4.8.11

First Circuit

Yacovi (In re Yacovi) v. Rubin and Rudman LLP, 2011 U.S. App. Lexis 28718 (1st Cir. March 18, 2011) (Before Justices Lynch, Souter [Retired Supreme Court Justice, sitting by designation] and Stahl, Opinion by Justice Stahl).

District Court affirmed the Bankruptcy Court's decision to approve the settlement as did the First Circuit. Chapter 7 trustee settled malpractice claims against former counsel to the debtor, which the debtor objected as "too low". Debtor further contended if the Trustee was going to settle so low, the trustee should have abandoned the action to the debtor to pursue, which position was deemed abandoned on appeal. The First Circuit noted, without deciding, that there is a circuit split as to whether the failure to list an issue in the statement of issues on appeal per Bankruptcy Rule 8006 results in a waiver of that issue.

Debtor incurred $226,000 pre-petition judgment against him for breach of an employment contract later determined to be non-dischargeable, which debtor claimed was done on advice of counsel. Later, debtor moved to reopen his no-asset chapter 7 case, to assert claims of malpractice against his former counsel, which the trustee settled for $25,000. Neither the trustee or debtor raised the issue of the debtor having standing to pursue the claims versus the chapter 7 trustee, but the First Circuit was able to dispose of the case on the merits, notwithstanding. Citing Circuit precedent, the Trustee is to be given deference for its decisions, and the settlement examined whether it falls within the lowest point in the range of reasonableness, which the court concluded it did. While the appellate court would have preferred more than the four sentence opinion of the bankruptcy court, the record reflected the issues were adequately briefed on both sides and a decision rendered after a hearing which together as factors supported the affirmance by the appellate court.

Doolan v. Town of Pembroke, 2011 BNH 2 (March 14, 2011)(J. Michael Deasy, Bankruptcy Judge).

Multiple debtors asserted that creditors, New Hampshire town tax authorities, violated various provisions of the automatic stay by sending various notices of impending tax liens and an arrearage, and execute such lien for delinquent property taxes. The court considered, as a matter of first impression , whether certain tax lien procedures under state law followed by the towns were violations of the automatic stay of 11 U.S.C. §362, or were excepted from the stay. One debtor also claimed the town was in contempt of the order confirming its chapter 13 plan by imposing and collecting interest on the obligations. One town conceded that it applied payments made to the wrong year, and as a result sent notices for unpaid taxes for years when in fact those taxes were paid. The court scheduled a hearing on actual damages, costs and fees, but noted that punitive damages were not available against a governmental unit per 11 U.S.C. §106(a)(3).

Court held that the Towns at issue violated the automatic stay under §362(a)(4), (a)(5), and (a)(6) by sending the various debtors a notice of arrearage and a notice of impending tax lien that included a demand for payment and threatened to execute a tax deed on the property if the arrearage was not redeemed, and that one Town was in contempt of the debtor's Chapter 13 confirmation order because it applied post-petition payments by the debtor to the pre-petition arrearage and accrued interest on the pre-petition arrearage at a rate different than provided in the debtor's confirmed Chapter 13 plan.

Court analyzed the steps the NH taxing authorities undergo to achieve a valid lien for unpaid taxes and how the steps impact upon the automatic stay of 11 U.S.C. § 362. Further, the court determined that the decision was applicable to the towns before it, but as to all other taxing authorities the impact was prospective, not retroactive.

Hermosilla v. Hermosilla, 2011 U.S. Dist. Lexis 28718 (D. Mass. March 11, 2011)(Nancy Gertner, District Judge).

Debtor appealed the Bankruptcy Court's finding that the unliquidated debt for personal injury owed to his former spouse was not discharged per 11 U.S.C. §Section 523(a)(6). Non-debtor former spouse moved to dismiss the appeal as untimely and for the costs and fees to defend a frivolous appeal. The District Court granted the motion to strike the debtor' brief as untimely, but of necessity had to decide the underlying appeal to determine whether it was frivolous. Upon consideration, the appeal was determined to be frivolous. The debtor asserted the statute of limitations barred the action, but it could not have run due to the automatic stay being in effect; the debtor asserted triable issues on his intent to harm his former spouse and whether she was actually injured when he in fact stipulated to having done so in his pretrial statement; debtor argued bankruptcy court lacked subject matter jurisdiction to declare the claim nondischargeable when the bankruptcy court certainly had standing to determine if an unliquidated claim was non-dischargeable, and was not barred from doing so, even though the spouse had not yet filed suit because she was precluded from doing so by operation of the automatic stay. Case remanded to the bankruptcy court to determine the costs and fees incurred by the debtor's former spouse relevant to the appeal.

Belice v. Belice, 2011 Bankr. Lexis 710 (BAP 1st Cir. March 7, 2011)(Before Bankruptcy Judges Lamoutte, Haines and Deasy, Opinion by Judge Lamoutte).

Creditor appealed the Bankruptcy Court's order dismissing its adversary proceeding for failure to state a claim. Pro se creditor sought to revoke the debtor's discharge or deny the dishchargeability of its debt for failure to notice the creditor of the bankruptcy case. Debtor misspelled the creditor's first and last name and listed the creditors last known address, despite knowing the creditor was incarcerated. Creditor filed his nondischargeablity action after he learned of the bankruptcy filing.

Bankruptcy Court ruled the creditor failed to state a claim under 11 U.S.C. §727(e)(1) as the claim was untimely. Although the deadline in §727(e)(1) was jurisdictional, and not subject to equitable tolling, the address the debtor used in its matrix for the creditor was not reasonably calculated to provide the creditor with notice. As such the complaint presented a plausible case for relief under 11 U.S.C. §523(a)(3), and it was error then for the bankruptcy court to dismiss the complaint. A debtor is held to a standard of reasonable diligence in ascertaining and listing all creditors. If a debtor would avoid the effect of the omission of a creditor's name from the schedules the debtor must prove the facts on which he or she relies. If the creditor is able to show that the address was inadequate for the purposes intended, the burden then shifts to the debtors to show that, notwithstanding the incorrect address, the creditor had timely notice or actual knowledge of the case.

In re Liebfried Aviation, 2011 Bankr. Lexis 681 (Bankr. D. Mass. Feb 25, 2011)(Melvin S. Hoffman, Bankruptcy Judge).

Accountant's fee application denied, and all post-petition fees and costs ordered disgorged when it was learned the accountant was not disinterested, and failed to disclose he did work for the debtor's principal and related companies before the filing.

Sousas v. Wells Fargo Bank, 2011 BNH 3 (Bankr. D.N.H. March 14, 2011)(J. Michael Deasy, Bankruptcy Judge)[unreported opinion].

Court found in favor of the Chapter 13 debtors that the bank violated TILA by failing to make certain disclosures at their loan closing, allowing the debtor to rescind the loan. The Truth in Lending Act requires that the borrower must receive two copies of a notice of right to rescind. 12 C.F.R. § 226.23(b). In the event the copies are never furnished, the right to rescind does not expire until three years after consummation. 12 C.F.R. § 226.23(a). If the borrower chooses to exercise his right of rescission, he is not liable for any finance or other charges, and any security interest given by the borrower becomes void upon such a rescission. 15 U.S.C. § 1635(b).

The evidentiary issue of import was whether the debtor's testimony alone was sufficient to rebut the presumption of receipt of the required notices, which the Court found it was. According to the "bursting

bubble" theory, a party need only introduce rebutting evidence that is sufficient to support a finding contrary to the presumed fact. Once the presumption is rebutted, the court makes its decision as any ordinary issue of fact. On the other hand, under the Morgan view, a presumption shifts the burden of proving the nonexistence of the presumed fact to the opposing party. The common understanding of Fed. R. Evid. 301 is that it embodies the bursting bubble theory. First Circuit precedent has reasoned that Rule 301 provides only that a presumption shifts the burden of going forward with evidence to rebut or meet the presumption and therefore the presumption has no probative effect once rebutted. Simply stated, once a rebuttable presumption arises, the party with the burden of going forward must bring forth evidence that would support a jury finding the nonexistence of that presumed fact and if done successfully, the presumption vanishes. The First Circuit has adopted this view.

In the case where a borrower rescinds and the creditor does not acknowledge the rescission, the Truth in Lending Act is silent. Some courts have held that a debtor may be relieved of its tender obligations where the creditor does not comply with its statutory duties. Such a remedy is viewed as a harsh one, but a court may impose it using its equitable powers in situations where creditors have not acted in good faith. The right to rescind is an equitable doctrine subject to equitable considerations. Courts are to consider traditional equitable notions in applying the statutory grant of rescission. Even where the statute does not require the debtor to tender first, the court may condition return of property to the debtor upon return of property to the creditor. Therefore, a court may tailor a remedy that is substantiated by the facts of the case.

A good faith belief that the Debtor did not have a right to rescind justified Wells Fargo's delay here in honoring the debtor's rescission request. Furthermore, the debtors have not tendered the money they received to Wells Fargo. At trial, the debtor testified that she was seeking financing to cover the monies lent by Wells Fargo in the Transaction, but so far has been unable to do so. Finally, the debtors have not offered any evidence that Wells Fargo has attempted to either cheat or deceive them. Therefore, the Court will enter a final judgment requiring the Sousas to tender to Wells Fargo the actual money lent minus any finance charges and payments made on the loan after and directing Wells Fargo to cancel its security interest upon satisfaction of the Sousas' obligation.

In re Mitchell, 2011 Bankr. Lexis 814 (Bankr. D. Mass. March 2, 2011)(Joan N. Feeney, Bankruptcy Judge).

Debtor's motion to dismiss appeal was granted, as the creditor's lateness was not due to excusable neglect, the court reviewing the applicable standards for excusable neglect (which did not include creditor's counsel not understanding the appellate rules).

In re Walsh, 2011 Bankr. Lexis 780 (Bankr. D. Mass. March 8, 2011)(William C. Hillman, Bankruptcy Judge).

Secured creditor objected to the Chapter 11 debtor's disclosure statement, for the two classes it was a member, which the court preserved as an objection to confirmation. Creditor voted "no" on the plan in its two classes. Assuming the existence then of a dissenting class, the individual debtor's plan must comply with 11 U.S.C. §1129(b). Further, the debts the debtor owed to a bank secured by mortgages on them could not be cross-collateralized because the debtor did not sign the mortgages as the "borrower".

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ALEX HERMOSILLA, Appellant, v. HILDA CRISTINA HERMOSILLA, Appellee,

Civil Action No. 10cv11195-NG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 28718

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

CORE TERMS: tort claims, summary judgment, statute of limitations, frivolous, Assault, waived, emotional, failure to comply, assault and battery, injury claim, dischargeability, unliquidated, bankruptcy proceeding, physical harm, genuine, present case, matter jurisdiction, res judicata, dangerous weapon, spousal support, attorney's fees, pendency, divorce, struck, tolled, tort action, divorce judgment, divorce proceedings, material facts, bad faith

COUNSEL: **[*1]** For Alex Hermosilla, Appellant: David G. Baker, Boston, MA.

For Hilda Christina Hermosilla, Appellee: Dennis R. Brown, Dennis R. Brown, P.C., Framingham, MA; Donald R. Lassman, Law Offices of Donald R. Lassman, Needham, MA.

JUDGES: NANCY GERTNER, UNITED STATES DISTRICT JUDGE.

OPINION BY: NANCY GERTNER

OPINION

GERTNER, D.J.

MEMORANDUM AND ORDER

I. INTRODUCTION

Defendant/appellant Alex Hermosilla ("Alex") appeals the **Bankruptcy** Court's decision that an unliquidated personal injury claim owed to his former spouse, plaintiff/appellee Hilda Cristina Hermosilla ("Cristina"), is exempt from discharge pursuant to 11 U.S.C. § 523(a)(6).

Alex's appeal presents four main arguments: First, he argues that the **Bankruptcy** Court lacked subject matter jurisdiction to determine the dischargeability of his debt to Cristina for her unliquidated personal injury claims. Second, he contends that the statute of limitations on her tort claims had run before she filed. Third, he asserts that Cristina waived her tort claims in a stipulation to their divorce judgment and/or that the claims are barred by res judicata because the Probate Court took Cristina's injuries into consideration when awarding alimony. Fourth, Alex argues that it was improper **[*2]** for the **Bankruptcy** Court to grant summary judgment because there still remained genuine disputes as to material facts, namely whether Cristina was actually injured and, if so, whether Alex intended to cause those injuries.

In conjunction with Alex's appeal, Cristina has submitted three motions that are now pending. First, she moves to strike Alex's appeal on the grounds that it was not timely filed as required by Federal Rule of **Bankruptcy** Procedure 8009 (document #11). Second, she filed a motion to dismiss Alex's appeal entirely for being procedurally defaulted and/or substantively meritless (document #12). Third, Cristina requests sanctions for damages and costs incurred defending against Alex's frivolous appeal (document #18).

I agree that Alex's appeal is procedurally barred for failure to comply with **Bankruptcy** Rule 8009. Accordingly, I **GRANT** Cristina's motions to strike Alex's brief **(document #11)** and dismiss Alex's appeal **(document #12)** for failure to comply with **Bankruptcy** Rule 8009. But while this is a procedural finding, I do have to address the merits in connection with Cristina's motion for sanctions **(document #18)**. That motion requires that I determine whether Alex's appeal **[*3]** is frivolous and whether Cristina is deserving of remuneration for having to defend against it. I so find and **GRANT** Cristina's motion for sanctions and remand the matter to the **Bankruptcy** court to determine the amount.

II. FACTUAL BACKGROUND

A. The Events Prior to the Underlying Bankruptcy Proceeding

Cristina and Alex were married on May 15, 2001. Amended Joint Pretrial Statement ("JPTS") APP2 97 (document #17-12). On July 20, 2003, the pair got into an argument, and Alex severely beat Cristina (the "Assault"). As a result of the Assault, the government filed a criminal complaint against Alex for assault and battery with a dangerous weapon. Id. On August 5, 2004, Alex pled sufficient facts to be found guilty; a guilty finding was entered on that same date. Id. at APP2 97-98. Alex received, among other things, a suspended sentence of nine months in the Essex County House of Correction. Id. at APP2 98.

On August 18, 2003, Cristina filed for a divorce from Alex in the Probate and Family Court Department of Essex Court Superior (the "Probate Court"). Id. The Probate Court entered a judgment of divorce nisi on September 15, 2005, which became final on December 14, 2005. Bankr. Ct. Decision **[*4]** 3 (document #2-1). On February 22, 2007, the Probate Court amended the September 15, 2005, judgment to include a stipulation of the parties (the "Stipulation"), which provided in relevant part that: 1) Cristina waived all future claims to alimony and spousal support; and 2) Cristina and Alex waived "any and all claims which could have been or were presented in these divorce proceedings and post divorce proceedings in [the Probate Court]." Id.

B. The Bankruptcy Proceeding

On February 16, 2005, Alex filed a voluntary Chapter 7 **bankruptcy** petition. Id. Cristina, in turn, commenced the underlying **bankruptcy** proceeding on May 20, 2005. Id. at 4. Cristina's complaint contained three counts seeking a judgment that the following debts allegedly owed to her by Alex were exempted from discharge: (1) spousal support pursuant to 11 U.S.C. § 523(a)(5); (2) attorney's fees and health premiums pursuant to 11 U.S.C. § 523(a)(15); and (3) unliquidated damages owed to Cristina by Alex for "willful and malicious injury" (the Assault) pursuant to 11 U.S.C. § 523(a)(6). Bankr. Compl. ¶¶ 20-28 (document #17-4). At the time Alex had filed for **bankruptcy,** Cristina had not yet filed a civil claim against him **[*5]** seeking damages for the injuries she sustained during the Assault. See Bankr. Ct. Decision 4; Bankr. Ct. Hr'g Tr. vol. 1, 7:6-12 (document #17-31). Under 11 U.S.C. § 362(c)(2), Cristina was therefore barred from filing her civil action during the pendency of Alex's **bankruptcy** action. See 11 U.S.C. § 362(c)(2).

On March 11, 2010, at the direction of the **Bankruptcy** Court, Alex and Cristina submitted an Amended Joint Pretrial Statement (the "Statement"), which included a statement of admitted facts requiring no proof, and which expressly acknowledged that the Amended Joint Pretrial Statement would supersede the pleadings. JPTS APP2 103. The Statement provided that the following facts were admitted:

During [the Assault], Alex purposefully struck Cristina with great force, grabbed Cristina by the throat and struck her head repeatedly against the interior wall of the premises at which Alex and Cristina then resided and threw Cristina with such force onto a table that the table was caused to be broken.

At the time Alex committed the physical acts referenced above, he intended to cause and did cause Cristina physical harm and pain and emotional fright and did cause Cristina such physical harm **[*6]** that she was caused to seek and obtain medical care for her injuries and did cause her such emotional harm that she was cased [sic] to seek and obtain care for her emotional condition.

Cristina became indebted for services rendered to her for her physical and emotional injuries for which Alex is liable to Cristina together with the physical and emotional damages Alex caused Cristina.

On July 21, 2003 a Criminal Complaint issued out of the Lynn District Court against Alex for assault and battery with a dangerous weapon and assault and battery as a result of Alex's beating of Cristina on July 20, 2003.

On August 5, 2004, Alex responded to the charges and admitted sufficient facts to support a finding of guilt on the charges of assault and battery with a dangerous weapon and assault and battery . . . a guilty finding [was] entered on those findings on August 5, 2004.
Id. at APP2 97-98. The Statement identified only one issue of fact remaining to be litigated, specifically: "Whether Alex willfully and maliciously injured Cristina and as a result owes her a debt." Id. at APP2 99. Among the issues of law remaining to be litigated, the Statement included: "Whether Alex's conduct [i.e., the Assault] **[*7]** set forth above constitute 'willful and malicious injury' to Cristina resulting in a debt for personal injury which is non-dischargeable under § 523(a)(6)." Id. at APP2 100.

On March 15, 2010, a few days before trial was set to commence, Cristina waived Count I (spousal support) and Count II (attorney's fees and health premiums) because they were prohibited by the facts established in her and Alex's divorce Stipulation. Bankr. Ct. Decision 4. Thus, the **Bankruptcy** Court was left to determine only the dischargeability of her unliquidated personal injury claim under 11 U.S.C. § 523(a)(6). Id. When the **bankruptcy** trial began on March 17, 2010, in lieu of opening statements, Cristina instead argued that she was entitled to summary judgment on Count III. Id. at 5. Alex responded that summary judgment was inappropriate for two reasons: First, he contended that there remained facts in dispute regarding the alleged Assault, namely whether he intended to cause Cristina injury and whether an injury did in fact result. Bankr. Hr'g Tr. vol. 2, 15:25-17:9 (document #17-32). Second, he argued that he could not be liable in tort to Cristina because she had waived all such claims in the Stipulation, **[*8]** and therefore there was no debt that the **Bankruptcy** Court could discharge. Id. at 14:6-12.

At the hearing, the **Bankruptcy** Court decided that, based upon the admissions of the parties, Alex did intend to injure Cristina and did in fact injure her. Id. at 18:8-15. However, the **Bankruptcy** Court reserved judgment on the issue of whether the Stipulation to the divorce judgment waived Cristina's right to later file a personal injury claim for injuries she sustained in the Assault. Id. at 18:15-19:3. The **Bankruptcy** Court instructed the parties to submit briefings on the issue. Id. at 19:3-7. On May 26, 2010, the **Bankruptcy** Court granted summary judgment in favor of Cristina. Bankr. Ct. Docket vol. 2, APP2 14-15 (document #17-3); see infra, Part III-C. Alex then filed the instant appeal from the **Bankruptcy** Court's decision on June 7, 2010.

C. The Bankruptcy Court's Decision

The **Bankruptcy** Court's order granting summary judgment for Cristina on Count III of her complaint held that Alex's unliquidated debt to Cristina for her personal injury claim is excepted from discharge pursuant to 11 U.S.C. § 523(a)(6). In its decision, the **Bankruptcy** Court squarely rejected all of the arguments that Alex **[*9]** submitted in his brief opposing Cristina's motion for summary judgment.

First, the **Bankruptcy** Court observed that Alex's argument that the statute of limitations for Cristina's tort action had run was completely contradicted by a provision of the **Bankruptcy** Code that expressly calls for tolling during the pendency of a debtor's **bankruptcy.** Bankr. Ct. Decision 10-11; see also11 U.S.C. §§ 108(c), 362(c)(2); Mass. Gen. Laws ch. 260, § 2A. Next, the **Bankruptcy** Court dismissed Alex's assertion that Cristina's tort claims were barred by res judicata and/or waived by the Stipulation, noting that the Supreme Judicial Court of Massachusetts ("SJC") had rejected the exact argument that Alex set forth. Bankr. Ct. Decision 11-12; see also Mass. Gen. Laws ch. 215, §§ 3, 6; Heacock v. Heacock, 402 Mass. 21, 520 N.E.2d 151 (1988). Finally, the **Bankruptcy** Court rejected Alex's contention that the pleadings were insufficient to support a grant of summary judgment, finding that the facts admitted in the Statement established all the elements necessary for discharge under section 523(a) of the **Bankruptcy** Code. Bankr. Ct. Decision 12-18 (citing Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998); Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); **[*10]** Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853 (1st Cir. 1997)); see also 11 U.S.C. § 523(a)(6). The **Bankruptcy** Court therefore granted Cristina's motion for summary judgment.

Having addressed each of Alex's arguments in turn, the **Bankruptcy** Court commented that Alex's defenses had no basis in fact or law and likely warranted sanctions pursuant to Federal Rule of **Bankruptcy** Procedure 9011(b). Bankr. Ct. Decision 3; see also Fed. R. Bankr. P. 9011(b). However, the **Bankruptcy** Court was barred from imposing such sanctions without first providing Attorney Baker, Alex's counsel, notice and a reasonable opportunity to respond. Bankr. Ct. Decision 20; see also Fed. R. Bankr. P. 9011(c). Therefore, the **Bankruptcy** Court instructed Attorney Baker to submit a brief explaining why he should not be sanctioned. Id. at 20. Ultimately, the **Bankruptcy** Court suspended consideration of the Order to Show Cause pending the resolution of Alex's appeal in this Court. Id.

III. STANDARD OF REVIEW

Ordinarily, a district court reviews a **bankruptcy** court's conclusions of law de novo, and its findings of facts pursuant to a "clearly erroneous" standard. Stoehr v. Mohamed, 244 F.3d 206, 207-08 (1st Cir. 2001). However, **[*11]** in cases where the **bankruptcy** court granted summary judgment, the district court must conduct a de novo review of all the issues. Id.; In re Varrasso, 37 F.3d 760, 762-63 (B.A.P. 1st Cir. 2001); see also Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56. A grant of summary judgment is appropriate when "there is no genuine issue as to any material fact and. . . . the moving party is entitled to judgment as a matter of law." Cont'l Cas. Co. v. Canadian Universal Ins. Co., 924 F.2d 370, 373 (1st Cir. 1991). The court does not weigh the evidence, but instead determines whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A trial worthy issue is not established by "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). The court must view the record in the light most favorable to the non-moving party, accepting all reasonable inferences favoring that party. Cont'l Cas., 924 F.2d at 373.

IV. DISCUSSION

Alex's appeal is subject to dismissal because he did not submit his supporting brief within fourteen days of when his appeal was docketed, as required by **[*12]** Federal Rule of **Bankruptcy** Procedure 8009. Moreover, Alex's appeal is so divorced from proper factual or legal support that it warrants the imposition of sanctions pursuant to Federal Rule of **Bankruptcy** Procedure 8020. **[*13]** First, Alex argues that the **Bankruptcy** Court lacked subject matter jurisdiction to determine the dischargeability of his debt to Cristina because she has not yet reduced her personal injury claims to judgment. Second, Alex contends that he could not possibly be indebted to Cristina because the statute of limitations on her tort claims has run. Third, Alex asserts that Cristina waived her tort claims in the Stipulation to the divorce judgment, and/or that the claims are barred by the doctrine of res judicata because the Probate Court took Cristina's injuries into consideration when awarding alimony. Fourth, Alex claims that it was improper for the **Bankruptcy** Court to grant summary judgment, because there still remained genuine disputes as to material facts, specifically, whether Cristina was injured and, if so, whether Alex intended to cause those injuries. As will be explained below, each of these arguments is completely erroneous, as the **Bankruptcy** Court already found.

A. Rule 8009

Federal Rule of **Bankruptcy** Procedure 8009 ("Rule 8009") instructs that "[u]nless the district court or the **bankruptcy** appellate panel by local rule

or by order excuses the filing of briefs or specifies different **[*14]** time limits . . . [the] appellant shall serve and file a brief within 14 days after entry of the appeal on the docket." Fed. R. Bankr. P. 8009(a)(1). Although neither the First Circuit nor any District of Massachusetts court has issued an opinion directly on point, most other courts in the First Circuit believe that the decision to dismiss **bankruptcy** appeals for failure to comply with Rule 8009 is discretionary. See, e.g., Balles v. Sturgill, 2009 U.S. Dist. LEXIS 54375, 2009 WL 690079, at *1 (D.N.H. 2009) (indicating that but for confusion as to instructions on the docket, appellant's appeal would have been dismissed for failure to comply with Rule 8009); Wiscovitch-Rentas v. Pharm. Processes, 2009 U.S. Dist. LEXIS 19829, 2009 WL 693178, at *1 (D.P.R. 2009) (dismissing appeal for failure to file a brief or request an extension of time to do so within the time allotted by Rule 8009(a)); Rodriguez-Quesada v. U.S. Trustee, 222 B.R. 193, 199 (D.P.R. 1998) (holding that "it is proper to dismiss an appellant's appeal for failure to file a brief or request an extension within the time allotted by the **Bankruptcy** Rules"); In re Cumberland Inv. Corp., 133 B.R. 275, 279 (D.R.I. 1991) ("The time limitations imposed by Rule 8009 are not jurisdictional, **[*15]** and hence the district court is not required to automatically dismiss the appeal of a party who has failed to meet those deadlines.") (quoting In re Beverly Mfg. Corp., 778 F.2d 666 (11th Cir. 1985)).

In the present case, the **Bankruptcy** Court issued its decision holding Alex's debt to Cristina non-dischargeable on May 26, 2010. Alex filed a timely appeal of that decision in this Court on June 6, 2010; his appeal was docketed on June 7, 2010 (document #1). Alex then filed his supporting brief over a month later, on August 19, 2010 (document #10). He did not submit any motions for an extension of time. [1] On August 30, 2010, Cristina filed a motion to strike Alex's brief on the grounds that it was not timely submitted (document #11); she also filed a motion to dismiss Alex's appeal based, in part, on the same grounds (document #12). I GRANT Cristina's motions to dismiss Alex's appeal for failure to comply with Rule 8009 without even addressing the merits (or lack thereof) of the appeal itself.

FOOTNOTES

1 Attorney Baker blames this delay on his own misunderstanding of the procedures of this Court. Appellant's Resp. Mot. Strike/Dismiss 1 (document #15). He writes: "In the experience of Alex's undersigned **[*16]** attorney, the judges of this court routinely issue Scheduling Orders . . . . Based on that experience, Alex's undersigned attorney was awaiting the entry of such an order in this case. When one was not forthcoming in this case, the undersigned essentially took the initiative and filed a brief in order to keep the process moving." Id.

B. Frivolous Appeal

In addition to seeking dismissal of Alex's appeal, Cristina also asks for sanctions. See Appellee's Br. Support Mot. Sanctions (document #18). Federal Rule of **Bankruptcy** Procedure 8020 ("Rule 8020") permits a district court to award just damages and single or double costs to the appellee if it determines that an appeal from a **Bankruptcy** Court decision is frivolous. Fed. R. Bankr. P. 8020. [2] While there is no set formula for determining whether an appeal is frivolous, courts in the First Circuit generally consider whether the appellant acted in bad faith, [3] and whether the argument presented on appeal is meritless in toto or only in part. In re Maloni, 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002). Other factors to be considered are whether the appellant's argument effectively addresses the issues on appeal, fails to cite any authority, cites **[*17]** inapplicable authority, makes unsubstantiated factual assertions, asserts bare legal conclusions, or misrepresents the record. Id. In particular, the court may impose sanctions if the appellant raises issues that are contradicted by long-established precedent or by a case decided while the appeal is pending. In re Great Rd. Serv. Cent. Inc., 304 B.R. 547, 552 (B.A.P. 1st Cir. 2004). [4]

FOOTNOTES

2 Rule 8020 essentially adopts Federal Rule of Appellate Procedure 38, which states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Fed. R. App. P. 38.

3 A finding of bad faith is generally not *required* to impose sanctions under Rule 8020. Maloni, 282 B.R. at 734. "Generally, sanctions will be imposed regardless of the motive of the appellant because the rule seeks to compensate an appellee who has had to waste time defending a meritless appeal." Id. (quoting 10 Lawrence P. King, Collier on **Bankruptcy** ¶ 8020.6).

4 In addition to determining that the appeal is frivolous, the district court must also ensure that the procedural requirements **[*18]** of Rule 8020 are met. In re Gavin, 319 B.R. 27, 34 (B.A.P. 1st Cir. 2004) (citing In re Maloni, 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002). Specifically, there must have been a separately filed motion by the appellee.

In the present case, Alex's appeal is frivolous *in toto*, as each and every one of the arguments he presents is completely unsupported by fact or law.

