844 F.3d 300
United States Court of Appeals, First Circuit.

Cathy N. Bates, a/k/a Lynn Cathy Bates, a/k/a Cathy Lynn Nichols; and Timothy J. Bates, Appellants,
v.
CitiMortgage, Inc., s/b/m to ABN AMRO Mortgage Group, Inc.; and Federal Home Loan Mortgage Corporation, Appellees, Victor W. Dahar, Trustee.

No.
16
–
1228
|
December 14, 2016

Synopsis

Background: Chapter 7 debtor-mortgagors brought postdischarge proceeding to recover for alleged violations of discharge injunction in connection with their residential mortgage loan, and parties cross-moved for summary judgment. The United States Bankruptcy Court for the District of New Hampshire, J. Michael Deasy, J., 517 B.R. 395, granted debtors' motion as to only one of the claims asserted and awarded punitive damages and attorney fees, and debtors, but not defendants, appealed. The District Court, Steven J. McAuliffe, J., 550 B.R. 12, affirmed. Debtors appealed.

[Holding:] The Court of Appeals, Thompson, Circuit Judge, held that delivery to debtor-mortgagors, in connection with mortgagee's post-discharge foreclosure on its lien interest in debtors' home, of IRS form advising debtors of possibility that foreclosure may have resulted in taxable income, was purely informational and did not violate discharge injunction.

Affirmed.

West Headnotes (8)

[1] Bankruptcy

Presentation of grounds for review

Argument that was not raised below, and on which no evidence was presented in proceedings in bankruptcy court, was waived as issue on appeal.

Cases that cite this headnote

[2] Bankruptcy

Conclusions of law; d e novo review

Bankruptcy

Findings of Fact

On appeal from district court's affirmance of bankruptcy court's grant of motion for summary judgment, the Court of Appeals reviews bankruptcy court's summary judgment decision de novo and gives no special deference to the district court's findings.

Cases that cite this headnote

[3] Bankruptcy

Discharge as injunction

To prove a violation of discharge injunction, debtor must establish that creditor: (1) had notice of debtor's discharge; (2) intended the actions which constituted the violation; and (3) acted in way that improperly coerced or harassed debtor. 11 U.S.C.A. § 524(a)(2).

1 Cases that cite this headnote

[4] Bankruptcy

Lien enforcement

Delivery to Chapter 7 debtor-mortgagors, in connection with mortgagee's post-discharge foreclosure on its lien interest in debtors' home, of IRS form advising debtors of possibility that foreclosure may have resulted in taxable income, was purely informational and did not violate discharge injunction, though box on form was erroneously checked indicating that debtors remained personally liable for mortgage debt, and though mortgagee refused to correct this error when it was brought to mortgagee's attention; nothing on form constituted a threat to debtors, or set forth, directly or indirectly, any adverse alternatives that could be avoided by paying discharged debt, and because error on form did not result in tax consequences for debtors beyond those resulting from

foreclosure itself, mortgagee's refusal to correct form did not support inference of coercive intent. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[5] Bankruptcy

Discharge as injunction

Courts assess whether conduct is improperly coercive or harassing, in violation of discharge injunction, using an objective standard, pursuant to which debtor's subjective feeling of coercion or harassment is not enough to establish a violation. 11 U.S.C.A. § 524(a)(2).

1 Cases that cite this headnote

[6] Bankruptcy

Discharge as injunction

To determine whether conduct is improperly coercive or harassing, in violation of discharge injunction, courts consider the facts and circumstances of each case, including factors such as immediateness of any threatened action and context in which statement is made. 11 U.S.C.A. § 524(a)(2).

1 Cases that cite this headnote

[7] Bankruptcy

Discharge as injunction

Creditor violates the discharge injunction only if it acts to collect or enforce a prepetition debt; bad acts that do not have a coercive effect on debtor do not violate debtor's discharge. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

[8] Bankruptcy

Discharge as injunction

Reporting false or outdated information to credit agency in attempt to coerce payment on discharged debt can violate the discharge injunction, and evidence that creditor refused to change a false or outdated report can give rise to inference that creditor intended to coerce debtor into paying the discharged debt, in violation of discharge injunction. 11 U.S.C.A. § 524(a)(2).

Cases that cite this headnote

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE, [Hon. Steven J. McAuliffe, U.S. District Judge]

Attorneys and Law Firms

Terrie Harman, Kristina Cerniauskaite, and Harman Law Offices, on brief for Appellants.

Gregory N. Blase, David D. Christensen, and K&L Gates LLP, on brief for Appellees.

Before Lynch, Thompson, and Barron, Circuit Judges.

Opinion

THOMPSON, Circuit Judge.

Cathy N. Bates and Timothy J. Bates (our Appellants, whom we also call the Bateses) went bankrupt and Appellees foreclosed on their home. At the end of the tax year, they each received an IRS Form 1099–A in the mail alerting them that the foreclosure might have tax consequences. The Bateses sued our Appellees, claiming that the Forms were a coercive attempt to collect on the mortgage debt—a debt Appellees have no right to collect because it was discharged during the Bateses' Chapter 7 proceedings. The bankruptcy court and the district court found the Forms were not objectively coercive attempts to collect a debt. We agree, and so we affirm.

The Facts

The Bateses took out a loan from Appellee CitiMortgage, Inc. s/b/m to ABN AMRO Mortgage Group, Inc. ("CitiMortgage") secured by a mortgage on their home in Newport, New Hampshire. The Bateses filed for Chapter 7 bankruptcy in 2008 and their mortgage debt was discharged in 2009. The Bateses entered into a Loan Modification Agreement with CitiMortgage after the discharge. Under that Agreement, the Bateses did not reaffirm personal liability for the mortgage, but they could

avoid foreclosure and stay in their home as long as they continued to make payments to CitiMortgage. The Bateses eventually stopped making payments, CitiMortgage foreclosed, and the Bateses moved out in October 2011.

In January 2012, the Bateses each received an IRS Form 1099–A ("1099–A Form" or "Form") in the mail. According to the instructions on the back of the Forms, "[c]ertain lenders who acquire an interest in property that was security for a loan ... must provide you with this statement. You may have reportable income or loss because of such acquisition or abandonment." Both Forms listed the lender as "Freddie Mac" (also known as Federal Home Loan Mortgage Corporation, our other Appellee) "c/o CitiMortgage." And, as of the time of acquisition, the Forms listed the "balance of principal outstanding" as $194,624 and the fair market value of the property as $168,000. Box Five on the Forms was checked, indicating that "the borrower was personally liable for the repayment of the debt." The front of the Forms also says "This is important tax information and is being furnished to the Internal Revenue Service. If you are required to file a return, a negligence penalty or other sanction may be imposed on you if taxable income results from this transaction and the IRS determines that it has not been reported."

We pause here to note that a discharged debt can count as taxable income. 26 U.S.C. § 61(a)(12). But, as Appellees point out (and the Bateses do not dispute), debt discharged in bankruptcy proceedings (like the Bateses') and on a qualified principal residence (like the Bateses') does not. 26 U.S.C. § 108(a)(1)(A), (E). The Bateses' 1099–A Forms directed them to "Pub. 4681 for information about foreclosures and abandonments." That publication explains: "Debt canceled in a title 11 bankruptcy case is not included in your income." I.R.S., Dep't of the Treasury, Publication 4681: Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals) 4 (2011), https://www.irs.gov/pub/irs-prior/p4681—2011.pdf. The Bateses do not claim that they owed any taxes as a result of the foreclosure or the Forms.

[1] But, the Bateses say the 1099–A Forms reported bad information. After their bankruptcy, the Bateses were no longer personally liable for the mortgage debt, so they say Freddie Mac should not have checked the box showing the opposite.[1] Timothy Bates averred that he called Appellees about his Form and was told that the debt was not discharged because it was a secured debt. The Bateses' attorney later sent a letter to Freddie Mac pointing out that the Bateses' mortgage was discharged in bankruptcy and demanding the revocation of the 1099–A Forms. The Bateses say they were terrified they would owe additional income taxes unless they resolved the matter with Freddie Mac or CitiMortgage. Freddie Mac did not revoke the Forms and claims they are accurate.

One other important detail: the Bateses received a prerecorded phone call from CitiMortgage on June 11, 2013, requesting proof of insurance on their old home; insurance was required under the terms of their former mortgage agreement. The phone call upset Timothy Bates: "it seemed we would never be free from the debt to CitiMortgage."

In May 2013, about one month before receiving the laststraw phone call from CitiMortgage, the Bateses filed a motion to reopen their bankruptcy proceedings, then sued CitiMortgage and Freddie Mac for attempting to collect on the discharged mortgage debt in violation of the discharge injunction provisions of 11 U.S.C. § 524(a). Following cross-motions for summary judgment, the bankruptcy court granted the Bateses summary judgment on their claim that the 2013 phone call violated the discharge injunction, though it later found the Bateses did not prove any damages on this claim. The bankruptcy court granted summary judgment for our Appellees on all of the Bateses' other claims, including their claim that the 1099–A Forms violated the discharge injunction. The bankruptcy court found the Forms gave the Bateses "no objective basis" to believe Appellees were trying to collect the discharged mortgage debt. The Bateses appealed the bankruptcy court's rulings on damages and the 1099–A Forms. The district court affirmed both. The Bateses now appeal the bankruptcy court's ruling on the 1099–A Forms to us.

Standard of Review

[2] Under Federal Rule of Bankruptcy Procedure 7056, as under Federal Rule of Civil Procedure 56, a motion for summary judgment "should be granted 'only when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment as a matter of law.' " Hannon v. ABCD Holdings, LLC (In re Hannon), 839 F.3d 63, 69 (1st Cir. 2016) (quoting Desmond v. Varrasso (In re Varasso), 37 F.3d 760, 763 (1st Cir. 1994)). We review the bankruptcy court's summary judgment decision de novo

and give no special deference to the district court's findings. Id.

The Bateses' Claim

[3] The Bateses allege that the 1099–A Forms violated the discharge injunction provisions of 11 U.S.C. § 524(a), which prohibit acts to collect, recover, or offset debts discharged in bankruptcy proceedings. See Canning v. Beneficial Me., Inc. (In re Canning), 706 F.3d 64, 69 (1st Cir. 2013). To prove a discharge injunction violation, a debtor must establish that the creditor "(1) has notice of the debtor's discharge ...; (2) intends the actions which constituted the violation; and (3) acts in a way that improperly coerces or harasses the debtor." Best v. Nationstar Mortgage LLC, 540 B.R. 1, 9 (B.A.P. 1st Cir. 2015) (quoting Lumb v. Cimenian (In re Lumb), 401 B.R. 1, 6 (B.A.P. 1st Cir. 2009)).

[4] The Bateses and our Appellees only dispute the third element—whether the 1099–A Forms were an improperly coercive or harassing attempt to collect on the discharged debt. The Bateses claim the Forms were coercive, especially because the Forms contained false information. They also claim the bankruptcy court erred by failing to consider whether the Forms were coercive under all the circumstances, including Freddie Mac's failure to correct the Forms and the phone call from CitiMortgage about the insurance policy on their old home. CitiMortgage and Freddie Mac, of course, disagree. So do we. We explain.

[5] **[6]** **[7]** We assess whether conduct is improperly coercive or harassing under an objective standard—the debtor's subjective feeling of coercion or harassment is not enough. In re Lumb, 401 B.R. at 6; see Pratt v. Gen. Motors Acceptance Corp. (In re Pratt), 462 F.3d 14, 19 (1st Cir. 2006). We have no "specific test" to determine whether a creditor's conduct meets this objective standard, but we consider the facts and circumstances of each case, including factors such as the "immediateness of any threatened action and the context in which a statement is made." Diamond v. Premier Capital, Inc. (In re Diamond), 346 F.3d 224, 227 (1st Cir. 2003); see In re Pratt, 462 F.3d at 20. "[A] creditor violates the discharge injunction only if it acts to collect or enforce a prepetition debt; bad acts that do not have a coercive effect on the debtor do not violate the discharge." In re Lumb, 401 B.R. at 7.

For example, a debt collector in Best, 540 B.R. at 10– 11, sent a series of letters stating information like the unpaid loan balance and that failure to pay could result in foreclosure; the letters included a disclaimer explaining that if the debt had been discharged in bankruptcy, then the letter was for informational purposes only. These letters did not violate the discharge injunction because "[s]tatements of an informational nature, even if they include a payoff amount, are not generally actionable if they do not demand payment," and these letters did not. Id. at 11. Likewise, references to potential foreclosure in letters to a debtor during bankruptcy proceedings were not coercive where the letters accurately reported that the debtor could face foreclosure after bankruptcy but threatened no "immediate action" against the debtors. Jamo v. Katahdin Fed. Credit Union (In re Jamo), 283 F.3d 392, 402 (1st Cir. 2002) (quoting Brown v. Penn. State Emps. Credit Union, 851 F.2d 81, 86 (3d Cir. 1988)).

The bankruptcy court found, and we agree, that the 1099–A Forms are not a collection attempt. The 1099– A Forms state that they provide "tax information" and that, because of the foreclosure, "[y]ou may have reportable income or loss." As in Jamo and Best, the Forms provide "information," but they do not demand payment or threaten any action. As in Jamo and Best, the 1099–A Forms state the outstanding principal balance as of the date of foreclosure, but they do not indicate that the Bateses owe any money to anyone—not taxes to the IRS, and not the discharged debt to Freddie Mac or CitiMortgage. And that Freddie Mac may have incorrectly checked the box showing that "the borrower was personally liable for repayment of the debt" does not change this analysis: nothing on the Forms indicates that the Bateses' potential "reportable income or loss" might be any different because of the checked box, and checking the box does not change the informational nature of the Forms or create a demand for payment. Because the discharge injunction prohibits acts "to collect, recover or offset" discharged debt, 11 U.S.C. § 524(a)(2), the fact that the 1099–A Forms do not attempt to collect any money from the Bateses would seem to decide the issue.

Undeterred, the Bateses claim the bankruptcy court was wrong because the Forms put the Bateses "between a rock and a hard place": they had to pay the discharged debt or seek tax advice. This tight spot makes the Forms coercive,

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they say, just as a tight spot made a creditor's conduct coercive in In re Lumb, 401 B.R. at 7. But the Bateses' situation does not compare.

The In re Lumb creditor threatened to sue the debtor's wife to collect if the debtor did not pay up. Id. at 3. When the debt was discharged in bankruptcy, the creditor followed through on the threat, and the couple incurred $50,000 in legal fees defending the meritless lawsuit. Id. at 5, 8. So, the debtor was in a jam: pay the discharged debt, or pay the legal fees and risk losing the lawsuit. Id. at 8– 9. In re Lumb features all of the hallmarks of objectively coercive creditor collection actions, and then some: an illicit demand to pay a debt despite the automatic stay (and later, the discharge injunction); a threat of immediate action if the debtor did not comply; and follow-through on that threat.

The Bateses have nothing in common with the debtor in In re Lumb. The Bateses were confronted with no demand for payment and the Forms threatened no action. Nor was any action taken by Freddie Mac illicit, as the parties agree that Freddie Mac was required to file the 1099– A Forms as a result of the foreclosure. So unlike in In re Lumb, where the consequence of paying to defend a bogus lawsuit was brought on by the creditor's misdeeds, here the consequence of potentially needing tax advice was triggered by the foreclosure itself. That some consequence may have followed from the Bateses' receipt of the 1099– A Forms does not make that consequence coercion.[2]

Finally, the Bateses claim the bankruptcy court erred because it did not consider all of the circumstances surrounding the 1099–A Forms. Freddie Mac did not correct the Forms after Timothy Bates called about his Form and after the Bateses' attorney sent a letter demanding the Forms be revoked. They also claim the bankruptcy court should have included the May 2013 prerecorded phone message in the coercion calculus. These arguments do not help the Bateses.

[8] As to the failure to correct the 1099–A Forms, the Bateses' argue their situation is like that of a debtor faced with a false credit report, and a creditor's refusal to correct a false credit report can show the creditor was trying to coerce the debtor into paying a debt, so that inference should apply here, too. It does not. Reporting false or outdated information to a credit agency in an attempt to coerce payment on a discharged debt can violate the discharge injunction. See In re Zine, 521 B.R. 31, 40 (Bankr. D. Mass. 2014); Torres v. Chase Bank USA, N.A. (In re Torres), 367 B.R. 478, 486 (Bankr. S.D.N.Y. 2007) (collecting cases). The reason: negative credit reports have consequences—like reducing creditworthiness, and with it the debtor's ability to get loans in the future—and so a false report might coerce a debtor into paying a discharged debt to avoid those consequences. In re Torres, 367 B.R. at 486. Evidence that a creditor refused to change a false or outdated report can give rise to an inference that the creditor intended to coerce the debtor into paying the discharged debt. Id. at 489–90.

The Bateses' situation is not analogous. As we explained above, even if Freddie Mac incorrectly checked the box showing the Bateses were personally liable for the debt, filing the 1099–A Forms did not create tax liability for the Bateses or any other consequences beyond those that come with foreclosure. Because there were no consequences and no attempt to collect a debt, Freddie Mac's failure to retract the 1099–A Forms does not give rise to an inference of coercion.

As to the pre-recorded message, the call was made by CitiMortgage around a year and a half after the Bateses received their 1099–A Forms. As the bankruptcy court noted, there is no other evidence in the record of communication between the Bateses and Freddie Mac or CitiMortgage about the discharged debt after the foreclosure.[3] The Bateses do not say why this phone call makes the Forms objectively coercive, and we see no reason to believe that it does.

Conclusion

We do not doubt that the 1099–A Forms caused the Bateses stress and concern. Indeed, when Timothy Bates called about the Forms, CitiMortgage just made things worse: its representative gave him wrong information and told him that the debt had not been discharged, instead of giving him correct information about his debt or helping him understand the 1099–A Forms. But the Bateses' subjective feeling of coercion is not enough to prove a violation of the discharge injunction, and the Bateses have not presented evidence that the Forms were objectively coercive. In fact, the only evidence in the record shows they were not. And so, we affirm.

Footnotes

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All Citations

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1 The Bateses also claim that the fair market value of their home was the price Freddie Mac paid at the foreclosure sale, $205,237, so Freddie Mac should not have reported the fair market value as $168,000 on the 1099–A Forms. Appellees dispute the fair market value of the home. Whatever the home's value, the Bateses did not make this argument or present any evidence of this fact to the bankruptcy court, so the argument is waived. Crefisa Inc. v. Wash. Mut. Bank (In re Colonial Mortg. Bankers Corp.), 186 F.3d 46, 49–50 (1st Cir. 1999).

2 The Bateses also make two arguments here related to the fair market value of their property. First, they say they would have had no tax questions at all if the Forms were filled out correctly and "no deficiency or liability [was] displayed." They also argue that if they reported what they believed to be the true fair market value on their taxes, the discrepancy between their figure and the 1099–A Forms could trigger an audit. As stated above, the Bateses' argument about the fair market value of their home is waived because it was not presented to the bankruptcy court, and so these derivative arguments are waived, too. In any case, the Bateses cite a Tax Topic to bolster their claim that a discrepancy between a tax return and a 1099–A Form can trigger an audit, but that same Tax Topic refers back to Publication 4681, which says debt cancelled in bankruptcy is not included in income. Indeed, the Bateses do not argue or present evidence that they had any tax liability, reported this event on their taxes, sought tax advice, or took any other action because of the Forms. See I.R.S., Tax Topic 432: Form 1099–A (Acquisition or Abandonment of Secured Property) and Form 1099–C (Cancellation of Debt), https://www.irs.gov/taxtopics/tc432.html (last updated Oct. 10, 2016); Publication 4681, supra, at 4.

3 On the Bateses' motion for summary judgment, the bankruptcy court found CitiMortgage liable for violating the discharge injunction by making the insurance call. In his affidavit in support of that motion, Timothy Bates claimed that a CitiMortgage representative "insist[ed]" he was "still responsible under the mortgage to pay for property insurance" and "demand[ed] that [the Bateses] pay for insurance on the foreclosed homestead." At a later hearing to assess the damages caused by the call, it came out that Mr. Bates did not speak to a CitiMortgage representative. Instead, he heard a pre-recorded message explaining that insurance was required under the terms of the mortgage agreement, but CitiMortgage did not have the policy information on file, and requesting that the Bateses "[p]lease provide your insurance carrier and policy information to us." On review of the damages order, the district court noted: "notwithstanding the bankruptcy court's conclusion to the contrary, there is no evidence in this record even remotely suggesting that the call was intended to coerce plaintiffs into paying a discharged debt ... Indeed, had defendants challenged the bankruptcy court's finding on appeal they may well have obtained a reversal." The Bateses did not appeal the district court's finding, so we need not wade into this bog. Whether or not the call violated the discharge injunction, under these circumstances it adds nothing to their 1099–A claim.

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844 F.3d 292
United States Court of Appeals, First Circuit.

In re Andrew A. DeMore;
Maureen A. DeMore, Debtors,
HSBC Bank USA, N.A., Plaintiff, Appellee,
v.
Donald Lassman, Chapter 7 Trustee of the Bankruptcy Estates of Andrew A. DeMore and Maureen A. DeMore, Defendant, Appellant.

