st Cir. 1997), and Lentz v. Spadoni (In re Spadoni), 316 F.3d 56, 58 (1st Cir. 2003). The Plaintiff added that "a plain reading of the Complaint indicates that the plaintiff has been proceeding under section 523(a)(2) from the inception of the action. . . ." The Plaintiff further argued that its Complaint tracked the complaint it filed in state court and that the Debtor was on notice of its claims for fraudulent inducement.

In further support of its Motion for Leave to Amend, the Plaintiff referenced Franklin's deposition in which she admitted that her resume, which she had given to the Plaintiff at some unspecified time, was inaccurate as it misrepresented her role in the company as a corporate CEO and the company's growth. The Plaintiff also cited the Debtor's admission that she falsely claimed to hold a degree from Howard University **[*19]** when, in fact, she did not graduate from high school. Additionally, the Plaintiff noted that documentation provided by Franklin obscured the distinction between revenue and profit, contained erroneous information about the years of operation of SeamlessTransition and her real estate experience, and income and liabilities. The Plaintiff attached a copy of an email, dated January 9, 2008, just prior to the execution of the $100,000 note on January 16, 2008, sent by the Debtor to Tan in which the Debtor represented that "[s]ince May 2007, we have been able to acquire 23 rental properties generating approximately $99,800 in new revenue over the last 7-months." The Plaintiff concluded: "no matter how innocent she might have though her motives were, [she] induced the plaintiff to lend her money (that she knew or should have known she would not be able to repay) based on a series of material documentary and verbal misrepresentations on which she intended the plaintiff to rely, and on which, in fact, the plaintiff did rely."

The Debtor opposed the Plaintiff's Motion to Amend, citing Fed. R. Bankr. P. 7016. She observed that two important case deadlines had passed, namely the discovery deadline **[*20]** of October 13, 2009, as well as the June 24, 2010 deadline for submitting pre-trial motions [sic]. [11] The Debtor cited Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 327 (1st Cir. 2008), for the proposition that the purpose of Rule 16 is "to assure that at some point. . . the pleadings will be fixed" and that the Plaintiff failed to satisfy the applicable "good cause" standard.

FOOTNOTES

11 The discovery deadline was extended until December 13, 2009 and the deadline for dispositive motions was April 21, 2010. The parties' Motions to Extend reveal that they engaged in discovery through March of 2010.

The Court conducted a hearing on the Plaintiff's Motion for Leave to Amend and the Debtor's Opposition on October 19, 2010. The Court denied the Motion to Amend without prejudice as to the filing a further motion to amend. At the October 19, 2010 hearing, the Court inquired of counsel to the Plaintiff whether the Complaint was based upon false statements respecting the Debtor's financial condition or false representations. Counsel to the Plaintiff answered: "I think it's both. . . ." The Court explained to counsel to the Plaintiff that a distinction exists between § 523(a)(2)(A) and **[*21]** § 532(a)(2)(B). The Court directed the Plaintiff to file another motion to amend and a proposed amended complaint by October 26, 2010.

On October 26, 2010, the Plaintiff filed an "Amended Motion for Leave to Amend the Adversary Proceeding Complaint Objecting to Dischargeability by Restating the Subsection of Section 523 of the Code under Which the Objection is Made," together with a Memorandum and an Amended Complaint. The Plaintiff sought to substitute the original reference to § 523(a)(4) with a reference to § 523(a)(2)(A). The Debtor opposed the Amended Motion. The Court heard the Amended Motion and the Opposition on February 3, 2011 and denied the Motion. At the hearing, the Court inquired whether the misrepresentations allegedly made by the Debtor were as to her financial condition. Counsel to the Plaintiff answered that the misrepresentations were as to the Debtor's financial condition and that there were writings. He further indicated that the documents, which he did not have with him, consisted of financial statements and emails. When asked why he did not amend the Plaintiff's Complaint to plead a cause of action under § 523(a)(2)(B), he responded that "the vast majority of **[*22]** the representations were verbal. . . and they — the writings were post-loan." At the conclusion of the hearing, the Court denied the Amended Motion for Leave to Amend. The reasons for that decision are discussed below. The Plaintiff now moves for reconsideration.

F. The Amended Complaint

A comparison of the original Complaint and the Amended Complaint is crucial to a determination of the Motion for Reconsideration. In the Amended Complaint, RBSF added a number of allegations, including an allegation that Tan is a recent immigrant from Singapore and an inexperienced lender. The Plaintiff additionally alleged that Tan attended a seminar promising to match potential investors with business opportunities and that Franklin had been introduced to Tan as the personification of just such an opportunity.

RBSF added allegations that on or around January 9, 2008, in connection with the Debtor's request for additional funds to expand her business, "Franklin prepared financial statements, including a 'prospectus' that materially misrepresented Seamless Transitions [sic] actual financial situation and Franklin's background and transmitted them to Tan." [12] RBSF alleged that it executed the $100,000 **[*23]** note "in reliance on Franklin's financial statements, her representations about the growth of her business, and her Website" before transferring $100,000 to her account. [13]

FOOTNOTES

12 RBSF did not amend the complaint to set forth when the original note was executed, but the Court notes that the January 9, 2008 email preceded the execution of the $100,000 note by one week.

13 RBSF did not aver whether the reliance was justifiable or reasonable. The Court notes that the new loan was made after the Debtor had informed RBSF that she could not repay the original $50,000 loan.

Except for those additional allegations, the Plaintiff did not amend the "Statement of Facts" set forth in the original Complaint. The Plaintiff, however, amended Count One to set forth a cause of action under 11 U.S.C. § 523(a)(2)(A), stating that

[T]he Debtor *should not be granted a discharge* [sic] in that she obtained from RBSF money, and and [sic] an extension, renewal, or refinancing of credit, by — (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition on which representation RBSF, whom the debtor is liable for such money, property, services, **[*24]** or credit justifiably relied.

(emphasis supplied). In its Prayers for Relief, the Plaintiff sought a determination not only that the Debtor is not entitled to a discharge in **bankruptcy,** but relief from the automatic stay and "judgment for RBSF and against the Franklin."

G. The Motion for Reconsideration and the Opposition

The Plaintiff moved for reconsideration of the Court's Order of February 3, 2011 under "Rule 8015," which is inapplicable as it pertains to motions addressed to the district court or the **bankruptcy** appellate panel for rehearing. The Plaintiff stated that "pleading Section 523(a)(2)(A) was appropriate under the circumstances, and, in the alternative, it should be granted leave to amend to plead in the alternative Section 523(a)(2)(B)." The Plaintiff argued that RBSF has a substantial claim; that Fed. R. Bankr. P. 7015 permits amendments "freely when justice so requires;" and that dismissal at this stage on the existing record could promote form over substance which would be contrary to the policy of disposing of cases on the merits.

The Plaintiff attached to its Motion for Reconsideration portions of the Debtor's deposition, which was taken on March 24, 2010, a copy of **[*25]** the Debtor's curriculum vitae, which reflected, falsely, that the Debtor is the founder and CEO of a corporate short-term housing and relocation management start-up currently operating in five (5) states. . ." and has a B.A. from Howard University.

In her Opposition, the Debtor argued that the Plaintiff's Motion for Reconsideration should be denied because it is based upon arguments that the Plaintiff previously made; the evidence was available when the underlying motion was decided but not brought to the Court's attention; and that the Plaintiff previously could have made its present arguments.

III. ANALYSIS

A. Applicable Law

1. Rule 9024

HN1 Rule 9024 of the Federal Rules of **Bankruptcy** Procedure make Fed. R. Civ. P. 60 applicable to cases under the **Bankruptcy** Code, subject to certain exceptions not relevant to the instant adversary proceeding. Rule 60(b) provides in pertinent part:

HN2 On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence which by due diligence could not have been discovered **[*26]** in time to move for a new trial under Rule 59(b);
(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Rule 60(b) is applicable to the instant matter. According to the United States Court of Appeals for the First Circuit, *HN3* in the context of a motion to vacate a default judgment, Rule 60(b)(6), "is a catch-all provision" and "[t]he decision to grant or deny such relief is inherently equitable in nature." Ungar v. The Palestine Liberation Organization, 599 F.3d 79, 83 (1st Cir. 2010) (citing United States v. One Star Class Sloop Sailboat, 458 F.3d 16, 25-26 & n. 10 (1st Cir. 2006); and Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co., Inc., 953 F.2d 17, 19-20 (1st Cir. 1992)). According to the First Circuit, however, "it is the invariable rule, and thus, the **[*27]** rule in this circuit, that a litigant, as a precondition to relief under Rule 60(b), must give the trial court reason to believe that vacating the judgment will not be an empty exercise." Teamsters, 953 F.2d at 20. Additionally,

A variety of factors can help an inquiring court to strike the requisite balance. Such factors include the timing of the request for relief, the extent of any prejudice to the opposing party, the existence or non-existence of meritorious claims of defense, and the presence or absence of exceptional circumstances. This compendium is neither exclusive nor rigidly applied. Id. Rather, the listed factors are incorporated into a holistic appraisal of the circumstances. In a particular case, that appraisal may-or may not-justify the extraordinary remedy of vacatur.

Ungar, 599 F.3d at 83-84 (footnote omitted, citations omitted). Thus, the contours of a motion for reconsideration, determination of which is reviewed for abuse of discretion, is "peculiarly malleable" and "hard-and-fast rules generally are not compatible with Rule 60(b)(6) determinations." Id. at 84 (citations omitted).

HN4 In **bankruptcy** cases, courts in this district routinely hold that motions for reconsideration **[*28]** are not "a means by which parties can rehash previously made arguments" and that to succeed on motions to reconsider, the movant must "show newly discovered evidence or a manifest error of fact or law." In re Wedgestone Financial, 142 B.R. 7, 8 (Bankr. D. Mass. 1992) (citations omitted).

