2016 WL 4165901
United States Bankruptcy
Appellate Panel of the First Circuit.

Joseph M. Curran, Debtor.
Carolyn Privitera, Plaintiff–Appellant,
v.
Joseph M. Curran, Defendant–Appellee.

BAP NO. MW 15–051
|
Bankruptcy Case No. 14–42811–CJP
|
Adversary Proceeding No. 15–04024–CJP
|
August 4, 2016

**Synopsis**
**Background:** Creditor brought adversary proceeding seeking a determination that Chapter 7 debtor's debt to her was nondischargeable. The United States Bankruptcy Court for the District of Massachusetts, Melvin S. Hoffman, J., denied creditor's motion to amend the complaint, and granted debtor's motion to dismiss. Creditor appealed.

**Holdings:** The Bankruptcy Appellate Panel, Deasy, J., held that:

[1] list of collateral attached to debtor's loan agreementwith creditor was not a "statement of financial condition," for purposes of discharge exception for debts obtained through false financial statements;

[2] list of collateral attached to debtor's loan agreementwith creditor was not materially false, for purposes of discharge exception for debts obtained through false financial statements; and

[3] bankruptcy court did not abuse its discretion indenying creditor's motion to amend adversary complaint to add claim that debt fell within the discharge exception for debts obtained by false pretenses, a false representation, or actual fraud.

Affirmed.

Appeal from the United States Bankruptcy Court for the District of Massachusetts, (Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

**Attorneys and Law Firms**

William C. Parks, Esq., on brief for Plaintiff–Appellant.

Joy D. Hotchkiss, Esq., on brief for Defendant–Appellee.

Before Lamoutte, Deasy, and Cary, United States Bankruptcy Appellate Panel Judges.

**Opinion**

Deasy, U.S. Bankruptcy Appellate Panel Judge.

***1** This appeal arises from an adversary proceeding in which Carolyn Privitera ("Privitera") sought a determination that a debt owed to her by the debtor, Joseph Curran ("Curran"), was nondischargeable pursuant to § 523(a)(2)(B).[1] Curran filed a motion to dismiss the complaint for failure to state a claim under Rule 12(b)(6) and Bankruptcy Rule 7012. Privitera objected to the motion, and also sought to amend the complaint to add a count under § 523(a)(2)(A). After a hearing, the bankruptcy court denied Privitera's motion to amend, granted the motion to dismiss, and dismissed the complaint. Privitera appealed. For the reasons set forth below, we **AFFIRM.**

### *BACKGROUND*

#### I. Factual Allegations Contained in the Complaint

In November 2007, Privitera made a loan in the amount of $30,000.00 to Curran to support his landscaping business. At the time, Privitera and Curran were in a romantic relationship. In connection with the loan, Privitera's attorney drafted and the parties executed a written document entitled "Loan Agreement and Promissory Note" ("Loan Agreement"), which consisted of a Loan Agreement, a Promissory Note attached as Exhibit 1.2, and a List of Collateral attached as Exhibit 2.1. Curran was not represented by counsel in connection with the loan.

In Article 2 of the Loan Agreement, entitled "Security and Guarantee," the parties agreed Curran would execute and deliver to Privitera a security agreement "covering the property described in Exhibit 2.1 [the List of Collateral], which would

be "duly recorded and/or filed." In Article 4, entitled "Negative Covenants," Curran agreed he would not "create, incur, assume, or suffer to exist any indebtedness, mortgage, pledge, security interest, encumbrance, lien, or charge of any kind upon the use of any ... property ..., whether owned at the date hereof or hereafter acquired...." Although Privitera alleged her attorney filed a financing statement after the parties executed the Loan Agreement, Curran did not execute a security agreement or other document granting Privitera a security interest.

In drafting the Loan Agreement, either Privitera or her attorney asked Curran to provide a list of property, which Privitera's attorney then incorporated into the List of Collateral. The list of property was "a list of personal property belonging to Curran, either by title or by physical possession." It included descriptions of the property and the "cost" of each item. The "cost" of each item represented the purchase price Curran paid, not the resale value of the property or any other valuation. The two pieces of equipment with the highest "costs" were two trucks, a Ford F350 and a Ford F250, with "costs" of $29,767.78 and $34,602.50 respectively. The total "cost" of all the other property was $22,137.86.

***2** At the time of the Loan Agreement, one or both trucks were subject to pre-existing security interests, and, Privitera alleged, the Ford F250 was "titled to the lender" rather than to Curran.[2] The List of Collateral did not mention the pre-existing security interests in the trucks, or that Curran did not have title to one of the trucks. Privitera alleged Curran was aware of the existing loans on the trucks, but did not tell her. At the time he executed the Loan Agreement, Curran intended to use some of the loan proceeds to "catch up on late payments [on] his loans for the trucks" and "used some of the loan proceeds ... for this purpose." If the full "cost" of the trucks had been available as security, Privitera asserted, the Loan Agreement "would have been fully secured when executed."

Privitera alleged she "relied on Curran's representations, including his offer of property as security on Exhibit 2.1 [the List of Collateral], in making the loan," and she would not have made the loan had she known the trucks were not available as security. She also asserted her brother had recently died, and she had no experience with the business of making loans.

After the parties executed the Loan Agreement, Privitera tendered the principal amount of the loan to Curran, using funds she obtained by using her credit card. Curran subsequently defaulted on his repayment obligations under the Loan Agreement, and Privitera had to repay the credit card debt herself. Privitera sued Curran in state court and, in March 2014, she obtained a default judgment against him in the amount of $137,030.78.

**II. The Bankruptcy Case** Curran filed a chapter 7 petition in December 2014.

Thereafter, Privitera filed a complaint seeking a determination that Curran's debt to her was nondischargeable under § 523(a)(2)(B).[3] In the complaint, Privitera asserted: (1) Curran had made a statement in writing regarding his financial condition, namely, that he "could offer two trucks as security" for the loan; (2) the statement was materially false because it "substantially misrepresented the amount of property that was available to secure" the loan, "failed to disclose pre-existing security interests in one or both trucks" and that "he did not have the title to one of the trucks," and because the "cost" provided for the trucks had "almost no relationship to his amount of equity in them"; (3) she reasonably relied on Curran's misrepresentation because she had no experience with business loans, had no reason to disbelieve him, had no knowledge of the truck loans, was grieving her brother's death, and was advised by an attorney in the transaction; (4) Curran knew of the preexisting security interests in the trucks and that one truck was not titled to him, and, therefore, made the statement with the intent to deceive; and (5) she "suffered a detriment due to her reliance, in the loss of the principal amount she loaned to Curran, plus interest, collections costs, and damage to her credit rating." Curran answered the complaint and asserted a counterclaim against Privitera, alleging, among other things, she had filed the complaint in bad faith and she had failed to perfect any alleged security interest she had in his property.[4]

***3** Thereafter, Curran filed a motion to dismiss the complaint ("Motion to Dismiss") for failure to state a claim under Rule 12(b)(6) and Bankruptcy Rule 7012(b), arguing, among other things, the List of Collateral did not constitute a statement regarding his financial condition as required under § 523(a)(2)(B). Privitera opposed the Motion to Dismiss and moved to amend her complaint to add a count under § 523(a)(2)(A) ("Motion to Amend").[5] In his response, Curran argued the complaint failed to meet

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the required elements under both § 523(a)(2)(A) and § 523(a)(2)(B).

The bankruptcy court held a hearing on the various motions on August 27, 2015. After hearing arguments from the parties, the bankruptcy court ruled as follows:

> The failure of the plaintiff to have [ ] properly perfected a security interest in these vehicles is at the heart of this whole situation. I didn't see it when the complaint was filed. I don't see it now. The [ ] standards for nondischargeability under [§] 523(a) include that ... the creditor's reliance was justifiable and the creditor's reliance here was not justifiable because it was her obligation to do her part of the deal, which was to get a security interest in the first place and without having gotten a security interest it doesn't matter what the misrepresentation was because ... even if he did misrepresent to her the status of the liens on the collateral, so what? She didn't have a lien herself. So how could she have been hurt by the misrepresentation?
>
> So I am going to grant the motion to dismiss the complaint. I'm going to deny the motion to amend the complaint to add the other count because it's futile. I don't think it will survive a motion to dismiss as well because as I pointed out earlier, the [ ] representation in the ... new count is that he failed to reveal the prior security interest. It doesn't say that he told her that ... these assets were unencumbered. And that would ... be the misrepresentation that might give rise [to a claim], but I ... would say that the fact that she didn't do her part and get her encumbrance perfected would be fatal, in any case.
>
> ***4** So I don't, I just don't see that this is a [§] 523(a) case, ... and I'm going to dismiss it.

After the hearing, the bankruptcy court entered an order denying Privitera's Motion to Amend ("Order Denying Motion to Amend") and an amended order granting Curran's Motion to Dismiss ("Order Granting Motion to Dismiss").[6] This appeal followed.

### *JURISDICTION*

**[1] [2]** We have jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. *See* 28 U.S.C. § 158(a)(1). Generally, an order granting a motion to dismiss an adversary proceeding is a final order. *Gonsalves v. Belice (In re Belice),* 480 B.R. 199, 203 (1st Cir. BAP 2012) (citation omitted). Although the bankruptcy court indicated dismissal of the adversary proceeding would not occur until after a ruling on Privitera's counsel's fees in connection with dismissal of the counterclaim, that does not prevent the Order Granting Motion to Dismiss from being final. *See Budinich v. Becton Dickinson & Co.,* 486 U.S. 196, 202, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988) ("[A]n unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."); *House of Flavors, Inc. v. TFG–Michigan, L.P.,* 700 F.3d 33, 36 (1st Cir.2012) ("[A] request for statutory attorneys' fees after a judgment is entered does not render the judgment on the merits non-final or toll the time for filing an appeal from it.").

**[3]** In addition, although a bankruptcy court's order denying a motion to amend a complaint is usually interlocutory when entered, it becomes final upon the entry of an order dismissing the case. *See Sullivan v. Costa (In re Costa),* BAP No. MB 12–032, 2013 WL 63916, 2013 Bankr.LEXIS 74 (1st Cir. BAP Jan. 3, 2013) (citation omitted). The bankruptcy court has not yet entered an order dismissing the case. Nonetheless, as the Order Granting Motion to Dismiss is sufficiently final for purposes of this appeal, the Order Denying Motion to Amend is also final.[7] Accordingly, we have jurisdiction to hear this appeal.

### *STANDARD OF REVIEW*

**[4] [5] [6] [7]** We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *See Castellanos Group Law Firm L.L.C. v. F.D.I.C. (In re MJS Las Croabas Prop., Inc.),* 545 B.R. 401, 417 (1st Cir. BAP 2016). An order dismissing a complaint for failure to state a claim is subject to de novo review. *See Juárez v. Select Portfolio Servicing, Inc.,* 708 F.3d 269, 276 (1st Cir.2013) (citation omitted); *Banco Santander de P.R. v. López–Stubbe (In re Colonial Mortg. Bankers Corp.),* 324 F.3d 12, 15 (1st Cir.2003) (citations omitted). An order denying a motion to amend a complaint is reviewed for an abuse of discretion. *Zullo v. Lombardo (In re Lombardo),* 755 F.3d 1, 3 (1st Cir.2014) (citations omitted) (internal quotations omitted); *Juárez,* 708 F.3d at 276 (citing *Hatch v. Dep't for Children,* 274 F.3d 12, 19 (1st Cir.2001)). A court's exercise of discretion will be left untouched if " 'the record evinces an arguably adequate basis for the court's decision,' such as futility of the amendment." *Juárez,* 708 F.3d at 276 (quoting

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*Hatch,* 274 F.3d at 19); *see also In re Lombardo,* 755 F.3d at 3 ("While the rules [ ] reflect a liberal amendment policy, we defer to the bankruptcy court's denial of leave to amend if supported by an apparent, adequate reason ....") (citation omitted).

### *DISCUSSION*

### I. Whether the Bankruptcy Court Erred in Granting the Motion to Dismiss.

#### A. Appropriate Legal Standard

***5 [8]** As a preliminary matter, although styled as a motion to dismiss under Rule 12(b)(6), Curran filed the motion after answering the complaint and after Privitera responded to his counterclaim. Thus, he should have filed the motion as one for a judgment on the pleadings under Rule 12(c). *See* Fed. R. Civ. P. 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."); *see also Doe v. United States,* 419 F.3d 1058, 1061 (9th Cir.2005) ("[T]he pleadings are closed for the purposes of Rule 12(c) once a complaint and answer have been filed...."). In any event, the standard for reviewing a motion for judgment on the pleadings is essentially the same as the standard for reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Pérez–Acevedo v. Rivero–Cubano,* 520 F.3d 26, 29 (1st Cir.2008) (citation omitted); *see also Gray v. Evercore Restructuring L.L.C.,* 544 F.3d 320, 324 (1st Cir.2008) (citation omitted).

Under Rule 12(b)(6), a court must dismiss a complaint if it fails to state a claim upon which relief can be granted. In *Ashcroft v. Iqbal,* the Supreme Court explained:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556, 127 S.Ct. 1955.... The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. [*Id.*] Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.* at 557, 127 S.Ct. 1955.

556 U.S. 662, 678–79, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

When considering a motion brought pursuant to Rule 12(b)(6), the court must treat all well-pleaded allegations in the complaint as true, and must view them in the light most favorable to the plaintiff. *Gray,* 544 F.3d at 324. However, the court need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. *Twombly,* 550 U.S. at 555–56, 127 S.Ct. 1955.

Applying this standard to Rule 12(c) motions, the Panel recently stated:

> While a Rule 12(b)(6) motion is "laser-focused on the legal adequacy of the complaint," a motion for judgment on the pleadings under Rule 12(c) examines "the undisputed factual record expanded by the defendant's answer to determine the merits of the claims as revealed in the formal pleadings." *Pimental v. Wells Fargo Bank, N.A.,* C.A. No. 14–494S, 2015 WL 5243325, [at] *4 (D.R.I. Sept. 4, 2015) (citations omitted). " 'In the archetypical case, the fate of such a motion will depend upon whether the pleadings, taken as a whole, reveal any potential dispute about one or more of the material facts.' " *Pollard v. Law Office of Mandy L. Spaulding,* 967 F.Supp.2d 470, 474 (D.Mass.2013), aff'd, 766 F.3d 98 (1st Cir.2014) (quoting *Gulf Coast Bank & Trust Co. v. Reder,* 355 F.3d 35, 38 (1st Cir.2004)). Because a Rule 12(c) motion "calls for an assessment of the merits of the case at an embryonic stage, the court must view the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences" in his favor. *R.G. Fin. Corp. v. Vergara–Nuñez,* 446 F.3d 178, 182 (1st Cir.2006) (citations omitted). "There is no resolution of contested facts in connection with a Rule 12(c) motion: a court may enter judgment on the pleadings only if the properly considered facts conclusively establish the movant's point." *Id.* (citation omitted).

***6** *Best v. Nationstar Mortg. LLC (In re Best),* 540 B.R. 1, 7–8 (1st Cir. BAP 2015).

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Thus, we must determine whether the factual allegations in the complaint set forth a plausible claim that the debt is nondischargeable pursuant to § 523(a)(2)(B).

**B. Whether the Complaint Stated a Claim Under § 523(a)(2)(B).** **[9]** In order to establish a debt is nondischargeable under § 523(a)(2)(B), a creditor must show that:

> (1) the debtor made a statement in writing; (2) the statement concerned the debtor's or an insider's financial condition; (3) the statement was materially false; (4) the creditor actually and reasonably relied on the false statement; and (5) the debtor made the false statement with the intent to deceive the creditor.

*Douglas v. Kosinski (In re Kosinski),* 424 B.R. 599, 608 (1st Cir. BAP 2010) (citing 11 U.S.C. § 523(a)(2)(B)). Failure to establish any one of these elements is fatal to a creditor's claim to relief. *Palmacci v. Umpierrez,* 121 F.3d 781, 787– 88 (1st Cir.1997) (citations omitted).

In pleading the first two elements, Privitera asserted "Curran made a statement in writing regarding his financial condition, namely, that he could offer two trucks as security for a loan." At the hearing before the bankruptcy court, Privitera's counsel confirmed the written statement for purposes of the statute was the List of Collateral attached to the Loan Agreement. Privitera argues the writing qualified as a statement respecting Curran's financial condition under at least one interpretation of the statutory phrase and, therefore, she "plausibly pled" this element.

The Bankruptcy Code does not define the phrase "statement respecting the debtor's financial condition," and courts disagree "whether to interpret the phrase broadly to include any statement that has a bearing on the financial position of the debtor or an insider, or narrowly so as to include only statements providing information as to a debtor's net worth, overall financial health, or an equation of assets and liabilities." *In re Kosinski,* 424 B.R. at 608–609 (collecting cases within the First Circuit); *see also Cadwell v. Joelson (In re Joelson),* 427 F.3d 700, 713–14 (10th Cir.2005) (engaging in detailed analysis of different approaches). Although neither the First Circuit nor the Panel has expressly stated whether the phrase should be interpreted broadly or narrowly (or something in between),[8] the emerging trend within the District of Massachusetts favors a narrow interpretation of the phrase.[9]

***7** When discussing the different approaches, the *Kosinski* panel stated as follows:

> Although a statement of financial condition does not need to be a formal financing statement, it must, in some way, describe the financial condition of the debtor. *See* [*Middlesex Sav. Bank. v. Flaherty (In re Flaherty) ],* 335 B.R. [481,] 489 [ (Bankr.D.Mass.2005) ] (noting that financial statement need not "be a formal document produced by commercial or banking institutions," but "[n]evertheless, it must describe the financial condition of the debtor"). The normal commercial meaning and usage of "statement" in connection with "financial condition" denote either a representation of an entity's overall net worth or an entity's overall ability to generate income. *See* [*Bal–Ross Grocers, Inc. v. Sansoucy (In re Sansoucy) ],* 136 B.R. [20,] 23 [ (Bankr.D.N.H.1992) ]; *Jokay Co. v. Mercado (In re Mercado),* 144 B.R. 879, 883 (Bankr.C.D.Cal.1992); *see also In re Joelson,* 427 F.3d at 714 ("False statements [for purposes of § 523(a) ] are those that purport to present a picture of the debtor's overall financial health," including "those analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities.... What is important is not the formality of the statement, but the information contained within it-information as to the debtor's or insider's overall net worth or overall income flow.").

**[10]** 424 B.R. at 609–10.[10] Thus, whichever approach is applied, the statement must, at the very least, contain some description of the debtor's financial condition.

Privitera argues that under the broad approach, the List of Collateral clearly constituted a statement regarding Curran's financial condition, because it "falsely asserted that the collateral was unencumbered (or failed to disclose that the collateral was encumbered)." In support, she cites *Engler v. Van Steinburg (In re Van Steinburg),* 744 F.2d 1060, 1061 (4th Cir.1984), in which the court held that a debtor's oral misrepresentation that certain property he owned was

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unencumbered at the time he pledged it as collateral for a loan was a statement regarding the debtor's financial condition. Privitera also asserts it is "not clear" whether the List of Collateral would be considered a statement concerning Curran's financial condition under the narrow approach. Nonetheless, she argues that at the motion to dismiss stage, it was only necessary for her to allege facts that support a plausible basis in law for relief, and the List of Collateral constituted a statement regarding Curran's financial condition under at least one interpretation of the phrase.

Curran argues, however, that because the List of Collateral was not a written financial statement and did not otherwise represent his financial condition, it did not constitute a statement concerning his financial condition under either interpretation of the phrase. As a result, Curran argues, Privitera did not sufficiently plead this element of § 523(a)(2)(B) in her complaint.

***8** **[11]** We agree. The list of personal property Curran provided included a description of the property and the "cost" of each item, which represented the item's purchase price. Privitera's attorney turned Curran's list into the List of Collateral. The List of Collateral also had a column titled "cost" (the term was undefined) but did not provide any type of valuation for the property, nor did it affirmatively represent he held title to each piece of property or the property was unencumbered. Clearly, the List of Collateral did not establish Curran's net worth, overall financial health, or ability to generate income, as required under the narrow approach. Nor did the List of Collateral contain an assertion he owned the property free and clear of other liens, as discussed in *Van Steinburg, supra* (holding debtor's false assertion that property he pledged as collateral was unencumbered was a statement regarding his financial condition). Thus, the List of Collateral, on its face, simply indicated the Debtor's ownership, possession, or control of property, and did not have any bearing on his financial position. *See, e.g., Bandi v. Becnel (In re Bandi),* 683 F.3d 671, 676 (5th Cir.2012) ("A representation that one owns ... property says nothing about the overall financial condition of the person making the representation or the ability to repay debt."); *In re Joelson,* 427 F.3d at 715 ("Ownership Representations do not qualify as 'respecting the debtor's ... financial condition.' ") (citations omitted). As such, the List of Collateral did not constitute a statement concerning Curran's financial condition under either interpretation of the phrase and, therefore, Privitera did not sufficiently plead this element of § 523(a)(2)(B) in her complaint.

**[12]** Moreover, even if we determined the List of Collateral could qualify as a statement regarding Curran's financial condition, Privitera's complaint still failed to state a claim for relief under § 523(a)(2)(B) because she did not plead sufficient facts to demonstrate the List of Collateral was materially false.

**[13]** **[14]** "A statement is materially false if it paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit...." *Greene v. Shaw (In re Shaw),* A.P. No. 11–1101–BAH, 2016 WL 1690706, 2016 Bankr.LEXIS 1823 (Bankr.D.N.H. Apr. 25, 2016) (citations omitted). Thus, "materiality is not assessed on the basis on the relative size of the error, but to the degree that it distorts the debtor's financial picture." *Id.* (citing *In re Movshovich,* 521 B.R. at 61).

In the complaint, Privitera alleged the List of Collateral was false because it: (1) misrepresented the amount of property available to secure the loan; (2) did not disclose the encumbrances or status of the title; and (3) revealed the properties' "costs" and not net equity. She did not allege, however, there was an understanding between the parties that Curran was going to pledge unencumbered collateral as security for the loan.[11] Nor did she allege there was a security agreement or a perfected security interest in any of the collateral that would support her claim that Curran pledged the collateral as security.[12] Moreover, Privitera did not allege in the complaint, nor did the Loan Agreement require, that the items on the List of Collateral be unencumbered.[13] As a result, the alleged facts do not establish that Curran's failure to disclose on the List of Collateral that the trucks were encumbered was a misrepresentation by omission.

***9** Moreover, there is no allegation in the complaint that the "costs" set forth in the List of Collateral were not, in fact, what each item cost Curran to purchase, nor is there any indication the listed "cost" of the property was a representation of the "value" of the property or Curran's "equity" in the property. Although Privitera asserted the listed "cost" had "almost no relationship to his amount of equity in them," she did not set forth what Curran's equity was in the property or how the List of Collateral misrepresented those values. In addition, although Privitera asserted the List of Collateral was false because Curran did not, in fact, hold title to one of the trucks identified on the

list, the List of Collateral did not contain any representation Curran had title to each of the items. Thus, even taking the facts alleged in the complaint as true, the List of Collateral was not materially false inasmuch as it merely purported to be what it was— a list of property belonging to Curran, either by title or physical possession, and the purchase price of each piece of property.

As Privitera failed to plead sufficient facts demonstrating the List of Collateral was a materially false statement concerning Curran's financial condition, we need not consider the remaining elements under § 523(a)(2)(B) as the failure to sufficiently plead even one of the elements under the statute dooms the complaint. Thus, we conclude Privitera failed to state a plausible claim for relief under § 523(a)(2)(B), and the bankruptcy court did not err in dismissing the complaint.

## II. Whether the Bankruptcy Court Abused its Discretion in Denying the Motion to Amend.

### A. Leave to Amend

**[15] [16] [17]** Amendment of a complaint is governed by Rule 15(a), applicable to adversary proceedings pursuant to Bankruptcy Rule 7015. Rule 15(a) allows a party to amend its pleading once as a matter of course under certain circumstances not present here. In other circumstances, a party "may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). The bankruptcy court should freely give a party leave to amend the complaint "when justice so requires." *See* Fed. R. Civ. P. 15(a)(2). Leave to amend "should be granted unless the amendment would be futile or reward undue delay." *Abraham v. Woods Hole Oceanographic Inst.,* 553 F.3d 114, 117 (1st Cir.2009) (citation omitted). A proposed amendment is futile if the complaint, as amended, still fails to state a claim upon which relief may be granted. *See id.*; *Glassman v. Computervision Corp.,* 90 F.3d 617, 623 (1st Cir.1996) (citations omitted). As noted above, the bankruptcy court has discretion to grant or deny a motion for leave to amend a complaint, and its exercise of discretion will be left untouched if there is an "arguably adequate basis" for its decision. *See Juárez,* 708 F.3d at 276.

Here, the bankruptcy court determined the proposed amendment to the complaint would be futile as the factual allegations did not set forth a claim under § 523(a)(2) (A). We must determine whether there is an "arguably adequate basis" for the bankruptcy court's decision. *See Juárez,* 708 F.3d at 276 (citation omitted) (internal quotations omitted).

### B. Whether the Complaint Stated a Claim Under § 523(a)(2)(A).

Section 523(a)(2)(A) excepts from discharge debts obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). Statements regarding the debtor's financial condition are expressly excluded from § 523(a)(2)(A) and are only actionable under § 523(a)(2)(B). Thus, § 523(a)(2)(A) and (a)(2)(B) are mutually exclusive. *Mitsubishi Motor Sales of Caribbean, Inc. v. Seda Ortiz,* 418 B.R. 11, 18 (D.P.R.2009) (citation omitted).

An action under § 523(a)(2)(A) involves three distinct categories of misconduct—false pretenses, false representation, or actual fraud–albeit with elements that overlap. *See Diamond v. Vickery (In re Vickery),* 488 B.R. 680, 686–91 (10th Cir. BAP 2013); *Lykins v. Thomas (In re Thomas),* A.P. No. 11–1056 MER, 2013 WL 6840527, at *12 (Bankr.D.Colo. Dec. 27, 2013) (ruling failure to address two of three categories resulted in waiver); *Schafer v. Rapp (In re Rapp),* 375 B.R. 421, 433 (Bankr.S.D.Ohio 2007); *see also Husky Int'l Elecs., Inc. v. Ritz,* ––– U.S. ––––, 136 S.Ct. 1581, 1590, 194 L.Ed.2d 655 (2016) (resolving a case law split and determining "actual fraud" for purposes of § 523(a)(2)(A) applies to fraudulent conveyance schemes despite the absence of a false representation); *Sauer Inc. v. Lawson (In re Lawson),* 791 F.3d 214, 220 (1st Cir.2015) (ruling actual fraud is not limited to fraud effected by misrepresentation) (citation omitted).

***10 [18]** In order to establish a debt is nondischargeable under § 523(a)(2)(A) due to a false representation, the plaintiff must show that:

> (1) the debtor made a knowingly false representation or one made in reckless disregard of the truth; (2) the debtor intended to deceive; (3) the debtor intended to induce the creditor to rely upon the false statement; (4) the creditor actually relied upon the misrepresentation; (5) the creditor's

> reliance was justifiable; and (6) the reliance upon the false statement caused damage.

*In re Kosinski*, 424 B.R. at 615 (citing *McCrory v. Spigel (In re Spigel)*, 260 F.3d 27, 32 (1st Cir.2001); *Palmacci*, 121 F.3d at 786).

**[19]** The requirements for false pretenses "are largely the same, except that requirement of a false representation is replaced by a requirement of a false pretense, which is an implied misrepresentation or a false impression created by conduct of the debtor." *Meads v. Ribeiro (In re Ribeiro),* A.P. No. 11–1188, 2014 WL 2780027, at *9 (Bankr.D.Mass. June 19, 2014) (explaining failure to disclose something debtor was obligated to disclose can constitute a false pretense) (citations omitted); *see also Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur),* 737 F.3d 814, 818 (1st Cir.2013) (explaining a false pretense occurs " 'when the circumstances imply a particular set of facts, and one party knows the facts to be otherwise,' and where the silent party 'may have a duty to correct what would otherwise be a false impression.' ") (citations omitted); *Birch Hollow, LLC v. Tardugno (In re Tardugno),* 510 B.R. 12, 18 (Bankr.D.Mass.2014) (same).

**[20]** Privitera proposed to amend the complaint to add a count under § 523(a)(2)(A) under essentially the same facts as those set forth in the original complaint. She titled this new count "False Pretenses, False Representation, or Actual Fraud," paralleling the language of the statute. Specifically, she alleged Curran made either a knowing false representation or one in reckless disregard of the truth by representing he "could and would offer trucks as security for a loan" even though he was aware they were already encumbered. At the hearing, Privitera offered the false representation was Curran's failure to disclose the encumbrance, either in writing or orally, and that he provided the "cost" of the equipment instead of the "true value."[14] She also alleged in her amended complaint that she "actually relied" on Curran's representations and her reliance was justifiable because she was a "private individual who had never worked for a bank and had no experience making business loans, she was in a romantic relationship with Curran and had no reason to disbelieve him, she had no knowledge of the prior loans ... and she was grieving her brother's death."

The bankruptcy court determined Privitera's characterization of a misrepresentation was unavailing as, although she claimed Curran failed to reveal an encumbrance, she did not allege in the complaint that he had an obligation to do so or that he stated otherwise. It also determined her reliance was not justifiable because even if Curran misrepresented the existence of encumbrances, she did not obtain a lien herself. The bankruptcy court concluded, therefore, that Privitera's failure to obtain a perfected security interest in the trucks doomed her causes of action under § 523(a) and it denied the request to amend. These rulings must remain untouched if there is an "arguably adequate basis" for the bankruptcy court's decision. *See Juárez,* 708 F.3d at 276.

***11** Although the amended complaint is not a model of clarity with respect to which of the three categories of conduct in § 523(a)(2)(A) she relies upon, it is evident Privitera is either arguing that the List of Collateral is a false representation or a false pretense. As to the former, we conclude there was an adequate basis for the court to rule as it did. That is, Curran used the word "cost," and the numbers he placed under that column are consistent with the common definition of the word (i.e. the purchase price).[15] Indeed, the list included in the Loan Agreement prepared by Privitera's attorney identified the numbers provided by Curran as "cost." That Privitera assumed the word meant what she wanted to see in that column (i.e. value or equity) does not make Curran's use of the word a false representation or a representation in reckless disregard for the truth.

From the amended complaint and Privitera's attorney's assertions at the hearing, however, it appears Privitera may also be alleging a false pretense. That is, she claims Curran

however, Curran must have had a duty to correct what heading "cost" over the list of numbers. Privitera's counsel
would otherwise be a false impression, and Privitera could repeated the word "cost" in the List of Collateral. Privitera not
point to anything obligating Curran to disclose the and her counsel assumed the word meant something other assets were
encumbered. *See In re Levasseur,* 737 F.3d at than the common definition of the word, and Privitera 818. Thus, the
record shows an "arguably adequate basis" never suggested they even made a cursory inquiry as to for the bankruptcy
court's determination. whether he too was using a definition other than the one commonly associated with cost (he has
represented he did **[21]** **[22]** **[23]** **[24]** As to Privitera's reliance, justifiablenot). Privitera has never alleged she
asked Curran what

knew she understood the List of Collateral to be a list of unencumbered assets which would be available to her in the event of default, and he had a duty to clarify his use of the word "cost." For there to be a false pretense, reliance is a less demanding standard than reasonable reliance, requiring only that the creditor not " 'blindly [rely] upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.' " *Ojeda v. Goldberg,* 599 F.3d 712, 717 (7th Cir.2010) (quoting *Field v. Mans,* 516 U.S. 59, 71, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) (internal quotations omitted)). Justifiable reliance is a subjective standard, not an objective one. *Id.* (citing *Field,* 516 U.S. at 71, 116 S.Ct. 437). What is justifiable thus depends on the qualities and characteristics of the particular plaintiff and the circumstances of the particular case. *Id.* (citing *Field,* 516 U.S. at 71–72, 116 S.Ct. 437). That said, a person "cannot recover if he blindly relie[d] upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Field,* 516 U.S. at 71, 116 S.Ct. 437 (citation omitted) (internal quotation omitted). Again, the court ruled Privitera would not be able to establish her reliance was justifiable given that she never bothered to take any steps to obtain or perfect a security interest in Curran's assets.

The facts, as Privitera set forth in the proposed amended complaint, are that the parties at the time of the loan were in a position of trust. Curran ran a business and was in debt. While Privitera makes much of the fact that she had no experience in lending money and was unfortunately grieving the loss of her brother she, unlike Curran, was represented by counsel. Her counsel drafted the List of Collateral based solely on the list Curran provided to her. The list Curran provided contained the

Footnotes

he meant by "cost." Neither in the complaint nor at the hearing did Privitera suggest her counsel ever took any steps to verify title or encumbrances, to draft a security agreement, or thereafter to perfect any interests other than to file a financing statement that did not relate back to a security agreement. Although Privitera claims she would not have extended the loan absent the availability of the trucks for security, she never offered why neither she nor her counsel took any steps to guaranty that she had anything more than an unsecured loan. Based upon the foregoing, the record shows an "arguably adequate basis" for the bankruptcy court's ruling that Privitera could not have justifiably relied on the List of Collateral for repayment of the loan, and the ruling must remain untouched.

***12** Thus, we conclude the bankruptcy court did not abuse its discretion in denying the Motion to Amend.

## *CONCLUSION*

For the reasons set forth above, we conclude the bankruptcy court did not err in granting the Motion to Dismiss and it did not abuse its discretion in denying the Motion to Amend. As a result, we **AFFIRM** the bankruptcy court's orders.

### All Citations

--- B.R. ----, 2016 WL 4165901, 62 Bankr.Ct.Dec. 263

1 Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101 *et seq.* All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure. All references to "Rule" shall be to the Federal Rules of Civil Procedure.

2 The hearing transcript reflects the parties' confusion about whether Curran "owned"

the Ford F250 at the time they executed the Loan Agreement. In Massachusetts, the exclusive method of perfecting a security interest in a motor vehicle is through a notation of the lien on a valid certificate of title. *See City of Boston v. Rockland Trust Co.,* 391 Mass. 48, 460 N.E.2d 1269, 1271 (1984) (citing Mass. Gen. Laws ch. 90D, §§ 21, 22, and 26). Therefore, the "owner" of the vehicle is not always the one holding the title to the vehicle.

3 Section 523(a)(2)(B) provides, in pertinent part, as follows:

(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt—

...

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

...

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonablyrelied; and

(iv) that the debtor caused to be made or published with intent to deceive[.] 11 U.S.C. § 523(a)(2)(B).

4 Privitera subsequently moved for a judgment on the pleadings with respect to the counterclaim, arguing it should be dismissed pursuant to the Massachusetts anti–SLAPP statute, Mass. Gen. Laws ch. 231, § 59H. After a hearing, the bankruptcy court granted the motion for judgment on the pleadings, awarded attorney's fees and costs to Privitera, and ordered Privitera to submit an affidavit detailing her attorney's fees and costs. The orders related to the counterclaim are not the subject of this appeal.

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5 In the First Amended Complaint attached to the Motion to Amend, Privitera asserted the identical facts as those in the original complaint, but she added a second count. In Count II, entitled “False Pretenses, False Representation, or Actual Fraud,” Privitera alleged the following: (1) Curran made a “knowing false representation or representation in reckless disregard of the truth to Privitera, namely a representation that he could and would offer trucks as security for a loan from Privitera, while at the same time Curran was aware the trucks were already encumbered by prior security interests”; (2) Curran intended to deceive Privitera because he prepared the list of property himself and failed to reveal the prior security interests or that one truck was not titled to him, he intended to use the loan proceeds to “catch up [on] prior loans,” and he was aware her brother had recently died; (3) Curran induced her reliance upon the false statement because he drafted the list of property for use in the Loan Agreement and provided the list “in order to memorialize the property offered as security for the Agreement,” and she would not have made the loan had Curran not offered collateral as security; (4) she actually relied on Curran's “false statements” in her assent to the Loan Agreement and she would not have made the loan had “Curran not offered collateral as security”; (5) her reliance was justifiable because she never worked for a bank and had no experience making business loans, she was in a romantic relationship with Curran and had no reason to disbelieve him, she had no knowledge of the prior loans on the trucks, and she was grieving her brother's death; and (6) her reliance on Curran's misrepresentations or omissions caused her damage, “including the loss of the principal amount of the loan, plus interest, collections costs, and damage to her credit rating.”

6 The Order Granting Motion to Dismiss provided, among other things: “Dismissal

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of this proceeding will occur upon the disposition of plaintiff's counsel's application for compensation [# 22] and supplemental application."

7 On March 4, 2016, Privitera filed a motion with the bankruptcy court in which she stated the court's award of attorney's fees and costs against Curran had been paid in full. The docket, however, does not reflect entry of an order dismissing the case.

8 In *Norcross v. Ransford (In re Ransford),* 202 B.R. 1, 4 (Bankr.D.Mass.1996), the bankruptcy court eschewed a categorybased analysis in favor of examining the statement and the purpose for which it was sought and made. Privitera refers to this as the "purpose-based approach," but acknowledges that her asserted purpose for the List of Collateral (to provide the value of the property available as collateral) "may not be sufficient to qualify it as a statement concerning the debtor's financial condition."

9 *See, e.g., Associated Receivables Funding, Inc. v. O'Donnell (In re O'Donnell),* 523 B.R. 308, 319–20 (Bankr.D.Mass.2014); *Abramov v. Movshovich (In re Movshovich),* 521 B.R. 42, 57 (Bankr.D.Mass.2014); *USAlliance Fed. Credit Union v. Stinson (In re Stinson),* A.P. No. 09–1217, 2012 WL 359917, at *5 (Bankr.D.Mass. Feb. 2, 2012); *Danvers Sav. Bank v. Alexander (In re Alexander),* 427 B.R. 183, 194 (Bankr.D.Mass.2010).

10 The *Kosinski* panel declined to adopt a specific approach because "the result would [have been] the same regardless of the approach taken." 424 B.R. at 609.

11 Although Privitera's counsel asserted at the bankruptcy court hearing that Curran testified at his Bankruptcy Rule 2004 examination that he "knew that he was being asked to pledge collateral" and that the "understanding between the parties

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was that Mr. Curran was going to pledge certain collateral which was unencumbered as security for the loan," there are no such allegations in the complaint. Moreover, the bankruptcy court could not consider anything outside of the pleadings (such as a Bankruptcy Rule 2004 examination) in the context of a motion to dismiss.

12 Privitera acknowledged at the bankruptcy court hearing that, although she claimed to have filed a financing statement (ostensibly with respect to non-rolling collateral), the financing statement was not backed by a security agreement.

13 Privitera argues Article 4 of the Loan Agreement required that the assets be unencumbered. That section provided, however, that Curran could not further encumber the property after executing the Loan Agreement, and was not a requirement that the assets be unencumbered at the time the agreement was executed.

14 During the bankruptcy court hearing (and for the first time), Privitera's counsel also stated Curran's actions constituted actual fraud and the record supported such a finding based upon *In re Lawson, supra.* In her appellate brief, she suggests Curran's failure to reveal the encumbrances was a misleading omission.

15 Black's Law Dictionary defines "cost" as "[t]he amount paid or charged for something; price or expenditure." *Black's Law Dictionary* 422 (10th ed.2014).

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2016 WL 3681089
Only the Westlaw citation is currently available. United States Bankruptcy Court, D. Puerto Rico.