No.
16
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|
December 13, 2016

Synopsis

Background: Chapter 7 trustee brought adversary proceeding to avoid mortgage in exercise of strong-arm powers based on alleged defect in acknowledgement. The United States Bankruptcy Court for the District of Massachusetts, Joan N. Feeney, J., 530 B.R. 519, granted trustee's motion for summary judgment, and mortgagee appealed. The District Court, Richard G. Stearns, J., 550 B.R. 157, reversed and remanded. Trustee appealed.

[Holding:] The Court of Appeals, Barron, Circuit Judge, held that acknowledgement sufficiently manifested that execution of mortgage was free and voluntary act of debtor-mortgagors, such that mortgage was properly recorded and was not avoidable by Chapter 7 trustee in exercise of strong-arm powers.

Affirmed.

West Headnotes (7)

[1] Acknowledgment

Nature and functions in general

Under Massachusetts law, "certificate of acknowledgment" is notarized document that is signed by officer entitled to take acknowledgments, often a notary public, and that attests that grantor appeared before the officer making the certificate and made such acknowledgment.

Cases that cite this headnote

[2] Mortgages

Recording and Registration

Mortgages

Sufficiency

Under Massachusetts law, mortgage must be accompanied by certificate of acknowledgment in order to be recorded; mortgage qualifies as "deed," for purposes of statutory recording requirement. Mass. Gen. Laws Ann. ch. 183, § 29.

Cases that cite this headnote

[3] Acknowledgment

Nature and functions in general

Under Massachusetts law, "acknowledgment" is formal statement of grantor to the official authorized to take the acknowledgment that execution of instrument was his free act and deed.

Cases that cite this headnote

[4] Acknowledgment

Making and form in general

Under Massachusetts law, acknowledgement need not contain any particular words, as long as they amount to an admission that grantor has voluntarily and freely executed instrument.

Cases that cite this headnote

[5] Mortgages

Execution in general

Mortgages

Acknowledgment

Principal and Agent

Mortgage of property

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Massachusetts law permits a person acting under power of attorney to execute and acknowledge a mortgage for another.

Cases that cite this headnote

[6] Bankruptcy
Conclusions of law; d e novo review

Bankruptcy
Clear error

On appeal from district court's decision in its bankruptcy appellate capacity, the Court of Appeals assesses bankruptcy court's decision directly, reviewing bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Fed. R. Bankr. P. 8013.

Cases that cite this headnote

[7] Bankruptcy
Bona fide purchasers and rights thereof

Mortgages
Acknowledgment

Certificate of acknowledgement accompanying mortgage, while not identical to form certificates approved for use in Massachusetts, and while ambiguous as to who appeared before notary, the Chapter 7 debtor-mortgagors themselves or individual whom they had authorized to execute mortgage on their behalf pursuant to power of attorney, sufficiently manifested that execution of mortgage was free and voluntary act of debtor-mortgagors, such that mortgage was properly recorded and was not avoidable by Chapter 7 trustee in exercise of strong-arm powers as hypothetical bona fide purchaser; certificate indicated that execution of mortgage was free and voluntary act of debtor-mortgagors' attorney-in-fact, and power of attorney and accompanying acknowledgement manifested that debtormortgagors had freely and voluntary executed power of attorney. 11 U.S.C.A. § 544(a)(3); Mass. Gen. Laws Ann. ch. 183, § 29.

Cases that cite this headnote

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Richard G. Stearns, U.S. District Judge]

Attorneys and Law Firms

Mark G. DeGiacomo, Boston, MA, with whom Taruna Garg, Stamford, CT, and Murtha Cullina LLP was on brief, for appellant.

Jason A. Manekas, with whom Bernkopf Goodman LLP, Boston, MA, was on brief, for appellee.

Before Torruella, Lipez, and Barron, Circuit Judges.

Opinion

BARRON, Circuit Judge.

This case concerns an appeal from a consolidated adversary action in bankruptcy. The action was brought by Donald Lassman, the appellant, who is the trustee for the estates of two bankruptcy petitioners, Andrew and Maureen DeMore. In bringing the adversary action that this appeal concerns, Lassman sought, pursuant to 11 U.S.C. § 544(a)(3), to "avoid" a mortgage on a parcel of land in Massachusetts that the DeMores had purportedly granted to the predecessor in interest to HSBC Bank, USA, N.A. ("HSBC"), which is the appellee.

Below, the Bankruptcy Court granted summary judgment to Lassman. The Bankruptcy Court did so on the ground that what is known under Massachusetts law as the certificate of acknowledgement for the mortgage at issue is "materially defective" because the certificate failed to make clear that the DeMores, as grantors of that mortgage, executed that mortgage as their free act and deed. But, when HSBC appealed that ruling to the District Court, the District Court reversed on the ground that the certificate of acknowledgement is not materially defective because it did make clear that the DeMores had executed the mortgage as their free act and deed. Because we agree with the District Court, we affirm its order reversing summary judgment for Lassman.

I.

The underlying dispute concerns a mortgage purportedly granted by the DeMores to HSBC Mortgage Corporation ("HSBC Mortgage"), the predecessor in interest to HSBC, on a parcel of property that is owned by the DeMores. We

start by recounting the uncontested facts that are critical to the resolution of this dispute.

A.

In 1994, the DeMores acquired a parcel of land in North Attleboro, Massachusetts. This property is what is known in Massachusetts as "registered land," which is a type of land for which the Massachusetts Land Court maintains a certificate of title, and to which chapter 185 of the Massachusetts General Laws applies.

In April 2004, the DeMores each executed a power of attorney to John G. Molloy. Those powers of attorney authorized Molloy to grant a mortgage on the property to HSBC Mortgage.

Later that month, Molloy granted a promissory note and mortgage on that property to HSBC Mortgage on behalf of the DeMores. Several days later, the note and the mortgage were registered on the certificate of title for the property in the Northern Bristol County Registry of Deeds of the Massachusetts Land Court.

[1] Appended to the mortgage document was a certificate of acknowledgment. A certificate of acknowledgment is a notarized document that is signed by an officer entitled to take acknowledgments (often a notary public) and that attests that "the grantor appeared before the officer making the certificate and made such acknowledgment." Bank of Am., N.A. v. Casey, 474 Mass. 556, 52 N.E.3d 1030, 1035 (2016) (quoting McOuatt v. McOuatt, 69 N.E.2d 806, 809 (Mass. 1946)). The certificate of acknowledgment in this case reads as follows:

> On this 27th day of April, 2004, before me, the undersigned notary public [,] personally appeared Andrew DeMore and Maureen DeMore by their attorney-in-fact, John G. Molloy[,] under Power of Attorney recorded herewith proved to me through satisfactory evidence of identification, which were drivers licenses to be the person whose name is signed on the proceeding attached document, and acknowledged to me that he/she signed it voluntarily and for its stated purpose.
>
> /s/ Melissa L. Henderson
>
> Melissa L. Henderson, Notary Public
>
> My Commission Expires 8/27/10[1]

[2] The requirement to record a mortgage with a certificate of acknowledgment comes from chapter 183, section 29 of the Massachusetts General Laws. That section states, in relevant part, that "[n]o deed shall be recorded unless a certificate of its acknowledgment ... is endorsed upon or annexed to it...." Mass. Gen. Laws ch. 183, § 29. It is clear that, for the purposes of section 29, a mortgage constitutes a deed. See Casey, 52 N.E.3d at 1035.

[3] **[4]** **[5]** The Supreme Judicial Court of Massachusetts ("SJC") has stated that "[a]n acknowledgment is the formal statement of the grantor to the official authorized to take the acknowledgment that the execution of the instrument was his free act and deed." McOuatt, 69 N.E.2d at 810. The SJC has also stated that "[n]o particular words are necessary as long as they amount to an admission that [the grantor] has voluntarily and freely executed the instrument." Id. (citations omitted). Massachusetts, however, permits a person acting under power of attorney to execute and acknowledge a mortgage for another. See Mass. Gen. Laws ch. 183, § 30 ("The acknowledgment of a deed or other written instrument required to be acknowledged shall be by one or more of the grantors or by the attorney executing it."); Malaguti v. Rosen, 262 Mass. 555, 160 N.E. 532, 560–62 (1928) (finding that a specific power of attorney extended the authority to borrow money and execute notes to mortgage property); Davidson v. Reznikow, 2005 WL 774047, at *5 (Mass. Land Ct. April 6, 2005) (finding that a power of attorney "regularly" provides authority to convey registered land). And thus the question that gives rise to this appeal: what must a certificate of acknowledgement for a mortgage state when a person acting by power of attorney appears to acknowledge the mortgage?

B.

The appeal itself comes to us by way of bankruptcy court. In 2013, each of the DeMores filed separate voluntary petitions for bankruptcy under Chapter 7 of the Bankruptcy Code. The schedule for each of the petitions listed the property and the mortgage in question. A single bankruptcy trustee, Donald Lassman, was appointed for both of the DeMores' bankruptcy cases.

Lassman, as trustee, then filed adversary actions against HSBC, which had received an assignment of the mortgage from HSBC Mortgage, to avoid the mortgage. In avoiding a lien, such as a mortgage, a trustee "invalidate[s] unperfected security interests," pursuant to 11 U.S.C. § 544(a)(3), and, "put[s] the estate in the shoes of the creditor whose lien is avoided," pursuant to 11 U.S.C. § 551. In re Traverse, 753 F.3d 19, 26 (1st Cir. 2014) (internal quotation marks, brackets, and citation omitted). The adversary actions Lassman filed against HSBC on behalf of each of the DeMores' bankruptcy estates were then consolidated.

In pressing the consolidated adversary action, Lassman explained that the Bankruptcy Code authorizes a bankruptcy trustee to avoid a transfer of property by the debtor, such as a mortgage, where such a transfer is voidable under state law by a bona fide purchaser. See 11 U.S.C. § 544(a)(3). Lassman then contended that, under section 29 of chapter 183 of the Massachusetts General Laws, the mortgage on the DeMores' property is required to be recorded along with a valid certificate of acknowledgement. And, finally, Lassman contended that the mortgage here is voidable under state law by a bona fide purchaser because the certificate of acknowledgement is "materially defective" under section 29.

To support this last contention, Lassman argued that the certificate of acknowledgment does not clearly state that the execution of the mortgage was the free act and deed of the DeMores. Lassman argued that this ambiguity arises because it is unclear from the certificate of acknowledgement whether the DeMores, Molloy, or some combination thereof were present to acknowledge the mortgage. According to Lassman, if only Molloy appeared before the notary to acknowledge the mortgage, then the certificate of acknowledgement by its terms makes clear only that Molloy had signed—and thus executed—the mortgage to HSBC Mortgage as his free act and deed pursuant to the powers of attorney that the DeMores had granted to him.[2] For that reason, Lassman argued, the certificate of acknowledgement is materially defective under section 29 because it fails to do what McOuatt requires an acknowledgement to do: make clear that the instrument being acknowledged (here, the mortgage from the DeMores to HSBC Mortgage) had been executed as the "free act and deed" of that instrument's grantors (here, the DeMores). See 69 N.E.2d at 810.

HSBC filed a motion to dismiss the consolidated adversary action. The motion contended that, if section 29's requirement applies to the mortgage at issue here, the certificate of acknowledgement complies with section 29 because the certificate does make clear that the execution of the mortgage was the free act and deed of the DeMores. In addition, HSBC contended that section 29's requirement does not apply to the mortgage at issue here because section 29 appears in chapter 183, which governs recorded land, while the underlying parcel that is subject to the mortgage at issue is registered land, which is governed by chapter 185.[3]

HSBC further contended that, even if the certificate of acknowledgment does not comply with section 29, the certificate and other documents still provide constructive notice of the mortgage to a bona fide purchaser, and that state law requires no more than constructive notice in order to preclude a bona fide purchaser from voiding the mortgage. In connection with this contention, HSBC also filed a motion for the Bankruptcy Court to certify to the SJC the question of whether a "mortgage encumbering registered land, whose certificate of acknowledgment is alleged to be potentially ambiguous regarding whether the execution of the mortgage was the voluntary act of the mortgagors, but which ... is noted on the certificate of title of such registered land, provides constructive notice."

After HSBC converted its motion to dismiss into a motion for summary judgment, the Bankruptcy Court denied both HSBC's motion to certify the question to the SJC and its motion for summary judgment. In doing so, the Bankruptcy Court ordered HSBC to show cause why the Bankruptcy Court should not grant summary judgment to Lassman, the trustee. After receiving briefing in response to that order, the Bankruptcy Court granted summary judgment to Lassman. The Bankruptcy Court did so because it found that a certificate of acknowledgment is required for this mortgage under section 29, notwithstanding the parcel's status as registered land; that the certificate of acknowledgement at issue does not make clear who appeared before the notary; that this ambiguity renders the certificate of acknowledgement "materially defective" by making it unclear whether there was an acknowledgment that the execution of the mortgage was the free act and deed of the DeMores; and that, while constructive notice of the mortgage is all that is required under state law to prevent a bona fide purchaser from voiding a mortgage, the defective certificate of acknowledgement and other documents do not suffice to provide constructive notice of the mortgage to a bona

fide purchaser. In re DeMore, 530 B.R. 519, 532–37 (Bankr. D. Mass. 2015).

HSBC appealed the Bankruptcy Court's order to the District Court. The District Court reversed the Bankruptcy Court's grant of summary judgment to Lassman on the ground that the certificate of acknowledgment is not materially defective. Lassman now appeals that order.

II.

[6] In an appeal from a district court's review of a decision by a bankruptcy court, our review "assess[es] the bankruptcy court's decision directly." In re Sheedy, 801 F.3d 12, 18 (1st Cir. 2015) (internal quotation marks and citation omitted). We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Id. Because we conclude that the certificate of acknowledgement in this case complies with section 29 of chapter 183, we need not address either the threshold question of whether section 29 applies to the parcel at issue, despite its being registered rather than recorded land,[4] or the back-end questions of whether a bona fide purchaser would have had constructive notice of the mortgage and whether such notice would be sufficient to preclude a bona fide purchaser from voiding the mortgage.

[7] In reaching this conclusion, we do not take issue with the finding below that the certificate of acknowledgement that is in dispute fails to show that the DeMores appeared before the notary to acknowledge the mortgage and thus may show no more than that Molloy alone appeared on their behalf. We simply conclude that, even assuming that the certificate of acknowledgment must be read to state that only Molloy appeared before the notary, the certificate of acknowledgement still does all that it needed to do.

If the certificate of acknowledgment is read to state that Molloy appeared without both DeMores, then it expressly states that Molloy appeared as the "attorney-in-fact" for the DeMores "under Power of Attorney recorded herewith." And, in the referenced "Power of Attorney recorded herewith," the DeMores specifically authorized Molloy to "do all things necessary to obtain a mortgage loan from ... HSBC ... including without limitation the right to execute, acknowledge and deliver any and all documents." Further, the certificates of acknowledgment accompanying those power of attorney forms state that the DeMores each signed the power of attorney forms "voluntarily for [their] stated purpose."

Thus, the certificate of acknowledgement for the mortgage does just what it needs to do: state that Molloy is acknowledging to the notary that he executed the mortgage not only as his own free act and deed but as the "free act and deed" of the DeMores. McOuatt, 69 N.E.2d at 809. As the District Court stated, "[u]nder the terms of the power of attorney[,] ... Molloy's 'free act and deed,' with respect to executing the mortgage, was the free act and deed of the DeMores." HSBC Bank USA, N.A. v. Lassman, 550 B.R. 157, 162 (D. Mass. 2016); cf. Sowden & Co. v. Craig, 26 Iowa 156, 163 (1868) ("It was the agent who executed the instrument, and, assuming his authority ... if it was his (the agent's) voluntary act and deed, as he acknowledged it to be, then in law it was the voluntary act and deed of his principal.").

Lassman argues against this seemingly commonsensical conclusion on the ground that the certificate of acknowledgment in this case does not, in a key respect, mirror a form certificate of acknowledgement that is set forth in an appendix to chapter 183, which, again, is the chapter in which section 29 appears. That appendix contains form certificates of acknowledgement for various situations, including the one that is relevant here. In particular, the form that appears in the appendix as "14," has the italicized title, "Acknowledgement of Individual Acting by Attorney." And the text that follows then states: "On this ________ day of ________ 19__, before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of said C D." Mass. Gen. Laws ch. 183 App., Form (14).

Lassman seizes on the fact that this form certificate of acknowledgment expressly states that "A B" in executing the instrument in behalf of "C D" was doing so "as the free act and deed of said C D." He contends that, in this way, the form signals the intention of the legislature to ensure that a certificate of acknowledgment for an instrument, such as a mortgage, expressly states that an attorney in fact who acknowledges that instrument executed it as the free act and deed of the grantor of the instrument. And, Lassman contends, because the certificate of acknowledgement in this case expressly states only that the execution of the

mortgage was the free act and deed of Molloy, and not of the DeMores themselves, the certificate of acknowledgement fails to make the representation that, in light of what McOuatt requires of an acknowledgement, is the critical one.

But we do not agree. It is true that the certificate of acknowledgment in this case does not use the very same words as does the form that is set forth in the appendix to chapter 183. Nonetheless, the certificate of acknowledgement in this case still does all that it must do. This certificate of acknowledgement expressly states that the one who appeared in order to acknowledge the mortgage, Molloy, did so as the DeMores' attorney and that he did so pursuant to power of attorney forms "recorded herewith." Those recorded power of attorney forms in turn make perfectly clear that the DeMores voluntarily granted the power to execute the mortgage to Molloy. And, indeed, the DeMores acknowledged those power of attorney forms as their free act and deed.

Thus, when the certificate of acknowledgement of the mortgage states that Molloy voluntarily executed the mortgage as attorney in fact under the power of attorney forms "recorded herewith," the certificate of acknowledgement leaves no doubt that Molloy is acknowledging that he had executed the mortgage—to quote the form certificate of acknowledgment in the appendix to chapter 183—"as the free act and deed" of the DeMores. And no more is required under section 29, given the standard for making an acknowledgement laid out in McOuatt. See id. at 810 (explaining that, to qualify as an acknowledgement, "[n]o particular words are necessary as long as they amount to an admission that [the grantor] has voluntarily and freely executed the instrument").

Nor is there any reason to conclude that Molloy's representation in the certificate of acknowledgment that is at issue here fails to comply with section 29 simply because that representation is formally distinct from the functionally equivalent representation set forth in the form certificate of acknowledgment in chapter 183's appendix. Chapter 183, section 42 states quite clearly that "[t]he forms set forth in the appendix to this chapter for taking acknowledgments ... may be used; but this shall not prevent the use of any other forms heretofore lawfully used." And the SJC has also confirmed that "[t]he acknowledgment required for proper recording of a mortgage ... need not take any one specific form." Casey, 52 N.E.3d at 1036.

Lassman also argues that the District Court's ruling is in error on the basis of another model certificate of acknowledgment—this one published by the Land Court, which maintains the certificate of title for registered land like the parcel that is at issue here. The Land Court model form reads: "Then personally appeared the aforementioned John Doe and acknowledged the foregoing instrument to be the free act and deed of Mary Doe." Commonwealth of Mass. Land Court Guidelines on Registered Land ("Land Court Guidelines"), Feb. 27, 2009, at 39, http://www.mass.gov/courts/docs/courts-andjudges/courts/land-court/guidelines-registered-land.pdf.

But, like the form certificate of acknowledgement in the appendix to chapter 183, the Land Court's form is also of no help to Lassman's argument, even assuming that the requirement of section 29 applies to registered land, as we must for the Land Court form to be of any help to Lassman.[5] For the reasons we have already given, the certificate of acknowledgment in this case— by expressly referencing the power of attorney forms "recorded herewith"—makes clear that Molloy, in signing the mortgage, was undertaking the free act and deed of the DeMores. Thus, the fact that the certificate of acknowledgment in this case does not use the precise words used in the Land Court form is not significant.

To the extent one might have any doubt on that score, moreover, the Land Court Guidelines containing the model Land Court form expressly state that "[t]he forms of certificates of acknowledgment ... set forth in Executive Order Revised No. 455 ... are acceptable for registration by the court's registration districts." Land Court Guidelines at 2. And that executive form in turn reads:

> On this ____ day of __________, 20__, before me, the undersigned notary public, personally appeared ________________________ (name of document signer), proved to me through satisfactory evidence of identification, which were ______________________, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that (he) (she) signed it voluntarily for its stated purpose.
>
> (as partner for ____________, a partnership)
>
> (as ____________ for ______________, a corporation)

(as attorney in fact for _______________, the principal)

(as ___________ for ______________, (a) (the) _________________)

_________________ (official signature and seal of notary)

Revised Executive Order No. 455 (04-04) (2004), at 6, http://www.mass.gov/courts/docs/lawlib/eo400-499/eo455rev.pdf. Footnotes

In other words, the Land Court Guidelines expressly bless a form certificate of acknowledgement that is not unlike the one that is at issue here. The executive form, like the one in this case, references the power of attorney relationship between the one who appears before the notary to acknowledge the instrument and the grantor of the instrument. And, the executive form, like the one in this case, does not also expressly state that the person who appeared as attorney in fact for the grantor in "voluntarily" signing the mortgage did so as the free act and deed of the grantor. We thus do not see how the Land Court form—given that the Land Court's own guidelines expressly approve the executive form—calls into question the certificate of acknowledgement that is at issue in this case.[6]

III.