1. Subject Matter Jurisdiction

Alex claims the **Bankruptcy** Court lacked subject matter jurisdiction to determine the dischargeability of his debt to Cristina as a result of the Assault because Cristina has not yet reduced her tort claims against Alex to a judgment. Appellant's Br. 7 (document #10). This argument ignores the plain, unambiguous meaning the **Bankruptcy** Code assigns to the word "claim" in 11 U.S.C. § 101(5)(A). [5]

FOOTNOTES

5 In fact, she has not even filed these claims yet.

The governing federal statute and **Bankruptcy** Code define a "debt" as a "liability on a claim," which in turn is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A); see also Rederford v. U.S. Airways, Inc., 589 F.3d 30, 35-37 (1st Cir. 2009) **[*19]** (stating that Congress intended to give the term "claim" the "broadest available definition," and holding that even a disputed claim to an equitable remedy not yet reduced to judgment is a "claim" within the meaning of the **Bankruptcy** Code if a monetary payment is an alternative for the equitable remedy). Therefore, in the case at bar, the **Bankruptcy** Court was not precluded from determining the dischargeability of Alex's yet unrealized debt to Cristina simply because she had not yet reduced her tort claims to judgment.

Second, his argument that the statute of limitations on Cristina's tort claims had run also ignores the express provisions of the **Bankruptcy** Code.

Alex is correct that ordinarily there is a three-year statute of limitations on tort actions. See Mass. Gen. Laws ch. 260, § 2A. However, as the **Bankruptcy** Court noted, sections 108(c) and 362(c)(2) of the **Bankruptcy** Code toll the statute of limitations for such actions during the pendency of a debtor's **bankruptcy** proceedings. Bankr. Ct. Decision 11; see also 11 U.S.C. §§ 108(c), 362(c)[6] Because the dischargeability of Alex's debt to Cristina is still being litigated, the statute of limitations for the underlying tort claims giving **[*20]** rise to that debt continue to be tolled, and therefore Cristina is not yet barred from bringing those claims. [7]

FOOTNOTES

6 Section 108(c) provides, in relevant part:

Except as provided in section 524 of this title, if applicable nonbankruptcy law... fixes a period for commencing or continuing a civil action in a court other than a **bankruptcy** court on a claim against the debtor... and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of ?

The end of such period, including any suspension of such period occurring on or after the commencement of the case; or

30 days after notice of the termination or expiration of the stay under section 362 , 922 , 1201 , or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c) . Likewise, Section 362(c)(2) provides that in a Chapter 7 case, the automatic stay set forth in section 108(c) continues until the time at which a discharge is granted or denied. Id. § 362(c)(2)(C) .

7 Alex essentially argues that Buker v. Nat'l Mgmt. Corp., 16 Mass. App. Ct. 36, 448 N.E.2d 1299 (1983) , holds that a creditor's tort claims are not tolled during the pendency of the debtor's **bankruptcy** proceeding, and that **[*21]** this one case should govern over the express provisions of the **Bankruptcy** Code contained in Sections 108(c) and 362(c)(2) . However, Buker was decided before the **Bankruptcy** Code was in effect. Moreover, what Buker actually held is that a *debtor's* tort claims are not tolled during the *entire* period that his assets are under the control of a trustee in **bankruptcy,** but only for two years after the debtor was adjudicated bankrupt, provided that the claims were not already time-barred at the time the debtor filed for **bankruptcy.** 16 Mass. App. Ct. at 40-41 . The court reasoned that one purpose of the **bankruptcy** statutes is to render to the creditors of an insolvent debtor "all for which they may reasonably hope," and that "[t]olling the statute of limitations during the entire period of **bankruptcy** would provide 'bonus time' to the debtor of no apparent benefit to his creditors." Id. Thus, if the holding of Buker can be stretched to provide *any* guidance for the determination of the present case, it is that the statute of limitations for Cristina's tort claims should be tolled, because the **Bankruptcy** Code should be construed in favor of those to whom the debtor is indebted.

Alex alternatively insists **[*22]** that it is "arguable" that determination of Cristina's tort claims is now time-barred because a Massachusetts trial court might decline to apply Section 108(c) , and rather, under the doctrine of laches, hold that she is not entitled to tolling because of unreasonable delay on her part. Appellant Br. 10-11. However Alex, admittedly, cites no cases in which a Massachusetts court has declined to apply Section 108(c) on the basis of laches or any other ground, nor does he set forth a persuasive argument for why a Massachusetts court might do so in the present case. See id.

Third, Alex's contentions that Cristina's tort claims were waived via the Stipulation and/or barred by res judicata is based on a distinction that has no bearing on the case at bar. He argues that Cristina's "tort-based issues" were presented to the Probate Court during the divorce proceedings, and that the judge took them into consideration when awarding spousal support, such that he "compensated her for them." Id. at 12. However, the Probate Court is a court of limited jurisdiction, which does not have the authority to decide tort claims. See Mass. Gen. Laws ch. 215, §§ 3, 6. In fact, the SJC has already rejected Alex's **[*23]** argument in a case quite similar to the one at bar. See Heacock, 402 Mass. at 21-22.

In Heacock, the defendant asserted res judicata as a defense against his former wife's tort action arising from domestic abuse, arguing that the abuse had been addressed previously in their divorce proceeding. Id. The SJC overturned a dismissal of the case, holding that claim and issue preclusion did not apply. Id.

Moreover, nothing in the Stipulation waives the instant issues. First, Alex takes issue with the fact that the Statement "was prepared by [Cristina's] attorney, who was not particularly open to modification of his work, and the 'admissions' made in it all were taken from the amended complaint, not from depositions (there were none) or other discovery." Appellant Br. 16. He continues by saying that the facts admitted in the Statement are in conflict with the triable issues of fact and law also set forth in the Statement, and with Alex's answer to the original complaint. Id. at 17. This argument is unpersuasive. If counsel was concerned that the material contained in the Statement was inaccurate in any way, or that contrary information could be revealed via depositions or other discovery, he **[*24]** should not have signed the Statement on behalf of his client. He cannot now argue that the Statement is not binding against his client simply because at the time he signed it he was uneasy about doing so. Alex's counsel knew, or certainly should have known, that the stipulated facts contained in the Statement were deemed admitted, and that those admissions would supersede the pleadings. In fact, the Statement contained a section setting forth as much. See JPTS APP2 103.

Second, Alex contends that Cristina has not shown that she has actually suffered an injury because "[p]aragraphs 9 through 12 of the complaint do not allege any injury physical or otherwise - only that there was an affray" and that "the joint pre-trial statement seems merely to quote the amended complaint, the material allegations of which, in answer to the original complaint were denied." Appellant's Br. 18-19. However, the Statement clearly sets forth that "[Alex] intended to cause and **did cause Cristina physical harm and pain and emotional fright** and did cause Cristina such physical harm that she was caused to seek and obtain medical care for her injuries and did cause her such emotional harm that she was cased [sic] **[*25]** to seek and obtain care for her emotional condition." JPTS at APP2 97 (emphasis added). If that is not an admission of injury, it is hard to imagine what could be.

Third, Alex claims that the admissions contained in the Statement do not necessarily establish that Cristina's injuries were willfully or maliciously inflicted. He argues that the fact that he admitted to having pled sufficient facts to be found guilty of assault and battery with a dangerous weapon and assault and battery does not prove that he acted willfully or maliciously; he asserts that reckless or negligent behavior could also have triggered his conviction. However, Alex admitted that he "**purposefully struck** Cristina with great force, **grabbed Cristina by the throat and struck her head repeatedly** against the interior wall of the premises. . . and **threw Cristina with such force onto a table that the table was caused to be broken**." JPTS at APP2 97 (emphasis added). These are willful actions.

Alternatively, Alex argues that "there are other possible explanations" for Cristina's injuries; he imagines, for example, "it is possible that Alex believed he was defending himself." Appellant's Br. 21. However, Alex never affirmatively **[*26]** argued at the hearing before the **Bankruptcy** Court or in the memorandum opposing summary judgment that he submitted to the **Bankruptcy** Court that Alex was acting in self defense. [8] He claims only that it "is not beyond the realm of possibility." Id. Nothing in the record suggests that Alex was acting in self-defense. Alex cannot now avoid summary judgment by offering "conclusory allegations, improbable inferences, [or] unsupported speculation in the place of genuine, trialworthy issues." Medina-Munoz, 896 F.2d at 8. Summary judgment was warranted.

FOOTNOTES

8 Alex seems to suggest that he could not affirmatively set forth this argument before the **Bankruptcy** Court without an evidentiary hearing. He argues: "It is not beyond the realm of possibility that after hearing live testimony, and not relying exclusively on the joint pre-trial statement, the court would find that the injury (if one could be proven) was recklessly or negligently inflicted." Appellant's Br. 21.

In addition, he asserts that the admissions contained in the Statement are insufficient to establish willfulness or maliciousness. All of these arguments fail.

Fourth, Alex's absurd assertion that the admissions contained in the Stipulation **[*27]** were insufficient grounds for summary judgment are so ridiculous that one can only imagine that they were made in bad faith. It boggles the mind to think that Alex could admit, as a fact not requiring proof, that he "intended to cause and did cause Cristina physical harm and pain," and then later argue that there were questions as to injury and intent precluding summary judgment. If there was ever a case to impose sanctions, this would be the one. [9]

FOOTNOTES

9 Appellate courts should give considerable deference to a **bankruptcy** court's determination of appropriate fee awards because "the **bankruptcy** judge is in the best position to gauge the interplay of factors and make delicate judgment calls anent fee awards." Great Road, 304 B.R. at 552. Although the **Bankruptcy** Court deferred the imposition of sanctions pending the outcome of this appeal, it is very telling that the **Bankruptcy** Court was so willing to issue sanctions that it gave Attorney Baker an opportunity to show cause, as Federal Rule of **Bankruptcy** Procedure 9011 © required it to. See Bankr. Ct. Decision 19-20; see also Fed. R. Bankr. P. 9011(c).

The court may award damages pursuant to Rule 8020 either in the form of a lump-sum monetary penalty **[*28]** or attorney's fees. Great Road, 304 B.R. at 553. A lump-sum amount may be whatever amount the court concludes is warranted. Id. If the court awards attorney's fees, the court may: 1) remand the matter to the **Bankruptcy** Court to determine the amount; or 2) make an award based on the appellee's submissions. Id. Single or double costs are calculated according to the provisions of Federal Rule of **Bankruptcy** Procedure 8014. See Fed. R. Bankr. P. 8014. Cristina contends that "Alex's appeal is utterly baseless and has caused Cristina to incur significant unwarranted expenses." Appellee's Br. in Support of Mot. for Sanctions 23 (document #20). Specifically, Cristina asserts that she has spent $23,629.75 on legal services in connection with this appeal. Aff. Supp. Mot. Sanctions ¶ 13 (document #19). She requests no less than $16,221.00 in sanctions. Id. ¶ 15. I agree and remand the case back to the **Bankruptcy** Court for the determination.

V. CONCLUSION

I **DISMISS** Alex's appeal for failure to comply with **Bankruptcy** Rule 8009 (and hence **GRANT** Cristina's motions to strike Alex's brief **(document #11)** and dismiss his appeal **(document #12)** for failure to comply with **Bankruptcy** Rule 8009). Finally, I **GRANT** **[*29]** Cristina's motion for sanctions for damages and costs **(document #18)**, because Alex's appeal is frivolous, and Cristina is deserving of remuneration for having to defend against it. I hereby **REMAND** this matter to the **Bankruptcy** court to determine the amount.

SO ORDERED.

Date: March 21, 2011

/s/ Nancy Gertner

NANCY GERTNER, U.S.D.J.

IN RE: NIR YACOVI, Debtor. NIR YACOVI, Appellant, v. RUBIN AND RUDMAN, L.L.P.; PETER B. FINN; HAROLD B. MURPHY, Chapter 7 Trustee, Appellees.

No. 10-1673

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2011 U.S. App. LEXIS 5707

March 18, 2011, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Joseph L. Tauro, U.S. District Judge.
In re Yacovi, 2010 U.S. Dist. LEXIS 50977 (D. Mass., May 24, 2010)

CASE SUMMARY
PROCEDURAL POSTURE: Appellee trustee moved for approval of a settlement he had reached with appellee law firm concerning malpractice claims held by the estate. A **bankruptcy** court granted the motion to approve pursuant to Fed. R. Bankr. P. 9019. The United States District Court for the District of Massachusetts affirmed. Appellant debtor filed an appeal.

OVERVIEW: The $25,000 settlement amounted to only a fraction of the damages that the debtor alleged resulted from what he claimed was the law firm's malpractice. Nonetheless, the court found that the settlement constituted a definitive, concrete, and immediate benefit that the trustee reasonably concluded outweighed the uncertainty and delay of litigation. The settlement fell within the range of reasonableness and the **bankruptcy** court did not abuse its discretion in approving it. In addition to his objection to the settlement, the debtor contended that equity demanded that the malpractice claims be abandoned. The debtor waived the issue in the court because, in his briefing to the court, the debtor presented neither adequate argument nor any citation to caselaw or even to a learned treatise.

OUTCOME: The judgment was affirmed.

CORE TERMS: malpractice, settlement, approve, abandon, arbitrator's, employment agreement, arbitration award, approving, sentences, reasonableness, abandonment, abandoned, pursuing, solicit, waived, collectively, proposed settlement, abuse of discretion, independently, credibility, compromised, boilerplate, litigating, outweighed, deference, equitable, briefing, cursory, split, legal claims

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Bankruptcy Law > Practice & Proceedings > General Overview

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

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN1 **Bankruptcy** court orders endorsing settlements are reviewed for manifest abuse of discretion. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN2 In deciding whether to approve a settlement pursuant to Fed. R. Bankr. P. 9019, a **bankruptcy** court essentially is expected to assess and balance the value of the claims being compromised against the value of the compromise proposal. The factors the **bankruptcy** court should consider include: (i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise. In addition, the trustee's judgment is to be accorded some deference. Moreover, compromises are favored in **bankruptcy.** In short, the responsibility of the **bankruptcy** judge, and a court's on review, is to see whether the settlement falls below the lowest point in the range of reasonableness. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN3 A **bankruptcy** court approving a settlement must set forth its rationale in sufficient detail such that a reviewing court can distinguish it from mere boilerplate approval of a trustee's suggestions. The court's consideration should demonstrate whether the compromise is fair and equitable, and whether the claim the debtor is giving up is outweighed by the advantage to the debtor's estate. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN4 Where an experienced trustee conducts an adequate investigation of the claims and offers a satisfactory explanation for his settlement decision, the record supports the reasonableness of that decision, and the **bankruptcy** court receives briefing on the motion and holds a hearing, a cursory explanation, in and of itself, does not rise to the level of an abuse of discretion. If the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. More Like This Headnote

COUNSEL: Valeriano Diviacchi on brief for appellant.

David C. Fixler and Rubin and Rudman, L.L.P. on brief for appellees Rubin and Rudman L.L.P. and Peter B. Finn.

Harold B. Murphy, Christian J. Urbano and Hanify & King, P.C., on brief for trustee appellee Murphy.

JUDGES: Before Lynch, Chief Judge, Souter, Associate Justice, * and Stahl, Circuit Judge.

* Hon. David H. Souter, Associate Justice (Ret.) of the Supreme Court of the United States, sitting by designation.

OPINION BY: STAHL

OPINION

STAHL, Circuit Judge. Nir Yacovi, the debtor in a Chapter 7 **bankruptcy,** appeals a decision approving the settlement of legal claims held by his estate. Yacovi also asserts that the **bankruptcy** court should have granted his motion to abandon those claims. We affirm.

I. Facts & Background

On October 5, 2005, Yacovi resigned from his position with URS Staffing Corporation and/or United Revenue Service, Inc. (collectively "URS") to start his own tax preparation business, IBTS, Inc., which was to provide services similar to those offered by his former employer. Shortly thereafter, URS accused Yacovi of violating the employment **[*2]** agreement he had entered into with URS, and Yacovi retained Peter Finn, an attorney at Rubin and Rudman, L.L.P. (collectively "R & R"), to advise him about this contractual issue.

On October 3, 2006, an arbitrator concluded that Yacovi had in fact breached the employment agreement and awarded URS $226,000. [1] Although the arbitrator did not find that Yacovi was prohibited from competing with URS, he concluded that Yacovi nonetheless violated the agreement by removing, and not timely returning after his resignation, documents from URS (including lists of URS's clients and the fees they paid); retaining the fees generated from some tax and financial services he provided while employed at URS; soliciting URS's clients and prospective clients for his own benefit prior to resigning; and, after leaving URS, using his knowledge of URS's clients' identities and URS's rates (that is, URS confidential information) to solicit business for IBTS. The arbitrator also noted that Yacovi's account of some facts lacked credibility.

FOOTNOTES

1 The agreement specified that "for any CLIENT lost as a result of Employee's breach of Paragraphs 22 through 26, Employee shall owe . . . the greater of $2,000.00, or three **[*3]** times the annual gross income derived from such CLIENT." The arbitrator found that Yacovi's breach caused URS to lose 113 clients.

Within weeks of the arbitration decision, Yacovi filed a voluntary petition for Chapter 7 **bankruptcy** relief, and Harold B. Murphy ("Trustee") of Hanify & King, P.C. ("H & K") was appointed as the trustee. Yacovi's petition listed R & R as holding a claim for legal fees and URS as holding a $226,000 claim for the arbitration award. In early 2007, URS filed a complaint asserting that the arbitration award was non-dischargeable in Yacovi's **bankruptcy** because it was the result of fraud as a fiduciary, embezzlement, and/or larceny. On March 13, 2008, the **bankruptcy** court granted URS's motion for summary judgment on this issue. The following year, the court granted Yacovi a discharge, [2] relieved the Trustee of his responsibilities, and closed the case.

FOOTNOTES

2 In November 2006, the Trustee filed a "Report of No Distribution," explaining that he had "received no property nor paid any money on account of the estate except exempt property, and diligent inquiry having been made . . . there is no nonexempt property available for distribution to creditors."

However, on May 13, **[*4]** 2009, exactly one month after the case was closed, Yacovi filed a motion to reopen the **bankruptcy** proceedings to list various legal claims against R & R (collectively "malpractice claims") [3] as additional assets of the estate. Specifically, Yacovi alleged that R & R had advised him that, because the employment agreement lacked a non-compete clause covering his post-employment activity, he could operate IBTS and service URS's clients. In a complaint he sought to pursue against R & R, Yacovi contended that a lawyer with appropriate experience exercising the requisite standard of care, "would have advised [him] . . . that any services provided to clients of [URS] would most definitely result in expensive litigation . . . [and] that there was a very real possibility in such litigation that there may be an adverse finding against him." Yacovi moved for the **bankruptcy** court to abandon the malpractice claims or, in the alternative, "administer this asset to allow him to seek a recovery of [the arbitration award]."

FOOTNOTES

3 These claims were breach of contract/warranty, legal malpractice, and negligent infliction of emotional distress.

On June 24, 2009, the **bankruptcy** court granted Yacovi's motion to **[*5]** reopen, but denied his motion to abandon without prejudice. Accordingly, the Trustee began investigating the malpractice claims and requested all relevant documents in Yacovi's possession. The Trustee also successfully applied to the **bankruptcy** court to have H & K employed as his own counsel to, among other things, advise on the merits of the malpractice claims.

On September 29, 2009, the Trustee moved for approval of a settlement he had reached with R & R. In exchange for the estate releasing all claims against R & R, the settlement required R & R to pay $25,000 and waive any claims it may have had against the estate. In his motion to approve, the Trustee asserted that his investigation of the malpractice claims consisted of the following: discussing the claims and defenses with Yacovi's counsel and with R & R, reviewing the arbitration opinion (which included a detailed analysis of the employment agreement), reviewing filings in URS's state court petition to confirm the arbitration award, reviewing Yacovi's proposed complaint against R & R, and reviewing Yacovi's letter demanding relief from R & R for the purported malpractice. Based on this work, the Trustee believed that there was **[*6]** a "real risk" that litigating the malpractice claims would be unsuccessful, and therefore concluded that the proposed settlement was in the best interest of the estate. The Trustee explained that the arbitrator had found that the employment agreement did not prohibit Yacovi from competing with URS, and therefore it would be difficult to prove that advising Yacovi about IBTS's ability to compete with URS constituted negligence or was the cause of the arbitration award. Moreover, the Trustee found "little support for the allegation" that R & R told Yacovi that he could solicit URS's customers without running afoul of the agreement.

Yacovi opposed the motion to approve, arguing that the Trustee's investigation was inadequate and consisted primarily of discussions with R & R. Although acknowledging that the Trustee procured the relevant documents, Yacovi's counsel swore in an affidavit that he was never consulted by the

Trustee about the merits of the malpractice claims. Yacovi's counsel also expressed his willingness to pursue the claims on a contingency basis with a percentage allocated to the estate, which was an offer he had previously proposed in conversations with the Trustee.

At the **[*7]** conclusion of a hearing held on October 14, 2009, the **bankruptcy** court granted the motion to approve, explaining its decision with only a few sentences:
It's always a tough call when you've got a disputed piece of litigation that the Trustee thinks is not worth pursuing and somebody else thinks is worth pursuing. My obligation generally speaking is to rely on the expertise of the Trustee. In this particular matter I have no reason to doubt the amount of due diligence Mr. Murphy performed in evaluating the claim. I am going to grant the motion.
The district court subsequently affirmed. See In re Yacovi, No. 09-11988, 2010 U.S. Dist. LEXIS 50977, 2010 WL 2106171, at *3 (D. Mass. May 24, 2010).

II. Discussion

A. The Bankruptcy Court Did Not Abuse Its Discretion in Approving the Settlement

HN1 "**Bankruptcy** court orders endorsing settlements are reviewed for manifest abuse of discretion." [4] Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 50 n.5 (1st Cir. 1998). HN2 In deciding whether to approve a settlement pursuant to Federal Rule of **Bankruptcy** Procedure 9019, "The **bankruptcy** court essentially is expected to assess and balance the value of the claims being compromised against the value of the compromise **[*8]** proposal." Id. at 50 (internal marks omitted) (quoting Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995)). The factors the **bankruptcy** court should consider include:
(i) the probability of success in the litigation being compromised; (ii) the difficulties, if any, to be encountered in the matter of collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and, (iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise.
Jeffrey, 70 F.3d at 185; accord Ars Brook, L.L.C. v. Jalbert (In re Servisense.com, Inc.), 382 F.3d 68, 72 (1st Cir. 2004).

FOOTNOTES

4 There may be a question as to whether Yacovi has standing to pursue this appeal. See Spenlinhauer v. O'Donnell, 261 F.3d 113, 117-20 (1st Cir. 2001) (discussing **bankruptcy** code's limitations on a debtor's appellate standing). Because neither party briefed this issue and we can dispose of Yacovi's appeal on the merits, we do not address the standing question. Greenwood ex rel. Estate of Greenwood v. N.H. Pub. Utils. Comm'n, 527 F.3d 8, 13 (1st Cir. 2008) ("This court has consistently interpreted [Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)] **[*9]** as applying in its strict form only to issues going to Article III requirements. . . . [W]here any concerns over jurisdiction are a matter of statutory interpretation and not an Article III issue, we may bypass the jurisdictional inquiry." (internal citation omitted)).

In addition, "[T]he trustee's judgment is to be accorded some deference." In re Healthco Int'l, Inc., 136 F.3d at 50 n.5 (internal marks omitted) (quoting Hill v. Burdick (In re Moorhead Corp.), 208 B.R. 87, 89 (B.A.P. 1st Cir. 1997)). Moreover, "'compromises are favored in **bankruptcy.**'" In re Servisense.com, Inc., 382 F.3d at 71 (quoting LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 212 F.3d 632, 635 (1st Cir. 2000)). In short, "'The responsibility of the **bankruptcy** judge, and ours on review, is . . . to . . . see whether the settlement falls below the lowest point in the range of reasonableness.'" Id. at 71-72 (quoting In re Healthco Int'l, Inc., 136 F.3d at 51).

We conclude that the settlement in this case fell within the "range of reasonableness" and the **bankruptcy** court did not abuse its discretion in approving it. To be sure, $25,000 amounted to only a fraction of the damages [5] that Yacovi alleges **[*10]** resulted from what he claims was R & R's malpractice. Nonetheless, the settlement constituted a "definitive, concrete and immediate benefit[]" that the Trustee reasonably concluded outweighed the uncertainty and delay of litigation. See In re Healthco Int'l, Inc., 136 F.3d at 50. The Trustee was appropriately apprehensive about litigating the malpractice claims in light of (1) the fact that the arbitrator did not find that the employment agreement prohibited Yacovi from competing with URS, (2) the arbitrator's judgment that Yacovi's account of some relevant facts lacked credibility, and (3) the dearth of evidence that R & R actually advised Yacovi that he could solicit URS's clients without any legal repercussions. Although the Trustee made this decision using counsel from his own law firm, there is no indication that H & K offered deficient advice or otherwise undermined the Trustee's ability to analyze the malpractice claims.

FOOTNOTES

5 Yacovi asserts that the damages include the arbitration award, which has a present value, with interest, in excess of $300,000.

We are mindful of our instruction that HN3 a court approving a settlement must set forth its rationale "in sufficient detail [such] that **[*11]** a reviewing court [can] distinguish it from 'mere boilerplate approval' of the trustee's suggestions." In re Boston & Providence R.R. Corp., 673 F.2d 11, 12 (1st Cir. 1982) (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 434, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968)); see also Jeremiah v. Richardson, 148 F.3d 17, 23 (1st Cir. 1998) ("The court's consideration . . . should demonstrate whether the compromise is fair and equitable, and whether the claim the debtor is giving up is outweighed by the advantage to the debtor's estate."). In this case, the **bankruptcy** court offered only four sentences to explain its decision. Providing a more detailed statement would have been preferable, and under different circumstances a somewhat succinct explanation might prevent affirmance. However, HN4 where, as here, an experienced trustee conducts an adequate investigation of the claims and offers a satisfactory explanation for his settlement decision, the record supports the reasonableness of that decision, and the **bankruptcy** court receives briefing on the motion and holds a hearing, a cursory explanation, in and of itself, does not rise to the level of an abuse of discretion. [6] Cf. **[*12]** In re Boston & Providence R.R. Corp., 673 F.2d at 12-13 (remanding where "trustee's petition and supporting affidavit gave only the most cursory description and conclusory evaluation" and the lower court's "findings and order do not demonstrate an independent evaluation").
Indeed, in the very case this court relied on in issuing its caution against "boilerplate approval" of settlements, the Supreme Court acknowledged:
If . . . the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. The deficiency in this case, however, is not a merely formal one.
Anderson, 390 U.S. at 437.

FOOTNOTES

6 This is not to say that a **bankruptcy** court's failure to independently judge a settlement can be saved by a particularly persuasive explanation or thorough investigation by the trustee. To the contrary, we remind **bankruptcy** courts that they are required to independently analyze and judge all proposed settlements before granting approval pursuant to **Bankruptcy** Rule 9019 . See Jeremiah, 148 F.3d at 23 **[*13]** (noting "the requirement

that the court's judgment be independent").

B. Yacovi Waived His Challenge to the Denial of the Motion to Abandon

In addition to his objection to the settlement, Yacovi contends that "equity demands that the malpractice claims be abandoned."

On June 24, 2009, the **bankruptcy** court denied, without prejudice, Yacovi's motion to abandon. Over three months later, on September 29, the Trustee filed a motion to approve the settlement. Yacovi filed an opposition brief to this motion, which included two sentences again requesting that the malpractice claims be abandoned. [7] After a hearing on October 14, 2009, the **bankruptcy** court granted the Trustee's motion to approve. The next day, October 15, Yacovi filed a notice of appeal, pursuant to Federal Rule of **Bankruptcy** Procedure 8002(a), characterizing his appeal to the district court as "from the Order entered in this Action on 14 October 2009 granting the Motion filed by the Trustee to Approve Settlement." Also on October 15, Yacovi filed a Statement of Issues and Designation of Record on Appeal ("Statement of Issues on Appeal"). See Fed. R. Bankr. Pro. 8006. This filing failed to mention abandonment and framed the appellate **[*14]** issue solely as "[w]hether the Court erred in granting the Motion filed by the Trustee to Approve [S]ettlement." On appeal, the district court declined to address Yacovi's abandonment argument, saying the following:

> As set forth in the Debtor's Statement of Issues, the only question on appeal is whether the **Bankruptcy** Court erred in allowing the Trustee's Motion to Approve . . . . To the extent that the Debtor also seeks to reargue his Motion to Abandon the Malpractice Claim, that issue is not properly before this court. On June 24, 2009, the **Bankruptcy** Court denied the Debtor's Motion to Abandon . . . . The Debtor did not appeal that Order, and the time to appeal it has since passed.

In re Yacovi, 2010 U.S. Dist. LEXIS 50977, 2010 WL 2106171, *3.

FOOTNOTES

7 These sentences read: "[A]bandonment of the malpractice claim is the only fair, equitable result and is in the best interest of the estate. THEREFORE, Debtor asks that the Motion be denied and that given the Trustee's lack of any interest in seriously pursuing the malpractice claim that it be abandoned."

Yacovi contends that this passage constituted a cross-motion to abandon, and therefore the October 14 settlement approval also "acted as a denial of [that] cross-motion." **[*15]** Even if we accept this characterization of Yacovi's opposition brief, however, it would not explain his failure to mention abandonment in his Statement of Issues on Appeal and it would not materially impact our analysis of the waiver question. See infra.