2. Rule 7015

HN5 Rule 15(a) of the Federal Rules of Civil Procedure, which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7015, provides in relevant part that "a party may amend the party's pleading only by leave of court . . and leave shall be freely given when justice so requires." According to the United States Court of Appeals for the First Circuit, there is a "liberal" amendment policy applicable to Rule 15." Epstein v. C.R. Bard, Inc., 460 F.3d 183, 190 (1st Cir. 2006) (citing O'Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 154 (1st Cir. 2004)). "However, although 'a district court's denial of a chance to amend may constitute an abuse of discretion if no sufficient justification appears . . . a district court need not grant every request to amend, come what may.'" Epstein, 460 B.R. at 191 (citing Correa-Martínez v. Arrillaga-Beléndez, 903 F.2d 49, 59 (1st Cir. 1990), *overruled* **[*29]** *on other grounds by* Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 66 (1st Cir. 2004). The First Circuit also has observed that *HN6* when a motion to amend is filed late in a case, Rule 16(b) establishes a different standard from the normal "freely given" standard. In Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc., 524 F.3d 315 (1st Cir. 2008). In Trans-Spec, the First Circuit stated:

Rule 16(b) requires that the district court enter a scheduling order setting the deadlines for subsequent proceedings in the litigation, including amendment of the pleadings. Fed. R. Civ. P. 16(b)(1), (3)(A). One purpose of the rule is "to assure 'that at some point . . . the pleadings will be fixed.'" O'Connell [v. Hyatt Hotels of P.R.], 357 F.3d [152,]at 154 [(1st Cir. 2004)](quoting Adv. Comm. Notes to 1983 Amends. to Fed. R. Civ. P. 16(b)). The deadlines established in the scheduling order may be extended on a showing of good cause. Id. Our case law clearly establishes that Rule 16(b)'s "good cause" standard, rather than Rule 15(a)'s "freely give[n]" standard, governs motions to amend filed after scheduling order deadlines. Id. at 154-55.

Trans-Spec, 524 F.3d at 327. In Trans-Spec, the **[*30]** First Circuit affirmed a decision of the district court denying a motion to amend in part on the grounds that "[t]he allegations that Trans-Spec seeks, to add to its amended complaint are based on information that Trans-Spec had or should have had from the outset of the case." Id.

HN7 The "good cause" inquiry must focus on prejudice to the defendant, the moving parties' diligence in satisfying the scheduling order's requirements, the promptness of the party in moving to amend when new information is gleaned during discovery, and delay in the proceedings. *See* Burns v. Hale and Dorr LLP, 242 F.R.D. 170 (D. Mass. 2007); Rich & Rich P'ship v. Poetman Records USA, Inc., 2009 U.S. Dist. LEXIS 117246, 2009 WL 5064454 (E.D. Ky. Dec. 15, 2009). *Cf.* Resnick v. Copyright Clearance Center, Inc., 422 F.Supp.2d 252, 256 (D. Mass. 2006) ("Rule 15(a) amendments are typically allowed in the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, [or] futility of the amendment.'").

B. Analysis

In its Motion for Reconsideration, the Plaintiff failed to reference Fed. R. Bankr. P. 9024 **[*31]** or Fed. R. Civ. P. 60(b). It did not set forth any *newly discovered* evidence or refer to any manifest error of law or fact. Accordingly, on those grounds alone, the Court would have cause to deny its Motion for Reconsideration.

The Plaintiff's original Complaint purported to set forth a cause of action under 11 U.S.C. § 523(a)(4), although it was devoid of any allegations which would have permitted this Court to have found a fiduciary relationship, larceny, or embezzlement. At the hearing on June 24, 2010, the Court informed counsel to the Plaintiff, who argued that a series of promissory notes gave rise to a fiduciary relationship, that he conceivably was attempting to assert causes of action under § 523(a)(2)(B) or § 523(a)(2)(A). The Plaintiff, in response, attempted to cure the deficiencies of the original Complaint through the expedient of a simple substitution — replace the reference to § 523(a)(4) with a reference to § 523(a)(2). That attempt failed on October 19, 2010. Although counsel to the Plaintiff argued that he was asserting causes of action under both § 523(a)(2)(A) and § 523(a)(2)(B), the original Complaint failed to adequately differentiate between allegations which **[*32]** would satisfy the elements of a cause of action under either § 523(a)(2)(A) or § 523(a)(2)(B).

Following the October 19th hearing, the Plaintiff filed its Amended Motion to Amend and its Amended Complaint. The Amended Complaint failed to cure the deficiencies associated with the original Complaint, although it contained allegations of reliance on "Franklin's financial statements, her representations about the growth of her business, and her Website" with respect to the January 16, 2008 loan in the amount of $100,000, and it specifically referenced a cause of action under § 523(a)(2)(A) and, in Count I itself, justifiable reliance.

In the Amended Complaint, the Plaintiff set forth no allegations in its "Statement of Facts" as to the level of reliance — justifiable or reasonable — or how reliance could have been either actual, justifiable or reasonable in view of the allegation in paragraph 13 of the Amended Complaint (as well as in paragraph 13 of the original Complaint) that "Franklin . . . represented that she had committed all her cash to business expansion and could not repay the original $50,000 loan." Moreover, the Plaintiff repeatedly confused exceptions to discharge under § 523(a) **[*33]** with grounds for the denial of the discharge under 11 U.S.C. § 727(a).

Despite those deficiencies and the requirements of Fed. R. Bankr. P. 7009, which makes the requirement of pleading fraud with particularity under Fed. R. Civ. P. 9(b) applicable to this adversary proceedings, the Court is mindful that the Plaintiff is not required to prove its case at this juncture. Nevertheless, the Amended Complaint is devoid of any blue print for establishing a claim under § 523(a)(2)(A) due to the failure to plead the requisite elements of a cause of action under that subsection of the **Bankruptcy** Code, *see* Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). [14] The Plaintiff, despite the Court's case management instructions to Plaintiff's counsel at hearings on June 24, 2010 and October 19, 2010 failed to distinguish between the separate causes of action under § 523(a)(2)(A) and § 523(a)(2)(B).

FOOTNOTES

14 According to the First Circuit,

Under the traditional common law rule, a defendant will be liable if (1) he makes a false representation, (2) he does so with fraudulent intent, i.e., with "scienter," (3) he intends to induce the plaintiff to rely on the misrepresentation, and (4) the misrepresentation **[*34]** does induce reliance, (5) which is justifiable, and (6) which causes damage (pecuniary loss).

Id. (citations omitted).

In view of those problems, the Court must decide whether the Plaintiff satisfied its burden under Fed. R. Civ. P. 60(b), and, assuming that it did, whether the Plaintiff established good cause for the allowance of its "Amended Motion for Leave to Amend the Adversary Proceeding Complaint Objecting to Dischargeability by Restating the Subsection of Section 523 of the Code und which the Objection Is Made," thereby permitting RBSF to proceed with its Amended Complaint under 11 U.S.C. § 523(a)(2)(A).

For purposes of reconsideration, the Court finds that it must balance the equitable nature of the relief requested with a determination of whether vacating the order denying the Amended Motion to Amend would not be an empty exercise. In this regard, the Plaintiff's Amended Complaint is critical. To repeat, the Plaintiff pled that it relied upon financial statements, representations about the growth of the Debtor's business and the Debtor's Website, without specifying the contents of that Website. It did not set forth the specific representations which were made by the Debtor to **[*35]** Tan or when they were made to induce RBSF to make both the original and subsequent loans. *See* Palmacci v. Umpierrez, 121 F.3d. at 786. [15] Additionally, as noted above, the Plaintiff did not set forth any allegations that reliance was justified in making the $100,000 in view of the Debtor's representations as to her inability to repay the initial loan. There were no allegations as to the Debtor's representations, as opposed to statements of financial condition which she provided, that led the Plaintiff to rely upon the representations to its detriment.

FOOTNOTES

15 In Palmacci, the First Circuit observed:

[T]he concept of misrepresentation includes a false representation as to one's intention, such as a promise to act. "A representation of the maker's own intention to do . . . a particular thing is fraudulent if he does not have that intention" at the time he makes the representation. Restatement (Second) of Torts § 530(1); *see* Anastas v. American Sav. Bank (In re Anastas), 94 F.3d 1280, 1285 (9th Cir.1996). "The state of a man's mind is as much a fact as the state of his digestion." Restatement (Second) of Torts § 530 cmt. a. Likewise, "a promise made without the intent to perform it is held to **[*36]** be a sufficient basis for an action of deceit." W. Page Keeton, et al., Prosser and Keeton on the Law of Torts *787 § 109, at 763 (5th ed.1984) (footnotes omitted); see Restatement (Second) of Torts § 530(1) cmt. c. On the other hand, if, at the time he makes a promise, the maker honestly intends to keep it but later changes his mind or fails or refuses to carry his expressed intention into effect, there has been no misrepresentation. Restatement (Second) of Torts at § 530 cmts. b, d. This is true "even if there is no excuse for the subsequent breach. A debtor's statement of future intention is not necessarily a misrepresentation if intervening events cause the debtor's future actions to deviate from previously expressed intentions." 4 Collier on **Bankruptcy** ¶ 523.08[1][d], at 523-43.

Applying the factors outlined by the First Circuit in Ungar v. The Palestine Liberation Organization, 599 F.3d at 83-84, the Court observes that the filing of the Motion for Reconsideration was timely. Although the Debtor might be prejudiced by the need to defend herself in the litigation, the Court could limit prejudice to her by an award of attorney's fees incurred in responding to the Plaintiff's two **[*37]** motions to amend. Additionally, the Debtor did not file any dispositive motions and essentially took a passive role relative to the issues raised by the Court, which she could have raised at the outset of the adversary proceeding by filing a motion to dismiss. The issue of whether the Plaintiff is entitled to proceed with its Amended Complaint turns upon whether vacating the order denying the Amended Motion for Leave to Amend would be a futile and empty exercise as the Court has no evidence of whether there exists a meritorious defense and there are no exceptional circumstances tipping the scales in favor of the Plaintiff.

The Court finds that a review of the Amended Complaint reveals deficiencies that would make reconsideration futile. Permission to further amend the Complaint to add a count under 11 U.S.C. § 523(a)(2)(B) is unwarranted in view of the ample opportunities granted to the Plaintiff to file a complaint stating a plausible claim for relief. The Amended Complaint, as it stands, would be subject to dismissal for failure to state sufficient facts that, if accepted as true, would "state a claim for relief that is plausible on its face." *See* Cunningham v. Nat'l City Bank, 588 F.3d 49, 52 (1st Cir. 2009) **[*38]** (citing Ashcroft v. Iqbal, U.S. , 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009), and quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Accordingly, the Court finds that reconsideration is unwarranted.

