5.20.11

First Circuit

Thunberg v. Wallick (In re Wallick), 2011 U.S. App. Lexis 8185 (1st Cir. 4/21/11)(Before Judges Torruella, Boudin, and Lipez, Per Curiam). First Circuit affirmed the District Court's affirmance of the Bankruptcy Court's finding the debtor's discharge had been revoked under §727(d)(2) as having been procured by fraud. Debtor misled Bankruptcy Court in inferring that property settlement payments received from ex-wife were subject to secured creditor's liens, when the liens were not properly perfected. Debtor led all to believe that the payments were going to secured creditors, which they were not.

Braunstein v. Dexter, et. als. (In re Aguilar), 2011 Bankr. Lexis 1505 (BAP 1st Cir. 4/25/11)(Before Bankruptcy Judges Haines, Lamoutte and Deasy, Opinion by Haines). Appellate Panel vacated the Bankruptcy Court's order that two condominium units conveyed pre-petition were not property of the Chapter 7 Bankruptcy Estate. It was error for the lower court to apply the common law of trusts (*Kaufman* decision)to highly regulated condominiums. Because of equitable defense raised but not considered, the matter was remanded.

Pawtucket Credit Union v. Picchi (In re Picchi), 2011 Bankr. Lexis 1188 (BAP 1st Cir 4/11/11)(Before Bankruptcy Judges DeJesus, Kornreich and Tester, Opinion by Kornreich). Appellate Panel affirmed the Bankruptcy Court's finding that the debtor's chapter 13 plan could bifurcate the second mortgage into a secured claim and unsecured claim under 506(a) without violating the anti-modifications provisions of 11 U.S.C. §1322(b), as this was a two-family home, the debtor residing in one half and renting out the other half. Previously the First Circuit had allowed (in *Lomas)* that the anti-modification provision of §1322(b) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interests extends to the other income-producing units. The Panel's determination was made under the law that *pre-dated* the 12/22/10 amendment to the Bankruptcy Code under the BTCA [Bankruptcy Technical Corrections Act]defining the debtor's primary residence at §101(13A), which *now provides* that the term 'debtor's principal residence' means a residential structure if used as the principal residence by the debtor, including incidental property, without regard to whether that structure is attached to real property and includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer if used as the principal residence of the debtor - the Appellate Panel did not determine if the outcome would have been different under the 12/22/10 amendment.

In re Blake, 2011 Bankr. Lexis 1609 (Bankr. D. Mass. 5/2/11)(Henry J. Boroff, Bankruptcy Judge). Redaction of settlement amount denied: Creditor contended that it had sound business reasons for keeping the terms of a settlement confidential, which settlement was approved by the bankruptcy court for the creditor's violations of the automatic stay, but the court held that there were no grounds to grant the creditor's redaction request. The creditor did not assert or show that the settlement amount was a trade secret, scandalous or defamatory, or created an unlawful injury, and there was no indication that the amount implicated any personally identifying information. Further, public disclosure of the amount was warranted to serve as a deterrent to violations of the stay, especially in view of the repeated and increasing severity of the creditor's violations even after communications from the debtor's attorney.

In re Visconti, 2011 BNH 6; 2011 Bankr. Lexis 1687 (Bankr. D.N.H. May 9, 2011)(J. Michael Deasy, Bankruptcy Judge). Court denied debtor's motion to convert from a Chapter 7 to 13, as the request was deemed to have been made in bad faith, finding the debtor does not have an absolute right to convert and may forfeit it by fraudulent conduct.

In re McGrahan, 2011 BNH 4; 2011 Bankr. Lexis 1485 (Bankr. D.N.H. 4/22/11)(J. Michael Deasy, Bankruptcy Judge). Dept. of Health and Human Services Division of Child Support Services (DHHS) could no longer intercept tax refunds to satisfy the pre-petition child support obligations because the confirmed Chapter 13 plan provided for payment in full of the DHHS pre-petition claim for unpaid child support as required by §1322(a)(2) and the confirmed plan did not allow for tax refund interception. DHHS was bound by the terms of the confirmed plan.

In re Ames, 2011 Bankr. Lexis 1379 (Bankr. D. Mass. 4/15/11)(Melvin S. Hoffman, Bankruptcy Judge). Although the Chapter 7 debtor acknowledged that the debt for post-petition condominium fees was non-dischargeable under 11 U.S.C. §523(a)(16) as long as the debtor held a legal, equitable, or possessory ownership interest in the unit, the debtor contended that his interest in the condominium unit terminated when he declared his intention to surrender it. Bankruptcy Court held that the debtor's surrender of the unit only relinquished his *possessory* interest in the unit, and the debtor retained legal title to the unit. The fact that the debtor stated the intent to surrender the condominium unit and acted on that intent did not alter the debtor's status as the title holder of the unit, and thus the post-petition condominium fees and assessments arising while the debtor remained the record owner of the unit were not dischargeable. The manager's motion for relief from the stay to hold the debtor personally liable was granted.

Riley v. Tencara, LLC (In re Wolverine, Proctor & Schwartz LLC), 2011 Bankr. Lexis 1721 (Bankr. D. Mass. May 4, 2011)(Joan N. Feeney, Bankruptcy Judge). Court allowed post-petition interest to over-secured creditor under §506(b), to include default rate of interest.

In re Lincoln Millwork, Inc., 2011 Bankr. Lexis 1608 (Bankr. D. Maine 4/28/11)(James B. Haines, Jr., Bankruptcy Judge). Debtor's counsel sought approval of fees incurred in the Chapter 11 case over the objection of a secured creditor. The hourly rate was reasonable and there was no question the work was done. However, in light of the little benefit to the estate (Chapter 11 case converted to 7 within twenty-one days), counsel was allowed less than half of the fees sought, with payment to await the conclusion of the Chapter 7 case.

Furlong v. Donarumo, 2011 U.S. Dist. Lexis 36077 (D. Mass. 4/1/11)(Patti B. Saris, District Judge). District Court affirmed Bankruptcy Court's decision to allow the individual debtors to keep scheduled causes of action that were abandoned under 11 U.S.C. §554(c)[no notice of abandonment, it was scheduled property not otherwise administered that reverted to the debtor].

Submitted by:
PATRICIA S. GARDNER, ESQ.
THE GARDNER LAW FIRM
PO Box 453, Newmarket, NH 03857
Phone: (603) 766 - 4933
Fax: (603) 292 - 5207
email to: GardnerBusinessLaw@gmail.com
web site: www.GardnerBusinessLaw.com

View Available Briefs and Other Documents Related to this Case

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

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

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

2011 U.S. Dist. LEXIS 36077; Bankr. L. Rep. (CCH) P81,981

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

PRIOR HISTORY: [*1]
Chapter 7. Case No. 06-42851-HJB.
In re Furlong, 437 B.R. 712, 2010 Bankr. LEXIS 3299 (Bankr. D. Mass., 2010)

CASE SUMMARY

OVERVIEW: Debtors and a company that the debtors purchased from a seller listed breach of contract claims against the seller in their **bankruptcy** schedules. All of the company's claims against the seller were abandoned pursuant to 11 U.S.C.S. § 554(c) because the scheduled claim was factually and legally related to the company's other claims against the seller and the trustee was aware of each claim. The debtors' transfer of the company's claims to the debtors did not violate the automatic stay because the debtors did not use their shares of company stock to effectuate the transfer of the claims.

OUTCOME: The court affirmed the rulings of the **bankruptcy** court.

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

LEXISNEXIS® HEADNOTES

Hide

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

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

HN1 The district court reviews the **bankruptcy** court's findings of fact for clear error and its conclusions of law de novo. More Like This Headnote

Bankruptcy Law > Estate Property > Content

HN2 **Bankruptcy,** as defined by 11 U.S.C.S. § 541(a)(1), includes all legal or equitable interests of the debtor in the property as of the commencement of the case. The language of the statute has been construed very broadly. These interests include causes of action owned by the debtor or arising from the property of the estate. It is the debtor's obligation to disclose all interests at the beginning of the **bankruptcy** proceedings. More Like This Headnote

Bankruptcy Law > Estate Property > Abandonment > General Overview

HN3 See 11 U.S.C.S. § 554.

Bankruptcy Law > Estate Property > Abandonment > General Overview

HN4 For purposes of 11 U.S.C.S. § 554, abandonment presupposes knowledge. More Like This Headnote

Bankruptcy Law > Estate Property > Abandonment > Operation of Law

HN5 Property must be formally scheduled in order to be subject to abandonment under 11 U.S.C.S. § 554(c). Intent to abandon estate property must be unambiguous. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Estate Property

HN6 Under 11 U.S.C.S. § 362(a)(3), the filing of a **bankruptcy** petition serves as an automatic stay of any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Duration

HN7 The automatic stay imposed under 11 U.S.C.S. § 362 is lifted when the case is closed or dismissed. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Duration

HN8 See 11 U.S.C.S. § 362(c).

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

HN9 The automatic stay under 11 U.S.C.S. § 362 does not extend to the assets of a corporation in which the debtor has an interest, even if the interest is 100% of the corporate stock. More Like This Headnote

Available Briefs and Other Documents Related to this Case:

U.S. District Court Brief(s)

COUNSEL: For Michael Furlong and Joann Furlong, In Re: Jeffrey B. Renton, Matthew J. Ginsburg, Gilbert & Renton LLC, Andover, MA; Michael B. Feinman, Law Offices of Michael B. Feinman, Andover, MA.

For Andrew C Donarumo, Appellant: Anthony L. Gray, Pollack & Flanders, LLP, Boston, MA; Daniel S. Treger, Jeffrey J. Phillips, Phillips & Angley, Boston, MA.

For Murray Supply Corp., Appellant: Anthony L. Gray, Pollack & Flanders, LLP, Boston, MA.

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

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

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

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

OPINION BY: PATTI B. SARIS

OPINION

MEMORANDUM AND ORDER

Saris, U.S.D.J.

I. INTRODUCTION

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

II. FACTUAL BACKGROUND

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

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

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

FOOTNOTES

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

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

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

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

V. DISCUSSION

A. Standard of Review

HN1 This Court reviews the **Bankruptcy** Court's findings of fact for clear error and its conclusions of law de novo. Davis v. Cox, 356 F.3d 76, 82 (1st Cir. 2004).

B. Abandonment

HN2 **Bankruptcy,** as defined by 11 U.S.C. § 541 (a)(1), includes "all legal or equitable interests of the debtor in the property as of the commencement of the case." The language of the statute has been construed very broadly. See In re Lalchandani, 279 B.R. 880, 883 (1st Cir. BAP, 2002) ("The scope of § 541 is broad and includes in the estate all kinds of property, including tangible and intangible property."); see also Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116, 122 (2d Cir. 2008) (per curiam) ("[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, derivative, is within reach of § 541." (quoting In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993))). These interests include causes of action "owned by the debtor **[*7]** or arising from the property of the estate." Chartschlaa, 538 F.3d at 122. It is the debtor's obligation to disclose all interests at the beginning of the **bankruptcy** proceedings. Id.

The issue of abandonment in **bankruptcy** cases is governed by HN3 11 U.S.C. § 554:
(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

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

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

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.
It is well-established that HN4 "abandonment presupposes knowledge." Guaranty Residential Lending, Inc. v. Homestead Mortg. Co., L.L.C., 463 F. Supp. 2d 651, 661 (E.D. Mich. 2006) **[*8]** (citing COLLIER ON **BANKRUPTCY** ¶ 554.03 (15th rev. ed. 2006)). Further, HN5 property must be formally scheduled in order to be subject to abandonment under § 554(c). See Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995). Intent to abandon estate property must be unambiguous. See Chartschlaa, 538 F.3d at 124 ("Absent an unambiguous intent to abandon estate property, the proposed abandonment is not effective.").

The **Bankruptcy** Court held that the claims against Donarumo were properly abandoned under § 554(c) in the corporate **bankruptcy** and § 554(a) in the personal **bankruptcy.** Donarumo argues here that the **Bankruptcy** Court erred in these rulings.

1. The Corporate **Bankruptcy**

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

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

Closer to the mark are three cases in which the debtors scheduled *something* to indicate the existence of a cause of action, but not the specific claims that they sought to prosecute post-**bankruptcy.** The **Bankruptcy** Court relied primarily on In re Bonner, 330 B.R. 880, 2005 WL 2136204 (6th Cir. BAP, 2005). In that case, the court found that
the debtors' scheduling of 'Auto Accident Claim' plainly and unambiguously included any claim that the debtors may have had for any personal injury arising out of the automobile accident. . . . By listing 'Auto Accident Claim,' the debtors gave the Trustee sufficient information alerting him to the possible existence of a personal injury claim and the need for further investigation. . . . A debtor involved in an automobile accident might have claims for

pain and suffering, loss of income, medical expenses, loss of consortium, **[*11]** property damage and any other expenses incurred as a result of the accident. Under the Trustee's reasoning, each of these claims would have to be specifically delineated in the schedules in order for the debtors to sufficiently satisfy their 11 U.S.C. § 521(1) obligation. Clearly, the Code does not require detail of this degree.
2005 Bankr. LEXIS 1683, [WL] at *4.

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

In *Tilley v. Anixter Inc.*, the plaintiff filed for **bankruptcy** after getting divorced. 332 B.R. 501, 504 (D. Conn. 2005). In her **bankruptcy** petition, she included a "claim against her ex-husband and her ex-husband's employer for back child support." Id. at 507. She also included this claim on her Schedule C list of exempt property pursuant to 11 U.S.C. § 522(d)(10)(D), which provides an exemption for alimony and child support. In her Schedule B, the plaintiff failed to also list a claim for intentional infliction of emotional distress deriving from the ex-husband's alleged deceptive withholding of child support. Id. The defendant argued that the tort claim for intentional infliction of emotional distress was not properly scheduled and remained the property of the plaintiff's **bankruptcy** estate. Id. The **[*13]** court ruled that
the fact that the instant plaintiff's claim for intentional infliction of emotional distress may have arisen out of the defendant's failure to pay adequate child support did not absolve her of her duty to schedule it separately from a claim of back child support. Whereas "it is common knowledge" that an "Auto Accident Claim" is likely to result in a personal injury claim, Bonner, 2005 Bankr. LEXIS 1683, 2005 WL 2136204 at *4, a claim "for back child support" does not similarly inform a trustee of the need to investigate whether the plaintiff had a claim for intentional infliction of distress arising out of fraud in connection with the reporting of Mr. Tilley's income. The present emotional distress claim existed while the plaintiff was in **bankruptcy,** and the trustee lacked the information he needed to determine whether to pursue it. Thus, it should have been scheduled separately on the plaintiff's **bankruptcy** petition.
Id. at 510-511.

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

2. The Personal **Bankruptcy**

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

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

C. The Automatic Stay

Donarumo's appeal challenges the **Bankruptcy** Court's determination that the Furlongs' transfer of the Drew's Plumbing claims from the corporation to themselves did not violate the automatic stay. [2] HN6 Under 11 U.S.C. § 362(a)(3), the filing of a **bankruptcy** **[*16]** petition serves as an automatic stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." HN7 The automatic stay imposed under § 362 is lifted when the case is closed or dismissed. Under HN8 § 362(c),
(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;
(2) the stay of any other act under subsection (a) of this section continues until the earliest of—
(A) the time the case is closed;
(B) the time the case is dismissed; or
(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied[.]
11 U.S.C. § 362(c).

FOOTNOTES

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

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

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

Trustee's approval as shareholder required court approval.

The **Bankruptcy** Court seems to have taken a different approach to this issue. The court found that the claims were transferred solely by the board of directors, without the consent of the stockholder trustee, and thus the transfer did not implicate the stock. It concluded that the transfer could not have violated the automatic stay. 437 B.R. at 721. The court noted that while transferring the claims did not involve "using" the stock in violation of the automatic stay, the transfer might nonetheless create liability under state corporations law:
. . . the stockholder of Drew's Plumbing (the Trustee) may have a derivative claim against the Furlongs on the basis that the Furlongs received a fraudulent transfer from Drew's Plumbing under state law. In **[*19]** addition, there remain important questions under state law as to the voidability of the transfer of what appears to have been Drew's Plumbing's only remaining interest (the claims against Donarumo) without stockholder (the Trustee's) consent.
Id.

With regard to the transfer itself, as the **Bankruptcy** Court noted, HN9 the automatic stay "does not extend to the assets of a corporation in which the debtor has an interest, even if the interest is 100% of the corporate stock." Furlong, 437 B.R. at 721; see also Kreisler v. Goldberg, 478 F.3d 209, 213-14 (4th Cir. 2007); In re Winer, 158 B.R. 736, 743 (N.D. Ill. 1993); Personal Designs, Inc. v. Guymar, Inc., 80 B.R. 29, 30 (E.D. Pa. 1987).

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

D. The Drew's Plumbing Stocks

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

VI. CONCLUSION

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

/s/ Patti B. Saris

PATTI B. SARIS

United States District Judge

---

*2011 Bankr. LEXIS 1609, **

In re: NIGEL ALAN BLAKE and MADELYN LOUISE BLAKE, Debtors

Chapter 7, Case No. 08-31098

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

2011 Bankr. LEXIS 1609

May 2, 2011, Decided
May 2, 2011, Filed

CASE SUMMARY
PROCEDURAL POSTURE: Bankruptcy debtors settled their claim against a creditor for violation of the automatic **bankruptcy,** and the creditor requested that the monetary amount of the settlement be redacted from the **bankruptcy** court records.

OVERVIEW: The creditor contended that it had sound business reasons for maintaining the confidentiality of the settlement amount, but the **bankruptcy** court held that there were no grounds to grant the creditor's redaction request. The creditor did not assert or show that the settlement amount was a trade secret, scandalous or defamatory, or created an unlawful injury, and there was no indication that the amount implicated any personally identifying information. Further, public disclosure of the amount was warranted to serve as a deterrent to violations of the stay, especially in view of the repeated and increasing severity of the creditor's violations even after communications from the debtors' attorney.

OUTCOME: The creditor's request to redact the settlement amount was denied.

CORE TERMS: settlement, notice, redaction, bankruptcy case, public access, disclosure, automatic stay, electronic, account number, security numbers, papers filed, redacted, confidentiality, confidential, redact, secret, settlement amount, repeated, publicly, entity, digits, common law, local rules, public records, punitive damages, certificate, contested, scheduled, deadlines, matrix

LEXISNEXIS® HEADNOTES

Hide

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

HN1 See 11 U.S.C.S. § 362(a)(6).

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

HN2 See 11 U.S.C.S. § 362(k).

Governments > Courts > Court Records

HN3 The right of public access to judicial records is entrenched in the judicial system, and the sealing or redaction of documents on the record is considered with a keen eye toward the presumption that papers filed in the course of judicial proceedings should be open to the public. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Governments > Courts > Court Records

HN4 In the **bankruptcy** context, the right of public access to court records is codified in 11 U.S.C.S. § 107. Section 107 establishes a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a **bankruptcy** case. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Governments > Courts > Court Records

HN5 Together, the two components of 11 U.S.C.S. § 107--the broad right of access to **bankruptcy** court records created in § 107(a) and the exceptions set forth in § 107(b)--create a framework for determining whether a paper filed in a **bankruptcy** case is available to the public or subject to protection. Absent § 107, this question would be addressed by reference to the common law. Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access to papers filed in a **bankruptcy** case. Once the presumption of public access attaches under § 107(a), the next step in the inquiry is to determine whether the material at issue falls within a specific exception to the presumption--namely, into one of the § 107(b) categories. More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Governments > Courts > Court Records

HN6 See 11 U.S.C.S. § 107(a).

Bankruptcy Law > Practice & Proceedings > General Overview

Governments > Courts > Court Records

HN7 See Fed. R. Bankr. P. 9018.

Bankruptcy Law > Practice & Proceedings > General Overview

Governments > Courts > Court Records

HN8 While the presumption of public access to documents filed in a **bankruptcy** case is paramount, **bankruptcy** courts may order the sealing or protection of additional information where justified. Under Fed. R. Bankr. P. 9037(d), courts may for cause, by order in a case under the **Bankruptcy** Code: (1) require redaction of additional information; or (2) limit or prohibit a non-party's remote electronic access to a document filed with the court. Rule 9037(d). Before prohibiting the public disclosure of information not delineated in the **Bankruptcy** Code or Rules, however, the **bankruptcy** court must first determine that cause has been established. Rule 9037(d). More Like This Headnote

Bankruptcy Law > Case Administration > Professional Services > Compensation > Debtor's Counsel

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Governments > Courts > Court Records

HN9 Where settlement of a disputed matter provides for compensation to a **bankruptcy** debtor's counsel, that compensation must be disclosed. 11 U.S.C.S. § 329(a); Fed. R. Bankr. P. 2016(b). Settlements generally are subject to disclosure and **bankruptcy** court approval procedures under both the federal and local **bankruptcy** rules. Fed. R. Bankr. P. 9019(a) ; Bankr. D. Mass. R. 9019-1(a), (b). Furthermore, the applicability of Fed. R. Civ. P. 41 to contested matters may be waived by the **bankruptcy** court. Fed. R. Bankr. P. 9014(c) More Like This Headnote

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN10 There exists a distinction between ordinary civil litigation between parties dealing with their own funds and litigation in the context of **bankruptcy.** Fed. R. Civ. P. 41 allows for the dismissal of actions by the filing of a stipulation for dismissal signed by all parties who have appeared in the action. Upon filing of the stipulation the dismissal is effective without the necessity of court approval. This rule, however, is not absolute. Once a **bankruptcy** has been filed the absolute dismissal right of Rule 41 is further circumscribed by Fed. R. Bankr. P. 9019(a), 2002(a)(3) which provide for the compromise or settlement of a controversy only upon notice, hearing. and court approval. The reason for these requirements in a **bankruptcy** case is not hard to discern. The **Bankruptcy** Code envisions a process whereby all parties in interest have equal access to information regarding the debtor's assets, liabilities, and claims. As contrasted to a nonbankruptcy situation, once a person elects to avail himself of the benefits of the federal **bankruptcy** laws by the filing of a petition, he can no longer expect to have any financial secrets. The Code contemplates a full and complete disclosure. In **bankruptcy** cases approval is committed to the sound discretion of the court consistent with what is in the best interest of the parties in interest or the estate. More Like This Headnote

Bankruptcy Law > Case Administration > Professional Services > Compensation > Debtor's Counsel

HN11 See 11 U.S.C.S. § 329(a).