In re: Industrias Vassallo Inc, Debtor(s)
Vassallo International Group, Inc., Plaintiff
v.
Peter Vazquez Massa, et. als., Defendant(s)

CASE NO. 08–07752
|
Adversary No. 16–00137
|
Signed July 5, 2016

***Attorneys and Law Firms***

Daniel Molina Lopez, Totti & Rodriguez Diaz Law Offices, San Juan, PR, for Plaintiff.

***OPINION & ORDER***

Brian K. Tester, U.S. Bankruptcy Judge

***1** Before the court is Plaintiff Vassallo International Group, Inc.'s ("VIGI") *Emergency Motion Requesting Ex–Parte Relief* [Dkt. No. 9]. In its motion, VIGI is requesting that this court stay the proceedings pending before the Puerto Rico Court of First Instance, Ponce part in cases JPE2015–0383(605) and JPE2015–0467 (605). The urgency of this request stems from the fact that the state court has scheduled a trial on the merits in the above cases to commence on July 6, 2016. VIGI is requesting the stay in order to allow this court to entertain the adversary complaint filed on June 30, 2016 [*See* Dkt. No. 1].

For the reasons discussed below this court concludes that it lacks jurisdiction to hear the complaint.[1] 28 U.S.C. § 1334 provides, in relevant part:

> (a) Except as provided in subsection (b) of this section,the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) ... [N]otwithstanding any Act of Congress thatconfers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

This section provides the bankruptcy court with three distinct jurisdictional bases: all cases filed under 11 U.S.C.; all proceedings "arising under" 11 U.S.C.; and, all proceedings "arising in or related to" 11 U.S.C. This court has no jurisdiction to adjudicate this Complaint as a "case under title 11," because the Plaintiff is not a debtor in this bankruptcy court. Similarly, we lack jurisdiction via the "arising under" provision, because Plaintiff's claims do not constitute a cause of action created by the Bankruptcy Code. In order to entertain VIGI's Complaint, we must find jurisdiction under the "arising in or related to" provision. Such jurisdiction is not unlimited, however. There must be some nexus between the "related" proceeding and the bankruptcy case, such that "the outcome of the litigation potentially could have some effect on the bankruptcy estate, such as altering debtor's rights, liabilities, options, or freedom of action, or otherwise have an impact upon the handling and administration of the bankrupt estate." *In re Boston Reg'l Med. Ctr.,* 410 F.3d 100, 105 (1st Cir. 2005) (internal citations and textual alterations omitted).

At best, the court's jurisdiction to adjudicate a dispute between two non-debtors is tenuous. *In re Shaner,* 96 B.R. 132, 135 (Bankr.S.D.Ohio 1989). Here, the Complaint unambiguously states that VIGI is *not* the successor in interest to Debtor. The Defendants, as stated in the Complaint, are former employees of the Debtor, Industrias Vasallo. The nexus to the Debtor, even recognizing the Plaintiffs' relationship to Industrias Vasallo, is difficult to fathom. Assuming complete success, and/or full recovery for the

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Plaintiff, said recovery would not inure to the benefit of the estate or to its creditors. "In the absence of any tangible effect on the bankruptcy case, bankruptcy courts have regularly concluded that they lack jurisdiction to resolve claims by non-debtors against other non-debtors." *In re Boston Reg'l,* 410 F.3d at 105 "[A] civil proceeding is related to bankruptcy [if] the outcome of that proceeding could conceivably have any effect on the [bankruptcy] estate." *In re G.S.F. Corp.,* 938 F.2d 1467, 1475 (1st Cir.1991) (internal quotations omitted), overruled on other grounds by *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249 (1992); *Pacor, Inc. v. Higgins,* 743 F.2d 984 (3d Cir.1984), overruled on other grounds by *Things Remembered v. Petrarca,* 516 U.S. 124 (1995); *TD Bank, N.A. v. Sewall,* 419 B.R. 103, 105–06 (D.Me.2009); *In re Twinlabs Personal Injury Cases,* 2004 WL435083, *1 (S.D.N.Y.2004) ("The standard for 'related to' jurisdiction over a suit in the posture of [an action against non-debtor third parties] is 'whether its outcome might have any "conceivable effect" on the bankrupt estate.' " (quoting *In re Cuyahoga Equip. Corp.,* 980 F.2d

***2** Where there is an arguable connection, the court should "determine the relative 'greyness' of the various causes of action." *Matter of Tvorik,* 83 B.R. 450, 455 (Bankr.W.D.Mich.1988). In this case there is no "greyness," largely due to the Plaintiff's unequivocal assertion in their own Complaint that they are not the successor in interest to the Debtor. *See also In re Incor, Inc.,* 113 B.R. 212, 218 (D.Md.1990) ("related to" jurisdiction does not exist where there is a speculative or insignificant effect on the administration of the estate); *Wayne Film Systems Corp. v. Film Recovery Systems Corp.,* 64 B.R. 45, 49 (N.D.Ill.1986) (the test for "related to" jurisdiction is "whether the outcome of the proceedings could have an effect on the administration of the estate"). In this proceeding, the Debtor is not a party to the proceeding. Accordingly, we conclude that bankruptcy court jurisdiction does not exist over this proceeding. All other pending motions related to this Adversary Proceeding are DENIED as moot. The case is dismissed. The Clerk to enter Judgment consistent with this opinion and order and close the adversary proceeding forthwith.

SO ORDERED

***All Citations***

Slip Copy, 2016 WL 3681089

Footnotes 1 The issue of whether a bankruptcy court should abstain from hearing a particular proceeding can be raised sua sponte by the bankruptcy court or by motion of a party. 28 U.S.C. § 1334(c)(1)-(2); *see also Sherer v. Carroll,* 150B.R. 549 (D.Vt.1993); *In re Southmark Storage Assoc. Ltd. Partnership,* 132 B.R. 231 (Bankr.D.Conn.1991).

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2016 WL 4410065
United States Court of Appeals,
First Circuit.

In re: Oak Knoll Associates, L.P., Debtor
Robert Harris, Appellant,
v. Rosa Scarcelli and Oak Knoll Associates, L.P.,
Appellees.

No. 15-2189
|
August 19, 2016

### *Synopsis*

**Background:** Real estate broker asserted claim for commission when debtor's property was eventually sold to prospective purchaser that he had identified. Debtor moved for summary judgment, arguing that there was no material dispute of fact and that broker was, as matter of law, not owed a commission. The United States Bankruptcy Court for the District of Maine granted debtor's motion, and broker appealed. The District Court, Jon D. Levy, J., 2015 WL 5542537, affirmed. Broker appealed.

**Holdings:** The Court of Appeals, Howard, Chief Judge, held that:

[1] provision in non-exclusive, six-month listing agreementcould not be interpreted in isolation, as obligating seller to pay broker a commission upon the mere acceptance of purchase offer;

[2] lack of evidence of any purchase negotiations withinrequisite time of seller's acceptance of purchase offer prevented broker from claiming right to commission; and

[3] bankruptcy court could not exercise authority grantedto it to issue “necessary or appropriate” orders in order to allow claim for commission to real estate broker who identified prospective purchaser that eventually purchased debtor's property.

Affirmed.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE [Hon. Jon D. Levy, U.S. District Judge]

### *Attorneys and Law Firms*

James F. Molleur, with whom Molleur Law Office was on brief, for appellant.

Daniel L. Cummings, with whom Norman, Hanson & DeTroy, LLC was on brief, for appellee Rosa Scarcelli.

Before Howard, Chief Judge, Torruella and Barron, Circuit Judges.

### *Opinion*

HOWARD, Chief Judge.

***1** Appellant Robert Harris seeks to recover a real estate broker's commission that he claims is owed to him by Appellees Rosa Scarcelli and Oak Knoll Associates, L.P. (collectively, “Oak Knoll”). Concluding on these facts that Oak Knoll is not contractually obligated to pay Harris a commission and that Harris has failed to identify a basis upon which he would be entitled to equitable relief, we affirm the grant of summary judgment in favor of Oak Knoll.

## I. Background

Oak Knoll Associates, L.P., is a limited partnership whose general partners at all relevant times consisted of Pamela Gleichman and Rosa Scarcelli. This case began when the partnership sought to sell some apartment buildings that it owned in Norwalk, Connecticut. To that end, Oak Knoll enlisted the services of Robert Harris, a real estate broker.

The parties accordingly entered into an agreement dated May 16, 2011 (“the listing agreement”). The listing agreement was to remain in effect for six months and outlined two scenarios under which Oak Knoll would be obligated to pay Harris a commission for his services.[1] First, Harris could earn a commission if the property were to be sold during the six-month term of the listing agreement. Second,

Harris could earn a commission if an offer to purchase or lease the property were to be accepted during the six-month term or within six months of the termination of the listing agreement (and if the accepted offer in fact resulted in a sale). The listing agreement also provided that if negotiations continued after the sixmonth term, the listing agreement would be automatically renewed until the conclusion of those negotiations. A rider to the listing agreement, in turn, provided that Harris's commission for selling the property would be 4.8 percent.

Harris subsequently located a potential buyer, Navarino Capital Management, LLC ("Navarino"). On October 11, 2011, Navarino and Oak Knoll executed a purchase and sale agreement ("2011 P&S"), whereby Navarino agreed to purchase the property from Oak Knoll for $6,300,000. The deal gave Navarino 45 days to inspect the property and allowed Navarino to terminate the deal for a number of reasons not relevant for present purposes.

In November 2011, Navarino requested and received the first in a series of extensions to the inspection period. Navarino had discovered that the property was subject to a number of restrictive covenants that Oak Knoll had agreed to at the behest of the Connecticut Housing Finance Authority when Oak Knoll first purchased the property in 1988. On February 24, 2012, Navarino wrote to Oak Knoll, offering to purchase the property at a reduced price in light of those covenants.

Oak Knoll did not accept this revised offer. Instead, intra-partnership disputes spilled into federal court: on February 28, 2012, Scarcelli sued Gleichman in United States District Court for the District of Maine. Scarcelli obtained a default judgment against Gleichman and the district court in turn issued a permanent injunction in Scarcelli's favor. See Scarcelli v. Gleichman, No. 2:12– CV–72–GZS, 2012 WL 1965681 (D. Me. May 31, 2012). Among other things, the injunction forbade Gleichman from entering into a contract to sell the property without Scarcelli's prior written consent. See id. at *4.

***2** Harris, in turn, was kept apprised of these developments. On June 25, 2012, Scarcelli's attorney emailed Harris to inform him that Scarcelli would seek contempt sanctions against Gleichman or any third party who—knowing of the district court's injunction—acted in violation of that injunction. The record is silent as to what transpired over the following months, save for the fact that on November 13, 2012, Harris sent an invoice to Gleichman demanding payment for his services, and some months after that recorded a lien against the property for a broker's commission.

The story picks up again on March 18, 2013, when the partnership filed for Chapter 11 bankruptcy in United States Bankruptcy Court for the District of Maine. Within days, Navarino demanded the return of its escrow deposit from Oak Knoll. On April 1, 2013, the partnership filed an application to retain Harris as a real estate broker, and on June 18, 2013, Harris filed a proof of claim for his brokerage services.[2]

Although the retention application had not yet been approved, on August 21, 2013, the partnership's counsel sent Harris an email telling Harris to "get us a contract for the $6,275,000." That same day, Harris informed Navarino that Oak Knoll was amenable to selling the property for that amount.

Then, on August 28, 2013, Scarcelli filed an objection to the application to retain Harris. The bankruptcy court held a hearing on the application on September 4, 2013. At the conclusion thereof, the court granted the application, provided that Oak Knoll file a revised proposed order reflecting certain changes. However, such a proposed order was never filed and the bankruptcy court thus never approved the retention application. In October 2013, the partnership's counsel withdrew the still-pending retention application with the court's approval. That same month, Navarino and Oak Knoll Associates executed a new purchase and sale agreement. This second agreement eventually resulted in the successful sale of Oak Knoll's apartment buildings.

But although Navarino got the property and Oak Knoll got its money, Harris received nothing for his efforts. Oak Knoll never paid him. Unsurprisingly, Harris pursued claims against both the partnership and Scarcelli in federal bankruptcy court, seeking the

commission that he believed he was owed. Eventually, Oak Knoll moved for summary judgment, arguing that there was no material dispute of fact and that Harris was—as a matter of law—not owed a commission. Following oral argument, the bankruptcy court granted the motion and denied Harris's claims.

The bankruptcy court's decision, in turn, was appealed to United States District Court for the District of Maine, which affirmed the grant of summary of judgment. This appeal timely followed.

## II. Standard of Review

**[1] [2]** "[T]he legal standards traditionally applicable to motions for summary judgment apply [ ] without change in bankruptcy proceedings." Daniels v. Agin, 736 F.3d 70, 78 (1st Cir. 2013). Thus, summary judgment is proper "if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Soto– Rios v. Banco Popular de P.R., 662 F.3d 112, 115 (1st Cir. 2011). The evidence, of course, must be viewed in the light most favorable to the nonmoving party (in this case Harris) and all reasonable inferences must be taken in that party's favor. See In re Varrasso, 37 F.3d 760, 763 (1st Cir. 1994).

**[3]** We review, in turn, a bankruptcy court's grant of summary judgment de novo. See Soto–Rios, 662 F.3d at 115.[3] And although the bankruptcy court's decision was first reviewed by the district court, we review the bankruptcy court's decision as if on a clean slate. See id.

## III. Discussion

***3** In seeking to recover his unpaid commission, Harris invokes two provisions of the Bankruptcy Code.[4] First, he cites 11 U.S.C. § 501, arguing that he is owed a commission under the terms of his contract with Oak Knoll. Second, Harris argues that he is entitled to it as a form of equitable relief under 11 U.S.C. § 105(a). We consider each theory of recovery in turn, explaining why each one fails as a matter of law in light of the undisputed facts of this case.

### *A. Proof of Claim*

**[4]** Harris filed a proof of claim for his unpaid commission pursuant to 11 U.S.C. § 501. The Bankruptcy Code, in turn, provides that when, as here, a party objects to such a claim, the bankruptcy court is to hold a hearing, and must thereafter allow the claim unless (in addition to other exceptions not presently relevant) the claim "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured...." Id. § 502(b)(1). The ultimate validity of such a claim is determined with reference to state law. See Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) ("The 'basic federal rule' in bankruptcy is that state law governs the substance of claims...."). Here, the parties agree that we must look to Connecticut law to determine whether Harris is entitled to his commission.

**[5]** In Connecticut, a broker's right "to recover a commission depends upon the terms of [his] employment contract with the seller." Revere Real Estate, Inc. v. Cerato, 186 Conn. 74, 438 A.2d 1202, 1204 (1982). Thus, while a broker can earn a commission merely by procuring a ready, willing, and able buyer, see Menard v. Coronet Motel, Inc., 152 Conn. 710, 207 A.2d 378, 379 (1965), the parties can "make the broker's right to a commission dependent on specific conditions, such as the consummation of the transaction and full performance of the sales contract." Revere Real Estate, 438 A.2d at 1205.

With this in mind, we turn to the listing agreement, which provides, in relevant part, as follows[5]:

> In order protect AGENT should the property known as Oak Knoll Apartments ... (the "PROPERTY") is sold within six (6) months from the date hereof, to sell the property for $7,000,000.00 or any such price as the OWNER may subsequently agree upon, agree to pay AGENT the commission set forth below. All parties to this agreement also

agree that all communications and agreements, whether written oral, will be transmitted through AGENT.

OWNER agrees that if the property is sold during the term of this Agreement to a Purchaser, procured by Agent during the term of this Agreement as outlined above, OWNER will pay AGENT a commission per Schedule A attached. Should negotiations continue after the six (6) month period the OWNER agree to automatically extend this agreement and its terms until such as the negotiations are completed.

The commission shall be due and payable by certified check in full upon the closing of title (or lease execution). If, during the term hereof, or within six (6) months from the termination of this Agreement, should there be an acceptance of an offer to purchase/lease from the PURCHASER, OWNER agrees to pay the AGENT a commission as per this AGREEMENT.

This Agreement shall become effective immediately and shall remain in effect six (6) months from the date hereof.

***4** Harris zeroes in on two provisions of the listing agreement. First, he points out that it obligates Oak Knoll to pay him "should there be acceptance of an offer," and asserts that he was owed a commission when an offer to purchase the apartments was accepted back in October 2011. Second, he asserts that the listing agreement's automatic extension provision (i.e., in the event of continued negotiations) kept the listing agreement alive such that he earned a commission based on the eventual sale of the property to Navarino. We examine his arguments seriatim, explaining why neither is persuasive.

### 1. Acceptance of an Offer

**[6]** As stated, the listing agreement obligates Oak Knoll to pay Harris a commission "should there be acceptance of an offer" during the term of the listing agreement or within six months of its termination. The parties don't appear to dispute that there was acceptance of an offer to purchase the property in October 2011, within the effective term of the listing agreement. Harris accordingly argues that he was owed a commission as of that date, because (in his telling) the listing agreement requires Oak Knoll to pay him upon the mere acceptance of an offer, regardless of whether this results in a sale. Oak Knoll counters that the listing agreement requires that a sale actually occur in order for Harris to earn his commission. Thus, succinctly put, our task is to interpret the contract (using Connecticut law) to determine whether Oak Knoll's obligation to pay Harris is predicated on the sale of the property. See In re Advanced Cellular Sys's., Inc., 483 F.3d 7, 13–14 (1st Cir. 2007).

**[7]** Although the listing agreement is hardly an exemplar of draftsmanship, we nonetheless think it unambiguous. See Salce v. Wolczek, 314 Conn. 675, 104 A.3d 694, 698 (2014) ("If the contract is unambiguous, its interpretation and application is a question of law for the court, permitting the court to resolve a breach of contract claim on summary judgment if there is no genuine dispute of material fact."); see also Ramirez v. Health Net of the Ne., Inc., 285 Conn. 1,938 A.2d 576, 587 (2008) ("A contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself.").[6] That is, the language of the contract leaves no doubt that the parties intended that a sale take place in order for Harris to earn his commission.

**[8]** We acknowledge, of course, that in Connecticut, a court has "no right to add a new term to a contract." Williams v. Lilley, 67 Conn. 50, 34 A. 765, 768 (1895). We have not done so here. While the acceptance-of-anoffer provision does not explicitly state that an accepted offer must result in a sale, the text of the listing agreement nevertheless indicates that this is precisely what must happen if Harris is to earn his commission. For starters, the acceptance-of-an-offer provision is qualified by important language: that Oak Knoll "agrees to pay the AGENT a commission as per this

AGREEMENT." The last four words dictate that we read this provision consistent with the contract as a whole. And indeed, the sale requirement is unambiguously reflected in the contract. Cf. Ramirez, 938 A.2d at 587 (explaining that courts should not "import terms into [an] agreement ... that are not reflected in the contract" (emphasis added)).

***5** For example, the listing agreement is titled a "Non– Exclusive Agency Sale Agreement." Cf. Bialowans v. Minor, 209 Conn. 212, 550 A.2d 637, 639–40 (1988) (holding, in the context of interpreting contract language, that a section heading delimited the scope of language appearing under said heading). Similarly, the first sentence of the quoted portion of the listing agreement provides:

> In order protect AGENT should the property known as Oak Knoll Apartments ... (the "PROPERTY") is sold within six (6) months from the date hereof, to sell the property for $7,000,000.00 or any such price as the OWNER may subsequently agree upon, agree to pay AGENT the commission set forth below.

The drafting errors do not obscure the critical point: this sentence announces the general purpose of the listing agreement (viz., protecting the agent in the event that the property "is sold") and concomitantly sets forth Oak Knoll's duty to pay Harris a commission. A commonsense reading would suggest that Oak Knoll's obligation to pay Harris is connected to the overall purpose of the listing agreement. Cf. Dist. of Columbia v. Heller, 554 U.S. 570, 577, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("Logic demands that there be a link between the stated purpose and the command."). And by thus linking the protection of Harris's interests, the sale of the property, and Oak Knoll's obligation to pay Harris a commission, the listing agreement indicates that a sale must take place in order for Harris to earn his commission.

Other features of the listing agreement support this conclusion. The second-quoted paragraph of the listing agreement conditions payment of Harris's commission on the property being "sold" during the term of the listing agreement. The third-quoted paragraph of the listing agreement provides that the commission "shall be due and payable ... upon closing of title." Similarly, Schedule A states (under the heading of "Sale Commissions") that "[t]he commission for selling the property shall be [ ]

4.8%."[7] All told, these repeated references to the sale of the property confirm that the parties intended to make Harris's commission contingent on the sale of the property.

Finally (and critically), reading the listing agreement as not requiring a sale (as Harris would have us do) would render the first and second-quoted paragraphs of the listing agreement superfluous, thereby contravening well-settled Connecticut law. See Ramirez, 938 A.2d at 586 ("The law of contract interpretation militates against interpreting a contract in a way that renders a provision superfluous." (internal citations omitted)). That is, Harris maintains that the listing agreement obligates Oak Knoll to pay him if an offer is accepted, regardless of whether a sale ultimately occurs. The listing agreement, however, is crystal-clear that Oak Knoll must pay Harris a commission if the property "is sold." It is axiomatic that a sale is preceded by acceptance of an offer; as Harris concedes, the former necessarily entails the latter. Cf. Norfolk & W. Ry. Co. v. Sims, 191 U.S. 441, 447, 24 S.Ct. 151, 48 L.Ed. 254 (1903). Consequently, if acceptance of an offer were all that were needed for Harris to earn his commission, there would have been no need to specify (as the listing agreement repeatedly does) that he could do so upon the successful closing of a sale. Thus, we do not believe that the listing agreement is susceptible to two reasonable interpretations and that Oak Knoll merely offers a better reading than Harris. Cf. Cruz v. Visual Perceptions, LLC, 311 Conn. 93, 84 A.3d 828, 835 (2014) ("If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous."). Rather, we believe that Harris's interpretation of the listing agreement is untenable, failing to "give operative effect to every provision in order to reach a reasonable overall result."

R.T. Vanderbilt Co., Inc. v. Cont'l Cas. Co., 273 Conn. 448,870 A.2d 1048, 1059 (2005).[8]

***6** The lily having been sufficiently gilded, the important point is this: the listing agreement unambiguously requires that a sale take place in order for Harris to earn his commission.[9] The bankruptcy court thus correctly determined that Harris was not entitled to his commission based on the acceptance of an offer in 2011.

### 2. Continued Negotiations

**[9]** Oak Knoll and Harris also agreed that the listing agreement would be automatically renewed in the event of continued negotiations. Harris maintains that such negotiations took place and thereby kept the listing agreement alive, such that he earned a commission based on the ultimate sale of the property. We disagree.

We begin by considering the language of the contract. The listing agreement states, in relevant part: “Should negotiations continue after the six (6) month period the OWNER agree to automatically extend this agreement and its terms until such as the negotiations are completed.” Harris takes this to mean that the listing agreement would not expire so long as negotiations took place at least once every six months.[10] Harris claims, in turn, that he would be entitled to a commission if an offer were to be accepted within twelve months of the last instance of negotiations.[11]

Even assuming for the sake of argument that this is a reasonable interpretation of the contract, see Cruz, 84 A.3d at 835, Oak Knoll is nonetheless entitled to summary judgment as there is no evidence that an offer was accepted within twelve months of the last instance of negotiations. Despite taking all reasonable inferences in Harris's favor, the record contains no evidence of any negotiations occurring between June 2012 and March 2013. In fact, it is wholly silent on that point. Thus, under Harris's proffered interpretation of the listing agreement, the negotiations concluded at some point in June 2012 (i.e., as no negotiations took place within six months of that date), and the listing agreement expired in December 2012. There is, in turn, no evidence that an offer was accepted within twelve months of June 2012. Thus, even under Harris's proposed interpretation of the contract, he cannot show that continued negotiations kept the listing agreement alive such that he earned a commission.

***7** In attempting to show otherwise, Harris points to an exchange of emails in late March 2013. He also highlights an April 2, 2013 affidavit from Gleichman, in which she states that Harris “recently” emailed her to say that “we have a deal for $6.0 period.” And Harris further points out that he contacted Navarino in August 2013. But again (and by Harris's own logic), the negotiations rang down the curtain and joined the choir invisible in June 2012, taking the listing agreement with them six months later. And while the negotiations were eventually rekindled at some point in 2013, Harris makes no argument that the already-expired listing agreement could be similarly resuscitated. The evidence cited by Harris is of no help to him.

Similarly, the evidence cited by Harris in no way suggests that the parties were continuously negotiating within the relevant timeframe: it does nothing to address the substantial gap in the record. Accordingly, Harris hasn't pointed to “hard evidence of a material factual dispute,” and thus fails to stave off summary judgment. Griggs– Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990); see also id. (“Evidence which is ‘merely colorable or is not significantly probative’ will not preclude summary judgment.” (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249–50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986))).[12]

### *B. Equitable Relief*

**[10] [11] [12]** This leaves us with Harris's claim for equitable relief. Congress has given bankruptcy courts the authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105(a). We have cautioned, however, that this does not give

bankruptcy courts "a roving writ, much less a free hand" to provide equitable relief. In re Jamo, 283 F.3d 392, 403 (1st Cir. 2002). Rather, this statute "may be invoked only if, and to the extent that, the equitable remedy dispensed by the court is necessary to preserve an identifiable right conferred elsewhere in the Bankruptcy Code." Id. As the foregoing demonstrates, Harris was not owed a commission based on the terms of his contract with Oak Knoll; if he has an identifiable right, it must accordingly have its genesis elsewhere.

**[13] [14]** To that end, Harris points to a Connecticut statute which entitles a real estate broker to recover a commission "if it would be inequitable to deny such recovery." Conn. Gen. Stat. § 20-325a(d). However, we need not address the merits of this argument as it is doubly waived. First, having failed to present this theory below, Harris may not do so for the first time on appeal. His argument is kneecapped: unpreserved claims don't warrant our review. See In re Woodman, 379 F.3d 1, 2 (1st Cir. 2004) (refusing to review a party's argument in light of its "failure to advance [it] before the bankruptcy court in the first instance"). Second, the argument is insufficiently fleshed-out to merit our consideration. That is, the statute cited by Harris allows for equitable relief only when a broker has "substantially complied" with the statute's formalities. See Conn. Gen. Stat. § 20-325a(d); see also Location Realty, Inc. v. Colaccino, 287 Conn. 706, 949 A.2d 1189, 1203 (2008) (substantial compliance with § 20-325a is the "sole avenue to recovery that the [Connecticut] legislature chose to provide in circumstances wherein the strict construction of § 20-325a would lead to unfair results or unjust enrichment"). Harris, however, makes no effort to argue that he so complied. As such, this argument is waived. See Alicea v. Machete Music, 744 F.3d 773, 780 (1st Cir. 2014). Since Harris otherwise fails to identify a right which would entitle him to equitable relief,[13] we reject this claim as well.

## IV. Conclusion

***8** Some may find this result unfair, particularly insofar as the partnership filed an application to retain Harris's services and asked Harris to communicate with Navarino (knowing that the retention application had not yet been approved), only to withdraw the pending application after Harris did so. And some may be especially troubled by Oak Knoll's conduct given the bankruptcy court's conclusion that the partnership was in a position to make "a 100% payment to all creditors, with money left over to pay out to [the partnership's] insiders." We are not, however, asked to decide whether Oak Knoll is deserving of opprobrium, but whether Oak Knoll was entitled to summary judgment. And for the reasons stated, we hold that it was.

**AFFIRMED**.

**All Citations**

--- F.3d ----, 2016 WL 4410065, 63 Bankr.Ct.Dec. 11

Footnotes

1 We reproduce the actual text of the listing agreement below, where we also discuss the parties' dueling interpretations thereof. For present purposes, we provide only a general summary of the listing agreement.

2 Oak Knoll and Scarcelli each eventually filed objections to the proof of claim.

3 There may be some tension within our cases as to whether we defer to a bankruptcy court's findings of fact when reviewing its grant of summary judgment. Compare In re Moultonborough Hotel Group, LLC, 726 F.3d 1, 4 (1st Cir. 2013) (reviewing questions of law de novo and findings of fact for clear error) with Stoehr v. Mohamed, 244 F.3d 206, 207–08 (1st Cir. 2001) (per curiam) (applying de novo review to questions of law and to findings of fact). It is, however, presently unnecessary to reconcile these cases, as Harris's claims fail under either standard of review.

4 Harris also sought payment pursuant to 11 U.S.C. § 503. However, he abandoned this theory of recovery on appeal and we therefore do not consider it.

5 With the exception of the property's address, we have otherwise reproduced the relevant portion of the listing agreement verbatim, with its warts and all.

6 Indeed, other courts—when interpreting contracts under Connecticut law—have found that typographical errors and the like do not necessarily render those contracts ambiguous. See, e.g., United Aluminum Corp. v. Boc Grp., Inc., No. 08–CV–977 (JCH), 2009 WL 2589486, at *6-7, *7 n.5 (D. Conn. Aug. 21, 2009) (finding contract unambiguous despite the presence of "typographical error[s]" or mistakes produced by "inattentive drafting"). And so too here. The many such errors in the listing agreement may produce frustration on the part of the reader, but they do not produce ambiguity so as to stave off summary judgment.

7 As the listing agreement expressly referenced Schedule A, and the parties were undoubtedly aware of that document's terms, we may properly consider it as having been incorporated into the listing agreement. See, e.g., Allstate Life Ins. Co. v. BFA Ltd. P'ship, 287 Conn. 307, 948 A.2d 318, 324 (2008).

8 Harris tries to flip this point on its head, arguing that the foregoing interpretation of the listing agreement renders the acceptance-of-an-offer provision superfluous. His argument is without merit. The acceptance-of-an-offer provision as we have construed it expands Harris's contractual rights in two respects:

> First, it requires Oak Knoll to pay a commission if an offer were to be accepted within the term of the listing agreement and resulted in a sale, but the sale only closed after the listing agreement's expiration, and no negotiations took place so as to keep the listing agreement alive until the closing. In such a case, Harris would not be entitled to a commission but for the acceptance-of-an-offer provision.
> Second, this provision enables Harris to claim a commission if an offer were to be accepted (again, resulting in a sale) within six months of the listing agreement's expiration and in the absence of continued negotiations. And once more, in such a scenario, Harris's only route to a commission would be through the acceptance-of-an-offer provision.
> Thus, our interpretation of the listing agreement does not render the acceptance-of-an-offer provision superfluous.

9 Accordingly, it does not matter whether Navarino was a ready, willing, and able buyer, as Oak Knoll was not obligated to pay Harris unless a sale actually happened. Harris similarly argues that the bankruptcy court erred in finding that Oak Knoll was not responsible for the failure of the 2011 P&S. However, our conclusion that the listing agreement requires a sale may make it unnecessary to reach this point. Cf. Revere Real Estate, 438 A.2d at 1205 ("A seller cannot defeat a broker's right to its commission by his unilateral nonperformance of a sales contract unless the listing contract reserves the right to condition payment upon consummation of the sales contract." (emphasis added)). Regardless, we need not address this argument because it is waived: Harris fails to bring to our attention any authority indicating that Oak Knoll's supposed breach of the 2011 P&S has any bearing on our analysis. See United States v. Munyenyezi, 781 F.3d 532, 542 n.11 (1st Cir. 2015). In fact, he offers no explanation whatsoever as to why this point should even affect the bottomline conclusion. A claim of error without explanation as to the error's import generally amounts to little more than sound and fury. Which is to say, it signifies nothing.

10 In other words, negotiations would be deemed to "continue" unless there were a six-month gap in those negotiations.

11 That is, seizing on the words "and its terms," Harris points out that one of the "terms" of the listing agreement is that it is to remain in effect for six months. And moreover, the acceptance-of-an-offer provision entitles Harris to a commission if

an offer were to be accepted within six months of the listing agreement's expiration (although, as we have established, the offer would have to result in a sale).

12 Harris also relies on the bankruptcy court's statement that "viewing the facts most favorably for Harris, [the negotiations] stopped by March 2013." But as stated, there is no record evidence of negotiations taking place between June 2012 and March 2013. And neither Harris nor the bankruptcy court points to anything that would suggest otherwise.

13 In his reply brief, Harris fleetingly mentions his broker's lien and 11 U.S.C. § 506 in conjunction with his equitable relief claim. But we need not consider the merits of this undeveloped argument for another reason altogether. "Contentions not advanced in an appellant's opening brief are deemed waived." DeCaro v. Hasbro, Inc., 580 F.3d 55, 64 (1st Cir. 2009). And so it is here.

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2016 WL 4501675
United States Court of Appeals,
Third Circuit.

Sara Rosenberg, Individually and as Trustee of the Douglas Rosenberg 2004 Trust, Separately and as General Partner of The Pennsylvania
Limited Partnerships 209 Chestnut St. Assoc., LP; 1501 Edgemont Associates, LP; 1538 Dekalb Associates, LP; 1561 Medical Drives Associates, LP; Imaging Properties of Illinois, LP; Imaging Properties of Philadelphia, LP; Imaging Properties of Roxborough, LP; Lane Limited Partnership, IV, Appellants
v.
DVI Receivables XVII, LLC; DVI Funding, LLC;
Jane Fox; Lyon Financial Services Inc, d/b/ a U.S. Bank Portfolio Services; U.S. Bank NA, a National Association Organized In Minnesota

No. 15–2622
|
Argued March 1, 2016
|
(Opinion filed: August 29, 2016)

*Synopsis*

**Background:** Debtor's wife and limited partnerships associated with debtor brought action against creditors asserting tortious interference claim under state law for damages allegedly caused by filing of involuntary bankruptcy petitions against debtor. After transfer, the United States District Court for the Eastern District of Pennsylvania, Cynthia M. Rufe, J., 2015 WL 3513445, dismissed complaint, and plaintiffs appealed.

**[Holding:]** The Court of Appeals, Ambro, Circuit Judge, held that Bankruptcy Code did not preempt non-debtors' state law claims.

Reversed and remanded.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. Civil Action No. 2–14–cv–05608), District Judge: Honorable Cynthia M. Rufe

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Before: AMBRO, JORDAN and SCIRICA, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

***1** This appeal presents a question of federal preemption law. In November 2008, DVI Funding, LLC and several entities known as DVI Receivables filed involuntary bankruptcy petitions against Maury Rosenberg and his affiliated businesses. After the Bankruptcy Court dismissed the involuntary petitions, Rosenberg recovered attorney's fees, costs, and damages under § 303(i) of the Bankruptcy Code. Now Rosenberg's wife and several limited partnerships associated with Rosenberg— persons and entities not named in the bankruptcy—have brought a tortious interference claim under state law for damages allegedly caused by the filing of the involuntary petitions. The District Court concluded that this claim was preempted by the Bankruptcy Code and dismissed the complaint. For the reasons that follow, we reverse and remand, as we conclude that § 303(i) does not preempt the state law claims

of non-debtors predicated on the filing of an involuntary bankruptcy petition.

## I.

It is an understatement to say that the factual background and procedural history lurking behind this case are complex. Our appeal is but one fragment of more than a decade of ongoing litigation between Maury Rosenberg and his medical imaging centers on the one side and

U.S. Bank and its affiliated entities on the other. By our estimate, that litigation has produced 27 written opinions at almost every level of the federal judiciary. But lucky for us (and our readers), this case turns on a narrow question of federal preemption law.

Rosenberg is the "principal architect" of National Medical Imaging, LLC ("NMI") and National Medical Imaging Holding Company, LLC ("NMI Holding"). NMI and NMI Holding are affiliated with various limited partnerships ("NMI LPs") that operate medical imaging centers. To finance the purchase of medical imaging equipment, the NMI LPs entered into leases with DVI Financial Services, Inc., who transferred the leases to DVI Funding, LLC. DVI Funding then held onto some of the leases directly and securitized the rest, transferring them to various entities with DVI Receivables in the name. DVI Financial was the initial servicer of the leases and U.S. Bank acted as trustee. When DVI Financial entered bankruptcy in 2004, Lyon Financial, a subsidiary of U.S. Bank, acquired the servicing contracts.

During litigation in state court over money the NMI LPs owed under the leases, DVI Funding and five DVI Receivables entities filed involuntary bankruptcy petitions against Rosenberg, NMI, and NMI Holding in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Rosenberg transferred his case to the Southern District of Florida, where the Bankruptcy Court there dismissed the involuntary petition because, among other things, DVI Funding and the DVI Receivables were not Rosenberg's creditors. *In re Rosenberg*, 414 B.R. 826, 840–41 (Bankr. S.D. Fla. 2009), *aff'd*, 472 Fed.Appx. 890 (11th Cir. 2012) (per curiam). The petitions against NMI and NMI Holding remained in the Eastern District of Pennsylvania, where its Bankruptcy Court gave collateral estoppel effect to the Florida decision and dismissed the petitions. *In re Nat'l Med. Imaging, LLC*, 439 B.R. 837, 854 (Bankr. E.D. Pa. 2009), *aff'd*, ––– Fed.Appx. ––––, No. 15–1996, 2016 WL 1743475 (3d Cir. 2016).

***2** Rosenberg then filed in the Southern District of Florida Bankruptcy Court an adversary action under 11 U.S.C. § 303(i) against DVI Funding, the DVI Receivables entities, Lyon, and U.S. Bank. He sought to recover costs, attorney's fees, and damages for the bad faith filing of the involuntary bankruptcy petition. The Court awarded Rosenberg fees and costs after a bench trial, *In re Rosenberg*, No. 09–13196, 2012 WL 3990725 (Bankr. S.D. Fla. Sept. 11, 2012), *aff'd in part*, 779 F.3d 1254 (11th Cir. 2015), *cert. denied*, ––– U.S. ––––, 136 S.Ct. 805, 193 L.Ed.2d 713 (2016), and transferred the claim for damages to the District Court for a jury trial. After trial, the jury awarded Rosenberg $1.1 million in compensatory damages and $5 million in punitive damages. The District Court initially overturned the punitive damages award in its entirety and limited compensatory damages to $360,000, but the Eleventh Circuit held that U.S. Bank's post-trial motion was untimely and reinstated the jury's verdict. *Rosenberg v. DVI Receivables, XIV, LLC*, No. 12– 22275, 2014 WL 4810348 (S.D. Fla. Sept. 29, 2014), *rev'd in part*, 818 F.3d 1283 (11th Cir. 2016).

With the stage set, we turn to the litigation currently on appeal. In August 2013, Sara Rosenberg (Maury's wife), the Rosenberg Trust, and several NMI Real Estate Partnerships (together with Mrs. Rosenberg and the Rosenberg Trust, the "Rosenberg Affiliates") brought suit to recover damages stemming from the involuntary bankruptcy petitions filed against Maury Rosenberg, NMI, and NMI Holding. All of the plaintiffs are affiliated with Maury Rosenberg, but none of them were parties to the involuntary bankruptcies.

The complaint stated a single claim of tortious interference with contracts and business

relationships. The NMI Real Estate Partnerships owned the medical imaging facilities subject to mortgages with various lenders. The Rosenberg Affiliates alleged that the DVI Receivables entities, DVI Funding, Lyon Financial, Jane Fox (an agent for Lyon who signed the involuntary bankruptcy petitions), and U.S. Bank (collectively, the "Defendants"), orchestrated the filing of the involuntary bankruptcy petitions with the intent to cause the NMI Real Estate Partnerships to default on their underlying mortgages. As a result, the Partnerships were declared in default, all but one of the properties have been lost, and Sara Rosenberg lost her interest in one of the Partnerships. The Rosenberg Affiliates also alleged that the Rosenberg Trust suffered losses on investments in the Partnerships and life insurance for Maury Rosenberg.