In summary, the Plaintiff failed to set forth newly discovered evidence, and it failed to demonstrate a manifest error of law or fact. Although the Plaintiff's Memorandum contained citations to applicable law, including citations to Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995), and Palmacci v. Umpierrez, 121 F.3d 781 (1st Cir. 1997), Plaintiff's counsel demonstrated profound unfamiliarity with provisions of the **Bankruptcy** Code and **Bankruptcy** Rules. The time to read the **Bankruptcy** Code and the applicable rules and decisions was before the commencement of the adversary proceeding, not after the deadlines set forth in the Court's pretrial order, as amended, had passed and the Court ordered an amendment to the Complaint. The inability of the Plaintiff to set forth in a cogent and chronological manner the facts required to state a cause of action under either § 523(a)(2)(A) or § 523(a)(2)(B) was not remedied by the Amended Complaint. The Plaintiff failed to set forth in its Amended Complaint when **[*39]** and what material misrepresentations the Debtor made and the circumstances which would have permitted it to rely upon those representations to make a $100,000 loan after learning that the Debtor could not repay the existing $50,000 loan. Accordingly, reconsideration would be "an empty exercise" under Rule 60(b). Teamsters, 953 F.2d at 20.

Assuming, arguendo, that the allowance of the Amended Motion to Amend were warranted and this Court were to reconsider its order of February 3, 2011, the Court would be required to determine whether the Plaintiff established good cause for allowance of the Plaintiff's second motion to amend. The Plaintiff failed in that burden.

The Plaintiff did not allude to unknown facts which prevented it from amending its Complaint before the expiration of the deadline for filing dispositive motions. Although it referenced the Debtor's deposition and other written materials, including emails, those materials were available to the Plaintiff in March of 2010, before the pretrial conference was even scheduled. There has been substantial delay in this case. Had the Plaintiff moved to amend its Complaint in July of 2011 and filed an Amended Complaint containing the requisite **[*40]** elements of causes of action under § 523(a)(2)(A) or § 523(a)(2)(B), the Court would be conducting a trial at this time, rather than addressing a Motion for Reconsideration "pursuant to Rule 8015." In view of the delay and the obvious prejudice to the Debtor due to that delay, the Court finds that the Plaintiff has failed to establish good cause for the allowance of the Plaintiff's Amended Motion to Amend. *See* Burns v. Hale and Dorr LLP, 242 F.R.D. at 174; Rich & Rich P'ship v. Poetman Records USA, Inc., 2009 U.S. Dist. LEXIS 117246, 2009 WL 5064454 at *4-5.

To grant either the Motion for Reconsideration or the Amended Motion to Amend at this juncture would undermine the integrity of the Court's pretrial order and reward the shoddy pleading of Plaintiff's counsel, who with guidance from the Court was afforded multiple opportunities to correct the deficiencies in the original Complaint. As the **Bankruptcy** Appellate Panel for the Tenth Circuit has observed: HN8 "A **bankruptcy** court's power to manage a case does not depend upon the **Bankruptcy** Rules, but rather it arises from the court's 'inherent authority to issue pretrial case management orders and to enforce them by appropriate measures.'" Rafter Seven Ranches L.P. v. WNL Investments L.L.C. (In re Rafter Seven Ranches L.P.), 414 B.R. 722, 739 (B.A.P. 10th Cir. 2009) **[*41]** (citing Adams v. Dorsie's Steak House, Inc. (In re Dorsie's Steak House, Inc.), 130 B.R. 363, 365 (D. Mass. 1991)).

IV. CONCLUSION

In view of the foregoing, the Court shall enter an order denying the Plaintiff's Motion for Reconsideration or hearing Regarding Court's Order on Plaintiff's Motion for Leave to Amend the Adversary Complaint. The Plaintiff was afforded an opportunity to amend its Complaint in June of 2010 to state a cause of action under § 523(a)(2)(B). It chose not to do so, relying upon the provisions of "§ 523(a)(2)." The Amended Complaint fails to state a cause of action under § 523(a)(2)(A). Accordingly, allowing the underlying Amended Motion for Leave to Amend would be an empty exercise.

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States **Bankruptcy** Judge

Dated: March 15, 2011

In re BRIAN SULLIVAN, Debtor; STEPHANIE R. LUSSIER, Plaintiff v. BRIAN SULLIVAN, Defendant

Chapter 7, Case No. 08-18652-JNF, Adv. P. No. 09-1211

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 Bankr. LEXIS 871

March 7, 2011, Decided
March 7, 2011, Filed, Entered

PRIOR HISTORY: Lussier v. Sullivan (In re Sullivan), 2011 Bankr. LEXIS 483 (Bankr. D. Mass., Feb. 14, 2011)

CORE TERMS: American Rule, attorney's fees, consumer debts, legal research, award of fees, dischargeability, paralegal, folders

COUNSEL: **[*1]** For Brian Sullivan, Debtor: Christopher J. Fein, Fein Law Office, Braintree, MA.

For Joseph Braunstein, Trustee: Joseph Braunstein, Kristin M. McDonough, Riemer & Braunstein, LLP, Boston, MA.

JUDGES: Joan N. Feeney, United States **Bankruptcy** Judge.

OPINION BY: Joan N. Feeney

OPINION

MEMORANDUM

Two matters are before the Court: 1) Plaintiff's Request for Fees and Costs, pursuant to which Stephanie Lussier (the "Plaintiff") seeks fees and costs in the total sum of $8,302.50;[1] and 2) the Defendant's Motion to Stay Pending Appeal, pursuant to which the Brian Sullivan, (the "Debtor" or the "Defendant") seeks a stay of further proceedings pending appeal,[2] or, in the alternative, a denial of the Plaintiff's "request for sanctions," such as the cost of file folders and paralegal services. Neither party proffered legal support for their respective positions, and the Plaintiff did not substantiate her Request for Fees and Costs with receipts or other evidence of payment.

FOOTNOTES

1 The Plaintiff seeks the following:

Court fees	$250.00
Legal Research (115 hours x $40)	$4,600.00
Para Legal [sic] Services (25 hours x $25.00)	$625.00
Pacer services	$150.00
Document typing services	$750.00
341 transcript	$168.00
Auto appraisal service	$250.00
Cost for subpoena documents	$150.00
Postage and mailing materials	$300.00
Loss of income	$750.00
Misc. supplies (folders files)	$174.29
Travel	$134.76

2 The **[*2]** Debtor referenced obtaining a supersedeas bond pursuant to Fed. R. Civ. P. 62(d), but correctly observed the difficulty with the applicability of the rule in the absence of a money judgment. He requested the Court to treat the Motion for Stay Pending Appeal

as an objection to the Plaintiff's Request for Fees and Costs.

In Bridgewater Credit Union v. McCarthy (In re McCarthy), 243 B.R. 203 (B.A.P. 1st Cir. 2000), the United States **Bankruptcy** Appellate Panel for the First Circuit observed:
The general rule in federal litigation is the "American Rule," under which the prevailing litigant is not entitled to collect his reasonable attorney's fees from his opponent unless authorized by statute or provided for by contract. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); In re Sheridan, 105 F.3d 1164, 1166 (7th Cir.1997) (rehearing en banc denied). The courts do not have "roving authority" to award counsel fees whenever they might consider it warranted. Roosevelt Campobello Int'l. Park Comm'n v. EPA, 711 F.2d 431, 435 (1st Cir. 1983) (quoting Alyeska Pipeline Serv. Co., 421 U.S. at 260, 95 S.Ct. 1612).

The American Rule reigns in the **[*3] bankruptcy** forum. *See* In re Sheridan, 105 F.3d at 1166; *see also* In re DN Assocs., 165 B.R. 344, 348-49 (Bankr. D. Me.1994) (applying American Rule in **bankruptcy** setting). In the context of dischargeability disputes concerning consumer debts, however, § 523(d) intervenes, providing that:
If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

§ 523(d).

In re McCarthy, 243 B.R. at 207. Although the Panel in McCarthy referred only to attorney's fees, in decisions such as In re Sheridan courts have considered requests for attorneys' fees and costs associated with suit. The Plaintiff's assertion of entitlement to compensation for paralegal services and legal research is sufficiently analogous to attorney's fees for this Court to apply the American Rule.

The Plaintiff succeeded in obtaining **[*4]** a judgment denying the Debtor his discharge under 11 U.S.C. § 727(a)(4)(A). She is not, however, the holder of a consumer debt and, thus, does not qualify for an award of fees and costs under 11 U.S.C. § 523(d). Moreover, the Plaintiff did not assert that she is entitled to an award of fees and costs either contractually or pursuant to any statute. Accordingly, in accordance with the American Rule, the Court denies her Request for Fees and Costs; sustains the Debtor's objection to her Request contained in his Motion to Stay; and grants the Debtor's Motion to Stay Pending Appeal to the extent that the Motion to Stay is, in effect, and objection to the Plaintiff's Request.

Dated: March 7, 2011

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

In re: LAWRENCE E. SARNER, Debtor. LAWRENCE E. SARNER, Appellant, v. DEAN COOPERATIVE BANK, Appellees.

Civil Action No. 10-11238-JLT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 32063

March 28, 2011, Decided
March 28, 2011, Filed

PRIOR HISTORY: [*1]
Bankruptcy Appeal.

CASE SUMMARY

OVERVIEW: The issue before the court was whether the **bankruptcy** court erred in denying appellant's motion for reconsideration after granting appellee relief from the automatic stay that arose pursuant to 11 U.S.C.S. § 362 when appellant filed for **bankruptcy.** The purpose of the stay was to prevent the foreclosure and sale of appellant's property. The property on which appellee had held a mortgage was foreclosed upon and sold to a third party. Because a court should not disturb valid third-party sales, the court could fashion no remedy. The appeal was therefore moot.

OUTCOME: The court denied appellant's renewed emergency motion for stay pending appeal and allowed appellee's motion to dismiss the appeal.

