

First Circuit Bankruptcy Case Summaries

4.9.10

In re Erving, Chapter 11 Case No. 09-30623 (Bankr. W.D. Mass. 4/7/10)(Chief Bankruptcy Judge Henry J. Boroff). Case presented an issue of first impression in the First Circuit: Whether a creditor's supply of electricity to a debtor within the 20 days preceding the commencement of a bankruptcy case constitutes a sale of goods [rather than the provision of services], entitling the creditor to a priority administrative expense claim under §503(b)(9) of the Bankruptcy Code. Debtor argued that since water is a service, so is electricity. Creditor argued that it did not perform the traditional service functions commonly associated with electric utilities and was not in fact a utility; arguing also that while regulated utilities are still responsible for the ultimate delivery of electricity to customers the creditor here had no role in that delivery and was involved solely in the sale of electricity as a competitive supplier; and, that debtor paid separately to the local eclectic unity for delivery of electricity, and creditors invoices reflected only the charges for the electricity itself. Court concluded that the creditor's claim was based on the sale of electricity and not the provision of services, and that electricity constitutes a good under §503(b)(9). Since goods are not defined by the Code, Court joined the majority of courts looking to the UCC's definition of "goods", in addition to considering the debtor's argument as to its definition, which conclusion did not run afoul of Supreme Court precedent indicating that priority statutes under the Code should be narrowly construed.

Duby v. US Dept. of Agriculture (In re Duby, Chapter 7 debtor), 2010 BNH 009 (Bankr. D.N.H. 2/22/10)(Chief Bankruptcy Judge Mark W. Vaughn)(Unreported Memorandum Opinion available on Court's web site).

Chapter 7 debtor sued the USDA for violation of the automatic stay of 11 U.S.C. §362(a)(6), and violation of the discharge injunction at §524(a)(2) due to its post-petition and post-discharge pursuit of its debt. USDA admitted it had received the petition and discharge order, but claimed a good faith mistake due to continued, internal "computer glitches". Court denied the USDA's motion to dismiss and granted the debtor's motion for summary judgment on the violations. 11 U.S.C. §106(a)(3) bars the Court from awarding punitive damages in any action against a government unit; and case law in the First Circuit prevents the award of damages for emotion distress against the government for violation of the discharge injunction or automatic stay violations. Court would allow the debtor the opportunity to prove her damages, namely costs and fees, for the USDA's *willful* automatic stay violation under Section §362(k) (case law rejects good faith mistakes as a defense to a §362 stay relief violation if the willful standard is proven). Damages for the discharge injunction violation could arguably be awarded under §105 under the "contempt standard" (but in that instance which is a higher standard, the Court may consider good faith mistakes as a defense) and the debtor was left to prove damages are appropriately recoverable against the USDA for the discharge injunction violation.

Notinger v. Zsofka (In re Zsofka, Chapter 7 debtor), 2010 BNH 013 (Bankr. D.N.H. 3/4/10)(Chief Bankruptcy Judge Mark W. Vaughn)(Unreported Memorandum Opinion available on Court's web site). Debtor filed Chapter 7, he was also a partner in a partnership owning three condominiums. Under New Hampshire Statute, bankruptcy is an event of partnership dissolution. However, because filing of bankruptcy was not in contravention of the partnership agreement, New Hampshire law allowed the bankruptcy estate to request judicially-ordered wind up and termination upon cause shown. Court ordered debtor to wind up the partnership, sell the assets and distribute the proceeds per the terms of the partnership contract. *See also the unreported and related opinion from Judge Vaughn in Notinger v. Zsofka (In re Zsofka), 2010 BNH 001 (Bankr. D.N.H. 1/25/10)(granting Plaintiff's request for turnover*

under 11 U.S.C. §542 for rental proceeds and half interest in escrowed funds owed to the Debtor, which was to be set off against half interest in escrowed funds owed to Defendant.)

HOMESTEADS: *In re Visconti (Chapter 7 debtor), 2010 BNH 16 (Bankr. D.N.H. 4/7/10)(Bankruptcy Judge J. Michael Deasy).* Court denied debtor's homestead exemption in the proceeds of sale of his former home, because (1) as of the petition date, he was not married to the owner of the property and held only a ½ interest in the proceeds of sale, and (2) the final divorce decree only gave him a monetary interest in the proceeds and not an equitable property interest in the actual real estate. When he conveyed his interest to the wife, he extinguished his homestead rights, the homestead requiring his occupancy and ownership. ***In re McLaughlin, Chapter 13 Case No. 09-44714-JBR, (Bankr. D. Mass. 3/18/10) (Bankruptcy Judge Joel B. Rosenthal).(Unreported Memorandum of Decision available on Court's web site)***(Court overruled creditor's objection to debtor's Massachusetts homestead exemption as being claimed in "bad faith", Court opining that the debtor followed the requisites of the Massachusetts statute and did not fall within case law exceptions.) ***In re Genzler, Chapter 7 debtor, Case No. 08-17431 (Bankr. D. Mass. 3/31/10) (Bankruptcy Judge Joan N. Feeney))(Unreported Memorandum Opinion available on Court's web site)***(Court sustained the Trustee's objection to the debtor's homestead exemption, finding the debtor did not meet the requisites of the Massachusetts homestead statute because he did not intend it to be, nor was it in fact, his principal residence at the time the homestead was recorded.)

Submitted by:

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