The order of the District Court is **affirmed**.

All Citations

844 F.3d 292

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1 The underlined portions of the acknowledgment indicate handwritten insertions into an otherwise typed form.

2 The certificate of acknowledgment in this case states that the one who appeared to acknowledge the mortgage "signed it voluntarily and for its stated purpose." Quite sensibly, Lassman does not argue that there is any material significance to the use of the word "voluntarily" rather than the use of the words "free act and deed."

3 For a useful discussion of the land registration system, which governs registered land, and the land recording system, which governs recorded land, and the differences between the two systems, see In re Bailey, 468 B.R. 464, 477 n.19 (Bankr. D. Mass. 2012).

4 In response to HSBC's argument that section 29 of chapter 183 does not apply to this mortgage because the mortgage concerns a parcel of registered land, which is governed by section 185, Lassman points to chapter 185, section 58. Lassman contends that this section of chapter 185 incorporates the requirements of section 29 of chapter 183 for recording a mortgage on recorded land into the requirements for registering a mortgage on registered land. Section 58 of chapter 185 provides that "[e]very ... attachment ... affecting registered land, which would under other provisions of law, if recorded ... affect the land to which it relates, shall, if registered ... be notice to all persons from time of such registering." Mass Gen. Laws ch. 185, § 58.

5 The Land Court Guidelines appear to contemplate that the requirement of section 29 does apply to registered land, because they state that deeds, among other documents "must be acknowledged in order to be recorded." Land Court Guidelines at 1 (citing Mass. Gen. Laws ch. 183, § 29).

6 We note that in In re Kelley, 498 B.R. 392 (B.A.P. 1st Cir. 2013), on which Lassman relies, the certificate of acknowledgment for the mortgage there at issue stated in relevant part that "before me ... personally appeared [Grantors] by Shannon Obringer as Attorney in Fact ... and acknowledged to me that he/she/they signed it voluntarily for its stated purpose." Id. at 394. The Bankruptcy Appellate Panel concluded that, despite the language stating that the grantor of the mortgage appeared "by" Obringer, id. Obringer "[n]ever said anything to the one who made out the certificate of acknowledgment to indicate that the Mortgage was the voluntary act of the [grantors]." Id. at 401. In so holding, the Bankruptcy Appellate Panel in In re Kelley made no reference to the terms of the power of attorney that would have enabled Obringer to execute and acknowledge the mortgage on behalf of the grantors. Thus, even if we were to assume that In re Kelley is right on its particular facts, our case is distinguishable because the certificate of acknowledgment at issue here expressly specified that the one who appeared before the notary to acknowledge the mortgage was acting "under Power of Attorney recorded herewith," and the recorded power of attorney forms that are referenced expressly and voluntarily authorize that attorney—Molloy—to execute and acknowledge the mortgage on behalf of the DeMores. Thus, we do not see how one could say that, on the basis of the certificate of acknowledgement here, the one who acknowledged the mortgage "[n]ever said anything to the one who made out the certificate of acknowledgment to indicate that the Mortgage was the voluntary act of the [grantors]." Id.

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2016 WL 7323983
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

In re: 11 East 36th, LLC, Debtor,
Victoria **Guthrie**, Claimant-Appellant,
v.
11 East 36TH, LLC, Morgan Lofts, LLC, Debtors-Appellees,

16-1233
|
December 16, 2016

Synopsis

Background: Order was entered by the United States Bankruptcy Court for the Southern District of New York, expunging two proofs of claim. Creditor appealed on theory that its claims should not have been expunged, but simply reclassified as unsecured claims. The District Court, Analisa Torres, J., 2016 WL 1117588, affirmed, and creditor appealed.

[Holding:] The Court of Appeals held that, upon avoidance, on strong-arm grounds, of unperfected security interest granted by debtor to secure debt of related entity, a debt which debtor had not guaranteed or otherwise assumed liability for, proof of claim filed by creditor to whom this debt was owed was properly expunged, and not just reclassified as unsecured claim.

Affirmed.

West Headnotes (1)

[1] **Bankruptcy**

Trustee as representative of debtor or creditors

Upon avoidance, on strong-arm grounds, of unperfected security interest granted by debtor to secure debt of related entity, a debt which debtor had not guaranteed or otherwise assumed liability for, proof of claim filed by creditor to whom this debt was owed was properly expunged, and not just reclassified as unsecured claim; creditor had no right to payment against debtor personally, and as result of avoidance of its security interest, had no rights in debtor's property. 11 U.S..A. §§ 101(5), 544.

Cases that cite this headnote

Appeal from judgment of the United States District Court for the Southern District of New York (Torres, J., Grossman, B.J.).

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the judgment of the district court be **AFFIRMED**.

Attorneys and Law Firms

FOR APPELLANT: ANTHONY F. GIULIANO, Pryor & Mandelup, L.L.P., Westbury, New York.

FOR APPELLEES: JONATHAN S. PASTERNAK, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, New York.

PRESENT: DENNIS JACOBS, JOSÉ A. CABRANES, BARRINGTON D. PARKER, Circuit Judges,

SUMMARY ORDER

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Victoria Guthrie appeals from the judgment of the United States District Court for the Southern District of New York (Torres, J., Grossman, B.J.) expunging her claim and declining to consider her constructive trust argument. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. We affirm the district court's judgment because Guthrie can no longer sue either *in rem* or *in personam*, and because she has waived her constructive trust claim.

In 2007, Guthrie mortgaged a condominium and loaned the proceeds to the Morgan Investment Fund, LLC (the "Morgan Fund"). When the loan was about to mature, Guthrie agreed to extend it if she received additional security. Avi Bobker, who managed the Morgan Fund, arranged for several other entities controlled by his family to sign pledge agreements putting up collateral in exchange for the loan extension. One entity that signed a pledge agreement was 11 East 36th, LLC ("11 East"). 11 East had a 100% interest in an entity called Morgan Lofts, LLC ("Morgan Lofts"), and Morgan Lofts in turn owned several condominium units. 11 East pledged its ownership interest in Morgan Lofts as security for the Morgan Fund's debt to Guthrie, and Avi Bobker filed a UCC financing statement for the pledge on Guthrie's behalf. 11 East received no benefit from the transaction.

A few years later, 11 East and Morgan Lofts have both entered bankruptcy, and Guthrie has filed a Proof of Claim. However, the bankruptcy court discovered that the financing statement was inconsistent with the pledge: the financing statement described the collateral as the apartments Morgan Lofts owned, but the collateral pledged was actually 11 East's ownership interest in the Morgan Lofts entity itself. The bankruptcy court found that the financing statement was "seriously misleading," that it was therefore ineffective to perfect Guthrie's security interest, and that Guthrie's resulting unperfected claim was avoided under 11 U.S.C. § 544(a). She was left with no claim whatsoever, and the district court affirmed.

that her claim should have been allowed to persist as an unsecured claim, rather than being expunged.

As Guthrie concedes, she never had a right to sue 11 East *in personam* for the debt owed to her by the Morgan Fund; and the bankruptcy court avoided her right to proceed *in rem* against the collateral (11 East's interest in Morgan Lofts). Guthrie has failed to persuade us that any other claim against the bankruptcy estate remains, and we decline to look for one. Since 11 East received no benefit from its pledge to Guthrie, and in the absence of a clear right to a claim, she has failed to show why she should share, *pari passu*, with the other unsecured creditors of 11 East. Even if we could posit some sort of non-*in rem*, non-*in personam* claim, it is difficult to see how the bankruptcy court could (other than by speculation) determine the dollar value of Guthrie's claim, given uncertainty as to whether the Morgan Fund will default, whether the other pledging entities can pay, and whether the starting point for the value of a claim should be the value of the Morgan Fund's debt or the value of 11 East's interest in Morgan Lofts, whatever that may be.

***2** The district court had discretion to address Guthrie's constructive trust claim despite her failure to raise it before the bankruptcy court. Davis v. Shah, 821 F.3d 231, 246 (2d Cir. 2016). It did not abuse its discretion by declining to do so: the factual predicates for a constructive trust claim are disputed, and there is no manifest injustice in holding that she has waived her claim. Id.

For the foregoing reasons, and finding no merit in the parties' other arguments, we hereby **AFFIRM** the judgment of the district court.

All Citations

--- Fed.Appx. ----, 2016 WL 7323983

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Guthrie does not appeal the holdings that the UCC statement was materially misleading, that her claim was therefore unperfected, or that it was properly avoided under the Bankruptcy Code. Her argument on appeal is

2016 WL 7107981
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

In re: **Emmons**-**Sheepshead** Bay Development, LLC, Debtor, Metropolitan Estates, Inc., Albert Wilk, derivatively on behalf of Emmons Avenue, LLC, DBA Wilk Real Estate, Ltd., Alex Dikman, Plaintiffs-Appellants,
v.
Emmons-**Sheepshead** Bay Development, LLC, Defendant-Appellee.

15
-
3844
-bk
|
December 6, 2016

Synopsis
Background: Plaintiffs filed complaint to revoke Chapter 11 plan confirmation order as having been procured by fraud. The United States Bankruptcy Court for the Eastern District of New York entered order dismissing complaint as failing to state plausible claim for relief, and plaintiffs appealed. The District Court, Gleeson, J., affirmed. Plaintiffs appealed.

[Holding:] The Court of Appeals held that conclusory allegations in complaint were insufficient to state plausible claim for revocation of Chapter 11 plan confirmation order as having been obtained by fraud.

Affirmed.

West Headnotes (2)

[1] **Bankruptcy**

Proceedings

Conclusory allegations in complaint, that plan proponents had fraudulently and intentionally misled bankruptcy court by underreporting value of property owned by Chapter 11 debtor, had obscured ownership history of this property, and had manufactured false sense of urgency in bankruptcy proceedings, without any factual allegations to substantiate those claims or to support an inference, let alone a strong inference, of fraudulent intent, were insufficient to state plausible claim for revocation of Chapter 11 plan confirmation order as having been obtained by fraud. 11 U.S.C.A. § 1144.

Cases that cite this headnote

[2] **Bankruptcy**

Proceedings

Bankruptcy court did not abuse its discretion in denying motion for reconsideration of order dismissing complaint as failing to state cause of action, where movants merely rehashed arguments that they raised at motion to dismiss stage.

Cases that cite this headnote

Appeal from the United States District Court for the Eastern District of New York (Gleeson, *J.*).

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED.**

Attorneys and Law Firms

FOR PLAINTIFFS-APPELLANTS: Karamvir Dahiya, Dahiya Law Offices LLC, New York, New York.

FOR DEFENDANT-APPELLEE: Lori Schwartz, Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York, New York.

PRESENT: JOHN M. WALKER, JR., ROBERT D. SACK, DENNY CHIN, Circuit Judges.

SUMMARY ORDER

Plaintiffs-appellants appeal the district court's judgment entered November 18, 2015 affirming the orders of the bankruptcy court dismissing their amended complaint in an adversary proceeding against defendantappellee **Emmons-Sheepshead** Bay Development, LLC ("Emmons"). By order entered December 19, 2014, the bankruptcy court (Stong, *B.J.*) dismissed the amended complaint with prejudice for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). By order entered April 24, 2015, the bankruptcy court denied plaintiffs' motion to vacate, alter, or reconsider the dismissal. On November 17, 2015, following oral argument, the district court affirmed the bankruptcy court's orders, ruling from the bench. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Plaintiff-appellant Metropolitan Estates, Inc. ("Metropolitan") invested in a condominium development known as "The Breakers at Sheepshead Bay Condominium" (the "Property"). Plaintiffs-appellants Alex Dikman and Albert Wilk are principals of Metropolitan. The Property was conveyed to Emmons in 2007. The amended complaint identifies non-party Jacob Pinson as a member of Emmons.

In August 2012, Pinson filed for bankruptcy protection under Chapter 11 on behalf of Emmons and, according to plaintiffs, undervalued the Property at $14 million when it was actually worth more than $30 million. In July 2013, the bankruptcy court confirmed Emmons's proposed plan of reorganization despite plaintiffs' objection that the plan had not been proposed in good faith. The bankruptcy court denied plaintiffs' motion for reconsideration in August 2013, and the district court (Mauskopf, *J.*) denied their appeal of that denial in September 2014.

Meanwhile, plaintiffs initiated this action as an adversary proceeding in the bankruptcy court and thereafter filed an amended complaint. Plaintiffs sought to revoke the confirmation order and rescind the discharge of the Property under 11 U.S.C. § 1144 on the grounds that (1) the order was procured by fraud, (2) the Property was fraudulently conveyed and held in a constructive trust, (3) the plan of reorganization benefitted the debtor but not the unsecured creditors, and also facilitated the secret sale of the Property to a sham purchaser, and (4) plaintiffs were denied due process because the bankruptcy court issued the confirmation order despite their lack of access to certain material discovery. The bankruptcy court dismissed the amended complaint with prejudice for failure to state a claim in December 2014 and, after convening a hearing in April 2015, denied plaintiffs' motion to vacate, alter, or reconsider the dismissal or its findings. The district court (Gleeson, *J.*) affirmed the bankruptcy court's orders and decisions in November 2015.

"In an appeal from a district court's review of a bankruptcy court decision, we review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law *de novo*." *In re Enron Corp.*, 419 F.3d 115, 124 (2d Cir. 2005) (quoting *In re AroChem Corp.*, 176 F.3d 610, 620 (2d Cir. 1999)).[1]

I. Dismissal of the Amended Complaint

***2 [1]** The sufficiency of a complaint in an adversary proceeding is evaluated under Federal Rule of Civil Procedure 12(b)(6). Fed. R. Bankr. P. 7012(b). We review the dismissal of a complaint pursuant to Rule 12(b)(6) *de novo* while construing the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). To survive a motion to dismiss under Rule 12(b)(6), the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

To revoke a confirmation order under 11 U.S.C. § 1144, a plaintiff must show the order was procured by fraud. 11 U.S.C. § 1144. Moreover, Federal Rule of Civil Procedure 9(b) requires plaintiffs alleging fraud to "state with particularity the circumstances constituting fraud or mistake," *In re Motors Liquidation Co.*, 462 B.R. 494, 505 (Bankr. S.D.N.Y. 2012) (applying Rule 9(b) to a § 1144 claim in a bankruptcy case), and to "allege facts that give rise

to a strong inference of fraudulent intent," *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994).

We conclude that the bankruptcy court properly dismissed the amended complaint because plaintiffs failed to sufficiently allege that the confirmation order was procured by fraud. The amended complaint presents only conclusory allegations that defendants fraudulently and intentionally misled the bankruptcy court by underreporting the value of the Property, obscuring the ownership history of the Property, and manufacturing a false sense of urgency in the bankruptcy proceedings. There are no factual allegations to substantiate those claims or to support an inference, let alone a strong inference, of fraudulent intent. Plaintiffs' claims as to incomplete discovery, the parties' unsuccessful settlement negotiations, the priority of creditors, the post-order sale of the Property, and the lack of due process are inapposite because § 1144 expressly limits the basis for revocation to procurement by fraud. The amended complaint thus fails to state a claim under § 1144. *See In re Motors Liquidation*, 462 B.R. at 508 (dismissing the complaint in an action brought under § 1144 for failure to plead fraud with sufficient particularity).

II. Denial of Plaintiffs' Motion to Vacate, Alter, or Reconsider

[2] Motions to vacate, alter, or reconsider a bankruptcy court's decisions or findings are governed by Federal Rules of Civil Procedure 52(b), 59(e), and 60(b), which apply to adversary proceedings through Federal Rules of Bankruptcy Procedure 7052, 9023, and 9024, respectively. Rule 52(b) allows a court to make amended or additional findings that are supported by the record and to amend the judgment accordingly. Fed. R. Civ. P. 52(b); *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 143–44 (2d Cir. 1998). Rule 59(e) permits a court to "alter or amend judgment to correct a clear error of law or prevent manifest injustice." *ING Glob. v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 96 (2d Cir. 2014) (quoting *Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 153 (2d Cir. 2008)). Rule 60(b) authorizes a court to grant relief from a judgment on specific grounds such as mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been discovered earlier with reasonable diligence; fraud, misrepresentation, or misconduct by the opposing party; and a void, satisfied, released, or discharged judgment.

Footnotes

Fed. R. Civ. P. 60(b). Although Rule 60(b) "strikes a balance between serving the ends of justice and preserving the finality of judgments[,] ... final judgments should not be lightly reopened." *Tapper v. Hearn*, 833 F.3d 166, 170 (2d Cir. 2016) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986)).

***3** We review rulings on motions under Rules 52(b), 59(e), and 60(b) for abuse of discretion. *ING Glob.*, 757 F.3d at 97 (Rule 59(e)); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 126 (2d Cir. 2009) (Rule 60(b)); *Sequa*, 156 F.3d at 143 (Rule 52(b)).

In this case, plaintiffs sought to have the dismissal of their amended complaint vacated, altered, or reconsidered. A review of their submissions and the transcript of the April 21, 2015 hearing, however, demonstrates that they merely rehashed the arguments that they raised at the motion to dismiss stage without establishing a basis under Rules 52(b), 59(e), or 60(b) for amending or altering the findings or judgment of the bankruptcy court. Accordingly, the bankruptcy court did not abuse its discretion in denying their motion to vacate, alter, or reconsider.

We have considered all of plaintiffs' additional arguments and find them to be without merit. For the reasons stated herein, the judgment of the district court is **AFFIRMED**.

All Citations

--- Fed.Appx. ----, 2016 WL 7107981

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1 Emmons argues that plaintiffs lack standing to pursue certain claims, and that their claims are equitably moot. We need not reach these issues, as we decide the appeal on the merits.

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2016 WL 7177759
Only the Westlaw citation is currently available.
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

In re: Lehr Construction Corp., Debtor.
Jonathan L. Flaxer, not individually but solely in his capacity as Chapter 11 trustee for Lehr Construction Corp., Appellant,
v.
Peter Gifford, Appellee.

No.
16
-
350
|
December 9, 2016

Appeal from a judgment of the United States District Court for the Southern District of New York (Woods, *J.*).

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Appellant: MICHAEL S. DEVORKIN (Daniel N. Zinman, on the brief), Golenbock Eiseman Assor Bell & Peskoe LLP, New York, NY.

For Appellee: JOSEPH ARONAUER, Aronauer & Yudell, LLP, New York, NY.
For Amicus Curiae J. Maxwell Beatty and Richard I. Janvey (Adam L. National Association of Rosen and Sheryl P. Giugliano, on the brief), Bankruptcy Trustees: Diamond McCarthy LLP, New York, NY; Ronald R. Peterson, Jenner & Block LLP, Chicago, IL (on the brief).

PRESENT: ROBERT A. KATZMANN, Chief Judge, RALPH K. WINTER, Circuit Judge, SIDNEY H. STEIN, District Judge.*

SUMMARY ORDER

Appellant Jonathan Flaxer, in his capacity as Chapter 11 trustee (the “Trustee”) of Lehr Construction Corp. (“Lehr”), appeals from a judgment of the district court, which affirmed an order of the U.S. Bankruptcy Court for the Southern District of New York granting appellee Peter Gifford's motion to dismiss the Trustee's faithless servant claim. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

In 2010, the Manhattan District Attorney's Office discovered that Lehr was systematically overbilling its clients. Public disclosure of the investigation led Lehr to file for Chapter 11 bankruptcy in February 2011. In May 2011, a grand jury indicted Lehr and several of its employees, and Lehr was subsequently convicted on thirteen counts, including enterprise corruption, a scheme to defraud, and grand larceny. Gifford was not indicted, though he entered into a cooperation agreement with the Manhattan District Attorney's Office. In February 2013, the Trustee brought a faithless servant claim against Gifford under New York common law, seeking to disgorge more than $1.2 million in compensation and legal fees based on Gifford's participation in the fraud. Gifford filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), asserting, *inter alia*, the affirmative defense of *in pari delicto*. The bankruptcy court granted the motion on the basis that the Trustee was *in pari delicto* with Gifford. The district court affirmed on the same ground.

On appeal, the Trustee contends that an employee may not impute his conduct to his principal to defend against the principal's claims and thus may not assert *in pari delicto* as a defense against his employer. Instead, according to the Trustee, only third parties may invoke principles of imputation and the defense of *in pari delicto* to defend against claims brought by a principal. To hold otherwise, the Trustee contends, would be irreconcilable with New York's faithless servant doctrine, which entitles a principal to disgorge a disloyal agent's compensation regardless of whether the

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agent's "services were beneficial to the principal." *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 394 N.Y.S.2d 626, 363 N.E.2d 350, 351 (1977); *see also* *Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200 (2d Cir. 2003).