The case was initially filed in the District Court for the Southern District of Florida, but it transferred the case to the Eastern District of Pennsylvania on the motion of the Defendants. They then moved to dismiss, arguing that the Rosenberg Affiliates' state law tortious interference claim was preempted by the involuntary bankruptcy provisions of the Bankruptcy Code. The District Court agreed and dismissed the complaint. *Rosenberg v. DVI Receivables, XIV, LLC*, No. 14–5608, 2015 WL 3513445 (E.D. Pa. June 4, 2015). This appeal followed.

**II.**

**[1]** The District Court exercised diversity jurisdiction under 28 U.S.C. § 1332(a), and we have appellate jurisdiction to review its order dismissing the complaint under 28 U.S.C. § 1291. Our review of the District Court's grant of a motion to dismiss based on preemption is plenary. *New Jersey Carpenters v. Tishman Constr. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014). We accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiffs. *Id.*

**III.**

Section 303 of the Bankruptcy Code governs involuntary bankruptcy cases. In an involuntary bankruptcy case it is the creditors, not the debtors, who start the proceedings by filing an involuntary petition under either Chapter 7 or 11 of the Code. 11 U.S.C. § 303(b). Important for our purposes is that § 303(i) provides that if an involuntary bankruptcy petition is dismissed, the debtor may recover attorney's fees, costs, and even damages from the creditors. It reads:

> ***3** (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—
>
> (1) against the petitioners and in favor of the debtor
>
> for—
>
> (A) costs; or
>
> (B) a reasonable attorney's fee; or
>
> (2) against any petitioner that filed the petition in badfaith, for—
>
> (A) any damages proximately caused by such filing;or
>
> (B) punitive damages

*Id.* § 303(i).

As they were not debtors, the Rosenberg Affiliates cannot recover damages from the Defendants under § 303(i). *See, e.g., In re Miles*, 430 F.3d 1083, 1093–94 (9th Cir. 2005); *In re Mike Hammer Prods., Inc.*, 294 B.R. 752, 755 (9th Cir. BAP 2003); *In re VII Holdings Co.*, 362 B.R. 663, 668 (Bankr. D. Del. 2007) (Shannon, J.); *Collier on Bankruptcy* ¶ 303.33 (16th ed.). Shut off from a remedy under the Bankruptcy Code, the Rosenberg Affiliates are instead pursuing a state law tortious interference claim for damages caused by the involuntary bankruptcy petitions filed

against Maury Rosenberg, NMI, and NMI Holding. The question for us is whether § 303(i) preempts this state law claim.

Federal preemption of state law is a "necessary but precarious component of our system of federalism under which the states and the federal government possess concurrent sovereignty." *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680, 687 (3d Cir. 2016). Under this dual system, federal and state law coexist peacefully much of the time. But when those laws come into conflict, the Supremacy Clause of the Constitution requires that state law give way to federal law. U.S. Const. art. VI, cl. 2.

[2] Federal preemption of state law comes in three forms: express preemption, conflict preemption, and field preemption. *Elassaad v. Indep. Air, Inc.*, 613 F.3d 119, 126 (3d Cir. 2010). Ours is a case of alleged field preemption. It "occurs when a field is 'reserved for federal regulation, leaving no room for state regulation,' and 'congressional intent to supersede state laws [is] clear and manifest.' " *Id.* (quoting *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3d Cir. 2009)).

[3] **[4]** In deciding whether Congress has occupied a field for exclusive federal regulation, we begin, based on concerns of federalism, with a sturdy "presumption against preemption." *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). "This 'strong presumption against inferring Congressional preemption' also applies 'in the bankruptcy context.' " *In re Fed.– Mogul Glob. Inc.*, 684 F.3d 355, 365 (3d Cir. 2012) (quoting *Integrated Solutions, Inc. v. Serv. Support Specialties, Inc.*, 124 F.3d 487, 493 (3d Cir. 1997)). It is overcome when "a Congressional purpose to preempt ... is clear and manifest." *Id.* (quoting *Farina v. Nokia Inc.*, 625 F.3d 97, 117 (3d Cir. 2010), *cert. denied*, ––– U.S. ––––, 132 S.Ct. 365, 181 L.Ed.2d 231 (2011)). To discern the preemptive intent of Congress, we look to the text, structure, and purpose of the statute and the surrounding statutory framework. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

**[5]** The inquiry we make is whether there is enough evidence in the text, structure, or purpose of § 303(i) or the Bankruptcy Code as a whole to rebut the presumption against preemption and say that it was Congress's "clear and manifest intent" to preempt state law causes of action for non-debtors based on the filing of an involuntary bankruptcy petition.[1] We conclude that the evidence is insufficient for field preemption.

***4** Starting with text, § 303(i) provides a remedy to the debtor, but is silent as to potential remedies for nondebtors harmed by an involuntary bankruptcy petition. This suggests that when Congress passed the provision it either did not intend to disturb the existing framework of state law remedies for non-debtors or (more likely) was not thinking about non-debtor remedies at all. In either case, field preemption does not apply. The Defendants ask us to infer that, by providing a remedy to debtors, Congress also meant to deprive non-debtors of any remedy.[2] However, we do not lightly infer from congressional silence the intent to deprive some persons of a judicial remedy for an abuse of the bankruptcy system. As the Supreme Court observed in a preemption case concerning the Atomic Energy Act, "[i]t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

Turning to structure and purpose, we see no indication of field preemption. By giving creditors the ability to bring a debtor into bankruptcy, Congress created a power that could be abused. Given the risks of involuntary petitions, it included a remedy for debtors to discourage abuse. *In re Diloreto*, 388 B.R. 637, 655 (Bankr. E.D. Pa. 2008), *aff'd*, 442 B.R. 373 (E.D. Pa. 2010) ("Involuntary petitions, even ones filed in good faith, can have a significant negative effect upon the interests of a putative debtor.... Section 303(i) was intended to ameliorate those negative effects by imposing liability upon the unsuccessful petitioning creditor....").

Nothing in the Code suggests that Congress was also concerned about protecting non-debtors from the effects of involuntary petitions.[3] That said, it would be inconsistent with the remedial purpose of § 303(i) to preempt state law remedies for non-debtors that can likewise be harmed by involuntary bankruptcy petitions. *See In re John Richards Homes Bldg. Co., L.L.C.*, 298 B.R. 591, 605 (Bankr. E.D. Mich. 2003) ("[T]he harm from an improper involuntary bankruptcy petition can result not only to the debtor but also to the debtor's owners, employees, suppliers, customers and other creditors.").

The Defendants point out that, in the automatic stay provisions of the Code, Congress provided that any individual "injured by any willful violation" of the automatic stay "shall recover actual damages." 11 U.S.C. § 362(k)(1). They argue this suggests that Congress knew how to provide broad remedies that covered non-debtors and declined to do so with § 303(i). No doubt this reading is plausible. But field preemption requires congressional intent that is clear and manifest, and this is lacking when Congress is silent on what courts are to do with state law remedies for non-debtors.

The Defendants also argue that permitting state law claims against creditors would be inconsistent with the comprehensive nature of the Bankruptcy Code, the exclusive nature of federal court jurisdiction over bankruptcies, and the uniform nature of bankruptcy law. They stoke fears of a flood of state court litigation challenging the actions of creditors that would chill the use of involuntary bankruptcy proceedings and permit state courts to rewrite bankruptcy law. Yet there is no evidence in the text, structure, or purpose of the Code that Congress was concerned with this outcome. Moreover, the fears of the Defendants are based more on conjecture than fact. They cite only a handful of state court cases where non-debtors brought state tort claims against petitioning creditors. *E.g.*, *PNH, Inc. v. Alfa Laval, Inc.*, 189 Ohio App.3d 704, 940 N.E.2d 577, 580 (2010) (purchasers of corporation's debt brought tortious interference, abuse of process, and defamation claims against creditors who filed involuntary petition against corporation). In these circumstances, we are not convinced by a floodgates argument to support a finding of field preemption.

***5** As for concerns that permitting state law claims will undermine uniformity in bankruptcy law, we rejected a very similar argument in *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383 (3d Cir. 2002). That case addressed whether the Federal Rules of Civil Procedure preempt state law tort claims based on misconduct in federal litigation. We held they did not but observed there were "legitimate public policy concerns in concluding that the federal rules foreclose state claims in the nature of abuse of process arising out of federal litigation." *Id.* at 394. Even though there would be conflicts between the federal rules and state law and "federal preemption would forestall such controversies," we were content to "rely on the traditional comity between the two systems to deal adequately and innovatively with such common problems." *Id.* We rely on that same comity today and trust that state courts faithfully will account for federal bankruptcy law to the extent it may be relevant to a state law claim against a creditor.

**[6]** Finally, the Defendants urge us to follow the Ninth Circuit's decision of *In re Miles*, 430 F.3d at 1083, a decision the District Court found persuasive when it dismissed the Rosenberg Affiliates' complaint. Nondebtors there were allegedly harmed by an involuntary bankruptcy and brought state law tort claims against the petitioning creditors in state court. *Id.* at 1086–87. The creditors removed the case to federal court and the Ninth Circuit held that the state law tort claims were removable because they were "completely preempted" by § 303(i). *Id.* at 1093 n.6.[4] This was so because "Congress intended 11 U.S.C. § 303(i) to provide the exclusive basis for awarding damages predicated upon the filing of an involuntary bankruptcy petition." *Id.* at 1089. Once convinced that the case was properly removed, the Court dismissed the complaint because the non-debtors lacked standing under § 303(i) to recover damages. *Id.* at 1093.

We do not find *Miles* persuasive on the preemption issue.[5] To start, its analysis of § 303(i) is inconsistent

with our decision in *Paradise Hotel Corp. v. Bank of Nova*

Footnotes

*Scotia*, 842 F.2d 47, 52 (3d Cir. 1988), where we held that § 303(i) is not an exclusive remedy for debtors who convert an involuntary Chapter 7 bankruptcy petition to a voluntary Chapter 11 reorganization. *U.S. Express Lines Ltd.*, 281 F.3d at 393 n.5 (noting that *Miles* is in tension with *Paradise Hotel*). We also think the analysis is inconsistent with the presumption against preemption, which, as we have discussed, requires that congressional intent to preempt state law must be clear and manifest. *In re Fed.–Mogul Glob. Inc.*, 684 F.3d at 365. Near the beginning of its analysis, the *Miles* Court admitted that the "Bankruptcy Code and its legislative history are silent on whether Congress intended 11 U.S.C. § 303(i) to provide the exclusive basis for awarding damages predicated upon the filing of an involuntary bankruptcy petition." 430 F.3d at 1089. If we apply faithfully the presumption against preemption, silence on the part of Congress should be the end of the analysis. But the Court went on to "infer from Congress's clear intent to provide damage awards only to the debtor ... that Congress did not intend [non-debtors] to be able to circumvent this rule by pursuing those very claims in state court." *Id.* at 1091. Absent evidence that Congress actually meant for § 303(i) to be an exclusive remedy, we do not make the same inference.[6]

* * * * *

***6** In this context, we hold that Bankruptcy Code § 303(i) does not preempt state law claims by non-debtors for damages based on the filing of an involuntary bankruptcy petition. Accordingly, we reverse the decision of the District Court and remand for further proceedings.

***All Citations***

--- F.3d ----, 2016 WL 4501675, 63 Bankr.Ct.Dec. 12

1 We express no opinion on whether similar state law claims brought by debtors would be subject to preemption.

2 The Defendants also suggested at oral argument that non-debtors have some remedy under § 303, namely asking the Bankruptcy Court to appoint a trustee to "take possession of the property of the estate and to operate any business of the debtor." 11 U.S.C. § 303(g). But we do not see how the post-petition appointment of a trustee would address the type of economic losses the Rosenberg Affiliates alleged in their complaint.

3 If we were inclined to also look at legislative history for clues as to Congress's thoughts on this subject, we would still come out empty-handed. Section 303(i) was enacted as part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, and the House and Senate Reports discussing involuntary bankruptcies say nothing about non-debtors, non-debtor remedies, or preemption.

4 Complete preemption is not the same as field preemption, and the two concepts should not be confused. Complete preemption "operates to confer original federal subject matter jurisdiction notwithstanding the absence of a federal cause of action on the face of the complaint." *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999). It applies when the preemptive force of a federal statute is so "extraordinary" that it "converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). Our case deals with field preemption, a species of "ordinary preemption" that operates as a federal defense to a state law claim, and has nothing to do with subject matter jurisdiction. For this reason, *Miles* could be deemed distinguishable. But we recognize that finding complete preemption in the context § 303(i) would also support finding field preemption in our case. We also note that if complete preemption were at issue in this case, we doubt it would apply. The Supreme Court has found complete preemption in three contexts: § 301 of the Labor Management Relations Act, § 502(a) of ERISA, and §§ 85 and 86 of the National Bank Act. *New Jersey Carpenters & the Trustees Thereof*, 760 F.3d at 302. It has never recognized complete preemption in the Bankruptcy Code, and it seems the Ninth Circuit stands alone in this regard. *See* *In re Repository Techs., Inc.*, 601 F.3d 710, 724 (7th Cir. 2010) (declining to follow *Miles*).

5 As noted above, we do agree with the *Miles* Court that non-debtors lack standing under § 303(i) to recover damages and do not take issue with this portion of its opinion.

6 The Defendants argue in the alternative that we can affirm on the basis of the statute of limitations, an issue the District Court did not reach. "It is an accepted tenet of appellate jurisdiction that we 'may affirm a judgment on any ground apparent from the record, even if the district court did not reach it.' " *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 761 (3d Cir. 2010) (quoting *Kabakjian v. United States,* 267 F.3d 208, 213 (3d Cir. 2001)). We decline to affirm on that alternate ground in this case because it is unclear from the record when the Rosenberg Affiliates were injured and when their tortious interference claim accrued. We do not know from the complaint, for example, when the NMI

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Real Estate Partnerships defaulted on their mortgages or when the Rosenberg Trust suffered its losses. Accordingly, we will leave the statute-of-limitations issue to the District Court on remand.

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2016 WL 4375018
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U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

In the Matter of: ALVIN GREEN, Debtor.

ALVIN GREEN, Appellant.

v.

TRADITIONAL HERITAGE VILLAGE HOMEOWNERS ASSOCIATION, INCORPORATED; KINGMAN HOLDINGS, L.L.C., Appellees.

No. 15-10872
|
Date Filed: 08/16/2016

Appeal from the United States District Court for the Northern District of Texas USDC
No. 3:15-CV-2571

Before KING, CLEMENT, and OWEN, Circuit Judges.

**Opinion**

PER CURIAM:*

***1** Rosanna Silverio owned a residence in Frisco, Texas. She was in Chapter 13 bankruptcy. Traditional Heritage Village Homeowners Association (the Association), complaining of unpaid assessment fees, sought relief from the automatic stay and permission to foreclose on

Silverio's property pursuant to an assessment lien.[1] The order obtained by the Association required Silverio to make assessment payments and provided that if she did not do so, "the stay will lift in rem for the [Association], and in any subsequent bankruptcy of [Silverio] or [Alvin Green, her husband], no automatic stay for the [p]roperty shall go into effect." Silverio failed to make the payments, and a Texas state court authorized the Association to foreclose. The sale of the property was set for June 2, 2015.

Footnotes

Just one day before that sale, Green himself filed for bankruptcy. As Silverio's husband, Green claimed a community property interest in the property. The sale nevertheless proceeded as planned and the property was bought by Kingman Holdings LLC (Kingman). Kingman then sought relief in bankruptcy court from the automatic stay. The court granted that relief on July 20, 2015, declaring that no stay was then in effect with regard to the property and authorizing Kingman to take possession of the property as its rightful owner. Green filed a notice of appeal challenging this order.

Now in district court, Green filed a motion for stay pending appeal, arguing that his appeal of the bankruptcy court's July 20, 2015 order was likely to succeed on the merits and the remaining factors counseled in favor of a stay. The district court denied that motion the same day. Green then appealed the district court's denial of the motion for stay pending appeal to this court, but otherwise failed to prosecute his challenge to the bankruptcy court order in district court. The district court dismissed the appeal for failure to prosecute on October 26, 2015, providing Green twenty-one days within which to move to reinstate the appeal. Green did not do so.

In these circumstances, we must dismiss Green's interlocutory appeal. It is axiomatic that "[a] claim becomes moot 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' "[2] This principle applies with full force to cases in which a final judgment eliminates the controversy raised by an interlocutory appeal.[3]

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Here, Green's requested stay pending appeal could have no effect because the underlying appeal—Green's challenge to the bankruptcy court's determination regarding the applicability of the automatic stay—has been dismissed for want of prosecution and judgment entered. Having determined that no justiciable case or controversy remains, we DISMISS this appeal as moot.[4]

**All Citations**

--- Fed.Appx. ----, 2016 WL 4375018 (Mem)

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1 *See* 11 U.S.C. § 362.

2 *Motient Corp. v. Dondero*, 529 F.3d 532, 537 (5th Cir. 2008) (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003)).

3 *See Kidd v. Thaler*, 460 F. App'x 451, 452 (5th Cir. 2012) (per curiam) (holding that interlocutory appeal of denial of an injunction was moot after underlying § 1983 action was dismissed); *Childs v. Ball Bros. Trucking Co.*, 193 F.2d 134, 135 (5th Cir. 1951) (concluding that appeal of temporary injunction was moot because the case had "already been dismissed below, taking the interlocutory order with it").

4 In light of this disposition, we need not address the question of whether we would have jurisdiction to review this interlocutory appeal. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (holding that 28 U.S.C. § 1292 does not preclude "appellate review of interlocutory orders in bankruptcy proceedings"); *McLain v. Beto*, 458 F.2d 503, 504 (5th Cir. 1972) ("We pretermit the question of whether the orders appealed from were purely interlocutory and not appealable ...
because we are of the opinion that in any event the appeal is now moot.").

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2016 WL 4409295
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In The Matter of: ODES HO KIM Debtor
ODES HO KIM; CHONG ANN KIM, Appellants
v.
DOME ENTERTAINMENT CENTER, INCORPORATED, Appellee

No. 15-10967
|
Date Filed: 08/18/2016

Appeal from the United States District Court for the Northern District of Texas USDC No. 3:15-CV-452

Before DAVIS, ELROD, and HIGGINSON, Circuit Judges.

**Opinion**

STEPHEN A. HIGGINSON, Circuit Judge:*

***1** This appeal, which stems from Odes Ho Kim's involuntary bankruptcy proceeding, concerns whether this court, in a previous judgment, awarded relief to Mr. Kim's wife, Chong Ann Kim. We affirm the district court's conclusion that in our previous decision, *Kim v. Dome Entertainment Center, Inc. (In re Kim)*, 748 F.3d 647, 650 (5th Cir. 2014), this court did not award the Kims relief as contemplated by the parties' settlement agreement.

I.

As described in our earlier decision, *In re Kim*, 748 F.3d 647, Dome Entertainment Center, Inc. prevailed in a civil suit against Odes Ho Kim, resulting in a $5,000,000 judgment. During that litigation, the Kims purchased a $1,048,028.36 home. After the final judgment, Dome filed an involuntary petition for relief against Mr. Kim under Chapter 7 of the Bankruptcy Code. The bankruptcy court then ordered relief for Dome, and Mr. Kim converted the case to a Chapter 11 proceeding. During the Chapter 11 proceeding, Mr. Kim claimed an unlimited homestead exemption under Texas law and 11 U.S.C. § 522(b)(3)(A) for the home they purchased during the litigation. Following Dome's objection, the bankruptcy court limited the exemption to $136,875 under § 522(p)—the provision adopted by Congress to override state law allowing for full exemptions of property in a bankruptcy proceeding due to homestead interests. Mr. Kim then sought a declaratory judgment in the bankruptcy court to determine Mrs. Kim's rights and claims by virtue of her separate homestead interest under Texas law and 11 U.S.C. § 541. The bankruptcy court granted partial summary judgment for Dome, holding that Mrs. Kim did not have "a separate and distinct exempt homestead interest in the property that would entitle her to compensation or to prevent the sale of the Property."[1] The bankruptcy court found that there was a fact issue as to whether some share of the residence was not community property and thus not part of the bankruptcy estate pursuant to § 541. The Kims appealed, and the district court granted both parties leave to file an interlocutory appeal.

During the appeal to the district court, the parties entered into a settlement agreement, under which Mr. Kim executed a promissory note payable to Dome. The amount of the note was contingent on the outcome of the adversary proceeding as described in the Note Adjustment Agreement. The relevant provisions of the agreement provided for a specified reduction in the note payable if the final order of the proceedings awarded Mrs. Kim monetary compensation. Most relevant to this appeal, the agreement also provided for reduction in the note payable if the final order awarded Mrs. Kim nonmonetary relief:

> In the event that a final order disposing of Adversary No. 08-03440 does not award [Chong Ann Kim ("CAK") ] monetary compensation for her homestead interest in the Property as of December 21, 2007, but instead awards CAK relief, other than monetary compensation, for her alleged homestead interest in the Property as of December 21, 2007, the value of which such order does not define, and the parties cannot agree on the valuation of such relief, then, on the written demand of either party, [Odes Ho Kim ("OHK") ] and [Dome Entertainment Center, Inc. ("DEC") ] shall each select a competent and disinterested appraiser

> and notify the other party of the identity of the selected appraiser within twenty (20) days of such demand. The selected appraisers shall first select and agree upon one competent and disinterested "umpire" for the purpose of resolving a difference of opinion among the two appraiser[s]. ... The appraisers shall then determine the fair market value of the Debtor's and the Estate's interest in the Property as of December 21, 2007 as encumbered by the nonmonetary relief awarded to CAK (the "Property Value"); and failing to agree, shall submit their differences, only, to the umpire. ...

***2** The district court upheld the bankruptcy court's summary judgment, concluding that Mrs. Kim's homestead interest did not prevent the property from being subject to § 522(p) and that her homestead interest was not a property right that would prevent the forced sale of the residence without just compensation. The Kims timely appealed to this court, which affirmed. *In re Kim*, 748 F.3d at 650.

Following this court's affirmance, Dome filed a motion for summary declaratory judgment in the bankruptcy court, seeking determination whether this court awarded monetary or nonmonetary relief to Mrs. Kim under the settlement agreement. The bankruptcy court granted that motion, holding that this court did not award Mrs. Kim such relief. The Kims again appealed, and the district court affirmed the bankruptcy court's order. This appeal followed.

## II.

We review the bankruptcy court's summary judgment de novo. *Shcolnik v. Rapid Settlements Ltd. (In re Shcolnik)*, 670 F.3d 624, 627 (5th Cir. 2012). We apply the same standard as the district court, affirming summary judgment if the evidence, taken in the light most favorable to the nonmovant, creates a genuine dispute of material fact. *Id.*; Fed. R. Civ. P. 56(a).

In reviewing the summary judgment, we must determine whether this court awarded Mrs. Kim nonmonetary relief in *In re Kim*, 748 F.3d 647, which would be cognizable under the above-described settlement agreement.[2] The Kims acknowledge that this court affirmed the district court's holding that Mrs. Kim had no right to prevent the forced sale of the property and was only entitled to the capped homestead interest under § 522(p). Therefore, it appears to us, as it did to the bankruptcy and district courts, that this court did not award any form of relief to Mrs. Kim in the previous appeal. The Kims' only argument to the contrary is that this court awarded nonmonetary relief through its conclusion— which differed from the reasoning of the bankruptcy and district courts—that "[h]omestead rights have *some* value *to a spouse*, separate and apart from an ownership interest in the real property on which homestead rights are impressed," *In re Kim*, 748 F.3d at 661.

To address the Kims' argument, we first look to the text of the Note Adjustment Agreement. Whether we apply Texas law or the general principles of contract interpretation, we look to the express language of the writing to determine the intention of the parties. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) (discussing application of state or federal law in bankruptcy cases); *United States v. Chromalloy Am. Corp.*, 158 F.3d 345, 350 (5th Cir. 1998) (applying general principles of contract interpretation); *Pirani v. Baharia (In re Pirani)*, --- F.3d ---, 2016 WL 3063261, at *5 (5th Cir. May 27, 2016) (applying Texas law). The express language of the agreement is clear, and our court's previous final judgment did not award the

Kims any relief under that clear language.[3] *See Relief*, Black's Law Dictionary (10th ed. 2014) ("The redress or benefit, esp. equitable in nature (such as an injunction or specific performance), that a party asks of a court.").

***3** The Kims are correct that our previous conclusion that "homestead rights have *some* value *to a spouse*" was contrary to the bankruptcy and district courts' holdings that Mrs. Kim did not have a vested property interest in the homestead exemption allowing for possession of the property or compensation from a forced sale. *In re Kim*, 748 F.3d at 661. This court recognized that Mrs. Kim had "a possessory interest in the real property by virtue of its homestead character." *Id.* at 661. Despite that difference, we affirmed the district court's judgment, concluding that the Kims failed to adequately brief whether "the determination by Congress to permit an exemption of $136,875 for a debtor such as Mr. Kim would not be just compensation for Mrs. Kim's homestead interest since $136,875 in proceeds would be impressed with her homestead rights," or to address the applicability of 11

U.S.C. § 363(j).[4] *Id.* at 663. This court also explicitly

rejected the argument that Mrs. Kim's homestead interest precluded the forced sale of the property. *Id.* at 654– 56. Therefore this court did not award Mrs. Kim any monetary compensation, above and beyond the $136,875 already awarded to Mr. Kim, and by affirming the district court's judgment, it did not award Mrs. Kim any relief at all. We conclude that this court's final judgment did not award Mrs. Kim any relief as contemplated by the express language of the settlement agreement.

**III.**

We AFFIRM the district court's affirmance of the bankruptcy court's summary judgment for Dome Entertainment Center, Inc.

**All Citations**

--- Fed.Appx. ----, 2016 WL 4409295

Footnotes

1 *In re Kim*, 405 B.R. 179, 188 (N.D. Tex. Bankr. 2009).

2 The Kims do not argue that this court awarded Mrs. Kim monetary compensation.

3 Even if we were to conclude that “relief” was ambiguous, the only extrinsic evidence the Kims put forth to support their argument is an email that expressly anticipated that this court *could* conclude that the home could not be sold as part of the estate, which this court did not hold. *In re Kim*, 748 F.2d at 663.

4 The parties stipulated that the property was not Mrs. Kim's separate property, which precluded the discussion of whether the property was not part of the estate under § 541. *In re Kim*, 748 F.3d at 656.

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U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

In the Matter of: ROBERT T. SMITH, Debtor
DAN HENNIGAN; DELIA STEPHENS, Appellants
v.
ROBERT T. SMITH, Appellee

No. 16-20241
|
Date Filed: 08/17/2016

Appeal from the United States District Court for the Southern District of Texas USDC
No. 4:13-CV-1313

Before JOLLY, DAVIS, and SOUTHWICK, Circuit Judges.

**Opinion**

PER CURIAM:[*]

***1** This bankruptcy appeal concerns whether someone who plans to sell and move from his residence as soon as possible may still claim that property as homestead. On the facts of this case, we agree with the bankruptcy and district courts that the homestead exemption applies.
AFFIRMED.

Robert T. Smith, debtor, acquired an interest in a residence in Crosby, Texas (the "Property"), under the will of his aunt, Barbara Christley. In 2005, Smith, an American citizen, was living in Australia. At Christley's request, he moved in with and cared for her until she died in January 2008. Under Christley's will, Smith was to receive the Property as well as 50% of the residual estate. After Christley's death, a dispute arose between Smith and the executor of Christley's estate. As a result, Smith hired the appellants, attorneys Dan Hennigan and Delia Stephens, to represent him. Four years of litigation followed, culminating in a settlement whereby Smith agreed to receive the Property in exchange for forfeiting his 50% share of the residuary estate. Smith was deeded the Property on September 26, 2011. On October 27, Smith filed for Chapter 7 bankruptcy, claiming the Property as homestead and therefore exempting it. Hennigan and Stephens sought to recover what they claimed from their contingency-fee contract with Smith.

In bankruptcy court, Hennigan and Stephens argued that Smith should not have been able to claim the Property as a homestead. Because he clearly intended to return to Australia, they asserted he could not also intend to make the Property his homestead. The bankruptcy court disagreed: "Debtor has established the homestead character of his property by living there for the last eight years and claiming the property as his homestead." The district court affirmed: "Even if the Court were to inquire into Debtor's intentions, he merely discussed a *future* move back to Australia, without any definite plans to do so." On appeal to this court, Hennigan and Stephens argue Smith always intended to sell the Property and return to Australia. It was only due to protracted litigation that Smith lived in the house for an extended period of time.

"[H]omesteads are favorites of the law, [and] we must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions. Indeed, we must uphold and enforce the Texas homestead laws even though in so doing we might unwittingly assist a dishonest debtor in wrongfully defeating his creditor." *In re Bradley*, 960 F.2d 502, 507 (5th Cir. 1992) (citations and quotation marks omitted). "It is well settled in Texas that an

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individual who seeks homestead protection has the initial burden to establish the homestead character of her property." *Id*. To meet this burden, "the claimant must have a possessory interest in the homestead he or she is claiming. But [m]ere ownership or possessory interest is not of itself sufficient to establish a homestead. A claimant must show both (i) overt acts of homestead usage and (ii) the intention on [his] part ... to claim the land as a homestead." *In re Saldana*, 531 B.R. 141, 156 (Bankr. N.D. Tex. 2015) (quotation marks omitted). Once a property is established as homestead, it can only be lost through death, abandonment, or alienation. *In re Perry*, 345 F.3d 303, 310 (5th Cir. 2003). In determining homestead status, we consider the facts as they existed on the date Smith filed for bankruptcy. *White v. Stump*, 266 U.S. 310, 313 (1924).

***2** The strongest statement about Smith's intentions is this: when asked if it was his "intent from the get-go that [he was] going to get the house and sell it and go back," Smith responded, "And go back to Australia? ... Yes." Smith, however, immediately clarified: "In the long run that was my intent. My family is there. I have children there."

We agree with the district court. Though Smith has consistently been clear that he intends eventually to sell the Property and move to Australia, there is no evidence showing that when Smith declared bankruptcy, he lacked the intention of making the Property his homestead. The fact that a party desires to sell the property and move does not defeat the exemption. *Bradley*, 960 F.2d at 509.

AFFIRMED.

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**All Citations**

--- Fed.Appx. ----, 2016 WL 4394560 (Mem)

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U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

In the Matter of: VITRO ASSET CORPORATION, Debtor.
UNITED INDEPENDENT SCHOOL DISTRICT, Appellant,
v.
VITRO ASSET CORPORATION, And its Affiliated Debtors, Reorganized Debtors and Appellees, Appellees.

No. 15-11056
|
Date Filed: 08/05/2016

Appeal from the United States District Court for the Northern District of Texas USDC
No. 3:15-CV-236

Before STEWART, Chief Judge, PRADO, and SOUTHWICK, Circuit Judges.

***Opinion***

PER CURIAM:*

***1** Appellant United Independent School District ("UISD") failed to timely object to, or appeal from, the bankruptcy court's order confirming Appellees Vitro Asset Corporation and its affiliated debtors' (collectively, "Reorganized Debtors") Chapter 11 reorganization plan. UISD then failed to file a claim for postpetition interest, penalties, and fees related to taxes on property owned by Reorganized Debtors within the period provided by the confirmed plan. UISD now argues that it should not be subject to the terms of the confirmed plan for various reasons. Because we agree with the district court that UISD's challenges to the plan are barred by res judicata, we affirm.

***BACKGROUND***

In 2010, several creditors filed involuntary bankruptcy petitions under 11 U.S.C. § 303 against Reorganized Debtors. In 2012, the bankruptcy court granted these petitions and initiated bankruptcy proceedings.

UISD is an entity in Laredo, Texas, that has taxing authority. For the 2012 tax year, Vitro Packaging, L.L.C., an affiliated debtor of Vitro Asset Corporation, owned personal property within UISD's jurisdiction. In October 2012, UISD issued two tax bills to Vitro Packaging seeking a total of $464,709.97 (the "Base Taxes"). Pursuant to Texas law, UISD's claims were secured by a statutory lien on Vitro Packaging's property. *See* Tex. Tax Code Ann. § 32.01.

On April 4, 2013, Reorganized Debtors sought permission from the bankruptcy court to pay the taxes they owed, including those claimed by UISD. On April 5, UISD filed a proof of claim against Vitro Asset Corporation seeking a total of $598,360.56, which was comprised of $464,709.97 in Base Taxes, $51,118.10 in penalties and interest, and $82,532.49 in collection fees. This proof of claim, however, erred in several respects as it was directed to Vitro Asset Corporation when the property subject to the claimed taxes was actually owned by Vitro Packaging and improperly included amounts for postpetition interest, fees, and penalties. The bankruptcy court granted Reorganized Debtors' motion to pay taxes on April 23, and on April 24, Vitro Packaging paid UISD $464,709.97—the amount claimed in the tax bills that had been issued by UISD. On June 19, 2013, UISD filed an amended proof of claim correcting the errors in its initial proof of claim. This amended proof of claim included Vitro Packaging as the debtor and no longer sought interest, penalties, or collection fees. As a result, the amended proof of claim sought only $464,709.97—the amount of the Base Taxes.

In November 2013, Reorganized Debtors filed their First Amended Joint Chapter 11 Plan of Reorganization. Several portions of this plan are relevant on appeal. Section 3.2 is titled "Unimpaired Classes of Claims and Interests" and provides in

relevant part that "Class 2" claims "consist[ ] of all Allowed Secured Claims." It is undisputed that UISD's claims fall within this category.

Next, Section 3.5 provides deadlines for creditors possessing Class 2 claims such as UISD to seek "payment of either postpetition interest or reimbursement of attorney's fees and other costs associated with such claimant's Allowed Claim." Pursuant to this section, these creditors "shall file with the Bankruptcy Court (and serve on the Debtors and the Office of the United States Trustee) a request seeking such relief within 30 days after the Effective Date."

***2** The bankruptcy court confirmed this plan on November 14, 2013. Pursuant to Federal Rule of Bankruptcy Procedure 8002, any appeal from the bankruptcy court's order confirming the Chapter 11 plan must have been filed within 14 days after entry of the order. Fed. R. Bankr. P. 8002(a). UISD neither objected to the plan nor filed a notice of appeal.

The confirmed reorganization plan became effective on December 19, 2013 (the "Effective Date"). Accordingly, pursuant to Section 3.5 of the confirmed plan, any claim for "payment of either postpetition interest or reimbursement of attorney's fees and other costs associated with such claimant's Allowed Claim" must have been made by January 18, 2014, which was 30 days after the Effective Date. UISD did not file a claim with the bankruptcy court for postpetition interest, penalties, or collection fees during this period. On February 21, 2014, the bankruptcy court closed the proceedings. UISD received notice of each of these relevant documents.

In June 2014, UISD sent a letter to Vitro Packaging asserting that its earlier payment of the Base Taxes in April 2013 was insufficient due to the accrual of interest, penalties, and fees. In response, Reorganized Debtors stated that they had paid in full the amount sought in UISD's amended proof of claim and that any further collection efforts by UISD were improper. UISD's counsel responded that they would continue collection efforts, including by seizing inventory.

On October 9, 2014, Reorganized Debtors petitioned the bankruptcy court to reopen their bankruptcy cases and sought an order enforcing the confirmed plan. In response to Reorganized Debtors' motion, UISD presented the same argument to the bankruptcy court that it advances now on appeal: that application of Section 3.5 of the confirmed plan to its claims violates 11 U.S.C. §§ 502, 503, and 506, and this Court's decision in *Financial Security Assurance, Inc. v. T-H New Orleans Ltd. Partnership (In re T-H New Orleans Ltd. Partnership)*, 116 F.3d 790 (5th Cir. 1997), by improperly impairing UISD's claims. At the hearing on Reorganized Debtors' motion, however, UISD's counsel admitted that UISD had failed to raise this argument within the deadlines for objecting to, or appealing from, the plan. UISD's counsel further conceded that UISD had not filed a petition for interest or fees within the period provided by the plan.

The bankruptcy court granted Reorganized Debtors' request to reopen the bankruptcy cases and their petition to enforce the confirmation order. According to the bankruptcy court, UISD "failed to preserve any claim to the Disputed Fees on account of its Allowed Claim by [not] acting in accordance with, and within the time frame required by, Section 3.5 of the Confirmed Plan." As a result, Reorganized Debtors' payment in April 2013 fully satisfied UISD's claim and UISD was not entitled to payment of any of the disputed fees. The bankruptcy court further held that any lien UISD may have held against Reorganized Debtors' property prior to the reorganization had been released and terminated upon the expiration of the 30-day claims period provided by Section 3.5 of the confirmed plan. Finally, the bankruptcy court issued an injunction prohibiting UISD from pursuing any further collection efforts related to the disputed fees. UISD sought reconsideration of this ruling, which the bankruptcy court denied.

***3** On appeal from the bankruptcy court, the district court noted that while UISD asserted that the issue was whether the bankruptcy court improperly interpreted the plan such that it impaired UISD's claims, the actual issue was whether UISD's arguments were barred by res judicata. The district

court held that each portion of UISD's claim—the taxes, interest, penalties, and collection fees—were covered by Section 3.5 of the confirmed plan and thus must have been sought within the 30-day period provided by the plan. Next, the district court held that the bankruptcy court had properly determined that UISD's lien had been discharged as part of the bankruptcy. Finally, the district court concluded that as a result of UISD's failure to timely object to, or appeal from, the bankruptcy court's order confirming the bankruptcy plan, UISD's arguments were precluded by res judicata. This appeal follows.

### *STANDARD OF REVIEW*

"When a court of appeals reviews the decision of a district court, sitting as an appellate court, it applies the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court." *Sikes v. Crager (In re Crager)*, 691 F.3d 671, 675 (5th Cir. 2012) (quoting *Kennedy v. Mindprint* (*In re ProEducation Int'l, Inc.*), 587 F.3d 296, 299 (5th Cir. 2009)). That is, questions of law are reviewed de novo while factual findings are reviewed for clear error. *United States Dep't of Educ. v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 91 (5th Cir. 2003).

### *DISCUSSION*

At the outset, it is necessary to clarify the issue on appeal. Like it did before the district court, UISD challenges the plan on the ground that the plan improperly impairs its claims to interest, penalties, and collection fees.[1] However, as the district court properly observed, the threshold issue is whether UISD's arguments are barred by res judicata. Notably, UISD does not seriously contend that the district court erred in finding that its arguments are barred by res judicata. In fact, UISD concedes that it has "never claimed that the Plan has no res judicata effect as to UISD" and that it "does not disagree with the district court that the Plan has res judicata effect." Instead, UISD appears to argue that the district court should not have addressed the issue of res judicata because UISD did not raise this question as an issue on appeal. UISD is mistaken. It is well settled that a court sitting on appeal is not limited to considering only those issues raised by the appellant, but "may affirm a judgment upon any basis supported by the record." *Templeton v. O'Cheskey (In re Am. Hous. Found.)*, 785 F.3d 143, 153 (5th Cir. 2015) (quoting *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998)). Moreover, UISD's failure to substantively contest the district court's ruling on res judicata waives this issue on appeal before this Court. *See Sanders v. Unum Life Ins. Co. of Am.*, 553 F.3d 922, 926 (5th Cir. 2008). Nevertheless, we address this issue below.