Bankruptcy Law > Case Administration > Professional Services > Compensation > Debtor's Counsel

HN12 See Fed. R. Bankr. P. 2016(b).

Bankruptcy Law > Practice & Proceedings > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

HN13 See Fed. R. Bankr. P. 9019(a).

Bankruptcy Law > Practice & Proceedings > General Overview

HN14 Bankr. D. Mass. R. 9019-1(a) requires all stipulations affecting a case or proceeding before a **bankruptcy** court, except stipulations which are made in open court, to be in writing, signed, and filed with the court. Rule 9019-1(a). Parties are also directed to file a signed stipulation or agreement for judgment within seven days after reaching that agreement. Rule 9019-1(b). Under the Rule, only settlements of 11 U.S.C.S. § 523 dischargeability actions may be documented by the filing of a stipulation or an agreement for judgment. Rule 9019-1(c). More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Free Press > Public Access

Governments > Courts > Court Records

HN15 It is access to the content of a court proceeding--whether in person, or via some form of documentation--that matters. First, openness is ongoing--a status rather than an event. At the heart of the U.S. Supreme Court's right-of-access analysis is the conviction that the public should have access to information; the Court never has suggested that an open proceeding is only open to those who are able to be bodily present in the courtroom itself. True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source. More Like This Headnote

COUNSEL: **[*1]** For Nigel Alan Blake, Ludlow, MA, Debtor: L. Jed Berliner, Berliner Law Firm, Springfield, MA.

For Madelyn Louise Blake, aka, Lyn L Blake, Ludlow, MA, Joint Debtor: L. Jed Berliner, Berliner Law Firm, Springfield, MA.

For Assistant U.S. Trustee: Richard King, Office of the U. S. Trustee, Worcester, MA.

Trustee: Joseph B. Collins-Tr, Hendel & Collins P.C., Springfield, MA.

JUDGES: Henry J. Boroff, United States **Bankruptcy** Judge.

OPINION BY: Henry J. Boroff

OPINION

MEMORANDUM OF DECISION

Before the Court is a request by a creditor in the Chapter 7 **bankruptcy** case filed by Nigel Alan Blake and Madelyn Louise Blake (the "Debtors") to redact portions of the transcript of a hearing held over a year ago. The motive for the request is fairly transparent — having failed to obtain this Court's permission to keep secret the amount paid by the creditor to the Debtors and their attorney in settlement of alleged violations of the automatic stay, the creditor now wants the transcript redacted to remove that disclosure.

I. FACTS AND TRAVEL OF THE CASE

The Debtors filed this **bankruptcy** case under Chapter 7 of the United States **Bankruptcy** Code (the "**Bankruptcy** Code" or the "Code") [1] on July 31, 2008. On Schedule F-Creditors Holding Unsecured **[*2]** Nonpriority Claims ("Schedule F"), filed with the petition, the Debtors listed "Verizon" as an unsecured creditor with a claim totaling $475.63 for "Utilities" and identified their Verizon account number by the last four digits. See Chapter 7 Voluntary Petition, All Schedules and Statements, Matrix and Disclosure of Attorney Compensation, July 31, 2008, ECF No. 1. The Debtors also included Verizon on their matrix list of creditors (the "Mailing Matrix"). See id. On August 6, 2008, all creditors listed on the Mailing Matrix, including Verizon, were sent notice of the Debtors' **bankruptcy** case filing (the "Notice of Filing"), which identified the Debtors' names, address, **bankruptcy** case number, and full social security numbers. See Notice of Chapter 7 **Bankruptcy** Case, Meeting of Creditors, & Deadlines, Aug. 4, 2008, ECF No. 10; BNC Certificate of Mailing, Aug. 6, 2008, ECF No. 11. [2]

FOOTNOTES

1 See 11 U.S.C. § 101 et seq. All references to statutory sections are to the **Bankruptcy** Code, as amended by the **Bankruptcy** Abuse and Prevention and Consumer Protection Act (Pub. L. 109-8, 119 Stat. 23 (2005)), unless otherwise specified.

2 Although notices of **bankruptcy** case filings sent to creditors include **[*3]** the debtors' full social security numbers, copies of those notices entered on the Court's public dockets are redacted so that only the last four digits of the social security number appears.

According to the Debtors, approximately one month after their **bankruptcy** case was filed, they received a letter from Verizon which identified the Debtors' **bankruptcy** case number and filing date and also noted that Verizon had "received notification that [the Debtors had] filed for **bankruptcy.**" See Debtor's Motion for Stay Violation Sanctions: Verizon (the "First Sanctions Motion"), Ex. B, Sept. 29, 2008, ECF No. 14. In that letter (the "Information Request"), Verizon asked the Debtors to provide their Verizon account number, the names listed on the Verizon account, the Debtors' social security numbers, the state in which service was provided, and a phone number where the Debtors could be reached for further information. On September 12, 2008, the Debtors' attorney, L. Jed Berliner ("Attorney Berliner"), responded to the Information Request, declining to provide the requested information. [3]

FOOTNOTES

3 According to Attorney Berliner's response to the Information Request, see First Sanctions Motion, Ex. C, he **[*4]** believed the account numbers to be irrelevant, as all prepetition debt would be discharged. He also noted that the Debtors' full social security numbers had been provided with the Notice of Filing and therefore should not have to be repeated. While the latter assertion is undoubtedly correct, the first is hard to justify. Although the last four digits of the Verizon account number was set forth on Schedule F, the Debtors' **bankruptcy** schedules may not have been immediately available to Verizon. And Attorney Berliner's simple accommodation to Verizon, rather than his unhelpful response, might have avoided much of the controversy that followed.

Shortly thereafter, Verizon sent a notice to the Debtors, dated September 24, 2008, advising that the Debtors' account was past due and threatening to cancel service if payment was not made by October 10, 2008 (the "First Cancellation Notice"). In response to the First Cancellation Notice, on September 29, 2008, the Debtors filed their First Sanctions Motion, asking this Court to sanction Verizon for its alleged violation of the automatic stay imposed by § 362(a) of the **Bankruptcy** Code. [4] The certificate of service attached to the First Sanctions **[*5]** Motion indicates that the motion was served on Verizon at three separate addresses, including the addresses for Verizon that appeared in the Information Request and First Cancellation Notice. See First Sanctions Motion, 6.

FOOTNOTES

4 Pursuant to § 362(a), HN1 "a petition filed under [the **Bankruptcy** Code] . . . , operates as a stay, applicable to all entities, of — . . . (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. § 362(a)(6). Section 362(k) creates a right of action for violations of the automatic stay, and provides: ". . . HN2 an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (formerly 11 U.S.C. § 362(h), this section was recodified as §362(k) in 2005).

Three days later, the Court scheduled the First Sanctions Motion for a hearing to be held on November 6, 2008. See Notice of Nonevidentiary Hearing, Oct. 2, 2008, ECF No. 15. On that same date, Attorney Berliner filed a certificate of service indicating that he had served Verizon **[*6]** (at the same three addresses) with a copy of the Notice of the November 6, 2008 hearing. See Certificate of Service of Notice of Hearing, Oct. 2, 2008, ECF No. 16.

The Debtors say that, also on October 2, 2008, a Verizon representative left a message on the Debtors' answering machine asking the Debtors to call Verizon to make payment arrangements. On October 13, 2008, the Debtors say, they received a second message on their answering machine in which a Verizon representative stated that it was critical for the Debtors to make payment arrangements in order to avoid termination of service. Verizon also sent an account statement to the Debtors, dated October 13, 2008, which the Debtors say included prepetition amounts due. Verizon sent yet another notice, dated October 8, 2008 (but which the Debtors say they received on October 14, 2008), threatening to cancel the Debtors' service unless all overdue amounts were paid by October 10, 2008 (the "Second Cancellation Notice").

The Debtors immediately sent a copy of the Second Cancellation Notice to Attorney Berliner, who claims to have contacted Verizon on October 15, 2008. According to Attorney Berliner, he spoke with a Verizon representative **[*7]** who assured him that the account would be put in "permanent nonprocess status" and a new bill reflecting only postpetition charges would be issued. See Debtor's Amended Motion for Stay Violation Sanctions: Verizon, 4 ¶ 15, Nov. 6, 2008, ECF No. 19.

Despite the representations to the contrary claimed to have been made by the Verizon employee during the October 15, 2008 telephone conversation, the Debtors' internet service *was* terminated on October 24, 2008. Attorney Berliner says that he immediately contacted Verizon, and was told that the service would be reinstated within a few hours. Attorney Berliner also says that he was told by the Verizon representative that Verizon's records reflected receipt of the pending sanctions motion and notice of the hearing scheduled for November 6.

At the November 6, 2008 hearing on the First Sanctions Motion (the "First Sanctions Hearing"), no one appeared on Verizon's behalf. Attorney Berliner

informed the Court at that time of, and proffered an affidavit attesting to, the events that had occurred after the filing of the First Sanctions Motion. Because Verizon had not received advance notice that the matters included in that affidavit would be considered **[*8]** at the First Sanctions Hearing, Attorney Berliner, at the Court's urging, withdrew the First Sanctions Motion and filed an amended motion for sanctions the same day (the "Amended Sanctions Motion").

The Amended Sanctions Motion included the events that followed the filing of the First Sanctions Motion and was initially set for a hearing to be held on December 11, 2008. After two continuances at the request of the parties, the hearing was ultimately held on February 5, 2009. On February 3, 2009 — approximately 3 months after the filing of the Amended Sanctions Motion and only 2 days before the hearing — Verizon filed a response (the "Response"). In the Response, Verizon did not admit or deny the allegations of the motion (as required by Massachusetts Local **Bankruptcy** Rule ("MLBR") 9013-1(i)), but alleged that it did not receive the Debtors' full account number in enough time to prevent the disconnection of the Debtors' service, concluding that: "the Debtors' failure to comply with the noticing requirements of 11 U.S.C. § 342(c)(2)(A) and the Debtors' counsel [sic] refusal to timely assist [Verizon] in the location of the Debtors' accounts resulted in the temporary disconnection of the **[*9]** Debtor's [sic] service." See Response, Feb. 3, 2009, ECF No. 35.

At the February 5, 2009 hearing on the Amended Sanctions Motion (the "Second Sanctions Hearing"), counsel for Verizon appeared. At the conclusion of that hearing, the Court scheduled the matter for an evidentiary hearing to be conducted in June 2009.

Prior to the scheduled trial date, however, Verizon filed a motion, assented to by the Debtors, to continue the trial. In that motion, Verizon indicated that a settlement had been reached and that the parties expected to be filing a motion to approve the settlement within a few days. See Motion by Verizon New England, Inc., to Suspend Response Date and to Continue Trial (Assented), ¶ 3, June 12, 2009, ECF No. 51. In light of that representation, the Court continued the matter generally.

No motion to approve a settlement was filed. However, on September 21, 2009, the parties filed a "Stipulation of Dismissal" with regard to the Amended Sanctions Motion. The Stipulation of Dismissal stated that "[p]ursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), made applicable by Fed. R. Bankr. P. 9014(c), the **[*10]** debtor and respondent stipulate to dismiss Debtor's Amended Motion for Stay Violation Sanctions." See Stipulation of Dismissal, Sept. 21, 2009, ECF No. 71.

On the same date, Debtors' counsel filed a "Corrected Supplement to Disclosure of Compensation to Attorney for the Debtor" (the "Supplemental Fee Disclosure") in which he indicated that 1) he had received additional compensation from Verizon in settlement of the Amended Sanctions Motion, 2) the "parties finally achieved a settlement agreement," and 3) "disclosure of the settlement amount is available for oral presentation to the Court at its request." See Supplemental Fee Disclosure 2 ¶ 7, 3 ¶ 9, Sept. 21, 2009, ECF No. 73.

The Court marked the Stipulation of Dismissal for hearing, which was held on October 15, 2009 (the "Settlement Hearing"). When the Court inquired into the resolution of the matter, Attorney Berliner responded that the matter had settled "with a payment of a sum certain." Hr'g Transcript 2:12-13, Oct. 15, 2009. When the Court asked what the amount of the settlement was, Verizon's counsel indicated that the settlement contained a confidentiality agreement and that he preferred not to disclose the monetary terms in **[*11]** open court. Unwilling to accept the parties' agreement to keep the amount confidential, the Court stated that, absent full disclosure, it would strike the Stipulation of Dismissal and the matter would proceed to trial. At that point, the parties indicated their willingness to disclose the amount of the settlement and did so, informing the Court as to the gross amount of the settlement and the portion thereof that would be allocated to the Debtors' attorney's fees. The Court then indicated that no further action would be required.

Thereafter, the Chapter 7 trustee was discharged and the case was closed on April 5, 2010. In early 2011, an official transcript of the Settlement Hearing was requested (the "Hearing Transcript"). [5] The Hearing Transcript was filed on the docket on February 9, 2011, see ECF No. 78, but was not immediately made publicly viewable. Instead, in keeping with the District Court of Massachusetts **Bankruptcy** Court policy regarding the electronic availability of transcripts and requests for redaction (the "Transcript Policy"), [6] the Court issued a "Notice of Filing of Official Transcript and of Deadlines Related to Restriction, Redaction and Release" (the "Transcript **[*12]** Notice") on February 10, 2011. See ECF No. 79.

FOOTNOTES

5 The Clerk's Office records reflect that the request was made by Attorney Berliner.

6 See Transcript Policy — Deadlines for Restriction, Redaction and Release, available online at www.mab.uscourts.gov/mab/node/95 (last visited May 2, 2011).

The Transcript Notice set forth deadlines and procedures by which parties could request redaction of the transcript, specifically indicating that social security numbers, financial account numbers, and minors' names and birthdates should be redacted. In the absence of a request for redaction, the transcript would be made publicly available through the electronic docket after the expiration of 90 days.

On March 2, 2011, Verizon filed a "Request . . . for Redaction of Transcript" (the "Redaction Request") asking the Court to redact from the transcript the references made to the dollar amount of the settlement. See ECF No. 81. Upon receipt of the Redaction Request, the matter was taken under advisement. Although opportunity to respond has been given, the Debtors have not responded to the Redaction Request, nor has Verizon filed a brief or any further pleadings to expand upon the basis for its request. Nonetheless, **[*13]** the Court now elucidates its reasons why the Redaction Request must be denied.

II. DISCUSSION

A. Section 107: Public Access to Bankruptcy Records and Exceptions

Outside of the **bankruptcy** context, HN3 the right of public access to judicial records is entrenched in this country's judicial system, see, e.g., Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) ("the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents"), and the sealing or redaction of documents on the record is considered with a keen eye toward the presumption that papers filed in the course of judicial proceedings should be open to the public. See, e.g., FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987).

In Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.), the First Circuit Court of Appeals recognized that this right of public access vis-a-vis **bankruptcy** proceedings is specifically codified in the **Bankruptcy** Code at §107(a) [7]:

HN4 In the **bankruptcy** context, the right of public access is codified in a specific statutory provision, 11 U.S.C. § 107. Section 107, which Congress enacted in 1978, establishes **[*14]** a broad right of public access, subject only to limited exceptions set forth in the statute, to all papers filed in a **bankruptcy** case. . . . As one of our sister circuits has explained,
section 107(a) is rooted in the right of public access to judicial proceedings, a principle long-recognized in the common law and buttressed by the First Amendment. This governmental interest is of special importance in the **bankruptcy** arena . . . .

In re Crawford, 194 F.3d 954, 960 (9th Cir. 1999).

422 F.3d 1, 6-7 (1st Cir. 2005). And because this "broad right of public access" in **bankruptcy** cases is a creature of federal statutory law, the exceptions to it are also limited by specific statutory terms. As the Gitto court explained:

HN5 Together, the two components of § 107 — the broad right of access created in § 107(a) and the exceptions set forth in § 107(b) — create a framework for determining whether a paper filed in a **bankruptcy** case is available to the public or subject to protection. Absent § 107, this question would be addressed by reference to the common law. Because § 107 speaks directly to the question of public access, however, it supplants the common law for purposes of determining public access **[*15]** to papers filed in a **bankruptcy** case.

. . .

Once the presumption of public access attaches under § 107(a), the next step in the inquiry is . . . to determine whether the material at issue falls within a specific exception to the presumption — namely, into one of the § 107(b) categories.
Gitto, 422 F.3d at 7-8, 10.

FOOTNOTES

7 Section 107(a) provides:

HN6 Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a **bankruptcy** court are public records and open to examination by an entity at reasonable times without charge.

11 U.S.C. § 107(a).

Sections 107(b) and (c) [8] thus define a universe of information that is exempt from the right of public access established by subsection (a). But none of those exceptions applies here. Verizon has neither argued nor demonstrated that the information sought to be redacted is "a trade secret or confidential research, development, or commercial information," see 11 U.S.C. § 107(b)(1), "scandalous or defamatory," see 11 U.S.C. § 107(b)(2), or "would create undue risk of identity theft or other unlawful injury," see 11 U.S.C. § 107(c). See also Fed. R. Bankr. P. 9018. [9] Therefore, there are no grounds **[*16]** under § 107(b) or (c) to grant Verizon's Redaction Request.

FOOTNOTES

8 Following the First Circuit's decision in Gitto, Congress amended the **Bankruptcy** Code in 2005 to include additional exceptions under subsection (c). See 11 U.S.C. § 107(c).

9 **Bankruptcy** Rule 9018 outlines the procedure for requesting the protection of information pursuant to § 107 and provides:

HN7 On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. . . .

Fed. R. Bankr. P. 9018.

B. Personal Information and Privacy Protections

In addition to the limited exceptions to public access set forth in §§ 107(b) and (c), Federal Rule of **Bankruptcy** Procedure 9037(a) also *requires* the redaction of certain sensitive, private information from documents filed with the **bankruptcy** court. The information required to be redacted pursuant to **Bankruptcy** Rule 9037(a) **[*17]** includes social security numbers, taxpayer-identification numbers, financial account numbers, and the birthdates and names of minors. See Fed. R. Bankr. P. 9037(a). [10]

FOOTNOTES

10 Importantly, **Bankruptcy** Rule 9037(a) contemplates redaction of the specified information *prior* to the filing of the document with the Court. It provides:

(a) *Redacted Filings.* Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

Fed. R. Bankr. P. 9037(a). Subsection (b) lists several exemptions to the redaction requirements of subsection (a), none of which are relevant here.

Any tension between (1) the policy of making documents, including transcripts of court proceedings, [11] publicly and electronically **[*18]** available and (2) the need to protect the information encompassed by **Bankruptcy** Rule 9037(a) has been resolved by the Judicial Conference of the United States' "Policy on Privacy and Public Access to Electronic Case Files (March 2008)" (the "Judicial Conference Privacy Policy"). [12] Under that policy,

[c]ourts making electronic documents remotely available to the public shall make electronic transcripts of proceedings remotely available to the public if such transcripts are prepared. Prior to being made electronically available from a remote location, however, the transcripts must conform to . . . Fed. R.

Bankr. P. 9037(a).

Once a prepared transcript is delivered to the clerk's office . . . the attorneys in the case are . . . responsible for reviewing it for the personal data identifiers required by the federal rules to be redacted, and providing the court reporter or transcriber with a statement of the redactions to be made to comply with the rules.
The Transcript Policy for the **Bankruptcy** Courts in the District of Massachusetts, in turn, was promulgated to effectuate the Judicial Conference's Privacy Policy and to implement the procedures outlined in that policy for the redaction of **[*19]** information from filed transcripts. [13]

FOOTNOTES

11 Although in Picciotto v. Salem Suede (In re Salem Suede), the First Circuit assumed, but did not decide, that a transcript of a hearing in a **bankruptcy** case was a "document," see 268 F.3d 42, 44 n.2 (1st Cir. 2001), this Court concludes that transcripts made available on its electronic docket are "papers" or "documents" that are "filed" on the Court's dockets. First, under the Local Rules, transmission of a document to the ECF System (such as the entry of the Hearing Transcript on the docket), "together with the transmission of a Notice of Electronic Filing from the Court, constitutes the filing of the document for all purposes of the Federal Rules of **Bankruptcy** Procedure and the local rules of this Court, and constitutes entry of the document on the docket kept by the Clerk pursuant to Fed. R. Bankr. P. 5003." See MLBR Appx 8, Rule 3(a). And the "official record is the electronic recording" of an electronically filed document. Id. at Rule 3(b). Second, in Gitto, the First Circuit recognized that under § 107, "the presumption of public access applies to *any* paper filed in a **bankruptcy** case, not only the narrower category of papers that would **[*20]** be considered judicial records under the common law." 422 F.3d at 9-10. Finally, the Court notes that, in the limited number of published decisions where the issue has arisen, other courts have also considered transcripts to be the same as other documents submitted to the court. See, e.g., United States v. Antar, 38 F.3d 1348, 1361 (3d Cir. 1994) ("at the most basic level, the transcript at issue is a public judicial document, covered by a presumptive right of access") (cited in Salem Suede, 268 F.3d at 44 n.2); Hausfeld v. Cohen Milstein Sellers & Toll, PLLC, 2009 U.S. Dist. LEXIS 96240, *11-12 (D. Pa. Oct. 14, 2009).

12 See Judicial Conference Privacy Policy, available online at http://www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/March2008RevisedPolicy.aspx (last visited May 2, 2011).

13 Under both the Judicial Conference Privacy Policy and the Transcript Policy, once a transcript is ordered, it must be placed on the electronic docket and made available to the public. However, it will not be publicly viewable for a period of 90 days, during which time, interested parties are directed to review the transcript and notify the court reporter of any redactions that should be made **[*21]** before the transcript is made public.

But neither the Judicial Conference Privacy Policy nor the Transcript Policy are intended to open the door to *automatic* transcript redactions that extend beyond the scope of information protected under **Bankruptcy** Rule 9037(a). Instead, as the Judicial Conference Privacy Policy notes, "[t]hese procedures are limited to the redaction of the specific personal data identifiers listed in the rules." [14] Thus, because the Redaction Request does not concern any personally identifying information, redaction of the settlement amount from the Hearing Transcript is not warranted under **Bankruptcy** Rule 9037(a), the Judicial Conference Privacy Policy, or this District's Transcript Policy.