CORE TERMS: moot, emergency, stay pending appeal, foreclosure, reconsideration, automatic stay, foreclosed, affirmation, mortgage, mootness, disturb, notice, interlocutory, duplication, designated, assigned

LEXISNEXIS® HEADNOTES

Hide

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN1 See Fed. R. Evid. 201(b).

Evidence > Judicial Notice > General Overview

HN2 See Fed. R. Evid. 201(f).

Civil Procedure > Justiciability > Mootness > General Overview

HN3 One justification for a finding of mootness is the court's jurisdictional bar from making decisions when it is unable to provide a remedy. More Like This Headnote

COUNSEL: For Lawrence E. Sarner, Appellant: David G. Baker, LEAD ATTORNEY, Boston, MA.

For Dean Cooperative Bank, Appellee: Mark W. Corner, LEAD ATTORNEY, Riemer & Braunstein, LLP, Boston, MA; John P. Vignone, Vignone & Vignone, LLP, Wrentham, MA.

Carolyn Bankowski-13, Trustee, Pro se, Boston, MA.

JUDGES: Joseph L. Tauro, United States District Judge.

OPINION BY: Joseph L. Tauro

OPINION

MEMORANDUM

TAURO, J.

I. Introduction

Appellant Lawrence Sarner appeals the **bankruptcy** court's denial of his motion to reconsider its decision to grant relief from an automatic stay. Presently at issue are Appellant's Renewed Emergency Motion for Stay Pending Appeal [#11] and Appellee's Motion to Dismiss Appeal [#16]. For the reasons set forth below, Appellant's Renewed Emergency Motion for Stay Pending Appeal [#11] is DENIED AS MOOT and Appellee's Motion to Dismiss Appeal [#16] is ALLOWED.

II. Background

Appellant filed for **bankruptcy** on November 24, 2009, which triggered an automatic stay on the sale of Appellant's assets pursuant to 11 U.S.C. § 362. [1]

Appellee holds a first mortgage on Appellant's house ("the property"). [2] On February 19, 2010, Appellee filed a motion seeking relief from the automatic stay, which was preventing **[*2]** a foreclosure sale of the property. [3] After a hearing, the **bankruptcy** court granted the motion and Appellant moved for reconsideration. [4] The **bankruptcy** court denied Appellant's motion for reconsideration, and Appellant appealed to the U.S. District Court for the District of Massachusetts. [5] In the interim, the property was foreclosed upon and sold to a third party. [6]

FOOTNOTES

1 This court takes judicial notice of the procedural history of this case, including its previous incarnations in front of the **bankruptcy** court, Judge Zobel, and the First Circuit. See *HN1* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); id. at *HN2* 201(f) ("Judicial notice may be taken at any stage of the proceeding.").

2 Renewed Emergency Mot. Stay Pending Appeal ¶ 2 [#11].

3 See supra note 1.

4 See id.

5 Id.

6 Taking the facts in the light most favorable to Appellant, the house has been foreclosed upon. See, e.g., Resp. Mot. Dismiss ¶ 10 [#17] (referring to "the resulting foreclosure" of the property).

On May 24, 2010, the appeal was assigned to Judge Zobel **[*3]** and designated Case Number 10-10872. [7] Appellant filed a motion for a stay pending appeal in that court, which Judge Zobel denied. [8] Appellant filed an interlocutory appeal of this denial, and on July 1, 2010, the First Circuit affirmed Judge Zobel's denial. [9] On October 1, 2010, Judge Zobel affirmed the order of the **bankruptcy** court. [10] Appellant appealed that judgment, and on November 29, 2010, the First Circuit again affirmed. [11]

FOOTNOTES

7 See supra note 1.

8 See id.

9 Id.

10 Id.

11 Id.

On July 12, 2010, this court was assigned a second appeal of the same issue by the same Appellant. [12] This case was designated Case Number 10-11238.

FOOTNOTES

12 This court can conceive of two ways this duplication may have occurred. First, it is possible that the interlocutory affirmation of the First Circuit was mistakenly treated as a remand. In that case, this district's procedure of assigning a remand to a judge other than the original trial judge produced a second case, while the first remained open. Second, it is possible that an error occurred in the CM/ECF computer system that controls this district's docket. The case before Judge Zobel listed Appellant as "Lawrence Sarner," while the case before this court lists Appellant **[*4]** as "Lawrence E. Sarner." The addition of the middle initial may have allowed the duplication of the appeal within the docketing system.

III. Discussion

Although admittedly "confused by the procedural anomaly" [13] of this duplicate appeal, Appellant continues to press his case. In his Renewed Emergency Motion for Stay Pending Appeal, Appellant claims that Judge Zobel's decision to deny a stay is not binding because that court did not have "the complete record." [14] Appellant presents arguments, similar to those in his Brief for Appellant [#8], for the stay.

FOOTNOTES

13 Resp. Mot. Dismiss ¶ 9 [#17].

14 Renewed Emergency Mot. Stay Pending Appeal ¶ 14 [#11]. Appellant does not specify what information was lacking from the record, why it was not provided to Judge Zobel, or how its absence invalidated either the district court's decision or the First Circuit's affirmation.

This court need not address these arguments. In its November 29, 2010 affirmation of Judge Zobel, the First Circuit held that (1) the appeal was moot, (2) Appellant lacked standing to pursue the matter further, and (3) the appeal did not present a substantial question. [15] The issues Appellant presents have therefore already been dismissed **[*5]** by a higher court.

FOOTNOTES

15 Sarner v. Dean Coop. Bank (In re Sarner), No.10-2257 (1st Cir. Nov. 29, 2010).

To the extent that this appeal and Appellant's motion for an emergency stay are separate from the prior case before Judge Zobel and the accompanying affirmation, subsequent events have rendered this appeal moot. First, Appellant moves for an emergency stay solely to prevent the "irreparable harm resulting from foreclosure." [16] Because the property was foreclosed upon and sold on September 10, 2010, [17] a stay for the purpose of preventing foreclosure would have no effect. Appellant's Emergency Motion is therefore moot. [18]

FOOTNOTES

16 Renewed Emergency Mot. Stay Pending Appeal ¶ 14 [#11].

17 Appellee's Mot. Dismiss Appeal, Ex. D [#16]; see also Resp. Mot. Dismiss ¶ 10 [#17].

18 See Anheuser-Busch, Inc. v. Miller (In re Stadium Mgmt. Corp.), 895 F.2d 845, 847-48 (1st Cir. 1990) (explaining that *HN3* one justification for a finding of mootness is the court's jurisdictional bar from making decisions when it is unable to provide a remedy).

So, too, is the appeal. The sole issue before this court is whether the **bankruptcy** court erred in denying Appellant's motion for reconsideration after granting Appellee relief **[*6]** from the automatic stay. [19] The purpose of that stay was to prevent the foreclosure and sale of Appellant's property. The property has since been sold to a third party. Because a court should not disturb valid third-party sales, [20] this court can fashion no remedy. This appeal is therefore moot. [21]

FOOTNOTES

19 Br. Appellant, 5 [#8].

20 Anheuser-Busch, 895 F.2d at 847-48.

21 See id.

In his Response to Motion to Dismiss, Appellant correctly quotes the First Circuit when he asserts that the "failure to obtain a stay is not sufficient ground for a finding of mootness." [22] The First Circuit continues, however, that "in the absence of a stay, interested parties are free to implement the confirmed reorganization plan according to its terms, and the consequent circumstances may moot the matter in dispute." [23] That is exactly what occurred here.

FOOTNOTES

22 Resp. Mot. Dismiss ¶ 10 [#17] (quoting Rochman v. Ne. Utils. Serv. Grp. (In re Pub. Serv. Co. of N.H.), 963 F.2d 469, 473 (1st Cir. 1992)).

23 Rochman, 963 F.3d at 473. Rochman dealt with a Chapter 11 **bankruptcy,** rather than the Chapter 13 **bankruptcy** now at bar. See id. at 470. The underlying issues, however, are the same.

Indeed, in his Emergency Motion, Appellant acknowledges **[*7]** that his appeal would be moot were the property sold. [24]

FOOTNOTES

24 Appellant cites a First Circuit case in which a mortgage was foreclosed after a case was improperly dismissed but before that dismissal could be overturned. See Renewed Emergency Mot. Stay Pending Appeal ¶¶ 14, 18, 22 [#11] (citing Lomagno v. Salomon Bros. Realty Corp. (In re Lomagno), 429 F.3d 16 (1st Cir. 2005)). In that case, the First Circuit declined to disturb the foreclosure because there was no stay prohibiting it. See Lomagno, 429 F.3d at 18. Accordingly, Appellant asserts that absent a stay to prevent foreclosure, the sale of the property could moot his appeal. Lomagno is factually distinguishable from the case at bar. Lomagno involved a due process violation, which Appellant does not allege. See id. Regardless, the issue is moot under Anheuser-Busch and Rochman. See supra notes 18-23 and accompanying text; see also Sarner, supra note 15 (citing Rochman when holding that Appellant's prior appeal had been rendered moot by the sale of the property).

Appellant later reversed his position, claiming that this appeal is not moot even though the property was sold. [25] He argues that an available remedy exists in the equitable **[*8]** power of Massachusetts courts to set aside wrongful foreclosures. [26] It is unnecessary to reach this question, however, because wrongful foreclosure is a state tort claim not at issue in this appeal. [27] This appeal is confined to the issue of whether the **bankruptcy** court abused its discretion when it denied Appellant's motion for reconsideration. This question, to the extent that it has not already been answered by both Judge Zobel and the First Circuit, has been mooted by the sale of the property.

FOOTNOTES

25 This reversal of position may be barred by judicial estoppel, a doctrine that "precludes a party from asserting a position contrary to a position it has already asserted." Cadle Co. v. Schlictmann, Conway, Crowley & Hugo, 338 F.3d 19, 22 (1st Cir. 2003) . Because the appeal is moot regardless, it is not necessary to reach that question here.

26 See Resp. Mot. Dismiss ¶ 10 [#17] (citing Kattar v. Demoulas, 433 Mass. 1, 739 N.E.2d 246 (2000)) .

27 See Br. Appellant, 5 [#8] (identifying the issue of whether the **bankruptcy** court erred in denying Appellant's motion for reconsideration as the issue on appeal).