#### A. Application of Section 3.5 to UISD's Claims

***4** UISD asserts that its claims are not covered by Section 3.5 of the confirmed plan. As clearly explained by the district court, this argument lacks merit. Section 3.5 applies to claims seeking "payment of either postpetition interest or reimbursement of attorney's fees and other costs associated with such claimant's Allowed Claim." Accordingly, by its unambiguous language, UISD's claim to postpetition interest is covered by this provision. The district court also correctly determined that this language, specifically "other costs associated with such claimant's Allowed Claim," includes UISD's claim to collection fees related to the Base Taxes owed by the Reorganized Debtors.

Next, UISD argues that its claim to penalties does not fall within this section because it is not seeking "reimbursement." However, as the district court observed, UISD itself considered these penalties to be a component of the interest owed as the tax bills it sent to Reorganized Debtors combined these amounts.

#### B. Res Judicata

Because each aspect of UISD's claim is covered by Section 3.5 of the confirmed plan, UISD was required to file a petition for these amounts within 30 days from the plan's Effective Date. UISD failed to do so. In an attempt to overcome this lapse, UISD argues that it should not be bound by this requirement because impairing its claims in this way would be at odds with Section 4.2 of the confirmed plan, 11 U.S.C. §§ 502,

503, and 506, and this Court's decision in *In re T-H New Orleans Ltd.* As the district court correctly held, however, UISD's arguments challenging the confirmed plan are barred by res judicata.

Res judicata "bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 934 (5th Cir. 1999). This principle is equally applicable to "bankruptcy plan confirmations." *Sun Fin. Co. v. Howard (In re Howard)*, 972 F.2d 639, 641 (5th Cir. 1992). As we explained in *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), where a creditor fails to object to, or appeal from, the confirmation of a bankruptcy plan, "[r]egardless of whether [a] provision [of the plan] is inconsistent with the bankruptcy laws," a challenge to the "propriety or legality" of the plan is "foreclosed." *Id.* at 1050.

***1. UISD's Lien***

Generally, res judicata does not apply to secured creditors who possess a lien. *See id.* Res judicata may apply, however, where the lien has been discharged as part of the reorganization. *See In re Simmons*, 765 F.2d at 556–58. A lien may be discharged in bankruptcy under several circumstances, including invalidation of the lien by a provision of the bankruptcy code. *Acceptance Loan Co. v. S. White Transp., Inc. (In re S. White Transp., Inc.)*, 725 F.3d 494, 496 (5th Cir. 2013). As we have previously held, 11 U.S.C. § 1141(c), which provides that "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors," has the effect of invalidating a lien where four conditions are met. *Id.* (quoting 11 U.S.C. § 1141(c)); *see also Elixir Indus., Inc. v. City Bank & Tr. Co. (In re Ahern Enters., Inc.)*, 507 F.3d 817, 822 (5th Cir. 2007) ("[T]he confirmation of a Chapter 11 plan voids liens on property dealt with by the plan unless they are specifically preserved, if the lien holder participates in the reorganization."). These four conditions are as follows: "(1) the plan must be confirmed; (2) the property that is subject to the lien must be dealt with by the plan; (3) the lien holder must participate in the reorganization; and (4) the plan must not preserve the lien." *In re S. White Transp., Inc.*, 725 F.3d at 496 (emphasis omitted) (quoting *In re Ahern Enters., Inc.*, 507 F.3d at 822).

***5** Each factor is met here. The First Amended Joint Chapter 11 Plan of Reorganization was confirmed by an order of the bankruptcy court on November 14, 2013. Second, the property subject to UISD's lien was dealt with by the plan. As the district court observed, circuit courts have held that a general reference to the property at issue is sufficient to satisfy this requirement. *See, e.g.*, *City of Concord v. N. New England Tel. Operations LLC (In re N. New England Tel. Operations LLC)*, 795 F.3d 343, 349 (2d Cir. 2015); *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 649 (7th Cir. 2008). Section 10.2 of the confirmed plan provides that:

> On the Effective Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, and except as otherwise provided in this Plan, the property of each Estate shall vest in the applicable Reorganized Debtor, free and clear of all Claims, liens, encumbrances, charges, and other interests, except as provided herein or in the Confirmation Order.

This general reference, which refers to all property held by Reorganized Debtors, includes the property to which UISD's lien was attached.

Third, UISD participated in the reorganization. UISD filed two proofs of claim: one which sought $598,360.56, and an amended proof of claim for $464,709.97. This conduct is sufficient to satisfy the participation requirement. *See Baker Hughes Oilfield Operations, Inc. v. Morton (In re R.L. Adkins Corp.)*, 784 F.3d 978, 981 (5th Cir. 2015) (Jones, J., concurring) (stating that a secured creditor may participate "by filing a proof of claim and then negotiating with the debtor or attempting to foreclose its lien"); *In re Ahren Enters., Inc.*, 507 F.3d at 823.

Finally, there is no dispute that the confirmed plan did not specifically preserve UISD's lien. Accordingly, the district court properly held that UISD's lien was discharged as part of the reorganization and that res judicata may therefore apply to UISD's claims.

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***2. Application of Res Judicata*** Res judicata will bar a claim where the following elements are met: (1) "the parties must be identical in both suits," (2) "the prior judgment must have been rendered by a court of competent jurisdiction," (3) "there must have been a final judgment on the merits" and, (4) "the same cause of action must be involved in both cases." *Nilsen v. City of Moss Point*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc) (quoting *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1052 (5th Cir. 1979)). These elements are satisfied here.

First, Vitro Asset Corporation and its affiliated debtors were parties to the bankruptcy proceedings. While UISD was not a formally named party, we have held that "[t]his element is satisfied not only by identity of 'formal or paper' parties but also of parties in interest, 'that is, ... persons whose interests are properly placed before the court by someone with standing to represent them.' " *Shoaf*, 815 F.2d at 1051 (alteration in original) (quoting *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 869 (5th Cir. 1984)). In *Shoaf*, we held that a party met this requirement where, even though it was never formally named as a party to the bankruptcy proceedings, it participated as a creditor. *Id.* As addressed above, UISD participated in the bankruptcy proceedings by filing two proofs of claim. Second, the bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

Third, the bankruptcy court's order confirming the plan constituted a final judgment. *Id.* at 1053.

***6** Finally, "[t]o determine whether the same cause of action is involved in two suits, [this Court] has adopted the transactional test of the *Restatement (Second) of Torts.*" *Id.* Pursuant to this test, we ask whether UISD's claim before the district court "arose out of the same transaction that was the subject of the bankruptcy court's order." *Id.* at 1054. This is unquestionably the case here. The bankruptcy court's order incorporated and confirmed the reorganization plan that UISD now challenges.

As a result, res judicata bars UISD's challenge to the terms of the plan at this late stage. UISD's complaints about the plan and its potential impairment of UISD's claims should have been brought within the period set for objections to, and appeals from, the confirmation order in 2013.

## *CONCLUSION*

The order of the district court is affirmed.

### All Citations

--- Fed.Appx. ----, 2016 WL 4169129

Footnotes 1 UISD also appears to contend that the confirmed plan terms should not apply to its claims because Reorganized Debtors did not object to UISD's original proof of claim that sought interest, penalties, and fees. In making this argument, however, UISD conspicuously ignores the fact that it filed an amended proof of claim that did not seek these amounts. As the district court correctly observed, this amended proof of claim is binding. As we explained in *Simmons v. Savell (In re Simmons)*, 765 F.2d 547 (5th Cir. 1985), “filing of a proof of claim is tantamount to the filing of a complaint in a civil action.” *Id.* at 552. As such, just like an amended pleading, an amended proof of claim supersedes the original filing and deprives the earlier filing of legal effect. *See* *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985); *In re Enron Corp.*, No. 01 B 16034 (AJG), 2005 WL 3874285, at *1 (Bankr. S.D.N.Y. Oct. 5, 2005) (“The Amended Claim amended and superceded the Initial Claim.”). Accordingly, the fact that Reorganized Debtors did not object to UISD's initial proof of claim is inconsequential.

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Only the Westlaw citation is currently available. United States Court of Appeals, Fifth Circuit.

Ralph S. Janvey, In His Capacity as Court Appointed Receiver for the Stanford International Bank Limited, et al; Official Stanford Investors Committee, Plaintiffs–Appellants;
v.
The Golf Channel, Incorporated; TGC, L.L.C., doing business as Golf Channel, Defendants–Appellees.

No. 13–11305
|
Filed August 22, 2016

*Synopsis*

**Background:** Court-appointed receiver of failed Ponzi scheme brought action against cable network to recover advertising payments made by scheme operator under Texas Uniform Fraudulent Transfer Act (TUFTA). The United States District Court for the Northern District of Texas, David C. Godbey, J., 2013 WL 11309343, entered summary judgment in network's favor, and receiver appealed. The Court of Appeals, Jennifer Walker Elrod, Circuit Judge, 780 F.3d 641, reversed. On rehearing, the Court of Appeals, 792 F.3d 539, vacated its opinion and certified question to Supreme Court of Texas regarding TUFTA's use of term "value." The Supreme Court of Texas, Guzman, J., 487 S.W.3d 560, answered question.

**[Holding:]** The Court of Appeals held that network's media-advertising services had objective value and utility from reasonable creditor's perspective at time of challenged transaction.

District court's judgment affirmed.

Appeal from the United States District Court for the Northern District of Texas, David C. Godbey, J.

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Before ELROD and SOUTHWICK, Circuit Judges.[*]

*Opinion*

PER CURIAM:

***1** Stanford International Bank, Limited paid $5.9 million to The Golf Channel, Inc., in exchange for a range of advertising services aimed at recruiting additional investors into Stanford's multi-billion dollar Ponzi scheme.[1] After the scheme was uncovered by the SEC and the district court seized Stanford's assets, the court-appointed receiver filed suit under the Texas Uniform Fraudulent Transfer Act (TUFTA) to recover the $5.9 million paid to Golf Channel. The

district court granted Golf Channel's motion for summary judgment, having determined that although Stanford's payments were fraudulent transfers under TUFTA, Tex. Bus. & Com. Code § 24.005(a)(1), Golf Channel had established the affirmative defense that it received the payments "in good faith and for a reasonably equivalent value," *id.* § 24.009(a).

We initially reversed the district court's judgment, reasoning based on the text of TUFTA, the comments in the Uniform Fraudulent Transfer Act (UFTA), and our binding precedent that the payments to Golf Channel were not for "value" because Golf Channel's advertising services could only have depleted the value of the Stanford estate and thus did not benefit Stanford's creditors. *Golf Channel I*, 780 F.3d at 646; *see* Bus. & Com. § 24.004(a). Subsequently, in response to the view in Golf Channel's petition for rehearing that the Supreme Court of Texas might not share our reading of TUFTA, we vacated our opinion in *Golf Channel I* and certified the following question to the Supreme Court of Texas:

> Considering the definition of "value" in section 24.004(a) of the Texas Business and Commerce Code, the definition of "reasonably equivalent value" in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

*Golf Channel II*, 792 F.3d at 547.

**[1]** **[2]** **[3]** The Supreme Court of Texas has now answered the question. *Janvey v. Golf Channel, Inc. (Golf Channel III)*, 487 S.W.3d 560 (Tex. 2016). *Golf Channel III* instructed that:

> TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business.

*Id.* at 564. As for determining whether consideration "had objective value at the time of the transaction," *Golf Channel III* elaborated that the transfer must have "confer[red] some direct or indirect economic benefit to the debtor." *Id.* at 574. The opinion clarified that the "value" inquiry under TUFTA does not depend on "whether the debtor was operating a Ponzi scheme or a legitimate enterprise,"[2] so long as "the services would have been available to another buyer at market rates" had they not been purchased by the Ponzi scheme. *Id.* at 581, 570. *Golf Channel III* noted that consideration— especially in the form of consumable goods or services— can have objective value "even if the consideration neither preserved the debtor's estate nor generated an asset or benefit that could be levied to satisfy unsecured creditors." *Id.* at 577.

***2** **[4]** Applying these principles to this case, the Supreme Court of Texas determined that "Golf Channel's media-advertising services had objective value and utility from a reasonable creditor's perspective at the time of the transaction, regardless of Stanford's financial solvency at the time." *Id.* at 581–82. This was so, the court explained, because "had Stanford not purchased Golf Channel's television air time, the services would have been available to another buyer at market rates." *Id.* at 570. Accordingly, the transfer was for "value" as viewed

from the reasonable creditor's perspective, even if the advertising services "only served to deplete Stanford's assets" "[b]ecause acquiring new investors ... ultimately extends the Ponzi scheme." *Id.* at 578, 582.

The Supreme Court of Texas's answer interprets the concept of "value" under TUFTA differently than we have understood "value" under other states' fraudulent transfer laws and under section 548(c) the Bankruptcy Code. *See Golf Channel III*, 487 S.W.3d at 573 ("Uniformity is a stated objective of the statute, but TUFTA is unique among fraudulent-transfer laws because it provides a specific market-value definition of 'reasonably equivalent value.' "). For example, applying Washington's UFTA statute, we have held that services that furthered a Ponzi scheme were not for "value" as a matter of law because "[t]he primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved."

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*Warfield v. Byron*, 436 F.3d 551, 560 (5th Cir. 2006). **[5]** The binding effect of these prior decisions in their Similarly, under section 548(c) of the Bankruptcy Code, respective areas of law remains unaffected by *Golf Channel* we have inquired whether the consideration provided in *Ill*. *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) exchange for a transfer conferred a tangible economic (reciting the rule of orderliness). When interpreting a benefit on the debtor, not whether the consideration federal statute or a statute from a different state, "we are (in that case, airplane fuel—a consumable good) had not bound by a state court's interpretation of a similar— objective value in the abstract. *Butler Aviation Int'l, Inc. v.* or even identical—state statute." *Johnson v. United States*, *Whyte* (*In re Fairchild Aircraft Corp.*), 6 F.3d 1119, 1125– 559 U.S. 133, 138, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). 27 (5th Cir. 1993), *abrogated on other grounds by In re* As for this case, the Supreme Court of Texas is the *Dunham*, 110 F.3d 286, 288–89 (5th Cir. 1997); *see also In* authoritative interpreter of TUFTA and we are bound by *re Randy*, 189 B.R. 425, 441–42 (Bankr. N.D. Ill. 1995) its answer to our certified question when applying that (holding, under section 548(c) of the Bankruptcy Code, statute. We consequently AFFIRM the district court's that broker services provided to a Ponzi scheme had no grant of summary judgment for Golf Channel.[4] value as a matter of law because recruiting new investors into the scheme "would only exacerbate the harm to the

***All Citations***

debtor's creditors").

--- F.3d ----, 2016 WL 4435633

## Footnotes

* This opinion is being entered by a quorum of this court. 28 U.S.C. § 46(d).

1 The factual background of this case is laid out in more detail in our two previous opinions. *See Janvey v. Golf Channel, Inc.* (*Golf Channel II*), 792 F.3d 539 (5th Cir. 2015), *vacating Janvey v. Golf Channel, Inc.* (*Golf Channel I*), 780 F.3d 641 (5th Cir. 2015).

2 The Supreme Court of Texas noted that "value" may not exist under TUFTA where the consideration itself is illegal and left open the possibility that the debtor's status as a Ponzi scheme might impact whether the transferee took "in good faith." *Golf Channel III*, 487 S.W.3d at 581. Neither of those two points is disputed in this appeal.

3 In this case, "Golf Channel put forward no evidence that its advertising services preserved the value of Stanford's estate" or otherwise economically benefitted Stanford's creditors, even when examined at the time of the transaction. *Golf Channel II*, 792 F.3d at 545.

4 In their post-*Golf Channel III* brief to our court, the appellants seek judgment in favor of the Receiver on the ground that, before our court, Golf Channel forfeited any argument that the $5.9 million transfer satisfied an antecedent debt. *See Golf Channel II*, 792 F.3d at 546 n.7. They characterize the Supreme Court of Texas as having held that a fraudulent transfer in exchange for services is for "value" *only* if it satisfied a valid antecedent debt. TUFTA provides that a transfer in exchange for which "an antecedent debt is secured or satisfied" is a transfer for "value," Bus. & Com. § 24.004(a), and *Golf Channel III* referenced this provision in explaining why Golf Channel's advertising services had "value," 487 S.W.3d at 575 n.82, 576, 582. However, the Supreme Court of Texas was clear that section 24.004(a)'s enumeration of transfers that are for value is "nonexclusive," *Golf Channel III*, 487 S.W.3d at 574, and offered its antecedent-debt theory of "value" in this case only in the alternative, *id.* at 582 ("*Moreover*, as services were fully performed, each payment *also* had value under TUFTA by extinguishing claims against the estate for the value of those services." (emphasis added)).
Golf Channel's forfeiture of the point is therefore not fatal to its position.

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2016 WL 4253552
United States Court of Appeals,
Fifth Circuit.

In the Matter of: Daniel Lee Ritz, Jr., also known as Bo Ritz, Debtor.
Husky International Electronics, Incorporated, Appellant,
v.
Daniel Lee Ritz, Jr., Appellee.

No. 14-20526
|
Filed August 10, 2016

*Synopsis*
**Background:** Creditor, a seller of electronic device components, brought adversary proceeding against Chapter 7 debtor, the individual who was in financial control of the company that had purchased components from creditor, seeking to pierce corporate veil in order to hold debtor personally liable on corporate debt, and to except debt from discharge on, inter alia, a "false pretenses, false representation, or actual fraud" theory. Following trial, the United States Bankruptcy Court for the Southern District of Texas, 459 B.R. 623, entered judgment in favor of debtor, and creditor appealed. The District Court affirmed, 513 B.R. 510, and creditor appealed. The Court of Appeals, 787 F.3d 312, affirmed. Certiorari was granted, and the Supreme Court, 136 S.Ct. 1581, reversed and remanded.

**Holdings:** The Court of Appeals, King, Circuit Judge, held that:

[1] under Texas law, as predicted by the Court of Appeals,if creditor could show that debtor's transfers satisfied the "actual fraud" prong of the Texas Uniform Fraudulent Transfer Act (TUFTA), then it could also show that debtor's conduct constituted actual fraud for purposes of veil-piercing, but

[2] the district court erred in concluding that debtor wasliable to creditor under the Texas veil-piercing statute because, in so concluding, it relied on a factual finding that the bankruptcy court did not actually make.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas

*Attorneys and Law Firms*

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Before STEWART, Chief Judge, and KING and ELROD, Circuit Judges.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

KING, Circuit Judge:

***1** Daniel Ritz, in financial control of Chrysalis Manufacturing Corp., caused funds to be transferred from Chrysalis which effectively rendered Chrysalis unable to pay a debt owed to Husky International Electronics, Incorporated. When Ritz filed for Chapter 7 bankruptcy, Husky initiated an adversary proceeding objecting to Ritz's discharge under, *inter alia*, 11 U.S.C. § 523(a)(2) (A). The bankruptcy court rejected this challenge, holding that Ritz owed no debt to Husky under Texas law. The district court affirmed the judgment of the bankruptcy court, explaining that, while Ritz owed a debt to Husky under Texas law, Husky could not prevail on its objection under the Bankruptcy Code because a misrepresentation is required to succeed on an objection under § 523(a) (2)(A). On appeal, this court did not address the state law issue but agreed with the district court's conclusion that Husky could not succeed on its objection under § 523(a)(2)(A) because that provision requires that the debtor make a misrepresentation. The Supreme Court reversed, holding that no misrepresentation was required to object successfully to a discharge

under § 523(a)(2)(A). We are therefore required to consider the issue that we pretermitted on Husky's appeal to this court: whether Ritz owes a debt to Husky under Texas law. We do so because if Ritz is not liable to Husky under Texas law, then there is no debt to discharge and the question of the deniability of a discharge under § 523(a)(2)(A) is moot. We VACATE the district court's judgment insofar as that court held that Ritz was liable to Husky under Texas law because the district court relied on fact findings not actually made by the bankruptcy court. However, we agree with the district court's legal conclusion that, under Texas law, depending on subsequent fact findings, Husky may be able to show that Ritz is liable to it. We REMAND to the district court (for remand to the bankruptcy court) for additional factfinding as to whether Husky may successfully establish Ritz's liability under state law.

### *I. FACTUAL AND PROCEDURAL HISTORY*

Because the factual and procedural history of this case has been recounted multiple times, we discuss only the background necessary to decide the issues before us today. *See generally* *Husky Int'l Elecs., Inc. v. Ritz*, ––U.S. ––, 136 S.Ct. 1581, 1585–86, 194 L.Ed.2d 655 (2016) (discussing the factual and procedural background); *Husky Int'l Elecs., Inc. v. Ritz (In re Ritz)*, 787 F.3d 312, 315–16 (5th Cir. 2015) (same). Husky International Electronics, Incorporated, (Husky) manufactures components for electrical devices. *Husky*, 136 S.Ct. at 1585. Between 2003 and 2007, Husky sold its products to Chrysalis Manufacturing Corp. (Chrysalis), and "Chrysalis incurred a debt to Husky of $163,999.38." *Id.* Chrysalis, which was under the financial control of Daniel Ritz at the time, did not pay its debts as they became due. *Id.* "All parties agree that between 2006 and 2007, Ritz drained Chrysalis of assets it could have used to pay its debts to creditors like Husky by transferring large sums of Chrysalis' funds to other entities Ritz controlled."[1] *Id.* In May 2009, Husky filed a lawsuit against Ritz, seeking to hold him personally responsible for the debt Chrysalis owed to Husky pursuant to Texas Business Organizations Code § 21.223(b). *Id.*

***2** Ritz filed a voluntary Chapter 7 petition for bankruptcy, and Husky initiated the adversary proceeding underlying Husky's appeal to this court, objecting to the discharge of Ritz's debt under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6). *In re Ritz*, 787 F.3d at 315. The bankruptcy court rejected Husky's arguments, holding that the denial of a discharge was not warranted by any of the Bankruptcy Code provisions advanced by Husky.

With respect to § 523(a)(2)(A),[2] which is the only bankruptcy provision at issue on remand, the bankruptcy court held that Husky could not prevail under this provision because Ritz was not liable to Husky pursuant to Texas Business Organizations Code § 21.223(b). Husky argued that: (1) Ritz's transfers of Chrysalis's funds were fraudulent transfers under the Texas Uniform Fraudulent Transfer Act (TUFTA), *see* Tex. Bus. & Com. Code Ann. § 24.005; (2) these fraudulent transfers under TUFTA allowed Husky to pierce the corporate veil and hold Ritz personally liable for Chrysalis's debt, *see* Tex. Bus. Org. Code Ann. § 21.223(b); and (3) 11 U.S.C. § 523(a)(2)(A) bars Ritz from discharging his debt to Husky. The bankruptcy court rejected step two of this argument, holding that Tex. Bus. Org. Code Ann. § 21.223(b) permits veil-piercing only for "actual fraud." The court explained that "actual fraud" under § 21.223(b) requires a misrepresentation and that Ritz never made a misrepresentation to Husky. In reaching this conclusion, the bankruptcy court never addressed TUFTA or whether Ritz's transfers constituted actual fraud under TUFTA. Based on the absence of a misrepresentation, the bankruptcy court held that Husky could not pierce the corporate veil of Chrysalis to hold Ritz responsible for Chrysalis's debt to Husky. Because Husky could not pierce the corporate veil, Husky "failed to establish any liability against the debtor"; therefore, "there [was] no debt to discharge." Husky also could not prevail under 11 U.S.C. § 523(a)(2)(A) because, as the court further explained, "the tests for fraud under section 22.223 of [the Texas Business Organizations Code]

and the requirements of section 523(a)(2)(A) of the [Bankruptcy] Code are virtually the same."

On appeal, the district court affirmed the judgment of the bankruptcy court but for different reasons than those given by the bankruptcy court. Specifically, the district court disagreed with the bankruptcy court that Husky could not pierce the corporate veil under Texas law to hold Ritz responsible for Chrysalis's debt. Although the bankruptcy court held that actual fraud under Texas law required a misrepresentation, the district court disagreed based on both Texas and Fifth Circuit caselaw that held that a plaintiff was able to pierce the corporate veil absent any misrepresentation. The district court explained that a plaintiff may pierce the corporate veil, despite the absence of a misrepresentation, if a plaintiff can prove that the defendant committed "actual fraud" under TUFTA. The district court then, noting the factual findings of the bankruptcy court, explained that the Ritz's transfers "met the requirements for fraudulent transfer[s] under [TUFTA]." Because Ritz's conduct constituted actual fraud under TUFTA, the district court concluded that Husky had shown actual fraud so that the corporate veil of Chrysalis could be pierced, i.e., Ritz could be held responsible for Chrysalis's debt under Texas law.

***3** Despite this conclusion, the district court held that "Husky still [could] not prevail" under § 523(a)(2)(A). The court explained that, "[w]hile the fraudulent transfer without a misrepresentation may qualify as actual fraud under § 22.223(b)(1) to pierce the corporate veil, it cannot meet the requirement under 11 U.S.C. § 523(a)(2)(A) to bar the discharge of the debt." "[S]ince there [was] no representation involved in th[e] Adversary Proceeding, Husky fail[ed] to prevail under § 523(a)(2)(A) to overturn the discharge of Chrysalis' debt to Husky."

Husky timely appealed the district court's judgment to this court, arguing that "Ritz committed 'actual fraud' under Texas Business Organizations Code Section 21.223(b) and thus c[ould] be held liable for Chrysalis's debt," and "that the debt is excepted from discharge in bankruptcy under ... the 'actual fraud' clause in 11 U.S.C. § 523(a)(2)(A)." *In re Ritz*, 787 F.3d at 316. This court agreed with the district court that, because Ritz had made no misrepresentation to Husky, his conduct did not amount to actual fraud under § 523(a)(2)(A). *Id.* Because this court concluded that § 523(a)(2)(A) did not apply, it did not reach the Texas state law issue. *Id.*

**[1]** The Supreme Court granted certiorari and addressed whether a misrepresentation is required to show "actual fraud" under § 523(a)(2)(A). *Husky*, 136 S.Ct. at 1585. The Court reversed the judgment of this court, holding that "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Id*. at 1586. In reaching this conclusion, the Court relied on historical understandings of "actual fraud" in the bankruptcy context. *Id*. at 1586–87. The Court explained that, "[b]ecause [it] must give the phrase 'actual fraud' in § 523(a)(2)(A) the meaning it has long held, [the Court] interpret[ed] 'actual fraud' to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation." *Id*. at 1590. While the Court clarified the meaning of actual fraud in § 523(a)(2)(A), it did *not* specifically hold that actual fraud had occurred here or determine whether Husky could ultimately prevail in its attempt to deny Ritz a discharge of the relevant debt. *Id*. Rather, following its holding as to actual fraud, it "remand[ed] the case for further proceedings consistent with [its] opinion." *Id.*

### *II. STANDARD OF REVIEW*

**[2]** When we review the decision of a district court sitting as an appellate court, we apply the same standards of review to the bankruptcy court's decision as applied by the district court. *Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647, 652 (5th Cir. 2010). Thus, we review conclusions of fact for clear error and conclusions of law *de novo*. *Id*.

## III. DENIAL OF A DISCHARGEUNDER § 523(a)(2)(A)

When we initially decided this case, we agreed with the district court that Husky could not succeed on its challenge under § 523(a)(2)(A) because that provision required a misrepresentation and no misrepresentation was made here. *In re Ritz*, 787 F.3d at 316–21. The Supreme Court reversed this court's decision, and we now vacate the district court's decision with respect to § 523(a)(2)(A) for the reasons given by the Supreme

Court.[3] The Supreme Court instructed this court to address specific issues with respect to § 523(a)(2)(A) on remand. Accordingly, we now specifically address the issue pretermitted in our ill-fated opinion: whether Ritz is liable to Husky under Texas state law. Ritz's liability to Husky under Texas law is a threshold question with respect to whether Ritz may be denied a discharge under § 523(a)(2)(A) because, if Ritz is not liable under Texas law, then he owes no debt to Husky.[4] Because, as we explain below, we cannot resolve the state law issue without further fact finding by the bankruptcy court, we do not address the denial of a discharge under § 523(a)(2)(A) here and leave this determination to be made in the first instance by the bankruptcy court, after the necessary fact finding, in light of the standard articulated by the Supreme Court. *See Husky*, 136 S.Ct. at 1589 n.3.

## IV. ACTUAL FRAUD UNDER TEXAS STATE LAW

***4** To succeed in denying Ritz a discharge under § 523(a) (2)(A), Husky must first show that Ritz is liable for the debt owed by Chrysalis to Husky. To show that Ritz is liable for the debt, Husky relies on Texas Business Organizations Code § 21.223(b), which allows a plaintiff to pierce the corporate veil and hold a shareholder, such as Ritz, liable for the debts of a corporation. The district court held that Husky could pierce the corporate veil to hold Ritz liable. In our previous opinion, we did not address whether Ritz could be held liable for Chrysalis's debt to Husky under Texas's veil-piercing statute, but we do so here. We hold that the district court erred in concluding that Ritz was liable to Husky under the Texas veil-piercing statute because, in so concluding, it relied on a fact finding that the bankruptcy court did not actually make. However, we agree with the district court that Husky's theory that Ritz is liable for the debt owed by Chrysalis to Husky under Texas law is legally viable and therefore remand for further factual findings on this theory.

[3] **[4] [5]** Because corporations offer their shareholders limited liability, a plaintiff seeking to impose individual liability on a shareholder must pierce the corporate veil to do so. *Spring St. Partners–IV, L.P. v. Lam*, 730 F.3d 427, 443 (5th Cir. 2013). Texas law allows veil-piercing but only in limited circumstances. *See Schimmelpenninck v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 356 (5th Cir. 1999) ("Texas recognizes various legal theories that facilitate disregarding the corporate form, i.e., piercing the corporate veil...."). Under Texas law, the shareholder of a corporation generally

> may not be held liable to the corporation or its obligees with respect to ... any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, beneficial owner, subscriber, or affiliate is or was the alter ego of the corporation or on the basis of actual or constructive fraud, a sham to perpetrate a fraud, or other similar theory[.]

Tex. Bus. Orgs. Code Ann. § 21.223(a)(2). However, the shareholder may be held personally liable for the business's obligations "if the obligee demonstrates that the ... beneficial owner ... caused the corporation to be used for the purpose of perpetrating and did perpetrate an *actual fraud* on the obligee primarily for the *direct personal benefit* of the ... beneficial owner." *Id.* § 21.223(b) (emphasis added). Thus, if Husky can show that Ritz

perpetrated an actual fraud for his direct personal benefit, Ritz is liable for Chrysalis's debt to Husky under Texas law. *See SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 454 (Tex. 2009) (noting that Texas courts "disregard the corporate fiction ... when the fiction is used as a means of perpetrating fraud" (quoting *Castleberry v. Branscum*, 721 S.W.2d 270, 271–72 (Tex. 1986))).

**[6] [7] [8] [9]** As to the actual fraud requirement, the bankruptcy court held that actual fraud under Texas law required a misrepresentation. The district court, relying on this court's decision in *Spring Street*, 730 F.3d at 442, disagreed and held that other conduct could satisfy the standard of "dishonesty of purpose and intent to deceive" necessary to show actual fraud. In particular, the district court held that a fraudulent transfer under TUFTA, if made with the actual intent to hinder, delay, or defraud, could satisfy the actual fraud requirement of the Texas veil-piercing statute. We agree with this legal conclusion.[5]

***5 [10]** "[I]n the context of piercing the corporate veil, actual fraud is not equivalent to the tort of fraud. Instead, in that context, actual fraud involves 'dishonesty of purpose or intent to deceive.' " *Latham v. Burgher*, 320 S.W.3d 602, 607 (Tex. App.—Dallas 2010, no pet.) (quoting *Castleberry*, 721 S.W.2d at 273). In *Spring Street*, we thoroughly reviewed the legislative and legal history of the actual fraud requirement for veil-piercing under Texas law. 730 F.3d at 443–44. While we do not repeat that review here, we note that, based on our examination of Texas law, we concluded that " '[a]ctual fraud' is defined as 'involv[ing] dishonesty of purpose or intent to deceive.' " *Id.* at 442–43 (quoting *Tryco Enters., Inc. v. Robinson*, 390 S.W.3d 497, 508 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd)).

We also discussed liability under TUFTA at length in *Spring Street*, *see id.* at 436–37, noting that a defendant may be liable under TUFTA if he "committed an actual, fraudulent transfer," *id.* at 436 (citing Tex. Bus. & Com. Code Ann. § 24.005(a)(1)). And we further noted that "[t]he actual fraud prong" of TUFTA provides that

> [a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]

*Id.* at 436–37 (quoting Tex. Bus. & Com. Code Ann. § 24.005(a)(1)). Based on the facts before us in *Spring Street*, we did not reach the issue of whether a showing that a defendant made a fraudulent transfer under TUFTA was, by itself, enough to support piercing the corporate veil. *Spring Street*, 730 F.3d at 445. We hold today, however, that establishing that a transfer is fraudulent under the actual fraud prong of TUFTA is sufficient to satisfy the actual fraud requirement of veil-piercing because a transfer that is made "with the actual intent to hinder, delay, or defraud any creditor," Tex. Bus. & Com. Code Ann. § 24.005(a)(1), necessarily "involves 'dishonesty of purpose or intent to deceive.' "[6] *Latham*, 320 S.W.3d at 607 (quoting *Castleberry*, 721 S.W.2d at 273).

**[11]** Given this holding, if Husky can show that Ritz's transfers in this case satisfy the actual fraud prong of TUFTA, then it can also show that Ritz's conduct constitutes actual fraud for the purposes of veil-piercing. As direct evidence of actual fraud is often scarce, TUFTA "supplies a 'non-exclusive list of eleven factors, commonly known as badges of fraud, that courts may consider in determining whether a debtor actually intended to defraud creditors under TUFTA.' " *Spring Street*, 730 F.3d at 437 (quoting *In re Soza*, 542 F.3d 1060, 1066 (5th Cir. 2008)). These badges of fraud, which aid "[i]n determining actual intent," include whether:

> ***6** (1) the transfer or obligation was to an insider;
>
> (2) the debtor retained possession or control of theproperty transferred after the transfer;

(3) the transfer or obligation was concealed;

(4) before the transfer was made or obligation wasincurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor'sassets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtorwas reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortlyafter the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly aftera substantial debt was incurred; and

(11) the debtor transferred the essential assets of thebusiness to a lienor who transferred the assets to an insider of the debtor.

Tex. Bus. & Com. Code Ann. § 24.005(b).

**[12] [13]** With respect to these badges of fraud, the district court noted that the bankruptcy court "found the trustee had proven four badges of fraud by Ritz and therefore met the requirements for fraudulent transfer under § 24.005." Ritz argued when this case was initially appealed, and repeats on remand from the Supreme Court, that these findings do not exist in the bankruptcy court's opinion. Ritz is partially correct. Ritz is incorrect insofar as he suggests that the bankruptcy court did not make factual findings consistent with TUFTA's badges of fraud. For example, the bankruptcy court noted that "[a]s a result of [the] transfers [effected by Ritz], [Chrysalis] was drained of all its cash and, therefore, could not pay its creditors." This is sufficient to conclude that, under TUFTA, Ritz "removed ... assets." Tex. Bus. & Com. Code Ann. § 24.005(b)(7). However, Ritz is correct that the bankruptcy court never drew the inference from its factual findings that Ritz's transfers here were made "with actual intent to hinder, delay, or defraud any creditor," and therefore satisfied the actual fraud prong of TUFTA. Tex. Bus. & Com. Code Ann. § 24.005.

**[14] [15]** Because the bankruptcy court—the fact finder in this case—never drew an inference of actual fraud here, even if its factual findings are consistent with that inference, the district court erred in holding that Ritz was liable to Husky under Texas law. Accordingly, we must remand this case to the district court (and thence to the bankruptcy court) for additional fact finding as to whether Ritz's conduct satisfies the actual fraud prong of TUFTA.
This is so because, under Texas law, "[i]ntent is a fact question uniquely within the realm of the trier of fact." *Flores v. Robinson Roofing & Const. Co.*, 161 S.W.3d 750, 754 (Tex. App.—Fort Worth 2005, pet. denied) (quoting *Coleman Cattle Co. v. Carpentier*, 10 S.W.3d 430, 433 (Tex. App.—Beaumont 2000, no pet.)). Moreover, "[i]f ... 'fraudulent intent is only to be deduced from facts and circumstances which the law considers as mere badges of fraud and not fraud per se, these must be submitted to the trier of fact, which draws the inference as to the fairness or fraudulent character of the transaction.' " *Id.* (quoting *Coleman Cattle*, 10 S.W.3d at 434).

***7** If the bankruptcy court concludes on remand that Ritz's conduct satisfies the actual fraud prong of TUFTA and that the actual fraud was for Ritz's "direct personal benefit," Tex. Bus. Orgs. Code Ann. § 21.223(b), then Ritz is liable for Chrysalis's debt to Husky under Texas's veil-piercing statute and the bankruptcy court must then address whether Ritz should be denied a discharge under

Footnotes

11 U.S.C. § 523(a)(2)(A), consistent with the Supreme Court's opinion in this case. If, however, the bankruptcy court concludes that Ritz's conduct does not amount to actual fraud under Texas state

law, then there is no debt to discharge, and the question of deniability under § 523(a)(2)(A) becomes moot.

### *V. CONCLUSION*

For the foregoing reasons, we VACATE the judgment of the district court, and we REMAND the case for further proceedings consistent with this opinion and the opinion of the Supreme Court.

### All Citations

--- F.3d ----, 2016 WL 4253552, 62 Bankr.Ct.Dec. 260

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1 Although the Supreme Court did not list all of Ritz's transfers, this court previously listed those transfers as follows:

> Specifically, Ritz transferred: (1) $677,622 to ComCon Manufacturing Services, Inc.; (2) $121,831 to CapNet Securities Corp. (of which Ritz held an 85% ownership interest); (3) $52,600 to CapNet Risk Management, Inc. (of which Ritz held a 100% ownership interest); (4) $172,100 to Institutional Capital Management, Inc., and Institutional Insurance Management, Inc. (of which Ritz held 40% and 100% ownership interests, respectively); (5) $99,386.90 to Dynalyst Manufacturing Corp. (of which Ritz held a 25% ownership interest); (6) $26,500 to Clean Fuel International Corp. (of which Ritz held a 20% ownership interest); and (7) $11,240 to CapNet Advisors, Inc.

*In re Ritz*, 787 F.3d at 314.

2 Section 523(a)(2)(A) excepts from discharge "any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by ... false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A).

3 In our initial decision in this case, we relied, in part, on Fifth Circuit precedent to conclude that actual fraud under § 523(a)(2)(A) required a misrepesentation. *In re Ritz*, 787 F.3d at 319; *see also, e.g., Gen. Elec. Capital Corp. v. Acosta (In re Acosta)*, 406 F.3d 367, 372 (5th Cir. 2005) (explaining that "[f]or a debt to be nondischargeable under section 523(a)(2)(A), the creditor must show ... that the debtor made a representation"); *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5th Cir. 1995) (noting that "under an 'actual fraud' theory, the objecting creditor must prove that ... 'the debtor made representations' " (quoting *In re Bercier*, 934 F.2d 689, 692 (5th Cir. 1991))). To the extent that *In re Acosta*, *RecoverEdge*, and other prior Fifth Circuit cases required that a debtor make a representation in order for a debt to be nondischargeable under § 523(a)(2)(A), those cases are effectively overruled by the Supreme Court's decision in this case. *Husky*, 136 S.Ct. at 1586

4 In our previous opinion, we explained that "[b]ecause we conclude—as did the bankruptcy and district courts—that [§ 523(a)(2)(A) does not] appl[y], we need not reach" the issue of Ritz's liability under Texas state law. *In re Ritz*, 787 F.3d at 316.