FOOTNOTES

14 See also Pfizer, Inc. v. Teva Pharms. USA, Inc., 2010 U.S. Dist. LEXIS 67631, *6 (D.N.J. July 7, 2010). The Court notes that Verizon did not attempt to use the "automatic" redaction procedures to redact the amount of the settlement, and instead complied with the Judicial Conference Privacy Policy for requests to redact information other than personal data identifiers. For such requests to redact other information, "an attorney may move the court for additional redactions to the **[*22]** transcript." Judicial Conference Privacy Policy. And given the mandate of public access to **bankruptcy** court documents codified in § 107(a), such requests are subject to stringent analysis. See, e.g., Gitto, 422 F.3d at 10.

C. Other Grounds for Redaction

HN8 While the presumption of public access to documents filed in a **bankruptcy** case is paramount, **bankruptcy** courts may also order the sealing or protection of additional information where justified. Under **Bankruptcy** Rule 9037(d), courts may "*[f]or cause*, . . . by order in a case under the Code: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court." Fed. R. Bankr. P. 9037(d) (emphasis supplied). See also MLBR 9018-1 (a), (f). Before prohibiting the public disclosure of information not delineated in the **Bankruptcy** Code or Rules, however, the **bankruptcy** court must first determine that cause has been established. See Fed. R. Bankr. P. 9037(d). Given that the Debtors and Verizon initially requested that the settlement amount remain confidential, the Court feels bound to consider whether its decision to require disclosure at the Settlement Hearing was **[*23]** in error. And since Verizon has not presented any additional arguments in favor of the need for confidentiality since the time of the hearing, the question is whether there was cause for keeping the information out of the public record at the time of the Settlement Hearing. If not, the Court must conclude that no cause exists for redacting the information from the Hearing Transcript now.

The Debtors and Verizon filed their Stipulation of Dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) ("Rule 41") [15] in an attempt to end the public record of their contest and deal with the matter privately. Indeed, in many civil matters, parties use Rule 41 stipulated dismissals to ensure the confidentiality of out-of-court settlements. [16] But while such stipulated dismissals may be routine in other civil matters, their use in **bankruptcy** cases is circumscribed by the **Bankruptcy** Code, Rules, and policy considerations.

FOOTNOTES

15 Rule 41 is made applicable to contested matters within **bankruptcy** cases under **Bankruptcy** Rules 7041 and 9014(c). Rule 41 allows a plaintiff (or, in contested matters, the moving party) to "dismiss an action without a court order by filing: . . . (ii) a stipulation **[*24]** of dismissal

signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii) .

16 For just one discussion (among many) regarding the debate surrounding the propriety and prevalence of these "secret settlements," see Erik S. Knutsen, "Keeping Settlements Secret," 37 Fla. St. U.L. Rev. 945 (2010) .

For example, HN9 where, as here, settlement of a disputed matter provides for compensation to debtor's counsel, that compensation must be disclosed. See 11 U.S.C. § 329(a)[17]; Fed. R. Bankr. P. 2016(b). [18] And settlements generally are subject to disclosure and **bankruptcy** court approval procedures under both the federal and local **bankruptcy** rules. See Fed. R. Bankr. P. 9019(a) [19]; MLBR 9019-1(a), (b). [20] Furthermore, the applicability of Rule 41 to contested matters may be waived by the **bankruptcy** court. See Fed. R. Bankr. P. 9014(c) (enumerated rules, including **Bankruptcy** Rule 7041, apply in contested matters "*unless the court directs otherwise*" (emphasis supplied)). In sum, as the **Bankruptcy** Court for the District of North Dakota has explained:

HN10 [t]here exists a distinction between ordinary civil litigation between parties dealing with their own funds and litigation in the context of **bankruptcy. [*25]** [Rule 41] . . . allows for the dismissal of actions by the filing of a stipulation for dismissal signed by all parties who have appeared in the action. Upon filing of the stipulation the dismissal is effective without the necessity of court approval. This rule, however, is not absolute . . . . Once a **bankruptcy** has been filed the absolute dismissal right of Rule 41 is further circumscribed by Rules 9019(a) and 2002(a)(3) which provide for the compromise or settlement of a controversy only upon notice, hearing and court approval. The reason for these requirements in a **bankruptcy** case is not hard to discern. The **Bankruptcy** Code envisions a process whereby all parties in interest have equal access to information regarding the debtor's assets, liabilities and claims. As contrasted to a non-**bankruptcy** situation, once a person elects to avail himself of the benefits of the federal **bankruptcy** laws by the filing of a petition, he can no longer expect to have any financial secrets. The Code contemplates a full and complete disclosure.

In **bankruptcy** cases . . . approval is committed to the sound discretion of the court consistent with what is in the best interest of the parties in interest or **[*26]** the estate.
In re Trout, 108 B.R. 235, 238 (Bankr. D.N.D. 1989).

FOOTNOTES

17 Section 329(a) provides:

HN11 (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, *shall file with the court a statement of the compensation paid or agreed to be paid*, if such payment or agreement was made after one year before the date of the filing of the petition, *for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation*

. . .

11 U.S.C. § 329(a) (emphasis supplied).

18 **Bankruptcy** Rule 2016(b) provides:

HN12 (b) *Disclosure of Compensation Paid or Promised to Attorney for Debtor.* Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code . . . . *A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.*

Fed. R. Bankr. P. 2016(b) .

19 **Bankruptcy** Rule 9019(a) **[*27]** provides:

HN13 (a) *Compromise.* On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a) .

20 HN14 Local Rule 9019-1(a) requires "[a]ll stipulations affecting a case or proceeding before the Court, except stipulations which are made in open court" to be "in writing, signed, and filed with the Court." See MLBR 9019-1(b) . Parties are also directed to file a signed stipulation or agreement for judgment within 7 days after reaching that agreement. See MLBR 9019-1(b) . Under the Local Rules, only settlements of § 523 dischargeability actions may be documented "by the filing of a stipulation or an agreement for judgment." See MLBR 9019-1(c) . In the present case, the Court, in its discretion, did not order the parties to file the entirety of the settlement terms with the Court as arguably required by the federal and local rules, deeming disclosure on the record at the Settlement Hearing as sufficient under the circumstances of this case.

While the Court can envision **[*28]** circumstances where confidentiality of a settlement agreement in whole or in part may be in the best interests of the parties, the estate, or both, strong policy reasons persuaded the Court that neither the Debtors' nor Verizon's interests in keeping the settlement confidential in this case outweighed the mandate of disclosure and public access embodied in the **Bankruptcy** Code and Rules.

The automatic stay imposed by § 362(a) that arises upon the filing of a **bankruptcy** case is one of the "cornerstones of **bankruptcy** law." Curtis v. LaSalle National Bank (In re Curtis), 322 B.R. 470, 483 (Bankr. D. Mass. 2005); see also Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 975 (1st Cir. 1997). The factual recitations in the First and Amended Sanctions Motions contained serious allegations of Verizon's repeated violations of the automatic stay — violations which, if widespread, affected not only the Debtors, but threatened to undermine the significance and centrality of the automatic stay within the **bankruptcy** system. In some cases, violations of the automatic stay are truly idiosyncratic and unlikely to be repeated. But

where, as here, (1) the alleged violations were repeated, **[*29]** continued, and increasingly severe; (2) the alleged violations escalated even after communication with the Debtors' attorney and notice of a hearing on a pending motion for stay violation sanctions; and (3) the respondent has denied none of the facts and has raised a rather flimsy excuse for its actions, [21] the controversy transcends a merely private dispute between parties and becomes a general affront to one of "the most basic of debtor protections under **bankruptcy** law." Soares, 107 F.3d at 975. Indeed, it is this very type of behavior that an award of punitive damages authorized by the Code is designed to deter. See 11 U.S.C. § 362(k).

FOOTNOTES

21 Although the Court did not proceed to take evidence, the Court finds that Verizon's defense raised in its Response — namely, that not having the Debtors' full account number earlier in the case led to the repeated violations and ultimate termination of service — borders on the spurious. At no time did Verizon deny that it had received the Notice of Filing (containing the Debtors' case number, names, and full social security numbers), which should have enabled a sophisticated business like Verizon to determine the account affected by the filing. And **[*30]** the Debtors attached copies of the written communications from Verizon to the First and Amended Sanctions Motions, the authenticity of which was never denied. Furthermore, Verizon conceded that Attorney Berliner finally provided Verizon with the account numbers on October 15, 2008, but, incredibly, maintained in its Response that it was unable to prevent the termination of service *nine* days later because of the delay in receiving the information.

Given that this Court, in similar circumstances, has awarded substantial punitive damages "in an amount sufficient to serve their purpose of deterrence," Curtis, 322 B.R. at 487, [22] it was incumbent upon the Court to assess the adequacy of the parties' private settlement in light of the gravity of Verizon's alleged violations of the **Bankruptcy** Code. To do otherwise would be to ignore the First Circuit's admonition that "courts must display a certain rigor in reacting to violations of the automatic stay." Soares, 107 F.3d at 975-76. [23]

FOOTNOTES

22 See also, e.g., id. at 484, 486 (violations of automatic stay continued after notice of violations from debtor's attorney; creditor's "arrogant defiance" of automatic stay heightened by frivolous and meritless **[*31]** defenses); In re Panek, 402 B.R. 71, 77-78 (Bankr. D. Mass. 2009) (agreed-upon amount of punitive damages adjusted upward in light of creditor's conduct in connection with the stay violation); In re Rosa, 313 B.R. 1, 8-9 (Bankr. D. Mass. 2004) (in assessing punitive damages, court considered fact that violations of automatic stay continued even after notified that its actions violated the stay).

23 See also id. at 971 ("Like a shade tree, the automatic stay which attends the initiation of **bankruptcy** proceedings . . . must be nurtured if it is to retain its vitality.").

For these reasons, the Court refused to allow the parties to simply dismiss the matter and maintain the confidentiality of their agreement. In light of the impact of such behavior, if true, on the "fresh start" which the **bankruptcy** system promotes for all honest debtors, it was incumbent on the Court to require disclosure of the settlement amount in order to assess whether it appropriately reflected the severity of the alleged offenses.

This Court determined at the time of the Settlement Hearing that confidentiality of the settlement amount was inconsistent with the Court's responsibility to maintain the integrity of the **[*32] bankruptcy** system. Accordingly, the Court cannot now permit Verizon's "backdoor attempt to 'seal the courtroom.'" Pfizer, 2010 U.S. Dist. LEXIS 67631, at *10-11. The reasons for requiring disclosure at the Settlement Hearing apply with equal force to disclosure of the Hearing Transcript with respect to which § 107(a) presumes public access. To redact the transcript now would circumvent that access and is not justified in this case. As the Third Circuit Court of Appeals artfully explained:

HN15 It is access to the content of the *proceeding* — whether in person, or via some form of documentation — that matters. First, *openness* is ongoing — a status rather than an event. At the heart of the Supreme Court's right of access analysis is the conviction that the public should have access to *information*; the Court never has suggested that an open proceeding is only open to those who are able to be bodily present in the courtroom itself. True public access to a proceeding means access to knowledge of what occurred there. It is served not only by witnessing a proceeding firsthand, but also by learning about it through a secondary source.

Antar, 38 F.3d at 1359-60 (3d Cir. 1994) (emphasis in original) **[*33]** (citations and footnot omitted).

III. CONCLUSION

This Court has taken a second look at its insistence at the Settlement Hearin that the terms of the settlement reached between the Debtors and Verizon be publicly available for disclosure, and discerns no error in that determination. The Redaction Request does not fall within the protections of either §107(b) and (c) or **Bankruptcy** Rule 9037(a), and if allowed, would offend strong policy considerations attendant enforcement of the automatic stay under § 362(a) of the **Bankruptcy** Code and to public access to court proceedings. Therefore, the Redaction Request must be DENIED. A order in conformity with this memorandum shall issue forthwith.

DATED: May 2, 2011

By the Court,

/s/ Henry J. Boroff

Henry J. Boroff

United States **Bankruptcy** Judge

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

2011 BNH 6; 2011 Bankr. LEXIS 1687

May 9, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: A chapter 7 debtor sought under 11 U.S.C.S. § 706 to convert his case to one under chapter 13.

OVERVIEW: The court held that the debtor's request to convert to chapter 13 was made in bad faith. The debtor's conduct showed an intent to misrepresent the amount and existence of his assets and to conceal property from the trustee, who had advised the debtor that he had no right to control or expend the assets in question. The debtor's sole reason in converting to chapter 13 was to effectively dismiss an 11 U.S.C.S. § 727 complaint over the objection of the United States Trustee. The debtor was not proposing to pay his creditors from his disposable income over the applicable commitment period under the **Bankruptcy** Code; instead, the debtor was proposing a single payment plan funded by the proceeds from the settlement of the debtor's claim, and a claim by the trustee, against the debtor's original counsel. Proposing a single payment plan, funded by settlement of a claim against a debtor's **bankruptcy** counsel, by a debtor without disposable income, was unfair manipulation of the **Bankruptcy** Code. The conduct of the debtor represented the "atypical" conduct described by the United States Supreme Court as warranting a forfeiture of the right to convert under § 1307(c).

OUTCOME: The court denied the debtor's motion to convert his case.

CORE TERMS: settlement, convert, conversion, bad faith, Homestead, homestead exemption, cashed, former spouse's, bank account, good faith, single payment, disposable income, forfeiture, objecting, totaling, dischargeable, transferred, prepetition, proposing, atypical, insurer, qualify, mislead, notice, sale proceeds, conceal, bankruptcy estate, bankruptcy case, trust account, timely filed

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

Bankruptcy Law > Conversion & Dismissal > Liquidations

HN1 A debtor does not have an absolute right to convert his case to chapter 13. A chapter 7 debtor may forfeit his right to convert to his case to chapter 13 by engaging in fraudulent conduct. More Like This Headnote

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

Bankruptcy Law > Conversion & Dismissal > Liquidations

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

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

HN2 11 U.S.C.S. 706(d) provides that a chapter 7 debtor may not convert a case to another chapter under § 706(a) unless the debtor qualifies to be a debtor under that chapter. In order to qualify to be a debtor under chapter 13, a debtor must satisfy the requirements of 11 U.S.C.S. §§ 109(e) and 1307(c). Section 109(e) imposes both secured and unsecured debt limitations and a requirement that a debtor has "regular income." Section 1307(c) permits a **bankruptcy** court to dismiss or convert a chapter 13 case to chapter 7 "for cause." **Bankruptcy** courts routinely treat dismissal for bad faith conduct either pre-petition, or before conversion to chapter 13, as cause for dismissal. Accordingly, the United States Supreme Court has concluded that a finding that a debtor had engaged in pre-petition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13. More Like This Headnote

Bankruptcy Law > Conversion & Dismissal > Individuals With Regular Income

HN3 The United States Supreme Court has declined to discuss what type of conduct constitutes sufficient "bad faith" to warrant forfeiture of the right to convert to chapter 13. However, the Court did indicate that a debtor's conduct must be "atypical" and that denial of conversion should be limited to extraordinary cases. Bad faith is the antithesis of good faith. Neither of the terms "good faith" or "bad faith" is defined in the **Bankruptcy** Code. The determination of good faith is a fact intensive inquiry to be assessed on a case-by-case basis in light of the totality of the circumstances. Factors considered in evaluating good faith include: (1) the debtor's accuracy in stating debts and expenses; (2) the debtor's honesty in the **bankruptcy** process, including whether he has attempted to mislead the court or whether he has made any misrepresentation; (3) whether the **Bankruptcy** Code is being unfairly manipulated; (4) the type of debt sought to be discharged; (5) whether the debt would be dischargeable in a chapter 7 proceeding; and (6) the debtor's motivation and sincerity in seeking chapter 13 relief. More Like This Headnote

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles

HN4 The trustee is the person charged with the collection and distribution of the debtor's **bankruptcy** estate. 11 U.S.C.S. § 704. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > General Overview

HN5 Chapter 13 was not enacted to permit debtors to resolve lawsuits with single payment plans. More Like This Headnote

COUNSEL: **[*1]** Krista E. Atwater, Esq., Atwater Law, Rye, New Hampshire, Attorney for Debtor.

Michael S. Askenaizer, Esq., Nashua, New Hampshire, Chapter 7 Trustee.

Peter G. Beeson, Esq. and Daniel J. Callaghan, Esq., Devine Millimet & Branch, Professional Association Manchester, New Hampshire, Attorneys for Michael J. Scott and Scott & Scott P.A.

Ann Marie Dirsa, Esq., Office of the United States Trustee, Manchester, New Hampshire, Attorney for the United States Trustee.

Diane M. Gaspar, Esq., Howie Law Office, PLLC, Salem, New Hampshire, Attorney for Brenda Brule.

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

OPINION BY: J. Michael Deasy

OPINION

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it Debtor's Partially Assented-To Motion to (A) Approve Settlement Agreement; (B) Convert Case to Chapter 13; (C) Confirm Chapter 13 Plan Dated As of May 5, 2011 and (D) Other Relief (Doc. No. 83) (the "Motion"). The Motion was filed to involving his appeal of an adverse ruling on an exemption claim, two complaints under § 727 of the **Bankruptcy** Code and a claim against his original **bankruptcy** counsel. After notice, the Court held a hearing on the Motion on May 5, 2011.

This Court has jurisdiction of the subject matter and the parties pursuant **[*2]** 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

At the hearing, the parties stipulated that the Court could treat the affidavit submitted by the United States Trustee ("UST") in support of his objection to the Motion as evidence for purposes of ruling on that portion of the Motion requesting conversion to chapter 13. The factual elements of the history below are drawn from that affidavit and the undisputed facts presented by the parties in their filings and at the hearing.

The Debtor filed a voluntary petition under chapter 7 of the **Bankruptcy** Code on January 27, 2010. The first meeting of creditors was convened by Michael Askenaizer, the chapter 7 trustee (the "Trustee") on February 23, 2010. At the creditors' meeting, the Trustee discovered that the Debtor had received proceeds from the sale of his former residence which had occurred only a few days after the filing of his **bankruptcy** petition. The Debtor stated that he had received $32,000.00 in proceeds **[*3]** from the sale of his former residence pursuant to a final divorce decree in May of 2009 and that the residence had been titled in his former spouse's name since March of 2007. He also stated that he had put some of the money in the bank, used some of it to pay bills, and had about $16,000.00 left, which he later revised to "about 14,000." The Debtor had claimed a homestead exemption in these proceeds.

The Trustee advised the Debtor and his counsel:
I want you to put it in your trust account. I don't want him spending another dime, because otherwise you're – there's a good chance you're going to lose your discharge if you do it. I want – until we resolve this issue. All right. And I want a full accounting of the 32,000, what happened to it. But I don't think you have a homestead exemption.
When asked by the Trustee if he would be giving his attorney all of the money to hold, the Debtor stated "I will." The Debtor ultimately turned over $12,000.00 of the sale proceeds to his counsel.

On May 11, 2010, the Trustee timely filed an objection the Debtor's claim of a homestead exemption in the sale proceeds (Doc. No. 14) (the "Homestead Objection") and a motion to compel the Debtor and his counsel **[*4]** to turn over the proceeds to the Trustee (Doc. No. 13) (the "Turnover Motion"). On March 17, 2010, the Court held a hearing on the Homestead Objection and the Turnover Motion. On April 7, 2010, the Court issued its memorandum opinion and entered orders sustaining the Homestead Objection and granting the Turnover Motion. On April 21, 2010, the Debtor filed a notice of appeal from the order sustaining the Homestead Objection.

In a Rule 2004 examination conducted by the UST on June 30, 2010, the Debtor testified that he picked up a check dated January 28, 2010, payable to him in the amount of $33,490.34, issued by the title company that conducted the closing on his former residence, from his **bankruptcy** counsel sometime after the closing. He testified that he encountered difficulty in opening a bank account with the check because the bank "found [his] name was on a consumer report" and that he "owed TD Bank $200 or something." The Debtor then returned to his counsel's office and asked him to convert the check into smaller checks so that he could cash them at the bank upon which they were drawn. On February 2, 2010, the Debtor's counsel issued fourteen trust account checks payable to the **[*5]** Debtor: one check in the amount of $20,000.00, twelve checks in the amount of $1,000.00 each and one check in the amount of $1,490.34.

On February 3, 2010, the Debtor used the $20,000.00 check to open a checking account at River Bank in North Andover, Massachusetts. In addition, three of the fourteen checks given to the Debtor by his counsel, totaling $3,490.34 were cashed on February 2, 2010. Two checks totaling $2,000.00 were cashed on February 3, 2010, and two more checks totaling $2,000.00 were cashed on February 8, 2010. Accordingly, as of February 8, 2010, the Debtor still had six of the fourteen checks given to him by his counsel representing $6,000.00 of proceeds from the sale of his former residence. As of February 23, 2010, the date of the first meeting of creditors, the Debtor's account at River Bank had a balance of $16,342.71. Including the six checks in the Debtor's possession, he held $22,342.17 in proceeds on the date of the first meeting. Between the date the River Bank account was opened on February 3, 2010, and the date of the first meeting, where the Trustee admonished the Debtor not to spend any of the money, the balance in the Debtor's River Bank checking account **[*6]** decreased to $12,902.25. Between March 2 and March 5, 2010, the Debtor cashed the remaining six checks in his possession in the amount of $6,000.00. On or about March 8, 2010, the Debtor gave his counsel a check for $12,000.00 to return to the Trustee. In summary, between February 2, 2010, the date the Debtor had effective possession and control of the sale proceeds, and February 23, 2010, the date of the first meeting of creditors, the Debtor used $14,588.09. After the first meeting, the Debtor used $6,902.25 and turned over $12,000.00 to the Trustee.

In addition to the funds given to the Debtor on February 2, 2010, the Debtor's counsel was also holding $38,462.72 in additional proceeds from the sale

of the residence pending a resolution of unstated claims by the Debtor's former spouse. Ultimately, the Trustee entered into a stipulation with the former spouse on the division of these moneys and was paid an additional $19,198.80. As of the date of the hearing on the Motion, the Trustee held $31,198.80 representing a portion of the Debtor's interest in the proceeds from the sale of his former residence.