"A district court's order in a bankruptcy case is subject to plenary review, meaning that this Court undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court." *In re Cacioli*, 463 F.3d 229, 234 (2d Cir. 2006) (internal quotation marks omitted). We review the grant of a motion for judgment on the pleadings made pursuant to Rule 12(c) de novo, "accept[ing] all factual allegations in the complaint as true and draw [ing] all reasonable inferences in plaintiff's favor." *In re Thelen LLP*, 736 F.3d 213, 218 (2d Cir. 2013). The Court may consider affirmative defenses on the basis of the pleadings, so long as "the defense appears on the face of the complaint." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (internal quotation mark omitted).[1]

***2** The Trustee's argument that *in pari delicto* and imputation arise only in the context of a principal's claim against a third party is belied by New York law. As the New York Court of Appeals recently emphasized, "a fundamental principle that has informed the law of agency and corporations for centuries" is that "the acts of agents ... are presumptively imputed to their principals." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 912 N.Y.S.2d 508, 938 N.E.2d 941, 950 (2010). "[A]ll corporate acts—including fraudulent ones—are subject to the presumption of imputation." *Id.*at 951. A narrow exception to the presumption of imputation is the adverse interest exception, "where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (i.e., 'adverse') to the corporation's own interests." *Id.* at 952. "Fraud on behalf of a corporation is not the same thing as fraud against it, and when insiders defraud third parties *for* the corporation, the adverse interest exception is not pertinent." *Id.* (internal quotation marks and citation omitted). Moreover, the defense of *in pari delicto*, which "mandates that the courts will not intercede to resolve a dispute between two wrongdoers," "applies even in difficult cases and should not be 'weakened by exceptions.' " *Id.* at 950 (quoting *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 199 N.Y.S.2d 483, 166 N.E.2d 494, 497 (1960)).

While *Kirschner* involved claims against third parties, we are not free to disregard the breadth of the New York Court of Appeals' language, nor its stated intent to "remove any lingering confusion" regarding the principles of *in pari delicto* and imputation "to the extent [its] law had become ambiguous." *Id.* at 959. Moreover, contrary to the Trustee's position, New York courts applying *Kirschner* have dismissed employers' claims against their employees on the basis of an *in pari delicto* defense. *See* *Teneyck, Inc. v. Rosenberg*, 39 Misc.3d 194, 957 N.Y.S.2d 845, 847–48 (N.Y. Sup. Ct. 2013), *aff'd*, 111 A.D.3d 529, 975 N.Y.S.2d 335 (2013); *Mosionzhnik v. Chowaiki*, 41 Misc.3d 822,972 N.Y.S.2d 841, 847–48 (N.Y. Sup. Ct. 2013).[2] Accordingly, we reject the Trustee's contention that employees are categorically barred from asserting an *in pari delicto* defense against their employers.[3] Nor does the adverse interest exception avail the Trustee, because the fraud in which Gifford participated was committed on behalf of Lehr and not against it. *See* *Kirschner*, 912 N.Y.S.2d 508, 938 N.E.2d at 952.

As for the Trustee's contention that allowing an employee to assert an *in pari delicto* defense against his employer inherently conflicts with the faithless servant doctrine, such conflict would appear to arise only where the basis for the *in pari delicto* defense is the imputation of the defendant's misconduct. That is not the case here where the basis for the *in pari delicto* defense was Lehr's conviction on thirteen felony counts for a scheme that was overseen by Gifford's superiors—including several Lehr officers and department heads—and for which Gifford was not convicted. *Cf.* *Teneyck, Inc.*, 957 N.Y.S.2d at 848 (applying *in pari delicto* defense to faithless servant claim where the plaintiff corporation had been convicted of the same crime for which it sought to hold the defendantagent accountable). Thus, we need not resolve under which circumstances, if any, an employee may assert an *in pari delicto* defense against his employer when the defense is based solely on imputation of his own misconduct.

***3** The Trustee also appears to rely on federal bankruptcy law for the proposition that there is an "insider" exception to an *in pari delicto* defense. But even assuming that New York courts recognize or would recognize the federal exception—a question we do not resolve—it would not apply here because Gifford was not an "insider" of Lehr in the relevant sense. *See, e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. 87, 123 (Bankr. S.D.N.Y. 2011) ("[I]t is well established

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that the ... *in pari delicto* rules do not apply to actions of fiduciaries who are insiders in the sense that they either are on the board or in management, *or in some other way control the corporation.*" (internal quotation marks omitted)).

Finally, the courts below committed no error in denying Lehr leave to amend. *See Grullon v. City of New*

Footnotes

Haven, 720 F.3d 133, 140 (2d Cir. 2013) ("Leave to amend may properly be denied if the amendment would be futile." (internal quotation marks and alteration omitted)). Though Lehr contends that it could plead facts showing that it was less culpable than Gifford—such that *in pari delicto* would not apply—any such argument would fail on the facts of this case.[4]

We have considered the Trustee's remaining arguments and find in them no basis for reversal. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

--- Fed.Appx. ----, 2016 WL 7177759

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* Judge Sidney H. Stein, of the United States District Court for the Southern District of New York, sitting by designation.

1 In deciding the Rule 12(c) motion, the bankruptcy court took judicial notice of documents relating to the underlying criminal proceedings against Lehr and its employees. The Trustee does not argue that these documents were not properly before the courts below.

2 The Trustee filed a motion requesting that the Court take judicial notice of the briefs filed in *Teneyck* and another case for purposes of verifying the Trustee's contention that certain arguments were not raised in those cases. Though Gifford opposes the Trustee's motion, he does not dispute that those arguments were not raised in those cases. Because the point is undisputed, we deny the motion as moot.

3 The Trustee's position on the application of imputation is drawn from §§ 5.03 and 5.04 of the Restatement (Third) of Agency. *See* Restatement (Third) Of Agency §§ 5.03–04 (2006). But we are bound in this case to apply the law of New York, not the law of the Restatement. The Trustee, in his reply brief, cites *Brown v. Poritzky,* 30 N.Y.2d 289, 332 N.Y.S.2d 872, 283 N.E.2d 751 (1972), *overruled on other grounds*, *Lusenskas v. Axelrod,* 81 N.Y.2d 300, 598 N.Y.S.2d 166, 614 N.E.2d 729 (1993), for the proposition that "[w]hen the agent is a defendant in a suit brought by his principal, the agent cannot impute his negligence to the principal." *Id.* at 753. *Brown* is readily distinguishable from the instant circumstances, however, because it was concerned with the imputation of negligent conduct—not intentional wrongdoing—and because it did not involve a defense of *in pari delicto.*

4 In light of the foregoing analysis, certification to the New York Court of Appeals, as the Trustee requests in the alternative, is not warranted in this case.

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2016 WL 7436608
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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

IN THE MATTER OF: **STERLING UNITED**, INC. Debtor.
JOHN H. RING, III, Trustee of the Chapter 7 Bankruptcy Estate of **STERLING UNITED**, INC., Plaintiff-Appellant,
v.
FIRST NIAGARA BANK, N.A., Defendant-Appellee.

No. 15-4131-bk
|
December 22, 2016

Appeal from a judgment of the United States District Court for the Western District of New York (William M. Skretny, *Judge*; Michael J. Kaplan, *Bankruptcy Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Attorneys and Law Firms

APPEARING FOR APPELLANT: ARTHUR G. BAUMEISTER, JR., Amigone, Sanchez & Mattrey, LLP, Buffalo, New York.

APPEARING FOR APPELLEE: GARRY M. GRABER, Hodgson Russ LLP, Buffalo, New York.

PRESENT: GUIDO CALABRESI, REENA RAGGI, GERARD E. LYNCH, Circuit Judges.

SUMMARY ORDER

***1** Plaintiff John H. Ring, III, the Chapter 7 bankruptcy trustee for the estate of Sterling United, Inc., appeals from the affirmance of the bankruptcy court's dismissal of his claims that defendant First Niagara Bank's security interests in debtor's assets were avoidable under 11 U.S.C. § 547. On plenary review of a decision of a district court functioning as an intermediate appellate court in a bankruptcy case, we assess the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. *See In re Lehman Bros. Holdings Inc.*, 761 F.3d 303, 308 (2d Cir. 2014). In applying these principles here, we assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we reference only as necessary to explain our decision to affirm.

Under 11 U.S.C. § 547(b)(4)(A), a bankruptcy trustee may avoid any "transfer of an interest of the debtor in property ... made ... on or within 90 days before the date of the filing of the petition" for bankruptcy, provided that those interests are not perfected security interests. *See id.* § 547(c)(3). In New York, a financing statement perfects a security interest if it (a) states the name of the debtor and the name of the secured party or a representative of the secured party, and (b) "indicates the collateral covered by the financing statement." N.Y. U.C.C. § 9-502. The collateral requirement may be satisfied by "an indication that the financing statement covers all assets or all personal property," *id.* § 9-504, which is the minimum necessary to "provide[ ] notice that a person may have a security interest in the collateral claimed," *id.* § 9-504 cmt. 2.

The trustee argues that First Niagara inadequately perfected its interests in debtor's assets under these provisions. He therefore maintains that, rather than dismiss his claim, the bankruptcy court should have awarded the estate the value of any property interests transferred to, or liquidation proceeds collected by, First Niagara within 90 days of the May 17, 2013 bankruptcy petition date. We do not agree.

The parties do not dispute the underlying facts. First Niagara loaned over one million dollars to the debtor and was granted a blanket security interest in all of debtor's assets. Between 2005 and 2007, First Niagara filed three financing statements, pursuant to N.Y. U.C.C. § 9-502, to perfect those interests. The collateral indication in the initial U.C.C. filings was as follows:

> *All assets* of the Debtor *including, but not limited to*, any and all equipment, fixtures, inventory, accounts, chattel paper, documents, instruments, investment property, general intangibles, letter-of-credit rights and deposit accounts now owned and hereafter acquired by Debtor *and located at or relating to the operation of the premises at 100 River Rock Drive, Suite 304, Buffalo, New York*, together with any products and proceeds thereof including, but not limited to, a certain Komori 628 P & L Ten Color Press and Heidelberg B20 Folder and Prism Print Management System.

***2** App'x 132 (emphasis added). On October 19, 2012, the financial statements were amended to indicate the debtor's change of address to 6030 N. Bailey Avenue, Amherst, N.Y. 14226. *Id.* at 195. Those amendments, however, did not update the description of the collateral to reflect the debtor's changed address; that was done by amendment on February 19, 2013. The final collateral indication states as follows:

> All assets of the Debtor including, but not limited to, any and all equipment, fixtures, inventory, accounts, chattel paper, documents, instruments, investment property, general intangibles, letter-of-credit rights and deposit accounts now owned and hereafter acquired by Debtor, *including but not limited to those located at or used in connection with the business premises at 6030 N. Bailey Avenue, Amherst, NY 14226*, together with any products and proceeds thereof.

Id. at 140 (emphasis added).

The parties agree that the February 2013 collateral amendments, which were filed within 90 days of the bankruptcy petition, did not and could not have perfected First Niagara's security interests. The only dispute, therefore, is whether the *initial* collateral description was sufficient to perfect First Niagara's security interests, or whether, as the trustee argues, the indication was restricted to property located at 100 River Rock Drive, the initially stated address, and therefore a nullity with respect to debtor assets at the new address.

We conclude that the description is sufficient because it unambiguously refers to "[a]ll assets of the Debtor" irrespective of their location. The phrase "including, but not limited to" introduces a subset of, and does not function as a limitation on, "[a]ll" of the debtor's assets. *See, e.g.*, *Bloate v. United States*, 559 U.S. 196, 208 (2010) (construing statutory phrase "including but not limited to" to introduce "list of categories" that was "illustrative rather than exhaustive"); *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) ("[A] list beginning with the word 'includes' ... is not exhaustive but merely illustrative."); *Pierre v. Providence Wash. Ins. Co.*, 99 N.Y.2d 222, 236, 754 N.Y.S.2d 179, 188 (2002) (describing phrase "includes, but is not limited to," as signifying "nonexclusive definition").

The trustee offers no reason for departing from this general principle of interpretation. Instead, he argues that the address modifies "[a]ll assets" or, at least, makes the collateral indication "seriously misleading" under N.Y. U.C.C. § 9-506. Neither argument persuades. The textual argument founders because the location restriction is the second half of a conjunctive phrase identifying assets included in but not exhaustive of those covered by the collateral specification. *See* App'x 132 ("All assets of the Debtor including, but not limited to, *any and all* [list of specific assets] ... *now owned and hereafter acquired by Debtor and located at or relating to the operation of the premises at 100 River Rock Drive, Suite 304, Buffalo, New York*." (emphasis added)). The reading plaintiff urges —"All assets of the Debtor ... *and* located at or relating to the operation of the premises ....," *id.* (emphasis added)— does not make sense.

***3** Nor do the cases cited by the trustee support his argument that the specific location here makes the collateral indication "seriously misleading." N.Y. U.C.C. § 9-506. In none of those cases did the challenged collateral indication contain an explicit and unambiguously broad term ("all assets") paired with language disclaiming *any* limitation on the contents of that category ("including, but not limited to"). For example, the financing statement in *In re I.A. Durbin, Inc.*, 46 B.R. 595, 598 (Bankr. S.D. Fla. 1985), covered "[a]ll property rights of any kind whatsoever, whether real, personal, mixed or otherwise, and whether tangible or intangible, encumbered by the above-mentioned mortgage." The phrase "encumbered by the above-mentioned mortgage" plainly modified and limited "[a]ll property rights." *Id.* The same conclusion applies to *In re Freeman*, 33 B.R. 234, 234 (Bankr. C.D. Cal. 1983) ("*All furniture* and fixtures and inventory of the Gold Chain Supermarkets now or at any time *located or installed on the land or in the improvements at* 813 State Street, Santa

Barbara, California." (emphasis added)). In sum, because the geographic reference in the initial collateral indication was merely illustrative and because the indication clearly reaches *all* assets of the debtor, we conclude, as the bankruptcy and district courts did, that the trustee's § 547 claim against First Niagara is properly dismissed.

We have considered plaintiff's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

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--- Fed.Appx. ----, 2016 WL 7436608

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2016 WL 7018353
Only the Westlaw citation is currently available.
This case was not selected for
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RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION “SUMMARY ORDER”). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals,
Second Circuit.

Stephen Yagman, Debtor–Appellant,
v.
David R. **Kittay**, Trustee–Appellee.

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December 1, 2016

Appeal from a judgment of the United States District

Court for the Southern District of New York (Caproni,

J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Appellant: Stephen Yagman, pro se, Venice Beach, California.

For Appellee: David R. **Kittay**, Esq., pro se, Tarrytown, New York.

PRESENT: DENNIS JACOBS, ROSEMARY S. POOLER, Circuit Judges, GEOFFREY W.

CRAWFORD,[*] District Judge.

SUMMARY ORDER

Stephen Yagman, the debtor in a Chapter 7 bankruptcy proceeding, appeals pro se from the district court's order dismissing, for lack of standing, his appeal from a bankruptcy court order that overruled his objections and directed the trustee to distribute the bankruptcy estate. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We conduct a plenary review when a bankruptcy appeal reaches us after district court review of a bankruptcy order, assessing conclusions of law de novo and factual findings for clear error. *In re First Central Fin. Corp.*, 377 F.3d 209, 212 (2d Cir. 2004). As to the ruling on standing: “To have standing to appeal from a bankruptcy court ruling in this Circuit, an appellant must be an ‘aggrieved person,’ a person ‘directly and adversely affected pecuniarily’ by the challenged order of the bankruptcy court.” *In re Gucci*, 126 F.3d 380, 388 (2d Cir. 1997) (citing *In re Colony Hill Assoc.*, 111 F.3d 269, 273 (2d Cir. 1997)).

Upon review, we conclude that the district court properly dismissed Yagman's appeal for lack of subject matter jurisdiction. The bankruptcy court approved a settlement agreement under which Yagman withdrew his objection to the claims of certain creditors and waived his right to object to the distribution of the bankruptcy estate. Yagman failed to object to the bankruptcy trustee's motion for settlement approval, and did not appeal from the bankruptcy court's order approving the settlement. He cannot now challenge that order, and is thus barred from challenging the distribution of the bankruptcy estate. As the district court determined, Yagman lacked standing to challenge the bankruptcy court's order because he had no direct financial interest in the bankruptcy estate's funds. *See In re Gucci*, 126 F.3d at 388.

We have considered all of Yagman's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

--- Fed.Appx. ----, 2016 WL 7018353 (Mem)

Footnotes

* Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Millennium Lab Holdings 11, LLC, et. al.,	Case No. 15-12284 (LSS)
Debtors. [1]	(Jointly Administered)
	Re: Del.: 312, 313, 325, 326, 327, 328, 330, 339, 358, 359, 360, 361, 362, 367

MEMORANDUM

This matter is before the Court on the motion (the "Rule 2004 Motion" or

"Motion") [2] of Marc S. Kirschner, as trustee of two trusts created pursuant to the Debtors' plan of reorganization, seeking authority under Federal Rule of Bankruptcy Procedure 2004 ("Rule 2004") to take discovery from certain third parties (the "Third Parties") [3] regarding the cause of the Debtors' financial collapse. The Third Parties each object[4] to the Rule 2004

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[1] The Debtors were: Millennium Lab Holdings Il, LLC; Millennium Health, LLC; and RxAnte, LLC.

[2] Motion ofthe Plan Trusteefor Authority to Take Targeted Discovery, Pursuant to the Debtors' Confirmed Plan or Reorganization, Confirmation Order, Bankruptcy Code Section 105(a) and Bankruptcy Rule 2004 (the "Rule 2004 Motion") [D.l. 312].

[3] The Trustee requests document production from: (a) JPMorgan Chase Bank, N.A; (b) J.P. Morgan Securities LLC; (c) Citibank Global Markets Inc.; (d) BMO Capital Markets Corp.; (e) Bank of Montreal; (f) SunTrust Bank; (g) Simpson Thacher & Bartlett LLP; and (h) KPMG LLP.

[4] See Objection ofJPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and Simpson Thacher & Bartlett
LLP to the Motion ofthe Plan Trusteefor Authority to Take Discovery Under Rule 2004 (the "JP Morgan Objection") [D.I. 325]; Objection ofSunTrust Bank to the Motion ofthe Plan Trusteefor Authority to Take Discovery Under Bankruptcy Rule 2004 (the "SunTrust Objection") [D.I. 326]; Objection of Citigroup Global Markets Inc. to the Motion ofthe Plan Trusteefor Authority to Take Discovery Under Rule 2004 (the ¿'Citigroup Objection") [D.I. 3271; Objection to Motion ofthe Plan Trusteefor Authority to Take Targeted Discovery, Pursuant to the Debtors' Confirmed Plan ofReorganization, Confirmation Order, Bankruptcy Code Sections 105(a) and Bankruptcy Rule 2004 (the "BMO Objection") [D.I. 328]; KPMG LLP's Objections to the Plan Trusts' Motion to take Targeted Discovery, Pursuant to the Debtor's [sic] Confirmed Plan of Reorganization, Confirmation Order, Bankruptcy Code Section 105(a) and Bankruptcy Rule 2004 (the
"KPMG Objection") [D.I. 330]; Supplemental Objection ofJPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and Simpson Thacher & Bartlett LLP to the Motion ofthe Plan Trusteefor Authority to Take

Motion. The Court has considered the Rule 2004 Motion, each Objection, the argument of counsel at a hearing held on May 4, 2016 and the supplemental submissions made posthearing. After due deliberation, the Court FNDS and CONCLUDES as follows:

Background5

The Debtors are in the business of providing laboratory-based diagnostic testing. In April 2014, the Debtors borrowed approximately $1.8 billion[6] pursuant to a certain senior secured term loan agreement (the "2014 Credit Agreement"), the proceeds of which were primarily used to pay off certain existing debt and provide a special dividend to equity holders, as well as to provide for working capital.

On November 10, 2015, the Debtors filed petitions for chapter 11 relief together with their Prepackaged Joint Chapter 11 Plan ofReorganization ofMillennium Lab Holdings 11, LLC (as later amended, the "Plan"). [7] The Plan contained a settlement (embodied in a prepetition restructuring support agreement) that resolved disputes between the Debtors, certain

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Discovery Under Rule 2004 (the "JP Morgan Supplemental Objection") [D.I. No. 3581; Joinder of

Citigroup Global Markets Inc. to the "Supplemental Objection ofJPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and Simpson Thacher & Bartlett LLP to the Motion ofthe Plan Trusteefor Authority to Take

Discovery Under Rule 2004" (the "Citigroup Supplemental Objection") [D.I. 359]; KPMG LLPs Supplemental Objections to the Plan Trusts' Motion to Take Targeted Discovery (the "KPMG Supplemental Objection") [D.I. 360]; Supplemental Objection ofSunTrust Bank to the Motion ofthe Litigation Trusteefor

Authority to Take Discovery Under Bankruptcy Rule 2004 (the "SunTrust Supplemental Objection") [D.I.