5 In resolving issues of state law, "we are bound to apply the law as interpreted by the state's highest court." *Barfield v. Madison Cty.*, 212 F.3d 269, 271–72 (5th Cir. 2000). But "[i]f no final disposition is directly on point, we must make an '*Erie*-guess', predicting how that court would rule." *Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 199 (5th Cir. 2006) (quoting *Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 382 (5th Cir. 1998)). *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In making an *Erie* guess "as to how the Texas Supreme Court would rule," this court looks to

> (1) decisions of the [Texas] Supreme Court in analogous cases, (2) the rationales and analyses underlying [Texas] Supreme Court decisions on related issues, (3) dicta by the [Texas] Supreme Court, (4) lower state court decisions, (5) the general rule on the question, (6) the rulings of courts of other states to which [Texas] courts look when formulating substantive law and (7) other available sources, such as treatises and legal commentaries.

*Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel L.L.C.*, 620 F.3d 558, 564 (5th Cir. 2010) (alterations in original) (quoting *Hodges*, 474 F.3d at 199).

6 Although no Texas court has previously reached the same holding, looking to the sources this court considers when making an *Erie* guess, we are convinced that the Supreme Court of Texas would arrive at the same conclusion as we do here. On this point, the Texas Court of Appeals's decision in *Tryco Enterprises* is particularly instructive. In *Tryco Enterprises*, the appellant, James Robinson, sought to enforce a judgment previously entered in his favor. 390 S.W.3d at 501. Immediately after this judgment was entered against Tryco Enterprises, Tryco's corporate officers transferred assets from Tryco to another entity they controlled, leaving Tryco without assets to pay the judgment in Robinson's favor. *Id.* at 502. The Texas Court of Appeals held that Tryco's corporate veil could be pierced because, *inter alia*, the corporate officers had transferred Tryco's assets to another entity to avoid a legal obligation, i.e., the judgment in Robinson's favor. *Id.* at 510; *see also McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 591 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (piercing the corporate veil when the owners of a business transferred assets out of the business for their own benefit).

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2016 WL 4501677
United States Court of Appeals,
Fifth Circuit.

Ron Sommers, Chapter 7 Trustee of Exquisite Designs by Castlerock & Company, Plaintiff–Appellee,
v.
Bank of America, N.A., Defendant–Appellee,
v.
Brad Jones, Movant–Appellant.

No. 15–20775
|
Summary Calendar
|
Filed August 26, 2016

*Synopsis*

**Background:** Sole shareholder of company moved to intervene in a lawsuit between company's Chapter 7 trustee and bank. The United States District Court for the Southern District of Texas, Vanessa D. Gilmore, J., denied the motion. Shareholder appealed.

**[Holding:]** The Court of Appeals, Jerry E. Smith, Circuit Judge, held that the motion to intervene was untimely.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas, Vanessa D. Gilmore, J.

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Brad Jones, Pro Se.

Before JOLLY, SMITH, and GRAVES, Circuit Judges.

*Opinion*

JERRY E. SMITH, Circuit Judge:

***1** Brad Jones appeals, *pro se,* the denial of his motion to intervene in a lawsuit between the Chapter 7 Trustee of Exquisite Designs by Castlerock & Company ("Exquisite Designs") and Bank of America, N.A. ("Bank of America"). He also appeals the order granting the stipulation of dismissal with prejudice filed by those parties. We affirm.

I.

Jones is the sole shareholder of Exquisite Designs, a company that filed for Chapter 11 bankruptcy in 2009 and 2012. In 2014, the second bankruptcy case was converted to a Chapter 7 proceeding, and Ron Sommers was appointed Trustee.

On November 3, 2014, the Trustee sued Bank of America in state court. After removal to federal court, the parties proceeded to mediation. On November 2, 2015, they filed a stipulation of dismissal. The next day, the district court signed an order, entered November 4, granting the stipulation.

On November 18, Jones moved to intervene. On December 1, the district court denied the motion without a hearing or offering findings or conclusions. Jones filed his notice of appeal on December 30.

II.

We begin by considering appellate jurisdiction. We conclude that we have jurisdiction, but limited to one issue.

A.

**[1] [2]** Jones appeals both the denial of his motion to intervene and the order granting the stipulation of dismissal. His notice of appeal is untimely as to the latter. With exceptions not applicable here, Federal Rule of Appellate Procedure 4(a)(1)(A) requires that the notice of appeal "be filed with the district clerk within 30 days after entry of the judgment or order appealed from." The requirement "is not jurisdictional but is a 'prerequisite to the exercise of [subject matter] jurisdiction.' "[1] Because the notice of appeal was filed well over thirty days after the order granting the stipulation of dismissal, we have no jurisdiction to review that order even though the appellant's objections go to the district court's jurisdiction.[2]

B.

**[3] [4]** In the district court, Jones moved for both intervention as of right and permissive intervention. Under our precedents, "[t]he denial of a motion to intervene of right is an appealable final order under 28 U.S.C. § 1291," but "we have only provisional jurisdiction" to review the denial of permissive intervention. *Edwards v. City of Hous.*, 78 F.3d 983, 992 (5th Cir. 1996) (en banc). "If the district court's denial of permissive intervention does not constitute an abuse of discretion, we must dismiss the appeal for lack of jurisdiction." *Id.*

**[5]** For purposes of the instant appeal, however, we may ignore the distinction between absolute and provisional jurisdiction. Because Jones's initial brief on appeal advances no argument as to why the district court erred in denying permissive intervention, that issue has been waived. *See Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 417 (5th Cir. 2009). We thus consider only the denial of intervention as of right, which we review *de novo*. *Texas v. United States*, 805 F.3d 653, 656 (5th Cir. 2015) (citing *Edwards*, 78 F.3d at 995).

III.

***2 [6]** The Federal Rules of Civil Procedure specify two situations in which a person is permitted to intervene as of right: first, when a federal statute grants "an unconditional right to intervene," FED. R. CIV. P. 24(a)(1); and second, when a person "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest," FED. R. CIV. P. 24(a)(2). Jones has asserted no federal statute giving him "an unconditional right to intervene,"[3] so at issue is only whether he can intervene as of right under Rule 24(a)(2).

**[7] [8] [9]** There is a four-prong test for intervention as of right under Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

*Texas*, 805 F.3d at 657 (quoting *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc)). In evaluating timeliness, a district court should consider four factors:

> (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in the case before it petitioned for leave to

> intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

*Ford v. City of Huntsville*, 242 F.3d 235, 239 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)). We generally review for abuse of discretion a district court's determination regarding the timeliness of intervention. *Id.* But where, as here, "the district court failed to make any findings regarding its timeliness conclusion," our review is *de novo*. *Id.*

Under these tests, the district court rightly denied intervention, because Jones's motion was untimely. First, he knew of his alleged interest in the case long before he filed his motion. Although he claims that he "could not have been aware that his interests would be adversely affected until the case was dismissed," that is not the relevant inquiry. What matters is not when he knew or should have known that his interests would be adversely affected but, instead, when he knew that he had an interest in the case.

Second, affirming the denial of intervention would not prejudice Jones. As a private agreement, the mediated settlement binds only its parties. It cannot affect any claims that Jones possesses in his personal capacity, nor does the agreement purport to do so.[4]

***3** Finally, also weighing against a finding of timeliness is the fact that Jones waited until after the court had already dismissed the case with prejudice before seeking to intervene. Though the appellees are incorrect in suggesting

Footnotes

that intervention is always improper after a case has been dismissed, they are accurate in asserting that it is a factor weighing against timeliness.[5]

IV.

In addition to maintaining that he can intervene as of right, Jones advances arguments regarding the mediated settlement agreement and the merits of the Trustee's suit. Those issues are outside the scope of the notice of appeal, so we do not consider them. Because Jones is proceeding *pro se*, however, we note that insofar as he is trying to attack the bankruptcy court's approval of the agreement, he has chosen the wrong forum. This suit is an adversary proceeding independent of the bankruptcycourt proceedings. The district court never approved the agreement, so Jones would be unable to attack it in the instant suit even if we permitted him to intervene.

AFFIRMED.

***All Citations***

--- F.3d ----, 2016 WL 4501677, 63 Bankr.Ct.Dec. 1

1 *United States v. Burns*, 668 F.2d 855, 858 (5th Cir. 1982) (quoting *Sanchez v. Bd. of Regents of Tex. S. Univ.*, 625 F.2d 521, 522 n.1 (5th Cir. 1980)).

2 *See* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 22 (2d ed. 2009) ("[B]ecause a timely appeal is a procedural prerequisite, a court of appeals may not consider an untimely appeal, even if the appeal only involves a challenge to the subject-matter jurisdiction of the district court.").

3 Although Jones moved to intervene under Rule 24(a)(1), neither his motion in the district court nor his briefs on appeal identify any federal statute granting him an unconditional right to intervene.

4 Jones claims that the release provision of the mediated settlement agreement could be interpreted as taking away his right to litigate against Bank of America in the future. But he is mistaken. His interpretation rests on a misreading of "Sommers' Release." He takes the pronoun "its" in the definition of the releasors to refer to Exquisite Designs and/or the loans at issue in this litigation. But the pronoun in fact refers to Sommers, the Trustee. Jones also expresses concern at language in the release concerning "any past, present, or future person or any entity that held or holds any interest in the Loan(s), and the underlying Note, Deed of Trust and/or Mortgage." That language, however, occurs in the definition of the releasees. Far from causing Jones injury, then, that language in fact confers on him a benefit: In consenting to this language, the Trustee has agreed not to sue Jones for conduct relating to the loans.

5 In *Ford*, 242 F.3d at 239, we found intervention as of right appropriate, even though the appellant did not file its motion for intervention until after the district court had entered an agreed order of dismissal. This case is materially indistinguishable. In support of the position that intervention after dismissal is always improper, the Trustee points to various cases in which we have stated that "[a] prerequisite of an intervention (which is an ancillary proceeding in an already instituted suit) is an existing suit within the Court's jurisdiction." *Non Commissioned Officers Ass'n of U.S. v. Army Times Pub. Co.*, 637 F.2d 372, 373 (5th Cir. 1981) (per curiam). The Trustee misreads those decisions, which stand merely for the proposition that a person may not intervene as of right in a "jurisdictionally or procedurally defective" suit. *Truvillion v.*

*King's Daughters Hosp.*, 614 F.2d 520, 526 (5th Cir. 1980). Our caselaw does not forbid intervention as of right in a jurisdictionally and procedurally proper suit that has been dismissed voluntarily.

In *SmallBizPros, Inc. v. MacDonald*, 618 F.3d 458 (5th Cir. 2010), we held that a voluntary stipulation of dismissal under Rule 41(a)(1)(A)(ii) deprives the district court of jurisdiction *to enforce the terms of a settlement agreement* unless the stipulation expressly provides for the retention of ancillary jurisdiction. The decision does not stand for the proposition that a voluntary stipulation of dismissal deprives the district court of jurisdiction from later making any decision whatsoever with regard to the case, some imprecise language in the opinion notwithstanding. Bank of America is thus mistaken when it asserts that "the District Court was powerless to do anything but adopt the Joint Stipulation of Dismissal, enter the Order of Dismissal ..., and deny the Motion to Intervene by Jones sixteen days after the District Court lost jurisdiction."

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**End of Document**

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2016 WL 4150920
United States Court of Appeals,
Eighth Circuit.

Reynal Caldwell Appellant,
v.
Alan E. DeWoskin; Alan E. DeWoskin, P.C.; Theresa Caldwell Lavender Appellees.

No. 15-1962
|
Submitted: January 12, 2016
|
Filed: August 5, 2016

*Synopsis*

**Background:** Chapter 13 debtor brought adversary proceeding against his former wife and attorneys who represented her in post-divorce contempt proceedings for allegedly violating automatic stay. After debtor moved for summary judgment, the Bankruptcy Court, Barry S. Schermer, J., 2014 WL 2931006, sua sponte entered summary judgment in favor of nonmoving parties, and debtor appealed. The United States District Court for the Eastern District of Missouri, John A. Ross, J., 529 B.R. 723, affirmed, and debtor appealed.

**[Holding:]** The Court of Appeals, Kelly, Circuit Judge, held that *Rooker-Feldman* doctrine did not preclude bankruptcy court from considering whether automatic stay applied to state court contempt proceedings against debtor.

Reversed and remanded.

Appeal from United States District Court for the Eastern
District of Missouri—St. Louis

*Attorneys and Law Firms*

Counsel who presented argument on behalf of the The following attorney(s) appeared on the appellant brief; Elbert Arthur Walton, Jr., of Saint Louis, MO.

Counsel who presented argument on behalf of the The following attorney(s) appeared on the appellee brief; Susan M. Dimond, of Saint Louis, MO.

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

*Opinion*

KELLY, Circuit Judge.

***1** Reynal Caldwell (Caldwell) appeals the grant of summary judgment in favor of his ex-wife, Theresa Caldwell Lavender (Lavender), and her attorney Alan E. DeWoskin and his law firm (DeWoskin). Caldwell also appeals the denial of his motion for summary judgment. Because we conclude the court erred in granting DeWoskin and Lavender summary judgment based on the

Rooker–Feldman doctrine,[1] we reverse and remand.[2]

**I. Background**

The facts are undisputed. DeWoskin represented Lavender in the dissolution of her marriage to Caldwell. In the Judgment of Dissolution, filed December 3, 2009, Caldwell was ordered to pay $2,500 per month in maintenance to Lavender, to pay $3,000 toward a U.S. Bank credit card debt, to pay $5,544.75 in attorney's fees to DeWoskin, and to either pay or refinance loans on property he owned. Caldwell appealed the decree of dissolution.

When Caldwell failed to make payments, DeWoskin, on behalf of Lavender, filed a motion in Missouri state court requesting the court set a hearing to determine whether Caldwell should be held in contempt. On July 16, 2010, following a hearing, a Judgment Order of Contempt was entered against Caldwell. He was ordered to pay Lavender $20,000, plus 9% interest, for the monthly maintenance that had accrued since the divorce, attorney's fees, and other debts ordered under the Judgment of Dissolution by August 10, 2010. On August 6, 2010, Caldwell sent two letters, one to Lavender and one to DeWoskin, stating he would pay Lavender only

$1.00 per year until the day he died. On August 11, 2010, after Caldwell again failed to make any payments, DeWoskin filed a motion requesting a hearing be set to determine whether a warrant and commitment order should be issued for Caldwell based on his failure to follow the court's July 16 order. A hearing was set for August 24, 2010.

On August 17, 2010, Caldwell filed a Chapter 13 bankruptcy case in the Bankruptcy Court for the Eastern District of Missouri. At the August 24, 2010, contempt hearing in state court, both Caldwell and Lavender were represented by counsel. DeWoskin, on behalf of Lavender, acknowledged receipt of Caldwell's notice of bankruptcy and requested the court rule on whether the automatic stay applied to the state contempt proceeding. Caldwell's attorney argued the automatic stay stopped the state court from proceeding. The court continued the hearing to August 27, 2010, to research the issue. After again hearing argument from Caldwell's counsel at the August 27 hearing, the court decided the automatic stay did not prevent it from holding Caldwell in contempt, and so held. Caldwell was committed to the St. Louis City Jail until he purged himself of contempt by paying the amounts set forth in the court's previous orders. A friend of Caldwell posted bond in the amount of $22,500—the amount of maintenance that had accrued since December 2009—and he was released from jail on August 28, 2010.

***2** On September 14, 2010, at the request of DeWoskin and Lavender, the state court held another hearing to address Caldwell's continued failure to pay maintenance to Lavender as ordered in the court's previous contempt order. The court ordered Caldwell to pay the maintenance payment due on September 15, 2010, or face another emergency contempt hearing within one week. Instead, on September 16, 2010, Caldwell appealed the July 16 Judgment of Contempt to the Missouri Court of Appeals.

DeWoskin made additional attempts on Lavender's behalf to collect the maintenance due, including motions for orders to withhold Caldwell's wages. On November 9, 2010, friends of Caldwell posted a $25,000 appeal bond to stay collection of the judgment for maintenance pending the outcome of the appeal of the original decree of dissolution. On March 22, 2011, the Missouri Court of Appeals affirmed the decree of dissolution. On April 28, 2011, DeWoskin applied to the court for a payout order on the $25,000 appeal bond that had been posted on Caldwell's behalf, which the court issued.

On May 17, 2011, the Missouri Court of Appeals reversed the Judgment of Contempt and Commitment entered against Caldwell, finding that the district court abused its discretion by not determining whether Caldwell had the financial ability to make the payment necessary to purge himself of contempt before ordering him jailed and did not make sufficient findings to support the judgment. Because the Court of Appeals found those two points on appeal "dispositive," it did not address Caldwell's final point.[3] See Caldwell v. Caldwell, 341 S.W.3d 734, 737 (Mo. Ct. App. 2011).

Caldwell's bankruptcy case was dismissed on July 20, 2011, and the case was closed on August 4, 2011. On January 11, 2013, Caldwell filed a complaint against DeWoskin and Lavender in federal district court alleging they violated the automatic stay and seeking damages pursuant to 11 U.S.C. § 362(k). Caldwell alleged DeWoskin and Lavender violated the automatic stay by requesting the state court hold Caldwell in contempt, requesting wage withholding orders, and seeking a payout order on the $25,000 appeal bond. The district court referred Caldwell's claim to the bankruptcy court on January 13, 2014.

DeWoskin and Lavender moved to dismiss the complaint but their motion was denied. DeWoskin and Lavender filed their answer and affirmative defenses, including the defense of res judicata and lack of subject-matter jurisdiction based on the Rooker–Feldman doctrine. Caldwell moved for summary judgment on the issue of liability. DeWoskin and Lavender resisted, again referencing the Rooker–Feldman doctrine in their response to Caldwell's motion. The bankruptcy court denied Caldwell's motion for summary judgment, and sua sponte granted defendants summary judgment, concluding it lacked subject-matter jurisdiction

under the Rooker–Feldman doctrine. The district court affirmed.

## II. Discussion

**[1] [2]** Although this is an appeal from the district court, our review is of the bankruptcy court's decision. In re Bowles Sub Parcel A, LLC, 792 F.3d 897, 901 (8th Cir. 2015). Like the district court, "we review the bankruptcy court's finding of fact for clear error and its conclusions of law de novo." Id. (quoting Tri–State Financial, LLC v. First Dakota Nat'l Bank, 538 F.3d 920, 923 (8th Cir. 2008)). We review the bankruptcy court's grant of summary judgment de novo. Contemporary Indus. Corp. v. Frost, 564 F.3d 981, 984 (8th Cir. 2009).

***3 [3] [4]** Caldwell first challenges the bankruptcy court's conclusion that it lacked jurisdiction under the Rooker–Feldman doctrine. Under the Rooker–Feldman doctrine, a lower federal court cannot exercise subjectmatter jurisdiction over an action that "seek[s] review of, or relief from, state court judgments." Hageman v. Barton, 817 F.3d 611, 614 (8th Cir. 2016). The bankruptcy court concluded the doctrine applied because, in order for Caldwell's complaint to succeed in federal court, the court would have to overrule the state court's determination that the automatic stay did not apply to the state court contempt proceedings. We conclude the bankruptcy court construed the Rooker–Feldman doctrine too broadly.

In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005), the Supreme Court specifically confined the Rooker–Feldman doctrine to "cases brought by statecourt losers complaining of injuries caused by statecourt judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284, 125 S.Ct. 1517. Whether the doctrine applies depends on whether a federal plaintiff seeks relief from a state court judgment based on an allegedly erroneous decision by a state court —in which case the doctrine would apply—or seeks relief from the allegedly illegal act or omission of an adverse party. Hageman v. Barton, 817 F.3d 611, 615 (8th Cir. 2016); see also MSK EyEs Ltd. v. Wells Fargo Bank, Nat'l Ass'n, 546 F.3d 533, 539 (8th Cir. 2008) (rejecting application of the doctrine in a case where appellants did not challenge the state court's "issuance of the judgment or seek to have that judgment overturned").

Here, Caldwell is not "complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." Exxon Mobil, 544 U.S. at 291, 125 S.Ct. 1517. As Caldwell points out, the state court's Judgment of Contempt was vacated on appeal. Instead, Caldwell seeks compensation for injuries he alleges were caused by the actions DeWoskin and Lavender took to enforce the state court's July 2010 Judgment of Contempt after the automatic stay was in place.[4] Caldwell's claims are not barred by Rooker–Feldman because they challenge the actions taken by DeWoskin and Lavender "in seeking and executing the [state contempt orders]," rather than the state court orders themselves. See Riehm v. Engelking, 538 F.3d 952, 965 (8th Cir. 2008).

Accordingly, we conclude the bankruptcy court erred in holding that it was barred by the Rooker–Feldman doctrine from considering Caldwell's claims, and reverse its grant of summary judgment. We note that "Rooker–Feldman does not otherwise override or supplant preclusion doctrine," Exxon Mobil, 544 U.S. at 284, 125 S.Ct. 1517, and we remand to the bankruptcy court to determine whether Caldwell's claims are precluded based on the state court's determination that the automatic stay did not bar its contempt proceedings.[5]

### *All Citations*

--- F.3d ----, 2016 WL 4150920, 62 Bankr.Ct.Dec. 252

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## Footnotes

1 The Rooker–Feldman doctrine derives its name from two United States Supreme Court cases, Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and Districtof Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

2 We have jurisdiction under 28 U.S.C. § 1291.

3 Although the Missouri Court of Appeals did not identify what Caldwell's "final point" on appeal was, the parties do not dispute that it involved an appeal of the state district court's determination that the automatic stay did not apply to the contempt proceedings.

4 Although in the bankruptcy court Caldwell also challenged the post-petition actions taken by DeWoskin and Lavender to have his wages withheld and to have the $25,000 appeal bond paid out to Lavender, on appeal he concedes "[t]he collection of bond funds and the wage withholding from property of the estate may not have been a violation of the automatic stay." We need not address any claim based on these actions because Caldwell makes no meaningful argument regarding these actions in his opening brief and so these claims are waived. See Chay–Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004) ("Since there was no meaningful argument on this claim in his opening brief, it is waived.").

5 Because the bankruptcy court's summary judgment was based on its conclusion it lacked jurisdiction to consider Caldwell's claims, rather than a judgment on the merits, we decline to address Caldwell's appeal of the denial of his motion for summary judgment. See Acton v. City of Columbia, Mo., 436 F.3d 969, 973 (8th Cir 2006) ("In general, denials of summary judgment are interlocutory and thus not immediately appealable." (quoting Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1079 (8th Cir. 2000))). Caldwell also challenges the bankruptcy court's decision to sua sponte grant DeWoskin and Lavender summary judgment. It is not necessary for us to address this issue on appeal since we are otherwise reversing the grant of summary judgment. See Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 729 (8th Cir. 1964) ("It is a uniform course of appellate review procedure to decline to review questions not necessary to a decision of an appellate court.").

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2016 WL 4437616
United States Court of Appeals,
Ninth Circuit.

In re Berkeley Delaware Court, LLC, Debtor,
Said Adeli, Plaintiff-Appellant,
v.
Christopher R. Barclay, Chapter 7 Trustee, Trustee-Appellee, First Citizens Bank & Trust Company, Defendant-Appellee.

No. 14-55854
|
Argued and Submitted May 3, 2016, Pasadena, California
|
Filed August 23, 2016

**Synopsis**

**Background:** Chapter 7 trustee moved for approval of proposed settlement whereby estate causes of action were effectively sold to other party to settlement agreement. The United States Bankruptcy Court for the Southern District of California entered order approving settlement, and debtor's founder appealed. The District Court, Cathy Ann Bencivengo, J., dismissed appeal as moot based on appellant's failure to seek stay pending appeal. Appeal was taken.

**Holdings:** The Court of Appeals, Nguyen, Circuit Judge, held that:

[1] bankruptcy court has discretion to apply proceduresspecified in bankruptcy statute governing sales of estate property to a sale of claims pursuant to a settlement approved under Bankruptcy Rule;

[2] appellant was bound by statutory requirement to seeka stay pending appeal in order to be able to challenge sale on appeal, regardless of whether outside party bid at the sale; and

[3] bankruptcy court did not clearly err in finding thatpurchaser of estate causes of action was purchaser in good faith, and that party's failure to seek stay pending appeal mooted appeal.

Affirmed.

Appeal from the United States District Court for the Southern District of California, Cathy Ann Bencivengo, District Judge, Presiding, D.C. No. 3:12-cv-02908-CAB-MDD

**Attorneys and Law Firms**

Eric M. Schiffer (argued), Costa Mesa, California; Mohammed K. Ghods and William A. Stahr, Ghods Law Firm, Santa Ana, California; for Plaintiff-Appellant.

Lisa Torres (argued), Gates, O'Doherty, Gonter & Guy, LLP, San Diego, California; J. Barrett Marum (argued), Karin Dougan Vogel, and Aaron J. Malo; Sheppard, Mullin, Richter & Hampton LLP, San Diego, California; for Defendants-Appellees.

Before: Raymond C. Fisher, Milan D. Smith, Jr., and Jacqueline H. Nguyen, Circuit Judges.

**OPINION**

NGUYEN, Circuit Judge:

***1**

Said Adeli appeals the district court's order dismissing his bankruptcy appeal as moot under § 363(m) of the Bankruptcy Code. We find no error and affirm.

**I**

About twenty years ago, Adeli bought a parcel of land in Berkeley, California, and formed Berkeley Delaware Court, LLC ("Debtor") for the purpose of constructing a mixed-use building on the property. In

2007, Debtor obtained a $16.25 million construction loan that was later sold to First-Citizens Bank & Trust Company ("First-Citizens"). First-Citizens eventually attempted to foreclose on the project, which prompted Debtor to file a Chapter 11 bankruptcy petition and a lawsuit against First-Citizens in the California Superior Court. After First-Citizens successfully removed the state court action to the bankruptcy court to be consolidated with the bankruptcy case, the parties reached a settlement. Under the terms of the settlement, First-Citizens agreed to reduce the loan pay-off amount by several millions of dollars on the conditions that Debtor pay the entire loan balance by a fixed date, and that construction on the project would be completed within six months. The settlement fell apart for reasons disputed by the parties. Debtor then filed a second Chapter 11 bankruptcy petition, and another action in state court alleging that First-Citizens acted fraudulently in connection with the project. Once again, First-Citizens successfully removed the state court action to bankruptcy court and consolidated it with the bankruptcy petition. First-Citizens obtained relief from the automatic stay, took possession of the project, and sold it to a third-party purchaser for $11,925,000, leaving First-Citizens with a deficiency claim of approximately $7 million. First-Citizens also filed cross-claims in the state action, alleging various breaches of the settlement agreement by Debtor including entering into leases and collecting rents. Based on the alleged breaches, FirstCitizens asserted an administrative priority claim against the bankruptcy estate.

***2** The bankruptcy court eventually converted the bankruptcy case to a Chapter 7 proceeding and appointed a Trustee, who met with counsel for Debtor and FirstCitizens to explore settlement options. A few months after his appointment, the Trustee reached a settlement with First-Citizens that allowed First-Citizens to purchase the estate's legal claims arising out of the state court case, subject to overbid procedures, in exchange for cash and a waiver of First-Citizens' claims against the estate. The Trustee filed a motion seeking approval of the settlement under Federal Rule of Bankruptcy Procedure 9019 and the sale of the estate's claims under 11 U.S.C. § 363(b), which the bankruptcy court granted.

In support of the motion, the Trustee submitted a declaration which outlined the terms of the settlement and his evaluation of those terms. The Trustee declared that the settlement allowed First-Citizens to purchase the estate's legal claims as reflected in the state court action, subject to overbid procedures, in exchange for $108,000 in cash and a waiver of First-Citizens' $7,000,000 deficiency claim and its $2,000,000 administrative Chapter 11 claim. The Trustee had investigated Debtor's legal claims against First-Citizens, including their value, likelihood of success, and estimated costs to defend. In the Trustee's view, the uncertainty of the legal claims against First-Citizens and the possibility of protracted litigation weighed in favor of the settlement. Finally, in the Trustee's professional judgment, the terms of the settlement were fair and equitable under Rule 9019 because, in light of the proposed overbid procedures, they presented the maximum amount that the estate and its creditors could realize for the value of the estate's claims.

In November of 2012, after no third parties bid on the sale, the bankruptcy court granted the Trustee's motion and approved the settlement agreement. Adeli appealed the bankruptcy court's approval of the settlement to district court. Significantly, he failed to seek a stay of the sale order. The district court dismissed the appeal as moot under 11 U.S.C. § 363(m). Adeli now appeals the district court's dismissal order.

### *II*

**[1] [2]** We review the district court's decision de novo.
*Ewell v. Diebert* (*In re Ewell*), 958 F.2d 276, 279 (9th Cir. 1992). The bankruptcy court's factual findings are reviewed for clear error, and its conclusions of law are reviewed de novo. *Id.*

### *III*

**[3] [4]** Section 363 of the Bankruptcy Code generally allows the trustee to use, sell, or lease property of an estate, other than in the ordinary course of business, after notice and a hearing. 11 U.S.C. § 363. Under § 363(m), the validity of a "sale or lease of property" executed under the terms of section 363 cannot be challenged on appeal "unless [the bankruptcy court's] authorization and such sale or lease were stayed pending appeal." *Id.* § 363(m). The requirement to seek a stay pending appeal only applies to purchases of estate property that were made in good faith, and is designed to protect the interests of good faith purchasers by guaranteeing the finality of property sales. *In re Onouli–Kona Land Co.*, 846 F.2d 1170, 1172 (9th Cir. 1988). Relatedly here, a trustee's proposed settlement between an estate and its creditors must be approved by the bankruptcy court under Rule 9019, which allows the court to grant approval if the settlement is deemed fair and equitable. Fed. R. Bankr. P. 9019(a); *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986).

There is no dispute in this case that Adeli failed to seek a stay pending appeal, but he offers several arguments as to why his appeal is nevertheless not moot under § 363(m). We address each in turn.

***3** Adeli first argues that § 363 only applies when a trustee sells estate property, not the estate's potential legal claims. Thus, his argument goes, the requirement to seek a stay in order to avoid mootness under § 363(m) does not apply here. Although we have not addressed in a published decision whether § 363 can apply to a settlement of potential claims, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") has done so. *See In re Mickey Thompson Entm't Grp., Inc.* ("*Mickey Thompson*"), 292 B.R. 415 (9th Cir. BAP 2003). In *Mickey Thompson*, the Ninth Circuit BAP held that "a bankruptcy court is obliged to consider ... whether any property of the estate that would be disposed of in connection with the settlement might draw a higher price through a competitive process and be the proper subject of a section 363 sale." *Id.* at 421– 22. The BAP reasoned that "the disposition by way of 'compromise' of a claim that is an asset of the estate is the equivalent of a sale of the intangible property represented by the claim." *Id.* at 421; *see also In re Nuttery Farm, Inc.*, 467 Fed.Appx. 711, 712 (9th Cir. 2012) ("The Bankruptcy Code allows the trustee [to seek authorization] to sell or settle a cause of action."). Similarly, two of our sister circuits have held that § 363 may be applied to the sale of an estate's legal claims. *See In re Moore*, 608 F.3d 253, 258 (5th Cir. 2010) (holding that "[a] trustee may sell litigation claims that belong to the estate, as it can other estate property, pursuant to § 363(b)"); *In re Martin*, 91 F.3d 389, 394–95 (3d Cir. 1996) (noting that § 363 procedures may be applied to a settlement agreement that involves the mutual release of claims).

**[5]** We agree with the BAP in *Mickey Thompson* and with our sister circuits, and hold that a bankruptcy court has the discretion to apply § 363 procedures to a sale of claims pursuant to a settlement approved under Rule 9019. As the Fifth Circuit noted, "[a] compromise of a claim of the estate is in essence the sale of that claim to the defendant." *In re Moore*, 608 F.3d at 264 (quoting 10 *Collier on Bankruptcy* ¶ 6004.01 (15th ed. rev. 2009)). We see no good reason why a trustee and the bankruptcy court cannot utilize the procedures of § 363 in certain settlements in order to ensure maximum value for the estate.[1]

**[6]** **[7]** Adeli next argues that even if § 363 applies, its requirement of a stay pending appeal should not be triggered here because the Trustee's overbid procedures did not in fact entice outside bidders, and First-Citizens is not deserving of the finality guaranteed by the stay-ofsale requirement. *See In re Healthco Int'l, Inc.*, 136 F.3d at 49. We have been reticent to carve out exceptions to the § 363(m) stay-of-sale requirement, and we again decline to do so now. *See In re Exennium, Inc.*, 715 F.2d 1401, 1404 (9th Cir. 1983) ("We are quite reluctant to invoke public policy to override the Code's express requirement that reversal of an authorization of sale not affect the sale's validity unless the authorization and sale were stayed."). We have applied the mootness rule to § 363 sales even where the

purchaser was a party to the appeal, and where the purchaser had not yet taken irreversible steps following the sale. *See In re Onouli–Kona Land Co.*, 846 F.2d at 1172. Indeed, we have recognized only two narrow exceptions to § 363(m), neither of which applies here.[2] *See In re Ewell*, 958 F.2d at 280 (recognizing exceptions "where real property is sold subject to a statutory right of redemption" and "where state law otherwise would permit the transaction to be set aside"). Where, as here, a bankruptcy court invokes § 363 for a sale of claims pursuant to a settlement agreement, all parties are bound by § 363(m)'s requirement to seek a stay regardless of whether an outside party makes a bid on the sale. *See In re Onouli–Kona Land Co.*, 846 F.2d at 1172 ("Finality in bankruptcy has become the dominant rationale for our decisions; the trend is towards an absolute rule that requires appellants to obtain a stay before appealing a sale of assets.").

***4 [8] [9]** Finally, Adeli argues that § 363(m) does not apply because the sale of claims to First-Citizens was not authorized in good faith. *See* 11 U.S.C. § 363(m). Absence of good faith is "typically shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *In re Filtercorp, Inc.*, 163 F.3d 570, 577 (9th Cir. 1998) (internal quotation marks and alterations omitted). The bankruptcy court found that the agreement "was the product of an arms-length negotiation between the Trustee and First-Citizens and entered into by the parties without collusion and in good faith." This good faith finding was supported by a declaration of the Trustee in which he stated that he met with counsel for Debtor and First-Citizens to investigate the parties' claims and explore settlement options. Adeli faults the Trustee for


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being insufficiently thorough in his assessment of the pending appeal. And because Adeli failed to seek a stay, parties' claims, but does not identify any facts suggesting the appeal is moot. We do not reach Adeli's challenges to bad faith. Based on this evidence, the bankruptcy court the propriety of the sale of claims under § 363, as such did not clearly err in finding that First-Citizens was a an analysis would require us to impermissibly reach the purchaser in good faith for the purpose of § 363(m). underlying merits of the settlement. *In re Exennium, Inc.*, 715 F.2d at 1404 ("[T]he equitable power to overturn a confirmed judicial sale is conditioned on the appellant's compliance with the stay requirement....").

* * *

**AFFIRMED.**

We conclude that the bankruptcy court had the discretion to apply 11 U.S.C. § 363 to the settlement involving a sale of the estate's potential claims, and did not clearly err in **All Citations** determining that First-Citizens was a good faith purchaser

of those claims. Under § 363(m), therefore, the sale may --- F.3d ----, 2016 WL 4437616, 63 Bankr.Ct.Dec. 4 not be modified or set aside on appeal unless it was stayed

## Footnotes

1 Adeli's reliance on *In re Healthco Int'l, Inc.*, 136 F.3d 45 (1st Cir. 1998), is misplaced. That case involved a settlement that was *not* processed under § 363, and thus is factually inapposite. *Id.* at 48.

2 Adeli's argument that the language of the settlement agreement exempts him from § 363(m) lacks merit. Although we suggested in *In re CADA Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981), that express contractual language could form a basis for an exception to the stay requirement, that case preceded *In re Ewell*, 958 F.2d at 280 (recognizing "only two exceptions" to § 363(m) mootness). Assuming *In re CADA* is still good law, it is distinguishable on its facts: there, the sale documents were explicitly premised on specific appeals the parties had clearly taken into account. *See In re CADA Invs., Inc.*, 664 F.2d at 1160. The settlement agreement at issue here simply states that the transaction will be effective upon entry of a final and non-appealable order of the bankruptcy court. The Trustee and First-Citizens—the only two parties to the settlement agreement—obviously viewed this condition as satisfied, as they both executed their respective obligations under the contract, and First-Citizens proceeded to litigate one of the causes of action against a third party until securing summary judgment in 2014.

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2016 WL 4435904
United States Court of Appeals,
Ninth Circuit.

In re William James Del Biaggio, III, Debtor,
Liquidating Trust Committee of the Del
Biaggio Liquidating Trust, Plaintiff–Appellee,
v.
David Freeman, Defendant–Appellant.

No. 13–17500
|
Submitted January 6, 2016[*],
San Francisco, California
|
Filed August 22, 2016

*Synopsis*

**Background:** Liquidating trust committee in Chapter 11 case commenced by individual debtor sought to subordinate and disallow claim filed by creditor that had invested in limited liability company (LLC) associated with debtor. The United States Bankruptcy Court for the Northern District of California granted committee's motion for summary judgment, and creditor appealed. The District Court, Yvonne Gonzalez Rogers, J., 2013 WL 6073367, affirmed. Creditor appealed.

**Holdings:** The Court of Appeals, O'Scannlain, Circuit Judge, held that:

[1] proof of claim in exact amount which creditor hadpaid for membership interest in limited liability company (LLC) that was affiliate of debtor, together with such additional sum as creditor had paid in connection with capital call from holders of membership interests, was claim for damages "arising from" the purchase or sale of securities;

[2] mandatory subordination provision of the BankruptcyCode for claims "for damages arising from the purchase or sale" of securities of debtor or debtor's affiliate is not limited in its application only to cases involving corporate debtors, but also applies in bankruptcy cases filed by individual debtors; abrogating *In re Kahn*, 523 B.R. 175;

and

[3] provision required that creditor's claim be subordinated to claims of debtor's general unsecured creditors.

Affirmed.

Appeal from the United States District Court for the Northern District of California, Yvonne Gonzalez Rogers, District Judge, Presiding. D.C. No. 4:12–cv–06447–YGR.

***Attorneys and Law Firms***

Merle C. Meyers and Michele Thompson, Meyers Law Group, P.C., San Francisco, California, for Defendant– Appellant.

Michael M. Lauter, Michael H. Ahrens and Steven B. Sacks, Sheppard, Mullin, Richter & Hampton LLP, San Francisco, California, for Plaintiff–Appellee.

Before: Alex Kozinski, John T. Noonan, and Diarmuid F. O'Scannlain, Circuit Judges.

**OPINION**

O'SCANNLAIN, Circuit Judge:

A provision of the Bankruptcy Code requires that damages claims arising from the purchase or sale of the security of a debtor be subordinated to other claims senior to or equal to it. We must decide whether such treatment applies where the debtor is an individual.