On July 21, 2010, the Trustee and the UST each timely filed complaints objecting to **[*7]** the Debtor's discharge under § 727 of the **Bankruptcy** Code. See Adv. Nos. 10-1084-JBH and 101083-JBH, respectively. On January 21, 2011, the United States **Bankruptcy** Appellate Panel for the First Circuit ("BAP") granted an assented to motion to cancel the oral argument scheduled for January 24, 2011, to stay the appeal until March 24, 2011, and to relinquish so much jurisdiction as may be necessary to permit this Court to consider a settlement between the parties. On March 25, 2011, the BAP extended that stay until May 19, 2011. After a hearing on the Motion, the Court took that portion of the Motion requesting conversion to chapter 13 under advisement and deferred ruling on the balance of the Motion.

III. DISCUSSION

The Motion requests approval of a settlement of all disputes among the Trustee, the Debtor and the Debtor's original counsel ("Original Counsel"). The terms of the settlement are: (1) the amount of $26,000.00 will be paid to the Trustee by the Original Counsel and its insurer, to resolve all claims against the Original Counsel by the Trustee and the Debtor; (2) the Debtor will waive any claim of exemptions to any of the money in the hands of the Trustee, including the proceeds **[*8]** from the sale of his former residence and the monies to be paid by the Original Counsel and its insurer; (3) the appeal to the BAP will be withdrawn; (4) the Original Counsel and its insurer will pay $27,000.00 to the Trustee for the fees and expenses incurred by his counsel in this matter and will pay an additional $16,000.00 to a legal fees account to be held by the chapter 13 trustee to pay the fees and expenses of Debtor's current counsel; (5) the Trustee will agree to dismiss his § 727 complaint; (6) the parties to the settlement will consent to conversion of the chapter 7 proceeding to chapter 13; (7) the parties to the settlement will support confirmation of a chapter 13 plan which will pay the approximately $57,000.00 held by the Trustee to the chapter 13 trustee as a single payment plan for distribution to creditors; and (8) the Debtor will receive a discharge under § 1328 of the **Bankruptcy** Code. The Debtor's former spouse has a significant priority domestic support obligation claim and does not oppose the settlement. However, the UST is opposed to the settlement.

Because the UST has not agreed to the settlement, the parties need to convert the case to chapter 13 in order for **[*9]** the Debtor to obtain a discharge without litigating the UST's § 727 complaint. The Trustee is supporting the settlement because the settlement places the chapter 7 **bankruptcy** estate in the same position it would have been if the Debtor had transferred all of the proceeds due to him from the sale of his residence immediately after the petition date without the need for the Trustee to retain counsel or litigate the Homestead Objection or the Turnover Motion. The UST opposes the settlement on a number of grounds, but the primary reason is that, as a policy matter, the Debtor's conduct during the chapter 7 proceeding should not be rewarded with a discharge under chapter 13.

At the conclusion of the hearing, the Court indicated that it would first consider the evidentiary record and the arguments of the parties on the Debtor's eligibility to convert to chapter 13 and defer ruling on the other relief requested in the Motion. If the Debtor is not eligible for conversion to chapter 13, the settlement, as it is currently structured, cannot be approved. If the Debtor is eligible to convert to chapter 13, then the settlement can be considered on the merits in connection with a confirmation hearing **[*10]** on any chapter 13 plan filed by the Debtor.

A. Applicable Law

The Debtor's request to convert to chapter 13 is determined under § 706 of the **Bankruptcy** Code. HN1 A debtor does not have an absolute right to convert his case to chapter 13. Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007). A chapter 7 debtor may forfeit his right to convert to his case to chapter 13 by engaging in fraudulent conduct. Id. at 374-75. The decision in Marrama was based on the Supreme Court's view of the relationship between several provisions of the **Bankruptcy** Code. HN2 Section 706(d) provides that a chapter 7 debtor may not convert a case to another chapter under § 706(a) unless the debtor qualifies to be a debtor under that chapter. Id. at 372. In order to qualify to be a debtor under chapter 13, a debtor must satisfy the requirements of § 109(e) and § 1307(c). Id. Section 109(e) imposes both secured and unsecured debt limitations and a requirement that a debtor has "regular income." Section 1307(c) permits a **bankruptcy** court to dismiss or convert a chapter 13 case to chapter 7 "for cause." **Bankruptcy** courts routinely treat dismissal for bad faith conduct either prepetition, or before conversion to **[*11]** chapter 13, as cause for dismissal. Id. at 373. Accordingly, the Supreme Court concluded that a finding that a debtor had engaged in "prepetition bad-faith conduct, including fraudulent acts committed in an earlier Chapter 7 proceeding, is tantamount to a ruling that the individual does not qualify as a Debtor under Chapter 13." Id. at 374. The UST argues that the Debtor's conduct during and after the first meeting demonstrates sufficient bad faith to warrant a forfeiture of his right to convert to chapter 13 under Marrama.

In Marrama, HN3 the Supreme Court declined to discuss what type of conduct constitutes sufficient "bad faith" to warrant forfeiture of the right to convert to chapter 13. Id. However, the Court did indicate that a debtor's conduct must be "atypical" and that denial of conversion should be limited to extraordinary cases. Id. at 375 n.11. Bad faith is the antithesis of good faith. Neither of the terms "good faith" or "bad faith" are defined in the **Bankruptcy** Code. Sullivan v. Solimini (In re Sullivan), 326 B.R. 204, 212 (B.A.P. 1st Cir. 2005). The determination of good faith is a fact intensive inquiry to be assessed on a case-by-case basis in light of the totality of **[*12]** the circumstances. In re Lilley, 91 F.3d 491, 496 (3d Cir. 1996) (joining the Seventh, Ninth and Tenth Circuits) (citations omitted); Sullivan, 326 B.R. at 212 (citing In re Love, 957 F.2d 1350, 1355 (7th Cir. 1992)). Factors considered in evaluating good faith include: (1) the debtor's accuracy in stating debts and expenses; (2) the debtor's honesty in the **bankruptcy** process, including whether he has attempted to mislead the court or whether he has made any misrepresentation; (3) whether the **Bankruptcy** Code is being unfairly manipulated; (4) the type of debt sought to be discharged; (5) whether the debt would be dischargeable in a chapter 7 proceeding; and (6) the debtor's motivation and sincerity in seeking chapter 13 relief. Sullivan, 326 B.R. at 212.

In Marrama, the debtor undervalued assets in his **bankruptcy** schedules and denied having transferred any property outside the ordinary course of business in the year before **bankruptcy.** Neither of his statements were true and he later admitted that the undisclosed transfer had been made for the purpose of protecting the property from his creditors. Marrama, 549 U.S. at 368. After the chapter 7 trustee advised Marrama and his counsel that **[*13]** he intended to recover the transferred property for the benefit of the estate, Marrama filed a notice of conversion to chapter 13. The **bankruptcy** court found that the facts established a bad faith case and denied the request to convert to chapter 13. The Supreme Court held that Marrama's conduct was the type of atypical conduct that resulted in a forfeiture of his right to proceed under chapter 13. Id. at 371.

B. Analysis

The Court shall now examine the conduct of the Debtor in this case utilizing the factors identified by the courts under the totality of the circumstances test.

1. The Debtor's Accuracy

In his original **bankruptcy** schedules, the Debtor claimed a homestead exemption in the proceeds from the sale of his former residence, but failed to disclose the facts and circumstances surrounding the previous transfer of title to his ex-spouse or the prepetition divorce decree. Immediately after the filing of the **bankruptcy** petition and schedules, the residence was sold. After the closing, two checks were delivered to counsel for the Debtor, one payable to him and one to be held pending a resolution of disputed claims by his ex-spouse. The record does not contain any evidence on the analysis **[*14]** of these facts by either the Debtor or his Original Counsel, but it appears that the **bankruptcy** schedules filed by the Debtor were less than candid on the subject of the former residence. Based on the paucity of facts in the record, however, the Court shall assume for the purposes of this opinion that any errors were inadvertent or due to a misapprehension of the significance of those facts and not an attempt to conceal the true facts.

The record in this case does reflect, however, that on the date of the first meeting of creditors the Debtor had a bank account balance of $16,342.71 as well as checks from his Original Counsel totaling $6,000.00, for a total of $22,342.17. All of this money represented proceeds from the sale of his former

residence. When the Trustee focused his questions on the Debtor's right to a homestead exemption claim to these funds, the Debtor first stated that he had about $16,000.00 left, then lowered his estimate to $14,000.00. The Trustee directed the Debtor not to spend any more of the funds and to turn over those funds to him. The Debtor agreed to turn over whatever funds he had to the Trustee. Ultimately, the Debtor turned over $12,000.00 to his Original **[*15]** Counsel for delivery to the Trustee. However, before turning over money to the Trustee, the Debtor cashed and used the $6,000.00 in checks in his possession on the date of the first meeting.

The Court questions the credibility of the Debtor's statements at the first meeting about the remaining proceeds. It is undisputed that the Debtor had difficulty opening a bank account with the initial check that he received for the sale of his former residence. In order to solve his need for cash, he took the check back to his Original Counsel and asked for it to be broken into smaller checks of $1,000.00 each that he could cash, as needed. Given the steps taken by the Debtor to gain ready access to those proceeds, it is not credible that he did not know at the first meeting that he had checks remaining, or the value of those checks. It is also not credible that the Debtor had uncashed checks and did not have an accurate knowledge of the balance in his bank account.

Even if the Debtor was unsure of the exact bank balance or the amount of uncashed checks, his conduct after the first meeting demonstrates an intent to conceal and deny the Trustee custody of funds that the Trustee had claimed as property **[*16]** of the estate. If the Debtor made a bona fide mistake in his statements at the first meeting, he was under an obligation to correct the error. He told the Trustee he would turn over the remaining proceeds in his possession. Instead, he intentionally disregarded his obligations, and his promise, and did not turn over all of the funds to the Trustee. The Court finds the conduct of the Debtor at and after the first meeting to demonstrate an intent (1) to mislead the Trustee and misrepresent the amount and existence of his assets and (2) to conceal property from the Trustee

2. The Debtor's Honesty in the Bankruptcy Process

HN4 The Trustee is the person charged with the collection and distribution of the Debtor's **bankruptcy** estate. 11 U.S.C. § 704. At and after the first meeting, the Debtor mislead and concealed from the Trustee assets that the Trustee advised him he had no right to control or expend. Such conduct demonstrates a failure to honestly satisfy his obligations to the Trustee in fulfilling his responsibilities under the **Bankruptcy** Code.

3. Unfair Manipulation of the Bankruptcy Code

The conduct of the Debtor described above resulted in the filing of an objection to his discharge under **[*17]** § 727 by the UST. The UST has not agreed to the terms of the Settlement, and, therefore, will not consent to the dismissal of his complaint objecting to discharge. The Debtor's sole reason in converting to chapter 13 is to effectively dismiss the § 727 complaint over the objection of the UST. The Debtor is not proposing to pay his creditors from his disposable income over the applicable commitment period under the **Bankruptcy** Code. See 11 U.S.C. §§ 1325(b)(1)(B) and (b)(4). Instead, the Debtor is proposing a single payment plan funded by the proceeds from the settlement of his claim, and a claim by the Trustee, against the Debtor's Original Counsel. The proceeds of the settlement could just as well be paid to the Trustee for distribution under chapter 7. However, distribution under chapter 7 would not resolve the UST's objection to discharge. The sole rationale for conversion to chapter 13 is to effectively dismiss the UST's complaint objecting to discharge without his consent. HN5 Chapter 13 was not enacted to permit Debtors to resolve lawsuits with single payment plans. While avoiding a suit by actually paying money to creditors from disposable income may be acceptable under most circumstances, **[*18]** it is not acceptable under the circumstances of this case. Proposing a single payment plan, funded by settlement of a claim against a debtor's **bankruptcy** counsel, by a debtor without disposable income, is unfair manipulation of the **Bankruptcy** Code.

4. The Type of Debt to be Discharged

The debts reflected in the Debtor's schedules and the filed proofs of claim appear to be debts incurred in the ordinary financial affairs of the Debtor and raise no special concern for the purposes of this opinion.

5. Dischargeability of the Debts in a Chapter 7 Proceeding

The debts reflected in the Debtor's schedules appear to dischargeable in a chapter 7 proceeding. There is no evidence, or argument, that the Debtor is seeking to discharge a debt which would not otherwise be dischargeable. The basis for the UST's objection is not the character of the Debtor's debts, but the character of his conduct during this **bankruptcy** case.

6. Debtor's Motivation and Sincerity in Seeking Chapter 13 Relief

For the reasons discussed above, the Court finds that the Debtor is seeking chapter 13 relief solely for the purpose of effectively dismissing the UST's § 727 complaint objecting to his discharge over the UST's objection **[*19]** and not for the purpose of paying the Debtor's creditors from his disposable income.

C. Summary

For the reasons discussed above, the Court finds that the Debtor's request to convert to chapter 13 is made in bad faith. The conduct of the Debtor in this **bankruptcy** case represents the "atypical" conduct described by the Supreme Court as warranting a forfeiture of the right to convert under § 1307(c) of the **Bankruptcy** Code. Marrama, 549 U.S. at 375 n.11. Because the settlement contemplated in the Motion requires conversion to chapter 13, there is no reason to defer a ruling on the Motion.

IV. CONCLUSION

For the reasons set forth above, the Debtor has forfeited his right to convert to chapter 13 and, therefore, the Court shall enter a separate order denying the Motion. 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: May 9, 2011

/s/ J. Michael Deasy

J. Michael Deasy

Bankruptcy Judge

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

2011 Bankr. LEXIS 1505

April 25, 2011, Decided

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Massachusetts. **Bankruptcy** Case No. 08-11434-FJB, Adversary Proceeding No. 08-01263-FJB. (Hon. Frank J. Bailey, U.S. **Bankruptcy** Judge).
Braunstein v. Dexter (In re Aguilar), 2010 Bankr. LEXIS 2098 (Bankr. D. Mass., June 23, 2010)

CASE SUMMARY
PROCEDURAL POSTURE: Plaintiff Chapter 7 Trustee appealed from the U.S. **Bankruptcy** Court for the District of Massachusetts' determination that debtors conveyed certain condominium units before the commencement of their **bankruptcy** case, and consequently, that the units were not property of the estate. Defendants included two condominium purchasers, mortgagees, and a mortgage electronic registration systems corporation.

OVERVIEW: The Chapter 7 Trustee had commenced an adversary proceeding seeking a determination that the prepetition sales of two condominium units did not convey good title and, therefore, that these units remained property of the **bankruptcy** estate, free and clear of the legal and equitable claims of two purchasers and their mortgagees. The **bankruptcy** court based its decision on the Massachusetts common law of trusts. It concluded that, notwithstanding the fact that debtors never conveyed their interest in units 2 and 4 to the trust, they had nevertheless effectively conveyed all their rights in those units to the buyers long before their **bankruptcy** filing. The instant court concluded that the application below of Kaufman's rationale to validate the conveyances at issue was error. Kaufman's holding may still be good law as to Massachusetts common law trusts, the court stated, but trusts established under Massachusetts' Condominium Act, Mass. Gen. Laws ch. 183A, were creatures of a different stripe--and a highly regulated stripe, at that. Applying generic common law principles to debtors here, as condominium trustees in the context of this conveyancing dispute, was inappropriate.

OUTCOME: The court vacated the judgment and remanded the matter to the **bankruptcy** court for further proceedings.

CORE TERMS: condominium, deed, mortgage, recorded, conveyed, unit owners, conveyance, grantor, condominium units, real estate, common areas, beneficiaries, signature, equitable, managing, convey, cestui, void, supplied, common law principles, real property, declaration of trust, individual capacity, adversary proceeding, equitable claims, final judgments, interlocutory orders, de novo, personal liability, individually

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

HN1 Before addressing the merits, the U.S. **Bankruptcy** Appellate Panel for the First Circuit must determine its appellate jurisdiction, whether or not the litigants contest it. It is empowered to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C.S. § 158(a). A decision is considered final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment, whereas an interlocutory order only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits. Because a judgment in an adversary proceeding is a quintessential final order, the Panel thus has jurisdiction to review a **bankruptcy** court's final judgment. 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** court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. More Like This Headnote

Estate, Gift & Trust Law > Trusts > General Overview

Estate, Gift & Trust Law > Trusts > Interpretation

HN3 Kaufman's holding may still be good law as to Massachusetts common law trusts. However, trusts established under Massachusetts' Condominium Act, Mass. Gen. Laws ch. 183A, are creatures of a different stripe--and a highly regulated stripe, at that. Though courts should be guided generally by common law principles when considering statutory trusts, in some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure or its purposes require departing from common-law trust requirements. More Like This Headnote

Estate, Gift & Trust Law > Trusts > Creation

Real Property Law > Common Interest Communities > Condominiums > Condominium Associations

Real Property Law > Common Interest Communities > Condominiums > Management

HN4 A condominium trust is formed to manage and regulate a condominium. Mass. Gen. Laws ch. 183A, § 8(i). A condominium trust is governed by a declaration of trust and by-laws that establish the obligations and powers of the trustees. Under § 10 of the Massachusetts' Condominium Act, Mass. Gen. Laws ch. 183A, the association may appoint managers to oversee the common affairs of the unit owners. Mass. Gen. Laws ch. 183A, § 10. The statute defines "manager" as "the managing agent, (or) the trustees in a self-managed condominium who performs or renders management or administrative services to the organization of unit owners. Mass. Gen. Laws ch. 183A, § 1. At a minimum, those services must include: procedures for maintenance and repair of the common areas, insurance requirements, association meetings and voting rights,

handling common expenses, managing reserve funds, and assessing unit owners. Mass. Gen. Laws ch. 183A, §§ 10, 11. More Like This Headnote

Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against

Real Property Law > Common Interest Communities > Condominiums > General Overview

HN5 The Massachusetts' Condominium Act, Mass. Gen. Laws ch. 183A, exclusively empowers the condominium trust, and by extension, its trustees, to conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities or arising out of the enforcement of the by-laws, administrative rules or restrictions in the master deed. Mass. Gen. Laws ch. 183A, § 10(b)(4). And it specifically limits the trustees' exposure to personal liability. Under Mass. Gen. Laws ch. 183A, § 13, all claims involving common areas of the condominium must be brought against the organization, with claims paid first out of common funds, and then apportioned to the individual unit owners. Mass. Gen. Laws ch. 183A, § 13. Thus, in the context of a condominium trust, the Massachusetts legislature has created a trustee with defined responsibilities and duties and with limited personal liability in managing trust affairs. In doing so, it has made condominium trustees akin to corporate officers, and condominium trusts more corporate-like than trust-like in nature. More Like This Headnote

COUNSEL: Mark W. Corner, Esq., on brief for Plaintiff-Appellant.

Kevin P. McMahon, Esq., on brief for Defendant-Appellee Michaela Betty.

Amato J. Bocchino, Jr., Esq., on brief for Defendants-Appellees Jason Dexter, Mortgage Electronic Registration Systems, Inc., GMAC Mortgage Corporation, and Taylor, Bean & Whitaker Mortgage Corp.

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

OPINION BY: Haines

OPINION

Haines, U.S. Bankruptcy Appellate Panel Judge.

Joseph Braunstein, chapter 7 trustee, appeals from the **bankruptcy** court's determination that the debtors conveyed certain condominium units before the commencement of their **bankruptcy** case, and consequently, that the units were not property of the estate. For the reasons set forth below, we **VACATE** the **bankruptcy** court's judgment and **REMAND** the matter for further proceedings consistent with this decision.

BACKGROUND

Sergio and Xiomara Janet Aguilar owned real property in Chelsea, Massachusetts as tenants by the entirety. They converted that **[*2]** property to a four-unit residential condominium in accordance with the provisions of Massachusetts' Condominium Act ("the Act"). Mass. Gen. Laws ch. 183A. The Aguilars executed and recorded a master deed under §§ 1 and 2 of the Act, and also recorded a declaration of trust, establishing an association of unit owners to manage and operate the condominium. Mass. Gen. Laws ch. 183A, §§ 8(i) and 10. The trust identified the condominium owners as its beneficiaries, with the Aguilars designated as the initial trustees. The Aguilars were listed on the master deed as the only condominium unit owners. A few months later, the Aguilars amended the master deed to show that the condominium trust owned the individual units aside from their own. They had not, however, actually conveyed the units to the trust.

On behalf of the trust, the Aguilars subsequently sold units 2 and 4 to Jason Dexter ("Dexter") and Michaela Betty ("Betty"), respectively. The deeds conveying the units identified the grantors as: "Grantor: Janet Aguilar and Sergio D. Aguilar *as Trustees of the 66 Hooper Street Condominium Trust u/d/t dated February 7, 2005, and recorded in the Suffolk County Registry of Deeds at Book 36484,* **[*3]** *Page 199*." (Emphasis supplied). Additionally, the conveyance clauses of each deed identified the grantors as: "*Janet Aguilar and Sergio D. Aguilar, as Trustees, both of Chelsea, Massachusetts*." (Emphasis supplied). Finally, the grantors' signature lines were labeled "*Janet Aguilar, Trustee as Aforesaid*" and "*Sergio D. Aguilar, Trustee as Aforesaid*." (Emphasis supplied). The signatures themselves simply read: "Janet Aguilar" and "Sergio D. Aguilar." Nowhere in the unit deeds were either of the Aguilars identified as grantor in his or her individual capacity. Dexter and Betty recorded their deeds and, in turn, granted mortgages on their units to their lenders. [1]

FOOTNOTES

1 The Aguilars retained unit 1 for themselves. They sold unit 3 to a third individual. Such claims as involved unit 3 were settled before trial.

Three years later, the Aguilars filed a chapter 13 petition. Their case was subsequently converted to chapter 7.

Braunstein commenced an adversary proceeding seeking a determination that the prepetition sales of condominium units 2 and 4 did not convey good title and, therefore, that these units remained property of the **bankruptcy** estate, free and clear of the legal and equitable claims **[*4]** of Dexter, Betty, and their mortgagees. The defendants argued that the deeds had effectively conveyed title to them well before the Aguilars filed for **bankruptcy.** In the alternative, the defendants asked the court to hold that, if title had not passed under their deeds: (1) such interest as the estate held in their units was subject to constructive trusts for their benefit; (2) that their interests as beneficiaries of those equitable trusts were excluded from the estate pursuant to § 541(d) of the **Bankruptcy** Code; [2] and (3) that their equitable claims to title were not subject to Braunstein's § 544(b) strong-arm powers.