IV. Conclusion

For the foregoing reasons, Appellant's Renewed Emergency Motion for Stay Pending Appeal [#11] **[*9]** is DENIED AS MOOT and Appellee's Motion to Dismiss Appeal [#16] is ALLOWED.

AN ORDER HAS ISSUED.

/s/ Joseph L. Tauro

United States District Judge

In re ELIZABETH RIGA, Debtor; ELIZABETH RIGA, Plaintiff v. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the Home Equity Mortgage Loan Asset Backed Trust Series INABS 2005-C Home Equity Mortgage Loan Asset Backed Certificates, Series INABS 2005-C Under the Pooling and Servicing Agreement Dated September 1, 2005, et al., Defendants

Chapter 13, Case No. 10-11415-FJB, Adversary Proceeding No. 10-1083

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF MASSACHUSETTS, EASTERN DIVISION

2011 Bankr. LEXIS 1051

March 25, 2011, Decided
March 25, 2011, Filed

CORE TERMS: assignee, assignor, limitations periods, joint venture, tolled, predicated, Act MCCCDA, adversary proceeding, lapsed

COUNSEL: **[*1]** For Elizabeth Riga, Debtor: John F. Sommerstein, Law Offices of John F. Sommerstein, Boston, MA.

Assistant U.S. Trustee: John Fitzgerald, Office of the US Trustee, J.W. McCormack Post Office & Courthouse, Boston, MA.

Trustee: Carolyn Bankowski-13, Chapter 13 Trustee Boston, Boston, MA.

JUDGES: Frank J. Bailey, United States **Bankruptcy** Judge.

OPINION BY: Frank J. Bailey

OPINION

MEMORANDUM OF DECISION AND ORDER ON MOTION OF DEUTSCHE BANK TO DISMISS

The plaintiff and debtor, Elizabeth Riga, has filed a complaint seeking damages against Deutsche Bank National Trust Company, as Trustee ("Deutsche Bank"). The adversary proceeding is before the Court on the motion of Deutsche Bank to dismiss Counts I (for fraud), III (for violation of Massachusetts G.L. c. 93A), and IV (for violation of TILA and the MCCCDA) of Debtor's Amended Complaint for failure to state a claim on which relief can be granted. For the reasons set forth below, the Court will allow the motion as to all three counts.

Count I, for fraud, must be dismissed because the complaint does not allege that Deutsche Bank made representations of any kind to Riga. The alleged misrepresentations were made by IndyMac, Deutsche Bank's predecessor in interest. The mere fact **[*2]** that Deutsche Bank now holds by assignment the promissory note and mortgage that IndyMac is alleged to have procured by fraud does not render Deutsche Bank liable for the fraud of IndyMac. The holding in *Graves Equipment, Inc., v. M. De Matteo Const. Co.,* 397 Mass. 110, 489 N.E.2d 1010 (1986)—that an assignee of the rights of one party to a contract has no better rights than, and is subject to contractual defenses available against, the assignor—does not govern where the action is not on the contract but an affirmative claim in tort. *Ford Motor Credit Co. v. Morgan,* 404 Mass. 537, 545, 536 N.E.2d 587 (1989) ("The common law principle that the assignee stands in the assignor's shoes means only that the debtor can raise the same defenses against the assignee as he could have raised against the assignor.... It has never been interpreted to mean that the assignee will be liable for all the assignor's wrongs."). In a brief filed in response to the Court's inquiry regarding successor liability, Riga for the first time alleged that Deutsche Bank can be liable for the fraud of IndyMac because IndyMac perpetrated the fraud in furtherance of a joint venture with Deutsche Bank. I need not address the viability of this theory **[*3]** because the complaint does not allege the existence of a joint venture or plead facts on which the existence of such a joint venture might be predicated.

Count III, for violation of the Massachusetts Consumer Protection Act, must be dismissed for two reasons. First, Riga concedes that she failed to serve on Deutsche Bank the demand letter required by G.L. c. 93A, § 9(3). Second, this count is based entirely on the conduct of IndyMac and alleges no conduct by Deutsche Bank. A claim under c. 93A against an assignee may not be predicated solely on conduct of the assignor. *McKensi v. Bank of America,* 2010 U.S. Dist. LEXIS 99540, 2010 WL 3781841, at *3 (D. Mass. 2010) (citing *Ford Motor Credit Co. v. Morgan,* 404 Mass. 537, 545, 536 N.E.2d 587 (1989)).

Count IV, for damages for violation of the federal Truth in Lending Act (TILA) and the Massachusetts Consumer Credit Cost Disclosure Act (MCCCDA), fails because it is barred by the limitations periods in these statutes. It is undisputed that this action was commenced after the limitations period for each statute had lapsed. Riga contends that the limitations periods can be tolled for late discovery, but tolling is essentially an affirmative defense to the application of the statute of **[*4]** limitations, which therefore requires that the plaintiff articulate facts on the basis of which the statute may be tolled.

The debtor has articulated no such facts, either in her complaint or in opposition to this motion. Absent an allegation of facts that can be proven to establish that the limitations period was tolled, the limitations period must be deemed to have lapsed, and Count IV fails to state a claim under TILA or the MCCCDA.

ORDER

For these reasons, the Motion of Deutsche Bank to Dismiss Adversary Proceeding is hereby granted. Insofar as the Court has already issued an order of abstention as to Riga's claims against the only other defendant, a judgment of dismissal shall enter forthwith.

/s/ Frank J. Bailey

Frank J. Bailey

United States **Bankruptcy** Judge

Date: March 25, 2011

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*2011 DNH 56; 2011 U.S. Dist. LEXIS 35997, **

Green Tree Servicing, LLC v. United States of America et al.

Civil No. 09-cv-191-JL

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

2011 DNH 56; 2011 U.S. Dist. LEXIS 35997

April 1, 2011, Decided
April 1, 2011, Filed

NOTICE: NOT FOR PUBLICATION

CORE TERMS: mortgage, equitable, recorded, discharged, reinstatement, federal tax liens, intervening, summary judgment, notice, federal law, tax lien, restoration, recording, lienholder, mistakenly, equitable relief, local law, judgment lien, new mortgage, quotation marks, security interest, erroneously, perfected, mortgagee, equitable subrogation, lien creditor, judgment creditor, prior mortgage, hypothetical, restore

COUNSEL: **[*1]** For Green Tree Servicing, LLC, Plaintiff: Jeffrey J. Hardiman, LEAD ATTORNEY, Bendett & McHugh PC, Farmington, CT.

For USA, other United States of America, Defendant: Austin L. Furman, LEAD ATTORNEY, US Dept of Justice - Tax Division (55), Washington, DC.

For Dana E. Ricker, Kristi L. Ricker, Defendants: Albert E. Souther, LEAD ATTORNEY, Law Office of Albert E. Souther, Dover, NH.

JUDGES: Joseph N. Laplante, United States District Judge.

OPINION BY: Joseph N. Laplante

OPINION

OPINION AND ORDER

This case raises several questions about the availability of equitable relief to restore a mistakenly discharged mortgage to a position of priority over subsequent federal tax liens. The plaintiff, Green Tree Servicing, LLC, claims that its predecessor erroneously recorded a discharge of its mortgage on a parcel owned by defendants Dana E. and Kristi L. Ricker, and seeks to restore that mortgage to its original priority over intervening liens filed by the Internal Revenue Service.

Green Tree originally brought this action in Rockingham County Superior Court against the Rickers and the IRS. Acting on behalf of the IRS, the government removed the case to this court under 28 U.S.C. § 1444. That statute authorizes the removal of actions **[*2]** brought against the United States under 28 U.S.C. § 2410, which in turn authorizes suits to "quiet title" to real property in "which the United States has or claims a mortgage or other lien." The court of appeals has held that the "meaning and scope" of § 2410 encompasses an action, like this one, seeking to establish the priority of the plaintiff's mortgage over the government's tax lien, and thus creating federal subject-matter jurisdiction here. Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1231-33 (1st Cir. 1996).

Green Tree has moved for summary judgment, see Fed. R. Civ. P. 56, **[*3]** arguing that it is entitled to equitable reinstatement of the mortgage to its seniority over the tax liens as a matter of law because the discharge was recorded in error, and the government did not rely on the discharge in recording the liens. The government objects on a number of grounds, including that federal law establishing the priority of tax liens bars the equitable reinstatement of Green Tree's mortgage to a superior position and, in any event, Green Tree is not entitled to that relief under New Hampshire law (or at least has not shown that entitlement as a matter of law).

Following oral argument, Green Tree's motion for summary judgment is denied. As explained fully infra, while the court of appeals has rejected the argument that federal law bars the equitable reinstatement of a mortgage to a position of seniority over federal tax liens, see, Progressive, 79 F.3d at 1234-35, Green Tree has not conclusively shown that it is entitled to that relief under New Hampshire law which—though not as circumscribed as the government argues—"view[s] claims to circumvent the established order of priority, through resort to equity, with trepidation," Hilco, Inc. v. Lenentine, 142 N.H. 265, 267 (1997).

I.Background

The **[*4]** following facts are stated in an affidavit by Green Tree's "foreclosure manager," Ruth Hernandez, who purports to derive her knowledge of them either from Green Tree's regularly maintained business records or "from information transmitted by[] a person with knowledge of the facts set forth in said records." On October 9, 2001, the Rickers executed a mortgage on a parcel located in Farmington, New Hampshire, in favor of Conseco Finance Servicing Corp., which Green Tree says was its former name.[1] The mortgage, which secured a $118,000 debt evinced by a promissory note, was recorded against the parcel in the Strafford County Registry of Deeds the next day.

FOOTNOTES

1 The government says that, following the **bankruptcy** of Conseco's parent company, a third party purchased the parent's equity interest in Conseco and reorganized it as Green Tree. So it is unclear whether Conseco is simply Green Tree's "former name" as it claims, but the court will assume it is for purposes of this motion.