I

A

The Nashville Predators are a National Hockey League ("NHL") team in Nashville, Tennessee. As of 2007, the Predators were owned by Craig Leipold

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and his family. During that year, however, David Freeman learned that Leipold intended to sell the team to a third party who wanted to move the Predators to another state. As a result, Freeman began organizing a group of Nashville investors to buy the team. Leipold talked with Freeman about purchasing the Predators, but was also in conversation with other potential buyers, including William Del Biaggio, III. Eventually, Leipold and the NHL Commissioner suggested to Freeman that his group of investors join forces with Del Biaggio to make a joint bid to buy the team. In so suggesting, Leipold related previous assertions made to him by Del Biaggio that stressed Del Biaggio's ability to fund the purchase and his experience with professional hockey.

During the summer and fall of 2007, Freeman and Del Biaggio engaged in negotiations concerning the acquisition of the Predators. Del Biaggio confirmed his ability to fund a $70 million share in the investment, and told Freeman he had connections in the NHL and hoped to become a major owner of a second NHL team. Freeman and his investors ultimately reached an agreement with Del Biaggio to purchase the Predators from Leipold for $193 million. Before the closing date, however, Del Biaggio contacted Freeman and informed him he could only invest $25 million, not the $70 million he originally promised. He proposed to replace the remainder with a $40 million increase in a loan from CIT Bank. Del Biaggio reported that he personally guaranteed the loan and that he would pay all the interest accrued on account of the loan increase. He also agreed to provide a personal guarantee to underwrite the Predators' lease obligations up to $10 million.

***2** The sale of the Predators to Freeman and his cohort of investors, including Del Biaggio, closed on December 7, 2007. As a result of the sale, the Predators became wholly owned and operated by Nashville Hockey Club Limited Partnership, LLC, which is in turn wholly owned by Predators Holdings, LLC (“Holdings”).

B

Freeman invested $31 million to obtain 31 Common Units of Holdings. Common Units were subject to capital calls and not afforded a liquidation preference, unlike the other form of equity investment in Holdings, the Series A Units. Freeman also made a $5 million subordinated loan to Holdings in exchange for its promissory note.

Del Biaggio invested in Holdings through an entity called Forecheck Investments, LLC (“Forecheck”). Forecheck paid $30 million to obtain all 30 Series A Units of Holdings. These Series A Units gave Forecheck 32.6% of the voting units in Holdings. Del Biaggio in turn invested $25 million to acquire an 83.33% interest in Forecheck. As a result, Del Biaggio controlled roughly 27% of the voting securities of Holdings.

C

Several months after the sale, Freeman learned that Del Biaggio never had the funds to support his guarantees and that the $25 million Del Biaggio already invested was in fact money he had embezzled from his clients. Del Biaggio filed for Chapter 11 bankruptcy which gave rise to the current proceeding. He was later indicted and convicted for various financial frauds and sentenced to an eight-year prison term.

Del Biaggio's fraud became headline news in Nashville, and as a result Predators revenues stagnated. To keep the business afloat, Holdings made capital calls to holders of the company's Common Units, including Freeman. Freeman satisfied this first capital call with a payment of $2,632,075. To prevent termination of the CIT Bank loan and the Predators' lease, he also replaced Del Biaggio's guarantees with his own. Freeman alleges he was unable to satisfy later capital calls because of these guarantees, and that as a result, his membership units in Holdings became “heavily diluted and virtually worthless.”

D

In October 2008, Freeman filed a general unsecured claim against Del Biaggio's bankruptcy estate seeking damages of an undetermined amount arising from

his fraud in the Holdings transaction.[1] In a later amended proof of claim, Freeman sought damages of $38,632,075. This amount included Freeman's initial $31 million investment in Holdings securities, the $5 million of subordinated debt he issued to Holdings in exchange for the promissory note, and the $2,632,075 paid in the first capital call. In response, the Liquidating Trust Committee of the Del Biaggio Liquidating Trust, the entity charged with prosecuting claims objections in Del Biaggio's bankruptcy, filed a counterclaim against Freeman and sought summary judgment. The counterclaim sought subordination and disallowance of Freeman's claim based on 11 U.S.C. § 510(b).

E

The bankruptcy court granted the Committee's motion for summary judgment, finding Freeman's claim was subject to mandatory subordination under § 510(b). After determining that Holdings was an “affiliate” of Del Biaggio via his ownership in Forecheck the court concluded that § 510(b) applied to Freeman's fraud claim because the plain language of the statute covers claims arising from the purchase of the securities of a debtor's affiliate. The bankruptcy court further reasoned that subordinating Freeman's claim under § 510(b) served the purposes of the statute, because as an investor in Holdings, he bargained for both a greater share of profits and a greater share of risks than Del Biaggio's unsecured creditors. The court also determined that the claims of Del Biaggio's other creditors were senior to Freeman's claim based on its conclusion that notes or shares issued by a subsidiary create no claim to the assets of a parent. Freeman appealed to the district court, which in turn affirmed the order and judgment of the bankruptcy court. Freeman timely appealed here.

II

***3 [1] [2]** We review a district court's decision on appeal from a bankruptcy court de novo, and apply the same standards applied by the district court without deference to that court. *In re Thorpe Insulation Co.*, 677 F.3d 869, 879 (9th Cir. 2012). When considering a bankruptcy court's grant of summary judgment, we apply the regular summary judgment standard in order to “determine whether there are any genuine issues of material fact and whether the bankruptcy court correctly applied the substantive law.” *In re Caneva*, 550 F.3d 755, 760 (9th Cir. 2008) (quoting *In re Bakersfield Westar Ambulance, Inc.*, 123 F.3d 1243, 1245 (9th Cir. 1997)).

III

**[3]** Freeman first contends that the bankruptcy court and the district court erred in applying Bankruptcy Code Section 510(b) to his claim against Del Biaggio.

Section 510(b) reads as follows:

§ 510. Subordination

....

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b). The statute operates in two steps. First, it commands that specific types of claims relating to securities, including claims “for damages arising from the purchase or sale” of a debtor's securities or the securities of an affiliate “shall be subordinated.” *See In re Betacom of Phoenix, Inc.*, 240 F.3d 823, 828–29 (9th Cir. 2001) (observing that subordination of qualifying claims under § 510(b) is mandatory). Second, it identifies other claims to which a qualifying claim must be subordinated—“all claims or interests that are senior to or equal the claim or interest represented by” the debtor's security or the security of his affiliate. Considered as a whole, § 510(b) “effectuate[s] one of the general principles of corporate and bankruptcy law: that creditors are entitled to be paid ahead of

shareholders in the distribution of corporate assets." *In re Am. Wagering, Inc.*, 493 F.3d 1067, 1071 (9th Cir. 2007). This principle is broadly known as the absolute priority rule. *See, e.g.*, *In re Telegroup, Inc.*, 281 F.3d 133, 139–40 (3d Cir. 2002) (explaining the absolute priority rule and its relation to § 510(b)).

**[4]** It is undisputed that Freeman's claim is a damages claim. Freeman also admits that his Holdings investments are securities[2] and that Holdings is an affiliate[3] of Del Biaggio. At this first step, Freeman argues only that the bankruptcy court and the district court erred in applying § 510(b) to his claim against Del Biaggio because his claim is not one "arising from the purchase or sale" of Holdings.

A

***4 [5] [6]** Beginning with the statute's plain text, we observe that § 510(b)'s "arising from" language reaches broadly to subordinate damage claims involving qualifying securities. The phrase "arising from" as employed in § 510(b) "connotes, in ordinary usage, something broader than causation" and is instead "ordinarily understood to mean 'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from' or in short, 'incident to, or having connection with.' " *In re Tristar Esperanza Props., LLC*, 782 F.3d 492, 497 (9th Cir. 2015) (quoting *Underwriters at Lloyd's of London v. Cordova Airlines, Inc.*, 283 F.2d 659, 664 (9th Cir. 1960)). In *Tristar*, we applied this reading of the statute's text to conclude that a claim involving the withdrawal of a member from an LLC was rightly subordinated, despite the fact that the withdrawal converted the claimant's interest from an equity interest to a debt interest before the bankruptcy filing. *Id.* at 497–98.

Our other precedents evince a similarly broad reading of § 510(b)'s "arising from" language. In *Betacom*, we found that a damages claim based on a purported breach of contract in a merger agreement was one that arose from the sale or purchase of a debtor's securities under § 510(b), even though the claimants never actually purchased or received stock. 240 F.3d at 830. In so holding, we construed the claim as one "surrounding" the sale or purchase of a security of the debtor. *Id.* at 829.

Likewise, in *American Wagering*, we concluded that § 510(b)'s "arising from" language requires that claims be subordinated "where there exists 'some nexus or causal relationship between the claim and the purchase of the securities.' " 493 F.3d at 1072 (quoting *Telegroup*, 281 F.3d at 138). Other courts interpreting § 510(b)'s "arising from" language have also endorsed this expansive "some nexus" reading. *See, e.g.*, *In re Am. Hous. Found.*, 785 F.3d 143, 155 (5th Cir. 2015); *SeaQuest Diving, LP*, 579 F.3d 411, 421–22 (5th Cir. 2009); *In re Med Diversified, Inc.*, 461 F.3d 251, 254–55 (2d Cir. 2006).

Applying our past reading of § 510(b), Freeman's damages claim is clearly one "arising from" the sale or purchase of securities in Holdings. The basis of Freeman's claim for damages against Del Biaggio's estate is not Del Biaggio's fraudulent misrepresentations, but rather Freeman's detrimental reliance on those misrepresentations in the form of his Holdings investment. Indeed, the damages sought by Freeman correspond exactly to the amount he invested in Holdings through his initial purchase of Holdings securities, the promissory note he obtained, and the money spent in the first capital call occasioned by his purchase of Common Unit stock. In light of these facts, we have no doubt that Freeman's claim "originates from" from his purchase of securities in Holdings, *Tristar*, 782 F.3d at 497, and thus possesses "some nexus" to that purchase, *Am. Wagering*, 493 F.3d at 1072 (citation and internal quotation marks omitted). Put simply, Freeman's claim is really no claim at all but for his investment in Holdings.

Freeman attempts to avoid this conclusion by analogizing his case to the facts of *American Wagering*, but such argument lacks merit. In *American Wagering*, we concluded that a claimant's assertion of a court-ordered money judgment against a debtor for breach of contract was not subject to subordination under § 510(b). 493 F.3d at 1073. We reasoned that such a claim fell outside § 510(b)'s "arising from" provision because the


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contract with the debtor merely used stock value as a basis for calculating compensation and the claim did not seek to recover an investment loss. *Id.* But Freeman's claim does not value a free-standing injury by reference to a security; rather, as we have already explained, Freeman's asserted injury is inseparable from his Holdings investment.

***5** Freeman also argues that his claim is not one "arising from the purchase or sale" of the securities of Del Biaggio's affiliate since he purchased the Holdings securities from Leipold rather than Del Biaggio. But nothing in § 510(b) requires that the debtor be the seller of the security at issue; indeed, the statute says only that a damages claim must be one arising from the purchase of securities "of an affiliate of the debtor," not *from* the debtor himself. § 510(b). The text of the statute clearly points toward subordination of Freeman's claim.

B

**[7] [8]** Freeman next seeks to avoid § 510(b)'s plain language by arguing that even if the statute's text points in favor of subordination, its purposes do not. Our Bankruptcy Appellate Panel ("BAP") appears to agree. In *In re Kahn*, 523 B.R. 175, 183 (B.A.P. 9th Cir. 2014), *appeal docketed*, No. 15–60002 (9th Cir. Jan. 13, 2015), the BAP concluded that the text of § 510(b) was ambiguous as to whether the law applies to individual debtors. Turning

to legislative history and statutory purposes, the BAP then determined that applying the statute to individual debtors was outside of Congress's intent. *Id.* While we generally treat decisions of the BAP as persuasive authority because of its "special expertise in bankruptcy issues and to promote uniformity of bankruptcy law throughout the Ninth Circuit," *In re Silverman*, 616 F.3d 1001, 1005 n.1 (9th Cir. 2010), in this case we are not persuaded.

**[9] [10]** "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd —is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (citation and internal quotation marks omitted). Only when statutes are ambiguous may courts look to legislative history. *See Nakano v. United States*, 742 F.3d 1208, 1214 (9th Cir. 2014). We doubt any recourse to sources outside the text is necessary to determine whether Freeman's transaction is one "arising from" the purchase or sale of the securities of a debtor's affiliate. As the Tenth Circuit has noted, § 510(b)'s "arising from" language has been "universally held" to cover "claims alleging fraud in the inducement to purchase or sell [a covered] security." *In re Geneva Steel Co.*, 281 F.3d 1173, 1174 (10th Cir. 2002).

C

Even assuming consideration of the statute's legislative history and purposes is useful and appropriate, they provide no help to Freeman.

**[11]** In *Betacom*, we identified "two main rationales for mandatory subordination: (1) the dissimilar risk and return expectations of shareholders and creditors; and (2) the reliance of creditors on the equity cushion provided by shareholder investment." 240 F.3d at 830; *see also Am. Wagering*, 493 F.3d at 1072. On the one hand, § 510(b) aims at subordinating claims "arising from" qualifying securities because "[s]hareholders expect to take more risk than creditors in return for the right to participate in firm profits." *Betacom*, 240 F.3d at 829. On the other, § 510(b)'s mandatory subordination is justified because "creditors extend credit in reliance on the cushion of investment provided by the shareholders." *Id.*

1

Both Freeman and the BAP in *Kahn* appear to assume the risk-allocation rationale does not apply to cases like Freeman's because an investor cannot have a profit expectation in an individual debtor. *See Kahn*, 523 B.R. at 183 (insisting that the risk-allocation rationale applies only to corporate debtors because "equity interests do not exist" in an individual debtor). But that reading overlooks that Congress did not limit § 510(b)'s application to

damage claims related to a debtor's own securities. Instead, Congress included within § 510(b)'s ambit claims arising from the purchase of the securities of "an *affiliate* of the debtor." We think it reasonable to assume that in expanding § 510(b)'s reach to include such claims, Congress recognized what our pre-Bankruptcy Code precedent already had—namely, that the fairness concerns underlying the risk-allocation rationale apply whether the investor's profit expectation is directed at the debtor or at an associated entity. *See In re THC Fin. Corp.*, 679 F.2d 784, 786 (9th Cir. 1982) (rejecting the idea that "the relative equitable position of a defrauded stockholder should be enhanced" merely because a stockholder's claim involves an affiliate).

***6** Those concerns are clearly implicated in Freeman's case. As an investor in an affiliate of Del Biaggio, Freeman bargained for increased risk in exchange for an expectation in the profits of Holdings as he himself admits. Del Biaggio's creditors made no such gamble. Allowing Freeman to stand on par with Del Biaggio's creditors "would give [Freeman] the best of both worlds —the right to share in profits if [Holdings] succeeded and the right to repayment as a creditor [of Del Biaggio] if it failed." *In re VF Brands, Inc.*, 275 B.R. 725, 728 (Bankr. D. Del. 2002). It was precisely that kind of inequity that Congress meant § 510(b) to eliminate. *See Tristar*, 782 F.3d at 496 ("Congress sought to subordinate claims ... that unfairly shift to creditors risks associated with stock ownership."); *see also Telegroup*, 281 F.3d at 142 ("Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding.").[4]

2

Freeman also argues that his claim cannot be subordinated since his investment in Holdings provided no equity upon which Del Biaggio's creditors could rely. But courts are otherwise agreed that the equity cushion rationale is the less important of the two, and actually unnecessary for § 510(b) to apply in the affiliate scenario. *See In re Lehman Bros. Inc.*, 808 F.3d 942, 949 (2d Cir. 2015) (observing the risk-allocation rationale is "more integral" than the equity-cushion rationale and "serves as an effective rationalization for subordination in those circumstances when an affiliate's securities provided the basis for the claim"); *see also SeaQuest Diving*, 579 F.3d at 421; *Med Diversified*, 461 F.3d at 259; *Geneva Steel*, 281 F.3d at 1180 n.3. That conclusion makes sense. In the context of claims "arising from" securities transactions involving a debtor's affiliate, the equitycushion rationale will almost always remain unfulfilled, since creditors of the parent do not rely on the equity contributed by the affiliate's investors as the basis for extending credit. Refusing to apply § 510(b) in such cases would render the statute basically inapplicable to claims involving the securities of an affiliate—a result that Congress itself has foreclosed through the statutory text. *See Lehman Bros.*, 808 F.3d at 950 (noting that the text of § 510(b) indicates that "Congress has already determined" that the risk-allocation rationale "is strong enough to warrant subordination of claims arising out of transactions in affiliate securities"); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, ––– U.S. ––––, 132 S.Ct. 2065, 2073, 182 L.Ed.2d 967 (2012) (observing that a "generalized statutory purpose" cannot override a statute's text).

***7** Because we conclude that Freeman's claim is one "arising from" his purchase of securities and that § 510(b) is not limited to corporate debtors, we conclude that Freeman's claim must be subordinated.

IV

Freeman next argues that even assuming his claim is subject to subordination, the bankruptcy court erred by subordinating his claim to the unsecured claims of Del Biaggio's creditors. According to Freeman, only "other interests in Holdings and claims against Holdings" are actually senior or equal to his claim. He contends that because his claims against Holdings are in a different priority scheme than claims against Del Biaggio, there are no claims to which his must be subordinated.

A

**[12]** *Kahn* offered a similar reading of § 510(b)'s "senior to or equal" language to conclude that the statute does not apply in individual debtor cases. The BAP reasoned that this language likely limits § 510(b) to corporate debtors because "[i]t is axiomatic that a claim or interest based on stock may exist only at a corporate level." 523 B.R. at 183. Moreover, the BAP observed that because other creditors with claims against the individuals in *Kahn* could not "seek recovery as creditors at the corporate level," these creditors held no claims senior to or equal to claims within the affiliate's own priority scheme. *Id.* Like Freeman, the BAP in *Kahn* found § 510(b) inapplicable to individual debtors because an individual debtor's priority scheme cannot and does not include claims involving affiliate securities.

We decline to endorse this reading of § 510(b). Courts have differed in their readings as to the level of subordination mandated by § 510(b)'s "senior to or equal" provision when the qualifying claim involves affiliate securities. *See Lehman Bros.*, 808 F.3d at 950 & n.10 (collecting cases). Yet as the Second Circuit has noted, "[e]very other court that has applied § 510(b) to claims based on affiliate securities"—with the exception of *Kahn*—"has required subordination." *Lehman Bros.*, 808 F.3d at 950. There is good reason for that consensus. As the district court in this case noted, reading § 510(b)'s "senior to or equal" language as requiring subordination only when claims fall within the same priority scheme would render the statute's application to affiliates meaningless, since claims against a debtor arising from the purchase or sale of a security of the debtor's affiliate will almost never be included in the same priority scheme. Such a reading simply cannot be squared with the plain language of the statute. *See Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (explaining that it is a "cardinal principle of statutory construction" that courts should " 'give effect, if possible, to every clause and word of a statute' " (quoting *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955))); *see also In re Lehman Bros. Inc.*, 519 B.R. 434, 450 (S.D.N.Y. 2014) (observing that limiting § 510(b)'s "senior to or equal" comparison to securities existing with the debtor's capital structure "would automatically exclude claims arising from the purchase or sale of securities of an affiliate in derogation of the plain language of the statute"). The question is not whether § 510(b) requires subordination of claims involving affiliate securities in a debtor's bankruptcy proceeding, but *how* it does so.

B

***8** Courts applying § 510(b)'s "senior to or equal" provision to claims involving affiliate securities have endorsed one of three approaches.

1

The first approach, employed by the bankruptcy court in this case, reads § 510(b)'s "senior to or equal" provision as requiring that a claim involving a security of the debtor's affiliate be subordinated below all claims actually included in the debtor's priority scheme, with the possible exception of claims involving an affiliate's common stock. *See In re Lernout & Hauspie Speech Prods., N.V.*, 264 B.R. 336, 341 (Bankr. D. Del. 2001) (considering an identical interpretation of § 510(b)). Under this approach, Freeman's claim would be subordinated to all general unsecured claims against Del Biaggio's estate on the theory that shares issued by a subsidiary create no claim to the assets of a parent. Although the bankruptcy court did not so explain, this approach places emphasis on § 510(b)'s mention of "such *security*" as the provision's interpretive touchstone. *See* § 510(b) (requiring subordination of qualifying claims to other claims or interests "senior to or equal the claim or interest represented by such security").

2

By contrast, a second approach employed by other courts focuses not on the affiliate security at issue, but instead on the claim made against the debtor. In *VF Brands*, for instance, the Delaware bankruptcy court acknowledged that shareholders of a subsidiary are "not part of any priority scheme of claims against the parent," but concluded nonetheless that claims involving an affiliate's securities could be incorporated

into the parent's priority scheme because these claims are *also* general unsecured claims against the debtor. 275 B.R. at 727. On this reading, claims involving the securities of an affiliate are conceptualized as general unsecured claims against the debtor, and subordinated under § 510(b) because they are "equal [to]" other general unsecured claims. *Id.*; *see also In re Lehman Bros.*, 503 B.R. 778, 784–85 (Bkrtcy.S.D.N.Y. 2014) (adopting the approach endorsed in *VF Brands*). Unlike the first approach that focuses on the affiliate security, this approach focuses on "the *claim* or interest represented by such security." § 510(b) (emphasis added). Like the first approach, however, this approach also mandates subordination of Freeman's claim. On this reading, Freeman's claim would be considered a general unsecured claim on par with other general unsecured claims against Del Biaggio's estate. Because Freeman's claim involves affiliate securities, however, § 510(b) mandates subordination of his claim to these other unsecured claims, since they are "equal [to]" Freeman's.

3

A third approach applying § 510(b)'s "senior to or equal" provision to claims involving affiliate securities has recently been endorsed by the Second Circuit. In *Lehman Brothers*, former underwriters of unsecured notes issued by Lehman Brothers Holdings, an affiliate of Lehman Brothers, Inc. (LBI), brought claims for contribution against LBI's bankrupt estate. 808 F.3d at 945. The underwriters admitted that their claims against LBI fell under the "affiliate" provision of § 510(b). *Id.* Relying on *Kahn*, however, the underwriters asserted that there were no claims senior to or equal to their claim, arguing that claims involving an affiliate can be subordinated in a debtor's bankruptcy proceeding "only when claims also could be made in that proceeding based on ownership of the affiliate's securities." *Id.* The Second Circuit disagreed and found the underwriters' claims were properly subordinated. In so deciding, the Court held:

> ***9** [I]n the affiliate securities context, 'the claim or interest represented by such security' means a claim or interest of the same type as the affiliate security. Claims arising from securities of a debtor's affiliate should be subordinated in the debtor's bankruptcy proceeding to all claims or interests senior or equal to claims in the bankruptcy proceeding that are of the same type as the underlying securities (generally, secured debt, unsecured debt, common stock, etc.; and in some circumstances potentially a narrower sub-category).

*Id.* at 946. Like the two approaches described above, the Second Circuit's approach reads § 510(b)'s "senior to or equal" provision as requiring subordination of claims involving affiliate securities in a debtor's bankruptcy. But the approach employed by the Second Circuit arrives at this conclusion by reasoning that § 510(b) requires "superimpos[ing] the capital structure of the affiliate onto that of the debtor." *Id.* at 950. The court concluded that this reading of § 510(b) was the most consistent with § 510(b)'s directive that a claim involving qualifying securities be subordinated to all claims senior to or equal to those "represented by" an affiliate security. *Id.* at 944– 46.

We note that *Lehman Brothers* expressly distinguished *Kahn* as a case concerning only § 510(b)'s application to individual debtors. *See id.* at 950 n.11. But like the other approaches applying § 510(b) to claims involving affiliate securities, the Second Circuit's reading of § 510(b)'s "senior to or equal" provision is irreconcilable with the reading of the statute offered by *Kahn* and Freeman. In *Kahn*, the BAP said it would be nonsensical to apply § 510(b) to individual debtors because claims based on affiliate securities are by definition outside the priority scheme in an individual debt case. 523 B.R. at 183. But the court in *Lehman Brothers* concluded that claims involving affiliate securities can indeed be subordinated in a debtor's bankruptcy notwithstanding varying priority schemes, and that the affiliate's capital structure should be "superimpose[d]" on the structure of the debtor to determine the correct level of priority. 808 F.3d at 946, 950. Moreover, as with the other two approaches, applying the Second Circuit's approach in Freeman's case requires subordination of his claim below

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Footnotes

that of Del Biaggio's unsecured creditors. Although equity interests in Holdings lie outside the priority scheme governing Del Biaggio's bankruptcy, under this approach Freeman's claim would be treated *as if* it arose from equity interests in Del Biaggio other than common stock. Under the confirmed bankruptcy plan, this "type" of interest is considered junior to the claims of Del Biaggio's unsecured creditors, and accordingly subordinated under § 510(b).

C

We agree with the Second Circuit that of the three approaches, *Lehman Brothers* is likely the best interpretation of § 510(b)'s "senior to or equal" provision as it applies to claims involving affiliate securities. For the purposes of this appeal, however, we need not adopt a definitive reading of this portion of the statute. Because under any legitimate reading of § 510(b), the claims of Del Biaggio's general unsecured creditors are "senior to or equal [to]" Freeman's claim, his claim was rightly subordinated to the claims of Del Biaggio's creditors.

V

The bankruptcy court properly subordinated Freeman's claim under § 510(b). Fittingly, the order of the district court affirming that judgment is also

**AFFIRMED.**

***All Citations***

--- F.3d ----, 2016 WL 4435904, 63 Bankr.Ct.Dec. 14, 16
Cal. Daily Op. Serv. 9128

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

1 Holdings' other investors submitted identical claims against Del Biaggio's estate. When the bankruptcy court approved Holdings' repurchase of Del Biaggio's estate's interest in the Predators, Holdings and all other investors except Freeman released their claims.

2 Interests in limited liability companies are "securities" under the Bankruptcy Code. *See In re Tristar Esperanza Props., LLC*, 782 F.3d 492, 495 (9th Cir. 2015) (noting that among the non-exhaustive list of items defined as securities in 11 U.S.C. § 101(49) "[an] LLC interest either qualifies as a 'transferable share' or falls within the broad residual category" (quoting *In re SeaQuest Diving, LP*, 579 F.3d 411, 418 (5th Cir. 2009))). Likewise, the term "security" as employed in the statute includes a promissory note. *See* 11 U.S.C. § 101(49)(A)(i).

3 The Bankruptcy Code defines affiliate as a "corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with the power to vote, by the debtor." 11 U.S.C. § 101(2)(B); *see also* 11 U.S.C. § 101(9)(A)(ii) (defining 'corporation' as including a "partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association"). It is uncontested that Del Biaggio controlled more than 20% of Holdings, given his interest in Forecheck.

4 The BAP in *Kahn* also observed that in drafting § 510(b), Congress relied on an influential law review article by John J. Slain and Homer Kripke that discusses only corporate bankruptcy. *See Kahn*, 523 B.R. at 183; *see also* John J. Slain & Homer Kripke, *The Interface Between Securities Regulation and Bankruptcy—Allocating the Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors*, 48 N.Y.U. L. Rev. 261 (1973) ("Slain and Kripke"); H.R. Rep. No. 95–595, at 195–96 (1977). Congress may well have crafted § 510(b) with Slain and Kripke's policy rationales in mind. *See Betacom*, 240 F.3d at 829 (discussing Congress's apparent reliance on Slain and Kripke's article). But there is no question that the text of § 510(b) reaches further than Slain and Kripke's precise concerns. Indeed, as the Second Circuit has observed, "Slain and Kripke did not propose subordinating claims arising from the purchase or sale of securities of the debtor's *affiliate*, and therefore had no occasion to consider how or whether the rationales they offered might bear upon the subordination of such securities." *See In re Lehman Bros. Inc.*, 808 F.3d 942, 949 n.8 (2d Cir. 2015). Our analysis of § 510(b) convinces us that the presence or absence of a debtor's corporate status makes no difference. Freeman presents the quintessential case of an investor trying to recoup a bad investment ahead of those who assumed no such risks.

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2016 WL 4205946
United States Court of Appeals,
Ninth Circuit.

In re Maria G. Rivera, Debtor,
Maria G. Rivera, Appellant,
v.
Orange County Probation Department, Appellee.

No. 14–60044
|
Argued and Submitted June 6, 2016, Pasadena, California
|
Filed August 10, 2016

*Synopsis*

**Background:** Chapter 7 debtor appealed from order of the United States Bankruptcy Court for the Central District of California, Theodor C. Albert, P.J., determining that county probation department did not violate discharge injunction when it attempted to collect from her after bankruptcy because the debt she owed to county was excepted from discharge as a domestic support obligation for her minor son, who was juvenile detainee of county. The Bankruptcy Appellate Panel, Pappas, J., 511 B.R. 643, affirmed. Debtor appealed.

**[Holding:]** The Court of Appeals, Reinhardt, Circuit Judge, held that debt for costs of juvenile detention was not "in the nature of support" and thus was not "domestic support obligation" that was excepted from bankruptcy discharge.

Reversed.

**West Codenotes**

**Prior Version Recognized as Unconstitutional**
Cal. Welf. & Inst. Code § 903

Appeal from the Ninth Circuit, Bankruptcy Appellate Panel, Kirscher, Pappas, and Latham, Bankruptcy Judges, Presiding, BAP No. 13–1476

*Attorneys and Law Firms*

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Adam C. Clanton (argued), Deputy; Laurie A. Shade, Senior Deputy; Nicholas S. Chrisos, County Counsel; Orange County Counsel, Santa Ana, California; for Appellee.

Before: Stephen Reinhardt, and Kim McLane Wardlaw, Circuit Judges, and Mark W. Bennett,[*] District Judge.

**OPINION**

REINHARDT, Circuit Judge:

*INTRODUCTION*

We must decide whether a mother's debt to Orange County arising from her son's involuntary juvenile detention is a "domestic support obligation" and thus excepted from discharge in bankruptcy. We conclude that it is not.

*FACTUAL BACKGROUND*

Appellant Maria Rivera is the mother of a minor who was held in juvenile detention in Orange County for more than a year, from 2008–2010. Upon her son's release, the County Probation Department sent Rivera a bill.

California law makes the parents of juvenile detainees "liable for the reasonable costs of support of the minor while the minor is" held in detention. Cal. Welf. & Inst. Code § 903(a). A county may seek reimbursement under § 903 only "for food and food preparation, clothing, personal supplies, and medical expenses," *id.*, and the statute imposes a cap of $30 per day. § 903(c). Within those constraints, the statute limits the bill to the parents' "ability to pay" at the time the debt is imposed. *Id.*

As a result, Rivera's bill did not cover the entire cost to the County of her son's detention, but it was a large sum nevertheless. The County sought to recover $23.90 from Rivera for each day her son was detained, and $2,199 for legal expenses. The total bill came to $16,372.

Rivera did her best to pay. After selling her house, she paid $9,508 on May 10, 2010. Part of the debt remained, however, and the County continued sending Rivera regular bills. Eventually, she was served with an order to appear before the juvenile court, and when she failed to do so, the court entered a default judgment against her. The judgment stated that she still owed the County $9,905, despite her earlier payment.[1]

Several months later, in September 2011, Rivera filed for bankruptcy under Chapter 7 of the Bankruptcy Code. She had no assets to distribute, only debts to discharge. In January 2012, Rivera received a full discharge and, thus, the "fresh start" that the protections of the Bankruptcy Code seek to provide. *Harris v. Viegelahn*, ––– U.S. ––––, 135 S.Ct. 1829, 1835, 191 L.Ed.2d 783 (2015).

***2** Orange County, however, persisted in its efforts to collect Rivera's debt even after the conclusion of her bankruptcy case. The County believed that Rivera's debt was a "domestic support obligation" ("DSO") like alimony or child support—the kind of debt that is not dischargable in bankruptcy under 11 U.S.C. § 523(a)(5).

Rivera believed that any remaining debt to the County had been fully discharged. In her bankruptcy petition, she had listed her unpaid obligation to the County as a priority unsecured debt, not a DSO, and the County did not object in writing to this characterization. Rivera moved to reopen her bankruptcy case and asked the bankruptcy court to sanction the County for attempting to collect a discharged debt. The court reopened the case, and issued a tentative ruling in Rivera's favor.

After further briefing, however, the bankruptcy judge changed his mind and ruled in favor of the County. The judge was persuaded that Congress expanded the category of DSOs in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to include Rivera's debt. The judge agreed with the County that Rivera's debt was in the nature of support because the County sought to recover only the costs of her son's food, clothing, and medicine, not the full cost of his detention. The Bankruptcy Appellate Panel affirmed on largely the same ground, and Rivera appealed. Whether Rivera's debt to the County is a domestic support obligation is the issue before us.

## *DISCUSSION*

### I.

**[1]** Bankruptcy gives people from all walks of life a "fresh start." *Harris*, 135 S.Ct. at 1835. "[A] debtor who successfully navigates the bankruptcy process is ordinarily entitled to a discharge of all pre-petition debts." *In re Leibowitz*, 217 F.3d 799, 801 (9th Cir. 2000). Some debts, however, are not eligible for discharge. Among them are domestic support obligations—the financial obligations upon which family members and former family members rely. Section 523(a)(5) of the Bankruptcy Code excepts DSOs from discharge. The purpose of this exception is to ensure that spouses and children continue to receive support even if the support provider has declared bankruptcy. *See In re Chang*, 163 F.3d 1138, 1140 (9th Cir. 1998). The exception to discharge for DSOs thus "strikes a balance between competing policies." *Id.* On the one hand, bankruptcy permits a petitioner to wipe his slate clean when debts become impossible to overcome. "On the other hand, this court has recognized an overriding public policy favoring the enforcement of familial obligations." *Id.* Bankruptcy provides a way to leave one's debts, but not one's most fundamental family obligations, behind.

Before 2005, the Bankruptcy Code provided that a debt was a DSO and thus excepted from discharge if it was owed "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or

support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement....” 11 U.S.C. § 523(a)(5) (pre-2005). The definition also provided for several exceptions.

Under this definition, it was clear that ordinary family support obligations owed directly to a child or former spouse were DSOs. Courts divided, however, on the DSO status of debts owed to government agencies concerned with family support. *Compare, e.g., City of Oakland v. Fralick*, 215 B.R. 132, 133 (W.D. Mich. 1997) (foster care debt is not a DSO because it is “owed to an entity other than a child, spouse or ex-spouse”); *with In re Burton*, 132 B.R. 575 (Bankr. N.D. Ind. 1988) (foster care debt is a DSO because it is in the nature of familial support). *Compare also, e.g., In re Spencer*, 182 B.R. 263 (Bankr. E.D. Cal. 1995) (a debt owed to a state wardship unit is not a DSO because it is owed to a government unit); *with In re Canganelli*, 132 B.R. 369 (Bankr. N.D. Ind. 1991) (wardship debt is a DSO because it is in the nature of domestic support). *Compare also, e.g., In re Linn*, 38 B.R. 762, 762 (9th Cir. BAP 1984) (debt arising from a “court appointed attorney and psychiatrist for [a] minor child” in a custody proceeding is not a DSO because it is owed to a government entity); *with Chang*, 163 F.3d at 1141 (debt arising from a court appointed guardian ad litem and neutral mental health expert in a custody proceeding is a DSO because it is in the nature of child support).

***3** BAPCPA, the statute that modified the Bankruptcy Code in 2005, resolved the dispute. Following the 2005 amendment, a debt does not lose its DSO status simply because it is owed to a governmental unit. The statute now states that a debt is a DSO if it is “owed to or recoverable by ... a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative” or “*a governmental unit*” and is “in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated.” 11 U.S.C. § 101(14A) (emphasis added). This definition does not change the substance or core meaning of the term DSO. It did, however, remove any doubt that debts owed to various government units for temporary child or spousal aid payments; for support provided in foster care, wardship, and residential treatment centers; or for expenses incurred for a child's benefit in divorce and custody proceedings could qualify as DSOs.[2] Thus, BAPCPA carries forward the core purpose of the DSO exception by ensuring that bankruptcy will not hinder the enforcement of family obligations in circumstances in which the government's family support infrastructure —the network of foster systems, aid agencies, family courts, and the like—has intervened on a spouse's, former spouse's, or child's behalf.

**[2]** The question before us, however, is whether debts owed to government units that are not part of the government's family support infrastructure, and specifically debts to a Probation Department for costs related to a juvenile's detention, are “in the nature of ... support,” and thus are DSOs. The answer to this question is the same after BAPCPA as it was before, as BAPCPA changed only the parties who could qualify as creditors to whom a DSO was owed, not the definition or nature of family support itself.

## II.

Rivera owes her debt to the Orange County Probation Department—a law enforcement unit. The Department's mission statement describes it as a “public safety agency” that makes use of “efficient and research supported corrections practices to Reduce Crime[,] Assist the Courts in Managing Offenders[,] Promote Lawful and Productive Lifestyles[, and] Assist Victims.”[3] The “support” that the Probation Department provided to Rivera's son in the course of his detention was incidental to— and the price of—its larger governmental purpose of promoting “public safety” and “reduc[ing] crime” through “corrections practices.” In short, the purpose

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of Rivera's son's detention was to enforce the criminal law.

This sets Rivera's case apart from all other cases in which debts have been found to be covered by the statutory definition of DSOs. The purpose of foster care and state wardship, for example, is to provide for a minor's safety, well-being, and support. Foster systems and wardship units are a part of the state's child support infrastructure, not its criminal justice system. This infrastructure is concerned with child welfare, not the protection of society, and its institutions assume custody over a minor because of problems with his family home life or the absence of his parents; they seek to reproduce for the child the kind of holistic support that parents ordinarily provide.[4] They are designed, in short, to improve the child's "domestic" circumstances. Accordingly, many courts have found that foster care and wardship debts are in the nature of support within the meaning of the bankruptcy statute. *See, e.g.*, *Canganelli*, 132 B.R. at 394–95; *Burton*, 132 B.R. at 584; *In re Huber*, 80 B.R. 531 (Bankr. D. Colo. 1987); *In re Carlson*, 176 B.R. 890, 894 (Bankr. D. Minn. 1995).

***4** In another line of cases, we identified debts to government units or related third parties as in the nature of support where those debts were inherently intertwined with the establishment of child support obligations. In *In re Leibowitz*, we considered the case of a mother who left her husband and applied for temporary financial support from a County aid program. 217 F.3d at 801. A condition of the County's support was that if she later won a child support order from her ex-husband, any benefits accrued during her enrollment in the aid program would be credited back to the County. Eventually, the court ordered the ex-husband to make monthly support payments and also to reimburse the County for its support of the mother after the separation but before the entry of the order. The question we confronted was whether the portion of the father's child support order owed directly to the County was in the nature of support. Similarly, in *In re Chang*, we considered whether the debt arising from the cost of a court-appointed guardian ad litem and neutral mental health expert in the course of custody proceedings was in the nature of support. 163 F.3d at 1138.

In both cases, we decided that the debt was indeed in the nature of support and thus excepted from discharge. *Chang*, 163 F.3d at 1141; *Leibowitz*, 217 F.3d at 803. The special feature of *Chang* and *Leibowitz* is that the debts arose in the course of custody and divorce proceedings— proceedings that are integral to the creation of domestic support obligations—and represented costs incurred to ensure the domestic welfare of the child. The debts were also owed, as in the case of foster care and wardship, to government units or actors for which child support was the primary concern—to units that were a part of the state's family support infrastructure.