There is a circuit split about whether the failure to list an issue in the statement of issues on appeal pursuant to **Bankruptcy** Rule 8006 results in a waiver of that issue. Compare Zimmermann v. Jenkins (In re GGM, P.C.), 165 F.3d 1026, 1032 (5th Cir. 1999) ("We . . . hold that, even if an issue is argued in the **bankruptcy** court and ruled on by that court, it is not preserved for appeal under **Bankruptcy** Rule 8006 unless the appellant includes the issue in its statement of issues on appeal."), and Snap-On Tools, Inc. v. Freeman (In re Freeman), 956 F.2d 252, 255 (11th Cir. 1992) ("An issue that is not listed pursuant to [**Bankruptcy** Rule 8006] and is not inferable from the issues that are listed is deemed waived and will not be considered on appeal."), with Office of the U.S. Tr. v. Hayes (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.), 104 F.3d 1147, 1148 (9th Cir. 1997) (per curiam) ("We hold that **Bankruptcy** Rule 8006 does not **[*16]** limit a party's ability to appeal from a **bankruptcy** court's judgment. This document, filed with the trial court clerk, does not impact upon issue statements required by the court of appeals.")

We do not state a position on this circuit split. In his briefing to this court, Yacovi has presented neither adequate argument nor any citation to caselaw or even to a learned treatise. As a result, he has waived the issue in this court.

III. Conclusion

For the foregoing reasons, we affirm.

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*2011 BNH 2; 2011 Bankr. LEXIS 783, **

In re: Sean Doolan and Nicole Doolan, Debtors In re: Lori J. Gaff, Debtor Lori J. Gaff, Plaintiff, v. Town of Pembroke, New Hampshire, Defendant

Bk. No. 09-14300-JMD, Chapter 13, Bk. No. 07-12763-JMD, Chapter 13, Adv. No. 10-1053-JMD

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF NEW HAMPSHIRE

2011 BNH 2; 2011 Bankr. LEXIS 783

March 14, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Multiple debtors asserted that creditors, New Hampshire town tax authorities, violated various provisions of the automatic stay by sending various notices of impending tax liens and an arrearage, and executing such liens for delinquent property taxes. The court considered, as a matter of first impression, whether certain tax lien procedures under state law followed by the towns were violations of the stay or were excepted from the stay.

OVERVIEW: Debtors asserted that the towns willfully violated the automatic stay by sending a notice of delinquent taxes, a notice of arrearage, and an impending tax lien; executing a lien for real estate taxes, in violation of 11 U.S.C.S. § 362(a)(4), (a)(5) and (a)(6), willfully applying postpetition tax payments to pre-petition obligations. One also claimed the town was in contempt of the order confirming chapter 13 plan by imposing and collecting interest on the obligations. Where one town conceded that it applied payments made to the wrong year, and as a result sent notices for unpaid taxes for years when in fact those taxes were paid. The court scheduled a hearing on damages, but noted that punitive damages were not available against a governmental unit 11 U.S.C.S. § 106(a)(3). The state's tax collectors had to recognize the limitations imposed by the **Bankruptcy** Code and to advise debtors. Additional language in the notices went beyond a statutory notice of tax deficiency and maintaining a lien under RSA 80:60. Paying a higher rate on pre-petition tax debt was not part of the process for perfecting or maintaining a tax lien.

OUTCOME: The towns violated the automatic stay imposed by sending notice of tax delinquencies, an arrearage, notice of an impending tax lien, misapplying postpetition property tax payments, failing to properly apply postpetition payments of unpaid property taxes, and imposing interest on unpaid tax obligations. Punitive damages were not allowable against the towns.

CORE TERMS: notice, tax liens, automatic stay, real estate, tax collector, prepetition, unpaid, postpetition, property taxes, perfection, collection, deed, confirmed, arrearage, contempt, state law, impending, bankruptcy proceeding, confirmation, summary judgment, property owner, interest rate, statutory lien, executing, registry, perfect, municipality, bankruptcy laws, tax payments, legal interest

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Taxation > State & Local Taxes

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > General Overview

HN1 The assessment and collection of real estate taxes in New Hampshire is governed by state law. Real estate taxes are assessed on an annual basis where the property tax year is April 1 to March 31 and all property taxes are assessed on the inventory taken in April of that year. RSA 76:2. The obligation to pay the property taxes falls not on the owner's equity in the property, but on the property itself. RSA 80:19. Accordingly, on April 1 of each year, an inchoate lien to secure property taxes arises on real estate by operation of law. The lien has priority over all other prior or subsequent liens on the property, but only continues for eighteen months, and expires on October 1 of the calendar year following the beginning of the tax year. RSA 80:19. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Assessment Methods & Timing

HN2 New Hampshire real estate taxes are assessed against the owner of record on April 1. RSA 76:10. The tax is generally collected over two semiannual payments. RSA 76:15-a. The first partial payment, which is 50 percent of the previous year's tax, is payable July 1 and the final payment is due December 1. If the payment of either installment is not made on or before the due date, interest at the rate of twelve percent is charged. RSA 76:13. Where a property owner does not make payments by the due date of the final installment, state law provides specific procedures for converting the statutory lien into an equitable interest and ultimately a legal interest. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > General Overview

HN3 Interest on unpaid taxes may not be imposed until thirty days after the last bill is mailed. RSA 76:13 and 76:15-a. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Assessment Methods & Timing

HN4 A New Hampshire tax collector is required to notify the owner of record as of April 1 of all uncollected and unredeemed real estate taxes on his property with the bill for the final installment, or within ninety days of the due date for the final tax bill. RSA 76:11-b. Eventually, if the property tax is not paid, state law requires the tax collector to follow certain procedures to execute a tax lien or else the inchoate lien will expire on October 1 of the year following assessment of the tax. Notice of the impending tax lien must be sent at least thirty days prior to executing the lien. The notice must be sent by certified or registered mail with a return receipt requested to the last known post office address of the current owner, if known, or to the person against whom the tax was assessed. The notice must also contain the name of the current owner or the person against whom the tax was assessed, a description of the property, the date and time on which the last payment shall be accepted, and the amount of the tax, interest, and costs owed up to the date of execution. RSA 80:60. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Assessment Methods & Timing

HN5 On the day following the last date for the payment of taxes stated in the notice, a New Hampshire tax collector must deliver to the municipality an affidavit of the execution of the tax lien. RSA 80:61. No less than thirty days after the execution of a tax lien to the municipality, the tax collector shall deliver to the registry of deeds for the county in which the real estate is located the facts stated in the notice of lien and the details regarding the execution of the lien, as required by law. RSA 80:64. The municipality is required, within forty-five days after the execution of the lien, to identify and notify all persons holding mortgages of record against the property. RSA 80:65. After two years from the date of execution of the tax lien, the tax collector may execute a tax deed for the property subject to the tax lien. RSA 80:76. Any time prior to the delivery of a tax deed, a person with a legal interest in the property subject to the lien may redeem the property by paying the amount of the tax lien plus interest and costs prescribed by law. RSA 80:69. Failure to notify a mortgagee of record of the execution of the tax lien results in the interests of the mortgagee surviving the delivery of the tax deed. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Assessment Methods & Timing

HN6 Compliance with the execution and notification requirements of the New Hampshire statutory tax lien procedure has two significant results for the municipality holding the lien. First, the first priority lien for real estate taxes does not expire on October 1 following the tax year, but continues indefinitely, even if a tax deed is not delivered. RSA 80:76. Second, upon execution of the tax lien, the interest on the delinquent taxes increases from twelve to eighteen percent. RSA 80:69. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Claims Against Debtors

HN7 Upon the filing of a **bankruptcy** petition, 11 U.S.C.S. § 362(a) imposes an automatic stay against the commencement or continuation of any action or proceeding against a debtor to collect a pre-petition debt. The automatic stay provision of the **Bankruptcy** Code, § 362(a), has been described as one of the fundamental debtor protections provided by the **bankruptcy** laws. Its purpose is to give debtors breathing room and stop collection efforts on the day of filing. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Liens

HN8 See 11 U.S.C.S. § 362(a)(4), (5), and (6).

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > General Overview

HN9 Congress has enacted several exceptions to the stay that allow governmental units to take actions that protect the public interest in the collection of taxes. Exceptions to the automatic stay are read narrowly. However, exceptions to the stay may not be narrowly construed when they pertain to the exercise of police powers to protect public health and safety. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

HN10 See 11 U.S.C.S. § 362(b).

Civil Procedure > Summary Judgment > Standards > General Overview

HN11 Under Fed. R. Civ. P. 56(c), made applicable to an adversary proceeding by Fed. R. Bankr. P. 7056, and a contested matter by Fed. R. Bankr. P. 9014, a summary judgment motion should be granted only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. "Genuine," in the context of Rule 56(c), means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party. "Material," in the context of Rule 56(c), means that the fact has the potential to affect the outcome of the suit under the applicable law. Courts faced with a motion for summary judgment should read the record in the light most flattering to the nonmovant and indulge all reasonable inferences in that party's favor. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > Assessment Methods & Timing

HN12 RSA 76-11-b requires a New Hampshire tax collector to provide to the owner of real estate a summary of all uncollected and unredeemed taxes against their real estate. More Like This Headnote

Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > General Overview

HN13 To perfect the inchoate lien for real estate taxes, New Hampshire law requires a four step process. First, the tax collector must provide a notice of impending lien. RSA 80:60. Second, an affidavit of the execution of the lien in favor of the municipality where the property is located must be delivered to the municipality on the day following the last date for payment of taxes as stated in the notice. RSA 80:61 and 80:63. Third, within thirty days after executing the tax lien to the municipality, the tax collector must record in the registry of deeds for the county where the real estate is located a statement containing the facts relating to each parcel of real estate on which a lien has been executed. RSA 80:64. Finally, within forty-five days from the date of the execution of the tax lien, the tax collector must identify and notify all persons holding mortgages of record in the registry of deeds of the facts relating to the execution of the lien. RSA 80:65. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

HN14 11 U.S.C.S. § 362(b)(9)(B)'s exception permits the delivery of the statutory notice of arrearage pursuant to RSA 76:11-b. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

HN15 The first step in executing a New Hampshire tax lien in order to maintain the perfection of the original lien is sending notice of the impending lien to the person against whom the tax was assessed. RSA 80:60 dictates that the notice (i) state the name of the person against whom the tax was assessed; (ii) describe the property committed to the tax collector for collection of taxes; (iii) state the date and time on which the last payment will be accepted; and (iv) state the amount of the tax, interest, and costs to the date of executing the lien. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Perfection of Property Interests

HN16 11 U.S.C.S. § 362(b)(3) only excepts from the automatic stay any act to perfect, or maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under 11 U.S.C.S. § 546(b). More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > General Overview

HN17 An increase in the statutory interest rate is not a violation of the automatic stay because it occurs by operation of law once the tax lien is executed. However, collection of the higher interest rate through the application of plan payments by the trustee, or postpetition payments by a debtor, at the higher rate on pre-petition tax debt is not part of the process for perfecting or maintaining a tax lien. Therefore, any such action would violate the stay under 11 U.S.C.S. § 362(a)(5). More Like This Headnote

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

HN18 The purpose of a Chapter 13 plan is to allow a debtor to pay arrears during the pendency of the plan while continuing to make payments at the contract rate. Payments made during the pendency of the Chapter 13 plan should have been applied by the lender to the current payments due and owing with the arrearage amounts to be applied to the back payments. If postpetition payments are applied in such a manner, the creditor must cure the accounting error and restore the debtor to its pre-default status. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

HN19 11 U.S.C.S. § 362(k)(1) allows individual debtors injured by a creditor's willful violation of the automatic stay to recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, punitive damages. However, the **Bankruptcy** Code expressly prohibits an award of punitive damages against any governmental unit. 11 U.S.C.S. § 106(a)(3). Accordingly, any hearing on damages shall be limited to actual damages, attorneys' fees, and costs. More Like This Headnote

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

HN20 Where a creditor does not object to its treatment and a chapter 13 plan is confirmed, the creditor is bound by the terms of the confirmed plan. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

Bankruptcy Law > Taxation > State & Local Taxes

HN21 A demand for payment of pre-petition taxes is not protected by the exceptions to the automatic stay in 11 U.S.C.S. § 362(b)(3) and (b)(18) for tax deficiency notices and did violate the automatic stay imposed by 11 U.S.C.S. § 362(a)(6). More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

HN22 The recording of a tax lien does not violate the automatic stay because of the exceptions in 11 U.S.C.S. § 362(b)(3) and (b)(18). More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Government Lien Enforcement

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

HN23 11 U.S.C.S. § 106(a)(3) expressly prohibits an award of punitive damages against any governmental unit. More Like This Headnote

Governments > Courts > Judicial Precedents

HN24 Federal courts traditionally look to three factors in determining whether a current decision in a civil case should be given retroactive effect or only apply prospectively. Those factors are: (1) whether the more recent rule or decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the history, purpose and effect of the new rule, retroactive application of the rule will further or retard its operation; and (3) whether retroactive application of the new rule could produce substantial inequitable results. The application of a federal law to a particular case does not turn on whether litigants actually relied on an old rule or how they would suffer from retroactive application of a new one. However, equitable principles govern the exercise of **bankruptcy** jurisdiction. More Like This Headnote

COUNSEL: **[*1]** Michelle Kainen, Esq., Kainen Law Office, P.C., White River Junction, Vermont, Attorney for Debtors Sean & Nicole Doolan.

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JUDGES: J. Michael Deasy, **Bankruptcy** Judge.

OPINION BY: J. Michael Deasy

OPINION

MEMORANDUM OPINION

I. INTRODUCTION

On May 4, 2010, Lori J. Gaff ("Gaff") filed a complaint against the Town of Pembroke ("Pembroke") claiming a violation of the automatic stay by Pembroke in sending various notices of impending tax liens and executing such liens. On May 25, 2010, Sean and Nicole Doolan ("Doolans") (the "Debtors" when referred to collectively with Gaff) filed a Motion for Contempt and Sanctions for Violation of the Automatic Stay by **[*2]** the Town of

Derry ("Derry") (the "Towns" when referred to collectively with Pembroke) based upon similar conduct by Derry with respect to real estate tax liens. In response to the Doolans' motion, the Town of Nottingham ("Nottingham") moved to intervene in the matter and the Court granted its motion. On August 25, 2010, this Court granted a motion to join the Doolans' contested matter with Gaff's adversary proceeding regarding common issues of law and fact. On September 18, 2010, Gaff filed a Motion for Summary Judgment in her adversary proceeding, and after argument, the Court took the motion under advisement. On October 8, 2010, the New Hampshire Tax Collectors' Association ("NHTCA") moved to intervene and be heard under **Bankruptcy** Rule 2018 and the Court granted the motion. The facts in these cases, pertaining to delinquent property taxes and the tax lien procedures followed by the Towns, are not in dispute.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States **Bankruptcy** Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, **[*3]** C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. THE LEGAL LANDSCAPE

These cases arise at the intersection of state law regarding the assessment and collection of real estate taxes and federal **bankruptcy** laws for the protection of debtors and the equitable payment of claims.

A. Applicable Non-bankruptcy Law

HN1 The assessment and collection of real estate taxes in New Hampshire is governed by state law. Real estate taxes are assessed on an annual basis where "[t]he property tax year [is] April 1 to March 31 and all property taxes [are] assessed on the inventory taken in April of that year." NH RSA 76:2. The obligation to pay the property taxes falls not on the owner's equity in the property, but on the property itself. NH RSA 80:19; First NH Bank v. Town of Windham, 138 N.H. 319, 321, 639 A.2d 1089 (1994). Accordingly, on April 1 of each year, an inchoate lien to secure property taxes arises on real estate by operation of law. Id. The lien has priority over all other prior or subsequent liens on the property, but only continues for eighteen months, and expires on October 1 of the calendar year following the beginning of the tax year. Id.; NH RSA 80:19.

HN2 Real estate taxes are assessed **[*4]** against the owner of record on April 1. NH RSA 76:10. The tax is generally collected over two semi-annual payments. NH RSA 76:15-a. The first partial payment, which is 50% of the previous year's tax, is payable July 1 and the final payment is due December 1. [1] Id. If the payment of either installment is not made on or before the due date, interest at the rate of twelve percent is charged. [2] NH RSA 76:13. Where a property owner does not make payments by the due date of the final installment, state law provides specific procedures for converting the statutory lien into an equitable interest and ultimately a legal interest. Windham, 138 N.H. at 321-22.

FOOTNOTES

1 Optional procedures are available for municipalities that budget on a fiscal year of July 1 to June 30, rather than a calendar year. NH RSA 76:15-c. Optional procedures are also available for towns that wish to bill real estate taxes on a quarterly basis. NH RSA 76:15-a. Neither of the Towns budget on a fiscal year or bill real estate taxes quarterly.

2 HN3 Interest on unpaid taxes may not be imposed until thirty days after the last bill is mailed. NH RSA 76:13 and 76:15-a.

HN4 The tax collector is required to notify the owner of record as of April **[*5]** 1 of all uncollected and unredeemed real estate taxes on his property with the bill for the final installment, or within ninety days of the due date for the final tax bill. NH RSA 76:11-b. Eventually, if the property tax is not paid, state law requires the tax collector to follow certain procedures to execute a tax lien or else the inchoate lien will expire on October 1 of the year following assessment of the tax. Notice of the impending tax lien must be sent at least thirty days prior to executing the lien. NH RSA 80:60. The notice must be sent by certified or registered mail with a return receipt requested to the last known post office address of the current owner, if known, or to the person against whom the tax was assessed. Id. The notice must also contain the name of the current owner or the person against whom the tax was assessed, a description of the property, the date and time on which the last payment shall be accepted, and the amount of the tax, interest, and costs owed up to the date of execution. Id.

HN5 On the day following the last date for the payment of taxes stated in the notice, the tax collector must deliver to the municipality an affidavit of the execution of the tax **[*6]** lien. NH RSA 80:61. No less than thirty days after the execution of a tax lien to the municipality, the tax collector shall deliver to the registry of deeds for the county in which the real estate is located the facts stated in the notice of lien and the details regarding the execution of the lien, as required by law. NH RSA 80:64. The municipality is required, within forty-five days after the execution of the lien, to identify and notify all persons holding mortgages of record against the property. NH RSA 80:65. After two years from the date of execution of the tax lien, the tax collector may execute a tax deed for the property subject to the tax lien. NH RSA 80:76. Any time prior to the delivery of a tax deed, a person with a legal interest in the property subject to the lien may redeem the property by paying the amount of the tax lien plus interest and costs prescribed by law. NH RSA 80:69. Failure to notify a mortgagee of record of the execution of the tax lien results in the interests of the mortgagee surviving the delivery of the tax deed. Id.; Windham, 138 N.H. 319, 639 A.2d 1089.

HN6 Compliance with the execution and notification requirements of the statutory tax lien procedure has two significant **[*7]** results for the municipality holding the lien. First, the first priority lien for real estate taxes does not expire on October 1 following the tax year, but continues indefinitely, even if a tax deed is not delivered. *Id.*; NH RSA 80:76. Second, upon execution of the tax lien, the interest on the delinquent taxes increases from twelve to eighteen percent. NH RSA 80:69.

B. Federal Bankruptcy Law

HN7 Upon the filing of a **bankruptcy** petition, § 362(a) of the **Bankruptcy** Code imposes an automatic stay against the commencement or continuation of any action or proceeding against a debtor to collect a prepetition debt. The automatic stay provision of the **Bankruptcy** Code, § 362(a), has been described as "one of the fundamental debtor protections provided by the **bankruptcy** laws." Midlantic Nat'l Bank v. New Jersey Dep't of Env't Protection, 474 U.S. 494, 503, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986). Its purpose is to give debtors breathing room and stop collection efforts on the day of filing. Jamo v. Katahdin Fed. Credit Union (In re Jamo), 283 F.3d 392, 398 (1st Cir. 2002); In re 229 Main St. Ltd P'ship, 262 F.3d 1, 3 (1st Cir. 2001).

Specifically, § 362(a) of the **Bankruptcy** Code imposes a stay against:

HN8 (4) any act to create, perfect, **[*8]** or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; [and]

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(4), (5), and (6).

Despite the importance of the automatic stay, HN9 Congress has enacted several exceptions to the stay that allow governmental units to take actions that protect the public interest in the collection of taxes. Id. Exceptions to the automatic stay are read narrowly. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Assoc., 997 F.2d 581, 590 (9th Cir. 1993). However, exceptions to the stay may not be narrowly construed when they pertain to the exercise of police powers to protect public health and safety. See Cournoyer v. Town of Lincoln, 790 F.2d 971, 976 (1st Cir. 1986). The present cases involve protection of the pecuniary interest of a governmental unit, not the protection of public health or safety. In re McMullen, 386 F.3d 320, 325 (1st Cir. 2004). Accordingly, this Court shall **[*9]** construe exceptions to the automatic stay narrowly to effectuate the fundamental public policy of federal **bankruptcy** law to grant broad relief to the debtor. Id.; Stringer v. Huet (In re Stringer), 847 F.2d 549, 552 (9th Cir. 1988).

The exceptions involved in these cases are provided in § 362(b) of the **Bankruptcy** Code:

HN10 (b) The filing of a petition . . . does not operate as a stay —
(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title . . .

(9) under subsection (a), of . . .
(B) the issuance to the debtor by a governmental unit of a notice of a tax deficiency; [and]

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax . . . imposed by a governmental unit, if such tax . . . becomes due after the date of the filing of the petition.
It is the scope of these exceptions, and the conduct of Derry and Pembroke, that are at issue in these cases.

III. DISCUSSION

In her Complaint and Motion for Summary Judgment, Gaff is seeking a ruling by the Court finding **[*10]** that Pembroke (1) willfully violated the automatic stay by sending a notice of delinquent taxes and executing a lien for the 2007 real estate taxes (Count I); (2) willfully violated the automatic stay by applying postpetition tax payments to prepetition obligations (Count II); and (3) is in contempt of the order confirming her chapter 13 plan by imposing and collecting interest on prepetition tax obligations in violation of the confirmed chapter 13 plan (Count III). She is also seeking a hearing on damages, including legal fees pursuant to § 362(k) of the **Bankruptcy** Code for the stay violations and under the Court's general supervisory power for contempt of the confirmation order.

In their Motion for Contempt and Sanctions for Violation of the Automatic Stay, the Doolans are seeking rulings by the Court holding Derry (1) in contempt for violation of the automatic stay; (2) liable for actual damages to be determined by the Court, including attorney's fees and costs; and (3) liable for punitive damages. In the Doolan case, the Court has before it the Doolans' motion for contempt, the objection by Derry, and several memoranda of law. No motion for summary judgment has been filed by the **[*11]** parties in that case. Neither have the parties submitted their dispute for decision on a stipulated record. However, neither the Doolans, nor Derry, objected to the motion filed by Gaff to join her case with their dispute. In addition, the motion and objection reflect agreement of many facts, including the documents used by Derry in execution of its lien for real estate taxes. Accordingly, the Court deems the Doolans and Derry to have asked the Court to review their pleadings as a motion for summary judgment by the Doolans based upon the undisputed factual record contained in their respective pleadings.

HN11 Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to the Gaff adversary proceeding by Federal Rule of **Bankruptcy** Procedure 7056, and the Doolans' contested matter by Federal Rule of **Bankruptcy** Procedure 9014, a summary judgment motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Genuine," in the context of Rule 56(c), "means that **[*12]** the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the "record in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

A. Gaff's Motion for Summary Judgment

Gaff's adversary proceeding springs from actions taken by Pembroke under New Hampshire law to maintain the perfection of prepetition liens for unpaid property taxes which Gaff contends violate the automatic stay imposed under federal **bankruptcy** law for the protection of debtors and the orderly payment of claims. On December 11, 2007, Gaff filed a chapter 13 **bankruptcy** petition. At the time of filing, Gaff owed Pembroke property taxes for **[*13]** 2006 and 2007. Prior to her **bankruptcy** filing, Pembroke had executed a tax lien for the 2006 taxes, but not the 2007 taxes. On December 28, 2007, Pembroke filed a proof of claim for unpaid property taxes for those years. On January 7, 2008, Pembroke sent Gaff a Notice of Tax Delinquency followed by a Notice of Impending Tax Lien on February 5, 2008. The Notice of Tax Delinquency noted that "[t]o avoid initiation of the tax lien process and associated additional expenses, payment in full must be made." The Notice of Impending Tax Lien stated that "the tax lien will entitle the Town to legal interest in the property unless, within two (2) years of the execution of the tax lien, the property is redeemed by payment of the amount due plus all accrued interest and costs." Finally, on March 10, 2008, Pembroke executed a tax lien on Gaff's property for the unpaid 2007 taxes.

On February 14, 2008, the Court confirmed Gaff's chapter 13 plan. Pembroke received proper notice of the plan and the confirmation hearing, but did not object or appear. The plan pays Pembroke's arrearage over five years without interest. Any payments outside the plan are applied to taxes going forward first, then to the **[*14]** arrearage. After confirmation, Pembroke executed a tax lien for unpaid 2007 real estate taxes. Gaff has remained the owner of the property and made payments for 2008 and 2009 property taxes. However, Pembroke erroneously applied these payments towards the 2006 and 2007 arrearage that is supposed to be cured by the plan. Pembroke concedes that it applied the payments to the wrong year. As a result of this "clerical error," Pembroke sent notices for unpaid taxes in winter of 2009 and 2010 when in fact those taxes were paid. Pembroke also added interest to the prepetition arrearage, in violation of the provisions of the confirmed plan. On January 29, 2010, Gaff appeared at the tax collector's office to discuss her account. According to the tax collector's affidavit, Gaff became visibly upset and stormed out of the office while the tax collector tried to explain that the town would cure the error. Finally, Gaff filed a complaint claiming violation of the automatic stay for notices sent by Pembroke for 2007 taxes and misapplication of postpetition tax payments as well as contempt of the final confirmation order.

1. Stay Violations Relating to Prepetition Taxes (Count I)

The dispute between **[*15]** Gaff and Pembroke involves the scope of the exceptions to the automatic stay regarding the collection of taxes. HN12 State law requires a tax collector to provide to the owner of real estate a summary of all uncollected and unredeemed taxes against their real estate. NH RSA 76-11-b. [3] Furthermore, in order HN13 to perfect the inchoate lien for real estate taxes, New Hampshire law requires a four step process. First, the tax collector must provide a notice of impending lien. NH RSA 80:60. Second, an affidavit of the execution of the lien in favor of the municipality where the property is located must be delivered to the municipality on the day following the last date for payment of taxes as stated in the notice. NH RSA 80:61 and 80:63. Third, within thirty days after executing the tax lien to the municipality, the tax collector must record in the registry of deeds for the county where the real estate is located a statement containing the facts relating to each parcel of real estate on which a lien has been executed. NH RSA 80:64. Finally, within forty-five days from the date of the execution of the tax lien, the tax collector must identify and notify all persons holding mortgages of record in **[*16]** the registry of deeds of the facts relating to the execution of the lien. NH RSA 80:65.

FOOTNOTES

3 Although a tax collector is required to provide this summary, it is not one of the necessary steps in executing the tax lien procedures. See NH RSA 80:59-86 . There is no apparent sanction for failure to provide the required summary.

a. The Notice of Arrearage - NH RSA 76:11-b

Pembroke sent a Notice of Tax Delinquencies and Unredeemed Tax Liens dated January 7, 2008 to Gaff as required by NH RSA 76:11-b. [4] The notice reflected an unredeemed tax lien for 2006 taxes in the amount of $2,627.61 and unpaid 2007 taxes in the amount of $6,275.00. The notice contained a summary of unpaid and unredeemed taxes as specified under the statute. [5] The notice also stated that "[t]o avoid the initiation of the tax lien process and associated additional expenses, payment in full must be made by January 25, 2008." [6] The 2007 taxes were due and payable prior to December 11, 2007, the date Gaff filed her chapter 13 petition.

FOOTNOTES

4 Gaff's **bankruptcy** petition was filed and her chapter 13 plan was confirmed under the name of "Lori Mader," and the notice was addressed to her under that name. However, she filed a notice of name **[*17]** change with the Court on June 15, 2010 (Doc. No. 86) to reflect a Certificate of Name Change issued by Merrimack County Probate Court on June 7, 2010. No party has contended that the notice was improperly addressed or that she is not the person identified in the notice.

5 The notice dated January 7, 2008, also list taxes for 2006 for which a tax lien had apparently been executed prepetition. Gaff has made no claim that the inclusion of this information violated the automatic stay.

6 The Court notes that the notice of delinquent taxes required under NH RSA 76:11-b is neither a condition precedent nor a part of the tax lien procedures under New Hampshire law. See NH RSA 80:59-86 .

Pembroke claims that its action was not a violation of the automatic stay because of the exception provided in § 362(b)(9)(B) of the **Bankruptcy** Code. Gaff agrees that giving the notice of arrearage required under NH RSA 76:11-b is excepted from the automatic stay. However, she contends that the notice of January 7, 2008, went beyond the narrow exception in the **Bankruptcy** Code when it attempted to collect or enforce the prepetition tax obligation for 2007. Gaff objects to language in the notice stating: "According **[*18]** to RSA 80:59 any outstanding 2007 tax not paid in full, including interest and costs, will be subject to the tax lien process. To avoid the initiation of the tax lien process and associated additional expenses, payment in full must be made by January 25, 2008." Gaff argues that this language goes beyond the requirements of NH RSA 76:11-b and is outside of the exception to the automatic stay for notices of tax deficiencies because it attempts to coerce her to pay prepetition taxes by threatening the commencement of the tax lien procedure in violation of the automatic stay imposed by § 362(a)(6).