361] ; Joinder ofthe BMO Entities in the Supplemental Objection Filed by JPMorgan Chase Bank, N.A. to Plan Trusteefor Authority to Take Targeted Discovery, Pursuant to the Debtors' Confirmed Plan or Reorganization, Confirmation Order, Bankruptcy Code Section 105(a) and Bankruptcy Rule 2004 (the "BMO Supplemental Objection") [D.I. 362] (each, an "Objection," and collectively, the "Objections"). [5] The Court is writing for the parties. A detailed background of the Debtors, their business, the Plan and the bankruptcy case is found in In re Millennium Lab Holdings 11, LLC, 543 B.R. 703 (Bankr. D. Del. 2016), which supplements the background discussion herein.

[6] The 2014 Credit Agreement permitted borrowings up to $1,825,000,000. See Trustee Ex. 2. The Trustee states that the amount of indebtedness incurTed pursuant to the 2014 Credit Agreement was $1.8 billion. See Rule 2004 Motion at '12.

[7] Amended Prepackaged Joint Chapter 11 Plan ofReorganization ofMillennium Lab Holdings 11, LLC [D .1. No. 182].

prepetition lenders under the 2014 Credit Agreement and the Debtors' equity holders, Millennium Lab Holdings, Inc. ("MLH") and TA Millennium, Inc. ("TA"). Under the settlement, MLH and TA contributed $325 million to

the Debtors and received releases from the Debtors and third parties; the claims under the 2014 Credit Agreement were converted into a new term loan in the amount of $600 million; the prepetition lenders received 100% of the equity of the reorganized Millennium; two frusts were created to pursue additional recoveries against "Excluded Parties", [1] and all other creditors received a

100% recovery. [2]

On December 14, 2015, an order confirming the Plan was entered. As anticipated, the Plan provided for the creation of the two trusts: the Millennium Corporate Claim Trust (the "Corporate Trust") and the Millennium Lender Claim Trust (the "Lender Trust, " and collectively with the Corporate Trust, the "Trusts"). The Corporate Trust holds the

Debtors' retained claims, and the Lender Trust holds claims contributed by the Consenting

Lenders. [3] All holders of claims arising under or relating to the 2014 Credit Agreement are the beneficiaries of the Corporate Trust, [11] while the Consenting Lenders are the beneficiaries of the Lender Trust. [12] The Plan provided funding for both Trusts. [13]

On December 21, 2015, Mr. Kirschner (the "Trustee") was appointed as the trustee of both Trusts. On April 6, 2016, the Trustee filed the Rule 2004 Motion seeking authority to examine the Third Parties on behalf of both the Corporate Trust and the Lender Trust. The Trustee seeks to investigate claims the Trusts may have against the Third Parties related to the Debtors' financial collapse. In particular, the Trustee is seeking to investigate (i) the banks that served as arrangers and/or administrative agents under the 2014 Credit

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[1] Under the Plan, the term "Excluded Parties" means any party not expressly identified as one of the Released Parties, or as a Related Party of such Released Party, including but not limited to (a) Bank of Montreal, (b) BMO Capital Markets, (c) Citibank Global Markets Inc., (d) Citibank, N.A., (e) J.P. Morgan Securities LLC, (f) JPMorgan Chase Bank, N.A., in its individual corporate capacity and in its capacity as Prior Administrative Agent, (g) KPMG LLP, (h) Skadden, Arps, Slate, Meagher & Flom LLP (including its partners and other attomeys), (i) Suntrust Bank, and (j) any affiliates or Related Parties of the foregoing parties listed in (a) through (i). Although not specifically listed in this definition, Simpson Thacher & Bartlett LLP falls within the definition of Excluded Parties.

[2] In re Millennium Lab Holdings 11, LLC, 543 B.R. at 706; see also Plan Confirmation Court Decision Tr. 12:4-5, Dec. 11, 2015 [D.l. 206].

[3] Capitalized terms not defined herein are ascribed the meaning provided to them in the Plan.

Agreement (i.e. J.P. Morgan Chase Bank, N.A.; J.P. Morgan Securities LLC; Citibank Global Markets Inc.; BMO Capital Markets Corp.; Bank of Montrea1 [4], and SunTrust Bank) (ii) Simpson Thacher & Bartlett LLP, the law firm that represented J.P. Morgan Chase Bank, N.A. (the administrative agent under the 2014 Credit Agreement) and J.P. Morgan Securities LLC (the joint lead arranger and joint bookrunner under the 2014 Credit

Agreement) in connection with the 2014 Credit Agreement; and (iii) KPMG, the Debtors' historical accounting firm (collectively, the "Objectors").

On April 22, 2016, the Objectors filed their Objections to the Rule 2004 Motion. The Objectors generally assert that: (i) the Court lacks subject matter jurisdiction over the post-confirmation Rule 2004 Motion and (ii) the information requested in the Rule 2004

Motion either falls outside of the scope of Rule 2004 or is overly broad. Separately, KPMG

I1 see Plan, Article

12 See Plan, Article V(G)(iii).

13 see Plan, Article V(F)(i),(ii); Plan, Article V(G)(i),(

argues that any discovery disputes between KPMG and the Debtors are governed by the arbiffation clause contained in the prepetition engagement agreement between KPMG and the Debtors dated July 10, 2015 (the "KPMG Engagement Agreement"). [5] On April 29,

2014, the Trustee filed an omnibus reply. [6]

On May 4, 2016, the Court held an evidentiary hearing on the Rule 2004 Motion. [7][8]The Trustee's declaration in support of the Rule 2004 Motion was admitted without objection and the Trustee provided additional live testimony. The Trustee testified that he believes that: (i) substantial harm was caused to the Debtors as a result of the 2014 Credit Agreement; (ii) an investigation regarding the circumstances surrounding the origination and papering of the 2014 Credit Agreement is appropriate; and (iii) the Third Parties possess information regarding these circumstances and regarding the possible attendant damages. Nevertheless, the Trustee further testified that "[t]he relief requested in the

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[4] The Trustee appears to refer to Bank of Montreal as an administrative agent or arranger. However, it is not evident to the Court that Bank of Montreal served in either of these roles with respect to the 2014 Credit Agreement.

[5] see KPMG Objection at 22-23 [D.l. 330].

[6] Plan Trustee's Omnibus Reply to Objections to the Motion ofthe Plan Trusteefor Authority to Take Targeted Discovery, Pursuant to the Debtors' Confirmed Plan ofReorganization, Confirmation Order, Bankruptcy Code Sections 1050) and Bankruptcy Rule 2004 (the "Trustee's Omnibus Reply") [D.l. 339].

[7] See Rule 2004 Mot. Hr'g Tr., May 4, 2016 [D.l. 353].

[8] Declaration ofMarc S. Kirschner in Support ofthe Trustee's Motion to Take Targeted Discovery Pursuant to Bankruptcy Rule 2004 at 9 ("Kirschner Declaration") [D.I. 313].

[20041 Motion is truly in the nature of an initial investigation. No decision has been made to initiate litigation against any party.„

Following the hearing, the parties provided limited supplemental briefing. [9]

Discussion

1. Subject Matter Jurisdiction

The Court has authority to determine whether it has subject matter jurisdiction over this Motion.[10]

Bankruptcy courts derive subject matter jurisdiction from federal statute, rather than Article Ill of the constitution.[11][12][13] Nevertheless, "[t]he bankruptcy court's jurisdictional mandate is quite broad. Pursuant to 28 U.S.C. 1334 and 157, bankruptcy courts have subject matter jurisdiction over four types of matters, pending referral from the district court:

'(1) cases under title 11, (2) proceeding arising under title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11."23

Cases falling under the first three categories are typically referred to as core proceedings, whereas proceedings "related to" a case under title 11 are designated as noncore proceedings.[14] Regardless of whether a proceeding is designated core or non-core, the bankruptcy court has subject matter jurisdiction over the matter.

"Cases under title 11 " refers to the bankruptcy petition itself. [15]

A proceeding 'arises under' title 11 if "the Bankruptcy Code creates the cause of action or provides the substantive right invoked. Examples of proceedings "arising under" title 11 include causes of action to recover fraudulent conveyances, avoidance actions brought under section 544(b), actions to recover postpetition transfers

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[9] See JP Morgan Supplemental Objection; Citigroup Supplemental Objection; KPMG Supplemental Objection; SunTrust Supplemental Objection; BMO Supplemental Objection; Plan Trustee's Omnibus Supplemental Reply to Supplemental Objections ofthe Motion ofthe Plan Trusteefor Authority to Take Targeted Discovery, Pursuant to the Debtors' Confirmed Plan ofReorganization, Confirmation Order, Bankruptcy Code Sections 105(a) and Bankruptcy Rule 2004 [D.I. 367].

[10] See, e.g., In re BWILiquidating Corp., 437 B.R. 160, 163 (Bankr. D. Del. 2010) (citation omitted) (holding that a federal court has authority to determine whether it has subject matter jurisdiction over a dispute).

[11] See, e.g., In re Resorts Int'l, Inc., 372 F.3d 154, 161 (3d Cir. 2004) (citations omitted).

[12] In re McMahon Books, Inc., 173 B.R. 868, 873 (Bankr. D. Del. 1994).

[13] U.S.C. 1334 and 157; see also In re Resorts Int'l, Inc., 372 F.3d at 162.

[14] See In re Resorts Int'l, Inc., 372 F.3d at 162 (citation omitted).

[15] See In re New Century TRS Holdings, Inc., 505 B.R. 431, 440 (Bankr. D. Del.), appeal dismissed sub nom. , In re New Century TRS Holdings Inc., 526 B.R. 562 (D. Del. 2014), affdsub nom. , In re New Century TRS Holdings, Inc., 619 F. App'x 46 (3d Cir. 2015) (citation omitted).

under section 549, actions against general partners under section 723, controversies regarding whether to appoint or elect a trustee under chapter 11, motions to obtain financing with priority over existing liens, and sales free and clear of liens. [27]

A proceeding 'arises in' title 11 if the proceeding "by its nature, and not the particular factual circumstance, could arise only in the context of a bankruptcy case.,,

Examples of proceedings "arising in" title 1 1 includes "'administrative matters' such as allowance and disallowance of claims, orders in respect to obtaining credit, determining the dischargeability of debts, discharges, confirmation of plans, [and] orders permitting the assumption or rejection of contracts.,,

Whether a proceeding 'relates to' a bankruptcy case varies depending on whether the proceeding is commenced pre or post confirmation. Pre-confirmation, a proceeding 'relates to' a bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Examples of "related to" jurisdiction pre-confirmation typically include "causes of action owned by the debtor that became property of a title 11 estate under section 541 (as distinguished from postpetition causes of

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[26] Id at 441 (citations omitted); see also 1 COLLIER ON BANKRUPTCY 3.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

[27] see 1 COLLIER ON BANKRUPTCY 3.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

[28] In re New Century TRS Holdings, Inc., 505 B.R. at 441 (citation omitted).

[29] Stoe v. Flaherty, 436 F.3d 209, 218 (3d Cir. 2006), as amended (Mar. 17, 2006) (citation omitted). [30] [d. at 164 (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

action, i.e., those that come into existence during the pendency of the bankruptcy case)" and

(2) "suits between third parties that in the absence of bankruptcy, could have been brought in a district court or a state court. Post-confirmation, a bankruptcy court's "related to" jurisdiction shrinks, and therefore, as first outlined by the Third Circuit in In re Resorts International, a proceeding 'relates to' a bankruptcy case post-confirmation only if "there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter.

Related to" jurisdiction post-confirmation includes proceedings to construe and enforce provisions of a plan, and matters affecting the interpretation, implementation, consummation, execution or administration of a confirmed plan.33

Both the Trustee, in his initial submission, and therefore the Objectors, in their Objections, argue that the Rule 2004 Motion should be analyzed in the context of the "related to" jurisdictional analysis laid out in Resorts. The Objectors argue that the Rule 2004 Motion does not have the mandated close nexus to the bankruptcy plan or proceeding, and thus the Court does not have bankruptcy court jurisdiction over the matter. The Court disagrees. 34

The "related to" analysis proposed by the Objectors is unsuitable for a Rule 2004 motion. Multiple courts have held that Rule 2004 is a rule of bankruptcy procedure that does

[31] | COLLIER ON BANKRUPTCY 3.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016).

[32] In re Resorts Int'l, Inc., 372 F.3d at 166-67.

not exist "independent of a bankruptcy environment. Put another way, Rule 2004 "by its nature, and not the particular factual circumstance, could arise only in the context of a bankruptcy case. "36 As such, Rule 2004 "arises in" title 11 of the Bankruptcy Code, and the

Court has subject matter jurisdiction to adjudicate this dispute."

The fact that this Rule 2004 Motion was filed post-confirmation does not alter this conclusion. Four years after Resons, the Third Circuit in Seven Fields explored postconfirmation jurisdiction in the context of "arising in" jurisdiction. In Seven Fields, the court held that once the bankruptcy court determines that it has "arising in" jurisdiction over a matter, the analysis is complete.[38] The court explained:

> After considering the parties' arguments, we will affrm the order of the district court and thus, in effect, the order of the bankruptcy court as we conclude that the bankruptcy court had core jurisdiction in this case. The bankruptcy and district courts were not required to address the "close nexus" test because the test was not applicable in this "arising in" proceeding. As we discussed in Resons, the "close nexus" standard only applies for the purposes of determining whether a federal court has jurisdiction over a non-core "related to" proceeding in the post-confirmation context. Appellants seem to believe that any time a party files a case post-confirmation, the "close nexus" test is triggered. This is plainly not the case. While courts may choose to rely on "related to" jurisdiction because it is the broadest category of federal bankruptcy jurisdiction when examining their own jurisdiction, it certainly is not incumbent upon them to do so, because, as occurred here, a party may argue and a court may decide that a proceeding falls within one of the narrower categories ofjurisdiction, such as "arising in" jurisdiction, in which case "related to" jurisdiction and the corresponding "close nexus" test are not implicated. [39]

[35] In re Refco, Inc., No. 06 Civ. 1888 (GEL), 2006 WL 1379616, at *2 (S.D.N.Y. May 16, 2006) (emphasis in original) (citation omitted); see also In re Recoton Corp., No. 04 Civ. 2466 (DLC), 2004 WL 1497570, at *4 (S.D.N.Y. July 1, 2004) (citation omitted) (Rule 2004 is "an action that has as its foundation the creation, recognition, or adjudication of rights which would not exist independent of a bankruptcy environment. ").

[36] In re New Century TRS Holdings, Inc., 505 B.R. at 441.

[37] A determination that the Court has "arising under" rather than "arising in" jurisdiction would not alter the conclusion that the Court has subject matter jurisdiction over the Motion.

[38] See In re Seven Fields Dev. corp., 505 F.3d 237, 260 (3d Cir. 2007). [39] Id. (citations omitted).

The court in Seven Fields further explained that in contrast to cases based on "related to" jurisdiction, "cases that 'aris[e] in' the bankruptcy case must satisfy a stringent standard in which the matter must have an intimate connection with the bankruptcy proceedings, and thus the stage at which the complaint isfiled is not detenninative.

Accordingly, unlike with

"related to" jurisdiction, there is no comparable constriction on the Court's "arising in" jurisdiction post-confirmation, and the Court has subject matter jurisdiction over the Rule 2004 Motion.

Notwithstanding this straightforward analysis, the Objectors argue that the Court, in conducting its post-confirmation jurisdictional analysis, should not look at the Rule 2004 Motion itself, but rather should look through the Motion to the underlying causes of actions that the Trustee may bring based on information gathered from his investigations. The Objectors contend that because the causes of action that will follow an investigation are non-core and do not have the requisite "close nexus" to the bankruptcy proceeding, the Court does not have jurisdiction to adjudicate this Rule 2004 Motion.[41] Such a contention endows the Court with prophetic powers it does not, and cannot, have. As numerous courts have recognized when presented with a Rule 2004 motion, "there is no way to determine where the investigations will lead, what claims may be revealed, and what issues are core and non-core. "42

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40 Id. at 265 n.26 (alteration in original) (emphasis added).
'related to" jurisdiction, I will consider it nonetheless.

In re Friedman's, Inc., 356 B.R. 779, 784 (Bankr. S.D. Ga. 2005); see also In re Refco, Inc., 2006 WL 1379616, at *2 (citation omitted) (finding that while the claims that the committee may later bring may be non-core, "the investigation into the possible existence of those yet-to-be-determined claims [via a Rule 2004 examination] is purely a bankruptcy matter"); In re Table Talk, Inc., 51 B.R. 143,
146 (Bankr. D. Mass. 1985) (emphasis in original) (stating, in the mandatory withdrawal context,

The Court is not persuaded that the cases cited by the Objectors dictate a different outcome. First, almost all of the cases cited by the Objectors were decided prior to Resorts and Seven Fields, and thus do not perform the mandated analysis in the Third Circuit.

Second, while some of the decisions offered by the Objectors are couched in a jurisdictional framework, a careful reading demonstrates that their analyses truly turns on whether the requested examinations comport with the scope of Rule 2004, rather than whether the court has jurisdiction over the motions. So, for example, in In re Express One International, Inc. , the court evaluated whether the party requesting the Rule 2004 examinations had demonstrated good cause for the 2004 examinations, not whether the court had jurisdiction to decide the Rule 2004 motion. [43] And in In re Good Hope Refineries, Inc. , the court specifically held that it had jurisdiction over a post-confirmation request for a Rule 205 (now 2004) examination, but denied the requested relief because the examination did not fall within the scope of the rule. [44]

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that even assuming arguendo that an antitrust suit, "when and if it is filed, would be subject to mandatory withdrawal" because it was non-core "it does not logically follow that a Rule 2004 examination would, at this time, be precluded by a future contingency. "); cf In re SemCrude L.P. , No .11-1174 (SLR), 2012 WL 5554819, at *3 (D. Del. Nov. 15, 2012) (affrming the bankruptcy

court's decision to look at the motion before it—a motion to enjoin—and not the subject matter of the underlying litigation pending in a different court when conducting its jurisdictional analysis); In re Asia Glob. Crossing, Ltd., 322 B.R. 247, 254-55 (Bankr. S.D.N.Y. 2005) (citing Hon. Barry Russell,
BANKRUPTCY EVIDENCE MANUAL 501.3, at 826 (2004 ed.)) (explaining that " [e]ven if the Trustee ultimately intends to pursue state law claims, federal law nonetheless controls the privilege' ,as an examination under Rule 2004 is "aimed at discovering evidence upon which future causes of action may be based and is therefore governed by bankruptcy law rather than state substantive law.")•

43 see In re Express One Intern., Inc., 217 B.R. 215, 217 (Bankr. E.D. Tex. 1998).

44 see In re Good Hope Refineries, Inc, 9 B.R. 421, 422-23 (Bankr. D. Mass 1981) (emphasis added) ("1 am satisfied that this Court can properly exercise jurisdiction over actions brought by a Debtor after a Plan has been confirmed by the Court, even if such actions are against a post-filing creditor, with no claim against the estate.. .1 now turn to the issue of whether or not, under the facts of this case, the Court should exercise its jurisdiction. ").

Finally, in In re Cinderella Clothing Industries, the bankruptcy court did look through the Rule 2004 request to the potential causes of action that would stem from an investigation in order to determine whether the court should grant the Rule 2004 motion. [16]In that case, certain creditors sought to take investigations in order to bolster an effort to dismiss or convert the bankruptcy case, or modify a confirmed plan. Because dismissal, conversion or modification of the plan were time barred and/or because the movants would not have standing to seek that relief, the court denied the requested Rule 2004 examination (while permitting other examinations on specific topics) [17] The court further stated that whether a cause of action existed in another forum was not relevant. To the extent that this is a universal statement, the Court respectfully disagrees and notes that the case cited in support of that proposition was in a different legal context.[18]

None of these cases convince the Court that in order to determine whether it has subject matter jurisdiction, the Court must speculate over possible causes of action that may be pursued after the investigation is complete. When evaluating jurisdiction, the Court will look at the motion in front of it—the Rule 2004 Motion—and not at a future lawsuit that the

Trustee may file.

The Objectors' final challenge to subject matter jurisdiction also fails. Certain of the Objectors argue that the Plan does not contain the requisite reservation ofjurisdiction language to provide the Court with jurisdiction over the

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16 See In re Cinderella Clothing Indus., Inc, 93 B.R. 373, 378-79 (Bankr. E.D. Pa. 1998).

17 See Id. The court did permit a Rule 2004 examination to the extent it was "limited in scope to the enforcement of the asset purchase agreement and the debtor's ability to comply with the terms of the confirmed plan." Id. at 379.

18 Similarly, in In re Bames, the court found that because it would not have jurisdiction over the breach of contract claim that was the subject of the Rule 2004 examination, the Rule 2004 examination would be inappropriate. See In re Barnes, 365 B.R. I, 4-6 (Bankr. D.D.C. 2007). But, Barnes was not a post-confirmation chapter 11 case, rather, it was an individual chapter 7 case that had not yet been closed by the chapter 7 trustee. The Barnes court specifically stated that the requested examination did not relate to the administration of the bankruptcy estate or the rights, liabilities or obligations of the debtor. Id. at 3.