Rivera's debt is different. It arises from her son's involuntary detention for law enforcement purposes by a "public safety agency," and the provision of food and clothing is only incidental to such incarceration. Rivera's son was taken into custody not in order to provide a place where he could secure a wholesome upbringing but because of his criminal misbehavior; he was placed and remained in a detention facility because of the state's interest in enforcing the law, not because of its interest in giving him a nourishing home, affording him sustenance, ensuring his safety, or providing him with an improved domestic environment. As the Supreme Court explained, a state's duty to provide basic needs to an incarcerated person "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney v. Winnebago Cty. Dept. of Social Servs*, 489 U.S. 189, 200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Moreover, Rivera's debt is not inherently intertwined with the establishment of child support obligations. To the contrary: it comes not in the course of a child custody hearing but in the wake of a criminal proceeding that results in involuntary detention.

It is therefore both inaccurate and inconsistent with precedent to characterize Rivera's debt to the County as "in the nature of ... support" as that term is defined in the Bankruptcy Code. *See* 11 U.S.C. § 101(14A). Unlike foster care or wardship units, which

seek to recreate a domestic environment for children without a suitable home, and unlike guardians and experts who are appointed on a child's behalf in family disputes in order to help protect a child's domestic welfare, juvenile detention serves not domestic but correctional ends. In short, Rivera's debt is not a domestic support obligation and thus not excepted from discharge.

This conclusion is in harmony with the cases that have directly addressed parents' debts arising from a child's correctional detention. The one other bankruptcy court to consider the dischargeability of parents' juvenile detention debts post-BAPCPA held that the debt "is not in the nature of support," reasoning that "an involuntary detention in a juvenile facility hardly seems to fit within the purpose and spirit of the statute." *In re Rosen*, No. 11– 07651–BHL–7, 2012 WL 1565617, at *2 (Bankr. S.D. Ind. May 2, 2012). The few pre-BAPCPA decisions dealing with such debts concluded that they were not DSOs, but did not directly address the question of whether the debt was in the nature of support and instead based their holdings on the fact that the debt was owed directly to a government unit. *See In re Erfourth*, 126 B.R. 736, 741 (Bankr. W.D. Mich. 1991); *In re Crouch*, 199 B.R. 690, 693 (9th Cir. BAP 1996). The Seventh Circuit followed the same approach in holding a parent's debt in connection with a juvenile delinquent's custody dischargeable in *In re Platter* but tellingly observed that "the ultimate purpose" of the debt "is not to provide the debtor's child with support; it is to provide the [County] with reimbursement for its efforts." 140 F.3d 676, 683 (7th Cir. 1998). That observation is equally pertinent here. Significantly, no court has previously held that a parent's debt resulting from a child's juvenile detention is excepted from discharge or that it constitutes a DSO.

### III.

***5** The conclusion that Rivera's debt is not a domestic support obligation as defined in 11 U.S.C. § 101(14A), and thus not excepted from discharge in bankruptcy, vindicates the purposes of the Bankruptcy Code and its discharge exceptions.

**[3]** "The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). "Congress normally confines [exceptions to discharge] to circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt." *Bullock v. BankChampaign, N.A.*, ––– U.S. ––––, 133 S.Ct. 1754, 1760, 185 L.Ed.2d 922 (2013). The exceptions to discharge that the Code spells out (including the exception for DSOs) are to be construed narrowly so as to make a fresh start possible unless Congress has clearly created an exception. *Id.*

There can be no doubt that Rivera is an "unfortunate but honest debtor." *Marrama*, 549 U.S. at 367, 127 S.Ct. 1105. She incurred her debt through no fault of her own. In fact, she incurred it as a result of *somebody else*'s fault. It was her son's actions, not hers, that led to his detention in juvenile hall, and thus his actions, not hers, that enabled the County to burden her with this debt under § 903. Nevertheless, in the wake of her child's incarceration —"[o]ne of the greatest misfortunes a parent may suffer," *In re Jerald C.*, 36 Cal.3d 1, 10, 201 Cal.Rptr. 342, 678 P.2d 917 (1984)—Rivera made a good faith effort to pay her bill. She has paid over half of it already, at great personal sacrifice. Rivera's debt thus arises in precisely the circumstance in which the Bankruptcy Code seeks to provide a fresh start.

The specific exception to discharge for DSOs is designed to ensure the continued "enforcement of familial obligations" even through bankruptcy proceedings. *Chang*, 163 F.3d at 1140. While bankruptcy provides a fresh start for almost everything, it does not permit debtors to abandon their financial obligations to their children, spouses, former spouses, and other beneficiaries who rely on domestic support or to government units that help administer or enforce such support.

Here, however, a conclusion that Rivera's debt is excepted from discharge would not benefit her son

but, as the Seventh Circuit pointed out, would only detract from her ability to fulfill her family support obligations. *See Platter*, 140 F.3d at 683 ("Excluding this debt from discharge ... will neither protect spouses, former spouses, or children from being injured by a debtor's discharge nor will it further the bankruptcy goal of a fresh start for the debtor."); *see also Crouch*, 199 B.R. at 693 (explaining that "[a] finding that the debt in question here is nondischargeable ... would not further the statutory policy of protecting family support obligations" but instead "would detract from the fresh start policy embodied in § 523(a)(5)"). While the discharge of a typical DSO harms the beneficiaries of domestic support by depriving them of that support—hence the Bankruptcy Code's exception— the discharge of Rivera's debt will almost certainly *benefit* her son, who has much to gain from his mother's fresh start. The only entity affected negatively by discharge in this case is the County, which will suffer only by losing the portion of its cost of incarceration that it seeks so adamantly to recover, surely not a loss that is inconsistent with furthering the objectives of family support. To allow the County "to recover its debt without entering the creditors' queue is counter to the Bankruptcy Code's general purpose and [the discharge exception's] specific purpose." *Platter*, 140 F.3d at 683.

## IV.

***6** The County's arguments that Rivera's debt is excepted from discharge are unpersuasive. Contrary to the County's assertion, Rivera's debt is not in the nature of domestic support simply because it represents in part the costs of her son's basic needs. There is no doubt that the County "supported" Rivera's son during his detention, and that the expenses for which the County seeks reimbursement fall under the general rubric of support; but that is not sufficient to make an obligation a DSO.[5] A credit card company could hardly claim that a credit card debt is "in the nature of ... support" as contemplated by § 101(14A) because the underlying charge was for food, medicine, and clothing for a dependent child. Nor could a retailer or a hotelier claim that an unpaid bill creates a debt "in the nature of ... support" because that bill represents the cost of a minor's basic needs. Rivera's debt is not in the nature of support for the purposes of the Bankruptcy Code simply because the underlying expenses for which the County seeks reimbursement can be described ordinarily as support expenses. Where the principal purpose of the County's custody over Rivera's son is public safety, not the son's domestic well-being or welfare, the debt does not qualify as a domestic support obligation.

For the same reason, Rivera's debt is not in the nature of support simply because state law limits the expenses for which the County may legally seek reimbursement to certain specific aspects of its total expenditure. We have said that the way a state characterizes a debt is relevant, though not conclusive, to its proper classification in bankruptcy, *see Chang*, 163 F.3d at 1140, but the County draws the wrong conclusion from the history of California Welfare and Institutions Code § 903.

A previous version of the statute permitted counties to bill parents for the full costs of their children's detention. The California Supreme Court found that version unconstitutional, explaining that it is unacceptable to bill parents for the costs of protecting society against the misdeeds of their children. *Jerald C.*, 36 Cal.3d at 10–11, 201 Cal.Rptr. 342, 678 P.2d 917. The Court then upheld the present version, noting that it properly limits the debt to "the reasonable costs expended for the support and maintenance of the minor." *Cty. of San Mateo v. Dell J.*, 46 Cal.3d 1236, 1250, 252 Cal.Rptr. 478, 762 P.2d 1202 (1988).

**[4]** While providing an explanation as to why state law limits the expenses for which a County may seek reimbursement to the costs of the minor's basic needs, the legislative action does not, contrary to the County's argument, support the conclusion that state law characterizes Rivera's debt as in the nature of support for the purposes of federal bankruptcy law; nor does it show that the purposes of the DSO exemption would be served by holding that such claims fall within the statutory definition of that

exception. At least as important, the statute explicitly states that its purpose is to "protect the fiscal integrity of the county ...," Cal. Welf. & Inst. Code § 903(c), and at oral argument the County's counsel stated that the motivation for seeking to collect from Rivera was indeed financial. The special federal policy excepting domestic support obligations from discharge in bankruptcy does not extend to the reimbursement of an obligation assessed not to support a child or to help operate a government department principally dedicated to the welfare of children, but rather to protect the fiscal integrity of a county's juvenile detention system.

Finally, the county is wrong in arguing that BAPCPA expanded the nature of the support that qualifies for reimbursement as a DSO. We agree that BAPCPA provides that debts to government units can now be DSOs and that "assistance provided by a government unit"— like foster care, residential treatment, or a court-appointed guardian—can sometimes fall into that category. *See* 11 U.S.C. § 101(14A)(B). BAPCPA, however, did not alter the purpose of the DSO discharge exception, nor did it change the fundamental requirement that DSOs be for the purposes of child or family support. *See In re Hickey,* 473 B.R. 361 (Bankr. D.Or. 2012) ("While § 523(a)(5) may have been amended by BAPCPA, the changes did not change the standard for whether a debt or obligation is in the nature of support."); *In re Phegley,* 443 B.R. 154, 157 (8th Cir. BAP 2011) ("The BAPCPA amendments ... did not change the standard for whether an obligation is in the nature of support."). In sum, BAPCPA amended the Bankruptcy Code's DSO exemption so as to expand its scope to cases in which "domestic support" is provided by a government agency but not so as to change the nature of domestic support itself.

## *CONCLUSION*

***7** Orange County's persistence in collecting a debt of over $9,000 from a bankrupt woman who has acted in good faith in difficult circumstances has been nothing if not resolute. Rivera's case is troubling, however, because the County's actions compromise the goals of juvenile correction and the best interests of the child, and, ironically, impair the ability of his mother to provide him with future support. Burdening a minor's mother with debts to be paid following his detention—debts that she cannot escape even in bankruptcy—hardly serves the future welfare of the child and hardly enhances the Probation Department's attempt to transform him into a productive member of society. Most disturbing, however, is that the County's actions undermine the very domestic "support" for which it is ostensibly seeking reimbursement. In relentlessly pursuing the debt's collection and opposing its discharge, the County raises yet another obstacle to Rivera's efforts to provide her son with the support about which the County claims to be so deeply concerned. That "betray[s] a misguided sense of values." *Jerald C.,* 36 Cal.3d at 10, 201 Cal.Rptr. 342, 678 P.2d 917.

The County's actions also highlight a recurring problem of public entities imposing fiscal burdens on those who can least afford them. Orange County's public budget shows that the Probation Department relies on selfgenerated revenue for more than 40% of its financing.[6] Seeking to obtain that revenue by unremittingly pursuing legal actions against disadvantaged individuals—the counterproductive practice at issue here—can have damaging effects on the community.[7] Not only does such a policy unfairly conscript the poorest members of society to bear the costs of public institutions, operating "as a regressive tax,"[8] but it takes advantage of people when they are at their most vulnerable, essentially imposing "a tax upon distress."[9] Moreover, experience shows that the practice undermines the credibility of government and the perceived integrity of the legal process.[10]

Section 903 permits the County to impose debts on the parents of children detained in juvenile hall, but it does

Footnotes

not require it to do so. Like so much else, it is a matter of the County's discretion whether to send the parent a bill in the first place, and a matter of further discretion whether to persist in collecting the debt

when that parent's circumstances change for the worse. We would hope that in the future the County will exercise its discretion in a way that protects the best interests of minors and the society they will join as adults, instead of following a directly opposite and harmful course.[11]

For the reasons discussed above, the judgment of the Bankruptcy Appellate Panel is **REVERSED**. Any further proceedings below shall be consistent with this opinion.

**All Citations**

--- F.3d ----, 2016 WL 4205946, 16 Cal. Daily Op. Serv. 8594, 2016 Daily Journal D.A.R. 8227

* The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa, sitting by designation.

1 The County's accounting in this case is highly questionable. It is unclear how this amount was reached. Rivera's son's expenses totaled $16,372. After Rivera's payment on May 10, 2010, this would leave at most $6,864. In addition, the child's father negotiated with the County to pay $3,336. If the father paid the full amount he promised, only $3,528 would appear to remain. At Oral Argument, County counsel was unable to explain this apparent discrepancy.

2 This was already the general approach we preferred in this Circuit before the BAPCPA amendments. *See* Chang, 163 F.3d at 1141 (explaining that the "identity of the payee is less important than the nature of the debt"); *Leibowitz*, 217 F.3d at 803 (adopting the same approach and explaining that the key question is whether the debt is "in the nature of support"). Thus BAPCPA resolved the dispute in favor of this Circuit's approach.

3 Orange County Probation Department, *Mission Statement*, http://ocgov.com/gov/probation/about/mission (last visited Aug. 3, 2016).

4 Moreover, a noncustodial parent's obligation to help bear a child's costs in foster care is similar to a typical domestic support obligation, in which a noncustodial parent must support a child's welfare in a different home. *See In re Hernandez*, 496 B.R. 553 (8th Cir. BAP 2013) (finding that a debt owed by an estranged mother to the state to assist foster parents who began to care for the child after the death of the father was in the nature of support). As a result, a foster care debt is not materially different from an ordinary child support debt.

5 The same is as true of room as of board. Indeed, under the County's theory, it could except almost the entire cost of incarceration from discharge, should state law permit it to send a more expansive bill. Similarly, under that approach, the cost of a juvenile's incarceration in an adult prison could be excepted from discharge if a state sought to charge his parents for such imprisonment.

6 *See FY 2016–17 Orange County Recommended Budget: Public Protection*, http://bos.ocgov.com/finance/2017WB/p1_frm.htm.

7 The problem is not limited to probation costs. Raising money for government through law enforcement whatever the source—parking tickets, police-issued citations, court-imposed fees, bills for court appointed attorneys, punitive fines, incarceration charges, supervision fees, and more—can lay a debt trap for the poor. When a minor offense produces a debt, that debt, along with the attendant court appearances, can lead to loss of employment or shelter, compounding interest, yet more legal action, and an ever-expanding financial burden—a cycle as predictable and counterproductive as it is intractable. *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 13–17 (2010), http://www.brennancenter.org/sites/default/files/ legacy/FeesändF#inesF#INAL.pdf; Beth A. Colgan, *Paying for* Gideon, 99 IOWA L. REV. 1929 (2014).

8 *Developments in the Law: Policing and Profit*, 128 HARV. L. REV. 1706, 1734 (2015); *see also* HUMAN RIGHTS WATCH, PROFITING FROM PROBATION (2014), http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf.

9 Jeremy Bentham, *A Protest Against Law–Taxes*, *in* 2 THE WORKS OF JEREMY BENTHAM 573 (John Bowring ed., 1843).

10 *See, e.g*, U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* (March 4, 2015) at 79 n.54 (reporting that the revenue orientation of the Ferguson police, among other factors, has “generated great distrust of Ferguson law enforcement, especially among African Americans”).

11 Earlier this year, the Alameda County Board of Supervisors voted to end the collection of juvenile probation fees under § 903, noting that “it is in the interest of the County, of young people involved in the juvenile justice system and their families, and of the larger community that the County repeal the ... juvenile probation fees.” Alameda Cty. Bd. of Supervisors, Res. No. 2016-66 (Mar. 29, 2016), http://www.acgov.org/board/bos_calendar/documents/DocsAgendaReg_03_29_16/ PUBLICP#ROTECTION/RegularC#alendar/Supervi sorV#alle_SupervisorC#arson_229888.pdf.

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2016 WL 4546645
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See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

In re: Mark Lee Rindlesbach, Debtor.
Mark Lee Rindlesbach, Appellant,
v.
Philip G. Jones, Trustee; J. Vincent Cameron, United States Trustee; Ruth B. Hardy Revocable Trust; Delcon Corporation Profit Sharing Plan, fbo
A. Wesley Hardy; Finesse PSP; MJS Real Properties;
Uintah Investments; David D. Smith; Steven Condie;
David L. Johnson; Berrett PSP; VW Professional
Homes PSP; TY Thomas; DRP Management PSP;
Lexon Surety Group; Bond Safeguard Insurance Company; Lexon Insurance Company, Appellees.

No. 15-4088
|
August 30, 2016

(D.C. No. 2:14-CV-00577-CW) (D. Utah)

Before HARTZ, O'BRIEN, and PHILLIPS, Circuit Judges.

***ORDER AND JUDGMENT*** [*]

Harris L Hartz, Circuit Judge

***1** In the Chapter 7 bankruptcy proceedings for Mark Lee Rindlesbach (Debtor), the United States Bankruptcy Court for the District of Utah approved a settlement agreement between a claimant to the bankruptcy estate (the Hardy Lenders) and the Trustee. Debtor appealed that order to the district court, which dismissed the appeal because the controversy was equitably moot and Debtor lacked standing. We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291, and affirm. Because we hold that Debtor lacks standing to challenge the settlement agreement, we do not reach the mootness issue.

***BACKGROUND***

In 2007 the Hardy Lenders loaned $3.3 million to Eagle Mountain Lots, LLC to acquire land in Utah. Debtor, acting as trustee for the Rindlesbach Construction Inc. Profit Sharing Plan (the Plan), signed a guaranty for the loan. The borrower defaulted and the Hardy Lenders filed suit in state court against the guarantors and against Debtor in his personal capacity (the Guaranty Action). The state court granted summary judgment to Debtor on the individual claim against him, ruling that he was not personally liable; the Hardy Lenders appealed. The Hardy Lenders prevailed at a jury trial, however, on their claims against the Plan, and the court entered judgment for $6,367,203.64.

The Hardy Lenders also brought two additional statecourt actions against Debtor alleging that after the jury verdict he had fraudulently transferred assets out of the Plan and personally retained a portion of the sale proceeds (Fraudulent Transfer Actions). In one action the state court ordered Debtor to deposit $2.2 million with the court pending resolution of the claims. Debtor failed to deposit the entire amount, so the court held him in contempt and ordered him to deposit the full amount and to pay the Hardy Lenders' expenses for the contempt proceedings. Debtor then filed for bankruptcy, automatically staying the pending actions.

In bankruptcy court the Hardy Lenders asserted three claims against Debtor: they sought roughly $7 million on the guarantee (on the theory that Debtor is personally liable), about $3.6 million on the fraudulent-transfer claims, and $5 million in punitive damages. The Hardy Lenders ultimately reached a settlement with the Trustee, which allowed their

claim in the amount of $4 million ($2.6 million on the guaranty and $1.4 million for the fraudulent transfers), subordinated to all other unsecured claims against the bankruptcy estate. The bankruptcy court approved the settlement over Debtor's objection and granted Debtor's discharge. The Trustee made a final distribution of the estate's assets on the allowed claims.

On appeal Debtor challenges two provisions of the settlement agreement. Because he lacks standing to challenge either, we dismiss the appeal.

### *STANDING*

Only a "person aggrieved" by a bankruptcy court order may seek appellate review of that order. *In re C.W. Mining Co.*, 636 F.3d 1257, 1260 (10th Cir. 2011). "To qualify as a 'person aggrieved,' a person's rights or interests must be directly and adversely affected pecuniarily by the decree or order of the bankruptcy court." *Id.* (internal quotation marks omitted). Thus, "unless the estate is solvent and excess will eventually go to the debtor, or unless the matter involves rights unique to the debtor, the debtor is not a party aggrieved by orders affecting the administration of the bankruptcy estate." *Id.* (brackets and internal quotation marks omitted). Rights "unique to the debtor" include "discharge of debts or exemption of property from the estate." *In re Weston*, 18 F.3d 860, 864 n.3 (10th Cir. 1994); *see also In re Am. Ready Mix, Inc.*, 14 F.3d 1497, 1500 (10th Cir. 1994) ("Litigants are 'persons aggrieved' if the order appealed from diminishes their property, increases their burdens, or impairs their rights." (brackets and internal quotation marks omitted)).

### *A. Judgment Provision*

***2** One provision of the settlement (the Judgment Provision) modifies the automatic stay to allow, among other things, the Hardy Lenders to seek recovery of assets fraudulently transferred by Debtor to his wife or other transferees. It also authorizes the Trustee (standing in the shoes of Debtor) to stipulate in the Utah Court of Appeals to reversal of summary judgment in the Guaranty Action and, upon remand of the action to the state trial court, to stipulate to a judgment against Debtor for $2.6 million.

Typically, postdischarge judgments against the debtor are barred. *See* 11 U.S.C. § 524(a)(2) ("A discharge ... operates as an injunction against the commencement or continuation of an action ... to collect, recover or offset any such debt as a personal liability of the debtor .... "). "The intent of this post-discharge injunction is to protect debtors ... in their financial 'fresh start' following discharge." *In re Walker*, 927 F.2d 1138, 1142 (10th Cir. 1991). But 11 U.S.C. § 524(e) states that ordinarily "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt"; and it is "well established" that this provision permits a creditor such as the Hardy Lenders "to bring or continue an action directly against the debtor for the purpose of establishing the debtor's liability when ... establishment of that liability is a prerequisite to recovery from another entity," *Walker*, 927 F.2d at 1142.

That is the circumstance here. No one will seek to enforce the judgment against Debtor; that would be a clear violation of § 524(a)(2). In the "Relief Sought" portion of their appellate brief in the Guaranty Action, the Hardy Lenders stated that they "anticipate that the only further proceeding that will be needed in the trial court is the dismissal of their claim against [Debtor] without prejudice, the matter having been resolved by the Bankruptcy Court's Settlement Order." Aplt. App. at 313. They sought reversal of the ruling that Debtor is not personally liable for the Plan's guaranty only because that ruling might bar their recovery against third parties. To recover on a fraudulent-transfer claim, one must show that one's claim against the transferor arose before the transfer. *See* Utah Code. Ann. § 25-6-6(1). The Hardy Lenders were concerned that those who received assets from Debtor would argue that the dismissal of the Guaranty Action against Debtor personally had proved that the Hardy Lenders had no pretransfer claim against him. Reversal of the summary-judgment ruling removed that potential problem. Insofar as the Judgment Provision does no more than remove an

impediment to the Hardy Lenders' recovery against third parties, it does not affect Debtor's rights or interests and therefore does not confer standing on him.

Debtor argues that the Judgment Provision impairs his rights because he may have to incur litigation expenses to defend against attempts to enforce the judgment. But enforcement of the judgment is clearly unlawful under 11 U.S.C. § 524(a) and unlikely to be sought; the remote possibility of future litigation does not constitute sufficient impairment to grant standing to Debtor. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–64 (1992) (possibility of future trips to foreign lands where endangered species live is too “conjectural or hypothetical” to present “actual or imminent” injury required for standing to challenge regulation limiting oversight under the Endangered Species Act to actions taken in the United States (internal quotation marks omitted)); *cf. Walker*, 927 F.2d at 1143 (possibility of litigation to establish debtor's liability, when debtor's discharge precludes judgment against debtor, “does not constitute sufficient prejudice to [debtor's] fresh start to preclude granting [creditor] relief from section 524's post-discharge injunction [to establish debtor's liability as prerequisite to recovery from another person]”). Debtor also argues that the judgment will damage his postbankruptcy credit prospects, but the notion that an unenforceable judgment, even in the unlikely event that it is entered, will have any incremental detriment to Debtor's credit beyond that stemming from his Chapter 7 bankruptcy is wholly speculative; it does not “directly and adversely affect[ ]” Debtor and thus does not confer standing. *C.W. Mining*, 636 F.3d at 1260; *see Lujan*, 504 U.S. at 563–64.

### *B. Assignment Provision*

***3** Another provision of the settlement agreement (the Assignment Provision) calls for the Trustee to sell all the estate assets, including all claims and causes of action available to the Trustee or the estate, to the Hardy Lenders. This provision allows the Hardy Lenders to pursue avoidance actions against third parties.

Debtor contends that he is aggrieved by the Assignment Provision because the Hardy Lenders, in their pursuit of their fraudulent-transfer claims, will likely seek discovery and testimony from him. But nothing in the bankruptcycourt order imposes any obligation on Debtor beyond that of every person to participate in discovery in civil litigation between other persons. *See In re Am. Ready Mix*, 14 F.3d at 1500 (“Litigants are ‘persons aggrieved’ if the order appealed from diminishes their property, increases their burdens, or impairs their rights.” (brackets and internal quotation marks omitted)); *cf. In re Paul*, 534 F.3d 1303, 1307 (10th Cir. 2008) (“[R]equiring a debtor to bear such collateral burdens of litigation as those relating to discovery (as opposed to the actual defense of the action and potential liability for the judgment), does not run afoul of § 524(a)(2).”).

## Footnotes

Debtor further contends that his standing is irrelevant to his challenge to the Assignment Provision because the challenge “raise[s] questions of subject-matter jurisdiction which the Court must address in any event.” Aplt. Br. at 13. He appears to argue that the bankruptcy court lacked subject-matter jurisdiction to approve what Debtor characterizes as “essentially the sale of the Trustee's office [to the Hardy Lenders],” Aplt. Br. at 27, because the Bankruptcy Code mandates that a trustee be disinterested and the Hardy Lenders are not. But this argument goes to the merits, not jurisdiction. Although “[b]ankruptcy courts are properly hesitant to authorize the sale or assignment of a trustee's avoidance powers or causes of action to a single creditor,” *In re Metro. Elec. Mfg. Co.*, 295 B.R. 7, 12 (Bankr. E.D.N.Y. 2003) (internal quotation marks omitted), the bankruptcy court undoubtedly has subject-matter jurisdiction to approve assignments of any asset of the bankruptcy estate, *see id.* (noting propriety of assigning avoidance powers in certain circumstances); 28 U.S.C. § 157(b)(2)(A) (bankruptcy courts have jurisdiction over “matters concerning the administration of the estate”).

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### *CONCLUSION*

We DISMISS Debtor's appeal for lack of standing and DENY the Trustee's motion to dismiss the appeal as moot.

**All Citations**

--- Fed.Appx. ----, 2016 WL 4546645

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

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decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

In re: Terry Kenneth Vickery, Debtor.
Richard K. Diamond, Chapter 7 Trustee for IVDS Interactive Acquisition Partners, L.P., a Florida general partnership, Plaintiff-Appellee,
v.
Terry Kenneth Vickery, Defendant-Appellant.

No. 15-1069
|
August 19, 2016

(D.C. No. 1:12-CV-01891-MSK) (D. Colorado)

Before KELLY, MATHESON, and MORITZ, Circuit Judges.

### *ORDER AND JUDGMENT*[*]

Nancy L. Moritz, Circuit Judge

***1** Terry Vickery, a debtor in a bankruptcy case, appeals the district court's order affirming the bankruptcy court's determination that a $4.6 million judgment against him is nondischargeable under 11 U.S.C. § 523(a)(6). Because the district court's order is not a final, appealable order, we dismiss the appeal for lack of jurisdiction.

### *BACKGROUND*

In 2007, Richard Diamond—serving in a representative capacity as the Chapter 7 trustee for IVDS Interactive Acquisition Partners—obtained a $4.6 million judgment against Vickery after a jury found that Vickery and others conspired to make fraudulent transfers from IVDS Interactive to themselves. In 2010, Vickery filed for bankruptcy. Diamond brought an adversary proceeding for a determination that Vickery's $4.6 million judgment debt is nondischargeable in bankruptcy.

In his complaint, Diamond asserted separate theories for nondischargeability under 11 U.S.C. § 523(a)(2)(A), § 523(a)(4), and § 523(a)(6). Under § 523(a)(2)(A), any debt for money obtained by "false pretenses, a false representation, or actual fraud" is nondischargeable. Under § 523(a)(4), any debt resulting from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" is nondischargeable. And under § 523(a)(6), any debt resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable.

In 2012, the bankruptcy court ruled in favor of Vickery on two of Diamond's theories, concluding that the debt didn't fit within the exceptions to discharge set out in § 523(a)(2) (A) and § 523(a)(4). But the court agreed with Diamond that Vickery's debt is nondischargeable under § 523(a)(6). Vickery then appealed the bankruptcy court's decision on § 523(a)(6), and Diamond cross-appealed the denial of his § 523(a)(2)(A) and § 523(a)(4) claims.

The Bankruptcy Appellate Panel (BAP) of the Tenth Circuit hears bankruptcy appeals unless one of the parties elects to have the district court hear it instead. 28 U.S.C. § 158(c)(1). Diamond elected to have the district court hear Vickery's appeal of the § 523(a)(6) issue. But the BAP determined that Diamond's statement of election as to his cross-appeal of the § 523(a)(2)(A) and § 523(a)(4) issues was defective and denied his request to have the district court hear his cross-appeal. As a result, appeals in the district court and the BAP proceeded concurrently.

In 2013, the BAP affirmed the bankruptcy court's § 523(a)(4) ruling. But it reversed in part, and affirmed in part, the bankruptcy court's ruling on § 523(a)(2)(A). Specifically, the BAP affirmed the bankruptcy court's decision that Diamond failed to

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show false representation. But the panel remanded to the bankruptcy court for further proceedings to determine whether Diamond can prove that Vickery's debt is for money obtained by actual fraud. *See* 11 U.S.C. § 523(a)(2)(A) (making debts nondischargeable if money is obtained by "false pretenses, a false representation, or actual fraud"). In 2015, the district court affirmed the bankruptcy court's § 523(a)(6) ruling. Vickery appeals from the district court's order, arguing that the bankruptcy court erred by ruling that the debt is for a "willful and malicious injury" that is nondischargeable under § 523(a)(6).[1]

## *DISCUSSION*

***2** After the parties completed briefing for this appeal, we ordered the parties to submit additional briefing addressing our jurisdiction.[2] Specifically, we asked the parties to address the finality of the district court's judgment. Our question arose because Vickery appeals from the district court's decision while proceedings are still pending in the bankruptcy court on remand from the BAP.

Both parties argue we have jurisdiction. Vickery argues we have jurisdiction under 28 U.S.C. § 158(d)(1), which states, "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by a district court or the BAP. Vickery asserts that because the district court entirely resolved the issue before it, its decision is final and appealable. Diamond agrees, additionally citing 28 U.S.C. § 1291, which states, "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts ...."

Despite the parties' shared desire that we resolve this appeal, we have an affirmative obligation to determine our own jurisdiction. *Niemi v. Lasshofer,* 728 F.3d 1252, 1259 (10th Cir. 2013). And we must fulfill this obligation before reaching the merits. *W. Energy All. v. Salazar*, 709 F.3d 1040, 1046 (10th Cir. 2013).

Usually, a decision in a civil case is considered final if it terminates the litigation on the merits, leaving the court with nothing to do but execute the judgment. *In re Baines*, 528 F.3d 806, 809 (10th Cir. 2008). But in bankruptcy, finality has a different meaning. *Id*. A bankruptcy case often involves several controversies that could constitute many individual lawsuits absent the filing of a bankruptcy

### Footnotes

petition. *Id*. As a result, we separately consider the finality of each discrete dispute raised within the larger bankruptcy case. *Id*. at 810. For example, we don't require resolution of the entire bankruptcy case for appellate jurisdiction. *Id*. Instead, "the appropriate 'judicial unit' " for determining § 158(d)(1) finality is "the particular adversary proceeding or discrete controversy pursued within the broader framework cast by the petition." *Id*. (quoting *In re Durability, Inc.,* 893 F.2d 264, 266 (10th Cir. 1990)).

In *Durability*, we said the proper jurisdictional inquiry focuses on the dispositional status of the matters contained in the trustee's adversary complaint. 893 F.2d at 266. There, we concluded that we lacked appellate jurisdiction because the lower court's order didn't resolve all of the matters the trustee pursued in his adversary complaint. *Id*. Similarly, we evaluate finality in this case by focusing on whether the district court order resolved the matters encompassed by Diamond's adversary complaint. *See id*.

Here, Diamond's adversary complaint alleged—in three separate counts—that Vickery's debt is nondischargeable under three separate exceptions to discharge: § 523(a)(2) (A), (a)(4) and (a)(6). The district court's order resolved only the § 523(a)(6) issue. Meanwhile, the § 523(a)(2)(A) issue remains pending on remand in the bankruptcy court. In short, the district court's order didn't resolve all of the matters Diamond raised in his adversary complaint. *See Durability*, 893 F.2d at 266. Therefore, under the unique circumstances of this case, we lack jurisdiction because the district court's order isn't a final, appealable order. Rather, the district court's order will ripen into a final, appealable order only when the

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bankruptcy court and the BAP resolve the § 523(a)(2)(A) issue. Accordingly, this appeal is dismissed.

**All Citations**

--- Fed.Appx. ----, 2016 WL 4413320

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value. *See* Fed. R. App. P. 32.1; 10th Cir. R. 32.1.

1 On appeal from the district court, we independently review the bankruptcy court's decision. *See* *In re Gentry*, 807 F.3d 1222, 1225 (10th Cir. 2015).

2 We also ordered additional briefing addressing the district court's jurisdiction. On further review, we conclude that the district court had jurisdiction under 28 U.S.C. § 158(c)(1).

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2016 WL 4245422
Only the Westlaw citation is currently available. United States Court of Appeals, Eleventh Circuit.

In re: Irain Lazaro Gonzalez, Debtor.
State of Florida Department of Revenue, Plaintiff–Appellant,
v.
Irain Lazaro Gonzalez, Defendant–Appellee.

No. 15-14804
|
Date Filed: 08/11/2016

*Synopsis*

**Background:** After the State of Florida Department of Revenue (DOR) attempted to intercept Chapter 13 debtor's work-related travel reimbursement check for the payment of a domestic support obligation (DSO), debtor filed motion to hold the DOR in contempt for violating the bankruptcy court's confirmation order. The United States Bankruptcy Court for the Southern District of Florida, Laurel M. Isicoff, J., held the DOR in contempt for violating the confirmation order, 2012 WL 2974813, and subsequently awarded debtor $21,360.00 in attorney fees. Agency appealed. The District Court, Kenneth A. Marra, J., affirmed, 2015 WL 5692561, and agency appealed.

**Holdings:** The Court of Appeals, Siler, Circuit Judge, held that:

[1] although the Bankruptcy Code authorizes DSOcreditors to collect after the imposition of the automatic stay, that right ends after confirmation of the plan, and

[2] the binding effect of debtor's plan encompassed allissues that could have been litigated in his case, and, given plan's silence regarding whether the DOR could intercept debtor's reimbursement check, the agency was prohibited from taking such action.

Affirmed.

Appeal from the United States District Court for the Southern District of Florida D.C. Docket No. 1:15–cv–20023–KAM, Bkcy No. 0–11–bkc–23183–LMI

Before JORDAN, ROSENBAUM, and SILER,[*] Circuit Judges.

***Opinion***

SILER, Circuit Judge:

***1** Following the confirmation of Appellee Irain Gonzalez's Chapter 13 bankruptcy plan, he received notice that his work-related travel reimbursement would be withheld at the request of the State of Florida Department of Revenue ("DOR") for the payment of a domestic support obligation ("DSO"). Because the DOR attempted to intercept a payment to Gonzalez after confirmation of his plan, the bankruptcy court found the DOR in contempt for violating the bankruptcy court's confirmation order and awarded attorney's fees to Gonzalez as a result. The district court affirmed the bankruptcy court's order of contempt and award of attorney's fees. The DOR now appeals, contending the bankruptcy court erred by holding it in contempt. For the reasons explained below, we affirm.

**I.**

In May 2011, Gonzalez filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. Soon after confirmation of Gonzalez's plan under Chapter 13, the DOR filed a proof of claim for arrearages in the amount of $2,400 related to a DSO. As a result, Gonzalez filed his First Amended Plan, which included a plan for full payment of the arrearages for the DSO and direct payment of existing child support to the DSO obligee. The bankruptcy court subsequently confirmed Gonzalez's First Amended Plan.

In April 2012, Gonzalez moved to hold the DOR in contempt for its efforts to intercept a travel reimbursement payment in the amount of $4,700.[1]

Because of the intercept, Gonzalez, a federal employee, averred that he was unable to make the required payment on his government-issued credit card and was therefore potentially subject to suspension from work if the funds were not released. During the hearing on the matter, the DOR agreed to release the reimbursement payment but did not concede that its actions constituted a violation of the automatic stay or the confirmed plan. The DOR, however, did cease all collection activities related to the
DSO.

Although the DOR's collections efforts had halted, Gonzalez renewed his motion to hold the DOR in contempt, maintaining that its actions violated the binding effect of the First Amended Plan. The bankruptcy court held the DOR in contempt for violating the confirmed plan and awarded Gonzalez attorney's fees. *In re Gonzalez*, No. 11–23183–BKC–LMI, 2012 WL 2974813, at *5 (Bankr. S.D. Fla. July 20, 2012). The district court affirmed the bankruptcy court's order of contempt and award of attorney's fees. *In re Irain Gonzalez*, No. 1:15–CV–20023–KAM, 2015 WL 5692561, at *7–8 (S.D. Fla. Sept. 29, 2015).

## II.

**[1]** " 'As the second court of review of a bankruptcy court's judgment,' we independently examine the factual and legal determinations of the bankruptcy court and employ the same standards of review as the district court." *In re Int'l Admin. Servs., Inc.*, 408 F.3d 689, 698 (11th Cir. 2005) (quoting *In re Issac Leaseco, Inc.*, 389 F.3d 1205, 1209 (11th Cir. 2004)). As such, we review a bankruptcy court's factual findings for clear error and conclusions of law de novo. *In re Brown*, 742 F.3d 1309, 1315 (11th Cir. 2014).

## III.

***2** The DOR contends that the bankruptcy court erred in holding it in contempt for intercepting Gonzalez's reimbursement payment even though its collection efforts occurred after the confirmation of Gonzalez's First Amended Plan. According to the DOR, "the lower courts effectively concluded that the mere confirmation of a Chapter 13 bankruptcy plan ... serves to unambiguously proscribe a DSO creditor from taking the collection actions at issue in this case." To this end, the DOR argues that the lower courts failed to appreciate a key change Congress made to the Bankruptcy Code when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109–8, 119 Stat. 23, ignored legislative history, created a conflict between two statutory provisions in the Bankruptcy Code, and based their decisions on a case that predated BAPCPA. In other words, the DOR believes that legislative intent and statutory construction control the disposition here.

**[2]** This case involves the interplay between two sections of the Bankruptcy Code: 11 U.S.C. §§ 362 and 1327. In broad terms, § 362 initiates an automatic stay against "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title" after the filing of a petition for bankruptcy. 11 U.S.C. § 362(a)(6). One of the important exceptions to the automatic stay—and the one most relevant here —permits "the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute." *Id.* § 362(b)(2)(C). The other relevant statutory provision in this case, § 1327(a), provides that "[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." When read together, these statutes present the question at issue in the instant action: does the exception to the automatic stay for DSOs apply even after the confirmation of a debtor's Chapter 13 plan?

The DOR insists that the legislative history and intent behind BAPCPA's changes to the domestic relations

provisions of the Bankruptcy Code govern the question before this court. In amending the domestic relations portion of the Bankruptcy Code, Congress considered several general objectives:

> 1. Bankruptcy should interfere as little as possiblewith the establishment and collection of on-going obligations for support, as allowed in State family law courts.
>
> 2. The Bankruptcy Code should provide a broad andcomprehensive definition of support, which should then receive favored treatment in the bankruptcy process.
>
> 3. The bankruptcy process should insure the continuedpayment of ongoing support and support arrearages with minimal need for participation in the process by support creditors.
>
> 4. The bankruptcy process should be structured toallow a debtor to liquidate nondischargeable debt to the greatest extent possible within the context of a bankruptcy case and emerge from the process with the freshest start feasible.