FOOTNOTES

2 Reference to the "**Bankruptcy** Code" or the "Code" is to the **Bankruptcy** Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq. Unless otherwise indicated, references to statutory sections are to sections of the **Bankruptcy** Code.

The parties stipulated to the facts and filed supporting briefs. After argument, the **bankruptcy** court concluded that the condominium units at issue were effectively conveyed to Dexter and Betty under Massachusetts law, and, thus, were not property of the estate. This appeal ensued.

JURISDICTION

HN1 Before addressing the merits, we must determine our **[*5]** appellate jurisdiction, whether or not the litigants contest it. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). We are empowered to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). Because a judgment in an adversary proceeding is a "quintessential final order," we thus have jurisdiction to review the **bankruptcy** court's final judgment. See Lassman v. Keefe (In re Keefe), 401 B.R. 520, 523 (B.A.P. 1st Cir. 2009).

STANDARD OF REVIEW

HN2 A **bankruptcy** court's findings of fact are reviewed **[*6]** for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). The parties contest only the legal basis for the **bankruptcy** court's ruling. We will review it *de novo*.

DISCUSSION

The **bankruptcy** court based its decision on the Massachusetts common law of trusts. It concluded that, notwithstanding the fact that the Aguilars never conveyed their interest in units 2 and 4 to the trust, they had nevertheless effectively conveyed all their rights in those units to Dexter and Betty long before their **bankruptcy** filing.

Although the deed forms identified the Aguilars only as "trustees" of the condominium trust (and not as the individual co-owners they were), the court relied on Kaufman v. Federal Nat'l Bank, 287 Mass. 97, 191 N.E. 422 (Mass. 1934), to determine that the conveyances were effective. In the **bankruptcy** court's view, Kaufman stands for the proposition that when an individual signs a title instrument to property in his capacity as trustee of a trust, he conveys all right, title and interest he has in the property, whether he owns it as a trustee or as an individual. Because Kaufman is the linchpin of the court's **[*7]** analysis, we will review its facts, and its import, in detail.

In Kaufman, Celia Green was trustee of a real estate operating trust, of which no original beneficiaries had been named, and of which no shares had ever been issued. The Kaufman court found that no *cestui* trust had ever existed and that Ms. Green was the actual and sole owner of all trust property. Id. at 423. Ms. Green had caused the trust to become indebted to Federal National Bank. To secure the debt, the bank asked for a mortgage on certain real estate owned by Ms. Green individually. Id. Working with the bank, Ms. Green mortgaged the property to herself as trustee, and then assigned that mortgage to the bank. The mortgage and subsequent assignment were all properly recorded. Id.

Ultimately, the trust defaulted on the mortgage debt, and the bank foreclosed on the property. Two months after the foreclosure was recorded, Ms. Green sold the real estate by quitclaim deed to Kaufman. Kaufman examined the title, finding all the recorded transactions between Ms. Green, her trust, and the bank. Although Kaufman actually knew of the foreclosure, he purchased the property after concluding that the mortgage was void, and therefore **[*8]** its assignment to the bank was void as well. Id.

The court agreed that the mortgage Ms. Green made from herself to the trust was indeed technically void, as she was both the maker and the payee of the note it secured. Id. at 423- 24. However, it held that the mortgage's subsequent assignment to the bank was legally a mortgage. The instrument complied with all the requirements of a property conveyance, and it had clearly been Ms. Green's intent to hypothecate the property to the bank, whether it was by direct mortgage or by assignment. Id. at 425. Finally, although Ms. Green had signed the assignment in her capacity as a trustee and individually, the court ruled "the signature of Celia Green as trustee was effective to convey her individual property as though she had signed simply her name. At law, the official and individual capacities of a trustee are not separated. A trustee simply owns the property, subject to such equitable rights of the *cestui* as may exist." Id. at 424 (emphasis added). Because no *cestui* did exist, Ms. Green owned the property outright.

We think the **bankruptcy** court's reliance on Kaufman was misplaced. HN3 Kaufman's holding may still be good law as to Massachusetts **[*9]** common law trusts. However, trusts established under Massachusetts' condominium statute are creatures of a different stripe - and a highly regulated stripe, at that. See Kaplan v. Boudreaux, 410 Mass. 435, 573 N.E.2d 495 (Mass. 1991) (noting that "condominiums are essentially creatures of statute"). Though courts should be guided generally by common law principles when considering statutory trusts, "[i]n some instances, trust law will offer only a starting point, after which courts must go on to ask whether, or to what extent, the language of the statute, its structure or its purposes require departing from common-law trust requirements." Conkright v. Frommert, 130 S. Ct. 1640, 1648, 176 L. Ed. 2d 469 (2010) (citing Varity Corp. v. Howe, 516 U.S. 489, 497, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996). The unique, legislatively prescribed characteristics of condominium trusts inform us that applying generic common law principles to the Aguilars, as condominium trustees in the context of this conveyancing dispute, is inappropriate.

HN4 A condominium trust is formed to manage and regulate a condominium. See Mass. Gen. Laws ch. 183A, § 8(i). The condominium trust is governed by a declaration of trust and by-laws that establish the obligations and powers of the trustees. **[*10]** Under § 10 of the Act, the association may appoint managers to oversee the common affairs of the unit owners. Mass. Gen. Laws ch. 183A, § 10. The statute defines "manager" as "the managing agent, [or] the trustees in a self-managed condominium . . . who performs or renders management or administrative services to the organization of unit owners." Mass. Gen. Laws ch. 183A, § 1. At a minimum, those services must include: procedures for maintenance and repair of the common areas, insurance requirements, association meetings and voting rights, handling common expenses, managing reserve funds, and assessing unit owners. See Mass. Gen. Laws ch. 183A, §§ 10 and 11.

HN5 The Act exclusively empowers the condominium trust, and by extension, its trustees, to "conduct litigation and to be subject to suit as to any course of action involving the common areas and facilities or arising out of the enforcement of the by-laws, administrative rules or restrictions in the master deed." See Mass. Gen. Laws ch. 183A, § 10(b)(4). And it specifically limits the trustees' exposure to personal liability. Under § 13, all claims involving common areas of the condominium must be brought against the organization, with **[*11]** claims paid first out of common funds, and then apportioned to the individual unit owners. Mass. Gen. Laws ch. 183A, § 13. Thus, in the context of a condominium trust, the Massachusetts legislature has created a trustee with defined responsibilities and duties and with limited personal liability in managing trust affairs. In doing so, it has made condominium trustees akin to corporate officers, and condominium trusts more corporate-like than trust-like in nature. [3] Consequently, the condominium trustee inhabits a role sufficiently distinct from the trustee's role as an individual as to make application of the Kaufman principle (an act of conveyance as trustee sweeps along with it personally owned property, as well) inapposite. [4]

FOOTNOTES

3 See E. Christopher Kehoe, et al., Trusts in Real Estate Title Practice in Massachusetts (Kathleen M. Mitchell, Esq. et al. eds., 2d ed. 2010).

4 We pause here to note, as well, that the Kaufman result placed title in the same hands as those indicated by a search of the real property records, with no break in the chain of title. Here, in a context where the legislature has worked to establish some degree of predictability and regularity, applying Kaufman's teaching **[*12]** would result in a break of the record title chain.

CONCLUSION

We thus conclude that the court's application of Kaufman's rationale to validate the conveyances at issue was error. Because the defendants have raised sundry equitable defenses which the **bankruptcy** judge did not assay, we will remand the matter for further consideration including, perhaps, the taking of additional evidence. We therefore **VACATE** the judgment and **REMAND** this matter to the **bankruptcy** court for further proceedings.

MARIE T. PICCHI, Debtor. PAWTUCKET CREDIT UNION, Appellant, v. MARIE T. PICCHI, Appellee.

BAP NO. RI 10-055

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

2011 Bankr. LEXIS 1188

April 11, 2011, Decided

PRIOR HISTORY: [*1]
Appeal from the United States **Bankruptcy** Court for the District of Rhode Island. (Hon. Henry J. Boroff, U.S. **Bankruptcy** Judge) *. **Bankruptcy** Case No. 10-11020-ANV.

* Hon. Henry J. Boroff, U.S. **Bankruptcy** Judge, D. Mass., sitting by designation.

CASE SUMMARY
PROCEDURAL POSTURE: Appellant creditor was the holder of a claim secured by a second mortgage against appellee debtor's two-family home. Debtor's Plan, which modified the creditor's rights as a mortgagee, was confirmed by the U.S. **Bankruptcy** Court for the District of Rhode Island. The creditor appealed, asserting that the **bankruptcy** court erred in concluding that 11 U.S.C.S. § 1322(b)(2) permitted a debtor to modify the rights of a mortgagee in a two-family home.

OVERVIEW: The creditor argued to the **bankruptcy** court that the rule permitting modification of a mortgagee's rights in a multi-unit dwelling had been abrogated by the definitions of "debtor's principal residence" and "incidental property" introduced into the **Bankruptcy** Code by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, 119 Stat. 23. Specifically, it urged the **bankruptcy** court to conclude that its claim was secured solely by debtor's "principal residence" and that the second unit in the two-family home was simply "incidental property." The **bankruptcy** judge rejected this notion. The instant court determined that the **bankruptcy** court did not err in permitting the modification of the creditor's secured claim and confirming debtor's plan. These actions were in accord with the principle of claim bifurcation, codified in 11 U.S.C.S. § 506(a) and did not violate the anti-modification clause contained within 11 U.S.C.S. § 1322(b)(2). Moreover, with respect to the creditor's specific concerns, the definitions of "debtor's principal residence" and "incidental property" introduced by BAPCPA did not alter the scope of the anti-modification clause.

OUTCOME: The **bankruptcy** court's decision was affirmed.

CORE TERMS: principal residence, real property, incidental, mortgage, anti-modification, secured claim, residential, security interest, bifurcation, multi-unit, dwelling, collateral, holder, modify, antimodification, modification, manufactured, condominium, cooperative, trailer, mobile, legislative history, unsecured claim, plain meaning, confirming, mortgagee's, ambiguity, conveyed, rents, Bankruptcy Technical Corrections Act

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

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

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > Res Judicata

HN1 A **bankruptcy** appellate panel has jurisdiction to hear appeals from final judgments, orders and decrees and, subject to its discretion, from certain interlocutory orders. 28 U.S.C.S. § 158(a). A decision is considered final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. A **bankruptcy** court's decision to modify a claim under 11 U.S.C.S. § 1322(b)(2) is a final order. An order confirming a plan is customarily res judicata to all issues that were or could have been decided during the confirmation process. More Like This Headnote

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

HN2 A **bankruptcy** appellate panel applies de novo review to legal issues presented in an appeal. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > General Overview

HN3 See 11 U.S.C.S. § 506(a)(1).

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN4 The bifurcation process separates an under-secured claim into two parts: a secured claim pegged at the value of the collateral and an unsecured claim for the difference between the value of the debt and the value of the collateral. In chapter 13, as in other chapter proceedings, bifurcation may be forced upon a secured party by a plan proponent. However, this process, known as "strip down" or "cram down," is barred by 11 U.S.C.S. § 1322(b)(2) where the claim is secured only by a lien on the debtor's principle residence. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN5 See 11 U.S.C.S. § 1322(b)(2).

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Avoidance & Survival

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN6 The anti-modification provision of 11 U.S.C.S. § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units. More Like This Headnote

Bankruptcy Law > General Overview

HN7 See 11 U.S.C.S. § 101(13A) (amended 2010).

Bankruptcy Law > General Overview

HN8 See 11 U.S.C.S. § 101(27B).

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN9 The meaning and scope of 11 U.S.C.S. § 1322(b)(2) have not been altered by the definitions of "debtor's principal residence" and "incidental property" introduced by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. More Like This Headnote

COUNSEL: John T. Gannon, Esq., and John I. Donovan, Esq., on brief for Appellant.

John S. Simonian, Esq., on brief for Appellee.

JUDGES: Before de Jesus, Kornreich, and Tester, United States **Bankruptcy** Appellate Panel Judges.

OPINION BY: Kornreich

OPINION

Kornreich, U.S. Bankruptcy Appellate Panel Judge.

Marie T. Picchi ("Picchi") is the debtor in this chapter 13 case from the District of Rhode Island. Pawtucket Credit Union ("Pawtucket") is the holder of a claim secured by a second mortgage against Picchi's two-family home. Picchi's plan, which modifies Pawtucket's rights as a mortgagee, was confirmed by the **bankruptcy** court over Pawtucket's objection. On appeal Pawtucket argues that the **bankruptcy** court erred in concluding that § 1322(b)(2) permits a debtor to modify the rights of a mortgagee in a two-family home. [1] For the reasons expressed below, we **AFFIRM**.

FOOTNOTES

1 Unless expressly stated otherwise, all references to "Code" or to specific statutory sections shall be to the **Bankruptcy** Reform **[*2]** Act of 1978, as amended by the **Bankruptcy** Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

BACKGROUND

Picchi filed a chapter 13 petition in March 2010. Her schedules show her to be the owner of a two-family home (the "property") valued at $125,000.00. She resides in one unit and rents out the second unit. Picchi's schedules also show the property to be subject to a first mortgage in favor of Navigant Credit Union in the amount of $134,928.00, a second mortgage in favor of Pawtucket in the amount of $87,032.00, and a third mortgage in favor of Beneficial Mortgage Co. of Rhode Island ("Beneficial") in the amount of $16,382.00.

Picchi's plan reduced the value of Pawtucket's secured claim to zero because, at $125,000.00, the value of the property would have been consumed totally by the senior secured claim. [2] Pawtucket objected to its treatment under the plan, arguing that Picchi had undervalued the property and that the anti-modification clause in § 1322(b)(2) prohibited Picchi from modifying its rights. [3] Pawtucket argued that the rule permitting modification of a mortgagee's rights in a multi-unit dwelling, see Lomas Mortgage, Inc. v. Louis, 82 F.3d 1 (1st Cir. 1996), **[*3]** has been abrogated by the definitions of "debtor's principal residence" and "incidental property" introduced into the Code by BAPCPA. Specifically, Pawtucket urged the **bankruptcy** court to conclude that its claim was secured solely by Picchi's "principal residence" and that the second unit in the two-family home was

simply "incidental property." The **bankruptcy** judge rejected this notion and overruled Pawtucket's objection based upon his own decision in In re French, 174 B.R.1 (Bankr. D. Mass.1994). [4] An order confirming the plan was entered. This appeal followed.

FOOTNOTES

2 Beneficial's claim was given the same treatment under Picchi's plan.

3 Pawtucket asserted the actual value to be $157,000.00 At the confirmation hearing, the parties settled on a value of $141,000.00 This value left Pawtucket with a small secured claim.

4 In In re French, the **bankruptcy** court stated:

In order to properly analyze the effect of "additional collateral" on the anti-modification provisions of § 1322(b)(2) , this Court believes that the test should be whether or not the "additional collateral" set forth in the subject mortgage is nothing more than an enhancement which is or can, by agreement of the parties, be made a component **[*4]** part of the real property or is of little or no independent value. The existence of collateral which is nothing more than such an enhancement should not result in a forfeiture by the lender of the anti-modification provisions of § 1322(b)(2) .

174 B.R. at 7 .

On December 22, 2010, after the briefs were filed, the **Bankruptcy** Technical Corrections Act of 2010 ("BTCA") became law without any express statement of temporal scope. See Pub.L. 111-327, 124 Stat. 3557 (Dec. 22, 2010). Although the legislative history provides that BTCA was "not intended to enact any substantive change to the **Bankruptcy** Code," see 156 CONG. REC. H7158 (daily ed. Sept. 28, 2010) (statement of Rep. Smith), there is no clear statement in the record on whether it was intended to have prospective or retroactive applicability. Among other things, BTCA amends § 101(13A) of the Code which defines debtor's principal residence. [5] The legislative record indicates that "[this] amendment clarifies that the definition pertains to a structure used by the debtor as a principal residence." See 156 CONG. REC. H7158 (daily ed. Sept. 28, 2010). Despite the centrality of the meaning of "debtor's principal residence" to the outcome of **[*5]** this case, neither party has asked us (a) to determine whether the revised definition contained in BTCA should apply in this case; or (b) to remand this case for such a determination in the **bankruptcy** court. Therefore, our review of the **bankruptcy** court's decision will be based upon the law as it was at the time of that decision.

FOOTNOTES

5 Section 101(13A) now provides:

The term 'debtor's principal residence' — (A) means a residential structure *if used as the principal residence by the debtor*, including incidental property, without regard to whether that structure is attached to real property; and (B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer *if used as the principal residence by the debtor*.

11 U.S.C. § 101(13A) (as amended by the **Bankruptcy** Technical Corrections Act of 2010, Pub.L. 111-327, 124 Stat. 3557 (Dec. 22, 2010) (emphasis supplied to show the amendments).

JURISDICTION

HN1 We have jurisdiction to hear appeals from final judgments, orders and decrees and, subject to our discretion, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). **[*6]** A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Id. at 646 (citations omitted). The **bankruptcy** court's decision to modify Pawtucket's claim under § 1322(b)(2) is a final order. See E. Sav. Bank, FSB v. LaFata (In re LaFata), 483 F.3d 13,18 (1st Cir. 2007); Carvalho v. Fed. Nat'l Mortgage Ass'n (In re Carvalho), 335 F.3d 45, 49 (1st Cir. 2003) (holding that an order confirming a plan is customarily *res judicata* to all issues that were or could have been decided during the confirmation process).

STANDARD OF REVIEW

The facts in this case are not in dispute. HN2 We will apply *de novo* review to the legal issues presented in this appeal. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010); Antognoni v. Basso (In re Basso), 397 B.R. 556, 562 (B.A.P. 1st Cir. 2008).

DISCUSSION

The **bankruptcy** court did not err in permitting the modification of Pawtucket's secured claim and confirming Picchi's plan. These actions were in accord with the principle of claim bifurcation, codified in § 506(a) [6] and did not violate the anti-modification clause contained within § 1322(b)(2). Moreover, **[*7]** with respect to Pawtucket's specific concerns, the definitions of "debtor's principal residence" and "incidental property" introduced by BAPCPA did not alter the scope of the anti-modification clause.

FOOTNOTES

6 Section 506(a) provides, in relevant part:

HN3 An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1) .

HN4 The bifurcation process separates an under-secured claim into two parts: a secured claim pegged at the value of the collateral and an unsecured claim for the difference between the value of the debt and the value of the collateral. In chapter 13, as in other chapter proceedings, bifurcation may be forced upon a secured party by a plan proponent. However, this process, known as "strip down" or "cram down," is barred by § 1322(b)(2) where the claim is "secured only by a lien on the debtor's principle residence." Nobelman v. American Sav. Bank, 508 U.S. 324, 332, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993). But, **[*8]** in deciding Nobelman, the Supreme Court did not address when a claim is secured *only* by a security interest in real property that is the debtor's principle residence.

The anti-modification clause within § 1322(b)(2) is ambiguous. [7] It could be understood (1) to bar bifurcation of a claim secured by a security interest in real property that *includes* the debtor's principal residence, or (2) to bar bifurcation of a claim secured by a security interest in real property that is *exclusively* the debtor's principal residence. The first understanding, preferred by the mortgage industry, would bar bifurcation of a claim secured by a mortgage on a multi-unit dwelling. The second, preferred by debtors, would allow it.

FOOTNOTES

7 Section 1322 provides in relevant part:

HN5 (b) Subject to subsections (a) and (c) of this section, the plan may — . . . (2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . .

11 U.S.C. § 1322(b)(2) (emphasis supplied.). Subsections (a) and (c) **[*9]** are not implicated in this case.

The U.S. Court of Appeals for the First Circuit discussed this ambiguity in 1996, two years after Nobelman, in a case with facts resembling those presented here. See Lomas, 82 F.3d at 3-4. Finding the contemporaneous legislative history to be inconclusive on the meaning of § 1322(b)(2), id. at 4-6, the First Circuit looked to the legislative history behind an identical anti-modification clause Congress added to chapter 11 as part of the **Bankruptcy** Reform Act of 1994. Id. at 6. The First Circuit observed: (1) that this new clause, codified at § 1123(b)(5), was intended by Congress to conform the treatment of residential mortgages in chapter 11 to that of chapter 13; and (2) that Congress understood, post-Nobelman, that § 1123(b)(5) would mimic its older chapter 13 sibling by permitting the strip down of a claim secured by a multi-unit dwelling. [8] Id. at 6-7. The First Circuit then held "that HN6 the anti-modification provision of § 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interest extends to the other income-producing units." Id. at 7. [9]

FOOTNOTES

8 This **[*10]** determination was based upon the portion of the legislative record referring to In re Ramirez, 62 B.R. 668 (Bankr. S.D. Cal. 1986), "as an example of a case in which the antimodification provision of Chapter 11 would not apply." Lomas, 82 F.3d at 6-7 (citing the Judiciary Committee Report, H.R. Report No. 835 at 46, n.13). In Ramirez, the **bankruptcy** court held that § 1322(b)(2) permits modification of a claim secured by a mortgage on real property that includes the debtor's principal residence and generates rental income. 62 B.R. at 670. Additionally, the First Circuit offered the following policy reason for its decision:

. . . extending the antimodification provision to multi-family houses would . . . create a difficult line-drawing problem. It is unlikely that Congress intended the antimodification provision to reach a 100-unit apartment complex simply because the debtor lives in one of the units. Limiting the antimodification provision to single-family dwellings creates a more easily administered test.

Lomas, 82 F.3d at 6.

9 Other courts have reached the same conclusion based upon the plain meaning of § 1322(b)(2). See, e.g., Scarborough v. Chase Manhattan Mortg. Corp. (In re Scarborough), 461 F.3d 406, 411 (3d Cir. 2006).

Pawtucket **[*11]** argues that the holding in Lomas has been abrogated by the definitions of "debtor's personal residence" and "incidental property" introduced by BAPCPA. Pawtucket's argument has two prongs: first, that the language of each definition is clear and unambiguous; and, second, that when these definitions are combined and inserted within § 1322(b)(2) they remove the ambiguity underlying the holding in Lomas. We are not convinced.