Motion. [48] The cases cited by these Objectors are inapposite as they analyze plan provisions in the post-confirmation "related to" jurisdictional context.[49] In the context of post-confirmation "related to" jurisdiction, courts have held that a plan needs to contain a specific retention ofjurisdiction provision because such language helps ensure that "bankruptcy court jurisdiction would not raise the specter of 'unending jurisdiction"' post-confirmation. [19] But, when the court's jurisdiction ‚arises in' title 11, the cause of action has an "intimate connection to the bankruptcy proceedings" and therefore there is less of a risk of "unending jurisdiction.„

In re Insilco is instructive.[52] In that case, Judge Carey found post-confirmation jurisdiction over core claims without analyzing the reservation of rights language in the relevant plan, but denied post-confirmation jurisdiction over non-core claims where the plan did not contain the requisite reservation of rights. [53] Here too, the Court need not determine whether the Plan contains the requisite reservation of rights language to determine its subject matter jurisdiction over the Rule 2004 Motion. The Court's subject matter

See, e.g., In re BWILiquidating Corp., 437 B.R. at 166 (concluding that "a Plan must specifically describe a cause of action in order to retain 'related to' jurisdiction. "); see also In re AstroPower Liquidating Trust, 335 B.R. 309, 325 (Bankr. D. Del. 2005) (citation omitted) ("The Court concludes that where, as here, the Plan specifically describes an action over which the Court had 'related to' jurisdiction pre-confirmation and expressly provides for the retention of such jurisdiction to liquidate that claim for the benefit of the estate's creditors, there is a sufficiently close nexus with the bankruptcy proceeding to support jurisdiction post-confirmation. ").

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19 In re BWILiquidating Corp. , 437 B.R. at 165 (citation omitted); see also In re AstroPower Liquidating Trust, 335 B.R. at 325 (citation omitted).

51 In re Seven Fields Dev. Corp., 505 F.3d at 265 n.26.

52 see In re Insilco Techs, Inc., 330 B.R. 512 (Banl«. D. Del. 2005), afd, 394 B.R. 747 (D. Del. 2008).

53 SeeId. at 519-26.

jurisdiction over stems from the fact that it is a proceeding that 'arises in' title Il of the Bankruptcy Code (i.e. it is a core proceeding). [2021]

Having dealt with all of the objections to the Court's jurisdiction, the Court concludes that it has subject matter jurisdiction over the Rule 2004 Motion.

n. Scope of the Trustee's Rule 2004 Motion

Rule 2004 provides that " [Oln motion of any party in interest, the court may order the examination of any entity.„

Rule 2004 further provides that:

> [tlhe examination of an entity under this rule or of the debtor under 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In
>
> . .. a reorganization case under chapter 11 of the Code . . . the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan. [22]

The purpose of a Rule 2004 examination is to "discover the nature and extent of the bankruptcy estate" in order to distribute debtor's assets for the benefit of its creditors. [2324] "Legitimate goals of Rule 2004 examinations include 'discovering assets, examining transactions, and determining whether wrongdoing has occurred.,,,

Potential examinees include "third parties that possess knowledge of the debtor's

acts, conduct, liabilities or financial condition which relate to the administration of the bankruptcy estate.
59

A Rule 2004 examination is not a deposition; it serves a different purpose and is governed by different procedural rules.[60] "Unlike traditional discovery, which narrowly focuses on the issues germane to the dispute," the scope of Rule 2004 is broad and unfettered, and has been likened to a "fishing expedition" and "an inquisition."61

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[20] The Court takes no position on the need to review a plan for retention of jurisdiction language with respect to matters "related to" the bankruptcy case.

[21] Fed. R. Bankr. P. 20040).

[22] Fed. R. Bankr. P. 2004(b).

[23] In re Washington Mut., Inc, , 408 B.R. 45, 50 (Bankr. D. Del. 2009) (citation omitted); see also In re Recoton corp., 307 B.R. at 755 (citation omitted).

[24] In re Washington Mut., Inc., 408 B.R. at 50 (quoting In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002)).

Indeed, a Rule 2004 examination is generally not available once an adversary proceeding or contested matter has been commenced; at that point, discovery is made pursuant to the Federal Rules of Bankruptcy Procedure. [62]

Nevertheless, parties do not have an absolute right to Rule 2004 examinations—the granting of a Rule 2004 examination is dependent on the discretion of the court. [63] The rule requires a balancing of "the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination. Further, Rule 2004 is not available to creditors seeking "to use this section to deal with their special problems."65

[59] In re E. W. Resort Dev. V, L.P., L.L.L.P., No. 10-10452 (BLS), 2014 WL 4537500, at *7 (Bankr. D. Del. Sept. 12, 2014) (citations omitted).

[60] See Simon v. FIA Card Services, 732 F.3d 259, 268 (3d Cir. 2013) (citing In re J & R Trucking, Inc., 431 B.R. 818, 821 (Bankr. N.D. Ind. 2010)).

[61] In re J&R Trucking, Inc., 431 B.R. at 821; In re Good Hope Refineries, Inc., 9 B.R. at 422 (citations omitted) (discussing Rule 205, the predecessor to Rule 2004); In re Washington Mut., Inc., 408 B.R. at 50 (citation omitted).

[62] see In re Bennett Funding Grp., Inc., 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (citations omitted).

[63] See Fed. R. Bankr. P. 2004(a) (emphasis added) ("On motion of any party in interest, the court may order the examination... "); see also In re Enron Corp., 281 B.R. at 840.

64 In re Drexel Burnham Lambert Grp., Inc., 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991).

65 In re Trucking, Inc., 431 B.R. 818, 821 (Bankr. N.D. Ind. 2010) (quoting Norton Bankruptcy Rules, 2009—10 ed., Rule 2004 ed. comment (c), at 136—37).

on [25]behalf of the Corporate Trust

The Trustee seeks to conduct an investigation on behalf of the Corporate Trust in order to explore prepetition causes of action the Debtors may have against the Third Parties.

In particular, the Trustee states that he seeks document production bearing upon the Debtors' financial collapse and chapter 11 filing. He argues that the facts as he knows them to date create "a strong suspicion of wrongdoing" in connection with the 2014 Credit Agreement, which caused creditors substantial harm." Proceeds from the claims (if any) the Trustee subsequently chooses to bring on behalf of the Corporate Trust based on the results of his Rule 2004 investigation will be disffibuted to all creditors holding claims in Class 2. [26] Thus, the Trustee's Rule 2004 Motion with respect to the Corporate Trust fits squarely within the purpose of Rule 2004, as he seeks to examine third parties

[25] Rule 2004 Motion at 2.

[26] Claimants in Class 2 are holders of claims arising under or relating to the 2014 Credit Agreement. See Plan, Article Ill(C)(ii). Under the Plan, general unsecured claims are paid in full in case. See
Plan, Article Ill(C).

for the purpose of "discovering assets, examining transactions, and determining whether wrongdoing has occurred" on behalf of the Debtors' estate. [27]

The Objectors argue that the Trustee has failed to demonstrate the requisite good cause to warrant the requested Rule 2004 examinations, [69] or that, at the very least, the discovery requests promulgated by the Trustee are overly burdensome and should be narrowed. [7]

The party seeking to conduct a 2004 examination has the burden of showing good cause for the examination which it seeks. 71 „Generally, good cause is shown if the [Rule 2004] examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice. "72 The Trustee has testified that the examinations are necessary to "enable the Plan Trusts to determine the scope of viable claims that may exist on behalf of the Plan trusts against potential third parties that may be culpable for causing such harm to the Debtors. "73 The fact that the Trustee already has access to certain documents and information of the Debtors does not detract from the Trustee's testimony that the documents already in his purview are not sufficient to determine the scope of the Trustee's viable claims. [74] As such, the Trustee has demonstrated good cause warranting granting of the Trustee's Rule 2004 Motion on behalf of the Corporate Trust.

The Court will defer on ruling on the breadth of the specific requests until the parties meet and confer to see whether the parties can resolve their differences. The Trustee is encouraged to avoid duplicative requests, both with respect to documents already in the Trustee's possession and in terms of targeting document requests to the most relevant Third Party(ies). [75] Any disputes that cannot be consensually resolved will be addressed pursuant to applicable rules.

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[71] See In re Eagle-Picher Indus., Inc., 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994), as amended No. 1-91* 10100, 1994 WL 731628 (Bankr. S.D. Ohio Aug. 2, 1994); see also In re Metiom, Inc., 318 B.R. 263, 268 (S.D.N.Y. 2004) (citation omitted); In re Countrywide Home Loans, Inc., 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008).

[72] In re Metiom, Inc., 318 B.R. at 268 (alteration in original) (citation omitted).

[73] Kirschner Declaration at Il 8. 74 See Id.

[75] *See, e.g.*, JP Morgan Objection at ¶¶ 25–29; KPMG Objection at ¶¶ 19–20; BMO Objection at ¶¶ 28–37, 39–51; *but see* Trustee's Omnibus Reply at ¶¶ 34–37; 42–44; 48–54.

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[27] In re Washington Mut., Inc., 408 B.R. at 50 (citation omitted).

on behalf of the Lender Trust

The Trustee's request to use Rule 2004 to investigate claims held by the Lender Trust is not within the scope or purpose of Rule 2004. Although the Lender Trust was established pursuant to the Plan, it is not comprised of debtor claims. Rather, the Consenting Lenders voluntarily contributed their claims to the Lender Trust (presumably to more effectively prosecute the claims), and those Consenting Lenders, not all claimants in Class 2, will be the beneficiaries of any recovery from that trust. [76]

An investigation into the existence of the Consenting Lenders' claims against nondebtor Third Parties does not fall within the scope or purpose of Rule 2004 as it is not an investigation into the "property or to the liabilities and financial condition of the debtor, " and will not further the recovery and distribution of the Debtors' assets or otherwise assist with the administration of this case. The Court is persuaded by the well-reasoned decision in J& R Trucking, in which the court concludes.

> As for movants' desire to identify third parties [in addition to the debtor] who may also be liable to them, that, quite simply is neither this court's concern nor the purpose of Rule 2004. No matter how artfully one tries to disguise the requested examinations, by dressing them up in the robes of bankruptcy administration, their real purpose is to identify another entity movants might be able to collect from, and whether those efforts would have any impact on the bankruptcy estate is of no real concern to them. Movants understandably want to [sic] their money, but that does not justify turning a tool that has been developed to efficiently administer bankruptcy estates into a private collection device for creditors. Movants have other tools and other fora which they can use to investigate their rights against third parties and to collect the amounts they are owed. They should use them and not Rule 2004. "

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[76] See Plan, Article V(G)(iii). The Court recognizes that in this case the two sets of beneficiaries are largely the same.

[77] Fed. R. Bankr. P. 2004(b).

[78] In re J & R Trucking, Inc., 431 B.R. at 822-23 (citation omitted); see also In re Hilsen, No. 87-11261 (JMP), 2008 WL 2945996, at *4 (Bankr. S.D.N.Y. July 25, 2008) ("Rule 2004 may be used to discover information about estate property, but it is not a proper means to inquire with respect to non-estate property. In re Good Hope Refineries, Inc., 9 B.R. at 423 (Rule 205 "is not intended to

In this case, the Trustee is entitled to Rule 2004 examinations on behalf of the Corporate Trust, as such an examination is a "legitimate post-confirmation inquiry" to ascertain potential causes of action, which success would benefit the Debtors' creditor body. [79] Any request for information regarding potential causes of action belonging to the Lenders' Trust, however, is denied, as Rule 2004 was not intended to provide private litigants [i.e. the Consenting Lenders] with "a strategic advantage in fishing for potential private litigation. "80 The fact that the Lender Trust was created by the Plan does not infuse the Lender Trust with bankruptcy tools that would not otherwise be available to third party creditors pursuing claims against non-debtor entities.

Does the Trustee's role as trustees for both the Corporate Trust and the Lender Trust compel a different result?

The Court recognizes that, as of now, the same individual serves as trustee for both Trusts. The Court further recognizes that, as currently stylized, the document requests proposed by the Trustee are propounded on behalf of both the Corporate Trust and the Lender Trust. Thus, even as the Court denies the Trustee's request for Rule 2004

examinations with respect to the Lender Trust, the granting of the Trustee's request for Rule 2004 examinations with respect to the Corporate Trust effectively provides the Trustee with the information sought in both of his capacities. While Objectors did not raise this concern in exactly this context, the Court has considered this issue.

Research did not reveal a reported case directly on point. But, multiple courts have held that the possible use of information obtained through a Rule 2004 examination in

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give the rehabilitated debtor post confirmation a strategic advantage in fishing for potential private litigation. ").

79 In re Express One Intern., Inc., 217 B.R. at 217. 80
In re Good Hope Refineries, 9 B.R. at 423.

collateral litigation pending in a different forum is not sufficient reason to deny an examination if it is not sought for the purpose of circumventing the federal rules of civil or bankruptcy procedure. [28] For example, the court in In re Washington Mutual granted the requested Rule 2004 examination of a party involved in a pending proceeding, finding that the examination was warranted as it sought to discover evidence unrelated to the pending proceeding. [29] The court further found that where there was no pending proceeding involving the proposed examinee, but the possibility of such a future proceeding exists, the Rule 2004 examination was also warranted. [30][31] In both situations, the court found that there was no concern that the movant was seeking to circumvent the Federal Rules of Civil Procedure, and an "aggressive application of the 'pending proceeding' rule may prevent legitimate Rule 2004 examinations thereby interfering with the trustee's fiduciary duty to maximize estate assets. "84 Accordingly, in the first instance, the potential use of information obtained through the Corporate Trust's Rule 2004 examination by another party

(the Lender Trust) in a proceeding that has yet to be commenced (and may not ever be commenced) cannot dictate denial of the Trustee's Rule 2004 Motion.

Ill. Arbitration Clause in the KPMG Engagement Agreement

Finally, KPMG argues that, as the prepetition Engagement Agreement between the Debtors and KPMG contains an arbitration clause, the Trustee's request to obtain information from KPMG should be governed by certain arbitration discovery rules, rather than by Rule 2004. [85] The Trustee does not dispute the validity of the arbitration clause; rather the Trustee argues that the scope of the arbitration clause does not include the examinations and information sought pursuant to Rule 2004.

The Supreme Court has repeatedly stated that the Federal Arbitration Act requires courts to "rigorously enforce agreements to arbitrate. 86 Nevertheless, the court must first determine whether the arbitration clause is applicable to the issue at hand. [87]

The arbitration clause in the KPMG Engagement Agreement provides that " [a]ny dispute or claim between the parties shall be submitted first to non-binding mediation and if mediation is not successful within 90 days after the

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[28] See In re Table Talk, Inc., 51 B.R. at 145 (alteration in original) (citation omitted) ("It is, however, 'clear that pending litigation ... against the person sought to be examined and the possible use of 205 [now 2004] testimony in that collateral litigation is not sufficient reason for denying examination. "'); see also In re Mittco, Inc., 44 B.R. 35, 37 (Bankr. E.D. Wis. 1984) (citation omitted) (same); In re
Mantolesky, 14 B.R. 973, 979 (Bankr. D. Mass. 1981) (citations omitted) (same); In re Buick, 174 B.R. 299, 305 (Bankr. D. Colo. 1994) (permitting a creditor to take a Rule 2004 examination after the trustee had already filed an adversary proceeding); In re Washington Mut., Inc., 408 B.R. at 51-53.

[29] See In re Washington Mut., Inc., 408 B.R. at 52.

[30] Seeld. at 53.

[31] Id. at 50 (citation omitted).

issuance of one of the parties of a request for mediation then to binding arbitration. However, a Rule 2004 examination is not a "dispute or claim"; it is an investigatory tool used prior to a dispute. [89] As discussed supra, the initiation of an adversary proceeding or a contested matter generally precludes the use of Rule 2004. [90] Therefore, by its plain language, the arbitration clause in the Engagement Letter does not apply to this Rule 2004 Motion.

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[85] *See* KPMG Objection at ¶¶ 22–23.

[86] Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (citations omitted).

[87] see In re New Century TRS Holdings, Inc., 407 B.R. 558, 570 (Bankr. D. Del. 2009) ("before 1 can consider whether an arbitration clause is enforceable, I must determine whether the particular clause is applicable to the motions before me.").

[88] KPMG Objection Ex. 1 at p. 5.

[89] See, e.g., In re J & R Trucking, Inc., 431 B.R. at 821 (citation omitted). 90 See Id.

New Century TRS Holdings, Inc., decided by Judge Carey, is illustrative. [32] In New Century, KPMG sought to use an arbitration clause in its engagement letter to prevent the transfer of documents from a court-appointed examiner to a liquidating trustee. The court found that the arbitration clause did not govern the issue, as at "the time this relief was sought, no evidence was presented that any claim had been asserted or that any particular proceeding had been commenced against KPMG. "92 The court further noted that " [t]o the contrary, the relief requested in the motions do not prevent KPMG from asserting any right to arbitration (and attendant rights) if a proceeding is commenced. Here too, the Rule 2004 Motion does not seek information related to any particular claim or proceeding; rather, the Rule 2004 Motion seeks information regarding prospective claims that the Trustee may bring in the future, whether against KPMG or another party. If and when the Trustee brings any claims, KPMG can then assert any right to arbitration it may have.

Similarly compelling is the decision in In re Friedman 's. [33] In that case, the debtor's accounting firm moved for a protective order, arguing that the arbitration provision in its engagement letter prevented the debtor from compelling discovery via Rule 2004. [95] The court denied the motion, finding that although arbitration clauses are generally favored, the arbitration clause did not govern the matter. In reaching this conclusion, the court explained that:

> [the debtor] has not identified a specific cause of action that is the source of its request for Rule 2004 examination ... Although the investigations may reveal that there is a claim directly against E & Y [the accounting firm] that can be asserted by the estate, that determination has not yet been made and has not been submitted to mediation or arbitration. Accordingly, the arbitration clause and dispute resolution procedures simply have not been triggered because there is no identifiable, discrete dispute between the parties that could be argued to control the scope of discovery. [34][35]The court further explained that a finding that the arbitration clause prevented a Rule 2004 investigation "would defeat a fundamental purpose of Rule 2004, which is to grant debtors

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[32] see In re New Century TRS Holdings, Inc., 407 B.R. 558 (Bankr. D. Del. 2009).

[92] Id. at 571.

[33] see In re Friedman's, Inc., 356 B.R. 779 (Bankr. S.D. Ga. 2005).

[95] Seeld. at 782.

[34] 1d. at 783-84.

[35] Id. at 784.

. . . a broad power to determine what causes of action they may possess."

The rationale in In re Daisytek, Inc., cited by KPMG, is unpersuasive in this instance. [36][37] In Daisytek, the court vacated a bankruptcy court order allowing a postconfirmation creditors' trust to take a Rule 2004 examination of the debtor's pre-bankruptcy accountants, finding that the bankruptcy court needed to look at the "underlying nature of the proceedings that could flow from the information obtained through the Rule 2004 examination" in order to determine whether the motion needed to be submitted to arbitration." As discussed in section I supra, the Court will not speculate as to what causes of action the Trustee may unearth through the Rule 2004 investigations, and therefore the reasoning in Daisytek is not compelling. [38]

The Court finds that the arbitration clause in the KPMG Engagement Agreement does not apply to this Rule 2004 Motion.

Conclusion

The Court has subject matter jurisdiction to adjudicate this post-confirmation Rule 2004 Motion. The Trustee has demonstrated good cause with respect to the Rule 2004 examinations of the Third Parties requested on behalf of the Corporate Trust, and thus this Rule 2004 Motion is granted with respect to the Corporate Trust. For the reasons discussed above, the Rule 2004 Motion is denied with respect to the Lender Trust. An order will

Issue.

Dated: December 2, 2016 BY
THE COURT:

LAURIE S LBER
SILVERSTEIN

UNITED STATES
BANKRUPTCY JUDGE

[36] Seeln reDaisytek, Inc., 323 B.R. 180 (N.D. Tex. 2005).

[37] Id. at 187.

[38] KPMG's argument with respect to arbitration highlights the dangers of speculating as to causes of action that the Trustee might bring in the future. Until a complaint is filed against KPMG, the Court cannot determine whether arbitration is required as to all counts of the complaint, several counts of the complaint, or none of the complaint. See e.g. Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1155 (3d Cir. 1989) (discussing arbitration in the context of debtorderived claims as opposed to causes of action created under the Bankruptcy Code for the benefit of creditors of the estate).

m THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Millennium Lab Holdings 11, LLC, et. al.,	Case No. 15-12284 (LSS)
Debtors.	(Jointly Administered)
	Re: D.l.: 312, 313, 325, 326, 327, 328, 330, 339, 358, 359, 360, 361, 362, 367

ORDER

For the reasons set forth in the Memorandum of even date, IT IS HEREBY ORDERED.

1. The Rule 2004 Motion is GRANTED with respect to the Corporate Trust. All objections to the breadth of the document requests propounded by the Trustee are preserved. If such objections are not consensually resolved, disputes shall be determined in accordance with all applicable rules.

2. The Rule 2004 Motion is DENIED with respect to the Lender Trust.

Dated: December 2, 2016

BY THE COURT:

LAURIE SELBER SILVERSTEIN

AURIE SELBER SILVERSTEIN

UNITED STATES BANKRUPTCY JUDGE

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Leahy-Fernandez v. Bayview Loan Servicing, LLC, M.D.Fla., February 3, 2016

2015 WL 5042913
Only the Westlaw citation is currently available.
United States District Court, W.D. Virginia,
Roanoke Division.