Pembroke and the interveners argue that in addition to the exception in § 362(b)(9)(B), prior proceedings in this Court in In re Pub. Serv. Co. of New Hampshire, 90 B.R. 575 (Bankr. D.N.H. 1988), as well as the decision in Jennings v. Town of Greene (In re Jennings), 304 B.R. 8 (Bankr. D. Me. 2004), demonstrate that the delivery of the notice on January 7, 2008, did not violate the automatic stay. They also argue that even if the demand for payment in the notice is outside the scope of § 362(b)(9)(B), it did not violate the stay because it did not constitute harassment or coercion of Gaff. **[*19]** See In re Pratt, 462 F.3d 14, 19 (1st Cir. 2006) (citing In re Diamond, 346 F.3d 224, 227 (1st Cir. 2003)); Jamo, 283 F.3d at 399.

This Court's previous decisions in the Public Service case are not helpful to Pembroke. In 1988, the language of § 362(b)(3) only referred to "any act to perfect an interest in property" to the extent that such interest would be superior to the rights of a trustee. The language did not explicitly include the right to maintain or continue the perfection of an interest. Accordingly, the decision in the Public Service case did not involve a dispute between the debtor and any city or town over the then applicable tax sale procedures under state law beyond the question of whether the language in § 362(b)(3) permitted a New Hampshire tax collector to follow state law procedures to maintain its status as a secured creditor without obtaining relief from the automatic stay. The Court in Public Service did not address the exception in § 362(b)(9) and did not examine the content or effect of the procedures used by any of the towns in maintaining their liens for taxes. In that case, the court only ruled that § 362(b)(3) provided an exception to the automatic stay to **[*20]** permit cities and towns to maintain liens for taxes. The decision in Public Service was subsequently codified by the 1994 amendments to the **Bankruptcy** Code. [7] Therefore, any exception to the automatic stay for Pembroke's actions must be found in the current statutory language, not the Public Service case.

FOOTNOTES

7 The addition of acts to "maintain or continue the perfection of" an interest, to the extent that such interest would be superior to the rights of a trustee, was added to § 362(b)(3) by section 204 of the **Bankruptcy** Reform Act of 1994, Pub. L. No. 103-394, effective October 22, 1994.

Similarly, the facts in Jennings limit its value to Pembroke as authority in this proceeding. In Jennings, the debtors conceded that the mailing of the notices by the town did not violate the automatic stay. Jennings, 304 B.R. at 9-10. Moreover, the court in Jennings found that the demand for payment in the notices was excepted from the automatic stay by § 362(b)(3) because it was required under applicable state law and was an essential component of the process to perfect a tax lien. Id. at 12. It was because the notices were held to be within the exception to the automatic stay under § 362(b)(3) that the **[*21]** court had to address whether the language in the notices violated the stay against postpetition collection of prepetition debt because it was coercive or harassing. Id. at 10. The court in Jennings stated that "[e]ven were I to assume the tenor of the statutory notice's language could convert lawful action to unlawful, the notice before me is not so coercive or harassing as to violate the stay." Id. at 13. Thus, the decision in Jennings turned on whether actions taken outside of otherwise lawful conduct may violate the stay. In this case, Gaff contends that sending a hypothetical notice under the provisions of NH RSA 76:11-b would be excepted from the stay, but that the notice sent to her went beyond the exception.

The parties agree that HN14 § 362(b)(9)(B)'s exception permits the delivery of the statutory notice of arrearage pursuant to NH RSA 76:11-b. The January 7, 2008, notice contains the information required by applicable state law for a notice of deficiency. However, the notice also contains the following language, not required by NH RSA 76:11-b:
According to RSA 80:59 any outstanding 2007 tax not paid in full, including interest and costs, will be subject to the tax lien process. **[*22]** To avoid initiation of the tax lien process and associated additional expenses, payment in full must be made by January 25, 2008. PLEASE CALL THE TAX OFFICE FOR INTEREST AMOUNT DUE.

(emphasis in the original). The language does not mention any exception for taxpayers in a **bankruptcy** proceeding. Contrary to the arguments of Pembroke, and the interveners, this additional language goes beyond simply giving notice of tax deficiency and therefore is outside the narrow exception of § 362(b)(9)(B). Since the demand for payment is not excepted, it is prohibited by § 362(a)(6).

Pembroke's claim that the notice was not improperly coercive or harassing is irrelevant to the Court's decision. Lawful actions may violate the automatic stay, or the discharge injunction, if they are improperly coercive or harassing. See Pratt, 462 F.3d at 19. However, actions that do violate the automatic stay are not lawful simply because they do not coerce or harass a debtor. See H & H Beverage Distrib. v. Dep't of Revenue of Pennsylvania, 850 F.2d 165, 167 (3d Cir. 1988), cert. denied 488 U.S. 994, 109 S. Ct. 560, 102 L. Ed. 2d 586 (1988) (governmental unit may issue a notice of tax deficiency but may not attempt to collect a prepetition tax). In this **[*23]** case, the demand for payment of the 2007 taxes in the January 7, 2008, notice was outside of the narrow exception from the automatic stay in § 362(b)(9), and violated the automatic stay provided in § 362(a)(6). Rosas v. Monroe Cnty. Tax Claim Bureau, 323 B.R. 893, 899 (Bankr. M.D. Pa. 2004); Headrick v. Georgia (In re Headrick), 203 B.R. 805, 810 (Bankr. S.D. Ga. 1996). The degree of coercion or harassment, or the good faith or bad faith of the Pembroke tax collector, or whether Pembroke's actions were intended to violate the stay or were a mistake, may be relevant to a determination of damages, but are not determinative of whether the automatic stay was intentionally violated. Fleet Mortg. Group, Inc. v. Kaneb (In re Kaneb), 196 F.3d 265, 268-69 (1st Cir. 1999).

b. Execution of Tax Lien Procedures

HN15 The first step in executing a tax lien in order to maintain the perfection of the original lien is sending notice of the impending lien to the person against whom the tax was assessed. State law dictates that the notice (i) state the name of the person against whom the tax was assessed; (ii) describe the property committed to the tax collector for collection of taxes; (iii) state the date **[*24]** and time on which the last payment will be accepted; and (iv) state the amount of the tax, interest, and costs to the date of executing the lien. NH RSA 80:60.

Pembroke sent a Notice of Impending Tax Lien dated February 5, 2008, to Gaff as the first step by Pembroke to execute a tax lien for unpaid taxes for the 2007 tax year in the amount of $6,653.30. The 2007 real estate taxes were due before December 11, 2007, the day Gaff filed her **bankruptcy** petition, so they were a prepetition debt. The notice contained the information required under state law. Id. However, the notice also contained the following additional language not required under state law:

IF A LIEN IS PLACED IT WILL BE LISTED ON YOUR CREDIT HISTORY.If the total amounts including interests and costs are not paid before 4 P.M. on Monday, March 10, 2008 a "Real Estate Tax Lien" will be executed to the Town of Pembroke and recorded in Merrimack County Registry of Deeds. This tax lien will entitle the Town to legal interest in the property unless, within two (2) years of the execution of the tax lien, the property is redeemed by payment of the amount due plus all accrued interests and costs. If payment is made before March 10, **[*25]** 2008 please call my office at 603-485-4747 extension 208 for the correct amount due.

(emphasis in the original). This additional language goes beyond the requirements of the tax lien procedure under state law and is not necessary to maintain an existing lien for taxes. Id. This language demands payment of the 2007 taxes within two years or the debtor will lose her property. The language does not mention any exception for taxpayers in a **bankruptcy** proceeding. Such statements violate the automatic stay imposed by § 362(a)(4) and (a)(6) and are not permitted under any exception to the automatic stay.

Pembroke claims that its actions were not a violation of the automatic stay because of the exception provided in § 362(b)(3) of the **Bankruptcy** Code. However, HN16 § 362(b)(3) only excepts from the automatic stay "any act to perfect, or maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b)" of the **Bankruptcy** Code. Rosas, 323 B.R. at 899. Gaff acknowledges that applicable state law requires town tax collectors to follow certain procedures to maintain a lien for prepetition real estate taxes **[*26]** and that § 362(b)(3) contains an exception to the automatic stay for such actions. However, she contends that the notice of February 5, 2008, went beyond the narrow exception in the **Bankruptcy** Code. She contends that the procedure under state law only requires identification of the property and the property owner, plus notification to the property owner of the amount due on the last day to pay and the last date for payment. See NH RSA 80:60. The additional language quoted is not mandated by NH RSA 80:60 and therefore goes beyond an act to maintain or continue perfection of a lien. Hence, the exception in § 362(b)(3) is not applicable to the additional language.

On March 10, 2008, Pembroke completed the second step in the tax lien procedure by delivery of an affidavit of execution of a tax lien. NH RSA 80:61. [8] As of the date of execution of the tax lien, the statutory interest rate on the unpaid taxes increased from 12% to 18%. See NH RSA 76:13 (12% interest after due date) and NH RSA 80:69 (18% interest after execution of a tax lien). HN17 The increase in the statutory interest rate is not a violation of the automatic stay because it occurs by operation of law once the tax lien is executed. **[*27]** However, collection of the higher interest rate through the application of plan payments by the trustee, or postpetition payments by a debtor, at the higher rate on prepetition tax debt is not part of the process for perfecting or maintaining a tax lien. Therefore, any such action would violate the stay under § 362(a)(5). [9]

FOOTNOTES

8 The summary judgment record is silent on any other steps taken by the tax collector and Pembroke in executing the tax lien for 2007 taxes. The Court assumes that it followed the remaining procedures required under state law to execute a tax lien by filing a report of the execution of the tax lien in the registry of deeds (NH RSA 80:64) and notifying persons holding liens on Gaff's property of the execution of the lien (NH RSA 80:65 & 66). However, for the reasons set forth in the opinion, those actions do not impact the Court's ultimate decision.

9 The Court notes that a town may require a plan to pay the statutory interest rate as of the calendar month the plan is confirmed, even if that rate increased postpetition. 11 U.S.C. § 511 .

The NHTCA argues that Congress has recognized the importance of real estate taxes to local communities when in 1994 it amended the **Bankruptcy** **[*28]** Code to overrule certain judicial decisions on the scope of § 362(b)(3) by adding an exception from the automatic stay regarding the creation or perfection of liens for postpetition taxes. [10] Prior to this amendment, some courts had held that the exception in § 362(b)(3) applied to prepetition liens, but not to postpetition tax liens. The NHTCA cites to the legislative history of the 1994 amendment to § 362(b) which states:

Local governments rely on real property taxes to constitute one of their principal sources of revenue. These taxes are, in turn, typically secured by statutory liens. Both the property owner and any mortgage holder recognize that their interest in real property is subject to the local government's right to collect such property taxes. However, several circuit courts have held that the automatic stay prevents local governments from attaching a statutory lien to property taxes accruing subsequent to a **bankruptcy** filing. See, e.g., In re Parr Meadows, 880 F.2d 1540 (2d Cir. 1989), cert. denied, 493 U.S. 1058, 110 S. Ct. 869, 107 L. Ed. 2d 953 (1990); Makoroff v. City of Lockport, 916 F.2d 890 (3d Cir. 1990). These decisions create a windfall for secured lenders, who would otherwise be subordinated to **[*29]** such tax liens, and significantly impair the revenue collecting capability of local governments. This section overrules these cases and allow local governments to utilize their statutory property tax liens in order to secure the payment of property taxes.

140 Cong. Rec. H 10,771 (October 4, 1994) (statement of Representative Brooks). The NHTCA contends that Congress intended the 1994 addition of § 362(b)(18) to provide the same treatment for taxes accruing postpetition as case law had applied to prepetition taxes, thereby affirming the treatment of prepetition tax claims under the exception in § 362(b)(3). The Court agrees with the NHTCA that Congress has clearly affirmed the exception to the automatic stay which permits the perfection and the continuation of perfection of statutory liens for the collection of both prepetition and postpetition real

estate taxes. However, the exception is expressly limited to the perfection or the continuation of perfection of the statutory lien, not demands for payment or other attempts to collect the tax. The inescapable inference from the history of Congressional action with regard to such statutory liens is that acts to perfect and to continue the **[*30]** perfection of property tax liens do not violate the automatic stay, but acts to collect or enforce such liens remain subject to the automatic stay.

FOOTNOTES

10 Section 362(b)(18) was added to the **Bankruptcy** Code by section 401 of the **Bankruptcy** Reform Act of 1994, Pub. L. No. 103-394.

c. Avoidance of Stay Violations

The Towns and the interveners in these cases contend that they are not seeking to collect unpaid prepetition taxes or to deed properties subject to a tax lien without relief from the stay. They contend that they are only employing that part of the statutory procedure that maintains their tax lien as permitted by § 362(b)(3) and (b)(18) of the **Bankruptcy** Code. While tax collectors may not intend to pursue those portions of the statutory tax collection procedures subject to the automatic stay, it is undisputed that the notices that they send to debtors in **bankruptcy** proceedings are indistinguishable from those sent to property owners who are not in **bankruptcy.** In fact, the summary judgment record strongly suggests that Pembroke does not recognize any distinction between proceedings against property owners in **bankruptcy** and those not in **bankruptcy.** The summary judgment record includes **[*31]** answers to interrogatories by the Pembroke tax collector dated August 18, 2010, which include the following:
*5. Please describe the Town of Pembroke's procedures and/or guidelines regarding application of post-petition property tax payments when a property owner files for Chapter 13 **bankruptcy** protection and the Court confirms a Chapter 13 plan which includes payment of pre-petition real estate property taxes.*

ANSWER:

Any payments received for taxes due are applied to the most outstanding year of taxes unless I am instructed otherwise.

*6. Please describe the lien procedure for the Town of Pembroke for unpaid real estate property taxes for a property owner who has filed for Chapter 13 **bankruptcy** protection.*

ANSWER:

The lien procedure is the same for all taxpayers regardless of **bankruptcy** filings. In January a delinquency letter is mailed to every taxpayer in Pembroke listing all outstanding taxes due as of the date of the letter. In February a Tax Lien Notice is sent to any taxpayer who has outstanding taxes for the prior year. In March, a tax lien is perfected for outstanding taxes, interest and costs and recorded at the Merrimack County Registry of Deeds.

*7. Please describe the rate of interest **[*32]** charged for unpaid property taxes, when interest begins to accrue, and how and when the interest rate changes. Please describe how this procedure changes, if at all, if a real estate property owner files for Chapter 13 **bankruptcy** protection.*

ANSWER:

Property tax interest is charged at 12% per annum. Interest begins to accrue the day after the bill is due. The interest rate goes up to 18% per annum when the tax lien is perfected on the property. The interest rate changes if the **bankruptcy** court orders a change.
The answer to interrogatory number 5 reflects a lack of understanding of the requirements for the application of payments under a plan on account of prepetition taxes and payments by a debtor for postpetition taxes. See Burrell v. Town of Marion (In re Burrell), 346 B.R. 561, 570-71 (B.A.P. 1st Cir. 2006). The answer to interrogatory number 6 reflects the statutory lien procedure and the procedures followed in this case, but does not reflect any recognition by Pembroke that there is any limitation on what the town may do in tax enforcement proceedings against **bankruptcy** debtors and their property. The answer to interrogatory number 7 suffers from the same problems as the answer **[*33]** to interrogatory number 5 as it fails to indicate any understanding of the impact of a pending **bankruptcy** proceeding or a confirmed plan on the application of payments or the accrual of interest. Id.

The difficulty for Pembroke, and all other cities and towns in New Hampshire, is that the statutory procedure for maintaining the perfection of liens for unpaid real estate taxes includes procedures for collection of such unpaid taxes. See NH RSA 80:69 and 80:76. These collection activities include the commencement of a two-year redemption period, with delivery of a tax deed if unredeemed, and an increase in the interest rate on the unpaid obligation. These collection activities are not excepted from the automatic stay. 11 U.S.C. § 362(a)(4), (5) and (6). The exception from the automatic stay is limited to acts to "perfect, or to maintain or continue the perfection of" certain interests in property. 11 U.S.C. § 362(b)(3). Pembroke, Derry and the interveners do not argue to the contrary.

They contend that they have no intent to take collection actions without first obtaining relief from the automatic stay. Of course, the problem is that debtors, who receive notices that are indistinguishable **[*34]** from those sent when a town intends to commence a collection action, may not discern what a town intends and does not intend to do. The question is whether, and how, a real estate tax collector in New Hampshire may maintain the perfection of liens for unpaid prepetition and postpetition taxes without violating the automatic stay.

The procedure used by Pembroke which sends the same notices and forms to all delinquent taxpayers, regardless of whether they are involved in a **bankruptcy** proceeding, and includes language indicating that property interests may be lost if payment is not made by prescribed deadlines does not suffice. However, a town taking no action could lose its statutory lien and thereby provide a windfall for debtors and third parties holding liens or other interests in the property taxed. Because the current New Hampshire statutory procedure includes both lien maintenance and collection actions within its parameters, the only options appear to be (1) eliminate all language not necessary under state law to maintain the lien for unpaid property taxes or (2) retain the current practices and include with all tax delinquency and tax lien notices, sent to debtors in **bankruptcy** **[*35]** proceedings, and other persons, with an interest in the property subject to the tax, a notice that (a) the tax collector or town is only acting to maintain the perfection of its statutory lien and is not attempting to collect any delinquent property tax debt, (b) the tax collector or town will not deliver a tax deed or impair a debtor's interest in the property, (c) the tax collector or town will not increase the interest rate on unpaid property taxes without seeking appropriate **bankruptcy** court approval, and (d) the provisions of federal **bankruptcy** law may affect the rights of the town under state law, as long as the debtor is in **bankruptcy.** Detailed explanations are neither necessary nor appropriate since tax collectors may not provide legal advice and the impact of **bankruptcy** law may vary from case to case. However, tax collectors need to recognize the limitations imposed on them by the **Bankruptcy** Code and need to advise debtors that such limitations exist. [11]

FOOTNOTES

11 The Court takes no position on the exact wording of such notices or whether they need to be part of the forms of notices sent to all taxpayers or whether they need only be included with notices sent to property owners in **[*36]** **bankruptcy.** The important point is for tax collectors to recognize the limitations that they acknowledge exist and, if they wish to use the current language, to advise debtors of the existence of such limitations.

2. Stay Violations Relating to Application of Postpetition Tax Payments (Count II)

Pembroke admittedly applied postpetition real estate tax payments to prepetition tax liabilities. Application of postpetition payments to prepetition obligations of a chapter 13 debtor is simply collection of a prepetition debt outside of a plan of reorganization prohibited by § 362(a)(6) of the **Bankruptcy** Code. There is no dispute that Pembroke intended to apply Gaff's postpetition payments to the oldest (i.e., prepetition) tax obligations first and that it was aware of the **bankruptcy** proceeding. Therefore, it actions were willful and constitute willful violations of the automatic stay. Kaneb, 196 F.3d at 268-69.

3. Contempt of the Confirmation Order (Count III)

Gaff contends that the actions of Pembroke in applying payment of postpetition taxes to prepetition claims, and the payment of interest on those prepetition taxes, were actions in contempt of the order confirming her plan of reorganization. **[*37]** Pembroke admittedly applied postpetition real estate tax payments to prepetition tax liabilities. Such actions failed to recognize both the distinction in **bankruptcy** proceedings between prepetition and postpetition obligations as well as the provisions of the confirmed chapter 13 plan. The court in In re Rathe, properly characterized the difference between payments made inside a confirmed plan to cure an arrearage and payments made outside the plan for postpetition obligations:

HN18 the purpose of a Chapter 13 Plan is to allow a debtor to pay arrears during the pendency of the plan while continuing to make payments at the contract rate. Payments made during the pendency of the Chapter 13 plan should have been applied by [the lender] to the current payments due and owing with the arrearage amounts to be applied to the back payments.

114 B.R. 253, 257 (Bankr. D. Ida. 1990). If postpetition payments are applied in such a manner, the creditor must cure the accounting error and restore the debtor to its pre-default status. Burrell, 346 B.R. at 571. Gaff's chapter 13 plan pays her tax arrearage for 2006 and 2007 property taxes to Pembroke over the life of the plan without interest. [12] Pembroke **[*38]** accrued interest on the arrearage and also applied payments for 2008 and 2009 taxes to that arrearage. Pembroke concedes both errors. When Pembroke did not apply payments in accordance with the terms of Gaff's confirmed chapter 13 plan, its actions were in contempt of the confirmation order. Pembroke argues that the mistakes were not willful and that it offered to reallocate the expenses however Gaff wished. A willingness to correct past mistakes does not cure the nature of Pembroke's conduct. However, it may be relevant to a determination of any sanctions to be imposed for such conduct.

FOOTNOTES

12 The treatment of Pembroke's secured tax claim under Gaff's chapter 13 plan is not an issue in this case. Gaff's chapter 13 plan dated December 7, 2007 (Doc. No. 6) proposed to treat Pembroke's prepetition tax claim as a priority unsecured tax claim to be paid without interest. The plan and a notice of the confirmation hearing were served on the Pembroke tax collector and the plan was confirmed on February 14, 2008, without objection by Pembroke. The confirmation order was not appealed and Pembroke is bound by the provisions of the confirmed plan. United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 1377, 176 L. Ed. 2d 158 (2010) .

4. [*39] Damages

Gaff seeks a hearing to determine damages for Pembroke's willful violation of the automatic stay and contempt of the order confirming her chapter 13 plan. HN19 The **Bankruptcy** Code allows individual debtors injured by a creditor's willful violation of the automatic stay to "recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, . . . punitive damages." 11 U.S.C. § 362(k)(1); Kaneb, 196 F.3d at 268-69. However, the **Bankruptcy** Code expressly prohibits an award of punitive damages against any governmental unit. 11 U.S.C. § 106(a)(3). Accordingly, any hearing on damages shall be limited to actual damages, attorneys' fees, and costs.

B. Doolans' Motion for Contempt and Sanctions for Violation of the Automatic Stay

The first billing for the 2009 real estate taxes was due and unpaid on the date the Doolans filed their chapter 13 petition on October 13, 2009. One month later, the balance of the 2009 real estate taxes became due and Derry filed a secured claim in the Doolans' **bankruptcy** case. After notice to Derry and a hearing, the Doolans' chapter 13 plan of reorganization was confirmed on January 5, 2010, without objection. The plan proposed to pay **[*40]** the 2009 real estate taxes owed to the town as an unsecured priority claim with interest at twelve percent. [13] The confirmation order became final on January 19, 2010. On January 22, 2010, Derry sent to the Doolans the required notice of arrearage under NH RSA 76:11-b for the 2009 real estate taxes. [14] The notice satisfied the statutory requirement to notify the Doolans of the uncollected real estate taxes due on their property. The notice also contained the following additional language:

To avoid initiation of the tax lien process as required by State statute and associated additional expense of $18.00 Certified Lien Notice Fee, you should pay the total amount due (tax and interest) on or before March 25, 2010 for all levies listed not previously liened.

FOOTNOTES

13 The treatment of Derry's secured claim for 2009 taxes in the Doolan's chapter 13 plan is not an issue in this case. On the date the Doolans filed their chapter 13 petition, and on the date their chapter 13 plan was confirmed, Derry held a fully secured claim for the 2009 real estate taxes. However, after notice and a hearing, HN20 Derry did not object to its treatment and the plan was confirmed. Therefore, Derry is bound by the terms of **[*41]** the confirmed chapter 13 plan. Espinosa, 130 S.Ct. at 1377 (2010) .

14 The notices in the record are addressed solely to Mr. Doolan. The record does not disclose whether Mrs. Doolan holds a legal interest in the property subject to Derry's tax lien. However, Mrs. Doolan holds at least a homestead interest in the property, and is a person with an interest in tax liens on the property in question as well as the redemption of tax liens, even if she does not hold a legal interest of record in the property. See e.g., Bursey v. Town of Hudson, 143 N.H. 42, 45, 719 A.2d 577 (1998) (holding that a party without legal title to real estate held an equitable interest under a divorce decree sufficient to constitute a legally protectable property interest in the property). Accordingly, in this opinion, the Court shall deem the notices issued by the Derry tax collector as actions taken against each joint debtor.

In response to the notice, the Doolans' attorney sent Derry a letter claiming the notice was a collection action in violation of the automatic stay and to cease any further activity. Derry's tax collector responded in writing stating:

For practicable purposes while a **bankruptcy** case is pending all steps short **[*42]** of those connected with giving a tax collector's deed may be taken without the **bankruptcy** court's approval in order to maintain the security of the first priority lien for real estate taxes.

Therefore, Mr. Doolan will continue to receive correspondence in regard to his outstanding real estate taxes as [sic] prescribed by NH RSA 80:59, although he is protected from the Tax Deeding process the steps of lien execution must be perfected.
On March 26, 2010, with the real estate taxes remaining unpaid, Derry took the first step in executing a tax lien by sending the debtor a Notice of Impending Tax Lien under NH RSA 80:60. The document notified the Doolans that if full payment were not made by May 4, 2010, Derry would execute a tax lien on the property. The notice also contained the following additional language:
If the total amounts are not paid before the date stated above, a "**Real Estate Tax Lien**" will be executed to the Town of Derry and recorded at the Rockingham County Registry of Deeds. This tax lien will entitle the Town of Derry to legal interest in the property described above unless, within two (2) years of the execution of the tax lien, the property is redeemed by payment of the **[*43]** amount listed below, plus all accrued interest and costs. (emphasis in the original). The notice also stated "[t]he amount due as of May 4, 2010 including interest and cost is $3,457.31." The Doolans' attorney sent another cease and desist letter to Derry on April 19, 2010. On May 7, 2010, Derry executed a tax lien with the registry of deeds. Finally, the Doolans filed the motion at issue for sending the notices and executing the tax lien.

Derry contends that it was only acting to maintain its existing prepetition first priority lien which is permitted by the exception to the automatic stay provided in § 362(b)(3), (b)(9) and (b)(18) of the **Bankruptcy** Code. Derry contends that its actions were clarified by the tax collector's letter of February 19, 2010 indicating Derry's intent in following the tax lien procedures. The Doolans contend that the notices sent by Derry contained more than the town was required to do under state statutory tax lien procedures when it threatened loss of the Doolans' interest in the property, demanded payment within thirty-nine days, and sought to increase the interest rate contrary to the terms of the confirmed plan. The Doolans contend that these actions **[*44]** brought Derry outside any exception to the automatic stay.

1. Violation of the Automatic Stay

The January 22, 2010, notice of arrearage contained additional language substantially similar to the notice sent by Pembroke and discussed in section III.A.1.a above. The additional language is a demand for payment of both a prepetition tax claim for the first half of the 2009 taxes and the postpetition claim for the second half of the 2009 taxes. The language does not mention any exception for taxpayers in a **bankruptcy** proceeding. Contrary to the statements in the Derry tax collector's letter to counsel for the Doolans, this additional language goes beyond a simple notice of tax deficiency. To the extent that the January 22, 2010, notice contains HN21 a demand for payment of prepetition taxes, it is not protected by the exceptions to the automatic stay in § 362(b)(3) and (b)(18) for tax deficiency notices and did violate the automatic stay imposed by § 362(a)(6).

On March 26, 2010, the tax collector for Derry sent a notice of impending tax lien as the first step in the statutory procedure to maintain the prepetition inchoate lien for the 2009 real estate taxes. The notice contained additional language **[*45]** substantially identical to the language in the similar notice of tax lien sent by Pembroke and discussed in section III.A.1.b above. This additional language goes beyond the requirements of the tax lien procedure under state law and is not necessary to maintain an existing lien for taxes. NH RSA 80:60. This language demands payment of the 2009 taxes within two years or the debtors will lose their property. The language does not mention any exception for taxpayers in a **bankruptcy** proceeding. Such statements violate the automatic stay imposed by § 362(a)(4) and (a)(6) and are not permitted under any exception to the automatic stay.

On May 7, 2010, Derry completed the second step in the statutory procedure to maintain the prepetition inchoate lien for the unpaid portion of the 2009 real estate taxes by recording a notice of lien in the Rockingham County Registry of Deeds. [15] The recording of the notice of tax lien was made in accordance with the statutory procedure to maintain the perfection of the prepetition lien for unpaid 2009 taxes. Accordingly, HN22 the recording of the tax lien did not violate the automatic stay because of the exceptions in § 362(b)(3) and (b)(18).

FOOTNOTES

15 The March 26, 2010 **[*46]** Notice of Impending Tax Lien stated the amount due as of May 4, 2010, as $3,457.31. The notice of lien recorded on May 7, 2010, was for $3,181.62 in taxes, or $275.68 less than the March 26, 2010, notice. The record contains no explanation for this difference, but the reason is not material to the decision in this case.

2. Actual and Punitive Damages

The Doolans seek damages for Derry's willful violation of the automatic stay. The **Bankruptcy** Code allows individual debtors injured by a creditor's willful violation of the automatic stay to "recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, . . . punitive damages." 11 U.S.C. § 362(k)(1); Kaneb, 196 F.3d at 268-69. However, HN23 the **Bankruptcy** Code expressly prohibits an award of punitive damages against any governmental unit. 11 U.S.C. § 106(a)(3). Accordingly, any hearing on damages shall be limited to actual damages, attorneys' fees and costs.

IV. PROSPECTIVE APPLICATION OF DECISION

The Court is mindful that this decision impacts long standing practices by all cities and towns in the State of New Hampshire with respect to the collection of unpaid property taxes from persons in **bankruptcy** proceedings. **[*47]** Pembroke, Derry, and the interveners have documented in the record the efforts by tax collectors in New Hampshire to conduct their tax collection activties within the restrictions of the **Bankruptcy** Code. The Court is satisfied that the vast majority of cities and towns have acted in a manner that they reasonably believed complied with the provisions of the **Bankruptcy** Code with respect to maintaining perfection of liens for unpaid real property taxes. The Court is also satisfied that the misapplication of plan payments made by the chapter 13 trustee and postpetition payments made by debtors could not be based on any good faith belief that such actions were in compliance with the law. Accordingly, the Court must decide whether to apply the decision in this case regarding the scope of the exceptions to the automatic stay under § 362(b)(3), (b)(9) and (b)(18) retroactively or only prospectively.