Green Tree says that the proceeds of the loan were used to satisfy an "existing" debt from the Rickers to Conseco, which arose from a mortgage loan extended earlier that same day. This was necessary, Green Tree explains, **[*5]** because the attorney who handled the closing on its behalf "inadvertently misplaced" the documents executed as part of the earlier loan. Green Tree also states that "[a]s part of any routine closing, the funds used to payoff the existing loan [from Conseco] were transmitted with a request for a discharge of lien."

As the government points out, Green Tree's foreclosure manager does not explain how she could have gleaned these facts from the company's business records, in light of the fact that the documents from the first loan were lost. Nevertheless, documents submitted by the government (including a settlement statement) tend to show that, on October 9, 2001, Conseco made a loan to the Rickers for $118,800, all of which was disbursed to Conseco, and that Conseco later sent a letter to itself enclosing the disbursement check and asking for a release of its mortgage.

Green Tree further explains that, because the mortgage securing Conseco's first loan was never recorded, Conseco "inadvertently executed and recorded a satisfaction of the new mortgage" when, presumably, it was intending to record a satisfaction of its first mortgage instead. Curiously, though, this did not happen until May **[*6]** 24, 2002—despite the fact that the first Conseco loan was satisfied as soon as the second Conseco loan was made, on October 9, 2001 (more than 7 months earlier).[2] Furthermore, as the government points out, Green Tree explains the filing of the satisfaction differently in its complaint, which alleges that, after the loan was assigned from Conseco to Green Tree (which would not seem to have been necessary if, as Green Tree says, Conseco simply changed its name to Green Tree) Conseco "executed, in error, a satisfaction of mortgage, rather than an assignment of mortgage and caused [it] to be recorded" (quotation marks and capitalization omitted).

FOOTNOTES

2 The court also notes that, in the versions of the note, mortgage, and discharge attached to the complaint, the note and the mortgage bear a "loan number" which is different from (and higher than) the loan number contained on the discharge. But the loan number (as well as other identifying information, such as the application number) has been blacked out on the versions of the note, mortgage, and discharge that Green Tree filed with Hernandez's affidavit, and also appears to have been redacted from the settlement statement, discharge request, and **[*7]** check submitted by the government.

Green Tree further explains that the proceeds from the first loan were used to pay off two mortgages on the parcel that had been recorded in favor of the United States Department of Agriculture. But Green Tree has not provided any documents to that effect, including either the mortgages or their discharges.[3]

FOOTNOTES

3 Green Tree has submitted "payoff statements" from the USDA to the Rickers, but these simply show the total amount due on two loans as of August 22, 2001; they do not show that the loans were in fact repaid, whether out of the proceeds of Green Tree's loan to the Rickers or otherwise. For reasons that are not apparent to the court, Green Tree has not submitted any documents from the Strafford County Registry showing either the existence or the discharge of the USDA mortgages.

Beginning in 2000, the Secretary of the Treasury began making assessments, first against Dana Ricker, and then against both Rickers, for unpaid federal tax liabilities. After the Rickers failed to satisfy those liabilities despite demands that they do so, the Secretary began recording notices of federal tax liens against the property. The first of these notices was recorded **[*8]** in September 2004, but Green Tree says that it did not learn of them until September 2008, when it was notified of the government's claim that its liens were senior to Green Tree's mortgage. As of January 2011, the Rickers owe more than $169,000 between them in federal tax liabilities secured by the liens. They also owe more than $114,000 to Green Tree.

II.Applicable legal standard

Summary judgment is appropriate where 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 that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Under this rule, "[o]nce the moving party avers an absence of evidence to support the non-moving party's case, the non-moving party must offer 'definite, competent evidence to rebut the motion.'" Meuser v. Fed. Express Corp., 564 F.3d 507, 515 (1st Cir. 2009) (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991)).

Where, however, "the party moving for summary judgment bears the burden of proof on an issue, he cannot prevail unless the evidence that he provides on that issue is conclusive." EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R., 279 F.3d 49, 55 (1st Cir. 2002) **[*9]** (quotation marks omitted). This standard applies to Green Tree's motion for summary judgment, since it bears the burden of proving "the existence and applicability of equitable principles" that entitle it to relief. Chase v. Ameriquest Mortg. Co., 155 N.H. 19, 26 (2007) (quotation formatting omitted).

III.Analysis

"Federal tax liens do not automatically have priority over all other liens." United States ex rel. IRS v. McDermott, 507 U.S. 447, 450 (1993). Instead, with some exceptions, "priority for purposes of federal law is governed by the common-law principle that the first lien in time is the first in right." Id. (quotation marks omitted). Thus, "for a state created lien to take priority over a later assessed federal lien, it must be 'choate' or 'perfected' so that the identity of the lienor, the property subject to the lien, and the amount of the lien are established prior to the filing of the subsequent federal lien." Progressive, 79 F.3d at 1234-35 (further internal quotation marks omitted). The perfection "of a state created lien is a matter of federal law and mirrors the standard applicable to liens asserted by the government," id. at 1235, i.e., among other things, perfection **[*10]** requires the filing of proper notice of the lien in the place designated by the law of the state where the property is situated, see 26 U.S.C. §§ 6323(a), (f).

Here, Conseco filed notice of its lien against the Rickers' property on October 10, 2001, when it recorded its mortgage in the place designated by New Hampshire law, i.e., the Strafford County Registry of Deeds. This occurred prior to the recording of any notice of the federal tax liens and, as a result, would have given the mortgage priority over the liens as "first in time." Green Tree's problem is that—also prior to the recording of the federal tax liens—

Conseco recorded a discharge of its mortgage, which, at least under ordinary principles of priority, would make the liens senior to the mortgage. See, e.g., Progressive, 79 F.3d at 1230. To change this result, Green Tree seeks equitable relief in the form of "expunging the mistakenly recorded discharge[] and reinstating the mortgage, restoring its priority over the tax liens" (capitalization corrected).

The government objects to this relief on two principal grounds. First, the government maintains that federal law, which, again, controls the priority of its liens here, does **[*11]** not allow the reinstatement of a discharged mortgage to a position of seniority over subsequently filed tax liens, regardless of whether state law would. Second, the government argues that, in any event, Green Tree has not demonstrated its entitlement to the equitable reinstatement of the mortgage under New Hampshire law. The court disagrees with the government's first point but agrees with its second point. As a result, Green Tree's motion for summary judgment must be denied.

A. Because New Hampshire law allows equitable reinstatement of a mortgage, federal law does not make that theory inapplicable here

As the government points out, a federal tax lien "shall not be valid against any . . . holder of a security interest . . . until notice thereof has been filed," 26 U.S.C. § 6323(a), and, in relevant part, "[a] security interest exists at any time if, at such time, . . . the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation," id. § 6323(h)(1) (formatting altered). The government argues that, once the discharge was filed, Conseco's mortgage no longer amounted to a "security interest" under § 6323(h)(1) because it was **[*12]** no longer protected under New Hampshire law against subsequent judgment lienors. Thus, the government explains, at the time its liens were filed, the mortgage was no longer perfected under § 6323(a) (which, as just discussed, controls the perfection of both federal and state-law liens here, see, Progressive, 79 F.3d at 1235) and could therefore not have been "first in time."

There is no question that a mortgage that has been discharged as of record is ordinarily not "protected" against a lien arising subsequent to the discharge. See Anatole Caron, Inc. v. Manchester Fed. Sav. & Loan Ass'n, 90 N.H. 560, 562 (1940); Restatement (Third) of Property: Mortgages § 7.3(a)(2) & cmt. *b,* at 476 (1997). But, as the New Hampshire Supreme Court has observed, "[c]ases in which mortgages have been revived and enforced after their discharge of record are fairly common in this jurisdiction," Caron, 90 N.H. at 564, on the theory that when "the discharge of [an] original mortgage was made through mistake, it may be set aside and the mortgage given its original priority as against the [post-discharge] attachment." Hammond v. Barker, 61 N.H. 53, 56 (1881); see also In re Chase, 388 B.R. 462, 468 (Bkrtcy. D.N.H. 2008) **[*13]** ("There is no question that [New Hampshire] courts may equitably revive discharged mortgages."); Int'l Trust Co. v. Davis & Farnum Mfg. Co., 70 N.H. 118, 119 (1900). The simple fact that the discharge of Conseco's mortgage was recorded before the notices of the federal tax liens, then, does not necessarily mean that the mortgage was not "protected" against the liens as a matter of New Hampshire law so as to give them priority over the mortgage as a matter of federal law.

In arguing to the contrary, the government relies heavily on Haas v. IRS (In re Haas), 31 F.3d 1081 (11th Cir. 1994), a case in which, similar to this one, federal tax liens were recorded against a parcel after the allegedly erroneous discharge of a prior mortgage. The **bankruptcy** court, applying Alabama law, had restored the mortgage to its position of seniority over the liens, ruling that "absent reliance by a subsequent creditor, a mortgage that has been satisfied by mistake may be . . . reinstated where such relief will not prejudice the rights of third or innocent persons," and that "the IRS had not detrimentally relied upon the erroneous release." Id. at 1083. The Eleventh Circuit Court of Appeals reversed. Id.

First, **[*14]** the court "concluded that Alabama law would protect a judgment creditor without notice from an erroneously released lien," so that "any tax liens filed by the IRS before the time the IRS had actual knowledge that [the mortgage] had been released by mistake would prevail over" it. Id. at 1086. Second, the court ruled that even those liens filed after the IRS learned of the erroneous nature of the discharge occupied a senior position to the mortgage, as a result of "the hypothetical judgment lien creditor rule." Id. at 1090. This test, which Haas adopted as "consonant with the purposes of [§ 6323] of promoting certainty and stability, thereby effectuating Congressional intent to designate the appropriate position for the IRS in the spectrum of priorities," places the IRS "in the shoes of any subsequent judgment creditor, including the most favorable shoes." Id. at 1090 (footnote omitted). Putting the IRS in the shoes of "a class of judgment creditors without notice" of the erroneous nature of the discharge, then, gave all of its liens priority over the mortgage, even though, as an actual (as opposed to a hypothetical) matter, the IRS knew full well that the discharge was erroneous at **[*15]** the time some of those liens were imposed. Id.