146 Cong. Rec. S11683–02 (daily ed. Dec. 7, 2000) (statement by Sen. Grassley). While the DOR suggests that the four general principles behind the changes to the domestic relations sections of the Bankruptcy Code support its position, the focus of its legislative-intent argument appears to be on Congress's explanation of § 362(b)(2)(C).

As part of Congress's section-by-section analysis of the changes under BAPCPA, it provided the following context to § 362(b)(2)(C):

> In this provision Congress has divested the bankruptcy court of exclusive jurisdiction over the bankruptcy estate to the extent a debtor's wages are estate property. Under prior law such withholding would have been allowed only if it were determined that the debtor's income was no longer property of the estate. This section specifically allows the use of estate property to pay support through the wage[-] withholding process without any bankruptcy [-]imposed limitation. The purpose of this provision is to allow income withholding to be implemented or to continue after a Chapter 11, 12 or 13 petition is filed, just as it would if a Chapter 7 petition were filed. The income[-] withholding provisions were enacted to allow compliance with procedures mandated in the Child Support Enforcement Program, Social Security Act, Title IV–D. Income withholding applies to the collection of on-going support and support arrearages. It may be implemented by court order or through an administrative process. ***3** 146 Cong. Rec. S11683–02 (daily ed. Dec. 7, 2000) (statement by Sen. Grassley).
>
> Within this explanation of § 362(b)(2)(C), the DOR highlights the phrase "without any bankruptcy[-]imposed limitation" as explicitly supporting its position. According to the DOR, Congress's explanation of § 362(2)(b)(C) coupled with the clear language of the section make apparent that Congress intended for DSO collection efforts to continue unhindered by the confirmation of a plan.

The DOR also argues that the Congressional Record reflects that Congress understood the problem with the Bankruptcy Code's treatment of DSOs under the preBAPCPA law. Prior to BAPCPA, the Bankruptcy Code only excepted from the automatic stay "the collection of alimony, maintenance, or support from property *that is not property of the estate*." 11 U.S.C. § 362(b)(2)(B) (1998) (emphasis added). Because §

362(b)(2)(B) did not include post-petition wages and property, this court observed that the section "ha[d] little or no practical effect in Chapter 13 situations." *Carver v. Carver*, 954 F.2d 1573, 1577 (11th Cir. 1992). The DOR believes that the problem identified by *Carver* is what Congress sought to fix with § 362(b)(2) (C) and explained as such in the Congressional Record.

> [U]nder former law the automatic stay did not apply to the collection of support so long as it was collected from property which was not property of the bankruptcy estate. Since property of the estate included debtor's income in Chapter 12 and 13 cases, at least until confirmation of the plan, a support creditor had no way of obtaining either ongoing support or prepetition support arrearages, unless the obligor/debtor paid these debts voluntarily or the creditor obtained relief from the stay. These amendments deal with both issues.

146 Cong. Rec. S11683–02 (daily ed. Dec. 7, 2000) (statement by Sen. Grassley).

Gonzalez offers two succinct responses to the DOR's statutory-intent arguments. First, Gonzalez contends that if Congress intended for DSO collection efforts to be exempt from the binding effect of § 1327, it could have easily "added the phrase 'non-Domestic Support Obligation' to 11 U.S.C. [§] 1327(a)." Second, Gonzalez asserts that Congress had no intention of exempting the collection of DSOs after the confirmation of a plan when that plan reflects the full payment of the DSO because "allowing such a preposterous framework would doom every Chapter 13 case that involves a DSO creditor." As Gonzalez explains, the interpretation espoused by the DOR would permit a DSO creditor after the confirmation of a plan to seize a vehicle paid in full by the debtor, thereby preventing the debtor from going to work and earning money to make payments under the plan. In short, Gonzalez believes that a DOR creditor could essentially wreck a Chapter 13 plan by ignoring the specific payment structure outlined by it.

With respect to Gonzalez's first argument, the DOR notes that Congress's "[s]ilence must yield to actual evidence of intent." In other words, the DOR believes that this court should not draw an adverse inference from Congress's silence as to § 1327(a) because that would undermine Congress's express intent manifested by § 362(b)(2)(C). To this point, the DOR reminds this court that we have "previously cautioned against drawing inferences from congressional silence." *See White v. Mercury Marine Div. of Brunswick, Inc.*, 129 F.3d 1428, 1434 (11th Cir. 1997). Further, in response to the concern that permitting post-confirmation collection would cause disarray of a debtor's finances, the DOR argues that "Congress clearly recognized that a *promise* to pay a DSO at some point in the future is not enough."

***4 [3]** Although the DOR makes a strong legislativeintent argument for DSO creditors to collect postpetition—something clearly authorized by § 362(b)(2) (C)—it falls short of demonstrating that Congress intended the exception for the automatic stay to similarly apply following the confirmation of a plan. Rather, the Congressional Record only indicates that Congress sought to enable a DSO creditor to reach assets of the estate post-petition without having to seek relief from stay because "a support creditor had no way of obtaining either on-going support or prepetition support arrearages." 146 Cong. Rec. S11683–02 (daily ed. Dec. 7, 2000) (statement by Sen. Grassley). But the same concerns do *not* exist post-confirmation. After all, not only are DSOs nondischargeable in bankruptcy, 11 U.S.C. §§ 523(a)(5), (15), 1328(a)(2), but the Bankruptcy Code also requires that DSO creditors be paid in full in a Chapter 13 plan, 11

U.S.C. §§ 507(a)(1), 1322(a)(2). Of course, as the DOR notes, the requirement that DSO creditors be paid in full predated the enactment of BAPCPA. True enough, but the Congressional Record *only* indicates that Congress set out to cure a problem with DSO creditors being unable to collect post-petition, not to

alter the post-confirmation process. To reach the same conclusion as the DOR, the court would have to disregard the clear text of § 362(b)(2) (C) and ignore that the Bankruptcy Code already required DSO creditors to be paid in full. The DOR conflates postpetition and post-confirmation processes in the hopes of creating a conflict between §§ 326(b)(2)(C) and 1327(a) where one does not exist. Simply put, the post-BAPCPA code now allows a DSO creditor to collect after the imposition of the automatic stay, but that right ends after confirmation of the plan. Therefore, neither the legislative history nor intent of § 326(b)(2)(C) impacts the clear language of § 1327(a) that binds *all* creditors to the plan.

In addition to discussing the legislative history of § 326, the parties also focus their attention on *In re Rodriguez*, 367 Fed.Appx. 25 (11th Cir. 2010), with very similar facts as the instant matter, although it applied pre-BAPCPA law. In *Rodriguez*, this court affirmed the bankruptcy court's award of attorney's fees to the debtor based on the DOR's efforts to collect a DSO after confirmation of the debtor's plan. *Id*. at 30. The conclusion in *Rodriguez* is the same adopted by the bankruptcy court and the district court in this case: "[A]lthough the State cannot be said to have violated the automatic stay provision of § 362(a) because of the child[-]support exception to that statute, it did violate the terms of Rodriguez's bankruptcy plan, as confirmed by the bankruptcy court." *Id*. at 28. However, to understand this court's holding in *Rodriguez*, it is important to examine the case that *Rodriguez* relied on, *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007).

Unlike *Rodriguez*, *Gellington* involved the application of § 362(b)(2)(C) because the debtor filed a petition for bankruptcy after BAPCPA went into effect. *In re Gellington*, 363 B.R. at 499–501. The debtor sought sanctions from the Office of the Texas Attorney General, Child Support Division (the "CSD") after the CSD garnished the debtor's paycheck following confirmation of the debtor's Chapter 13 plan. *Id*. at 499–500. While the bankruptcy court considered the language of § 362(b)(2) (C) to be clear in meaning that the "automatic stay had no bearing on the garnishment action by the [CSD] for collection of the domestic support obligation," it clarified that the confirmation order meant that the CSD and the debtor were both bound to the plan based on § 1327(a). *Id*. at 502. As the bankruptcy court explained, the plan binds all creditors because "an order confirming a Chapter 13 plan is *res judicata* regarding all issues that could have been decided at the confirmation hearing." *Id*. (citing *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1049–50 (5th Cir. 1992)).[2] Because the debtor's plan in *Gellington* did not have any provision permitting the CSD to garnish the debtor's wages, the bankruptcy court found the CSD's collection efforts in violation of the plan. *Id*. at 502–03.

The DOR criticizes the bankruptcy court's and the district court's reliance on *Rodriguez*, emphasizing that *Rodriguez* applied pre–BAPCPA law, but the DOR ignores this court's reliance on *Gellington* in deciding *Rodriguez*.[3] Instead, the DOR contends that this court should adopt the reasoning of *In re McGrahan*, 459 B.R. 869 (1st Cir. BAP 2011). In *McGrahan*, the court found that the confirmed plan's silence as to the Department of Health and Human Services' ("DHHS") ability to intercept tax refunds did not prevent it from taking such action because of 11 U.S.C. § 362(b)(2)(F), which "expressly excepts from the automatic stay the interception of a debtor's tax refunds for the payment of a support obligation, even where the tax refund is property of the estate." *McGrahan*, 459 B.R. at 874. The court explained that "[t]he binding effect of a chapter 13 plan extends ... only to those issues 'which were actually litigated by the parties and any issue necessarily determined by the confirmation order,' " *id*. at 875 (quoting *In re Torres Martinez*, 397 B.R. 158, 165 (1st Cir. BAP 2008)), and that there is no binding effect "as to issues 'not sufficiently evidenced in a plan to provide adequate protection to the creditor,' " *id*. (quoting *In re Enewally*, 368 F.3d 1165, 1172–73 (9th Cir. 2004)). Therefore, the court concluded that the only way that the confirmed plan would be able to preclude the DHHS from intercepting the debtor's tax refunds would be by having the plan specifically state such. *Id*. According to the DOR, *McGrahan*'s interpretation of § 1327(a) supports its position that "simply by requiring clear

injunctive language in a plan, relating to a DSO creditor whose rights are not stayed by 11 U.S.C. § 362, gives meaning to both" §§ 362(b)(2)(C) and 1327(a).

***5 [4]** We find *McGrahan* unpersuasive. The full text of the quote used in *McGrahan* for the proposition that the Chapter 13 binds *only* issues actually litigated states as follows:

> A leading bankruptcy authority has said that "the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan," 8 Collier on Bankruptcy, ¶ 1327.02, at 1327–3 (15th ed. 1998), and that it is "quite clear that the binding effect ... extends to any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." *Id.* at 1327–5.

*Torres Martinez*, 397 B.R. at 165. As Gonzalez notes, the insertion of the word "only" into the partial quote taken from *Torres Martinez* and used by the court in *McGrahan* indicates that the binding effect of the plan applies solely to issues actually litigated, rather than just being inclusive of issues actually litigated. The inclusive reading of the quote found in *Torres Martinez*—that is, that the binding effect includes issues actually litigated, plus those that could have been litigated—more accurately tracks the actual text of § 1327(a) than what was proposed by *McGrahan*. *See* § 1327(a) ( "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." (emphasis added)). Furthermore, the inclusive reading is also supported by the other case cited in *McGrahan*, which noted that "[t]he binding effect of confirmation as *res judicata* encompasses *all the issues that were or could have been litigated* by the parties at or before the confirmation hearing." *In re Marquez*, No. 10–03882, 2011 WL 4543226, at *11 (Bankr. D.P.R. Sept. 28, 2011) (emphasis added).[4]

*McGrahan* also inaccurately quoted *Enewally* when it explained that a confirmed plan must provide "adequate protection" to creditors rather than just "adequate notice." *Compare McGrahan*, 459 B.R. at 875 ("[A] confirmed chapter 13 plan is not binding as to issues 'not sufficiently evidenced in a plan to provide adequate *protection* to the creditor.' " (emphasis added)), *with Enewally*, 368 F.3d at 1173 ("[T]he confirmed plan has no preclusive effect on issues that ... were not sufficiently evidenced in a plan to provide adequate *notice* to the creditor." (emphasis added)). Presumably, based on this misquote, *McGrahan* held that for the debtor's confirmed plan "to have the preclusive effect on DHHS's right to intercept tax refunds ... it must have *specifically addressed* that right." 459 B.R. at 875 (emphasis added). However, *Enewally* stands only for the proposition that a creditor be put on sufficient notice of the resolution of its claim in the plan, thereby affording a creditor an opportunity to determine whether to litigate or seek to modify its claim. *See* 368 F.3d at 1173. To extend *Enewally* any further, as *McGrahan* did, would significantly distort the holding by providing greater protections to creditors than contemplated by the decision. Therefore, because *McGrahan* conflicts with both a plain reading of § 1327(a) and the cases it relies upon, it is of little aid to the DOR.

***6 [5]** In sum, while the text of § 326(b)(2)(C) appears to permit DSO collection efforts post-petition, the legislative history lacks any suggestion that Congress intended the exception to abrogate the binding effect of § 1327(a). Rather, a plain reading of § 1327(a) makes clear that the binding effect of a confirmed plan encompasses all issues that could have been litigated in Gonzalez's case—including whether the DOR could intercept Gonzalez's reimbursement payment. Accordingly, because Gonzalez's plan fell silent on the issue of whether the DOR could intercept Gonzalez's

Footnotes

reimbursement payment, the DOR was prohibited from taking such action.

**IV.**

The legislative intent behind § 362(b)(2)(C), which permits a DSO creditor to collect notwithstanding the automatic stay, does not indicate that Congress intended the exception to interfere with the binding effect a confirmed plan per § 1327(a). As such, although the DOR did not violate the automatic stay when it intercepted Gonzalez's reimbursement payment, it did violate the confirmed plan.

**AFFIRMED.**

*All Citations*

--- F.3d ----, 2016 WL 4245422

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

1 It appears that before this motion for contempt, the DOR had intercepted another travel expense payment and had frozen a bank account jointly held by Gonzalez and his mother. According to Gonzalez, the DOR unfroze the bank account but neither returned the intercepted reimbursement payment nor took efforts to cease intercepting future reimbursement payments.

2 The bankruptcy court noted that the logic behind the binding effect of the plan is to "provide finality so that all parties may rely on it without concern that later actions could result in a subsequent change or revocation of the order." *In re Gellington*, 363 B.R. at 502 (citing *In re Layo*, 460 F.3d 289, 293 (2d Cir. 2006)).

3 Several cases post-BAPCPA also concluded that the binding effect of § 1327(a) prohibited a DSO creditor from taking collection efforts after the confirmation of a plan. *In re Hutchens*, 480 B.R. 374, 384 (Bankr. M.D. Fla. 2012) ("[O]nce a Chapter 13 plan has been confirmed pursuant to § 1327 it becomes binding on all creditors, including holders of prepetition domestic support obligations."); *In re Fort*, 412 B.R. 840, 850 (Bankr. W.D. Va. 2009) ("If the State's contention that its post-confirmation collection activities are not affected by the provisions of a confirmed plan were to be accepted, then a creditor with protection against the automatic stay would be free to collect a debt in any way it sees fit."); *In re Worland*, No. 08–2148–AJM–13, 2009 WL 1707512, at *2 (Bankr. S.D. Ind. June 16, 2009) (finding that the DSO creditor violated the plan because "[n]either the confirmed plan nor the confirmation order provide[d] for the [DSO creditor] to garnish [the Debtor]'s wages or intercept the Debtors' tax refund as a method of satisfying the support claim").

4 The parties briefly debate the relevance of *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010), to the question of the binding effect of Chapter 13 plans. To the extent that *Espinosa* applies to this case, it further solidifies the finality of a confirmed plan. *See id.* at 269, 130 S.Ct. 1367. Despite *McGrahan*'s suggestion to the contrary, this principle is fairly settled. 8 Collier on Bankruptcy ¶ 1327.02 (15th ed. 2015) ("Upon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack."). However, the DOR's rejection of *Espinosa* because of its limited relevance here is well taken; *Espinosa* does not address any issues concerning the post-BAPCPA exception to the automatic stay.

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2016 WL 4490489
United States Court of Appeals,
Eleventh Circuit.

In re: Ocean Warrior, Inc., Debtor.
James E. Gowdy, Plaintiff–Appellant,
v.
Christopher Mitchell, Joel Tabas, Trustee,
Chapter 7 Trustee of the Bankruptcy Estate of
Ocean Warrior, Inc., Defendants–Appellees.

No. 15–11891
|
Date Filed: 08/26/2016

*Synopsis*

**Background:** Civil contempt proceedings were instituted against president of corporate Chapter 7 debtor for not complying with bankruptcy court's orders, in failing to keep vessel that was debtor's sole asset in United States waters, failing to maintain insurance on vessel, and failing to deposit money into registry of court. The United States Bankruptcy Court for the Southern District of Florida awarded contempt sanctions, and president appealed. The District Court, Robert N. Scola, Jr., J., 2015 WL 1608092, affirmed. President appealed.

**Holdings:** The Court of Appeals, Melloy, Circuit Judge, held that:

[1] evidentiary show-cause hearing conducted by bankruptcy court prior to imposition of contempt sanctions was sufficient to satisfy due process requirements;

[2] bankruptcy court had subject matter jurisdictionover allegations of civil contempt against president of corporate Chapter 7 debtor and authority to enter a final order, not merely a proposed judgment, finding president in civil contempt;

[3] time for alleged contemnor to appeal award ofsanctions by bankruptcy court did not begin to run, as to what court characterized as "interim" award, from time of entry of that award; but

[4] fee award could not include fees beyond thosereasonably related to litigation and asset recovery efforts surrounding the contempt litigation.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 14–cv–22650–RNS, Bkcy No. 90–bkc–15999–AJC

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Before MARCUS, DUBINA and MELLOY,* Circuit Judges.

*Opinion*

MELLOY, Circuit Judge:

***1** This appeal arises from an order by the United States District Court for the Southern District of Florida, dated March 31, 2015. In that order, the district court affirmed eight rulings of the United States Bankruptcy Court for the Southern District of Florida. The bankruptcy court found, in part, that Appellant James Gowdy was liable for civil contempt. The bankruptcy court also imposed compensatory sanctions against Gowdy. Gowdy raises five issues on

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appeal. We affirm in most respects but reverse and remand for redetermination of the amount of the Trustee fee award.

I.

In June 1989, Appellee Mitchell, a commercial fisherman, sued two Florida corporations, Ocean Warrior, Inc. (“Ocean Warrior”), and Warrior Fleet, Inc., in the United States District Court for the Western District of Washington. He alleged the corporations failed to provide “basic maritime remedies of maintenance, cure and unearned wages” after he was injured while working aboard the corporations' commercial shrimping vessel, the F/V Janice. Mitchell also filed an *in rem* maritime claim against the F/V Janice, naming as its owner Ocean Warrior. The United States District Court for the Western District of Washington had the F/V Janice arrested in admiralty. On August 28, 1990, the district court in Washington ordered the *in rem* sale of the F/V Janice and the sale took place on the same day.

On the same day as the sale, Ocean Warrior filed a Chapter 11 Petition in the United States Bankruptcy Court for the Southern District of Florida. The sale of the F/V Janice was voided. The bankruptcy court determined there was substantial equity in the boat, over and above the amount claimed in Mitchell's lawsuit. As a result, on May 9, 1991, the bankruptcy court ordered that Gowdy, the president of Ocean Warrior, be allowed to continue to operate the F/V Janice. The bankruptcy court ordered that Gowdy maintain insurance on the boat. The bankruptcy court also ordered the boat to remain in U.S. waters off the state of Washington pending the determination of Mitchell's maritime claim. In April of 1992, the district court in Washington awarded Mitchell a judgment for his maritime claim.

Based on the Washington district court's judgment, the bankruptcy court in Florida ordered Ocean Warrior to deposit $38,000.00 into the court's registry as security for Mitchell.[1] No money was deposited, insurance was not maintained on the F/V Janice, and the F/V Janice disappeared in August 1992. When the boat disappeared, Gowdy also disappeared. The bankruptcy court in Florida and the district court in Washington each issued warrants for Gowdy's arrest. The Washington warrant was for criminal contempt in connection with the suspected theft of the F/V Janice.

On February 10, 1993, with Ocean Warrior's only valuable asset missing and a bankruptcy reorganization no longer possible, the bankruptcy court converted Ocean Warrior's Chapter 11 case to a Chapter 7 case and appointed a Trustee. The case was closed and reopened several times over the years. Then, on December 2, 1999, the bankruptcy court closed the case with the condition that “[t]he court shall retain jurisdiction to reopen this case in the event the Vessel F/V Janice and/or Mr. James Gowdy are located. All existing Orders shall remain in full force and effect.”

***2** In June 2011, nearly twenty years after the F/V Janice and Gowdy disappeared, United States Marshals arrested Gowdy in Texas. At that time, he alleged that the F/V Janice had been stolen by a group of Colombians and that he had nothing to do with the theft. He also alleged that he came back into possession of the boat but subsequently lost it to creditors for liens. Gowdy was brought before the United States District Court for the Western District of Washington on the arrest warrant issued by that court. In September 2011, the Washington district court released Gowdy on his own recognizance and deferred to the civil contempt proceedings in the United States Bankruptcy Court for the Southern District of Florida. On October 17, 2011, the bankruptcy court reopened the bankruptcy proceedings and entered an Order to Show Cause as to why Gowdy should not be held in civil contempt.

The bankruptcy court held a hearing on December 8, 2011, regarding its show cause order. Gowdy appeared *pro se* at the hearing. Gowdy initially indicated he thought he was being brought before the court on criminal contempt. However, the bankruptcy judge made it clear to Gowdy that the December 2011 hearing was for civil contempt only. According to the bankruptcy judge, Gowdy was not in danger of being incarcerated as a result of the hearing and the only issue was the location of the boat and damages owed to Mitchell if it could not be

located. Gowdy refused to disclose the location of the F/V Janice or answer any questions about what had happened to the boat.

The court found Gowdy in civil contempt and ordered him to produce the F/V Janice or pay the amount due on Mitchell's judgment. On May 4, 2012, the bankruptcy court entered a written order finding Gowdy in civil contempt for violating "numerous" prior orders of the court, including provisions in orders dated February 9, 1991, and August 7, 1992. The May 4, 2012 order allowed Gowdy to purge the civil contempt by either returning the F/V Janice or depositing funds into the court's registry to compensate Mitchell for damages caused by Gowdy's contempt. The court gave Gowdy 90 days to purge his contempt before other sanctions would be considered, such as incarceration until the contempt was purged.

On June 19, 2012, Gowdy filed an affidavit alleging he had no assets, seeking to avoid paying filing fees to appeal the bankruptcy court's civil contempt order. However, Gowdy's representations about his finances excluded reference to his interest in a pending maritime personal injury lawsuit in Texas. Gowdy's Texas lawsuit later settled for $449,637.22. Gowdy also excluded reference to his interest in a Texas home. Gowdy opined that the home was valued at $75,000.00 whereas Mitchell asserts on appeal that the home's publicly assessed value is approximately $120,000.00. On September 7, 2012, the Trustee commenced an adversary proceeding against Gowdy, seeking recovery for the conversion of the F/V Janice, turnover of the F/V Janice, and injunctive relief relating to the settlement funds due to Gowdy. Following interpleader proceedings, on May 29, 2013, the Trustee received $224,818.63 from the Texas court registry.

On July 17, 2013, the bankruptcy court entered an order awarding interim attorneys' fees and costs to the Trustee. On December 11, 2013, the bankruptcy court entered an order temporarily staying the disbursement of funds to Mitchell pending the adversary proceeding's conclusion or final conclusion of any appeal of the July 17, 2013 order.

On March 7, 2014, the bankruptcy court ordered sanctions against Gowdy for failing to purge his civil contempt. In that order, the bankruptcy court also approved the disbursement of funds to Mitchell and authorized the entry of a final judgment against Gowdy and in favor of the Trustee. On April 8, 2014, the bankruptcy court entered an amended final judgment in favor of the Trustee in the amount of $239,143.14. Gowdy filed his notice of appeal on April 16, 2014 and appealed the bankruptcy court's judgment. The district court affirmed the bankruptcy court's judgment. This appeal followed.

## II.

***3 [1] [2] [3]** In a bankruptcy case, the Eleventh Circuit Court of Appeals "sits as a second court of review and thus examines independently the factual and legal determinations of the bankruptcy court and employs the same standards of review as the district court." In re Fisher Island Invs., Inc., 778 F.3d 1172, 1189 (11th Cir. 2015) (quoting In re Brown, 742 F.3d 1309, 1315 (11th Cir. 2014)). "Where the district court [sitting as an appellate court] affirms the bankruptcy court's order," the Eleventh Circuit "review[s] the bankruptcy court's decision." Id. In doing so, the court "review[s] the bankruptcy court's factual findings for clear error and its legal conclusions *de novo*," id. and its imposition of sanctions for an abuse of discretion, In re Walker, 532 F.3d 1304, 1308 (11th Cir. 2008). A lower court's decision to impose sanctions will be affirmed unless the court "made a clear error of judgment, or has applied the wrong legal standard." In re Walker, 532 F.3d at 1308 (quoting Amlong & Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1238 (11th Cir. 2007)).

### A.

**[4]** Gowdy initially contends that the bankruptcy court abused its discretion by failing to conduct an evidentiary hearing on disputed issues of fact regarding his civil contempt. Appellees counter that

the bankruptcy court conducted an evidentiary show-cause hearing on December 8, 2011. Having reviewed the record, it is clear that Gowdy received notice of the civil contempt allegations against him and that the bankruptcy court gave Gowdy the opportunity to testify, submit evidence, and rebut the allegations of civil contempt at his showcause hearing. Gowdy failed to disclose any information as to why he could not purge the civil contempt. For these reasons, the bankruptcy court did not err in holding an evidentiary show-cause hearing, which satisfied due process requirements. See F.T.C. v. Leshin, 719 F.3d 1227, 1235 (11th Cir. 2013) ("It is by now well-settled law that due process is satisfied when a civil contempt defendant receives notice and an opportunity to be heard....").

B.

Gowdy next argues that his due process rights were violated when the bankruptcy court threatened incarceration for contempt and he lacked counsel at the show-cause hearing. Appellees reply that the show-cause hearing met the due process requirements and that Gowdy was not entitled to counsel at his civil contempt hearing. The United States Supreme Court has made clear Gowdy was not entitled to counsel at his civil contempt hearing because he faced no jeopardy of incarceration. See Turner v. Rogers, 564 U.S. 431, 443, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011) (interpreting prior Supreme Court cases as "pointing out that the Court previously had found a right to counsel '*only*' in cases involving incarceration, not that a right to counsel exists in *all* such cases...."). As the district court noted in its May 31, 2015 order, at Gowdy's show-cause hearing the bankruptcy court stated: "[W]e're not going to incarcerate you.... This is a civil contempt motion here notwithstanding that you were arrested on the criminal contempt motion...." Thus, the bankruptcy court did not violate Gowdy's due process rights by conducting a show-cause hearing on his civil contempt without appointing Gowdy an attorney.[2]

C.

***4 [5]** Gowdy contends that the bankruptcy court had no authority to punish him for contempt and that the bankruptcy court's sanction amounted to a criminal sanction. Appellees reply that the bankruptcy court had authority to impose civil contempt sanctions.

**[6] [7] [8]** "Civil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders." Alderwoods Grp., Inc. v. Garcia, 682 F.3d 958, 967 n.18 (11th Cir. 2012) (citation omitted). Distinct from the bankruptcy courts' inherent contempt powers, 11 U.S.C. § 105 creates the bankruptcy courts' statutory civil contempt power. See 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). "Civil penalties must either be compensatory or designed to coerce compliance." In re Evergreen Sec., Ltd., 570 F.3d 1257, 1280 (11th Cir. 2009) (quoting In re Dyer, 322 F.3d 1178, 1192 (9th Cir. 2003)).

In this case, the bankruptcy court had subject matter jurisdiction to hold Gowdy, the president and agent of Ocean Warrior, liable for civil contempt. Gowdy did not comply with the bankruptcy court's orders in 1991 and 1992 because he failed to keep the F/V Janice in U.S. waters, failed to maintain insurance on it, and failed to deposit money into the registry of the court. At the showcause hearing on December 8, 2011, the bankruptcy court determined Gowdy was in civil contempt and sought to coerce Gowdy to return the F/V Janice: "So the Court, based on what you have to say here, determines you are in civil contempt and directs that you have, let's say, 14 days to either deliver the boat or the amount due [Mitchell's] judgment." After Gowdy failed to purge his civil contempt, on March 7, 2014, the bankruptcy court imposed sanctions to compensate the aggrieved parties —Mitchell and others—for the costs incurred because of Gowdy's contempt.

Further, the sanctions were not punitive. See In re McLean, 794 F.3d 1313, 1323 (11th Cir. 2015)

("Punitive sanctions ... take the form of a fixed fine and have no practical purpose other than punishment; it is immaterial to a court imposing such sanctions that a contemnor might be fully in compliance with the order in question at the time the sanctions are imposed."). Moreover, as the district court noted in affirming the bankruptcy court's orders, "The bankruptcy court never contemplated incarceration or punitive sanctions and it acted within its jurisdiction to find Gowdy in civil contempt." Thus, the bankruptcy court did not err by imposing coercive and compensatory civil contempt sanctions. See In re Evergreen Sec., Ltd., 570 F.3d at 1280; see also Leshin, 719 F.3d at 1234 (discussing the distinctions between coercive civil contempt sanctions and compensatory civil contempt sanctions).

D.

[9] Gowdy claims that the bankruptcy court lacked jurisdiction because the civil contempt proceeding was not a "core proceeding." Relying on Stern v. Marshall, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), Gowdy argues that the bankruptcy court should have proposed a judgment instead of entering a final order. Appellees disagree, arguing that the civil contempt proceedings relating to the F/V Janice and Gowdy's violation of the bankruptcy court's orders are "core proceedings" over which the bankruptcy court has jurisdiction to enter a final order.

***5** Bankruptcy courts may "enter final judgments in 'all core proceedings arising under title 11, or arising in a case under title 11.' " Stern, 564 U.S. at 474, 131 S.Ct. 2594 (quoting 28 U.S.C. § 157(b)(1)). There are 16 different types of core proceedings set forth by section 157(b)(2), including, in relevant part, "matters concerning the administration of the estate" and "orders to turn over property of the estate." 28 U.S.C. § 157(b)(2)(A), (E). If a proceeding is "not a core proceeding but ... is otherwise related to a case under title 11 ... the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court." Id. § 157(c)(1).

Here, Gowdy violated the bankruptcy court's 1991 and 1992 orders involving the F/V Janice. As a result, following Gowdy's show-cause hearing, the bankruptcy court found Gowdy in civil contempt and ordered him to turn over the F/V Janice or pay damages. The court's orders concerned "the administration of the estate" and "turn[ing] over property of the estate." Therefore, the matters were "core proceedings" under the text of 28 U.S.C. § 157(b)(2). See 28 U.S.C. § 157(b)(2)(A), (E).

[10] In addition, "[c]ivil contempt proceedings arising out of core matters are themselves core matters." In re Skinner, 917 F.2d 444, 448 (10th Cir. 1990); see In re White–Robinson, 777 F.3d 792, 795–96 (5th Cir. 2015) (per curiam) (noting post-Stern that a contempt order was a "core proceeding" because it was a "matter[ ] concerning the administration of the estate" pursuant to 28 U.S.C. § 157(b)(2) (alteration in original)). Thus, the bankruptcy court had subject matter jurisdiction over the allegations of civil contempt against Gowdy and the authority to enter a final order, not merely a proposed judgment, finding Gowdy in civil contempt. See In re Skinner, 917 F.2d at 448.

E.

i.

Lastly, Gowdy argues that the bankruptcy court erred in disbursing his money to pay the Trustee fees pursuant to the July 17, 2013 order. On appeal, Gowdy raises the same argument that he raised at the district court: he contends that, if sanctions were appropriate, fees should have been "paid out of the judgment, not fees awarded from [his] property first, and then a judgment entered on top of the fees." As the district court correctly noted, Gowdy fails to cite case law or statutes to support his argument. In making his argument, Gowdy also fails to fully explain

the details of his critique of the bankruptcy court's sanction and fee orders. Appellees counter that Gowdy's appeal of the fee orders was untimely and that the bankruptcy court has wide discretion in fashioning an equitable remedy.

Notwithstanding the foregoing, we are compelled to reverse as to the quantity of the fee award. First, we conclude Gowdy's appeal is not untimely. And second, we conclude the fee award cannot include fees beyond those reasonably related to litigation and asset recovery efforts surrounding the contempt litigation. See Abbott Labs. v. Unlimited Beverages, Inc., 218 F.3d 1238, 1242 (11th Cir. 2000) ("[A]ttorneys' fees in a civil contempt proceeding are limited to those reasonably and necessarily incurred in the attempt to enforce compliance."); see also Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1557 (11th Cir. 1996) (noting that one purpose of civil contempt sanctions is to "compensate the complainant for ... expenses it incurred because of the contemptuous act."). Further, on remand, the district court must decide whether to permit the Trustee to pursue its adversary proceeding against Gowdy—a proceeding that never actually took place in light of the transfer of the substantial sums from Texas.

ii.

***6 [11] [12]** Under Bankruptcy Rule 8002, Gowdy had 14 days from the "entry of the judgment, order, or decree being appealed" to file a notice of appeal. The timely filing of a notice of appeal "is jurisdictional." In re Williams, 216 F.3d 1295, 1298 (11th Cir. 2000). Gowdy timely moved to stay and reconsider the July 17 fee disbursal order, but did not file a notice of appeal until April 16, 2014, after the final sanctions judgment was entered and the court ordered the remainder of the fees disbursed to Mitchell. While the language of the rule suggests that Gowdy should have filed a notice of appeal within 14 days of the bankruptcy court's order denying his motion for reconsideration of the fee disbursal order, we conclude he was not required to do so in the circumstances of this case. In the July 17 order, the bankruptcy court characterized the disbursal being authorized as an "interim" award and declined to finally resolve the Trustee's disbursal motion until it held a hearing and entered a final judgment regarding the contempt sanctions. Rule 8002(a)(1) does not require a party to a bankruptcy proceeding to file a separate notice of appeal for each interim fee disbursal at least where, as here, the interim order reserves decision on a substantial intertwined portion of the disbursal motion. The Trustee's motion for the disbursal of the settlement funds was not substantially resolved until the court granted the portion of the order requesting disbursal of the fees to Mitchell and simultaneously entered final judgment in Mitchell's favor. Gowdy timely appealed from that order.

iii.

**[13]** Regarding the actual sanction award and the absence of any resolution of the conversion claim, we believe it is necessary to recount in additional detail what occurred after the Trustee received $224,818.63 from the Texas court registry on May 29, 2013. Instead of continuing to pursue the adversary proceeding, the Trustee filed a motion to summarily disburse Gowdy's settlement funds in the following manner: $135,167.95 to Mitchell; $80,465.78 to Trustee's Counsel; and $9,184.90 to Trustee's Local Counsel in Texas. On July 17, 2013—even though the bankruptcy court had not entered a sanctions award against Gowdy and the adversary proceeding had not been resolved—the court ordered allocation of the Trustee's and attorneys' fees and scheduled a hearing to consider disbursement to Mitchell. The bankruptcy court did not identify the fees as "reasonable and necessarily incurred in the attempt to enforce compliance." Abbott Labs., 218 F.3d at 1242. Instead, the court explained the fees were reasonable in light of the work performed during the entire 20–year bankruptcy proceeding.

Finally, on March 7, 2014, the bankruptcy court imposed the sanction award in favor of Mitchell,

which was a judgment "in favor of Mitchell in the amount of $372,209.02." The court ordered the Trustee to transfer to Mitchell the $133,433.75 remaining from Gowdy's settlement, and then entered a final judgment against Gowdy for the rest of the sanction award, $238,775.27.

[14] **[15]** **[16]** Bankruptcy courts have broad discretion in awarding professional fees in bankruptcy proceedings. Howard Johnson Co. v. Khimani, 892 F.2d 1512, 1519 (11th Cir. 1990) ("District courts have broad discretion in fashioning civil contempt sanctions."). And, in awarding sanctions for civil contempt, a court "ha[s] numerous options, among them: a coercive daily fine, a compensatory fine, attorneys' fees and expenses." Citronelle–Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991). A fee award in relation to

Footnotes

a civil contempt sanction, however, is not without limit, and we conclude the bankruptcy court abused its broad discretion because it possessed no legal basis to require Gowdy to pay the full Trustee's fee. In re Red Carpet Corp. of Panama City Beach, 902 F.2d 883, 890 (11th Cir. 1990) ("An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous.").

**[17]** We reach this conclusion because Gowdy was never adjudged liable to the bankruptcy estate for converting the JANICE. Rather, he was found liable for contempt pursuant to Mitchell's motion. Therefore, the fee award should have been limited to an amount necessary to "compensate the complainant"—Mitchell—"for losses and expenses ... incurred because of the contemptuous act [or to] coerce the contemnor into complying with the court order." Jove Eng'g, 92 F.3d at 1557. The bankruptcy court could have required Gowdy to compensate the Trustee for the efforts in obtaining the personal injury settlement funds from Texas, which were costs reasonably incurred in enforcement of the court's sanction order. But before being required to bear the full Trustee's fees, Gowdy was entitled to a jury trial in an Article III tribunal on the Trustee's conversion claim. See Stern, 564 U.S. at 503, 131 S.Ct. 2594.

III.

***7** For the reasons above, we affirm the judgment of the district court in all respects other than the amount of the fee award. We remand for the bankruptcy court to award a fee based on the work the Trustee performed pursuant to Mitchell's motion for contempt. The lower court also shall determine whether the Trustee may pursue its adversary claim at this late date.

**AFFIRMED in part, REVERSED and REMANDED in part**.

***All Citations***

--- F.3d ----, 2016 WL 4490489, 63 Bankr.Ct.Dec. 15

* Honorable Michael J. Melloy, United State Circuit Judge for the Eighth Circuit, sitting by designation. 1 It is undisputed that the F/V Janice was worth far in excess of $38,000.00. In fact, it was represented to the bankruptcy court that the boat was worth over $250,000.00, and an examiner later valued the boat at $225,000.00.

2 The bankruptcy court did not indicate an intention to incarcerate Gowdy at the show-cause hearing or in the order calling for the hearing. The bankruptcy court's May 4, 2012 order, however, indicated the court would "consider the imposition of sanctions," including incarceration until the contempt was purged, if Gowdy did not purge the contempt within 90 days. Even if that order suggests Gowdy might in the future face the possibility of incarceration, the bankruptcy court met the due process requirements at Gowdy's show-cause hearing and eventually concluded Gowdy was not indigent on March 7, 2014. See Lassiter v. Dep't of Soc. Servs. of Durham Cnty, N.C., 452 U.S. 18, 26–27, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) ("[T]he Court's precedents speak with one voice about what 'fundamental fairness' has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an *indigent litigant* has a right to appointed counsel only when, if he loses, *he may be deprived of his physical liberty*."

(emphasis added)). Nowhere else in the record does the bankruptcy court mention incarceration. We need not consider whether Gowdy would have been entitled to counsel at a future hearing if the possibility of incarceration had actually arisen.

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