

## First Circuit Bankruptcy Case Summaries

### 8.13.10

***Motta v. Andre, 2010 Bankr. Lexis 2405 (BAP 1st Cir. 8/10/10)(Judges Haines, Lemoutte & Tester, Per Curiam).***

Bankruptcy Appellate Panel affirmed the Bankruptcy Court's denial of the Chapter 7 trustee's request to avoid a creditor's mortgage. Debtor had executed a note and mortgage in 1997, and when the note became due in 2007, executed a new note and mortgage to extend the final balloon payment. Creditor failed to record the new note and mortgage which the trustee argued was avoidable, trustee standing as a bona fide purchaser under 11 U.S.C. Section 544(a)(3) Court found, which was upheld on appeal, that the 2007 mortgage was not a novation but rather a re-amortization of the existing debt, which mortgage was still of record.

***Concepcion v. Concepcion, 2010 Bankr. Lexis 2426 (BAP 1st Cir. 8/10/10)(Judges Vaughn, Boroff, Kornreich, Per Curiam).***

Creditor appealed the Bankruptcy Court's denial to allow it to file an untimely claim in the debtor's Chapter 11 case. Because the Bankruptcy Court erroneously concluded that the bankruptcy rules do not allow the application of equitable principles to late-filed claims, the Bankruptcy Appellate Panel remanded the matter for further findings and conclusions consistent with the case of *Pioneer Inv. Serv. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993).

***Clemente v. Nickless, 2010 U.S. Dist. Lexis 82801 (D. Mass. 8/11/10)(Nathaniel M. Gorton, District Judge).***

Appeal concerned whether the debtor had an equitable interest in a parcel of real estate, District Court reversing the Bankruptcy Court's finding that such an interest existed based upon a resulting trust. District Court reviewed the legal and factual proofs for an express trust, constructive trust and resulting trust and found none applied.

***Rothrock v. Turner, 2010 U.S. Dist. Lexis 82157, (D. Maine 8/12/10)(John A. Woodcock, Jr., Chief District Judge).***

Motion for reconsideration of the District Court's upholding the Bankruptcy Court's grant of summary judgment was denied, as the Court did not err and the movant made new arguments not previously advanced. At issue was loss of perfection of a stock certificate, the proceeds of same and whether the monetary proceeds were impermissible post-petition transfers.

***U.S. v. Beninati, 2010 U.S. Dist. Lexis 80079 (D. Mass. 8/9/10)(Nathaniel M. Gorton, District Judge).***

Summary judgment granted to the government, holding that the debtor's federal income tax liability was excepted from discharge under 11 U.S.C. Section 523(a)(1)(C) because the uncontroverted evidence showed that the debtors willfully evaded their income tax liabilities such as using a trust to buy and sell real estate to hide the transfers from the IRS, dealing in cash, living a lavish life style, making frivolous offers of compromise to the IRS and filing late returns.

***In re Escribano & Co., Inc., Chapter 11 Debtor, 2010 Bankr. Lexis 2315, (Bankr. D.P.R. 8/3/10) (Brian K. Tester, Bankruptcy Judge).***

Bank's claim to consigned funds found subordinate to IRS as IRS notice of tax lien was appropriately filed.

***In re Ski Market Ltd., Inc., Chapter 11 Debtor, Case No. 09-22502-HJB (Bankr. D. Mass. 8/25/10)(Henry J. Boroff, Chief Bankruptcy Judge)[unreported cases found on Court's web site].***

Court regrettably denied payment to counsel, as Supreme Court and local precedent would not allow Counsel for the Chapter 11 debtor to be compensated for services rendered to the debtor after conversion to Chapter 7 from a flat fee retainer created after the commencement of the bankruptcy case.

***In re Butts, Chapter 13 Debtor, Case No. 10-40538-MSH (Bankr. D. Mass. 8/25/10)(Melvin S. Hoffman, Bankruptcy Judge)[unreported cases found on Court's web site].***

Chapter 13 debtor allowed to retain special counsel to investigate potential claims against the second position lender, over the objection of the lender.

***In re Pires, Chapter 13 Debtor, Case No. 09-18708-FJB (Bankr. D. Mass. 8/24/10)(Frank J. Bailey, Bankruptcy Judge)[unreported cases found on Court's web site].***

Court sustained creditor's objection to debtor's second amended plan, and ordered the debtor to file a third amended plan because the plan treatment was vague and contradictory, and was unclear as to the applicable interest rate being paid, thus not reaching the substance of the objection as to whether a hybrid plan was permissible under the *McGregor* line of cases.

***In re Sarner, Chapter 13 Debtor, Case No. 10-17487-JNF (Bankr. D. Mass. 8/19/10)(Joan N. Feeney, Bankruptcy Judge)[unreported cases found on Court's web site].***

Court denied debtor's motion to either jointly administer or substantively consolidate her case to her husband's Chapter 13 case, and granted the bank stay relief. The wife's case had no unsecured debt and a different claims bar date, so consolidating her case to her husband's would diminish what she could pay to her secured and priority creditors; and changing the proof-of-claim bar date would violate due process here. As for stay relief, the bank prevailed in its burden that the property at issue had no equity, and the debtor failed her burden that the property was needed for reorganization as her plan was neither feasible nor confirmable.

***In re Yonjan, Chapter 7 Debtor, Case No. 08-10796-WCH (Bankr. D. Mass. 8/24/10)(William C. Hillman, Bankruptcy Judge)[unreported cases found on Court's web site].***

Debtor moved to reopen his no-asset Chapter 7 case, to list a missing guaranty from his schedules, so that it would be discharged as well, to which the creditor objected. Creditor argued it continued to extend credit, post-bankruptcy, based on the guaranty. Court scheduled the matter for trial to determine whether (1) omission of the guaranty from the debtor's schedules was innocent and (2) whether it is equitable or not to allow the schedules to be amended to include this debt, and thus discharge it. The facts presented were insufficient, absent a trial, to make that determination.

Submitted by:  
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