The government argues that applying the "hypothetical judgment lien creditor test" here would result in the priority of its liens "[b]ecause a class of New Hampshire judgment lien creditors (those without actual notice of Green Tree's unrecorded mortgage) could have had priority over Green Tree's 'mortgage.'" But, as just discussed, New Hampshire law—unlike Alabama law, at least as interpreted by the Haas court—does allow for erroneously discharged mortgages to have priority over intervening judgment liens, even if the lienors were unaware that the discharge was erroneous.[4] Indeed, the New Hampshire doctrine of equitable reinstatement "has frequently been applied" against "subsequent incumbrancers," unless they "have done or omitted to do an[] act relying upon the recorded discharge." Int'l Trust, 70 N.H. at 118. Under New Hampshire law, then, equitable reinstatement can be appropriate where the subsequent lienor knew the discharge was a mistake (on the theory that he could not have relied upon it), but it is not limited to that circumstance. It follows that there is no "class of judgment creditors" under New Hampshire law whose interest **[*16]** would have necessarily been superior to Conseco's mortgage, and that the "hypothetical judgment lien creditor" test is therefore unavailing to the government here.

FOOTNOTES

4 In suggesting otherwise, the government relies exclusively on cases dealing with unrecorded, or improperly recorded, mortgages and other encumbrances. See, e.g., Amoskeag Bank v. Chagnon, 133 N.H. 11, 16 (1990) (holding that a judgment creditor, unlike a purchaser, does not take subject to a prior mortgage which has been improperly recorded). But Conseco's mortgage was not "unrecorded"—it was recorded and then discharged as of record, and mistakenly so, according to Green Tree. None of the cases on which the government relies to support its "hypothetical judgment lien creditor" argument address that situation, and the government's argument does not address the New Hampshire cases, discussed herein, which do.

The government also relies on Haas's alternative holding: that "Treasury Regulations forbid application of a relation back principle to award an unperfected lien priority over the tax lien." 31 F.3d at 1091 (citing 26 C.F.R. § 301.6323(h)-1). Those regulations state, in relevant part, that:
a security interest is deemed **[*17]** to be protected against a subsequent judgment lien on–

(A) The date on which all actions required under local law to establish the priority of a security interest against a judgment lien have been taken, or

(B) If later, the date on which all required actions are deemed effective, under local law, to establish the priority of the security interest against a judgment lien.

For purposes of this subdivision, the dates described in (A) and (B) of this subdivision (i) shall be determined without regard to any rule or principle of local law which permits the relation back of any action to a date earlier than the date on which the action is actually taken.
26 C.F.R. § 301.6323(h)-1(a)(2)(I) (emphasis added). The Haas court reasoned that, because "a court reinstating the mortgage would permit the perfection of the mortgage to relate back to the original date of recording," this regulation barred the use of equitable reinstatement against federal tax liens, even if state law would otherwise allow it. 31 F.3d at 1091.

But equitable reinstatement does not treat a mistakenly discharged mortgage as if it had been perfected as of the date it was originally recorded, when it was in fact perfected on some **[*18]** later date. After all, a mortgage is perfected on the date it is originally recorded, even if it is subsequently discharged; equitable reinstatement merely treats that discharge as a nullity if it was the product of mistake and intervening lienholders have not relied on it. See Caron, 90 N.H. at 564; Int'l Trust, 70 N.H. at 119. Equitable reinstatement, then, does not "perfect" an otherwise unperfected mortgage. Aside from Haas, this court is not aware of any authority for the proposition that the Treasury Regulation in question bars equitable reinstatement, or, for that matter, equating equitable reinstatement with relation back in any context.[5]

FOOTNOTES

5 As the Supreme Court has explained, "the doctrine of relation back . . . by process of judicial reasoning merges the attachment lien in the judgment and relates the judgment lien back to the date of [the pre-judgment] attachment." United States v. Sec. Trust & Sav. Bank of San Diego, 340 U.S. 47, 50 (1950) . This is the kind of "relation back" to which most courts have applied 26 C.F.R. § 301.6323(h). See, e.g., Smith Barney, Harris Upham & Co. v. Connolly, 887 F. Supp. 337, 345 n.20 (D. Mass. 1994) ; Assured Inv. & Loan, Inc. v. United States, 732 F. Supp. 94, 96 (D. Kan. 1990) ; **[*19]** In re Jasper-O'Neil, 149 N.H. 87, 89-90 (2003) .

Moreover, this aspect of Haas was squarely rejected by our court of appeals in Progressive. There, a mortgage on property in Massachusetts was recorded before several federal tax liens, but was discharged when the mortgagee refinanced the loan and recorded a new mortgage, resulting in "priority of the federal tax liens, because of their recording dates, over the new mortgage." 79 F.3d at 1230. The mortgagee, like Green Tree here, "sought a declaration that its mortgage had priority over [the] properly recorded federal tax liens." Id. In support of this relief, the mortgagee invoked what the court of appeals referred to as the Massachusetts law "doctrine of unjust enrichment," i.e., "'where a mortgage has been discharged by mistake, equity will set the discharge aside and reinstate the mortgage to the position which the parties intended it to occupy, if the rights of the intervening lienholders have not been affected.'" Id. at 1236 (quoting N. Easton Co-op Bank v. MacLean, 15 N.E.2d 241, 245 (Mass. 1938)).[6] Because the Massachusetts cases did "not concern federal tax liens," however, the district court granted summary judgment to the government. **[*20]** Id. at 1237.

FOOTNOTES

6 This is plainly the same theory of equitable relief recognized in New Hampshire. See, e.g., Caron, 90 N.H. at 564 . The fact that the New Hampshire Supreme Court has not referred to the theory as "unjust enrichment" does not make Progressive inapplicable here, as the government seems to suggest.

The court of appeals reversed, explaining that "cases involving the reinstatement of mortgages that have been inadvertently discharged to the advantage of unintended and unexpected beneficiaries are sufficiently analogous . . . [w]hether or not federal tax liens are involved." Id. The court further observed that other "federal courts have held that the doctrine is applicable where the federal government is involved; and, in several instances, have restored state created liens to their intended positions without regard for the United States' potential loss of priority under federal law." Id. (citing United States v. McCombs, 30 F.3d 310, 333 (2d Cir. 1994); Dietrich Indus., Inc. v. United States, 988 F.2d 568, 573 (5th Cir. 1993); and Han v. United States, 944 F.2d 526, 530 n.3 (9th Cir. 1991)). Progressive, then, expressly holds that federal law allows the use of a state-law equitable **[*21]** doctrine to restore a mistakenly discharged mortgage to its position of priority over federal tax liens. That holding is binding on this court, whatever it may think of the decision to the contrary in Haas.

Despite Progressive, the government argues that federal law does not contemplate the relief sought by Green Tree because it does not amount to "subrogation" under 26 U.S.C. § 6323(i)(2). That section provides that "[w]here, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any [federal tax lien]." This argument is a red herring, as Progressive makes clear.

There, emphasizing that § 6323(i)(2) "explicitly authorizes the application of local laws of subrogation and is silent as to the application of the doctrine of unjust enrichment," the government defended the district court's conclusion that "there is no basis upon which to presume the applicability of a common law doctrine," i.e., unjust enrichment, "not expressly provided for by the statute." 79 F.3d at 1235. But the court of appeals rejected that argument, explaining that "federal courts should presume applicability **[*22]** of state common law doctrines in determining the status of state created liens." Id. So, even if the doctrine Green Tree has invoked here does not qualify as "subrogation" under § 6323(i)(2), it still applies in deciding the relative priority of the discharged mortgage and the federal tax liens, as Progressive expressly holds.[7] Contrary to the government's assertion, then, federal law does not render the doctrine of equitable reinstatement inapplicable here.

FOOTNOTES

7 The court therefore need not decide whether, as the government argues at length, Green Tree cannot invoke equitable subrogation because the funds from Conseco's erroneously discharged mortgage were used to satisfy the prior mortgage to Conseco, instead of a third party. The court notes that Green Tree states—in one sentence in its summary judgment brief—that "since [Conseco] satisfied two prior mortgages of record in favor of the USDA" when it extended the first mortgage loan, "equity commands that [its] mortgage have priority" over the subsequent tax liens in the amount of the prior indebtedness to the USDA "at the very least." But the court also need not decide at the moment whether that amounts to equitable subrogation under **[*23]** § 6323(i)(2) because Green Tree has not shown by admissible evidence that Conseco's first loan was used to pay off the USDA mortgages. See note 3 and accompanying text, supra.

B. Green Tree has not conclusively shown it is entitled to equitable reinstatement under New Hampshire law

The government also argues that, even if federal law does not bar the equitable reinstatement of Green Tree's mortgage to a position of priority over the federal tax liens, Green Tree is not entitled to that relief under state law.[8] As already discussed at length, New Hampshire law recognizes that a "'mortgage released through mistake may be restored in equity and given its original priority as a lien.'" Hilco, 142 N.H. at 267 (quoting Caron, 90 N.H. at 564). Nevertheless, the New Hampshire Supreme Court "view[s] claims to circumvent the established order of priority, through resort to equity, with trepidation," because that relief runs counter to the "essential purpose" of recording statutes in "ensuring notice to the public of property interests." Id. Whether to restore a mortgage that a plaintiff has discharged by mistake, then, "will depend upon the strength of the plaintiff['s] case for equitable intervention, **[*24]** and not upon any supposed weakness of the . . . equitable position" of the intervening lienholders. Id. at 267-68.

FOOTNOTES

8 The government argues that Green Tree's claim for equitable reinstatement is moot because, even if this court enters a judgment granting it, "that interest will not be perfected until that judgment is recorded" and will therefore remain junior to the government's existing liens. This argument verges on the nonsensical. A judgment granting equitable reinstatement of an erroneously discharged mortgage to a prior position over subsequent liens would always be meaningless if the mortgage nevertheless remained junior to the liens in this way.

The authorities cited by the government establish merely that a judgment creating a lien is not effective against subsequent lienholders until it is recorded. But a judgment granting equitable reinstatement does not itself create a lien. It restores a lien previously created, but erroneously discharged of record before subsequent liens were imposed. The **Bankruptcy** Court's decision in In re Chase, on which the government heavily relies, holds only that a judgment granting equitable subrogation "is not binding on subsequent **[*25]** attaching creditors" who perfect their interests before the judgment is recorded. 388 B.R. at 469 (emphasis added). It does not hold that, until it is recorded, the judgment is not binding on the very parties against whom equitable subrogation has been awarded, i.e., the intervening creditors. Again, if that were the law, the doctrines of equitable subrogation and reinstatement would be pointless.