Pawtucket takes the plain meaning of the term "residential structure," appearing in the definition of "debtor's principal residence," to include both a single family home and a multi-unit dwelling. See 11 U.S.C. § 101(13A). [10] If "residential structure" appeared as a stand alone term, Pawtucket would be correct. But in the context of § 101(13A), "residential structure" appears in subparagraph (A), which is qualified by subparagraph (B). Subparagraph (B) includes within the meaning of "debtor's principal residence," such living units as "an individual condominium or cooperative unit, a mobile or manufactured home, or trailer." The combination of subparagraphs (A) and (B) suggests that the term "residential structure" may refer to the space encompassing the debtor's **[*12]** actual living unit.

FOOTNOTES

10 The pre-BTCA version of § 101(13A) states:

HN7 The term 'debtor's principal residence' —

(A) means a residential structure, including incidental property, without regard to whether that structure is attached to real property; and

(B) includes an individual condominium or cooperative unit, a mobile or manufactured home, or trailer.

Similarly, Pawtucket understands the plain meaning of the phrase "including property commonly conveyed with a principal residence in the area

where the real property is located," taken from the definition of "incidental property," see 11 U.S.C. § 101(27B), [11] to include a rental unit within a multi-unit dwelling in Picchi's locale. This reading of "incidental property" is plausible; but we are more impressed with the **bankruptcy** court's reckoning that "incidental property" means objects like a "boiler, the attached garage, [or] the window treatments that are typically listed in a standard mortgage."

FOOTNOTES

11 Section 101(27B) provides:

HN8 The term 'incidental property' means, with respect to a debtor's principal residence —

(A) property commonly conveyed with a principle residence in the area where the real property is located;

(B) all easements, rights, appurtenances, **[*13]** fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

11 U.S.C. § 101(27B) .

Thus we are not inclined to agree that the definitions of "debtor's principal residence" and "incidental property" are clear and unambiguous. More importantly, we reject the suggestion that these definitions, when combined and inserted into § 1322(b)(2), cure the ambiguity in the anti-modification clause.

The anti-modification clause, including the definitions suggested by Pawtucket, would look like this:
[T]he plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is *a residential structure, including property commonly conveyed with a principal residence in the area where the real property is located, all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil and gas rights or profits, water rights, escrow funds or insurance proceeds, and all replacements or additions, without regard to whether that structure is attached to real property including an individual condominium or cooperative unit, a mobile* **[*14]** *or manufactured home, or trailer . . . .*

This enhanced clause does not remove the question of whether the statute bars bifurcation of a claim secured by a security interest in a multi-unit dwelling that includes the debtor's principal residence.

CONCLUSION

HN9 The meaning and scope of § 1322(b)(2) have not been altered by the definitions of "debtor's principal residence" and "incidental property" introduced by BAPCPA. [12] For the reasons given long ago in Lomas,. Consequently, we **AFFIRM**.

FOOTNOTES

12 Due to the failure of the parties to raise the question, 12 we offer no comment on whether the same result would pertain under the revised definition of "debtor's principal residence" contained in BTCA.

---

*2011 BNH 4; 2011 Bankr. LEXIS 1485, **

In re: Robert S. McGrahan, Debtor

Bk. No. 09-13578-JMD, Chapter 13

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

2011 BNH 4; 2011 Bankr. LEXIS 1485

April 22, 2011, Decided

NOTICE: NOT FOR PUBLICATION

CASE SUMMARY

PROCEDURAL POSTURE: A Chapter 13 debtor moved under 11 U.S.C.S. § 1329 to modify his confirmed Chapter 13 plan to reduce a claim held by the New Hampshire Department of Health and Human Services Division of Child Support Services (DHHS). DHHS moved for a ruling that the plan did not affect its ability to intercept tax refunds to apply to a child support arrearage.

OVERVIEW: The Chapter 13 plan provided for payment in full to DHHS of a claim for unpaid child support, as required by 11 U.S.C.S. § 1322(a)(2). The plan originally provided that the debtor's income tax refunds were being seized to pay the arrearage and stated that DHHS's proof of claim was to be decreased to reflect the amounts seized. After DHHS failed to amend its proof of claim, the plan was modified to remove the provision that allowed the seizure of tax refunds. The debtor moved to further modify the plan to reduce the arrearage in order to account for the amount of tax refunds that DHHS had intercepted. The court held that the exception from the automatic stay under 11 U.S.C.S. § 362(b)(2)(F), which allowed interception of tax refunds to pay prepetition domestic support obligations, did not require the Chapter 13 plan to include a provision allowing DHHS to intercept tax refunds. Upon confirmation of the plan, DHHS became bound by its terms and could no longer intercept tax refunds to satisfy the prepetition child support obligation. DHHS was bound by the plan's provisions to accept distributions from the trustee in satisfaction of its claim.

OUTCOME: The debtor's motion to modify the plan was granted. DHHS's motion was denied.

CORE TERMS: tax refunds, modified, confirmed, intercept, automatic stay, confirmation, prepetition, support obligations, domestic, modify, child support, modification, interception, reconsider, intercepted, seized, support arrearage, full payment, intercepting, approving, amend, federal income, monthly installments, proof of claim, postpetition, collection, arrearage, objected, exempted, seizure

LEXISNEXIS® HEADNOTES

Hide

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

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

HN1 In a Chapter 13 case, creditors are ordinarily prevented from collecting prepetition debt by the automatic stay. In the enforcement of support obligations, Congress has exempted from the automatic stay the interception of tax refunds under applicable state or federal laws. 11 U.S.C.S. § 362(b)(2)(F). More Like This Headnote

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

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

HN2 Upon the filing of a **bankruptcy** petition, the **Bankruptcy** Code imposes an "automatic stay" on any acts to collect debt that arose before the commencement of the case. 11 U.S.C.S. § 362(a)(6). The automatic stay provides "breathing room" for the debtor and the **bankruptcy** court to institute an organized repayment plan and allows for the equitable disbursement of estate property among creditors. Despite the importance of the automatic stay, Congress has enacted several exceptions enumerated in § 362(b). The enactment of the **Bankruptcy** Abuse and Prevention Act of 2005 further narrows the scope of the automatic stay by broadening the exceptions. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

HN3 Prior to the **Bankruptcy** Abuse and Prevention Act of 2005 (BAPCPA), an exception to the automatic stay provided that creditors who were owed prepetition domestic support obligations, 11 U.S.C.S. § 101(14A), could only pursue assets that were not property of the estate. 11 U.S.C.S. § 362(b)(2)(B). BAPCPA added § 362(b)(2)(F) which allows creditors to intercept tax refunds, as specified in 42 U.S.C.S. §§ 464 and 466(a)(3) of the Social Security Act or under an analogous state law, even where the tax refund is property of the estate. Because of the exception added by BAPCPA, it would not be a violation of the automatic stay for a state agency to intercept a debtor's tax refund to pay either a prepetition or postpetition child support arrearage. The agency's interception of the debtor's tax refunds to satisfy delinquent child support obligations is the sort of action addressed by § 362(b)(2)(F). More Like This Headnote

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

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN4 Confirmation of a Chapter 13 plan is done through a rigid application of statutory requirements. A **bankruptcy** court must confirm a Chapter 13 plan if the plan meets each of the requirements set forth in 11 U.S.C.S. § 1325(a) and the debtor proposes payments which meet the requirements of 11 U.S.C.S. § 1325(b). 11 U.S.C.S. § 1325(b)(1)(B), (b)(2). Also, creditor approval is not necessary for plan confirmation. Under Chapter 13 of the **Bankruptcy** Reform Act of 1978, a majority of unsecured creditors no longer have to approve the debtor's plan for confirmation. More Like This Headnote

Bankruptcy Law > Claims > Types > Unsecured Priority Claims > Alimony, Maintenance & Support

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

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN5 Since the **Bankruptcy** Code was enacted in 1978, additional confirmation requirements have been added to Chapter 13. In 1994, Congress made it mandatory for a plan to provide for full payment of all claims entitled to priority under 11 U.S.C.S. § 507. 11 U.S.C.S. § 1322(a)(2). Moreover, 11 U.S.C.S. § 1325(a)(1) states that a plan must comply with all of the provisions of Chapter 13 and Title 11 to be confirmed. Hence, for a plan to be confirmed, it must adhere to § 1322(a)(2). Domestic support obligations are entitled to first priority under § 507(a)(1)(A) and (B). Therefore, a chapter 13 plan must provide for payment in full of domestic support obligations. 11 U.S.C.S. § 1322(a)(2). More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > Modification

HN6 A debtor may modify a plan anytime after confirmation but before completion of payments. 11 U.S.C.S. § 1329(a). Any such modification must comply with the provisions of 11 U.S.C.S. §§ 1322(a) and 1325(a) to be approved. 11 U.S.C.S. § 1329(b). More Like This Headnote

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

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

HN7 A **bankruptcy** court cannot accept a proposition that essentially seeks to turn an exception to the automatic stay into a requirement for Chapter 13 plan confirmation. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

HN8 Once a **bankruptcy** plan is confirmed, the debtor and each creditor are bound by its terms. 11 U.S.C.S. § 1327(a) addresses the effect of a confirmed plan: the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan. Once a plan is confirmed, a creditor's rights and interests are defined within the boundaries of the plan and proceedings that are inconsistent with the confirmed plan are improper. After confirmation, the plan and confirmation order control. The ability of a support creditor to continue to collect a prepetition debt is only limited to the extent that the confirmed plan abrogates those rights. Confirmation is the bright line in the life of Chapter 13 case at which all important rights of creditors and responsibilities of the debtor are defined and after which all rights and remedies must be determined with reference to the plan. Therefore, a creditor may not collect a prepetition debt by means that are outside the terms of a confirmed Chapter 13 plan. More Like This Headnote

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

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

HN9 A creditor may not circumvent the terms of a confirmed Chapter 13 plan because its actions are exempted from the automatic stay. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

HN10 Because 11 U.S.C.S. § 1327(a) forbids collection of any debt not confirmed by the plan, the 11 U.S.C.S. § 362(b)(2) exception has little or no practical effect in Chapter 13 situations. More Like This Headnote

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

HN11 In the event a creditor violates the terms of a Chapter 13 confirmation order, the **bankruptcy** court may impose sanctions. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

HN12 Regarding whether the enactment of 11 U.S.C.S. § 362(b)(2)(F) in the **Bankruptcy** Abuse and Prevention Act of 2005 is evidence that Congress wanted to make enforcement of child support unimpeded by the **bankruptcy** process, Congress did not intend to go as far as granting support creditors complete immunity from the effects of the **Bankruptcy** Code. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

Bankruptcy Law > Individuals With Regular Income > Plans > Confirmation > Effects

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN13 When a debtor files for Chapter 13, a support creditor, as described in 11 U.S.C.S. § 362(b)(2)(F), may intercept tax refunds before the plan is confirmed since such acts are exempt from the automatic stay. A support creditor may even intercept tax refunds to recover arrears on postpetition domestic support obligations. However, once a plan is confirmed, the support creditor will receive payments that will fully satisfy its prepetition claim because that is a requirement for confirmation. 11 U.S.C.S. § 1322(a)(2). More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Exceptions > Alimony, Maintenance & Support

Bankruptcy Law > Individuals With Regular Income > Plans > Contents

HN14 Nothing in 11 U.S.C.S. §§ 1322 or 1325 requires a Chapter 13 plan to include a provision permitting a support creditor to intercept tax refunds as described in 11 U.S.C.S. § 362(b)(2)(F). More Like This Headnote

COUNSEL: **[*1]** Raymond J. DiLucci, Esq., Raymond J. DiLucci, P.A., Concord, New Hampshire, Attorney for Debtor.

Peter C.L. Roth, Esq., Senior Assistant Attorney General, Concord, New Hampshire, Attorney for New Hampshire Department of Health and Human Services.

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

OPINION BY: J. Michael Deasy

OPINION

MEMORANDUM OPINION

I. INTRODUCTION

Robert S. McGrahan (the "Debtor") filed an amended motion to modify his confirmed chapter 13 plan (Doc. No. 53) (the "Motion") pursuant to 11 U.S.C. § 1329. The plan modification seeks to reduce the allowed claim held by the New Hampshire Department of Health and Human Services Division of Child Support Services (the "DHHS") to account for federal income tax refunds that were seized and applied towards the claim. DHHS filed a response to the Motion requesting a ruling by the Court that the modified plan, in its current form, does not affect its ability to intercept tax refunds to apply to any child support arrearage. 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 **[*2]** January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. BACKGROUND

The Debtor filed for relief under chapter 13 on September 17, 2009. On January 19, 2010, the Debtor filed his first amended chapter 13 plan (Doc. No. 17) (the "Plan"). The Plan listed DHHS as a creditor holding a $13,000 claim for unpaid child support. As required by § 1322(a)(2), the Plan paid DHHS's claim in full through monthly installments and included the following provision:
The Internal Revenue Service is seizing Income Tax Refunds to pay Child Support Arrears. The Proof of Claim of NH DHHS Dept. of Child Services will be decreased annually to reflect the amounts seized.
The Plan was confirmed on January 22, 2010 (Doc. No. 19). On March 17, 2010, DHHS timely filed a proof of claim. No objection was filed to the proof and on July 19, 2010, the Court entered an order allowing the claim of DHHS in the amount of $13,862 (Doc. No. 24).

DHHS intercepted tax refunds on April 23, 2010, and November 5, 2010, and applied the funds received to its prepetition child support arrears claim. However, DHHS did not amend its proof of claim. Consequently, the chapter 13 trustee continued **[*3]** to make payments to DHHS based on its allowed claim, without accounting for the payments received from intercepted tax refunds.

On October 14, 2010, the Debtor filed a motion to modify the plan (Doc. No. 32). In the motion to modify, the Debtor increased DHHS's arrearage claim to the amount of the allowed claim, but removed the provision that allowed the seizure of tax refunds. The Court granted the motion to modify on November 5, 2010 (Doc. No. 38) (the "Modified Plan"). On November 15, 2010, DHHS filed a motion to reconsider the order granting the motion to modify (Doc. No. 41). The Debtor objected to the motion to reconsider (Doc. No. 48).

In his objection, the Debtor claimed that seizure of the tax refunds would be burdensome on the Debtor and the Court because DHHS had not amended its claim to reflect the application of seized refunds. DHHS disclaimed responsibility to notify either the Debtor or the chapter 13 trustee about the application of seized income tax refunds. The Debtor explained that because DHHS refused to amend its claim the confirmed plan would need to be modified on an annual basis to prevent overpayment. DHHS argued that they could intercept tax refunds under the **[*4]** exception to the automatic stay in § 362(b)(2)(F), whether the Modified Plan provided for it or not. On December 1, 2010, the Court denied the motion to reconsider as moot because according to DHHS, it could intercept tax refunds regardless of the terms of the Modified Plan (Doc. No. 50). However, the Court did not rule on the merits of DHHS's assertion that it had a right to intercept tax refunds despite the absence of a provision in the Modified Plan permitting such action. The order approving the Modified Plan became final on December 15, 2010.

On November 23, 2010, prior to the Court's ruling on DHHS's motion to reconsider, the Debtor filed another motion to modify the plan (Doc. No. 47), which was withdrawn on December 15 and replaced with the Motion and its accompanying proposed modified plan (the "Proposed Modified Plan"). The Motion seeks to reduce DHHS's arrearage by $4,348 to account for the creditor intercepting the Debtor's federal income tax refunds. In its response (Doc. No. 57), DHHS did not object to the reduction of its claim, but requested that either (1) the Debtor amend the Proposed Modified Plan to provide for tax refund intercepts or (2) the Court enter an order **[*5]** stating the Proposed Modified Plan does not prohibit DHHS from exercising its right to intercept tax refunds. A hearing on the Motion was held on January 14, 2011. At the hearing, the parties argued over (1) whether in order to be approved, the Proposed Modified Plan must contain a provision allowing DHHS to intercept tax refunds and (2) if the Proposed Modified Plan does not, can DHHS intercept the tax refunds anyway. The Court took the matter under advisement.

III. DISCUSSION

HN1 In a chapter 13 case, creditors are ordinarily prevented from collecting prepetition debt by the automatic stay. In the enforcement of support obligations, Congress has exempted from the automatic stay the interception of tax refunds under applicable state or federal laws. 11 U.S.C. § 362(b)(2)(F). The parties do not dispute that the interception of tax refunds in this case is not stayed under the provisions of § 362. Rather, the question is what effect, if any, the confirmation of a chapter 13 plan has on the ability of a state to intercept tax refunds on account of a prepetition child support arrearage.

A. The Automatic Stay

HN2 Upon the filing of a **bankruptcy** petition, the **Bankruptcy** Code imposes an "automatic stay" **[*6]** on any acts to collect debt that arose before the commencement of the case. 11 U.S.C. § 362(a)(6). The automatic stay "provides 'breathing room' for the debtor and the **bankruptcy** court to institute an organized repayment plan and allows for the equitable disbursement of estate property among creditors." In re Gellington, 363 B.R. 497, 500 (Bankr. N.D. Tex. 2007). Despite the importance of the automatic stay, Congress has enacted several exceptions enumerated in § 362(b). In re 229 Main St. Ltd. P'ship, 262 F.3d 1, 3 (1st Cir. 2001). The enactment of the **Bankruptcy** Abuse and Prevention Act of 2005 ("BAPCPA") further narrowed the scope of the automatic stay by broadening the exceptions. Gellington, 363 B.R. at 501. HN3 Prior to BAPCPA, an exception to the automatic stay provided that creditors who were owed prepetition domestic support obligations[1] could only pursue assets that were not property of the estate. 11 U.S.C. § 362(b)(2)(B). BAPCPA added § 362(b)(2)(F) which allows creditors to intercept tax refunds, "as specified in section 464 and 466(a)(3) of the Social Security Act or under an analogous state law," even where the tax refund is property of the estate. Because of the exception **[*7]** added by BAPCPA, it would not be a violation of the automatic stay for DHHS to intercept the Debtor's tax refund to pay either a prepetition or postpetition child support arrearage. The Debtor conceded that DHHS's interception of the Debtor's tax refunds to satisfy delinquent child support obligations was the sort of action addressed by § 362(b)(2)(F). Although it is clear that the automatic stay did not apply to DHHS, it is not clear whether the interception of tax refunds are within the boundaries of the Modified Plan.

FOOTNOTES

1 See 11 U.S.C. § 101(14A).

B. The Plan

i. Confirmation of the Plan

HN4 Confirmation of a chapter 13 plan is done through a rigid application of statutory requirements. "A **bankruptcy** court must confirm a Chapter 13

Plan if the plan meets each of the . . . the requirements set forth in 11 U.S.C. § 1325(a) and the debtor proposes payments which meet the requirements of 11 U.S.C. § 1325(b)." In re Young, 237 B.R. 791, 797 (B.A.P. 10th Cir. 1999); see In re Estus, 695 F.2d 311, 314 (8th Cir. 1982), superseded by statute on other grounds, 11 U.S.C. §§ 1325(b)(1)(B) and (b)(2). Also, creditor approval is not necessary for plan confirmation. See Estus, 695 F.2d at 314 n.4 (noting **[*8]** that under chapter 13 of the **Bankruptcy** Reform Act of 1978, a majority of unsecured creditors no longer had to approve the debtor's plan for confirmation).HN5 Since the **Bankruptcy** Code was enacted in 1978, additional confirmation requirements have been added to chapter 13. In 1994, Congress made it mandatory for a plan to provide for full payment of all claims entitled to priority under 11 U.S.C. § 507. 11 U.S.C. § 1322(a)(2); In re Jacobson, 231 B.R. 763, 765 (Bankr. D. Ariz. 1999). Moreover, 11 U.S.C. § 1325(a)(1) states that a plan must comply with all of the provisions of chapter 13 and title 11 to be confirmed. Hence, for a plan to be confirmed, it must adhere to § 1322(a)(2). Domestic support obligations are entitled to first priority under § 507(a)(1)(A) and (B). Therefore, a chapter 13 plan must provide for payment in full of domestic support obligations. 11 U.S.C. § 1322(a)(2). Finally, HN6 a debtor may modify a plan anytime after confirmation but before completion of payments. 11 U.S.C. § 1329(a). Any such modification must comply with the provisions of §§ 1322(a) and 1325(a) to be approved. 11 U.S.C. § 1329(b).

In the present case, DHHS's claim is for a domestic support obligation. **[*9]** The Plan provided for full payment of the claim and was confirmed without objection. Afterwards, the Debtor moved to modify the Plan to remove DHHS's right to intercept tax refunds but still pay its claim in full. The modification was granted without objection. In response to the modification order, DHHS filed a motion to reconsider. DHHS's motion was denied as moot because DHHS argued that it had the right to intercept tax refunds regardless of the provisions in a confirmed plan. DHHS also argued that the Modified Plan deprived it of the right to intercept tax refunds under § 362(b)(2)(F). According to DHHS, the Modified Plan was in contradiction of the **Bankruptcy** Code, and, therefore, modification should have been denied under § 1325(a). Now, DHHS makes the same argument in its response to the Motion and the Proposed Modified Plan. HN7 DHHS essentially seeks to turn an exception to the automatic stay into a requirement for plan confirmation. The Court cannot accept such a proposition. Consequently, the Motion can be granted and the Proposed Modified Plan can be approved without a provision allowing DHHS to intercept tax refunds.

ii. Effect of the Confirmed Plan

HN8 Once a **bankruptcy** plan is **[*10]** confirmed, the debtor and each creditor are bound by its terms. In re Rodriguez, 367 F. App'x 25, 28 (11th Cir. 2010); In re Dagen, 386 B.R. 777, 783 (Bankr. D. Colo. 2008); Gellington, 363 B.R. at 502. Section 1327(a) addresses the effect of a confirmed plan: "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Once a plan is confirmed, a creditor's rights and interests are defined within the boundaries of the plan and proceedings that are inconsistent with the confirmed plan are improper. Rodriguez, 367 F. App'x. at 28 (noting that after confirmation, the plan and confirmation order control); Dagen, 386 B.R. at 783 ("[T]he ability of a support creditor to continue to collect a prepetition debt is only limited to the extent that the confirmed plan abrogates these rights."); In re Sanders, 243 B.R. 326, 331 (Bankr. N.D. Ohio 2000) ("Confirmation is the bright line in the life of Chapter 13 case at which all important rights of creditors and responsibilities of the debtor are defined and after which all **[*11]** rights and remedies must be determined with reference to the plan.") (quoting Keith M. Lundin, Chapter 13 **Bankruptcy**, § 6.9, 6-4 and 6-5 (2d ed. 1997)). Therefore, a creditor may not collect a prepetition debt by means that are outside the terms of a confirmed chapter 13 plan.