Thomas W. LOVEGROVE, Plaintiff,
v.
OCWEN LOAN SERVICING, LLC, Defendant.

Civil Action No. 7:14cv00329.
|
Signed Aug. 25, 2015.
|
Filed Aug. 26, 2015.

Attorneys and Law Firms

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MEMORANDUM OPINION

MICHAEL F. URBANSKI, District Judge.

***1** This case involves the interplay between the protections afforded the personal interests of individuals under the federal bankruptcy laws, federal credit reporting and debt collection statutes, and the ability of a secured creditor, acting through a loan servicing company, to protect its interests in real estate secured by a mortgage following default. Plaintiff Thomas Lovegrove ("Lovegrove") defaulted on his mortgage in 2009, received a Chapter 7 bankruptcy discharge of that debt in 2011, yet remains on the premises. In this lawsuit, Lovegrove claims that Ocwen Loan Servicing, LLC ("Ocwen") violated both the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, by attempting to collect on his mortgage debt that was discharged in bankruptcy and falsely reporting to consumer reporting agencies ("CRAs") that the debt was still owed. Ocwen denies any statutory violations and asserts that, Lovegrove's personal bankruptcy notwithstanding, the deed of trust allows it to protect the secured creditor's interest in the real estate secured by the defaulted mortgage and that it acted lawfully to do so. This matter is before the court on Ocwen's Motion for Summary Judgment. ECF No. 49. Lovegrove filed an opposition brief, ECF No. 53, and the court heard oral argument on July 22, 2015. For the following reasons, Ocwen's motion is **GRANTED.**

I.

In 2006, Lovegrove signed a promissory note in the amount of $1,239,000.00 in favor of Bank of America and secured by a deed of trust on a home at Smith Mountain Lake in Moneta, Virginia. Although Lovegrove defaulted on the loan in April 2009, ECF No. 51 at *1, it is undisputed that he continues to live at the property. In December 2010, Lovegrove filed for Chapter 7 bankruptcy relief, and in March 2011, he obtained a discharge of his obligation to Bank of America under the promissory note. *Id.* at *2. In May 2012, Bank of America began foreclosure proceedings on the property. ECF No. 56–1 at *4. Lovegrove filed for Chapter 13 bankruptcy protection which halted the foreclosure process. The Chapter 13 action was dismissed about two weeks later. ECF No. 51 at *2.

On October 1, 2012, Ocwen became the servicer of Lovegrove's mortgage for the Moneta property and mailed Lovegrove a letter informing him of Ocwen's role. *Id.;* ECF No. 51–2 at *2. The letter contained two disclaimers. The first disclaimer gave Lovegrove thirty days to dispute the validity of the debt secured by the Moneta property. The second disclaimer located at the bottom of the page in bold and italicized font states:

> ***This communication is from a debt collector attempting to collect a debt; any information obtained will be used for that purpose. However, if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt.***

***2** ECF No. 50–2. Ocwen mailed another letter the same day discussing alternatives to foreclosure. ECF No. 53 at *26. Ocwen then began sending Lovegrove monthly account statements regarding the amount secured by the deed of trust for the Moneta property. ECF No. 51 at *2.

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The monthly account statements contain various information. For example, the October 2012 statement lists the current principal balance as $1,207,066.87 and the next payment due date as 4/01/2009. The October statement also identifies the total amount due, including current and past due principal, interest, and escrow, of $373,804.05 and gives a due date of 11/1/2012. Under a section titled "Important Messages," the account statement provides the following:

> We may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.....
>
> If you are currently in bankruptcy or if you have filed for bankruptcy since obtaining this loan, please read the bankruptcy information provided on the back of this statement.
>
> Our records indicate that your loan is in foreclosure. Accordingly, this statement may be for informational purposes only.....

ECF No. 50–3 at *2. The "Important Bankruptcy Information" section on the back of the statement reads

> If you or your account are subject to pending bankruptcy or the obligation referenced in this statement has been discharged in bankruptcy, this statement is for informational purposes only and is not an attempt to collect a debt. If you have any questions regarding this statement, or do not want **Ocwen** to send you monthly statements in the future, please contact us....

Id. at *3. **Lovegrove** does not allege that **Ocwen** made any other attempts to contact him either by phone or through any third parties.

Lovegrove wrote to **Ocwen** on November 16, 2012 and asked **Ocwen** to "stop collection [and] reporting debt to the credit bureau's [sic] regarding my home mortgage notes originated by Bank of America that was discharged in a Chapter 7 bankruptcy.... Please stop, I am unable to secure credit for my business with your reporting that is not correct." ECF No. 53 at *41. **Lovegrove** wrote similar letters to **Ocwen** on June 15, 2013 and April 3, 2014. ECF No. 50–6 at *9; ECF No. 53 at *40, *42. **Ocwen** continued to send **Lovegrove** monthly statements until at least June 2013. ECF No. 50–3 at *18. **Ocwen** also sent **Lovegrove** an escrow account disclosure statement in July 2014. ECF No. 53 at *32–38.

In April 2014, **Lovegrove** wrote to the three major CRAs: Equifax Credit Information Services, Inc. ("Equifax"), Experian, and Transunion, L.L.C. ("Transunion") and claimed "Bank of America has mistakenly reported to you that I owe a mortgage debt that was not discharged in bankruptcy. Therefore, remove any information regarding the Bank of America mortgage...." ECF No. 50–8 at *2. The letter purports that a copy was sent to **Ocwen**. In June 2014, shortly before filing his Complaint in this case, **Lovegrove** wrote to Equifax, Experian, and Transunion again. This time, he wrote "**Ocwen** Home Loan Servicing, L.L.C. has mistakenly reported to you that I owe a mortgage debt that was not discharged in his [sic] bankruptcy. Therefore, remove any information regarding **Ocwen** Home Loan Servicing, L.L.C. ...." *Id.* at *5. In July 2014, **Ocwen** received a dispute notification from Experian, and, the same day, **Ocwen** sent a notice to "all consumer reporting agencies to which it reports removing any reporting as to Mr. **Lovegrove's** discharged mortgage debt." ECF No. 50–1 at *2–3.

II.

***3** **Ocwen** moves for summary judgment as to both the FDCPA claim and FCRA claim. Regarding the FDCPA claim, **Ocwen** argues that **Lovegrove's** complaint is really an attempt to create a private right of action to enforce the bankruptcy discharge injunction and, therefore, the FDCPA claim is preempted by the Bankruptcy Code. Further, even if **Lovegrove** can bring a FDCPA claim for the actions alleged in the complaint, none of **Ocwen's** communications were in connection with collection of a debt because they all carried clear disclaimers stating that if the debt had been discharged in bankruptcy the statements were for informational purposes only. As to the FCRA claim, **Ocwen** argues it cannot be liable for failing to correct **Lovegrove's** credit report until after it received notice from a CRA. **Ocwen** did not receive notice of a dispute from a CRA until June 2015 and corrected the information on **Lovegrove's** credit report within the statutory thirty-day period.

In opposition, **Lovegrove** claims **Ocwen** has waived any argument that the Bankruptcy Code preempts his claim under the FDCPA because it was not raised as an affirmative

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defense, and, regardless, Lovegrove can maintain a private action for Ocwen's alleged acts under the FDCPA because Ocwen is not a creditor but rather a debt collector. Further, Lovegrove argues there is an issue of fact as to whether the account statements and other documents sent to Lovegrove were an attempt to collect a debt. Lovegrove also maintains that the FDCPA provides a cause of action for Ocwen's alleged false reports to the CRAs. Finally, Lovegrove asserts that Ocwen violated the FCRA by reporting information to the CRAs Ocwen knew was diputed.

Ocwen replied that it was not required to expressly plead preemption because preemption does not apply to the interaction of two federal statutes, i.e., the Bankruptcy Code and the FDCPA. Ocwen also claims that Lovegrove has inappropriately attempted to add a claim by arguing that the FDCPA provides a cause of action for alleged false reporting to the CRAs.

After oral argument, the court ordered supplemental briefing regarding the interplay between the Bankruptcy Code, the FDCPA, and the parties. In his brief, Lovegrove continues to maintain that Ocwen is not a creditor under the Bankruptcy Code and not subject to the exceptions to the discharge injunction in 11 U.S.C. § 524(j). Ocwen replied that as the authorized agent of the holder of the note, Bank of America, Ocwen does fall under the § 524(j) exception, and, as to Lovegrove's credit reporting claim under the FDCPA, that claim is both precluded by the Bankruptcy Code and untimely.

III.

Pursuant to Federal Rule of Civil Procedure 56(a), the court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Glynn v. EDO Corp.,* 710 F.3d 209, 213 (4th Cir.2013). When making this determination, the court should consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with ... [any] affidavits" filed by the parties. *Celotex,* 477 U.S. at 322. Whether a fact is material depends on the relevant substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (citation omitted). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. If that burden has been met, the non-moving party must then come forward and establish the specific material facts in dispute to survive summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986).

***4** In determining whether a genuine issue of material fact exists, the court views the facts and draws all reasonable inferences in the light most favorable to the non-moving party. *Glynn,* 710 F.3d at 213 (citing *Bonds v. Leavitt,* 629 F.3d 369, 380 (4th Cir.2011)). Indeed, "[i]t is an 'axiom that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [her] favor.' " *McAirlaids, Inc. v. Kimberly–Clark Corp.,* No. 13–2044, 2014 WL 2871492, at *1 (4th Cir. June 25, 2014) (internal alteration omitted) (citing *Tolan v. Cotton,* 134 S Ct. 1861, 1863 (2014) (per curiam)). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...." *Anderson,* 477 U.S. at 255. However, the nonmoving party "must set forth specific facts that go beyond the 'mere existence of a scintilla of evidence.' " *Glynn,* 710 F.3d at 213 (quoting *Anderson,* 477 U.S. at 252). Instead, the non-moving party must show that "there is sufficient evidence favoring the non[-]moving party for a jury to return a verdict for that party." *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.,* 407 F.3d 631, 635 (4th Cir.2005) (quoting *Anderson,* 477 U.S. at 249). "In other words, to grant summary judgment the Court must determine that no reasonable jury could find for the non[-]moving party on the evidence before it." *Moss v. Parks Corp.,* 985 F.2d 736, 738 (4th Cir.1993) (citing *Perini Corp. v. Perini Const., Inc.,* 915 F.2d 121, 124 (4th Cir.1990)).

A.

Count One of the Amended Complaint alleges that Ocwen violated the FDCPA by sending monthly bills to Lovegrove, demanding payment of the debt from the Bank of America mortgage, and making false representations as to the consequences of not making any payments. Ocwen claims it is entitled to summary judgment because Lovegrove is masquerading an alleged violation of the bankruptcy discharge injunction as a FDCPA claim, and, even if he could maintain a FDCPA action, there is no issue of fact that

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Ocwen's communications were not in connection with collection of a debt. The court agrees that the Bankruptcy Code precludes Lovegrove's FDCPA claim under these circumstances, and, regardless, even if Lovegrove could bring a FDCPA claim, Ocwen is entitled to summary judgment on Count One.[1]

1.

In *Kokoszka v. Belford,* 417 U.S. 642 (1974), the Supreme Court addressed the interplay between the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601 et seq., of which the FDCPA is a part, and the Bankruptcy Code. The issue before the Court in that case was whether an income tax refund could be considered "property" under the Bankruptcy Code, and, if so, whether the CCPA's wage garnishment provision exempted a portion of the tax refund from the jurisdiction of the bankruptcy trustee. *Id.* at 643. Upon reaching the second inquiry, the Court noted that "Congress did not enact the Consumer Credit Protection Act in a vacuum. The drafters of the statute were well aware that the provisions and the purposes of the Bankruptcy Act and the [CCPAA] would have to coexist." *Id.* at 649. The Court examined the legislative history of the CCPA and determined that "Congress' concern was not the administration of a bankrupt's estate but the prevention of bankruptcy in the first place by eliminating 'an essential element in the predatory extension of credit resulting in a disruption of employment, production, as well as consumption' and a consequent increase in personal bankruptcies." *Id.* at 651 (quoting H.R.Rep. No. 1040, 90th Cong., 1st Sess., 20 (1967)). The Court concluded that the CCPA "sought to prevent consumers from entering bankruptcy in the first place. However, if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act." *Id.*

***5** The Fourth Circuit has not addressed whether a FDCPA claim based on communications sent to a debtor after he receives a Chapter 7 discharge is precluded by the Bankruptcy Code. Other circuit courts have reached different conclusions under circumstances factually distinct from those presented in this case.

The Second and Ninth Circuits have concluded that the Bankruptcy Code precludes FDCPA claims because " 'debtors are protected in bankruptcy proceedings-and by discharge afterward." *Simmons v. Roundup Funding, LLC,* 622 F.3d 93, 96 (2d Cir.2010); *Walls v. Wells Fargo Bank, N.A.,* 276 F.3d 502, 510 (9th Cir.2002) ("Nothing in either Act persuades us that Congress intended to allow debtors to bypass the [Bankruptcy] Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy remain under the Bankruptcy Code."). In *Simmons,* the debtors' bankruptcy case was still active when they filed their FDCPA claims in the federal district court. *Simmons,* 622 F.3d at 94– 95. In *Walls,* however, the Ninth Circuit went further and held that FDCPA claims based on a violation of a discharge injunction are precluded by the Bankruptcy Code. *Walls,* 276 F.3d at 510; *see also Diamante v. Solomon & Solomon, P.C.,* No. 1:99–cv–1339, 2001 WL 1217226, at *6 (N.D.N.Y. Sept. 18, 2001) ("To permit Plaintiff to circumvent [11 U.S.C. § 524] and its remedy by bringing a claim under the FDCPA, which provides for damages and attorneys' fees, would directly contravene the Bankruptcy Code's remedial scheme..... Finally, if the reasoning of the courts finding no preclusion were followed, it would render the Bankruptcy Code's remedy for violations of § 524 superfluous because in most, if not all, cases, the plaintiff would choose the potentially more lucrative remedies found in the FDCPA.")

The Third Circuit has determined that FDCPA claims are not precluded by the Bankruptcy Code so long as there is "no direct conflict between the [Bankruptcy] Code or [Bankruptcy] Rules and the FDCPA...." *Simon v. FIA Card Servs., N.A.,* 732 F.3d 259, 274 (3d Cir.2013); *see also Randolph v. IMBS, Inc.,* 368 F.3d 726, 730 (7th Cir.2004) ("When two federal statutes address the same subject in different ways, the right question is whether one implicitly repeals the other" due to "irreconcilable conflict between the two statutes or a clearly expressed legislative decision that one replace the other."). In *Randolph,* three cases were consolidated on appeal that were factually similar. The factual circumstances the Seventh Circuit used for illustrative purposes involved an unsecured creditor's alleged violation of the automatic stay protecting debtors while the bankruptcy proceeding is open. *Randolph,* 368 F.3d at 728.

Simon also involved an active bankruptcy proceeding. In that case, a law firm sent a debt collection letter and a notice requesting an examination of the debtors pursuant to Federal Rule of Bankruptcy Procedure 2004 regarding unsecured credit card debt. *Id.* at 262. The Simon court undertook a narrow inquiry in order to determine whether any of the FDCPA claims were precluded by the Bankruptcy Code.

Simon, 732 F.3d at 278. While finding several claims were not precluded, the Simon court did conclude that the plaintiff's claims under § 1692e(11) of the FDCPA were precluded because it would be impossible to comply with both § 1692e(11) and Rule 2004 of the Federal Rules of Bankruptcy Procedure because compliance with one would necessarily entail a violation of the other. *Id.* at 280. 15 U.S.C. § 1692e(11) requires a debt collector to include a "mini-*Miranda* " notice in all communications stating that the communication is sent from "a debt collector attempting to collect a debt and that 'any information obtained would be used for that purpose.' " *Id.* Rule 2004 permits a creditor in a bankruptcy proceeding to serve a debtor with a subpoena in order to conduct an examination of the debtor covering a "wide range of topics" as to " 'any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.' " *Id.* at 278 (quoting F.R. Bankr.P.2004(b)). Because the Bankruptcy Code "forbids 'any act to collect, assess, or recover a claim against the debtor that arose before the commencement' of the bankruptcy proceeding[,]" the Simon court ruled that a creditor would violate the automatic stay by including a "mini-Miranda" notice on the Rule 2004 subpoena. *Id.* at 280 (quoting 11 U.S.C. § 362(a)(6)). Thus, the plaintiff's claim under § 1692e(11) was precluded. *Id.*

***6** The court agrees with the *Walls* and *Simmons* courts that **Lovegrove's** allegations stem from a violation of the discharge injunction, and **Lovegrove's** remedy lies with the bankruptcy court's contempt power. Courts across the country, including two courts in the Fourth Circuit, agree that a mortgage servicer like **Ocwen** "has standing to participate in a debtor's bankruptcy case by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *In re Eads,* 417 B.R. 728, 739 n. 12 (Bankr.E.D.Tx.2009) (citing *In re Tainan,* 48 B.R. 250, 252 (Bankr.E.D.Pa.1985; *Bankers Trust (Del.) v. 236 Beltway Inv.,* 865 F.Supp. 1186, 1191 (E.D.Va.1994); *In re O'Dell,* 268 B.R. 607, 618 (N.D.Ala.2001) *aff'd* 305 F.3d 1297, 1302 (11th Cir.2002); *In re Miller,* 320 B.R. 203, 206 n. 2 (Bankr.N.D.Ala.2005); *In re Woodberry,* 383 B.R. 373, 379 (Bankr.D.S.C.2008)). Accordingly, **Ocwen**, as a loan servicer for Bank of America, "is to be considered a creditor" and entitled to the exception to the bankruptcy discharge under § 524(j). *In re Gulley,* 436 B.R. 878, 892 (Bankr.N.D.Tx.2010) (citing *In re Eads,* 417 B.R. at 739). The purpose of the discharge injunction is to protect debtors after bankruptcy, but it does not provide debtors a private right of action. To allow **Lovegrove** to assert a private right of action under the FDCPA for **Ocwen's** actions would circumvent the purpose of the discharge injunction. However, even under the *Simon* court's more narrow inquiry, **Lovegrove's** FDCPA claim fails.

2.

Lovegrove's FDCPA claims arise under 15 U.S.C. §§ 1692f and 1692e(2) and (10). Section 1692f prohibits debt collectors from using any "unfair or unconscionable means to collect or attempt to collect any debt." Section 1692e(2) prohibits a debt collector from making a "false representation of the character, amount, or legal status of any debt," and § 1692e(10) prohibits the "use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a customer."

a.

When a debtor receives a discharge in bankruptcy, the discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...." 11 U.S.C. § 524(a)(2). Certain exceptions to the discharge injunction exist, however, and any act by a secured creditor that "is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien" does not violate the injunction. 11 U.S.C. § 524(j)(3). This is because the bankruptcy discharge does not extinguish a secured creditor's in rem rights as to the debtor's property; the discharge only prohibits an in personam claim against the debtor. *In re Tucker,* 516 B.R. 340, 346 (Bankr.W.D.Va.2014) (citing *Johnson v. Home State Bank,* 501 U.S. 78, 84 (1991)). As such, courts generally agree that a secured creditor may send informational statements to a debtor without violating the discharge injunction so long as the creditor's communications do not demand payment of the debt. *See In re Tucker,* 516 B.R. at 346; *In re Canning,* 706 F.3d 64, 71–72 (1st Cir.2013); *In re Pennington–Thurman,* 499 B.R. 329, 332 (B.A.P. 8th Cir.2013); *In re Mele,* 486 B.R. 546, 557– 58 (Bankr.N.D.Ga.2013); *Anderson v. Bank of Am.,* No. 6:12–cv–00017, 2012 WL 4458474, at *2–4 (W.D.Va. July 11, 2012); *In re Jones,* Bankr.No. 08–05439–AJM–7, Adv. No. 09–50281, 2009 WL 5842122, at *3 (Bankr.S.D.Ind. Nov. 25, 2009).

b.

***7** Under the *Simon* inquiry, a direct conflict exists between the Bankruptcy Code and the FDCPA. First, the Bankruptcy Code does not provide for a private right of action for a violation of the discharge injunction. Rather, the code provides a remedy through the bankruptcy court's civil contempt power. Thus, a debtor who believes a creditor has violated the discharge injunction may move to reopen the bankruptcy proceeding and ask the bankruptcy court to determine whether the injunction was indeed violated. *See Anderson,* 2012 WL 4458474, at *2 (citations omitted).