HN24 Federal courts traditionally looked to three factors in determining whether a current decision in a civil case should be given retroactive effect or only apply prospectively. Those factors are: (1) whether the more recent rule or decision establishes a new principle of law, either by overruling **[*48]** clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the history, purpose and effect of the new rule, retroactive application of the rule will further or retard its operation; and (3) whether retroactive application of the new rule could produce substantial inequitable results. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (citing Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)). The standard in Chevron has evolved in a number of ways which leave little clarity for courts to follow. Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann), 505 F.3d 1033, 1051 (10th Cir. 2007). Chevron has been described as being overruled by the decision in Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995); Mills v. Maine, 118 F.3d 37, 49 (1st Cir. 1997). The application of a federal law to a particular case does not turn on "whether litigants actually relied on an old rule or how they would suffer from retroactive application of a new one." Mersmann, 505 F.3d at 1051-52 (citing Harper, 509 U.S. at 95 n.9). **[*49]** However, equitable principles govern the exercise of **bankruptcy** jurisdiction. Mersmann, 505 F.3d at 1052; In re Jarvis, 53 F.3d 416, 419 (1st Cir. 1995) (citing Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 389, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)); In re Smith Corset Shops, Inc., 696 F.2d 971, 976 (1st Cir. 1982) (citing Bank of Marin v. England, 385 U.S. 99, 87 S. Ct. 274, 17 L. Ed. 2d 197 (1966)).

Since 1988, cities and towns in New Hampshire have taken actions to maintain the inchoate lien for unpaid property taxes under the mistaken impression that an unpublished ruling by this Court in the Public Service case excepted their actions from the automatic stay. However, for the reasons discussed in this decision, the Court in the Public Service case did not review or approve the details of how tax collectors were maintaining liens for unpaid property taxes. In the Public Service case, the Court only held that cities and towns could act to maintain prepetition property tax liens under the language in § 362(b)(3), as it existed in 1988. For twenty-two years, this Court has not had an occasion to rule on the details of how the tax collectors acted to maintain such liens. The absence of any dispute is a reliable indication **[*50]** that debtors and their counsel did not disagree with the view of the cities and towns that their actions did not violate the automatic stay. To that extent, this is a case of first impression, even though it is not articulating a new rule of decision. Revisiting past actions by tax collectors, where there was no contemporaneous objection by a debtor, would not serve any useful purpose.

Accordingly, using the Chevron factors as general principles, and applying general equitable principles of **bankruptcy,** the Court shall apply the rulings on the scope of the exceptions to the automatic stay under § 362(b)(3), (b)(9) and (b)(18) to these two cases and the case of Hall v. Town of Hudson (In re Hall), AP 10-1092-LHK. [16] This decision on exceptions to the automatic stay shall apply to all other cases prospectively. Applying the same principles to the decision on contempt of the confirmation order by Pembroke regarding the manner it applied postpetition payments to unpaid tax obligations, the Court shall apply the decision retroactively because it does not announce any new or altered interpretation of federal **bankruptcy** law.

FOOTNOTES

16 The complaint in Hall was filed on August 3, 2010 and raises many **[*51]** of the same issues involved in these two cases. On October 19, 2010, this court denied a motion by the debtor/plaintiff in Hall to join this proceeding in order not to delay further consideration of the matters in these cases.

V. CONCLUSION

For the reasons discussed in this opinion, the Court shall enter a separate order in Gaff v. Pembroke:
1. finding that Pembroke violated the automatic stay imposed by §§ 362(a)(4), (a)(5) and (a)(6) when it sent the notice of tax delinquencies dated January 7, 2008, sent the notice of impending tax lien dated February 5, 2008, and misapplied postpetition property tax payments;

2. finding that Pembroke was in contempt of the Court's order of February 14, 2008, confirming Gaff's chapter 13 plan when it failed to properly apply postpetition payments of unpaid property taxes and imposed interest on unpaid tax obligations; and

3. scheduling an evidentiary hearing on damages for violation of the automatic stay and sanctions for contempt of the confirmation order.
For the reasons discussed in this opinion, the Court shall enter a separate order in the Doolan case:
1. finding that Derry violated the automatic stay imposed by § 362(a)(4) and (a)(6) when it sent **[*52]** the notice of arrearage dated January 22, 2010, and the notice of impending tax lien dated March 26, 2010;

2. finding that Derry did not violate the automatic stay when it recorded a notice of lien on May 7, 2010; and

3. scheduling an evidentiary hearing on damages for violation of the automatic stay.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of **Bankruptcy** Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: March 14, 2011

/s/ J. Michael Deasy

J. Michael Deasy

Bankruptcy Judge

ABEL BELICE, a/k/a Belice Abel, Debtor. SANDON GONSALVES, Plaintiff-Appellant, v. ABEL BELICE, Defendant-Appellee.

BAP NO. MB 10-030

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

2011 Bankr. LEXIS 710

March 7, 2011, Decided

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. (Hon. William C. Hillman). **Bankruptcy** Case No. 08-11927-WCH. Adversary Proceeding No. 09-01241-WCH.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff creditor appealed from an order of the United States **Bankruptcy** Court for the District of Massachusetts, that granted defendant debtor's motion to dismiss for failure to state a claim, creditor's adversary proceeding by which he sought an order revoking the debtor's discharge or denying the dischargeability of his debt for failure to notify the creditor of the **bankruptcy** case.

OVERVIEW: Creditor and another had obtained a judgment in the amount of $13,851.88 on counterclaims in the debtor's summary process action in the a housing court. In his **bankruptcy** schedules, the debtor misspelled the creditor's first and last names, and listed his own address as the creditor's last known address, despite knowing the creditor was incarcerated. Creditor filed his nondischargeability action after he learned of the **bankruptcy** filing. The **bankruptcy** court ruled that the creditor failed to state a claim. Under 11 U.S.C.S. § 727(e)(1), the creditor's filing was tardy. The deadline in § 727(e)(1) was jurisdictional, and not subject to equitable tolling, so relief under 11 U.S.C.S. § 727(d) was time-barred. However, the address the debtor used was not reasonably calculated to provide the creditor notice. As such, the complaint presented a plausible case for relief under 11 U.S.C.S. § 523(a)(3). It was error for the **bankruptcy** court to dismiss the § 523(a)(3) claim on grounds of failure to state a claim upon which relief could be granted.

OUTCOME: The judgment was affirmed in part, as to the dismissal of the request for revocation, and reversed and remanded for consideration of the request for relief based on the errantly scheduled debt.

CORE TERMS: notice, deadline, revocation, adversary proceeding, default judgment, failed to state, last known, reasonable diligence, actual knowledge, timely filing, dischargeability, failure to state a claim, file claims, de novo, jurisdictional, incarcerated, objecting, incorrect, venue, Federal Rules, order granting, received notice, judicial notice, reasonable inferences, provide notice, timely notice, proof of claim, reasonably calculated, well-pleaded, time-barred

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN1 A **bankruptcy** appellate panel may hear appeals from final judgments, orders and decrees pursuant to 28 U.S.C.S. § 158(a)(1) or with leave of the court, from interlocutory orders and decrees pursuant to 28 U.S.C.S. § 158(a)(3). A decision is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. An order granting a motion to dismiss an adversary proceeding is a final order. More Like This Headnote

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

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

HN2 A **bankruptcy** appellate panel reviews the **bankruptcy** court's findings of fact for clear error and conclusions of law de novo. More Like This Headnote

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

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

HN3 A **bankruptcy** court's determination that a proceeding should be dismissed is a legal conclusion subject to de novo review. Upon review of a dismissal order, an appellate court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the appellant. The appellate court can affirm the allowance of a motion to dismiss only if the factual averments in the complaint hold out no hope of recovery under any theory set forth in the complaint. More Like This Headnote

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims

HN4 A plaintiff's combined allegations, taken as true, must state a plausible, not a merely conceivable case for relief. If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal. More Like This Headnote

Civil Procedure > Parties > Self-Representation > Pleading Standards

HN5 Pro se filings are held to a less stringent procedural standard than others. A pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Liquidations > Denial of Discharge > General Overview

HN6 See 11 U.S.C.S. § 727(d).

Bankruptcy Law > Discharge & Dischargeability > Liquidations > Revocation

HN7 See 11 U.S.C.S. § 727(e).

Bankruptcy Law > Discharge & Dischargeability > Liquidations > Revocation

HN8 The commencement of an action seeking the revocation of a discharge is subject to strict time limitations. 11 U.S.C.S. § 727(e)(1) is not a mere statute of limitations, but an essential prerequisite to the proceeding. As such, a majority of courts have refused to apply the doctrine of equitable tolling to the deadline set forth in the statute. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Liquidations > Denial of Discharge > General Overview

HN9 The deadline to object to discharge set forth in Fed. R. Bankr. P. 4004(a). The United States Supreme Court has ruled that the latter deadline is not jurisdictional and could be forfeited if a debtor fails to raise it in a pleading responsive to the complaint. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Embezzlement & Fraud

HN10 11 U.S.C.S. § 523(a)(2), which provides that a discharge does not discharge a debtor from any debt for money, property, services to the extent obtained by certain types of fraudulent actions or writings. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Unscheduled Debts

HN11 See 11 U.S.C.S. § 523(a)(3).

Civil Procedure > Pleading & Practice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Proceedings in Other Courts

HN12 As part of its de novo review, a **bankruptcy** appellate panel can consider not only the complaint but also matters fairly incorporated within it and matters susceptible to judicial notice. More Like This Headnote

Civil Procedure > Pleading & Practice > Service of Process > General Overview

HN13 See Fed. R. Civ. P. 5(b)(2)(B).

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Unscheduled Debts

HN14 A debtor is required to file a list of creditors with their names and addresses. 11 U.S.C.S. § 521(a)(1)(A) and Fed. R. Bankr. P. 1007(a)(1). The **bankruptcy** clerk uses this list to provide notice to all creditors and parties in interest of the order for relief, meeting of creditors, the bar date to file claims, and the deadlines for objecting to a discharge. Fed. R. Bankr. P. 2002(f). The list of creditors submitted by the debtor must therefore contain information reasonably calculated to provide notice to the creditor. More Like This Headnote

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Unscheduled Debts

HN15 A debtor is held to a standard of reasonable diligence in ascertaining and listing all creditors. More Like This Headnote

HN16 If a debtor would avoid the effect of the omission of a creditor's name from schedules the debtor must prove the facts on which he or she relies. If the creditor is able to show that the address was inadequate for the purpose intended, the burden then shifts to the debtor to show that, notwithstanding the incorrect address, the creditor had timely notice or actual knowledge of the case. More Like This Headnote

COUNSEL: Sandon Gonsalves, Pro se, on brief for Plaintiff-Appellant.

Abel Belice, Pro se, on brief for Defendant-Appellee.

JUDGES: Before Haines, Lamoutte, and Deasy, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Lamoutte

OPINION

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Sandon Gonsalves ("Gonsalves") appeals from the order granting the motion of Abel Belice (the "Debtor") to dismiss Gonsalves' adversary proceeding by which he sought an order revoking the Debtor's discharge or denying the dischargeability of his debt for failure to notify Gonsalves of the **bankruptcy.** On appeal, Gonsalves argues that the **bankruptcy** judge erred in dismissing the adversary proceeding on the grounds he failed to state a claim upon which relief could be granted. For the reasons set forth below, the Panel **AFFIRMS**, in part, and **REVERSES** and **REMANDS**, in part.

BACKGROUND

In August 2006, Gonsalves and Keivonna Briggs ("Briggs") obtained a judgment in the amount of $13,851.88 for their counterclaims in the Debtor's summary process action in the Southeast **[*2]** Housing Court, New Bedford, Massachusetts, No. 06-SP-02859. Gonsalves and Briggs had been tenants of the Debtor on 26 George Street in New Bedford, Massachusetts ("George Street"). Shortly after the judgment issued, Gonsalves and Briggs obtained a lien on real estate of the Debtor located in Brockton, Massachusetts (the "Brockton Property") and Gonsalves was incarcerated.

On March 19, 2008, the Debtor filed for relief under chapter 7 and listed George Street as his residence. He listed Gonsalves and Briggs as creditors and gave as their addresses George Street. Belice misspelled the first and last names of Gonsalves. [1]

FOOTNOTES

[1] There is no information in the record indicating whether the Debtor listed Gonsalves as a secured or unsecured creditor or the status of the Brockton Property.

The deadline for filing complaints objecting to discharge/dischargeability was set for June 16, 2008. The bar date for filing claims was set for October 7, 2008. The Debtor received his discharge on June 27, 2008. [2] The **bankruptcy** court sent notice of the bar date to file claims and discharge order to Gonsalves' address at George Street.

FOOTNOTES

[2] The discharge order and the notice of the bar date to file claims were not **[*3]** included in the appendix but are on the **bankruptcy** court docket and the Panel can take judicial notice of these facts. Hamilton v. Appolon (In re Hamilton), 399 B.R. 717, 719 n.1 (B.A.P. 1st Cir. 2009) .

Gonsalves filed his adversary proceeding on July 30, 2009. In the complaint, he alleged that the **bankruptcy** court had jurisdiction under §§ 727(c), (d), and (e), and 523(a)(2). [3] He briefly recounted the history of the state court action and explained that he first received notice of the **bankruptcy** on May 18, 2009, in response to steps he had taken to collect his state court judgment. Gonsalves argued that the Debtor knew that he was incarcerated because the Debtor had tried to contact him in the fall of 2006 to negotiate a settlement and obtain a release of the lien. [4] He further explained that he would have participated in the **bankruptcy** had he received notice and that he believed that the Debtor was hiding assets.

FOOTNOTES

[3] Unless otherwise indicated, the terms " **Bankruptcy** Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. , as amended by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37. All references **[*4]** to " **Bankruptcy** Rule" are to the Federal Rules of **Bankruptcy** Procedure, and all references to "Rule" are to the Federal Rules of Civil Procedure.

[4] Gonsalves filed an affidavit of his state court trial counsel. In the affidavit, counsel describes the conversations he had with representatives of the Debtor at that time.

In his answer, the Debtor claimed that the **bankruptcy** court lacked jurisdiction and venue was improper [5] under **Bankruptcy** Rule 7012(b). He offered that both Gonsalves and Briggs knew of the **bankruptcy.** He argued that the complaint failed to state a claim for which relief could be granted, was filed beyond the dischargeability deadline, [6] and that Gonsalves

was barred from proceeding as he must have known of the **bankruptcy.**

FOOTNOTES

5 The venue issue was not briefed or prosecuted on appeal. However, venue is proper under 28 U.S.C.A. § 1409 .

6 The Debtor did not argue that the action was time-barred under § 727(e) .

On January 25, 2010, Gonsalves filed a motion for a default judgment based upon the Debtor's failure to respond to discovery. On February 12, 2010, the court entered a default judgment in favor of Gonsalves.

Also on February 12, 2010, the Debtor filed a motion seeking dismissal **[*5]** pursuant to Rule 12(b)(6). In his motion and memorandum in support, he explained that he was required to serve Gonsalves pursuant to Rule 5(E)(B) and that he had complied with the rule because he had listed Gonsalves as a creditor and notice was sent to his last known address. He argued that there must be a presumption of notice because the Debtor served Briggs at the same address. The Debtor also argued that the complaint was untimely and in any event that Gonsalves had not demonstrated that he had a nondischargeable claim.

Gonsalves moved to strike the motion to dismiss on the grounds that the Debtor had failed to respond to discovery resulting in Gonsalves' request for default judgment and had failed to notify Gonsalves of his **bankruptcy** filing. He explained that had not had any contact with Briggs since 2006.

On April 21, 2010, the **bankruptcy** court held a hearing on the motion to dismiss and the motion to strike, treating the latter as an objection to the motion to dismiss. Gonsalves appeared telephonically. In response to the **bankruptcy** court's question about service, Gonsalves represented that he was first notified of the Debtor's **bankruptcy** on May 18, 2009. The **bankruptcy** court **[*6]** ruled that Gonsalves had failed to state a claim, overruled the objection, and granted the motion to dismiss. 7

FOOTNOTES

7 The **bankruptcy** court did not explain whether this ruling applied to one or both counts and did not address the default judgment which it had previously entered. In their briefs, the parties addressed the default judgment but that issue is not before the Panel.

This appeal followed.

JURISDICTION

HN1 A **bankruptcy** appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory

orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is 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). An order granting a motion to dismiss an adversary proceeding is a final order. Burrell-Richardson v. Mass. Bd. of Higher Educ. (In re Burrell-Richardson), 356 B.R. 797, 799 (B.A.P. 1st Cir. 2006).

STANDARD OF REVIEW

HN2 The Panel reviews the **bankruptcy** court's findings of fact for clear error and **[*7]** conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). As this Panel has explained:

> HN3 A **bankruptcy** court's determination that a proceeding should be dismissed is a legal conclusion subject to *de novo* review. See In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003). Upon review of a dismissal order, the appellate court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the appellant. Aybar [v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997)]. The appellate court can affirm the allowance of a motion to dismiss only if the factual averments in the complaint hold out no hope of recovery under any theory set forth in the complaint. Colonial Mortgage, 324 F.3d at 15.
>
> In re Burrell-Richardson, 356 B.R. at 800.

As the First Circuit has explained, HN4 the "make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable case for relief." Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico, 628 F.3d 25, 29 (1st Cir. 2010) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950-51, 173 L. Ed. 2d 868 (2009)). "If the factual allegations in the complaint **[*8]** are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." S.E.C. v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010).

DISCUSSION

On appeal, Gonsalves argues that the **bankruptcy** court erred in dismissing the complaint for failure to state a claim because the Debtor committed fraud on the court by listing him at an address he knew to be incorrect. This was evident, he contends, based upon: (1) the Debtor's knowledge of his incarceration as evidenced by his counsel's affidavit; and (2) the Debtor's petition wherein he lists both his address and Gonsalves' as the same. He also contends that under § 523(a)(3), his debt could not be subject to the discharge.

The Debtor counters that service was proper because he complied with his burden as a debtor, to send it to a creditor's last known address. He disputes the facts set forth in the affidavit Gonsalves filed and argues that Gonsalves failed to demonstrate that he had actual knowledge that Gonsalves was not living at George Street on the petition date.

The Panel is mindful that HN5 "*[p]ro se* filings are held to a less stringent procedural standard than others." Nunnally v. MacCausland, 996 F.2d 1, 6 n.8 (1st Cir. 1993); **[*9]** see also Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (". . . [A] pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'").

Gonsalves' complaint alleges that the jurisdictional bases are §§ 727(c), (d), and (e), and 523(a)(2).

The Debtor obtained his discharge on June 27, 2008, and Gonsalves filed his complaint on July 30, 2009. As such, Gonsalves could not have been objecting to the grant of a discharge under § 727(c) but rather was seeking a revocation of the discharge under § 727(d). [8] Further, given the allegations of fraud in the complaint, Gonsalves was seeking revocation under subsection (1) of § 727(d). Under subsection § 727(e)(1), [9] however, Gonsalves had one year after the grant of discharge to file the complaint. He filed it 13 months after the grant of discharge.

FOOTNOTES

8 That subsection provides:

HN6 (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke **[*10]** a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

11 U.S.C. § 727(d) .

9 Section 727(e) provides:

HN7 (e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--

(1) under subsection (d)(1) of this section within one year [*11] after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of--

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

11 U.S.C. § 727(e) .

HN8 The commencement of an action seeking the revocation of a discharge is subject to strict time limitations. As this Panel has previously explained, § 727(e)(1) is not "a mere statute of limitations, but an essential prerequisite to the proceeding." Pelletier v. Donald (In re Donald), 240 B.R. 141, 146 (B.A.P. 1st Cir. 1999) (citing 6 Lawrence P. King, et al., Collier on **Bankruptcy** ¶ 727.16 at p. 727-72 (15th ed. rev. 1999)). As such, a majority of courts have refused to apply the doctrine of equitable tolling to the deadline set forth in the statute. See, e.g., Dery v. Rosenberg, Case No. 02-73274, 2003 WL 21919267 (E.D. Mich. Jan. 13, 2003); (Gargula v. Lombard (In re Lombard), Case No. 10-3008, 2010 Bankr. LEXIS 2992, 2010 WL 3504130 (Bankr. W.D. Mo. Sept. 7, 2010); Murrietta v. Fehrs (In re Fehrs), 391 B.R. 53, 66-67 (Bankr. D. Idaho 2008); Hadlock v. Dolliver (In re Dolliver), 255 B.R. 251, 254 (Bankr. D. Me. 2000); Bevis v. Bevis (In re Bevis), 242 B.R. 805, 812 (Bankr. D.N.H. 1999). [10]

FOOTNOTES

[10] Courts [*12] have ruled otherwise with respect to the doctrine's application to § 727(d)(2) . See, e.g., Dwyer v. Peebles (In re Peebles), 224 B.R. 519 (Bankr. D. Mass. 1998) .

This Panel adopts the comprehensive analysis provided in the foregoing opinions and agrees that because the deadline in § 727(e)(1) is firm and not subject to equitable tolling, [11] Gonsalves' request for relief under § 727(d) was time-barred. Accordingly, the **bankruptcy** court's dismissal of the request for revocation of discharge for failure to state a claim was harmless error and the Panel will affirm the **bankruptcy** court, albeit on separate grounds.

FOOTNOTES

[11] This statutory deadline to seek revocation of a discharge is in contrast to HN9 the deadline to object to discharge set forth in **Bankruptcy** Rule 4004(a) . The Supreme

Court has ruled that the latter deadline is not "jurisdictional" and could be forfeited if a debtor fails to raise it in a pleading responsive to the complaint. Kontrick v. Ryan, 540 U.S. 443, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) . **Bankruptcy** courts continue to agree, post-Kontrick, that § 727(e) is jurisdictional. See, e.g., In re Fellheimer, Case No. 03-33298, 2010 Bankr. LEXIS 3707, 2010 WL 4008461 (Bankr. E.D. Pa. Oct. 13, 2010) ; In re Fehrs, 391 B.R. at 66-67 .

Gonsalves, **[*13]** however, also sought relief under HN10 § 523(a)(2), which provides that a discharge does not discharge a debtor from any debt "for money, property, services . . . to the extent obtained by" certain types of fraudulent actions or writings. The facts in the complaint do not address § 523(a)(2), rather they are replete with facts pertaining § 523(a)(3). [12] That section provides:

HN11 (a) A discharge . . . does not discharge an individual debtor from any debt — . . .

(3) neither listed nor scheduled under section 521(a) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit —

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request . . . .

11 U.S.C. § 523(a)(3).

FOOTNOTES

[12] The **[*14]** Debtor's answer and motion to dismiss likewise address matters related to § 523(a)(3) .

HN12 As part of our *de novo* review, we can "consider not only the complaint but also matters fairly incorporated within it and matters susceptible to judicial notice." In re Colonial Mortgage, 324 F.3d at 15. We must accept all well-pleaded facts as true, draw reasonable inferences in favor of Gonsalves, and affirm only if the averments in the complaint augur no hope of recovery under any theory set forth therein.

In his complaint and related pleadings, Gonsalves explains that given the misspelling of his first and last names and the erroneous address, effectively, the Debtor did not list him as a creditor. He explained that the address was erroneous as he had been incarcerated well before the petition date. [13] He sets forth the nature of his claim and the facts related to how and when he received his belated notice of the Debtor's petition.

FOOTNOTES

[13] In his memorandum in support of dismissal, the Debtor argued that Gonsalves received timely notice of the petition because the Debtor served notice pursuant to Rule 5(E)(B). Pursuant to **Bankruptcy** Rule 7005, Rule 5, Serving and Filing Pleadings and Other Papers, applies **[*15]** in adversary proceedings. Although Rule 5 contains no subsection 5(E), the language to which the Debtor cited HN13 ("at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there . . ."), is located at Rule 5(b)(2)(B). He also indicated in the same pleading that service of the petition was proper because it was sent to Gonsalves' last known address thereby complying with Rule 5(b)(2)(C). As explained below, however, the Debtor misapprehends the mechanics of how a creditor is served with notice of a petition.

When he filed for relief, HN14 the Debtor was required to file a list of creditors with their names and addresses. See 11 U.S.C. § 521(a)(1)(A) and Fed. R. Bankr. P. 1007(a)(1). The **bankruptcy** clerk uses this list to provide notice to all creditors and parties in interest of, *inter alia*, the order for relief, meeting of creditors, the bar date to file claims, and the deadlines for objecting to a discharge. See Fed. R. Bankr. P. 2002(f). As we have previously explained, the list of creditors "submitted by the debtor must therefore contain information reasonably calculated to provide notice to the creditor." Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 507 (B.A.P. 1st Cir. 2005); **[*16]** see also Anderson v. Richards (In re Anderson), Case No. 07-1328, 2009 Bankr. LEXIS 4081, 2009 WL 4840871 (Bankr. D. Mass. Dec. 10, 2009) (explaining debtor obligated to provide proper deliverable address if debtor knows it); Oxford Video, Inc. v. Walker (In re Walker), 125 B.R. 177, 180 (Bankr. E.D. Mich. 1990) ("We conclude that a creditor has been duly scheduled and listed if the address provided by the debtor is sufficiently accurate to permit delivery the United States Postal Service to the appropriate party."); In re Gray, 57 B.R. 927, 931 (Bankr. D.R.I. 1986) ("Case law is clear and consistent;HN15 the debtor is held to a standard of reasonable diligence in ascertaining and listing all creditors.").

"The burden is on the debtors to use reasonable diligence in completing their schedules and lists. . . . If a creditor proves that an address is incorrect, the debtor must justify the inaccuracy in preparing his schedules." Lubeck v. Littlefield's Restaurant Corp. (In re Fauchier), 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987) (ruling "[a]ddresses that are two years old do not constitute reasonable diligence."); see also Hill v. Smith, 260 U.S. 592, 595, 43 S. Ct. 219, 67 L. Ed. 419 (1923) (". . . HN16 [I]f the debtor would avoid the effect of his **[*17]** omission of a creditor's name from his schedules he must prove the facts on which he relies."); In re Walker, 125 B.R. at 180 ("If the creditor is able to show that the address was inadequate for the purpose intended, the burden then shifts to the debtor to show that, notwithstanding the incorrect address, the 'creditor had [timely] notice or actual knowledge of the case.'").

On his petition, the Debtor used George Street both as his mailing address and the mailing

address for Gonsalves. As Gonsalves' on-site landlord, it is likely that he knew Gonsalves had vacated the apartment. Claiming that George Street was valid because it was a "last known address" does not satisfy the Debtor's burden of reasonable diligence under the present factual scenario.

Accepting the facts Gonsalves set forth in his complaint and further pleadings as true, the address the Debtor used for Gonsalves was not reasonably calculated to provide notice. As such, we conclude that Gonsalves' complaint presented a plausible case for relief under § 523(a)(3). Therefore, it was error to dismiss this claim on the grounds that he failed to state a claim upon which relief can be granted.

CONCLUSION

Based upon the forgoing, **[*18]** the Panel **AFFIRMS** the **bankruptcy** court's dismissal of the request for relief under § 727(d), and **REVERSES** and **REMANDS** for consideration of the request for relief under § 523(a)(3).

In re: LIEBFRIED AVIATION, INC., Debtor.

Chapter 7, Case No. 07-42603-MSH

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

2011 Bankr. LEXIS 681

February 25, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: This matter came before the court for hearing on an accountant's (applicant's) Application for Compensation for Professional Services Rendered From June 1, 2009 through August 31, 2009, with Supplement, and the Chapter 7 trustee's objection thereto.

OVERVIEW: Although the application failed to comply with Bankr. D. Mass. R. 2016-1 and the court's November 10, 2010 order, this lack of compliance paled in comparison to the other deficiencies presented by the facts. 11 U.S.C.S. § 327(a) permitted a trustee or debtor in possession, with the court's approval, to employ, inter alia, one or accountants that did not hold or represent an interest adverse to the estate, and that were disinterested persons. The applicant had failed to provide the level of disclosure required by the **Bankruptcy** Code and rules, which was and continued to be his personal responsibility. Even without reference to the specific facts that called into question his purported disinterestedness and lack of a material adverse interest as regards to debtor and the **bankruptcy** estate, his failure even to disclose his connections to debtor's principal and affiliated entity provided sufficient grounds to warrant disqualifying him from his engagement, vacating the court's prior order approving his employment, and denying the application. He was not entitled to any of the compensation he had received from debtor following the filing of debtor's **bankruptcy** petition on July 11, 2007.

OUTCOME: The fee application was denied, the order of March 28, 2008 authorizing his employment was vacated, and the applicant was required to disgorge those fees paid to him by debtor for post-petition services rendered or expenses incurred.