Moreover, HN9 a creditor may not circumvent the terms of the confirmed plan because its actions are exempted from the automatic stay. In re Worland, No. 08-2148-AJM-13, 2009 Bankr. LEXIS 1512, 2009 WL 1707512, at *2 (Bankr. S.D. Ind. June 16, 2009) (holding a child support creditor did not violate the automatic stay but did violate the confirmation order where it intercepted the debtor's tax refund); Dagen, 386 B.R. at 783 (explaining that it was the confirmed plan, not the automatic stay, that forbade collection of prepetition debt); Gellington, 363 B.R. at 502 (holding that 11 U.S.C. § 362(b)(2)(C) did not authorize the state to garnish the debtor's wages where the claim was being paid in monthly installments under the plan). In fact, the court in Rodriguez explained that HN10 because § 1327(a) forbids collection of any debt not confirmed by the plan, the § 362(b)(2) exception "has little or no practical effect in Chapter 13 situations." Rodriguez, 367 F. App'x. at 28 **[*12]** (quoting Carver v. Carver, 954 F.2d 1573, 1577 (11th Cir. 1992)).HN11 In the event a creditor violates the terms of the confirmation order, the **bankruptcy** court may impose sanctions. In re Fatsis, 396 B.R. 579, 583 (Bankr. D. Mass. 2008).

Prior to confirmation of a plan, the automatic stay did not prevent DHHS from intercepting tax refunds under the exception in § 362(b)(2)(F). DHHS did not breach the terms of the original confirmation order when it intercepted the Debtor's tax refunds in April and November of 2010 because the confirmed plan in effect at the time permitted the interception of tax refunds. However, once the order approving the Modified Plan became final on December 15, 2010, DHHS was prohibited from intercepting tax refunds to satisfy the Debtor's prepetition domestic support obligation because the Modified Plan provided that DHHS's prepetition claim would be paid through plan payments. DHHS was bound by the provisions of the Modified Plan and was obligated to accept distributions from the chapter 13 trustee in satisfaction of its allowed prepetition domestic support claim. Dagen, 386 B.R. at 783; Gellington, 363 B.R. at 502. The Proposed Modified Plan satisfies DHHS's claim **[*13]** in the same manner. Therefore under the terms of the Proposed Modified Plan, DHHS is subject to the same limitations.

At the hearing to consider the Proposed Modified Plan, HN12 counsel for DHHS argued that the enactment of § 362(b)(2)(F) in BAPCPA was evidence that Congress wanted to make enforcement of child support unimpeded by the **bankruptcy** process. The Court does not agree with DHHS that Congress intended to go as far as granting support creditors complete immunity from the effects of the **Bankruptcy** Code. The framework outlined by the Court in this case is in line with Congress's legislative intent regarding the strong policy of fully satisfying domestic support obligations. HN13 When a debtor files for chapter 13, a support creditor, as described in § 362(b)(2)(F), may intercept tax refunds before the plan is confirmed since such acts are exempt from the automatic stay. A support creditor may even intercept tax refunds to recover arrears on postpetition domestic support obligations. However, once a plan is confirmed, the support creditor will receive payments that will fully satisfy its prepetition claim because that is a requirement for confirmation. See 11 U.S.C. § 1322(a)(2); Rodriguez, 367 Fed. App'x at 28 **[*14]** (noting that since the 1994 amendments mandated chapter 13 plans to pay support obligations in full, § 362(b)(2)(B) was rendered somewhat superfluous). Consequently, DHHS may not intercept tax refunds to pay its prepetition claim according to the Proposed Modified Plan.

III. CONCLUSION

The Proposed Modified Plan provides for full payment of DHHS's claim as required by § 1322(a)(2) of the **Bankruptcy** Code. HN14 Nothing in §§ 1322 or 1325 requires a chapter 13 plan to include a provision permitting a support creditor to intercept tax refunds as described in § 362(b)(2)(F). Accordingly, the Motion shall be granted and the Proposed Modified Plan shall be approved. For the reasons set forth above, DHHS may not intercept the Debtor's tax refunds in order to satisfy the Debtor's prepetition support obligation because such action would violate the order approving the Proposed Modified Plan. 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 consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: April 22, 2011

/s/ J. Michael Deasy

J. Michael Deasy

Bankruptcy Judge

In re: KENNETH AMES, Debtor.

Chapter 7, Case No. 11-40020-MSH

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

2011 Bankr. LEXIS 1379

April 15, 2011, Decided
April 15, 2011, Filed

CASE SUMMARY

PROCEDURAL POSTURE: A **bankruptcy** debtor stated his intent to surrender a condominium unit and the condominium manager moved for relief from the automatic **bankruptcy** stay to enforce the manager's right to hold the debtor personally liable for all postpetition common expense obligations in connection with the unit.

OVERVIEW: Although the debtor acknowledged that the debt for postpetition condominium fees was nondischargeable under 11 U.S.C.S. § 523(a)(16) as long as the debtor held a legal, equitable, or possessory ownership interest in the unit, the debtor contended that his interest in the condominium unit terminated when he declared his intention to surrender it The **bankruptcy** court held, however, that the debtor's surrender of the unit only relinquished his possessory interest in the unit, and the debtor retained legal title to the unit. The fact that the debtor stated the intent to surrender the condominium unit and acted on that intent did not alter the debtor's status as the title holder of the unit, and thus the postpetition condominium fees and assessments arising while the debtor remained the record owner of the unit were not dischargeable.

OUTCOME: The manager's motion for relief from the stay was granted.

CORE TERMS: condominium, postpetition, surrender, condominium unit, dischargeable, collateral, equitable, record owner, possessory interest, ownership interest, possessory, mortgage, common areas, personally liable, collection efforts, nondischargeable, prepetition, surrendered, unpaid, notice, occupy

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > General Overview

HN1 11 U.S.C.S. § 523(a)(16) provides that a **bankruptcy** debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the **bankruptcy** petition is filed as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in the unit. This section applies to Chapter 7 and Chapter 11 debtors generally and to Chapter 12 and Chapter 13 debtors only in the event of a hardship discharge under 11 U.S.C.S. §§ 1228(b), 1328(b) respectively. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > General Overview

Bankruptcy Law > Debtor Benefits & Duties > General Overview

HN2 When a **bankruptcy** debtor surrenders collateral pursuant to 11 U.S.C.S. § 521(a)(2)(B), he relinquishes only his possessory interest in the property. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Relief From Stays > General Overview

HN3 See 11 U.S.C.S. § 362(d).

COUNSEL: **[*1]** For Kenneth Ames, Debtor: David G. Baker, Boston, MA; Osborn N Nzepuome, Law Office Of Osborn N. Nzepuome, Medford, MA.

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

For Janice G. Marsh, The Marsh Law Firm, PC, Trustee: Janice G. Marsh, The Marsh Law Firm, PC, Worcester, MA.

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

OPINION BY: Melvin S. Hoffman

OPINION

MEMORANDUM OF DECISION ON MOTION FOR RELIEF FROM STAY

Kenneth Ames, the debtor in this Chapter 7 case, is the record owner of condominium unit number 262 at 178 Wellman Avenue, Chelmsford, Massachusetts. The condominium is managed by the Williamsburg Condominium No. 1 Trust (the "Trust"). Prior to December 30, 2010, when he filed his petition for relief under Chapter 7 of the **Bankruptcy** Code, 11 U.S.C. §§ 101-1532, the debtor ceased making monthly payments to the Trust for his share of common areas fees and assessments and vacated the unit. On January 2, 2011 the debtor filed a statement of intent in accordance with **Bankruptcy** Code § 521(a)(2)(A) stating his intention to surrender the unit. On January 10, 2011, the Trust filed a motion seeking relief from the automatic stay provisions **[*2]** of **Bankruptcy** Code § 362 to exercise its contractual and statutory rights against the unit and the debtor, including (i) establishing its statutory lien on the unit for unpaid condominium fees and assessments under Mass. Gen. Laws ch. 183A, § 6,[1] (ii) realizing on its lien by public auction sale and (iii) seeking to hold the debtor personally liable for all postpetition common expense obligations to the Trust in connection with the unit. The debtor opposes the motion with respect to the Trust's third request.[2]

FOOTNOTES

1 Mass. Gen. Laws ch. 183A, § 6 provides that a condominium association such as the Trust acquires a lien against the units in the condominium for its fees and assessments from the time they become due. The association may begin collection efforts after a fee or assessment has been delinquent for 60 days, and may enforce its lien by filing a civil action in superior court in accordance with Mass. Gen. Laws ch. 254, §§ 5-5A and, assuming certain preliminaries are accomplished, the lien will have priority over all liens on the unit except tax liens, a first mortgage recorded before the delinquency arose and liens which pre-date the condominium master deed. The portion of the lien **[*3]** that represents up to six months of common area expenses plus reasonable costs and attorneys' fees up to $2500 has priority even over the first mortgage on the unit. This priming lien does not, however, include amounts owed for special assessments, late charges, penalties and the like.

2 By order dated February 17, 2011, I granted the Trust's motion for relief from stay in part, permitting it to proceed with its collection efforts for the purpose of establishing its lien and selling the unit, while reserving judgment on the Trust's request to hold the debtor personally liable for postpetition fees and assessments.

HN1 **Bankruptcy** Code § 523(a)(16) provides that a debtor shall not receive a discharge for condominium fees and assessments that become due and payable after the **bankruptcy** petition is filed as long as the debtor or the trustee "has a legal, equitable or possessory ownership interest" in the unit.[3] This section applies to Chapter 7 and Chapter 11 debtors generally and to Chapter 12 and Chapter 13 debtors only in the event of a "hardship discharge" under §§ 1228(b) and 1328(b), respectively. *See In re Danastorg,* 382 B.R. 585, 588 (Bankr. D. Mass. 2008). The Trust argues that because **[*4]** the debtor remains the record owner of the unit, any fees and assessments arising since the date of the Chapter 7 petition remain his personal obligation and are not dischargeable.

FOOTNOTES

3 This seems patently obvious since § 727(b) limits discharge to debts arising prior to the date of the order for relief and the condominium fees and assessments which are subject to the § 523(a)(16) exception to discharge are limited to postpetition assessments. It appears that § 523(a)(16) was intended to preempt any argument that

postpetition fees and assessments should be considered prepetition obligations because they relate to the prepetition past when the debtor acquired the condominium unit and accepted responsibility to pay assessments. *See* *In re Rivera,* 256 B.R. 828, 832 (Bankr. M.D. Fla. 2000) .

The debtor maintains that his interest in the unit terminated on January 2, 2011, when he declared his intention to surrender it, and that any subsequent fees and assessments are dischargeable. To support his argument the debtor cites *Pratt v. GMAC (In re Pratt),* 462 F.3d 14, 18-19 (1st Cir. 2006), in which the First Circuit Court of Appeals held that a debtor is not required to take any affirmative action **[*5]** to effectuate the surrender of secured property beyond merely making the collateral available to the secured creditor. The debtor argues that by stating his intention to surrender the condominium unit and making it available to the Trust and his mortgage lender, he effectively surrendered his legal, equitable and possessory interest in the property within the meaning of **Bankruptcy** Code § 523(a)(16), rendering any subsequent condominium fees and assessments dischargeable.

Pratt does not go where the debtor attempts to take it. In *Pratt* the First Circuit was called upon to determine how a debtor carried out his or her duty to surrender collateral pursuant to **Bankruptcy** Code § 521(a)(2). Neither *Pratt* nor § 521(a)(2) has anything to say about title, whether legal or equitable, to the collateral. As the First Circuit observed:
the most sensible connotation of "surrender" in the present context is that the debtor agreed to make the collateral available to the secured creditor-viz., to cede his *possessory* rights in the collateral-within 30 days of the filing of the notice of intention to surrender possession of the collateral.

Pratt, 462 F.3d at 18-19 (emphasis added). Thus, the First Circuit **[*6]** held that HN2 when a debtor surrenders collateral pursuant to **Bankruptcy** Code § 521(a)(2)(B), he relinquishes only his possessory interest in the property. Section 523(a)(16), on the other hand, deals with more than mere possessory interest[4] and provides that if a debtor retains either a legal or equitable ownership interest in a condominium unit, any postpetition fees and assessments remain nondischargeable.

FOOTNOTES

4 Section 523(a)(16) was amended in 2005 to significantly broaden the exception to discharge with respect to condominium fees. Prior to the amendment, postpetition fees were dischargeable as long as the debtor did not occupy or rent the property. The legislative history of the 2005 amendment indicates Congress' intention to render postpetition condominium fees nondischargeable "[i]rrespective of whether or not the debtor physically occupies such property. . . during the period the debtor or the trustee has a legal, equitable, or possessory ownership interest." **[*7]** H.R. Rep. No. 109-31,

at 88 (2005). The amendment was enacted to prevent the discharge of postpetition condominium fees and assessments that arise while a debtor who, as in this case, continues to own the unit after vacating it.

The debtor in this case has failed to identify any authority suggesting a connection between the surrender provisions of **Bankruptcy** Code § 521(a)(2) and the exception to discharge established by § 523(a)(16). The fact that the debtor stated the intent to surrender the condominium unit in accordance with § 521(a)(2)(A) and has acted on that intent in accordance with § 521(a)(2)(B) does not alter his status as the title holder of the unit and thus postpetition condominium fees and assessments arising while he remains the record owner of the unit are not dischargeable under § 523(a)(16).

Having concluded that the debtor's liability for postpetition condominium fees and assessments may not be dischargeable does not necessarily mean the Trust is entitled to unconditional relief from stay to pursue the debtor now, especially where the debtor has surrendered the unit and stay relief has been granted with respect to the unit. **Bankruptcy** Code § 362(d) states that HN3"[o]n **[*8]** request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or *conditioning* such stay" (emphasis added). *See In re Unanue-Casal,* 159 B.R. 90, 94 (D.P.R. 1993) (**bankruptcy** courts have full discretion in "fashioning the grant of relief" from stay). I previously granted the Trust partial relief on its motion to enable the Trust to take the steps necessary under state law to enforce its lien on the condominium unit. In light of the foregoing discussion, I will also grant the Trust relief from the stay to seek to hold the debtor liable for non-dischargeable postpetition condominium fees and assessments but with the caveat that the Trust first seek recovery through a sale of the condominium unit. In other words, the Trust will be given relief from the stay to proceed against the debtor individually for any postpetition fees and assessments which are subject to § 523(a)(16) but only for amounts which remain unpaid after a sale of the debtor's condominium unit.

Dated: April 15, 2011

By the Court,

/s/ Melvin S. Hoffman

Melvin S. Hoffman

U.S. **Bankruptcy** Judge

In re WOLVERINE, PROCTOR & SCHWARTZ, LLC, Debtor; LYNNE F. RILEY, CHAPTER 7 TRUSTEE OF WOLVERINE, PROCTOR & SCHWARTZ, LLC, Plaintiff v. TENCARA, LLC, Defendant

Chapter 7, Case No. 06-10815-JNF, Adv. P. No. 07-1179

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

2011 Bankr. LEXIS 1721

May 4, 2011, Decided
May 4, 2011, Filed, Entered

CASE SUMMARY

PROCEDURAL POSTURE: The court had earlier issued a Memorandum and Order in this adversary proceeding, entering judgment in favor of defendant creditor and against plaintiff, the Chapter 7 Trustee, with respect to all counts of the Trustee's Second Amended Complaint, which sought to recharacterize as equity or equitably subordinate the creditor's claim. In its order, the Court scheduled a hearing to determine the allowable amount of the creditor's proof of claim.

OVERVIEW: The issues were whether the creditor was entitled to the default rate of interest set forth in its Secured Promissory Note, and, if so, the date from which that rate of interest should accrue. 11 U.S.C.S. § 506(b) provided that oversecured creditors may receive postpetition interest on their claims. The creditor was oversecured. A majority of courts had determined that the default rate of interest set forth in a contract presumptively applied unless it were to produce an inequitable result. The In re Jack Kline decision set forth a list of factors courts could consider in determining whether an oversecured creditor was entitled to the contractual default rate of interest. Applying those factors, the court stated that the 2 percent difference between the interest rate and the default interest rate was not substantial. Finally, there was justification for the increased rate. Even were the court to have adopted the minority view that default interest was a charge which must be reasonable, it found that the 12 percent default rate was reasonable. Moreover, there was authority in the U.S. **Bankruptcy** Court for the district of Massachusetts to permit payment of the default interest rate.

OUTCOME: The creditor was entitled to interest at the default rate from a date which was 30 days after last business day of the month of June 2006 pursuant to paragraphs 2.2 and 4.1(a) of the Note.

CORE TERMS: default, default rate, interest rate, compensate, oversecured, rate of interest, non-payment, interim, maturity, secured claim, adversary proceeding, proof of claim, interim order, security interests, postpetition, over-secured, non-default, nonpayment, allowance, holder, principal amount, unpaid, Amendment To Proof of Claim, entitled to interest, bankruptcy proceedings, bankruptcy estate, pertinent part, paid in full, contract rate, time value

LEXISNEXIS® HEADNOTES

Hide

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN1 See 11 U.S.C.S. § 506(b).

Bankruptcy Law > Claims > Allowance

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN2 11 U.S.C.S. § 506(b) is an exception to the general rule that interest stops accruing on prepetiton claims on the date of the filing of the **bankruptcy** case, 11 U.S.C.S. § 502(b)(2), as § 506(b) provides that oversecured creditors may receive postpetition interest on their claims. For secured creditors recovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN3 Courts are not in agreement as to whether a creditor is entitled to interest at the default rate provided for in an agreement. A majority of courts has determined that the default rate of interest set forth in the contract presumptively applies unless it were to produce an inequitable result. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN4 Relevant factors in a Chapter 7 case that weigh against a presumptively valid default rate of post-petition interest under the balancing of the equities test in Laymon include: (1) whether the spread between default and non-default interest rates is large; (2) whether the over-secured creditor was obstructing the **bankruptcy** process; (3) whether junior creditors will be harmed if the over-secured creditor is awarded default interest; (4) whether the over-secured creditor ever faced a realistic risk of nonpayment of its debt either before or during the **bankruptcy** proceedings; (5) whether there is evidence that the non-default contract rate was the prevailing market rate of interest at the time of default and thereafter; (6) whether there is any justification for an increased rate to compensate for an assumed increased risk following default; and (7) whether liquidation of assets will benefit parties in interest. This list, however, is not exhaustive and the court may consider other factors it deems pertinent to the particular facts of the case. As such, a **bankruptcy** court has also included a "catch-all" factor so that it may consider other miscellaneous equitable considerations. More Like This Headnote

Bankruptcy Law > Claims > Types > Secured Claims & Liens > Secured Creditors Rights

HN5 In the context of 11 U.S.C.S. § 506(b), there is authority in the U.S. **Bankruptcy** Court for the District of Massachusetts to permit payment of the default interest rate. More Like This Headnote

COUNSEL: **[*1]** For Lynne F. Riley, Chapter 7 Trustee, of Wolverine Proctor & Schwartz LLC, Plaintiff: Janet E. Bostwick, LEAD ATTORNEY, Janet E. Bostwick, PC, Boston, MA; Lynne F. Riley, Riley Law Group LLC, Boston, MA; Michael L. Altman, Altman Riley Esher, Boston, MA.

For Tencara, LLC, Defendant: Lee Harrington, Nixon Peabody LLP, Boston, MA.

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

OPINION BY: Joan N. Feeney

OPINION

MEMORANDUM

I. INTRODUCTION

The issues before the Court are whether the Defendant, Tencara, LLC ("Tencara") is entitled to the default rate of interest set forth in its Secured Promissory Note (the "Note"), and, if so, the date from which the default rate of interest should accrue. For the reasons set forth below, the Court finds that Tencara is entitled to default interest and that the default interest should accrue from 30-days after the last business day of June 2006 pursuant to paragraphs 2.2 and 4.1(a) of the Note.

II. BACKGROUND

On January 21, 2011, this Court issued a Memorandum and Order in this adversary proceeding, entering judgment in favor of Tencara and against the Plaintiff, the Chapter 7 Trustee of the **bankruptcy** estate of Wolverine, Proctor & Schwartz, LLC (the "Trustee"), with respect to **[*2]** all counts of the Trustee's Second Amended Complaint. In its order, the Court scheduled a hearing to determine the allowable amount of Tencara's proof of claim.