In moving for summary judgment, however, Green Tree focuses exclusively on the "supposed weakness" of the government's equitable position, emphasizing that it was not aware of the discharge when it recorded the tax liens and therefore could not have acted in reliance on it. As Hilco holds, however, the availability of equitable restoration "focuses entirely upon the equitable arguments in favor of the plaintiff['s] position"; because an intervening lienholder "stand[s] upon his or her legal rights to establish priority, the weakness of his or her equitable position is irrelevant." Id. at 268. So Green Tree is not entitled to summary judgment simply because the government did not rely upon the discharge when it filed its tax liens. Other than that misplaced argument, Green Tree does not offer **[*26]** any other reason why it should be entitled to equitable relief here.

That shortcoming aside, Green Tree has not established the very premise of its equitable restoration claim, i.e., that the discharge was in fact recorded by mistake. Mistake "is a proper ground upon which to relieve a party from the legal consequences of his own act[] only when its effect is to disappoint the intention of the doer by bringing about an unintended result," not "merely because it later appears to have been unwise." Churchill v. Exeter Mfg. Co., 86 N.H. 415, 417-18 (1934). Green Tree has not conclusively shown that its discharge of the second mortgage was mistaken in the sense that, at the time, it was intending to accomplish some other objective.

Green Tree relies on Hernandez's statement that because the first "mortgage was never recorded, Conseco inadvertently executed and recorded a satisfaction of the new mortgage." But Hernandez does not say how she knows this. She claims that all of the facts set forth in her affidavit come from either "business records, which are kept and maintained in the ordinary course of business by" Green Tree, "or from information transmitted by[] a person with knowledge of **[*27]** the facts set forth in said records," but neither of these demonstrates the proper foundation for the statement at issue.

First, while "a corporate representative may testify and submit affidavits based on knowledge gained from a review of books and records," as this court has recognized, Philbrick v. eNom, 593 F. Supp. 2d 352, 364 (D.N.H. 2009) (quotation marks omitted), Green Tree does not say why its regularly maintained business records would contain an explanation of the reason a discharge was filed in a particular case, and that proposition is far from self-evident. Second, if Hernandez learned this instead from "a person with knowledge of" it (which her affidavit acknowledges as the basis for at least some of its statements), then her account of it is inadmissible hearsay, as the government points out. See Fed. R. Evid. 801. Either way, her statement as to why the discharge was filed is inadmissible on summary judgment. See Fed. R. Civ. P. 56(c)(4).

Furthermore, even if Hernandez's statement could be considered, it still would not conclusively establish that Conseco mistakenly discharged the second mortgage while intending to discharge the first. As the government notes, Green **[*28]** Tree offered a different explanation for the discharge in its complaint, alleging that Conseco meant to file an assignment of the mortgage, rather than a discharge. Furthermore, the discharge was not filed until more than seven months after the alleged substitution of the second mortgage for the first, calling into question Green Tree's account that the discharge was directed at the first mortgage. Green Tree has not explained any of these discrepancies, which leave a genuine issue as to whether the second mortgage was in fact discharged by mistake at all.

Finally, there is also a genuine issue as to Conseco's degree of fault in mistakenly discharging the mortgage. The government argues that, because Conseco was negligent, it is not entitled to equitable restoration of the mortgage as a matter of law. While the court agrees that Conseco may have been negligent (at least based on the record as it stands) the court disagrees that any such negligence would automatically disqualify Green Tree from obtaining equitable restoration here.

The government relies on Hilco, which ruled that the Superior Court had erred in equitably restoring the plaintiffs' mortgage to its original position of priority **[*29]** over that of intervening lienholders because "it allowed the plaintiffs to be shielded by equity from the consequences of their agent's negligence in not discovering" the intervening lien. 142 N.H. at 268 (citing 55 Am. Jur. 2d Mortgages § [417] and 59 C.J.S. Mortgages § 282(c)(2) (1949)). The intervening lien there existed as of record when the plaintiffs' predecessor banks discharged their prior mortgages, and recorded new ones, as part of a refinancing, but was not discovered due to "the negligence of the bank's counsel." Id. at 266. This put the lien "first in line, unless, for some adequate reason, equity does not follow the law in this instance." Id. at 267 (quotation marks and bracketing omitted). The New Hampshire Supreme Court found no such reason. Explaining that, while "[i]gnorance and deceit are factors that in some circumstances . . . weigh[] the equities in favor of restoring a previously discharged mortgage," the court ruled that the plaintiffs could show neither, because they "had constructive notice" of the intervening lien by virtue of its proper recording. Id. at 268 (citing Caron, 90 N.H. at 564).

Here, though, the federal tax liens had not yet been recorded when **[*30]** Conseco discharged its mortgage, so it makes no sense to say that Conseco was on constructive notice of the liens, or negligent in failing to discover them, so as to bar equitable restoration of the mortgage here. This is not a case like Hilco, or Caron, where the mortgagee unquestionably intended to discharge its original mortgage in favor of a new one, but did not intend that the new mortgage take a junior position to intervening liens. Instead, Green Tree argues that Conseco never intended to discharge its mortgage at all.

In Caron, in fact, the New Hampshire Supreme Court specifically recognized this distinction. The court explained that, in its prior cases where "a new mortgage [was] substituted in ignorance of an intervening lien," the mortgagee had suffered from "ignorance or deceit" as to the existence of the intervening lien, but noted that "no comparable factors" were "present in the case at bar." 90 N.H. at 564 (quotation marks omitted). The court then separately discussed International Trust, supra, as "stand[ing] for the proposition that where the acts of the parties are not legally effective to accomplish the acts which they intended, equity may intervene to correct the **[*31]** mistake and produce the intended result when the rights of third parties will not be affected thereby."[9] Id. But the court noted that this theory did not apply there either, because there was "no indication that the parties intended their acts to have any other results other than those which would normally follow from them by operation of law." Id.

FOOTNOTES

9 While, at first blush, restoring the discharged mortgage to a position of priority over the intervening liens would seem to affect the rights of those lienholders, this is not the sort of "prejudice" (which, after all, would result from every instance of equitable restoration) that makes the relief

unavailable. Instead, there is an absence of prejudice—and therefore a potential for equitable restoration—so long as the intervening lienholders did not rely on the mistaken discharge. See Caron, 90 N.H. at 564; Int'l Trust, 70 N.H. at 119; accord Progressive, 79 F.3d at 1237. The government does not argue to the contrary.

Caron strongly suggests, then, that to obtain equitable restoration of a mortgage discharged by mistake (as opposed to a mortgage discharged in the face of intervening liens), a mortgagee need show only that the mortgage was **[*32]** discharged by mistake (and that the intervening lienholders have not relied on the mistaken discharge, see note 9, supra). So far as this court can tell from its research, the New Hampshire Supreme Court has never held that the negligent character of the mistake bars equitable restoration or, for that matter, any other form of equitable relief premised on mistake.

Indeed, as one leading treatise observes, the proposition "that a mistake resulting from the complaining party's own negligence will never be relieved" in equity "is not sustained by the authorities." III John Norton Pomeroy, Equity Jurisprudence § 856b, at 339-40 (Spencer W. Symons, ed., 5th ed. 1941). Instead, to bar equitable relief, "the neglect must amount to the violation of a positive legal duty. The highest possible care is not demanded."[10] Id. at 341. Courts in other jurisdictions have applied essentially the same formulation in deciding claims for equitable restoration of mistakenly discharged mortgages, referring to it as "culpable negligence." See, e.g., Home Fed. Sav. & Loan Ass'n v. Citizens Bank of Jonesboro, 861 S.W.2d 321, 324 (Ark. Ct. App. 1993); Conn. Nat'l Bank v. Chapman, 216 A.2d 814, 817 (Conn. 1966); **[*33]** 59 C.J.S. Mortgages § 260, at 307 (1998).

FOOTNOTES

10 As an example of conduct sufficiently negligent to bar equitable relief, Pomeroy cites an early Supreme Court case refusing to allow recovery to a bank against a depositor who had presented the bank with notes purporting to be its own but which had been forged (without its knowledge) by a third party who had subsequently sold them to the presenter (who also did not know the notes had been forged). Bank of the United States v. Bank of Ga., 23 U.S. 333, 341 (1825). The Court reasoned that the bank was "bound to know its own paper, . . . and must be presumed to use all reasonable means . . . to secure itself against forgeries . . . . Its own security, not less than that of the public, requires such precautions." Id. at 343.

Again, there is no reason to believe New Hampshire would apply a different standard. Thus, any negligence by Conseco in recording the discharge will not bar its claim for equitable reinstatement unless it rises to the level of culpable negligence. "Whether or not a plaintiff will be barred of remedy in equity against the effect of mistake because of his negligence depends to a large extent upon the circumstances of the particular **[*34]** case." Conn. Nat'l Bank, 216 A.2d at 817 (citing Pomeroy, supra). As already discussed, though, the summary judgment record contains little if any admissible evidence as to the circumstances surrounding the recording of the discharge. Whether those circumstances amount to culpable negligence on the part of Conseco, then, is yet another genuine issue for trial.[11]

FOOTNOTES

11 The government argues, on the last page of its brief, that the court should not only deny Green Tree's motion for summary judgment, but enter summary judgment for the government. A party seeking summary judgment, however, must file a separate motion to that effect; it is not enough simply to request that relief in the objection to the other side's motion. See L.R. 7.1(a)(1) ("Objections to pending motions and affirmative motions for relief shall not be combined into a single filing."). So the government's request to enter summary judgment against Green Tree must be denied for that reason alone.

IV.Conclusion

For the foregoing reasons, Green Tree's motion for summary judgment[12] is DENIED.

FOOTNOTES

12 document no. 15.

SO ORDERED.

/s/ Joseph N. Laplante

Joseph N. Laplante

United States District Judge

Dated: April 1, 2011