CORE TERMS: tax returns, disclosure, services rendered, disinterested person, post-petition, accountant, adverse interest, entity, accounting services, equity security, disinterestedness, converted, affiliate, disgorge, disclose, invoice, insider, holder, ion, time records, accounting records, federal income, shareholder, rec—

LEXISNEXIS® HEADNOTES

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Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > Court Approval

Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > Debtors in Possession & Trustees

HN1 11 U.S.C.S. § 327(a) permits a trustee or debtor in possession, with the court's approval, to employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons. 11 U.S.C.S. § 327(a). Among other things, a "disinterested person" cannot be a creditor, equity security holder, or an insider: of the debtor nor can he have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other reason. 11 U.S.C.S. § 101(14)(A), (C). Although the **Bankruptcy** Code does not define "adverse interest," "adverse interest" has been described in pragmatic terms as the possession or assertion of mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between rival claimants as to which of them the disputed right or title to the interest in question attaches under valid and applicable law; or (2) the possession of a predisposition or interest under circumstances that render such a bias in favor of or against one of the entities. The **Bankruptcy** Code places an affirmative obligation on the **bankruptcy** court to undertake a rigorous conflict of interest analysis. More Like This Headnote

Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > General Overview

Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > Court Approval

HN2 To ensure that the appropriate level of disclosure is made, Fed. R. Bankr. P. 2016(a) and its local counterpart, Bankr. D. Mass. R. 2014-1, require an applicant to file a verified statement disclosing the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Fed. R. Bankr. P. 2014(a). Rule 2014-1(b)(1)(A) expressly requires that among the connections and relationships to be disclosed are: The professional's representation of the debtor or any affiliate of the debtor as that term is defined in 11 U.S.C.S. § 101(2), or any insider of the debtor as that term is defined in 11 U.S.C.S. § 101(31) at any time. The rule also imposes a continuing duty on the professional to amend this statement immediately upon my learning that (A) any of the within representations are incorrect or (B) there is a change of circumstance relating thereto. Bankr. D. Mass. R. 2014-1(a)(5). The requirements of the rule transcend those of 11 U.S.C.S. § 327(a), as they mandate disclosure of all connections with the named parties, rather than being limited to those which deal with disinterestedness. More Like This Headnote

Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > General Overview

Bankruptcy Law > Case Administration > Professional Services > Retention of Professionals > Court Approval

HN3 In the context of 11 U.S.C.S. § 327(a), failure to be forthcoming with disclosure provides the **bankruptcy** court with an independent ground for disqualification. More Like This Headnote

Bankruptcy Law > Case Administration > Professional Services > Compensation > General Overview

HN4 Bankr. D. Mass. R. 2016-1 requires any professional seeking interim or final compensation for services rendered to a debtor to file with the court a fee application which sets forth a number of specific items. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

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

COUNSEL: **[*1]** For Liebfried Aviation, Inc., Debtor: Sherrill R. Gould, Gould Law Office, Littleton, MA.

For Richard King, Assistant U.S. Trustee: Richard T. King, United States Trustee, Worcester, MA.

For David M. Nickless, Trustee: David M. Nickless, Nickless & Phillips, PC, Fitchburg, MA; David M. Nickless, Susan H Christ, Nickless, Phillips and O'Connor, Fitchburg, MA.

JUDGES: Melvin S. Hoffman, U.S. **Bankruptcy** Judge.

OPINION BY: Melvin S. Hoffman

OPINION

MEMORANDUM OF DECISION ON APPLICATION FOR COMPENSATION OF JOSEPH H. O'DONNELL, CPA

This matter came before me for hearing on Joseph O'Donnell's Application for Compensation for Professional Services Rendered From June 1, 2009 Thru [sic] August 31, 2009 [#125], with Supplement [#128], [1] and the Chapter 7 trustee's objection thereto [#129]. I will deny the application for compensation because Mr. O'Donnell is not a disinterested person as required by the **Bankruptcy** Code, 11 U.S.C. § 101 et seq. I will also require Mr. O'Donnell to disgorge money paid to him post-petition by the debtor because Mr. O'Donnell accepted those payments for post-petition services without having sought, much less received, Court approval of those payments.

FOOTNOTES

1 The supplement was filed in response to my order **[*2]** of November 10, 2010 requiring Mr. O'Donnell to submit a signed copy of the application and to provide copies of his time records. The Supplement is signed but no time records are included.

Background

The debtor filed a voluntary petition for relief under Chapter 11 of the **Bankruptcy** Code on July 11, 2007. On March 11, 2008 the debtor filed an application to employ Mr. O'Donnell, a certified public accountant, to prepare its corporate tax returns. In his affidavit Mr. O'Donnell stated that he had no connection with the debtor, any creditor, or other party in interest, their respective attorneys and accountants and that he and his firm were disinterested persons as defined by § 101(14) of the **Bankruptcy** Code. He also stated in his affidavit that he had reviewed the provisions of Massachusetts Local **Bankruptcy** Rule ("M.L.B.R.") 2016-1. The Court held a hearing on the motion to employ on March 27, 2008 and on the same day entered an order allowing it. On August 6, 2010 the case was converted to one under Chapter 7 and the Chapter 7 trustee was appointed. The Chapter 7 trustee has not sought permission to employ Mr. O'Donnell.

The Chapter 7 trustee represents that his review of the debtor's **[*3]** records reveals that Mr. O'Donnell has performed significant accounting work not only for the debtor but also for Andrew Liebfried, the debtor's principal, and the Liebfried Realty Trust of which Andrew Liebfried and his family are beneficiaries. According to the Chapter 7 trustee, Mr. O'Donnell prepared the debtor's 2007 federal income tax return, which lists among the debtor's assets as of December 31, 2007 a $228,909 "loan to shareholder". The trustee averred that the same tax return lists a $35,582 "loan rec—LRT" as of the beginning of 2007 with a zero balance as of the end of that year as well as a $904 "loan pay—LRT" as of the end of that year. [2] The Chapter 7 trustee further noted that the debtor's 2008 federal income tax return lists the beginning balance of the shareholder loan as $8,909 while listing the remaining $220,000 as "Uncertain S/H Rec at B/R." The 2008 tax return also indicates that the "Loan pay—LRT" item increased to $20,809.

FOOTNOTES

2 The Chapter 7 trustee identified LRT as the Liebfried Realty Trust. Mr. O'Donnell did not dispute this.

In addition, the Chapter 7 trustee represented that the debtor's internal accounting records indicate that during the Chapter 11 phase **[*4]** of this case the debtor paid Mr. O'Donnell a total of $5,500 or $5,600 by means of at least three separate checks beginning on May 8, 2008. The Chapter 7 trustee also maintains that in January 2011, after the case had been converted, Mr. O'Donnell appears to have received an additional payment of $500 from the debtor for accounting services previously rendered. The Chapter 7 trustee notes that based on the debtor's internal accounting records, it appears that on at least one occasion the debtor paid Mr. O'Donnell for worked performed for the Liebfried Realty Trust. None of these payments appeared on the debtor's monthly operating reports filed with the United States trustee.

At the hearing on his fee application Mr. O'Donnell acknowledged that he has performed accounting services for the Liebfrieds and their entities since the mid 1990s. He blamed the debtor's attorney for failing to disclose his connections with these debtor affiliates stating that she had prepared his affidavit which he signed but did not read. He admitted having sent the debtor invoices for services rendered post-petition for which he received payments from the debtor without seeking Court approval. Apparently oblivious **[*5]** to the requirements of **Bankruptcy** Code § 330, Mr. O'Donnell explained that the reason he filed the fee application presently before me was because, unlike his prior bills to the debtor, this time the debtor had failed to paid him.

Discussion

Although, as the Chapter 7 trustee correctly notes, Mr. O'Donnell's fee application fails to comply with M.L.B.R. 2016-1 and my November 10, 2010 order, this lack of compliance pales in comparison to the other deficiencies presented by the facts before me.

HN1 Section 327(a) of the **Bankruptcy** Code permits a trustee or debtor in possession, "with the court's approval ... [to] employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons...." 11 U.S.C. § 327(a). Among other things, a "disinterested person" cannot be "a creditor, equity security holder, or an insider: of the debtor nor can he "have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or for any other **[*6]** reason." 11 U.S.C. § 101(14)(A) and (C). Although the **Bankruptcy** Code does not define "adverse interest," the First Circuit noted that "'adverse interest' has been described in pragmatic terms as the "possess[ion] or assert[ion][of] mutually exclusive claims to the same economic interest, thus creating either an actual or potential dispute between rival claimants as to which ... of them the disputed right or title to the interest in question attaches under valid and applicable law; or (2) [the possession of] a predisposition or interest under circumstances that render such a bias in favor of or against one of the entities." *Rome v. Braunstein,* 19 F.3d 54, 58 n.1 (1st Cir. 1994) (quoting *In re Roberts,* 46 B.R. 815, 826-27 (Bankr. D. Utah 1985)). As the *Rome* court noted, the **Bankruptcy** Code places an affirmative obligation on the **bankruptcy** court to undertake a rigorous conflict of interest analysis. *Id.*

HN2 To ensure that the appropriate level of disclosure is made, Rule 2016(a) of the Federal Rules of **Bankruptcy** Procedure and its local counterpart, M.L.B.R. 2014-1, require an applicant to file a verified statement disclosing "the person's connections with the debtor, creditors, any other **[*7]** party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P.2014(a). M.L.B.R. 2014-1(b)(1)(A) expressly requires that among the connections and relationships to be disclosed are
The professional's representation of the debtor or any affiliate of the debtor as that term is defined in 11 U.S.C. § 101(2), or any insider of the debtor as that term is defined in 11 U.S.C. § 101(31) at any time....
The rule also imposes a continuing duty on the professional to "amend this statement immediately upon my learning that that (A) any of the within representations are incorrect or (B) there is a change of circumstance relating thereto." M.L.B.R. 2014-1(a)(5).

[T]he requirements of the rule transcend those of § 327(a), as they mandate disclosure of all connections with the named parties, rather than being limited to those which deal with disinterestedness." *In re Filene's Basement, Inc.*, 239 B.R. 850, 856 (Bankr. D. Mass. 1999). "The purpose of the disclosure requirements is to provide the court with information necessary to determine whether the professional's employment meets the broad **[*8]** test of being in the best interests of the estate." *Id.* at 855-56. HN3 "Failure to be forthcoming with disclosure provides the **bankruptcy** court with an independent ground for disqualification." *Id.* at 856 citing *Miller v. United States Trustee (In re Independent Engineering Co.),* 232 B.R. 529, 532 (1st Cir. BAP 1999); *Leslie Fay Cos.* at 533; *In re EWC, Inc.,* 138 B.R. 276, 281-82 (Bankr.W.D.Okla.1992). *See also Smith v. Marshall (In re Hot Tin Roof, Inc.),* 205 B.R. 1000, 1003 (1st Cir. BAP 1997).

Mr. O'Donnell has failed to provide the level of disclosure required by the **Bankruptcy** Code and rules, which was and continues to be his personal responsibility. His attempt to blame his lack of compliance on the debtor's attorney is unpersuasive, unprofessional and unavailing. Even without reference to the specific facts that call into question Mr. O'Donnell's purported disinterestedness and lack of a material adverse interest as regards the debtor and the **bankruptcy** estate, his failure even to disclose his connections to the debtor's principal and affiliated entity provides sufficient grounds to warrant disqualifying him from his engagement, vacating the Court's prior order approving his employment **[*9]** by the debtor and denying the application before me.

Moreover, Mr. O'Donnell swore under oath in his affidavit that he had reviewed M.L.B.R. 2016-1. HN4 That rule requires any professional seeking interim or final compensation for services rendered to a debtor to file with the Court a fee application which sets forth a number of specific items. Mr. O'Donnell has acknowledged that he repeatedly failed to abide by this rule and in fact filed the instant application only because the debtor had not paid his invoice when presented..

Conclusion

Mr. O'Donnell is not entitled to any of the compensation, be it for fees or expenses, he has received from the debtor following the filing of the debtor's **bankruptcy** petition on July 11, 2007. His fee application will be denied, the order of March 28, 2008 authorizing his employment will be vacated and he will be required to disgorge those fees paid to him by the debtor for post-petition services rendered or expenses incurred..

A separate order will issue.

Dated: February 25, 2011

By the Court,

/s/ Melvin S. Hoffman

Melvin S. Hoffman

U.S. **Bankruptcy** Judge

In re RICHARD C. MITCHELL, Debtor

Chapter 7, Case No. 10-20059-JNF

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

2011 Bankr. LEXIS 814

March 2, 2011, Decided
March 2, 2011, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Movant, counsel for a claimant in debtor's Chapter 7 case, sought an extension of time per Fed. R. Bankr. P. 8002 to file notices of appeal of orders granting, inter alia, debtor's motions to avoid judicial lien and overruling claimant's objection to a claimed homestead exemption. Debtor moved to dismiss the appeals as untimely. The issue was whether counsel had established "excusable neglect" in failing to file timely notices of appeal.

OVERVIEW: Though the deadline for filing of a notice of appeal based on orders issued on January 11 was January 25, counsel filed the notices of appeal and motions to extend deadlines on January 28. Counsel advised that he initially had believed that the court was going to issue a written decision and that when he realized that the orders at issue had been docketed, he used a January 13 certificate of service date as the basis for his calculation of the appeal period. The court denied relief. Noting the evolving jurisprudence on the concept of "excusable neglect" under the parallel federal appellate rule and the Supreme Court's ruling calling for a more flexible interpretation of that phrase as used in Fed. R. Bankr. P. 9006, the court held that even under the more flexible standard, movant was not entitled to relief because no satisfactory explanation for the late filing was given. That is, the actual mistake made by movant involved a misconstruction of Rule 8002 and the date on which the appeal period commenced, and such explanations were not properly viewed as "excusable neglect." Moreover, even if adequate "excusable neglect" had been shown, movant's filing still was one day late.

OUTCOME: The court denied the Rule 8002 motion and granted debtor's motion to dismiss the appeal.

CORE TERMS: excusable neglect, notices of appeal, late filing, deadline, notice, appeal period, clerk, good faith, electronic, mailing, movant, law practice, homestead exemptions, summary judgment, notification, certificate, overruling, expiration, authorizes, noticing, marked, advisement, decree appealed, written opinion, extension of time, circumstances beyond, papers filed, danger of prejudice, potential impact, satisfactory explanation

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HN1 Fed. R. Bankr. P. 8002(a) provides that a notice of appeal shall be filed with the clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from. More Like This Headnote

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HN2 See Fed. R. Bankr. P. 8002(c).

Bankruptcy Law > Practice & Proceedings > General Overview

HN3 The "excusable neglect" provision in Fed. R. Bankr. P. 9006(b)(1) empowers a **bankruptcy** court to permit a late filing if the movant's failure to comply with an earlier deadline was the result of excusable neglect. A narrow view of "excusable neglect" under which the failure to meet a deadline had to be caused by circumstances beyond the movant's control has been rejected in favor of a more flexible analysis. The ordinary meaning of the word "neglect" encompasses not just unavoidable omissions, but also negligent ones. Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

HN4 The determination whether to grant a motion for an extension of time for an appeal per Fed. R. Bankr. P. 8002(c) is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

HN5 Where a court has been asked to grant a motion for an extension of time for an appeal per Fed. R. Bankr. P. 8002(c), there must be a satisfactory explanation for the late filing. The four so-called "Pioneer" factors identified by the U.S. Supreme Court do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry. This focus comports with the recognition in Pioneer that inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

HN6 For purposes of Fed. R. Bankr. P. 8002(a), a document is "entered" when the clerk makes the notation on the official public record, the docket, of the activity or submission of the particular document. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

HN7 It is well established that the appeal period in Fed. R. Bankr. P. 8002(a) begins to run upon entry of the judgment or order and not from the date of service of the notice. More Like This Headnote

COUNSEL: **[*1]** For Richard C. Mitchell, Debtor: Robert Osol, Melia & Osol, Worcester, 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: Mark G. DeGiacomo, Murtha Cullina LLP, Boston, MA.

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

OPINION BY: Joan N. Feeney

OPINION

MEMORANDUM

I. INTRODUCTION

The matters before the Court are 1) the Motion to Extend Deadline for Filing Notices of Appeal, pursuant to which New England Phoenix Co., Inc. ("NEPCO") seeks an order extending the deadline for filing notices of appeal with respect to this Court's orders of January 11, 2011, granting the Motion of Richard C. Mitchell (the "Debtor") to Avoid Judicial Lien of NEPCO and overruling NEPCO's Objection to the Debtor's Claimed Homestead Exemption; 2) the Debtor's Opposition to the Motions to Extend; 3) the Debtor's Motions to Dismiss Appeal for Late Filing; and 4) NEPCO's Opposition to the Debtor's Motions to Dismiss.

The Court heard the matters on February 22, 2011 and took them under advisement. Following the hearing, both parties submitted supplemental memoranda. Neither party requested an evidentiary hearing, and **[*2]** the facts necessary to decide the matters are not in dispute. The issue presented by NEPCO's Motion to Extend and the Debtor's Motions to Dismiss is whether NEPCO's counsel has established "excusable neglect" in failing to file a timely notice of appeal so as to permit the late filing of the appeals.

II. FACTS

As noted above, the Court entered its orders on January 11, 2011. Pursuant to Fed. R. Bankr. P. 8002(a), the appeal period expired on January 25, 2011.[1] NEPCO filed its Notices of Appeal together with its Motions to Extend Deadline on January 28, 2011, seventeen (17) days after the entry of the Court's orders of January 11, 2011 on the docket.

FOOTNOTES

1 HN1 Rule 8002(a) provides: "The notice of appeal shall be filed with the clerk within 14 days of the *date of the entry* of the judgment, order, or decree appealed from." Fed. R. Bankr. P. 8002(a) (emphasis supplied).

The attorney for NEPCO, John C. La Liberte, Esq., filed an Affidavit in conjunction with his Motion to Extend for Filing Notices of Appeal. In his Affidavit, he stated the following:
1. I am a partner in the law firm of Sherin and Lodgen LLP, with offices at 101 Federal Street, Boston, Massachusetts. Sherin and Lodgen represents New **[*3]** England Phoenix Co., Inc. ("NEPCO") in this proceeding.

2. After the Court's ruling granting Debtor's motion to avoid NEPCO's judicial lien and overruling NEPCO's objection to the debtor's claim of homestead objection, I believed that the Court intended to issue a brief written opinion as the matter ruling [sic] may be distinguishable from Cassese [In re Cassese, 286 B.R. 472 (Bankr. D. Mass. 2002)] and may bring further clarity to the availability of homestead exemptions to non-declarant former spouses filing the protections of the **Bankruptcy** Code.

3. I intended to file a Notices of Appeal [sic] of the Court's January 11, 2011 orders. After the Court entered its orders on the docket, however, I mistakenly docketed the deadline for noticing the appeals based upon the certificate of mailing on January 13, 2011.

4. Upon realizing this mistake, I filed this motion for leave to extend the deadline for noticing an appeal as well as the notice of appeal as soon as possible.

5. I have filed the Motion to Extend Deadline for Filing Notice of Appeal on behalf of NEPCO in good faith and not for the purpose of imposing any delay in this matter.

In addition to his Affidavit, in NEPCO's Opposition to **[*4]** the Debtor's Motions to Dismiss Appeals, Attorney La Liberte reiterated his belief that the Court intended to issue a brief written opinion. The Court, however, made no reference to the issuance of a decision and did not indicate that it was taking the matters under advisement. The Court issued a Proceeding Memorandum/Order of Court overruling NEPCO's Objection to the Debtor's Claimed Homestead Exemption and a Proceeding Memorandum/Order of the Court granting the Debtor's Motion to Avoid NEPCO's Judicial Lien. A review of the transcript of the hearing held on January 11, 2011 corroborates the conclusion that the Court did not state or imply that it was taking the matters under

advisement. Finally, Attorney La Liberte conceded at the hearing that he was a registered CM-ECF user and had received electronic notification of the Court's January 11th orders early on January 12, 2011. He stated:
What my error was is that I saw a certificate of mailing dated the 13th. I thought that would be the date that it would be entered on the docket as for the running of the appeal period. I discovered my error on the 26th of January as I was preparing the notice of appeal and I immediately filed the **[*5]** motion with the Court.
Transcript, p. 3.

III. DISCUSSION

A. Applicable Law

Rule 8002(c) of the Federal Rules of **Bankruptcy** Procedure provides in relevant part the following:
HN2 (c) Extension of time for appeal
(1) The **bankruptcy** judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:
(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;
(B) authorizes the sale or lease of property or the use of cash collateral under § 363;
(C) authorizes the obtaining of credit under § 364;
(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;
(E) approves a disclosure statement under § 1125; or
(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days from the expiration **[*6]** of the time for filing a notice of appeal otherwise prescribed by this rule or 14 days from the date of entry of the order granting the motion, whichever is later.
Fed. R. Bankr. P. 8002(c).

The United States Court of Appeals for the First Circuit discussed the meaning of excusable neglect in Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1 (1st Cir. 2001). In that case, the First Circuit Court of Appeals considered an appeal from the denial of a motion for an extension of time to file an appeal where the appellant filed its notice of appeal one day after the expiration of the applicable 30-day appeal period under Fed. R. App. P. 4(a)(1)(A). The circumstances in that case included appellant's attorney's use of an outdated address for mailing the notice of appeal to local counsel and a secretary's mistake in losing track of the appeal papers under a stack of other documents on her desk.

The First Circuit explained the evolution of the "excusable neglect" standard, stating:
Before the Supreme Court's decision in Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the rule **[*7]** in this circuit was that "[n]eglect is excusable within the meaning of FRAP 4(a)(5) only in unique or extraordinary circumstances." . . .

In Pioneer the Supreme Court endorsed a more generous reading of the phrase "excusable neglect." The Court interpreted HN3 the "excusable neglect" provision in Rule 9006(b)(1) of the Federal Rules of **Bankruptcy** Procedure, which "empowers a **bankruptcy** court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" 507 U.S. at 382, 113 S.Ct. 1489. Rejecting what it termed a "narrow view of 'excusable neglect,'" under which the failure to meet a deadline had to be "caused by circumstances beyond the movant's control," the Court advanced "a more flexible analysis." Id. at 387 n. 3, 113 S.Ct. 1489. The Court observed that the ordinary meaning of the word "neglect" encompasses not just unavoidable omissions, but also negligent ones, and concluded that "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 388, 113 S.Ct. 1489.

The **[*8]** Court then identified factors to be weighed in evaluating a claim of excusable neglect:
we conclude that HN4 the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [non-moving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S.Ct. 1489. Although the excusable neglect provision interpreted in Pioneer was located in the **Bankruptcy** Rules, the Court cited a disagreement among the circuits on the meaning of "excusable neglect" in Fed. R. App. P. 4(a)(5) as a reason for granting certiorari. *See* id. at 387 & n. 3, 507 U.S. 380, 113 S.Ct. 1489, 123 L. Ed. 2d 74. In Virella-Nieves v. Briggs & Stratton Corp., 53 F.3d 451 (1st Cir.1995), we concluded that "Pioneer's exposition of excusable neglect, though made in the context of late **bankruptcy** filings, applies equally to Fed. R.App. P. 4(a)(5)." Id. at 454 n. 3; *see also* Pratt v. Philbrook, 109 F.3d 18, 19 (1st Cir. 1997) ("Pioneer must be understood to provide guidance outside **[*9]** the **bankruptcy** context.").

We have recognized that Pioneer marked a shift in the understanding of excusable neglect. In Pratt, we vacated the district court's denial of the plaintiff's motion to reopen a case under Fed R. Civ. P. 60(b)(1), and remanded for reconsideration under the "latitudinarian standards" for excusable neglect announced in Pioneer. 109 F.3d at 19. We noted that the Supreme Court had "adopted a forgiving attitude toward instances of 'excusable neglect,' a term Pioneer suggests will be given a broad reading." Id. at 22. In Hospital del Maestro v. National Labor Relations Board, 263 F.3d 173, 174 (1st Cir. 2001) (per curiam), we observed that excusable neglect after Pioneer is "a somewhat elastic concept" (internal quotation marks omitted). Other circuits have come to the same conclusion. *See* Robb v. Norfolk & W. Ry. Co., 122 F.3d 354, 359 (7th Cir.1997) ("Pioneer broadened the definition of 'excusable neglect.'"); United States v. Thompson, 82 F.3d 700, 702 (6th Cir. 1996) (Pioneer establishes "a more liberal definition of what constitutes excusable neglect when an individual seeks a motion for an extension of time in the district court under Fed. R.App. P. 4"); Fink v. Union Cent. Life Ins. Co., 65 F.3d 722, 724 (8th Cir.1995) **[*10]** (Pioneer "established a more flexible analysis of the excusable neglect standard"); United States v. Hooper, 9 F.3d 257, 258 (2nd Cir.1993) (Pioneer advances "a more lenient interpretation" of excusable neglect).
Graphic Communications, 270 F.3d at 4-5. Although the United States Court of Appeals for the First Circuit recognized that Pioneer marked a shift in the approach to the concept of excusable neglect and was a "more forgiving" standard than the one used in its prior decisions, the court added:
HN5 [T]here still must be a satisfactory explanation for the late filing. We have observed that "'[t]he four Pioneer factors do not carry equal weight; *the excuse given for the late filing must have the greatest import.* While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry. . . .'" Hosp. del Maestro, 263 F.3d at 175 (quoting Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 463 (8th Cir. 2000)). This focus comports with the Pioneer Court's recognition that *"inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect."* 507 U.S. at 392, 113 S.Ct. 1489.
Graphic Communications, 270 F.3d at 5-6 **[*11]** (emphasis supplied). *See also* Balzotti v. RAD Investments, LLC (In re Shepaherds Hill Dev. Co., LLC), 316 B.R. 406, 415 (B.A.P. 1st Cir. 2004) ("mere lack of notice does not constitute excusable neglect;" whether appellant had notice of the order does not affect its validity or the date the notice of appeal should have been filed); In re LaClair, 360 B.R. 388 (Bankr. D. Mass. 2006) (failure to consult or abide by an unambiguous court procedural rule normally does not constitute excusable neglect); In re Steve A. Clapper & Assocs. of Fla., 346 B.R. 882 (Bankr. M.D. Fla. 2006) (misunderstanding of the rules governing appeals does not constitute excusable neglect).

B. Analysis

In the instant case, the Pioneer factors, including the danger of prejudice to the Debtor, the length of delay and the potential impact on the case, and NEPCO's good faith are not dispositive of the Motions before the Court. Rather, the reason for the delay, as the First Circuit Court of Appeals emphasized

in Graphic Communications, is controlling.

The excuses proffered by Attorney La Liberte are not compelling. While the Court sympathizes with his predicament and recognizes his mistake as an honest one, his mistake **[*12]** involved misconstruing the applicable appellate rule and the date from which the appeal period runs. Counsel's assumption that the date that the **Bankruptcy** Noticing Center mailed copies of the Court's January 11, 2011 orders to the Debtor and his attorney was the same date that the January 11, 2011 orders were docketed, as well as the date from which the appeal period was to be calculated, is belied by the electronic transmission of those orders to him on January 11, 2011. Moreover, the Court's docket reflects that the orders were entered on the docket on January 11, 2011. Thus, Attorney La Liberte's reasons cannot serve as a satisfactory explanation for the late filing under Supreme Court and First Circuit precedent. Moreover, even were the Court to accept his oversight in calculating the 14-day appeal period from January 13th, instead of January 11th, the appeal filed by NEPCO would still be untimely.

HN6 For purposes of Rule 8002(a), "[a] document is entered when the clerk makes the notation on the official public record, the docket, of the activity or submission of the particular document." *See* In re Henry Bros. P'ship, 214 B.R. 192, 195 (B.A.P. 8th Cir. 1997) (footnote omitted). As **[*13]** the United States **Bankruptcy** Appellate Panel for the Eighth Circuit noted:
This is sometimes referred to as "docketing" because this official notation is made upon the docket kept by the clerk. *See* Fed. R. Bankr. Proc. 5003(a)("The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made."); *see also* Fed. R. Civ. Proc. 79 ("All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. . . .").
Id. note 4. HN7 "It is well established that the ten [now fourteen] day period begins to run upon entry of **[*14]** the judgment or order and not from the date of service of the notice." *See* Alan Votta Construction, Inc. v. Kirkbride (In re Kirkbride), 2009 Bankr. LEXIS 3233, 2009 WL 3247837 (Bankr. E.D.N.C. Oct. 1, 2009). In Kirkbride, the staff of counsel who was on vacation miscalculated the deadline for filing a notice of appeal, as in this case, based upon the docket entry for the certificate of mailing instead of the date the order entered on the docket. As in the First Circuit, the Fourth Circuit has identified the most important Pioneer factor as the reason for the delay. 2009 Bankr. LEXIS 3233, 2009 WL 3247837 at * 3 (citing Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996)). In weighing the Pioneer factors, the **bankruptcy** court determined that counsel had failed to establish excusable neglect.

The decisions cited by Attorney La Liberte are distinguishable and of no assistance to NEPCO. In PonceBank v. Memorial Prods. Co., Inc. (In re Memorial Prods. Co., Inc.), 212 B.R. 178 (B.A.P. 1st Cir. 1997), a case decided under Fed. R. Civ. P. 60(b) (made applicable to the proceeding by Fed. R. Bankr. P. 9024), the debtor filed a motion to vacate and set aside an order of dismissal citing excusable neglect. Because **[*15]** counsel failed to respond to a the motion for summary judgment, the court dismissed the debtor's Chapter 11 case. Counsel indicated that, although the motion for summary judgment was received in his office, his secretary inadvertently misfiled the motion without having brought it to his attention. The **bankruptcy** appellate panel observed that the **bankruptcy** judge did not abuse its discretion in vacating dismissal of the case because there was equity in the estate and the estate would be best served by options other than dismissal. 212 B.R. at 181. Attorney La Liberte did not indicate that the fault for the late filing of the notice of appeal rested with anyone at his firm and shouldered complete responsibility for the error. His error involved interpretation of the appellate rule, and not delay caused by the mistakes of others.