The Court incorporates by reference its Memorandum and Order. *See* Riley v. Tencara, LLC (In re Wolverine, Proctor & Schwartz, LLC), B.R. , 2011 Bankr. LEXIS 235, 2011 WL 212834 (Bankr. D. Mass. Jan. 21, 2011). Additionally, the Court incorporates the findings set forth in the parties' "Stipulation Regarding Allowance and Payment of Tencara Claim," which the Court approved on April 20, 2011. Pursuant to their Stipulation, the parties recited the following:
WHEREAS, the Debtor commenced the above **bankruptcy** proceedings ("Proceedings") under Chapter 7 of the **Bankruptcy** Code ("Code") on April 1, 2006;
WHEREAS, Tencara filed a proof of claim in the Proceedings, docketed as claim no. 7, asserting a secured claim in the amount of at least $1,896,476.67 ("Tencara Claim"),
WHEREAS, the Trustee commenced the within adversary proceeding against Tencara, seeking to recharacterize as equity or equitably subordinate the Tencara Claim and other relief;
WHEREAS, on January 21, 2011, the Court made findings of fact and conclusions of law as reflected in a Memorandum **[*3]** and separate order ("Order") granting judgment in the favor of Tencara, denying the relief requested by the Trustee, and setting for further determination the amount of the Tencara Claim;
WHEREAS, on February 17, 2011, Tencara filed the Post-Trial Statement of Claim and Amendment To Proof of Claim No. 7 ("Amended Tencara Claim") pursuant to which Tencara amended its original proof of claim and sought a claim of no less than $4,084,304, comprised of principal, accrued interest at the default rate, and fees and costs (collectively, such fees and costs are referred to as "Costs");
WHEREAS, on February 22, 2011, the Trustee filed a Response to Post-Trial Statement of Claim and Amendment To Proof of Claim No. 7, which has been considered by the Court and the parties to be an Objection to the Amended Tencara Claim ("Objection"), pursuant to which the Trustee objected to the allowance of interest at the default rate and Costs, and sought further detail and information regarding the Costs;
WHEREAS, on February 23, 2011, the Court held a preliminary hearing on the Objection;
WHEREAS, on March 2, 2011, the Court entered an interim order with respect to the Tencara Claim providing for the payment **[*4]** of totaling in the amount of $3,362,753.13 together with interest at the rate of $526.80 per day for each day after March 1, 2011, such payment to include
(i) payment to Tencara LLC in the amount of $2,828,384.23 representing payment in full of principal in the amount of $1,896,476.67 and payment of nondefault interest in the amount of $929,907.56 through March 1, 2011, and payment of any additional interest accruing after March 1, 2011 until payment at the rate of $526.80 per day;
(ii) an interim payment to Nixon Peabody LLP in the amount of $462,176.90 with respect to the attorneys' fees and costs incurred by Tencara, LLC;
(iii) an interim payment to Mesirow Financial in the amount of $72,192 with respect to Costs incurred by Tencara, LLC; and it is further [sic]

WHEREAS, the Interim Order was without prejudice to the rights of the parties regarding the issue of Costs and the application of the default rate of interest;
WHEREAS, the Trustee has made the payments ("Interim Payments") as directed under the Interim Order;
WHEREAS, Tencara has provided the Trustee with documentation regarding the Costs;
WHEREAS, the Trustee and Tencara wish to resolve the disputes regarding the Objection, without **[*5]** the further cost, expense and risk of litigation, but only on the terms set forth herein;
Additionally, the parties agreed to the following:
1. The Trustee agrees that Tencara will be entitled to an allowed claim for Costs in the amount of $1,026,237.79 including $ 881,853.79 representing the fees and expenses of Nixon Peabody, LLP and $144,384 representing the fees of Mesirow Financial.

2. Tencara agrees not to seek any further Costs, expenses or fees from the estate, and agrees the Costs will be limited to the amounts provided in paragraph 1.

3. Tencara reserves the right to assert its entitlement to additional interest based on the application of the default rate and the Trustee reserves the right to dispute that Tencara is entitled to such interest. The parties agree that, unless requested by the Court, the issue of Tencara's entitlement to such additional interest may be determined by the Court based on the pleadings to date and without the requirement for a further hearing.

4. The Trustee agrees to pay the balance of the Costs remaining after application of the Interim Payments (such payments to be $ $419,676.89 to Nixon Peabody, LLP and $72,192 to Mesirow Financial) within five business **[*6]** days of an order approving the Stipulation, provided however that in the event such order is reversed or modified on appeal or otherwise and the amount of such Costs is determined to be less than such payments, such payments are subject to repayment by Tencara, Nixon Peabody LLP or Mesirow Financial as applicable.

In view of the parties' Stipulation, the only issues to be determined by the Court are whether Tencara is entitled to the default rate of interest set forth in the Note and the date of default.

III. THE TERMS OF THE NOTE

The Note provides in pertinent part the following:

2. Interest; Payment At Maturity Date; Optional Prepayment
2.1 Interest. This Note shall bear interest at a rate of ten percent (10%) per annum on the unpaid principal amount hereof from and including the date hereof until such principal amount shall have been paid in full. Interest on this Note shall be computed on the basis of a 360 day year of twelve 30-day months. After the occurrence of an Event of Default, the interest rate shall be increased to twelve percent (12%) per annum.

2.2 Interest Payments. Except as otherwise prohibited by third party subordination arrangements as to which the Holder and the Company **[*7]** both shall have agreed in writing, interest shall be paid with respect to this Note on the last Business Day of each march, June, September and December,

commencing on the last Business Day of March 2005 or on such other three monthly intervals as the holder may specify (each, and "Interest Payment Date"). On (i) the Maturity Date or (ii) the earlier maturity of the accelerated Note pursuant to Section 4 hereof, the Company shall pay all accrued and unpaid interest on the unpaid principal amount of the Note.

***

4. Events of Default
4.1 Defaults on Note. The company shall fail to pay (i) any principal of the Note when the same becomes due and payable, whether upon maturity, acceleration or otherwise or (ii) any interest on the Note for a period of 30 days after the same shall become due and payable.

IV. DISCUSSION

Section 506(b) of the **Bankruptcy** Code provides in pertinent part:
HN1 (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided **[*8]** for under the agreement or State statute under which such claim arose.
11 U.S.C. § 506(b). HN2 Section 506(b) is an exception to the general rule that interest stops accruing on prepetiton claims on the date of the filing of the **bankruptcy** case, *see* 11 U.S.C. § 502(b)(2), as section 506(b) provides that oversecured creditors may receive postpetition interest on their claims. In U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989), the United States Supreme Court explained that for secured creditors "[r]ecovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose." Id. at 241. *See also* Wooley v. Faulkner (In re SI Restructuring, Inc.), 542 F.3d 131, 137 (5th Cir. 2008); In re Courtland Estates Corp., 144 B.R. 5, 9 (Bankr. D. Mass. 1992).

As set forth in the Court's Memorandum, there is no dispute that Tencara is oversecured. *See* In re Wolverine Proctor &Schwartz, LLC, 2011 Bankr. LEXIS 235, 2011 WL 212834 at * 3. On June 28, 2006, the Court conducted an auction of the Debtor's assets which were security for the Note held by Tencara in the face amount of $1.9 million, finding **[*9]** that the successful bidder at the auction was CPM Holdings for the sum of $8.2 million plus additional consideration of $500,000. On July 5, 2006, the Court entered an "Order Approving Sale of Substantially all of the Debtor's Business Assets Outside the Ordinary Course of business, Free and Clear of Liens, Claims and Encumbrances pursuant to 11 U.S.C. § 105 and § 363." Pursuant to the Court's order, "[a]ny Liens consisting of liens and security interests or encumbrances ("Security Interests") . . . attach[ed] to the proceeds of the sale but only to the extent such Security Interests are valid, perfected and enforceable."

HN3 Courts are not in agreement as to whether a creditor is entitled to interest at the default rate provided for in the agreement. A majority of courts has determined that the default rate of interest set forth in the contract presumptively applies unless it were to produce an inequitable result. *See* The Southland Corp. v. Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054, 1059-60 (5th Cir. 1998) (citing, *inter alia*, In re Terry, Ltd. P'ship, 27 F.3d 241, 243-44 (7th Cir. 1994), *cert. denied*, Invex Holdings, N.V. v. Equitable Life Ins. Co. of Iowa, 513 U.S. 948, 115 S. Ct. 360, 130 L. Ed. 2d 313 (1994); **[*10]** and In re Courtland Estates, 144 B.R. 5, 9 (Bankr. D. Mass. 1992)).

In In re AE Hotel Venture, 321 B.R. 209 (Bankr. N.D. Ill. 2005), the court articulated the following standard for the allowance of the default rate of interest:
Generally speaking, interest compensates for the delay in receiving money owed: "the loss of the time value of money." In re Continental Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir.1992); *see also* Art Press Ltd. v. Western Printing Mach. Co., 852 F.2d 276, 278 (7th Cir.1988). GMACCM arrived at the interest rate it believed would compensate for that loss in the Note: a rate of 9.72%. That being so, the difference between the original rate and the 14.72% default rate—a difference of 5%—could not have been meant to perform the usual function of interest. The time value of GMACCM's money, after all, did not magically increase by 5% once AE Hotel defaulted.

Default interest is instead designed to reimburse creditors for "extra costs incurred after default." In re Consol. Props. Ltd. P'ship, 152 B.R. 452, 455 (Bankr. D. Md. 1993); *see also* In re Vest Assocs., 217 B.R. 696, 701 (Bankr. S.D.N.Y. 1998). Default interest, then, is not true interest at all. It is a form **[*11]** of late charge and thus is a "charge" for purposes of section 506(b). *See* Fischer Enters., Inc. v. Geremia (In re Kalian), 178 B.R. 308, 316—17 (Bankr. D.R.I. 1995) (deeming default interest to be a "charge"); *see also* Consol. Props., 152 B.R. at 455 (noting that default interest is "more in the nature" of a charge); *but see* 4 A. Resnick & H. Sommer, Collier on **Bankruptcy** ¶ 506.04[2][b][ii] at 506—112 (15th rev. ed.2004) (stating that "[i]n general, a default rate of interest is properly a form of interest").
In re AE Hotel Venture, 321 B.R. at 215-16 (footnote omitted). The court concluded: "[b]ecause GMACCM's default interest is actually a charge, it must be "reasonable" to be allowed." Id. at 216 (citing 11 U.S.C. § 506(b), and Consol. Props., 152 B.R. at 456), adding "[d]efault interest is not a "reasonable" charge, however, if it compensates for an injury that has already been compensated in some other way under the parties' agreement. Id. (citing In re 1095 Commonwealth Ave. Corp., 204 B.R. 284, 305 (Bankr. D. Mass.1997), and Consol. Props., 152 B.R. at 458).[1] The court in AE Hotel Venture also reasoned:
Although interest is also sometimes charged to compensate for the risk of **[*12]** non-payment, *see* Till v. SCS Credit Corp., 541 U.S. 465, 479—80, 124 S.Ct. 1951, 1961—62, 158 L.Ed.2d 787 (2004), default interest sought under section 506(b) performs no such function. Because a creditor claiming default interest under section 506(b) is oversecured, the creditor will be paid in full. Arguably, in fact, default interest never compensates for any risk of nonpayment. A "risk" is the possibility of experiencing some harm or loss. American Heritage Dictionary 1557 (3rd ed.1992). Once the harm comes about, however, there is no longer any "risk" of it. When a default interest rate comes into effect, there has already been non-payment. Indeed, non-payment is what makes the rate effective in the first place. At that point, non-payment is not a "risk"; it is a reality.
AE Hotel Venture, 321 B.R. at 216 n. 8.

FOOTNOTES

1 Although the court in AE Hotel Venture cited In re 1095 Commonwealth Ave. Corp. for that proposition, the court in In re 1095 Commonwealth Ave, Corp., awarded an oversecured creditor postpetition interest at the default rate. The court rejected the creditor's request for late fees finding that they constituted a second recovery for the same loss covered by the default rate **[*13]** of interest. 204 B.R. at 305 .

In In re Jack Kline Co., Inc., 440 B.R. 712, 745 (Bankr. S.D. Tex. 2010), the court set forth a list of factors that courts may consider in determining whether an oversecured creditor is entitled to the contractual default rate of interest. It stated:
HN4 Relevant factors in a Chapter 7 case that weigh against a presumptively valid default rate of post-petition interest under the balancing of the equities test in Laymon [Bradford v. Crozier (In re Laymon), 958 F.2d 72 (5th Cir. 1992)] include: (1) whether the spread between default and non-default interest rates is large; (2) whether the over-secured creditor was obstructing the **bankruptcy** process; (3) whether junior creditors will be harmed if the over-secured creditor is awarded default interest; (4) whether the over-secured creditor ever faced a realistic risk of nonpayment of its debt either before or during the **bankruptcy** proceedings; (5) whether there is evidence that the non-default contract rate was the prevailing market rate of interest at the time of default and thereafter; (6) whether there is any justification for an increased rate to compensate for an assumed increased risk following default; and **[*14]** (7) whether liquidation of assets will benefit parties in interest. *See* Yazoo, 2009 Bankr. LEXIS 2599, 2009 WL 2857863 at *3 & n. 2 (citing Southland, 160 F.3d at 1060); Sheppley, 62 B.R. at 278—79. This list, however, is not exhaustive and the court may consider other factors it deems pertinent to the particular facts of the case. Southland, 160 F.3d at 1060 ("[The] suggestion that a balancing of the equities requires

resort to a particular list of factors is by definition flawed. The very purpose of equity is to exalt the individual characteristics of a case over law's hard and fast rules."). As such, this Court will also include a "catch-all" factor so that it may consider other miscellaneous equitable considerations. 440 B.R. at 745-46 (footnote omitted).

Applying those factors to the instant case, the 2% difference between the interest rate and the default interest rate is not substantial. Tencara did not obstruct the **bankruptcy** process. Indeed, it facilitated that process by entering into a Borrowing Stipulation with the Chapter 7 Trustee pursuant to which it agreed to advance up to $105,000 to meet certain expenses to maintain and preserve the assets of the **bankruptcy** estate. *See* In re Wolverine, Proctor & Schwartz, LLC, 2011 Bankr. LEXIS 235, 2011 WL 212834 at *2; **[*15]** *see also* Borrowing Stipulation dated June 2, 2006 between the Chapter 7 Trustee and Tencara, which the Court approved on June 7, 2006. With respect to the third factor, harm to creditors, the Court finds that any increase in the amount of Tencara's secured claim diminishes the funds available to distribute to priority and unsecured creditors.

From the commencement of an adversary proceeding against it by the Chapter 7 Trustee on May 1, 2007 and during the four years of litigation, Tencara faced a realistic risk of nonpayment of its debt during the **bankruptcy** case. The Court was presented with no evidence that the non-default contract rate was the prevailing market rate of interest at the time of the default. Nevertheless, the Court takes judicial notice that the default rate of interest is the same as the rate of interest added to judgments for damages in contract actions under Massachusetts Law. *See* Mass. Gen. Laws ch. 231, § 6C.

Finally, the Court concludes there is justification for the increased rate of interest. Even were this Court to adopt the minority view that default interest is a charge which must be reasonable, the Court finds that the 12% default rate is reasonable. Moreover, **[*16]** HN5 there is authority in the **bankruptcy** court for the district of Massachusetts to permit payment of the default interest rate. *See* In re 1095 Commonwealth Ave. Corp., 204 B.R. at 305; In re Courtland Estates Corp., 144 B.R. at 9; In re White, 88 B.R. 494, 498 (Bankr. D. Mass. 1988). Unlike the circumstances in In re White, 88 B.R. 498 (Bankr. D. Mass. 1988), the contractual default rate is neither a penalty nor unconscionable.

V. CONCLUSION

Weighing the relevant factors, the Court finds that Tencara is entitled to interest at the default rate from a date which is 30 days after last business day of the month of June 2006. At that time, the Chapter 7 Trustee had sold substantially all the assets of the Debtor and the Court's order of July 5, 2006 was a final order.

By the Court,

/s/ Joan N. Feeney

Joan N. Feeney

United States **Bankruptcy** Judge

Dated: May 4, 2011

---

*2011 U.S. App. LEXIS 8185, **

IN RE: BRUCE E. THUNBERG, Debtor. BRUCE E. THUNBERG, Appellant, v. MARC D. WALLICK, Appellee.

No. 10-1705

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

2011 U.S. App. LEXIS 8185

April 21, 2011, Decided

PRIOR HISTORY: [*1]
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. William E. Smith, U.S. District Judge.
Thunberg v. Wallick, 2010 U.S. Dist. LEXIS 44050 (D.R.I., May 4, 2010)

DISPOSITION: Affirmed.

CORE TERMS: inferences drawn, alimony, bankruptcy petition, accelerated, revocation, revoked, settlement agreement, property settlement, designated, revoking, ex-wife

COUNSEL: Christopher M. Lefebvre with whom Claude Lefebvre, Christopher Lefebvre, P.C. was on brief for appellant.

Andrew S. Richardson with whom Boyajian, Harrington & Richardson was on brief for appellee.

JUDGES: Before Torruella, Boudin and Lipez, Circuit Judges.

OPINION

Per Curiam. Bruce Thunberg filed a Chapter 7 **bankruptcy** petition in August 2000, 11 U.S.C. §§ 701-784 (2006), and Marc Wallick was appointed trustee. An order by the **bankruptcy** court discharging Thunberg issued in December 2000, but in April 2002, the trustee sought to revoke the discharge on the ground that it had been procured by Thunberg's fraud. Id. § 727(d)(2). In August 2009, the **bankruptcy** court revoked the discharge, and the district court affirmed. [1] Thunberg now appeals from the revocation.

FOOTNOTES

1 Thunberg v. Wallick, CA. No. 09-419 S, 2010 U.S. Dist. LEXIS 44050, 2010 WL 1838003 (D.R.I. May 5, 2010); Wallick v. Thunberg (In re Thunberg), 413 B.R. 20 (Bankr. D.R.I. 2009).

At issue is Thunberg's interest derived from a 1997 settlement agreement with his ex-wife incident to their divorce. The settlement agreement specified that, each December **[*2]** for the next 15 years, his former wife would pay Thunberg $30,000--$16,666.66 being designated in the agreement as alimony and $13,333.33 being designated as a property settlement payment. Thunberg's **bankruptcy** petition listed the $160,000 over the remaining 12 years as a property settlement, asserting that it was subject to two liens, and listed the $1,333 per month in alimony as income.

Nevertheless, according to testimony accepted by the **bankruptcy** judge, Thunberg (or his lawyer with Thunberg remaining silent) represented to the trustee that all the payments including the alimony were subject to the liens; he accelerated by private agreement with his ex-wife two of the payments without advising the trustee or the court; he used funds from two sets of payments in part for private purposes; and--it turned out--the liens on which he relied had not properly been perfected. The details are spelled out in the decisions of the **bankruptcy** and district courts and need not be repeated.

Ultimately, the **bankruptcy** court revoked Thunberg's discharge, agreeing with the trustee that Thunberg "acquired property that is property of the estate . . . and knowingly and fraudulently failed to report the **[*3]** acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee," 11 U.S.C. § 727(d)(2); cf. Boroff v. Tully (In re Tully), 818 F.2d 106, 110-12 (1st Cir. 1987). The district court wrote a cogent decision upholding the revocation.

On appeal, Thunberg argues that his actions were at worst honest mistakes. We agree that Thunberg largely avoided explicit false statements and that the finding of fraudulent intent depends in part on seeing a pattern of evasion and silence in the face of culpable knowledge and in part on inferences drawn from Thunberg's conduct. But the perception and inferences are rational, and there is nothing close to clear error, which is the test on review of factual findings, Gannett v. Carp (In re Carp), 340 F.3d 15, 21 (1st Cir. 2003).

Thunberg says that the **bankruptcy** court's understanding was flawed by a mistaken belief that no security interests covered the payments; this is doubtful, but in any event Thunberg allowed the trustee and the court to believe that he was turning over whatever he received to secured creditors, which was not true, and he withheld knowledge of the accelerated payments. Further payments to the estate **[*4]** shortly before the trial did not undo Thunberg's earlier conduct and omissions. Olsen v. Reese (In re Reese), 203 B.R. 425, 431-32 (Bankr. N.D. Ill. 1997).

Thunberg also suggests (1) that the **bankruptcy** judge conflated the standard for denying a discharge with that for revoking a discharge and (2) that the factual inferences drawn do not support a holding of deliberate misconduct. There is no indication of the former; and, as to the latter, the ultimate findings met the statutory standard for revoking a discharge, and the factual inferences drawn were reasonable.

Affirmed. 

---

*2011 Bankr. LEXIS 1608, **

In re: Lincoln Millwork, Inc., Debtor

Chapter 7, Case No. 10-21952

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

2011 Bankr. LEXIS 1608

April 28, 2011, Decided

JUDGES: **[*1]** James B. Haines, Jr., U.S. **Bankruptcy** Judge.

OPINION BY: James B. Haines, Jr.

OPINION

Order on Final Fee Application of Debtor's Counsel

Molleur Law Office (Molleur) has filed its first and final application for fees and expenses in this short-lived attempt at reorganization. Notwithstanding the scant twenty-one day run for the debtor's Chapter 11 case, counsel's requested fees total $14,913.00, with expenses of $1,127.30.

Under the Code [1] **bankruptcy** judges are given broad discretion in determining reasonable compensation of attorney's fees. See, In re Bosse, 407 B.R. 444, 446 (Bankr. D. Me. 2009). In determining reasonableness, the court considers the nature, the extent, and the value of services, taking into account all relevant factors, including:

(A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional **[*2]** person, whether the person is board certified or otherwise has demonstrated skill and experience in the **bankruptcy** field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. § 330(a)(3).
Further, the court assesses fee requests for unnecessary duplication of services; or services that were not reasonably likely to benefit the debtor's estate or necessary to the administration of the case. 11 U.S.C. 330(a)(4)(A).

FOOTNOTES

1 Reference to the " **Bankruptcy** Code" or the "Code" is to the **Bankruptcy** Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq. Unless otherwise indicated, references to statutory sections are to sections of the **Bankruptcy** Code.

The Chapter 7 trustee and Norway Savings Bank, a secured creditor, have objected to final allowance of Molleur's fees. Neither contends that the work itemized in the application was not actually performed. And neither objects to the hourly rates charged by Molleur's attorneys and paralegal assistants. Rather, this is one of those cases where the objecting parties assert - with considerable persuasiveness - that the effort was not **[*3]** worth the candle, and that the amount of fees sought is unreasonable in light of the benefit realized by the estate.

I must agree. Notwithstanding certain advantages gained by filing, notably the imposition of the automatic stay and the chance to reorganize, this debtor's reorganization effort had no staying power. The debtor filed its petition on November 24, 2010; its schedules and statements on November 30, 2010; and filed its own motion to convert the case to Chapter 7 on December 13, 2010. Thus, functionally, the debtor's reorganization attempt lasted less than three weeks. I cannot conceive that the handwriting was not writ large on the wall from the very beginning. It was counsel's duty to read it and to manage the case to conserve, rather than to expend, the debtor's dear resources.

I realize that fault-finding with counsel's efforts should focus on the reasonableness and necessity of services performed *at the time of their performance*. But if a quarterback elects to hurl a fourth-down Hail Mary pass, he cannot effectively question those who challenge his judgment when the pass goes incomplete or is intercepted.

I have considered the parties' positions, and have reviewed Molleur's **[*4]** application, the justifications for it, and the subsequent objections in detail. I will allow counsel $2,500.00 for prepetition services and $2,500.00 for post-petition, pre-conversion services. Added to that total fee award of $5,000.00, I will include the unchallenged $1,127.30 sought for reimbursement of expenses, totaling an allowance of $6,127.30.

The allowance is final, but payment (or application of funds held by counsel to answer for it) must await further order in the course of the Chapter 7 case.

Dated: April 28, 2011

/s/ James B. Haines, Jr.

James B. Haines, Jr.

U.S. **Bankruptcy** Judge