Attorney La Liberte also relied upon Spear v. Schafler (In re Schafler), 263 B.R. 296 (N.D. Cal. 2001), a case in which counsel proffered the following in support of his excusable neglect:
(1) on December 19, 2000, counsel for Trustee sent counsel for Debtor a copy of a proposed judgment which had been submitted to the **Bankruptcy** Court, but Debtor did not receive **[*16]** thereafter a copy of a filed judgment as required by Rule 9022-1 of the **Bankruptcy** Local Rules . . .; (2) counsel was aware that, pursuant to Rule 9021-1(c) of the **Bankruptcy** Local Rules, submitted orders not approved as to form are ordinarily lodged with the **bankruptcy** court, and then held by the court for 7 days . . .; (3) although counsel was present on December 18, 2001 when the **Bankruptcy** Court ruled on the parties' motions for summary judgment, counsel did not consider it unusual that he had not received an order by early January due to the holiday season . . .; (4) because the **Bankruptcy** Court had made a lengthy pronouncement of its findings at the December 18, 2000 hearing, counsel believed that the Court might be preparing its own order . . .; and (5) counsel did not have a subscription to the PACER system.
263 B.R. at 302 (footnotes omitted). The court also noted that counsel for debtor further explained that he did not file a notice of appeal prior to entry of judgment, as allowed by Rule 8002(a) because he became substituted in the action after the decision and needed to familiarize himself with the record before determining if an appeal would be meritorious, explaining **[*17]** that he was counting on the time it would take for a judgment to be entered to conduct his evaluation. The district court concluded:
[The] Trustee focuses on only one circumstance, the reason for the delay. In that regard, Debtor's explanation is weak; counsel could have checked the docket to determine if, and when, a judgment had been entered or could have filed a notice of appeal pursuant to Rule 8002(a). Although such conduct may show a lack of regard for the court's docket, in the absence of any evidence of deviousness or willfulness or of prejudice to Debtor's ability to defend the judgment on appeal, and in light of the very short period of delay, the **Bankruptcy** Court did not abuse its discretion in determining that Debtor was entitled to relief pursuant to Rule 8002(c).
Id. at 303 (footnote omitted). The Court finds that the Schafler decision conflicts with First Circuit precedent. In Graphic Communications, the First Circuit Court of Appeals emphasized that the excuse given for the late filing is the most important factor. 270 F.3d at 5-6.

In Bli Farms v. Greenstone Farm Credit Servs. (In re Bli Farms), 294 B.R. 703 (Bankr. E.D. Mich. 2003), another case cited by NEPCO, the court **[*18]** considered the "law practice upheaval" or "extremely busy" excuse for failing to timely file a notice of appeal. According to the court:
That is a factor which has been emphasized in various cases (and this case as well) that have found the neglect inexcusable, with an overlay in this case to the effect that counsel for Debtors is a sole practitioner and was spending much of his time during the 10-day appeal period in this Court in hearings on various aspects of this very same **bankruptcy** case. The Supreme Court in Pioneer and later lower court cases in this circuit have given the "law practice upheaval" excuse short shrift, or, in the words of the Supreme Court itself, such is deserving of "little weight." Pioneer, 507 U.S. at 398, 113 S.Ct. 1489.
Id. at 707. Nevertheless, the court concluded: "What saves the day for counsel, however, is that this factor should not be seen or considered as outweighing all of the other indicated factors, all of which favor a finding of 'excusable neglect' and an otherwise appropriate equitable conclusion on the facts of this case." Id. See also In re McLean Indus., Inc., 196 B.R. 670 (S.D.N.Y. 1996). As noted above, the First Circuit has focused upon **[*19]** the reason for delay, and Attorney La Liberte did not advance any excuse such as his busy law practice, a relocation of his office, or illness. Moreover, because of the Court's CM-ECF system, registered users, such as Attorney La Liberte, receive electronic notification of the entry of orders, and Attorney La Liberte admits having received electronic notification of the Court's orders early on January 12, 2011.

IV. CONCLUSION

In accordance with the foregoing, the Court shall enter orders denying NEPCO's Motion to Extend Deadline for Filing Notices of Appeal and granting the Debtor's Motions to Dismiss Appeal for Late Filing.

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States **Bankruptcy** Judge

Dated: March 2, 2011

In re: MARY ANN WALSH, Debtor

Chapter 11, No. 09-16031-WCH

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

2011 Bankr. LEXIS 780

March 8, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Debtor filed a petition under Chapter 11 of the **Bankruptcy** Code, and an investors trust filed a limited objection to the debtor's disclosure statement. The court overruled the trust's objection but preserved it as an objection to confirmation of the debtor's plan. The trust, as a secured creditor in Class 6 of the debtor's plan and an unsecured creditor in Class 8 of the debtor's plan, cast negative votes on the plan.

OVERVIEW: The debtor filed an amended **bankruptcy** plan that established seven classes of secured creditors, a class for general unsecured claims, and a class for equity the debtor held in real property she owned, and proposed to pay debts the debtor owed to secured creditors by transferring title to real property, using proceeds derived from the sale of particular properties, or as ordered by the court, and to pay unsecured claims 5% of amounts they claimed. An investors trust that held both secured and unsecured claims filed a limited objection to the debtor's disclosure statement, and although the court overruled the objection, it preserved the objection as a statement of opposition to confirmation of the debtor's plan. The court rejected the debtor's claim that the absolute priority rule did not apply to the debtor's plan and found that, assuming the existence of a dissenting class, the debtor's plan had to comply with 11 U.S.C.S. § 1129(b). Although the court found that dragnet clauses were recognized in Massachusetts generally, cross-collateralization provisions in three mortgages the debtor signed could not be enforced because the debtor did not sign the mortgages as the "Borrower."

OUTCOME: The court found that the debtor had to confirm her plan by satisfying 11 U.S.C.S. § 1129(b) and that debts the debtor owed to a bank that were secured by mortgages on various properties she owned could not be cross-collateralized, and it scheduled a final hearing on confirmation of the debtor's plan.

CORE TERMS: mortgage, dragnet clause, disclosure statement, signing, post-petition, junior, confirmation, Absolute Priority Rule, secured creditors, mortgagee, holder, unsecured claims, individually, co-signers, co-makers, bankruptcy estate, unsecured creditor, commencement, postpetition, pre-petition, confirmed, equitable, converted, evidentiary hearing, accommodation, preserved, valuation, scheduled, mortgagor, vacation

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Reorganizations > Plans > Confirmation > Prerequisites > Fairness

HN1 If the result of creditor votes in a Chapter 11 **bankruptcy** plan show that a class of creditors has rejected the plan, the plan may nonetheless be confirmed so long as it is, among other things, fair and equitable. 11 U.S.C.S. 1129(b). Before the enactment of the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, the term "fair and equitable" required that the holder of any claim or interest that was junior to the claims of such class would not receive or retain under the plan, on account of such junior claim or interest, any property. However, the BAPCPA added language specifically addressed to individual Chapter 11 debtors, which provides that the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the **bankruptcy** estate under 11 U.S.C.S. § 1115. 11 U.S.C.S. § 1129(b)(2)(B). More Like This Headnote

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Reorganizations > General Overview

HN2 See 11 U.S.C.S. § 1115(a).

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Reorganizations > General Overview

HN3 11 U.S.C.S. § 1115 deals with something more than postpetition income from services; it also brings in property described in 11 U.S.C.S. § 541 but which is acquired postpetition. Because it deals with postpetition § 541(a) property, § 1115 does not include § 541(a) property as such. More Like This Headnote

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Reorganizations > General Overview

HN4 The United States **Bankruptcy** Court for the District of Massachusetts, Eastern Division, joins with the United States **Bankruptcy** Court for the Northern District of California in disagreeing with the conclusion the United States **Bankruptcy** Court for the District of Nevada reached in In re Shat. If the court were writing on a clean slate, it would read the phrase "included in the estate under section 1115" that appears in 11 U.S.C.S. § 1129(b)(2)(B)(ii) to be reasonably susceptible to only one meaning, i.e., "added to the **bankruptcy** estate by § 1115." 11 U.S.C.S. § 103(a) provides that 11 U.S.C.S. § 541 applies in a Chapter 11 **bankruptcy** case, including an individual Chapter 11 case. Section 541

provides that, when a petition is filed, a **bankruptcy** estate is created, consisting of the debtor's pre-petition property. 11 U.S.C.S. § 1115 provides that, in an individual Chapter 11 case, in addition to the property specified in § 541, the estate includes the debtor's postpetition property. If the clause referring to § 541 had not been included in § 1115 and if § 1115 had merely stated that an individual Chapter 11 debtor's estate included postpetition property, the argument could have been made that an individual Chapter 11 debtor's estate did not include his pre-petition property. More Like This Headnote

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

Real Property Law > Financing > Mortgages & Other Security Instruments > Transfers > General Overview

HN5 In Massachusetts, dragnet clauses have long been recognized. The guiding principle in construction of a dragnet clause in a mortgage is the determination of the intent of the parties in view of the particular circumstances and the language employed in the mortgage. Dragnet clauses are generally enforced, but because their apparent coverage is so broad, and because the mortgagor is often unaware of their presence or implications, the courts tend to construe them narrowly against the mortgagee. More Like This Headnote

COUNSEL: **[*1]** For Mary Ann Walsh, Debtor: Charles R. Bennett, Jr., Kathleen R. Cruickshank, Murphy & King, Professional Corporation, Boston, MA.

For John Fitzgerald, Assistant U.S. Trustee: Paula R.C. Bachtell, U.S. Department of Justice, Office of the United States Trustee, Boston, MA.

JUDGES: William C. Hillman, United States **Bankruptcy** Judge.

OPINION BY: William C. Hillman

OPINION

PRELIMINARY DECISION ON CONFIRMATION OF AMENDED PLAN OF REORGANIZATION

Background

Mary Ann Walsh ("Debtor") filed, her petition under Chapter 11 of the **Bankruptcy** Code on July 29, 2009. She owns and operates 56 residential apartments in five locations in Barnstable County and owns a home and a vacation property (collectively the "Properties").

The Properties are encumbered by a variety of mortgages. With the exception of mortgages in favor of Corinth Investors Trust ("Corinth"), the Debtor has reached accommodation with her various secured creditors.

On October 13, 2010, Debtor filed her Amended Disclosure Statement (the "Disclosure Statement") and Amended Chapter 11 Plan (the "Plan"). [1] The Plan established seven classes of secured creditors, Class 8 for general unsecured claims, and Class 9 for Debtor's Equity Interest. The secured creditors were to **[*2]** be paid as provided in the plan, by a deed in lieu of foreclosure (or surrender), payment from the proceeds of the sale of the particular property involved, as agreed by the creditor, or as ordered by the Court.

FOOTNOTES

1 Docket No.s 136, 137.

The unsecured claims were to receive 5% over five years. As to the Debtor's Equity Interest, the Plan provides that the Properties shall re-vest in the Reorganized Debtor at the effective date of the plan.

Corinth filed a limited objection to Debtor's original disclosure statement which was carried over as applicable to the Disclosure Statement. On October 26, 2010, I entered an order [2] approving the Disclosure Statement. Corinth's objection was overruled as to the Disclosure Statement but preserved as an objection to confirmation of the Plan. [3] Corinth, as a secured creditor in Class 6, and an unsecured creditor in Class 8 (assuming a deficiency) cast negative votes on the Plan. The issues preserved relate to the applicability of the Absolute Priority Rule to confirmation of Debtor's plan, the enforceability of the dragnet clause contained in three mortgages, [4] the issue of merger of title to the South Cape Property, and the valuation of the Marshfield **[*3]** Property.

FOOTNOTES

2 Docket No. 147.

3 Docket No. 147, ¶ 2; 11 U.S.C. § 1128(b) .

4 The PTS actually reserves this issue as to one mortgage only. PTS ¶IV(A). I assume that an economic issue exists as to that mortgage only, but the legal analysis would apply to all three mortgages.

A hearing on the Plan was scheduled for January 25, 2011. Unfortunately, counsel for Corinth became ill on that date and was unable to be present. However, armed with the PTS, I took the matter under advisement as to the legal issues involving the Absolute Priority Rule and the effect of the dragnet clauses and ordered that the evidentiary hearing would be rescheduled after issuance of an opinion as to those issues. [5] This is the promised opinion.

FOOTNOTES

5 Docket Nos. 197-200.

The Absolute Priority Rule

HN1 If the result of creditor votes in Class 8 show that class to have rejected the plan (it may depend on the amount of Corinth's deficiency) the Plan may nonetheless be confirmed so long as it is, among other things, "fair and equitable." [6]

FOOTNOTES

6 11 U.S.C. 1129(b) .

Before the enactment of The **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), [7] "fair and equitable", as applicable here, required that
the holder of any claim **[*4]** or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property. [8]
Because Debtor is the holder of an interest that is junior to Class 8, the impaired class of unsecured claimants, and she proposes to retain the Property on account of her interest, the Plan could not be confirmed under the prior version of the statute unless the so-called "new value exception" was satisfied. [9]
However, BAPCPA added language to the subsection specifically addressed to the individual Chapter 11 debtor, some of which I have added here in italics:
The holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, *except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115.* . . . [10]

FOOTNOTES

7 Pub.L. No. 109-8 (2005).

8 11 U.S.C. § 1129(b)(2)(B) , prior to amendment.

9 *See generally* 1 WILLIAM C. HILLMAN AND MARGARET M. CROUCH, **BANKRUPTCY** DESKBOOK § 11:8.2[B] (4th ed. 2010). I held that the absolute priority rule applied in individual chapter 11 cases **[*5]** prior to BAPCPA. *In re* Shepcaro, 144 B.R. 3 (Bankr. D. Mass. 1992) .

10 11 U.S.C. § 1129(b)(2)(B) in part. I have omitted the "subject to" provision cross referencing § 1129(a)(14) as not relevant to this case.

This change has resulted in a variety of decisions from courts regarding whether the Absolute Priority Rule still applies to individual chapter 11 debtors. To answer the question, we must next examine the meaning of "property included in the estate under section 1115" which is hardly free from doubt. Section 1115(a) provides (emphasis added)

HN2 In a case in which the debtor is an individual, property of the estate includes, *in addition to the property specified in section 541* —

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13, whichever occurs first.

In the *Shat* decision, Judge Markell provided us with an extensive study of this **[*6]** issue. In connection with an interpretation of "included," which is the key to the interpretive problem, he said
If "included" means only property which is added by Section 1115, then Section 1129(b)(2)(B)(ii) has a very narrow meaning: it refers only to postpetition income from services — and not to property originally specified in Section 541. Section 1115, however, itself includes Section 541(a) property. Thus, "included" could refer to all property Section 1115 itself references, and this would then be a reference to the superset of Section 541 (a) property *and* the debtor's postpetition service income. Put another way, if Section 1115 entirely supplants Section 541 by specifically incorporating it and adding to it, the "included" has a very broad meaning, essentially exempting individuals from the absolute priority rule as to unsecured creditors. [11]

FOOTNOTES

11 *In re* Shat, 424 B.R. 854, 863 (Bank. D. Nev. 2010) (emphasis in original).

I have several problems with this characterization. First of all, HN3 Section 1115 deals with something more than post-petition income from services — it also brings in property described in section 541 but which is acquired post-petition. Second, because it deals **[*7]** with post-petition section 541 (a) property (a most awkward construction), Section 1115 does *not* include section 541 (a) property as such.
In any event, Judge Marked concludes that

Given the relatively straightforward reading of the statute supporting the broader reading, and the general rehabilitative aim of chapter 11, the court understands the phrase "in addition to the property specified in section 541" to mean that Section 1115 absorbs and then supersedes Section 541 for individual chapter 11 cases. This construction, in turn, leads to the position that Section 1129(b)(2)(B)(ii)'s exception extends to *all* property of the estate, including such things as prepetition ownership interest of non-exempt property. [12]

I must disagree. HN4 I join instead with Judge Tchaikovsky, who held that

Notwithstanding the thorough and thoughtful analysis by the *Shat* court, the Court is unable to agree with its conclusion. If the Court were writing on a clean slate, it would read the phrase "included in the estate under section 1115" to be reasonably susceptible to only one meaning: i.e., added to the **bankruptcy** estate by § 1115.

Section 103(a) provides that § 541 applies in a chapter 11 case, including an **[*8]** individual chapter 11 case. Section 541 provides that, when a petition is filed, a **bankruptcy** estate is created, consisting of the debtor's pre-petition property. Section 1115 provides that, in an individual chapter 11 case, in addition to the property specified in § 541, the estate includes the debtor's post-petition property. If the clause referring to § 541 had not been included

in § 1115 and if § 1115 had merely stated that an individual chapter 11 debtor's estate included post-petition property, the argument could have been made that an individual chapter 11 debtor's estate did not include his pre-petition property. [13]

FOOTNOTES

12 *Id.* at 865 (emphasis in original). Reaching the same conclusion are *In re* Tegeder, 369 B.R. 477, 480 (Bankr. D. Neb. 2007) and *In re* Roedemeier, 374 B.R. 264, 276 (Bankr. D. Kan. 2007).

13 *In re* Gbadebo, 431 B.R. 222, 229 (Bankr. N.D. Cal. 2010). To the same effect, *In re* Gelin, 437 B.R. 435, 441 (Bankr. M.D. Fla. 2010); *In re* Mullins, 435 B.R. 352, 360 (Bankr. W.D. Va. 2010); *In re* Karlovich, B.R. , 2010 Bankr. LEXIS 4014, 2010 WL 5418872 at *4 (Bankr. S.D. Cal. Nov. 16, 2010).

Debtor flatly asserts that the Rule is inapplicable. [14] As I have concluded otherwise, and assuming the **[*9]** existence of a dissenting class, Debtor will be required to confirm her plan by satisfying § 1129(b) . [15]

FOOTNOTES

14 PTS ¶1A(B).

15 I do not consider at this time the nature or adequacy of the new value or the manner in which it must be offered. *See* Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607 (1999).

The Dragnet Clauses

Debtor and various trusts in which she had an interest granted three mortgages to Cape Cod Cooperative Bank ("Cape Cod Bank") covering various of the Properties. The first ("CCC 1 Mortgage") secured a note ("CCC 1 Note") in which "Borrower" is defined as the Debtor individually and as trustee of the Cape Cod Vacation Realty Trust ("CCVR Trust'). [16] The CCC 1 Mortgage defines "Grantor" as the Debtor in her capacity of trustee of the CCVR Trust and the "Borrower" as the Debtor and the CCVR Trust as well as co-signers and co-makers signing the CCC 1 Note. [17]

FOOTNOTES

16 PTS ¶ IIB.

17 *Ibid*.

The second ("CCC 2 Mortgage") secured a note ("CCC 2 Note") in which the "Borrower" is described as the Debtor and South Cape Trust, Mary Ann Walsh Trustee. [18] The CCC 2 Mortgage defines "Grantor" as South Cape Trust, Mary Ann Walsh Trustee. It defines "Borrower" as South Cape **[*10]** Realty Trust and the Debtor, and includes all co-signers and co-makers signing the Note. [19]

FOOTNOTES

18 PTS ¶IIC.

19 *Ibid*.

The third ("CCC 3 Mortgage") secured a note ("CCC 3 Note") in which "Borrower" is defined as the Debtor as Trustee of the CCVR Trust and the Debtor. [20] The CCC 3 Mortgage defines "Grantor" as the Debtor as Trustee of the CCVR Trust and "Borrower" as the CCVR Trust and the Debtor and includes all co-signers and co-makers signing the note. [21]

FOOTNOTES

20 PTS ¶IIF.

21 *Ibid*.

Each of the CCC mortgages contains the following provision:
CROSS COLLATERALIZATION. In addition to the Note, this Mortgage secures all obligations, debts and liabilities, plus interest thereon, of Borrower to Lender, or any one or more of them, whether now existing or hereafter arising, whether related or unrelated to the purpose of the Note, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated whether Borrower or Grantor may be liable individually or jointly with others, whether obligation as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred **[*11]** by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable. [22]

FOOTNOTES

22 PTS ¶IIG.

Subsequent to the grant of the three notes and mortgages to Cape Cod Bank, Debtor individually and as trustee of various trusts, including the CCVR Trust and the South Cape Trust, granted a note and mortgage to Corinth. [23]

FOOTNOTES

23 PTS ¶IIH.

Corinth first argues that the cross-collateralization clauses are ineffective because the obligations sought to be brought within the mortgage are those of other entities. [24] This is an incorrect statement of Massachusetts law. [25]

FOOTNOTES

24 Corinth Investors Trust's Objection to Confirmation of the Debtor's Amended Plan Of Reorganization, Docket No. 162 ("Corinth Objection") ¶28.

25 Perry v. Miller, 330 Mass. 261, 263, 112 N.E.2d 805 (1953) (collecting earlier cases).

Corinth further contends that the dragnet clause cannot be used to pay the unsecured deficiency claims of Cape Cod Bank ahead of the validly secured claims of Corinth. [26] Alternatively, it argues that if the dragnet clause is effective to render its claim substantially unsecured, the amount of its unsecured claim, in Class 8, would result in a negative voting **[*12]** class.

FOOTNOTES

26 Memorandum in Support of Corinth Investors Trust's Objection to Confirmation of Debtor's Amended Plan of Reorganization, Docket No. 214 ("Corinth Memo").

HN5 In Massachusetts, dragnet clauses have long been recognized. The guiding principle in construction of a dragnet clause in a mortgage is the determination of the intent of the parties in view of the particular circumstances and the language employed in the mortgage." [27] As Judge Saris has pointed out, "dragnet clauses are generally enforced, but because their apparent coverage is so broad, and because the mortgagor is often unaware of their presence or implications, the courts tend to construe them narrowly against the mortgagee." [28]

FOOTNOTES

27 Financial Acc. Corp. v. Garvey, 6 Mass.App.Ct. 610, 613, 380 N.E.2d 1332, 1335 (1978) .

28 Foxborough Sav. Bank v. Ballarino (*In re* Ballarino), 180 B.R. 343, 346 (D. Mass. 1995) (quoting 2 GRANT S. NELSON AND DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 12.8 (5th ed. 2010) ("Nelson & Whitman")).

In the present case, the language used is quite explicit — the mortgage was also intended to secure all further indebtedness, of whatever nature, of the "Borrower," and that term is broadly defined. It is certainly **[*13]** true that "Dragnet clauses are frequently included in the printed language of mortgages drafted by mortgagees. They are seldom the subject of negotiation, and may go entirely unnoticed by the mortgagor until the mortgagee attempts to enforce them." [29]

FOOTNOTES

29 Nelson and Whitman, § 12.8.

Whether the Debtor, in her individual or trustee capacity, was aware of the dragnet clause, Corinth's mortgage came after the three mortgages to Cape Cod Bank. The issue would be more complex but for additional language which appears in the mortgages:
Joint and Several Liability. All obligations of Borrower and Grantor under this Mortgage shall be joint and several, and all references to Grantor shall mean each and every Grantor, and all references to Borrower shall mean each and every Borrower. This means that each Borrower and Grantor *signing below* is responsible for all obligations in this Mortgage. [30]

FOOTNOTES

30 Copied from the 2004 mortgage, Book 18914, Page 225, attached to Corinth Memo as Exhibit B (emphasis added). Identical language appears in the other two mortgages, Corinth Memo Exhibits C and D.

The words "signing below," absolutely unessential in a severability clause, were, nonetheless, inserted in the printed **[*14]** form by the mortgagee. Under the ancient rule of *contra proferentem*, they must serve to restrict to meaning of "Borrower" to those actually signing the mortgage. Since none did so, the debts cannot be cross-collateralized.

The result of this conclusion is to alter Class 6 voting rights, depending upon valuation of the various items of collateral. Analysis must await the further hearing.

Conclusion

As this is a preliminary decision, no final order will be entered. A final evidentiary hearing is scheduled for Hyannis on May 13, 2011, at 10.00 a.m.

March 8, 2011

/s/ William C. Hillman

William C. Hillman

United States **Bankruptcy** Judge

In re: Mary Beth Sousa, Debtor; Mary Beth Sousa, William Sousa, Jr., and Lawrence P. Sumski, Chapter 13 Trustee, Plaintiffs v. Wells Fargo Bank, N.A., Geoffrey B. Ginn, and Geoffrey B. Ginn and Associates, P.C., Defendants; Wells Fargo Bank, N.A., Cross-Claimant v. Geoffrey B. Ginn and Geoffrey B. Ginn and Associates, P.C., Cross-Defendants

Bk. No. 06-11398-JMD, Chapter 13, Adv. No. 07-1215-JMD

UNITED STATES **BANKRUPTCY** COURT FOR THE DISTRICT OF NEW HAMPSHIRE

2011 BNH 3; 2011 Bankr. LEXIS 796

March 14, 2011, Decided

NOTICE: This is an unreported opinion. Refer to LBR 1050-1 regarding citation.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, a Chapter 13 trustee, the debtor, and the debtor's husband, filed claims against defendant lender under the Truth in Lending Act (TILA) and against defendant law firm under the New Hampshire Consumer Protection Act (CPA), RSA ch. 358-A. The court entered a default judgment as to liability against the law firm on the CPA claim and on the lender's cross-claims. It held a trial on the TILA claims against the lender.

OVERVIEW: Plaintiffs signed a notice of right to cancel which indicated that they had received two copies of their notice of their right to rescind under 15 U.S.C.S. § 1635. The court stated that although this gave rise to a rebuttable presumption that the debtors had been provided the copies, they had rebutted the presumption with their testimony, which was consistent and persuasive. Taking into account the several missteps that occurred at the closing, it was not inconceivable that the law firm failed to provide copies of the closing packet, even if it were its standard practice, because the firm might have been holding the documents with the intent to revise them. The witness called by the lender had no specific recollection of the closing or his dealings with the debtors; his testimony was limited to the routine office procedures of the law firm. As a result, the debtors' right to rescind existed beyond midnight of the third business day after the closing, and the rescission letter they sent to the lender was valid. Accordingly, the lender's proof of claim was disallowed and the debtors were entitled to damages.

OUTCOME: The court disallowed the lender's proof of claim and held that the debtors were entitled to damages. The debtors were required to tender to the lender the actual money lent to them, less any finance charges and payments they made on the loan. The court assessed damages against the law firm, except for a member of the firm who had filed for Chapter 7 **bankruptcy** and who was subject to the automatic stay.

CORE TERMS: right to rescind, notice, rescission, mortgage, borrower, packet, disclosure, rebut, disclosure statement, presumption of delivery, security interest, consumer, rebutted, right to cancel, presumed fact, acknowledgment, pre-payment, rebuttable, finance, payout, consumer credit, standard practice, burden of going forward, cross-claim, non-receipt, equitable, bursting, credible, revised, obligor

LEXISNEXIS® HEADNOTES

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Banking Law > Consumer Protection > Truth in Lending > Liability

Evidence > Inferences & Presumptions > Presumptions

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Governments > Legislation > Interpretation

HN1 The stated purpose of the Truth in Lending Act (TILA) is to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit. As TILA was enacted with the purpose of protecting consumers, its provisions are to be construed liberally in favor of the consumer and strictly enforced. Therefore, even technical or minor violations impose liability on the creditors. Generally, the lender bears the burden of proving compliance with the requirements of TILA. However, introduction of a written acknowledgment of receipt creates a rebuttable presumption of delivery of any required disclosures. 15 U.S.C.S. § 1635(c). More Like This Headnote

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HN2 See 15 U.S.C. § 1635(a).

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HN3 The Truth in Lending Act requires that the borrower must receive two copies of a notice of right to rescind. 12 C.F.R. § 226.23(b). In the event the copies are never furnished, the right to rescind does not expire until three years after consummation. 12 C.F.R. § 226.23(a). If the borrower chooses to exercise his right of rescission, he is not liable for any finance or other charge, and any security interest given by the borrower becomes void upon such a rescission. 15 U.S.C.S. § 1635(b). More Like This Headnote

Evidence > Inferences & Presumptions > Effects

HN4 See Fed. R. Evid. 301.

Evidence > Inferences & Presumptions > Effects

Evidence > Inferences & Presumptions > Rebuttal of Presumptions

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

HN5 According to the bursting bubble theory, a party need only introduce rebutting evidence that is sufficient to support a finding contrary to the presumed fact. Once the presumption is rebutted, the court makes its decision as any ordinary issue of fact. On the other hand, under the Morgan view, a presumption shifts the burden of proving the nonexistence of the presumed fact to the opposing party. The common understanding of Fed. R. Evid. 301 is that it embodies the bursting bubble theory. The United States Court of Appeals in Yoder reasoned that Rule 301 provides only that a presumption shifts the burden of going forward with evidence to rebut or meet the presumption and therefore the presumption has no probative effect once rebutted. Simply stated, once a rebuttable presumption arises, the party with the burden of going forward must bring forth evidence that would support a jury finding the nonexistence of that presumed fact and if done successfully, the presumption vanishes. The First Circuit has adopted this view. More Like This Headnote

Banking Law > Consumer Protection > Truth in Lending > General Overview

Evidence > Inferences & Presumptions > Rebuttal of Presumptions

Evidence > Procedural Considerations > Burdens of Proof > Burden Shifting

HN6 Courts are split over whether a borrower's testimony of nonreceipt is enough to rebut the presumption of delivery in the Truth in Lending Act. One line of cases holds that mere testimony that the borrower did not receive the required documents is not enough to rebut the presumption of delivery. Other courts have held that positive sworn testimony of nonreceipt is enough evidence to rebut the presumption of delivery. The latter position is more in line with the United States **Bankruptcy** Court for the District of New Hampshire's view on Fed. R. Evid. 301. Rule 301 only shifts the burden of going forward with evidence when a presumption arises. Once the party presents evidence to the contrary, the presumption disappears. Because a borrower's sworn testimony or affidavit is considered evidence, such evidence may rebut the presumption if it is credible and contradicts the presumed fact. More Like This Headnote

Banking Law > Consumer Protection > Truth in Lending > General Overview

HN7 The Truth in Lending Act provides a statutory framework to effectuate a rescission. Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest. 12 C.F.R. § 226.23(d)(2). Once the creditor fulfills its obligations under the statute, the debtor is to return to the creditor any property he received from the creditor. § 226.23(d)(3). If the creditor does not take possession of the

money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation. § 226.23(d)(3). More Like This Headnote

Banking Law > Consumer Protection > Truth in Lending > General Overview

Contracts Law > Remedies > Rescission & Redhibition > General Overview

HN8 In the case where a borrower rescinds and the creditor does not acknowledge the rescission, the Truth in Lending Act is silent. Some courts have held that a debtor may be relieved of its tender obligations where the creditor does not comply with its statutory duties. Such a remedy is viewed as a harsh one, but a court may impose it using its equitable powers in situations where creditors have not acted in good faith. The right to rescind is an equitable doctrine subject to equitable considerations. Courts are to consider traditional equitable notions in applying the statutory grant of rescission. Even where the statute does not require the debtor to tender first, the court may condition return of property to the debtor upon return of property to the creditor. Therefore, a court may tailor a remedy that is substantiated by the facts of the case. More Like This Headnote

COUNSEL: **[*1]** Peter S. Wright, Jr., Franklin Pierce Law Center, Civil Practice Clinic, Attorney for Plaintiffs.

Joshua D. Shakun, Harmon Law Offices PC, Attorney for Defendant and Cross-Claimant Wells Fargo Bank, N.A.

JUDGES: J. Michael Deasy, **Bankruptcy** Judge.

OPINION BY: J. Michael Deasy

OPINION

MEMORANDUM OPINION

I. INTRODUCTION

Mary Beth Sousa filed a voluntary petition under chapter 13 of the **Bankruptcy** Code on October 25, 2006. On November 15, 2007, Lawrence Sumski, Chapter 13 Trustee for the estate of Mary Beth Sousa, Mary Beth Sousa and her husband, William Sousa, Jr. (collectively the "Plaintiffs") timely filed a complaint against Wells Fargo Bank, NA ("Wells Fargo") regarding a consumer credit transaction (the "Transaction") between the parties. Subsequently, the Plaintiffs filed an amended complaint (the "Complaint") adding Geoffrey B. Ginn and Geoffrey B. Ginn and Associates, P.C. (collectively the "Ginn Firm") as defendants (Wells Fargo and the Ginn Firm shall be collectively referred to as the "Defendants"). The Complaint prays for relief on five claims.

Claim 1 consists of four elements. The Plaintiffs allege in the Complaint (1) that the Defendants violated the provisions of 15 U.S.C. § 1635(a) and Regulation Z, 12 C.F.R. §§ 226.15(b) **[*2]** and 226.23(b) by failing to deliver to the Sousas two copies of the notice

of right to rescind; (2) that as a result of the violation, the Sousas had a continuing right to rescind the Transaction for either three years or until the third business day after receiving the notice of the right to rescind and all other material disclosures under the Truth in Lending Act ("TILA"); (3) that under TILA, the Sousas are entitled to statutory damages of $2,000, as well as actual damages, compensatory damages for emotional distress, and costs and attorney's fees; and (4) that the Sousas are entitled to a detailed accounting and refund of all payments and charges that they would not have incurred but for the Transaction. In Claim 2, the Plaintiffs seek relief under 15 U.S.C. § 1635(b) for Wells Fargo's failure to honor the Sousas' rescission notice. In Claim 3, the Plaintiffs seek a determination under 11 U.S.C. §§ 502(b)(1) and 506(d) that Wells Fargo's lien is void by reason of the Sousas' rescission. In Claim 4, the Plaintiffs object to the proof of claim filed by Wells Fargo ("POC 1"). In Claim 5, the Plaintiffs allege that the Ginn Firm violated New Hampshire RSA 358-A.

In addition, Wells Fargo **[*3]** filed a cross-claim against the Ginn Firm. Due to the Ginn Firm's failure to appear or defend the allegations brought against it, the Court entered a default judgment against the Ginn Firm on both the Plaintiffs' Complaint and Wells Fargo's cross-claim for purposes of liability only.

On October 18, 2010, the Court held a half-day trial on the Complaint where testimony was heard from three witnesses. A total of twenty-one exhibits were admitted into evidence, eleven by the Plaintiffs and ten by Wells Fargo. At the conclusion of the trial, the parties elected to submit closing arguments in writing and the Court took the matter under advisement. The Plaintiffs and Wells Fargo submitted closing arguments and memoranda of law on Claim 1. The parties did not address the remaining claims in their memoranda or at trial.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States **Bankruptcy** Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Sousas are owners **[*4]** of residential real estate located in Nashua, New Hampshire. The real estate is the couple's primary residence. In the fall of 2005, the Sousas sought to refinance their home with Wells Fargo in order to pay for their son's college education. The loan from Wells Fargo was for $239,000, which would pay off the current mortgage on the property held by Ameriquest and would provide the Sousas with a cash payout for personal, family or household purposes. On September 28, 2005, the Sousas attended the closing that was conducted by attorney Samir Ragab ("Ragab") of the Ginn Firm. The only parties present at the closing were the Sousas and Ragab. According to the Sousas, the process lasted approximately three hours. At the closing, the Sousas were presented with each closing document sequentially. They were given time to review and sign each document, after which they were presented another document for review and signature. The Sousas testified that Ragab would leave the room while they reviewed the documents. Ragab stated that leaving the room was not his standard practice, but he had no specific recollection of the closing with the Sousas. While Ragab's standard practice may very well **[*5]** have been to stay in the room for the entire closing, the closing described in the Sousas' testimony was not a standard closing because few borrowers insist on reading the lending documents with such thoroughness.

Among the documents signed by the Sousas were the TILA disclosure statement and the

notice of the right to rescind. The notice of the right to rescind contained a clause above the signature line that read "I the undersigned acknowledge receiving 2 copies of this notice on the 28th day of September 2005." The Sousas concede they read this statement and signed it under the impression they would receive the copies upon completion of the closing. The Sousas also concede signing the TILA disclosure statement despite noticing several serious errors. For example, the disclosure statement indicated that if the loan were paid off early, there would be no pre-payment penalty. Yet a prepayment rider attached to the loan documents clearly stated that if a full pre-payment were made within two years of execution of the security instrument, a pre-payment charge would be assessed to the principal balance. The Sousas testified they asked Ragab about the inconsistency. While his response is **[*6]** a matter of dispute, what is not disputed is that the TILA disclosure statement was inconsistent with the pre-payment rider. In addition, the TILA disclosure statement denoted an acknowledgment by Joe Haglund, an employee for First New England Mortgage, which was the mortgage originator. The testimony of the witnesses is conclusive that Joe Haglund could not have notarized the TILA disclosure statement because he was not present.

Upon completion of the closing, the Sousas testified they left the Ginn Firm's office without copies of any of the documents in the closing packet. The Sousas were uncomfortable leaving without any paperwork, but were told by Ragab that the office copiers were broken and they would receive everything within a few days. Ragab testified that he had no memory of this particular closing,[1] but stated that the Sousas' account is highly unlikely. He insisted that providing borrowers with copies of the closing packet was a high priority in the office and worst case-scenario he would have mailed it overnight. Furthermore, Ragab explained that lenders usually sent the closing packets "stacked." Meaning, all of the required disclosures and copies were already integrated **[*7]** into the packet and would require no further copies. For instance, there would be three copies of the notice of right to rescind in the packet, one for the lender and the two required copies for the borrower. However, Ragab noted that, though stacking was the standard practice, he dealt with several lenders who had varying procedures, and he did not recall what was provided at the Sousas' closing.

FOOTNOTES

1 Ragab testified that at the time of closing he had already conducted between 200-250 closings for the Ginn Firm prior to the Sousas' closing.

Shortly after, on October 3, 2005, the Ginn Firm wire transferred loan proceeds totaling $16,683.53 to the Sousas. On either that day or the day after, Mr. Sousa said he received a phone call from Ragab indicating that due to a short payoff to Ameriquest, the Sousas would need to bring the Ginn Firm a check for $1,018.66. In response to the call, Mrs. Sousa went to the Ginn Firm's office to deliver the check to Ragab. The Sousas submitted as evidence the check that was delivered. The check is dated October 4, 2005, and the memo line appears to state "for Mortgage Payout." Ragab testified that short payments are common, though this amount was unusually **[*8]** high. Upon reviewing the evidence, the Court concludes that the Ginn Firm disbursed funds to Ameriquest and the Sousas on October 3, 2005, when it became evident that the payout to Ameriquest was short, and the Sousas were told they needed to deliver a check the following day to cover the missing funds. The payment by the Sousas significantly changed the figures in the HUD-1 settlement statement submitted by the Plaintiffs as exhibit 6. More specifically, the Sousas' payment increased the

Ameriquest payoff, and decreased the payout to the borrowers, lines 104 and 303 respectively. According to Ragab, the Ginn Firm should have revised the HUD-1 immediately. However, there is no evidence in the record that a revised HUD-1 was ever prepared or delivered to the Sousas.

Upon delivery of the check to Ragab, Mrs. Sousa inquired about the missing copies and Ragab responded that they would be received in a few days. Again, the Sousas claim no copies were delivered and again Ragab testified that although he had no specific recollection of a discussion with Mrs. Sousa about when the copies would be delivered, the set of events alleged by the Sousas was improbable. Mr. Sousa testified he made another **[*9]** attempt to attain the copies by arriving at the Ginn Firm's office several weeks later to find that the office was either closed or vacant. The Sousas only other effort to acquire the closing packet copies was a request to First New England Mortgage, who was unable to offer the copies. The Sousas never requested the documents from Wells Fargo and never discussed the issue with family or friends. They continued to make regular payments on the mortgage.

Eventually, the Sousas defaulted on the mortgage due to a real estate tax revaluation that increased their property taxes by approximately 45%. The tax increase created a shortage in the Sousas' escrow account and they could not afford the increased payments. On October 3, 2006, the Sousas received from Wells Fargo a notice of foreclosure sale to be held on October 31, 2006. The notice prompted the Sousas to seek legal counsel. On October 25, 2006, the Debtor filed for **bankruptcy** under chapter 13. On July 19, 2007, Mrs. Sousa's **bankruptcy** attorney sent Wells Fargo a letter exercising her right to rescind the mortgage. The letter notified Wells Fargo that the Sousas did not receive copies of material disclosures and did not receive the **[*10]** required notices of their right to rescission. Since Wells Fargo disputed the Sousas' right to rescind, the Sousas filed the Complaint on November 15, 2007.

III. DISCUSSION

Claim 1 of the Complaint is based on the Sousas' right to rescind pursuant to the provisions of TILA. The parties have stipulated that Wells Fargo is a creditor within the meaning of 15 U.S.C. § 1602(f) because it regularly extends consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required. In addition, the parties have agreed that the Transaction is a consumer credit transaction per 15 U.S.C. § 1602(h) because the loan was extended for personal, family or household purposes. Therefore, the Transaction must comply with the requirements of TILA. HN1 "The stated purpose of [TILA] is 'to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . .'" Underwood v. American Home Mortg. Corp. (In re Underwood), 66 B.R. 656, 659 (Bankr. W.D. Va. 1986) (citations omitted). As TILA was enacted with the purpose of protecting **[*11]** consumers, its provisions "are to be construed liberally in favor of the consumer and strictly enforced." Id. at 660. Therefore, "even technical or minor violations . . . impose liability on the creditors." Kajitani v. Downey Sav. and Loan Ass'n, 647 F. Supp. 2d 1208, 1214 (D. Haw. 2008) (citations omitted). Generally, the lender bears the burden of proving compliance with the requirements of TILA. Williams v. Gelt Fin. Corp. (In re Williams), 232 B.R. 629, 640 (Bankr. E.D. Pa. 1999) (citing Wright v. Tower Loan of Mississippi, Inc., 679 F.2d 436, 444 (5th Cir. 1982)). However, introduction of a written acknowledgment of receipt creates a rebuttable presumption of delivery of any required disclosures. 15 U.S.C. § 1635(c).

Among TILA's protections is the right of borrowers to rescind certain transactions:

HN2 in the case of any consumer credit transaction . . . in which a security interest . . . is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of **[*12]** the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.
15 U.S.C. § 1635(a) (emphasis added). HN3 TILA requires that the borrower must receive two copies of a notice of right to rescind. 12 C.F.R. § 226.23(b). In the event the copies are never furnished, the right to rescind does not expire until three years after consummation. 12 C.F.R. § 226.23(a). If the borrower chooses to exercise his right of rescission, he is not liable for any finance or other charge, and any security interest given by the borrower becomes void upon such a rescission. 15 U.S.C. § 1635(b). Here, the Sousas argue that **[*13]** their right to rescind existed beyond midnight of the third business day after the closing because they did not receive two copies of the notice of right to cancel. Yet, both the Plaintiffs and Wells Fargo introduced into evidence the notice of right to cancel, signed by the Sousas, that contained an acknowledgment of receipt of the two copies. As a result, a rebuttable presumption arises that the Sousas were provided the two copies. The Sousas offered only their testimony to rebut the presumption. For the Sousas to prevail, the Court must determine that their testimony is enough to rebut presumption of delivery.

A. Rebuttable Presumption

"The problem of the effect of a presumption when met by proof rebutting the presumed fact has literally plagued the courts and legal scholars." 2 McCormick on Evidence § 344 (Kenneth S. Brown, ed., 6th ed. 2009). Furthermore, the statute and regulations in TILA are silent as to what evidence is necessary to overcome the rebuttable presumption. Jackson v. New Century Mortg. Corp., 320 F. Supp. 2d 608, 611 (E.D. Mich. 2004). Consequently, since TILA is silent on the matter, the Court will start with the Federal Rules of Evidence.

Under Rule 301,
HN4 A presumption **[*14]** imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was original cast.
Fed. R. Evid. 301 (emphasis added). Prior to the adoption of the Federal Rules of Evidence, there existed two theories concerning the effect of a presumption when met with rebuttal evidence: the Thayer or "bursting bubble theory" and the "Morgan view." Bratton v. The Yoder Co. (In re The Yoder Co.), 758 F.2d 1114, 1119 (6th Cir. 1985). HN5 According to the bursting bubble theory, a party need only introduce rebutting evidence that is sufficient to support a finding contrary to the presumed fact. See 2 McCormick on Evidence § 344. Once the presumption is rebutted, the court makes its decision as any ordinary issue of fact. Yoder, 758 F.2d at 1119. On the other hand, under the Morgan view, "a presumption shifts the burden of proving the non-existence of the presumed fact to the opposing party." Id. The common understanding of Rule 301 is that it embodies the bursting bubble theory. Id. The Court **[*15]** in Yoder reasoned that Rule 301 provides only that a presumption shifts the burden of going forward with evidence to rebut or meet the presumption and therefore the presumption has no probative effect once rebutted. Id. Simply stated, once a rebuttable

presumption arises, the party with the burden of going forward must bring forth evidence that would support a jury finding the nonexistence of that presumed fact and if done successfully, the presumption vanishes. See Jackson, 320 F. Supp. 2d at 611. The First Circuit has adopted this view. Bank One, Texas, N.A., v. Montle, 964 F.2d 48, 51 n.2 (1st Cir. 1992) (citing Yoder and holding that since the defendant met his burden of production, no special evidentiary weight is given to the presumption). Accordingly, the Court will apply the bursting bubble theory.

The only evidence directly rebutting the presumption was the testimony of the Plaintiffs. HN6 Courts are split over whether a borrower's testimony of non-receipt is enough to rebut the presumption of delivery in TILA. One line of cases holds that mere testimony that the borrower did not receive the required documents is not enough to rebut the presumption of delivery. CUNA Mut. Ins. Group v. Williams, 185 B.R. 598, 599 (B.A.P. 9th Cir. 1995) **[*16]** ("The law in this circuit is that denial of receipt does not rebut the presumption."); Rhoades v. Credithrift, Inc. (In re Rhoades), 80 B.R. 938, 941 (Bankr. C.D. Ill. 1987) (holding something more than denial of receipt is required); see also McCarthy v. Option One Mortg. Corp., 362 F.3d 1008, 1012 (7th Cir. 2004) (holding that mere assertion of non-receipt is not enough to raise a genuine issue of fact as to compliance with the regulation). Other courts have held that positive sworn testimony of non-receipt is enough evidence to rebut the presumption of delivery. Stutzka v. McCarville, 420 F.3d 757, 762 (8th Cir. 2005) (stating the debtor's affidavit would have at least rebutted the presumption of delivery); Williams v. First Gov't. Mortg. and Investors Corp., 225 F.3d 738, 751, 343 U.S. App. D.C. 222 (D.C. Cir. 2000) (rejecting the district court's legal standard that the plaintiff's testimony, on its own, was insufficient to rebut the presumption of delivery); Williams, 232 B.R. at 641 ("[I]t is not clear what else a consumer *could* present to 'prove the negative' of non-receipt other than testimony of the same."); Underwood, 66 B.R. at 662 (finding that the debtor's testimony combined with discrepancies **[*17]** in dates on the TILA forms was enough to rebut the presumption). The latter position is more in line with this Court's view on Rule 301. Rule 301 only shifts the burden of going forward with evidence when a presumption arises. Once the party presents evidence to the contrary, the presumption disappears. Because a borrower's sworn testimony or affidavit is considered evidence, such evidence may rebut the presumption if it is credible and contradicts the presumed fact.

Here, the Sousas' account both disposed of the possibility that copies of the notice of right to cancel were actually provided and was credible. The Sousas' unequivocal position is that they did not receive any copies of the closing packet at any point in time. After every effort to acquire the paperwork from the Ginn Firm, the Sousas left its office empty handed. The Sousas testified no copies were ever delivered to their home. Their testimony is they have absolutely no copies of anything from the closing packet, including the required notice of the right to rescind. If the Sousas' testimony is credible, they were not provided copies of the right to rescind. In Williams, the court held in favor of the debtor because his **[*18]** testimony was candid in that he did not receive all of the requisite disclosures and there was no evidence that he ever disposed of or located any additional documents. 232 B.R. at 641. On the contrary, in Jackson, the plaintiffs alleged that every document they received at the closing was in an envelope that did not contain the notices. 320 F. Supp. 2d at 611. However, evidence was presented that the plaintiffs received other documents. Id. Therefore, the absence of the notices in the envelope was not dispositive of the fact that the plaintiffs did not receive the notices. Id. In the present case, the Sousas testified that no documents were ever provided.

The Sousas' testimony was consistent, persuasive, and was based on their specific recollections. The fact that there were errors in the closing documents that should have necessitated revisions supports their testimony that documents were not provided at the

closing. Both Mr. and Mrs. Sousa testified and their accounts of the events were unchanging. They described a closing process where they took the time to read each document they were signing. The Sousas concede they not only signed the acknowledgment of receipt but also read it. **[*19]** However, they also state that they were told the copies would be provided at the end of the closing. The Sousas' reliance on such statements was justified based upon the conduct of the closing and the sequential review and signing of the documents. Why the Ginn Firm would not actually provide copies of the closing packet is a more perplexing question. There is no reason to doubt Ragab's testimony that providing copies was a high priority because there was no incentive for the Ginn Firm to withhold these documents from the Sousas.

In fact, as this case demonstrates, it is in the Defendants' interest to provide all required disclosures in order to start the time to exercise the right to rescind. Nonetheless, this closing was fraught with careless errors. The TILA disclosure statement was inaccurate regarding the existence of a pre-payment penalty and contained a false acknowledgment by the loan originator. More significantly, the short payout to the mortgagee was abnormally high and was ultimately paid by the Sousas to the Ginn Firm. This payment should have resulted in a revised HUD-1. Yet, the Ginn Firm failed to ever submit a revised HUD-1, an admittedly serious oversight. Taking into **[*20]** account the several missteps that occurred at the closing, it is not inconceivable that the Ginn Firm failed to provide copies of the closing packet, even if it were its standard practice, because they may have been holding the documents with the intent to revise them. Similarly, in Underwood, the court held that the presumption was rebutted by sworn testimony supported by inconsistencies in the closing papers where the TILA disclosure statement had a different signature date than the notice of right to cancel even though the debtor was present on only one occasion. 66 B.R at 662. Thus, the Court finds that the Sousas' testimony is credible and that the presumption of delivery of the notice of the right to rescind is rebutted.

B. Proving Compliance with TILA Disclosures

Since the presumption was rebutted, Wells Fargo must prove its compliance with TILA disclosures. Wells Fargo called one witness, attorney Ragab. Ragab had no specific recollection of the closing or his dealings with the Sousas. Thus, he could not testify as to what occurred on the day of closing nor during his subsequent communications with the Sousas. Instead, Ragab's testimony was limited to the routine office procedures **[*21]** and practices at the Ginn Firm. The Court does not question Ragab's sincerity in recalling the practices of his former employer. Nonetheless, at the Sousas' closing, enough errors were made to suggest that, at least at this particular closing, office procedures may not have been followed due to a desire to correct errors in the documents. Wells Fargo argues that the closing errors have no relationship to the question of whether the TILA disclosures were produced. It is true that failing to revise a HUD-1, for example, cannot directly lead the Court to conclude that Wells Fargo did not provide two copies of the notice of right to cancel. But those errors make the Sousas' account much less unimaginable, as it was characterized by Wells Fargo. In fact Wells Fargo describes the scenario, i.e., where copies of the closing packet were never provided, where the Sousas never discussed the situation with family and friends, and where the Sousas never requested the copies either in writing or orally from Wells Fargo, as simply "unbelievable." The Court strongly disagrees. Ragab testified that, at the time of closing, he had worked at the Ginn firm for ten months and he had conducted approximately **[*22]** twenty-five closings a month. Considering the high volume of work and the noted errors at the Sousas' closing, the possibility of the Ginn Firm inadvertently failing to provide borrowers copies of their closing packet is hardly unimaginable. Furthermore, the Sousas started making their regular mortgage payments after the closing. Hence, it appears that after a month of trying to obtain their copies, they

started making their mortgage payments and moved on with their lives. Though the Sousas could have been more zealous in pursuing the documents, their account is certainly plausible.

The Plaintiffs came forward with two witnesses, Mr. and Mrs. Sousa, who convincingly testified that they left the closing with no paperwork and were never provided any, even after making several requests. The Court finds that Wells Fargo failed to establish that it, or its agent, provided the Sousas with two copies of their notice of right to rescind the mortgage. As a result, the Sousas still had a right to rescind on July 19, 2007, making the rescission letter sent by Debtor's counsel to Wells Fargo valid.

C. Damages

The Sousas rescinded their mortgage with Wells Fargo and therefore are not liable for any **[*23]** finance or other charge or any security interest given. 15 U.S.C. § 1635(b). However, the Sousas must still pay Wells Fargo the amount actually lent less any sums they have already paid. Underwood, 66 B.R. at 664. In addition, the Sousas are entitled to statutory damages of $2,000, as well as the costs of the action and reasonable attorney's fees as determined by the Court. 15 U.S.C. § 1640.

D. Effect of Rescission

Claim 2 of the Complaint alleges that under the provisions of TILA, the Sousas are excused from tendering the net proceeds of the loan because Wells Fargo failed to honor the rescission letter sent by Mrs. Sousa's **bankruptcy** attorney. HN7 TILA provides a statutory framework to effectuate a rescission. See Brown v. Nat'l Permanent Fed. Sav. and Loan Ass'n, 683 F.2d 444, 447, 221 U.S. App. D.C. 125 (D.C. Cir. 1982). "Within 20 calendar days after receipt of a notice of rescission, the creditor shall return any money or property that has been given to anyone in connection with the transaction and shall take any action necessary to reflect the termination of the security interest." 12 C.F.R. § 226.23(d)(2). Once the creditor fulfills its obligations under the statute, the debtor is to return to the creditor **[*24]** any property he received from the creditor. 12 C.F.R. § 226.23(d)(3); See Rudisell v. Fifth Third Bank, 622 F.2d 243, 253 (6th Cir. 1980). "If the creditor does not take possession of the money or property within 20 calendar days after the consumer's tender, the consumer may keep it without further obligation." 12 C.F.R. § 226.23(d)(3). However, HN8 in the case where a borrower rescinds and the creditor does not acknowledge the rescission, the statue is silent. Rudisell, 622 F.2d at 253. Some courts have held that a debtor may be relieved of its tender obligations where the creditor does not comply with its statutory duties. Shepeard v. Quality Siding & Window Factory, Inc., 730 F. Supp. 1295, 1306 (D. Del. 1990); Williams v. Bank One, 291 B.R. 636, 655 (Bankr. E.D. Pa. 2003). Such a remedy is viewed as a harsh one, but a court may impose it using its equitable powers in situations where creditors have not acted in good faith. Id. The right to rescind is an equitable doctrine subject to equitable considerations. Brown, 683 F.2d at 447. "[C]ourts are to consider traditional equitable notions in applying the statutory grant of rescission." Id. Even where the statute does not require the **[*25]** debtor to tender first, the court may condition return of property to the debtor upon return of property to the creditor. Rudisell, 622 F.2d at 254. Therefore, a court may tailor a remedy that is substantiated by the facts of the case.

On July 19, 2007, Mrs. Sousa's **bankruptcy** attorney sent a letter to Wells Fargo exercising his client's right to rescind. The letter notified Wells Fargo that it had twenty days to cancel its security interest and return all consideration paid by the Debtor. Wells Fargo did not comply with the Debtor's demand because it did not believe the Debtor had

a valid right to rescind. A good faith belief that the Debtor did not have a right to rescind justifies Wells Fargo's delay in honoring the rescission request. See Rudisell, 622 F.2d at 253. Furthermore, the Sousas have not tendered the money they received to Wells Fargo. At trial, Mrs. Sousa testified that she was seeking financing to cover the monies lent by Wells Fargo in the Transaction, but so far has been unable to do so. Unlike in Sosa v. Fite, 498 F.2d 114, 119 (5th Cir. 1974), where the court excused the debtor of her duties after she tendered her obligations and the creditor failed to take possession **[*26]** of the property, the Sousas have not offered to return the loan proceeds to Wells Fargo. Finally, the Sousas have not offered any evidence that Wells Fargo has attempted to either cheat or deceive them. Therefore, the Court will enter a final judgment requiring the Sousas to tender to Wells Fargo the actual money lent minus any finance charges[2] and payments made on the loan after and directing Wells Fargo to cancel its security interest upon satisfaction of the Sousas' obligation.

FOOTNOTES

[2] See 12 C.F.R. § 226.4 .

E. The Remaining Claims

Claim 3 seeks a determination that the lien in favor of Wells Fargo is void by reason of rescission. As noted in the previous section, Wells Fargo is required to cancel its security interest within twenty days of entry of a final judgment. Therefore, Claim 3 is addressed by TILA's statutory remedy and shall be denied as moot.

Claim 4 alleges that POC 1 should be disallowed in full due to the rescission. POC 1 is based on the mortgage and note acquired by Wells Fargo as a result of the Transaction. Since the Transaction has been rescinded, the obligation no longer exists and the claim shall be disallowed in full. Wells Fargo may not hold a prepetition contract claim **[*27]** against the Plaintiffs but rather a claim under the rescission provisions of TILA. Accordingly, Wells Fargo may submit a new proof of claim for any obligations owed by the Debtor under the provisions of TILA.

Claim 5 asserts a claim under RSA 358-A, the New Hampshire Consumer Protection Act, against the Ginn Firm. On May 19, 2010, the Court granted the Plaintiffs' motion for default judgment as to liability only and directed the Plaintiffs to file an affidavit of damages. The affidavit of damages was filed by the Plaintiffs on June 2, 2010. On August 26, 2010, the Court was notified that Geoffrey B. Ginn filed for chapter 7 in the Western District of North Carolina. As a result, the Court will assess damages against Geoffrey B. Ginn and Associates, P.C. but not against Geoffrey B. Ginn since further proceedings against Geoffrey B. Ginn are subject to the automatic stay.

Finally, Wells Fargo filed a cross-claim against the Ginn Firm for indemnification (Count I) and contribution (Count II). On May 24, 2010, the Court granted Wells Fargo's motion for default judgment as to liability only and directed Wells Fargo to submit an affidavit of damages within thirty days of the date of any judgment **[*28]** establishing Plaintiffs' damages against it. Upon the filing of the affidavit of damages by Well's Fargo, the Court will assess damages against Geoffrey B. Ginn and Associates, P.C. but not against Geoffrey B. Ginn since liquidation of the Wells Fargo's claim against Geoffrey B. Ginn would violate the automatic stay.

IV. CONCLUSION

The Court concludes that Wells Fargo violated TILA and the Sousas were therefore entitled to rescind the Transaction in July 2007. As a result of the violation and the rescission, Wells Fargo's proof of claim is disallowed and the Sousas are entitled to damages. The Sousas are required to tender to Wells Fargo the actual money lent to them less any finance charges and payments they made to Wells Fargo on the loan. Accordingly, the Court shall grant Claim 1, deny Claim 2, deny as moot Claim 3, grant Claim 4, and grant Claim 5. Furthermore, the Court will grant Count I and Count II of Wells Fargo's cross-claim against the Ginn Firm. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of **Bankruptcy** Procedure 7052. The Court will issue a separate order and judgment consistent with this opinion.

ENTERED at **[*29]** Manchester, New Hampshire.

Date: March 14, 2011

/s/ J. Michael Deasy

J. Michael Deasy

Bankruptcy 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

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

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 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, generally a Chapter 7 debtor may not prosecute **[*4]** claims belonging to the estate. *Vreugdenhil v. Hoekstra (In re Vreugdenhill)*, 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 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 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); *Steyr 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. "[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