Second, the Bankruptcy Code and the FDCPA are in conflict because each statute requires a different standard of proof and carries a different scienter requirement, and each provides for a different remedy. Under the Bankruptcy Code, a debtor must show, by clear and convincing evidence, that the creditor violated the discharge injunction and that the violation was willful, or, in other words, "an intentional act with knowledge of the discharge injunction." *Id.* at *3; *In re Tucker,* 526 B.R. 616, 621 (Bankr.W.D.Va.2015) (citing *In re Harlan,* 402 B.R. 703, 715 (Bankr.W.D.Va.2009)). If the discharge injunction was violated, the bankruptcy court may hold the creditor in contempt and order sanctions equal to the debtor's actual damages as well as punitive damages but not damages for "pain and suffering" or " 'emotional distress.' " *In re Tucker,* 526 B.R. at 622 (citing *In re Gecy,* 510 B.R. 510, 524 (Bankr.D.S.C.2014)). The FDCPA, however, is a strict liability statute, the burden of proof is a preponderance of the evidence, and debtors may potentially recover damages for emotional harm. *See Russell v. Absolute Collection Servs., Inc.,* 763 F.3d 385, 389 (4th Cir.2014) (citing *Warren v. Sessoms & Rogers, P.A.,* 676 F.3d 365, 375 (4th Cir.2012)); *Ademiluyi v. PennyMac Mortg. Inv. Trust Holdings I, LLC,* 929 F.Supp.2d 502, 536 (D.Md.2013) (citing *McCollough v. Johnson, Rodenburg & Lauinger, LLC,* 637 F.3d 939, 957–58) (9th Cir.2011)).

Third, the Bankruptcy Code permits a creditor to send informational statements to a post-discharge debtor where the FDCPA's more strict provisions do not. Indeed, § 524(j) explicitly permits a creditor holding "a security interest in real property that is the principal residence of the debtor" to seek "periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien" after the debt is discharged in bankruptcy. Under **Lovegrove's** reading of the FDCPA, such an act would constitute a false representation that a debt exists because the debt was discharged, but **Lovegrove's** argument fails to appreciate that the lien on the house he continues to live in still remains secured and valid after his personal bankruptcy discharge. Such communications from **Ocwen** are thus proper given **Lovegrove's** clear intention to continue living in the house. *In re Mele,* 486 B.R. at 556. Thus, were the FDCPA claim not precluded, a creditor would be forced to choose between exercising its rights under § 524(j) and risking potential liability under the FDCPA or foregoing those rights in order to shield itself from a potential FDCPA claim. In this sense, the Seventh Circuit's decision in *Randolph* and the Third Circuit's decision in *Simon* are distinguishable. Both of those cases involved violations of 11 U.S.C. § 362, the automatic stay, and § 362 contains no similar exception for creditors with a security interest in real property. Indeed, under § 362 even those secured creditors must seek leave of court before they can perform any act to enforce such a lien. 11 U.S.C. § 362(d).

***8** Furthermore, the "mini-*Miranda* " notice required under 15 U.S.C. § 1692e(11) is directly contrary to the purpose of the discharge injunction. The discharge injunction is meant to prevent a creditor from personally collecting a debt from the debtor, and, yet, the FDCPA requires the creditor to inform the debtor that any communication is in connection with collection of a debt. Failure to do so is a violation of § 1692(e). While creditors may attempt to inoculate the "mini-*Miranda* " notice by adding disclaimers such as those appearing on the communications at issue here, that does not remedy this direct conflict between the Bankruptcy Code and the FDCPA. *See Garfield v. **Ocwen** Loan Servicing, LLC,* 526 B.R. 471, 479–80 (W.D.N.Y.2015).

Finally, the fact that many courts recognize loan servicers as creditors in bankruptcy proceedings highlights the conflicts between these provisions even more. The FDCPA applies only to debt collectors, not creditors. While **Ocwen** may have begun servicing the debt after it was in default thus qualifying it as a "debt collector" under the FDCPA, it is still considered a creditor for purposes of the Bankruptcy Code. Thus, **Ocwen** is left in the precarious and baffling quagmire of being subject to two different statutes, one of which expressly permits **Ocwen** to do a certain act that is forbidden by the other.

Accordingly, the court finds that **Lovegrove's** FDCPA claim is precluded by the Bankruptcy Code because the statutes are in irreconcilable conflict. Even if **Lovegrove's** FDCPA claim was not precluded by the Bankruptcy Code, however, **Ocwen**

is entitled to summary judgment because the communications were not in connection with the collection of a debt.

3.

In order to establish a violation of the FDCPA, the plaintiff must have been a "consumer," the defendant must have been a "debt collector," and the defendant must have violated the FDCPA through an act or omission. *Yarney v. Ocwen Loan Servicing, LLC,* 929 F.Supp.2d 569, 574–75 (W.D.Va.2013). Lovegrove is a consumer under the FDCPA because he is "allegedly obligated to pay [a] debt." 15 U.S.C. § 1692a(3). Assuming Ocwen began servicing the debt after it was in default, then Ocwen would qualify as a debt collector under the FDCPA. *Yarney,* 929 F.Supp.2d at 575 (citing *Bridge v. Ocwen Federal Bank, FSB,* 681 F.3d 355, 360 n. 4 (6th Cir.2012)). The issue here is whether Ocwen violated the FDCPA. As noted above, the FDCPA prohibits collecting a debt through false representations or deceptive, unfair, and unconscionable means. *See* 15 U.S.C. §§ 1692e and 1692f. Thus, the FDCPA first requires that the defendant's actions be taken in connection with the collection of a debt. *See Boosahda v. Providence Dane LLC,* 462 F. App'x 331, 333 n. 3 (4th Cir.2012).

To determine if the communications are in connection with the collection of a debt, the court must focus on 'the capacity of the statement to mislead; evidence of actual deception is unnecessary' " because the FDCPA is a strict liability statute. *United States v. Nat'l Fin. Servs., Inc.,* 98 F.3d 131, 139 (4th Cir.1996). In order to determine whether Ocwen's actions violated the FDCPA, the court must assess the communications under the "least sophisticated consumer standard." *Russell,* 763 F.3d at 394. The least sophisticated consumer is, essentially, " 'the single most unsophisticated consumer who exists.' " *Yarney,* 929 F.Supp.2d at 575 (quoting *Gammon v. GC Servs., Ltd. P'ship,* 27 F.3d 1254, 1257 (7th Cir.1994)). However, this standard "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Nat'l Fin. Servs.,* 98 F.3d at 136 (citing *Clomon v. Jackson,* 988 F.2d 1314, 1318 (2d Cir.1993)). Under this analysis, neither the October 5 letters, nor the account statements, were in connection with collection of a debt.

a.

***9** The cases Lovegrove relies on in support of his claim that the communications at issue here were in connection with collection of a debt are unpersuasive.

In *Yarney,* the plaintiff executed a settlement agreement with Wells Fargo Bank under which Wells Fargo accepted the plaintiff's deed in lieu of foreclosure, and the plaintiff agreed to voluntarily dismiss a lawsuit against the bank. Ocwen was the loan servicer for the Wells Fargo mortgage loan. *Yarney,* 929 F.Supp.2d at 572. After executing the settlement agreement and transferring the deed to Wells Fargo, however, the plaintiff continued to receive monthly bills from Ocwen, received "a Notice of Intent to Force Place Insurance," and a bill for the forced place insurance "though Plaintiff no longer owned the property or resided there." *Id.* Wells Fargo admitted notifying Ocwen of the settlement agreement, and Wells Fargo's attorney " 'reminded Ocwen to cease its billing of [the plaintiff]' " after plaintiff's counsel alerted Wells Fargo of the continued billing. *Id.* at 573. In addition, plaintiff's counsel notified Ocwen of the settlement agreement and that plaintiff was represented by counsel. Nevertheless, the plaintiff continued to receive monthly bills and received "numerous phone calls ... from Ocwen representatives, sometimes multiple times per day." *Id.* Later on, Ocwen began to send payoff quotes to the plaintiff's attorney though the plaintiff never requested any payoff quotes. *Id.* The court granted summary judgment for the plaintiff on her claim under § 1692e(2)(A) because after the execution of the settlement agreement Ocwen continued to send monthly bills, sent notices that plaintiff's escrow account would be charged for an insurance policy premium, sent the plaintiff's attorney "unsolicited payoff quotes," and made "repeated phone calls ... seeking to collect payments from [plaintiff]." *Id.* at 578. Here, although Lovegrove has not vacated the house, there are no allegations of any phone calls or payoff quotes that rises to the level of the harassing behavior present in *Yarney.*

Lovegrove also relies on the dissenting opinion from *Ramsay v. Sawyer Property Management of Maryland LLC,* 593 F. App'x 204 (4th Cir.2014), *cert. denied sub nom., Ramsay v. Tapper,* 135 S.Ct. 2838 (June 15, 2015). In that case, a creditor's attorney stamped the "mini-*Miranda* " notice on a state court order directing the plaintiff to appear in court. The plaintiff failed to appear, and the creditor's attorney stamped the same language on a new court order directing the plaintiff to appear for a show cause hearing. The plaintiff again failed

to appear and was held in contempt. *Ramsay,* 593 F. App'x at 205– 06. The plaintiff brought suit alleging that the stamped language on the state court orders violated § 1692e. The district court granted the defendant's motion to dismiss, and the court of appeals affirmed because the "documents plainly stated that they were orders of the court, and set forth both the name of the court and the signature of a judge." *Id.* at 209. Further, "the stamped language did not alter these clear representations that the documents were issued by a court and required compliance with the court's directives.... In fact, the stamped language was consistent with the overall message of the court orders...." *Id.* Finally, the Fourth Circuit rejected the plaintiff's argument that the stamped language was false because the language appeared on the portion of the documents the creditor's attorney was required to complete. *Id.*

***10** Dissenting in part, Judge Gregory felt the plaintiff "plausibly alleged that the stamp was deceptive or misleading to the least sophisticated consumer." *Id.* at 510 (Gregory, J., dissenting in part) (citing *Nat'l Fin. Servs.,* 98 F.3d at 136). Judge Gregory further disagreed with the majority's conclusion that the "mini-*Miranda* " language was not false because the stamped language appeared on a court order, and "a court order is expressly a communication between the court and debtor, directing the debtor to appear or perform some action," not a communication from a debt collector. *Id.* (citing *Black's Law Dictionary* 1123 (7th ed.1999). This dissent is distinguishable, however, as the motion before this court is pursuant to Rule 56 rather than Rule 12. There must be a genuine issue of fact as to whether the statements here were deceptive, false, or misleading, not just a plausible allegation to that effect.

Finally, **Lovegrove** relies on language from a Seventh Circuit opinion in a FDCPA class action suit, *Johnson v. Revenue Management Corp.,* 169 F.3d 1057 (7th Cir.1999), to argue that a question of fact exists as to whether the documents at issue here were attempts to collect a debt. In *Johnson,* another case reviewing a motion to dismiss ruling, collection agencies sent letters containing paraphrased versions of the notice required under 15 U.S.C. § 1692g. Consolidating two class actions involving the same language on appeal, the *Johnson* court noted that "[u]nsophisticated readers may require more explanation than do federal judges; what seems pellucid to a judge, a legally sophisticated reader, may be opaque to someone whose formal education ended after sixth grade. To learn how an unsophisticated reader reacts to a letter, the judge may need to receive evidence." *Id.* at 1060. Again, such language from a court reviewing a complaint at the Rule 12 stage is unpersuasive here especially given that the *Johnson* court went on to explain that "[i]f all the plaintiffs have to go on is the language of these letters, they must lose in the end." *Id.*

b.

Exhibit 1 to **Lovegrove's** response in opposition to the motion for summary judgment is plainly not an attempt to collect a debt. *See* ECF No. 53 at *26–27. The letter is non-threatening, purely informational, makes no mention of any balance due or demand for payment, and its subject matter is entirely limited to "a potential foreclosure sale." *Id.* at *26. As noted above, the discharge may have extinguished **Lovegrove's** personal liability for the debt under the mortgage, but it did nothing to the lien on the Moneta property that secured **Lovegrove's** promise to pay the mortgage loan. *In re Tucker,* 516 B.R. at 346. Foreclosure is an *in rem* action that survives the bankruptcy discharge. *Johnson v. Home State Bank,* 501 U.S. 78, 83 (1991); *In re Collins,* 474 B.R. 317, 320 (Bankr.D.Me.2012). Most importantly, while the letter does contain the "mini-*Miranda* " notice required on all communications from debt collectors, that sentence is followed by clear, unambiguous language in bold and italicized font stating that "if the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt." Even the least sophisticated consumer is presumed to read documents such as this one with care. Accordingly, **Lovegrove's** Exhibit 1 was not in connection with collection of a debt.

***11** **Lovegrove** claims the communications in this document contain false representations therefore triggering FDCPA liability. This assertion, however, fails to appreciate that FDCPA liability hinges on an attempt to collect a debt. If the communication is not an attempt to collect a debt, it is of no consequence for FDCPA purposes that the letter contains a false representation. *See* 15 U.S.C. §§ 1692e and 1692f. Nonetheless, even if this letter were an attempt to collect a debt, which plainly by its own terms it is not, the court does not find this document contains any false or misleading representations.

According to **Lovegrove**, the "Consequences of Foreclosure" section contains three false or misleading statements: (1) "a foreclosure on your credit record will

damage your credit rating and may impair your ability to get credit in the future"; (2) "after foreclosure, if the proceeds from the sale of your property were less than the amount you owe the lender, you may, under certain circumstances, be liable for that difference"; and (3) "if you do not pay the lender the deficiency liability as explained above ... the IRS may consider the unpaid debt to be part of your taxable income." ECF No. 53 at *27. **Lovegrove** believes these statements are false or misleading because after receiving a Chapter 7 discharge of his personal liability as to the Bank of America loan, he would not be subject to any negative credit reporting, deficiency liability, or tax ramifications after a foreclosure sale of the Moneta property. Where **Lovegrove's** argument falters is his attempt to insert a subjective inquiry into the FDCPA analysis. It is not the subjective understanding of the plaintiff that plays any role in this analysis, rather it is the unsophisticated but reasonable consumer which "prevents liability for bizarre or idiosyncratic interpretations of collection notices by preserving a quotient of reasonableness and presuming a basic level of understanding and willingness to read with care." *Nat'l Fin. Servs.,* 98 F.3d at 136. Furthermore, none of these statements are objectively false. A foreclosure on a credit report does negatively impact an individual's credit score and his or her ability to obtain credit. Neither are the statements regarding any potential deficiency liability and tax ramifications objectively false. Additionally, both the deficiency liability and the tax ramifications disclaimers contain the word "may." They do not say the reader "will" be liable for any deficiency or taxable income. These statements plainly are not false or misleading.[2]

In summary, the court finds that this letter is not an attempt to collect a debt, and, in addition, it does not contain any false or misleading statements. Because FDCPA claims cannot rest on a plaintiff's subjective, idiosyncratic interpretation of the statements in a letter from a debt collector, **Lovegrove's** FDCPA claim as to these statements fails.

c.

***12** **Ocwen's** other communications with **Lovegrove** were not in connection with collection of a debt as well. **Ocwen's** Exhibit A, ECF No. 50–2 at *2–3, informs **Lovegrove** that **Ocwen** is the new servicer of the mortgage loan. While it does provide a "Total Due" amount in the body of the letter, the letter makes no demand for payment. *Id.* at *2. Further, at the bottom of the page, in bold and italicized font, the letter states: "[I]f the debt is in active bankruptcy or has been discharged through bankruptcy, this communication is not intended as and does not constitute an attempt to collect a debt." *Id.* The letter also provides **Lovegrove** with instructions on how to dispute the validity of the debt by submitting notice of the dispute in writing. Finally, the information provided in this letter fits the definition of the "validation notice" required under 15 U.S.C. § 1692g. As such, this statement as a whole does not represent an attempt to collect a debt.

Likewise, the monthly account statements and escrow statements are not attempts to collect a debt. *See* ECF No. 50–3 at *2–19; ECF No. 53 at *32–38. The account statements do provide information regarding the "Total Amount Due" as well as a payment coupon. However, the statements also contain a section in the middle of the statement titled "Important Messages" in bold font and enclosed by a box. That section of the statement contains the following two messages:

> If you are currently in bankruptcy or if you have filed for bankruptcy since obtaining this loan, please read the bankruptcy information provided on the back of this statement.
>
> Our records indicate that your loan is in foreclosure. Accordingly, this statement may be for informational purposes only. Payments received are to be applied in accordance with your mortgage note. Payments will be first applied to bring your loan contractually current. Any additional funds received will be applied to outstanding fees and advances prior to being applied to principal.

Id. at *2. On the back of the statement, under the section titled "IMPORTANT BANKRUPTCY INFORMATION," the statement reads:

> If you or your account are subject to pending bankruptcy or the obligation referenced in this statement has been discharged in bankruptcy, this statement is for informational purposes only and is not an attempt to collect a debt. If you have any questions regarding this statement, or do not want **Ocwen** to send you monthly statements in the future, please contact us at 1–888–554–6599.

Id. at *3. Given the disclaimers in the "Important Messages" and "IMPORTANT BANKRUPCTY INFORMATION" sections of the account statements, these statements are not in connection with collection of a debt. See Anderson, 2012 WL 4458474, at *4; *In re Mele,* 486 B.R. at 557–58.[3] There is no evidence, much less an allegation, that Lovegrove even called Ocwen at the number provided on the statement to request Ocwen stop sending him monthly statements. *Id.* The escrow documents list the "Total Shortage" on one page but there is no demand for payment or any other similar language such as a payment due date or "payment past due." The documents also contain the same disclaimer at the bottom of each page that if the debt is in active bankruptcy, the letter is not an attempt to collect a debt.

***13** All of these communications were informational and non-threatening in nature and contained disclaimers that if the debt was in bankruptcy the communications were not an attempt to collect a debt. This is not a case where a creditor harassed the debtor or tried to pressure the debtor into making payments through multiple phone calls or threats. Nor is this a case where the debtor signed a modification agreement or turned over the deed to the property and the creditor continued to demand payments. Indeed, Lovegrove has not even alleged that there were any other communications from Ocwen other than these letters and account statements. All of the documents contained clear disclaimers that if the subject debt had been discharged in bankruptcy that the communication was not an attempt to collect a debt. Because even the least sophisticated consumer is expected to read these communications with care, none of the communications Ocwen sent to Lovegrove were in connection with collection of a debt. Further, none of the documents contained any objectively false or misleading representations. As such, the court finds no genuine issue of material fact as to the FDCPA claim, and Ocwen is entitled to summary judgment on Count One.

B.

In Count Two of the Amended Complaint, Lovegrove claims Ocwen violated the FCRA by providing inaccurate or false information to the CRAs when it had reasonable cause to believe the information was inaccurate. Ocwen asserts summary judgment is proper as to Count Two because it had no duty under the FCRA until Lovegrove notified a CRA of a dispute with Ocwen's reporting. When Lovegrove did notify a CRA, Ocwen remedied the dispute immediately.

15 U.S.C. § 1681s–2 prohibits a person from providing inaccurate information "relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate." 15 U.S.C. § 1681s–2(a)(1)(A). A person has "reasonable cause to believe that the information is inaccurate" if the person has "specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information." 15 U.S.C. § 1681–s2(a)(1)(D). The statute further requires those who "regularly and in the ordinary course of business furnish [ ] information to one or more consumer reporting agencies" to correct and update information provided to consumer reporting agencies so that the information is "complete and accurate." 15 U.S.C. § 1681s–2(a)(2).

There is no private right of action under § 1681s–2(a). 15 U.S.C. § 1681s–2(c); *Saunders v. Branch Banking & Trust Co.,* 526 F.3d 142, 149 (4th Cir.2008). A private right of action does exist under § 1681s–2(b) which requires a "creditor who has been notified by a CRA that a consumer has disputed information furnished by that creditor" to investigate the dispute, " 'report the results of the investigation to the consumer reporting agency,' " and, if any information was inaccurate, report the results of the investigation to the other consumer reporting agencies. *Johnson v. MBNA Am. Bank,* NA, 357 F3d 426, 429–30 (4th Cir.2004) (quoting 15 U.S.C. § 1681s–2(b)). In order to maintain an action under § 1681s–2(b), the consumer must notify "a CRA that he disputes the accuracy of an item in his file...." *Saunders,* 526 F.3d at 148; *Brown v. Wal–Mart Stores, Inc.,* 507 F. App'x 543, 547 (6th Cir.2012); *Gorman v. Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1154 (9th Cir.2009).

1.

***14** Lovegrove wrote to the CRAs on two occasions. On April 3, 2014, Lovegrove wrote that "Bank of America has mistakenly reported to you that I owe a mortgage debt that was not discharged in my bankruptcy. Therefore, remove any information regarding the Bank of America mortgage...." ECF No. 50–8 at *2. The letter makes no mention that Ocwen was mistakenly reporting any information to the CRAs. The

only reference to Ocwen in the letter is that they were allegedly sent a copy. On June 25, 2014, Lovegrove again wrote to the CRAs, but this time he claimed Ocwen had "mistakenly reported to you that I owe a mortgage debt that was not discharged in ... bankruptcy." *Id.* at *5. Ocwen received notice of the dispute from Experian on July 21 and "sent a Universal Data Form to all [CRAs] to which it reports removing any reporting as to Mr. Lovegrove's discharged mortgage debt." ECF No. 50–1 at *2–3. Because Lovegrove cannot maintain a cause of action under the FCRA based on his disputes sent directly to Ocwen, there is no genuine issue of material fact that Ocwen complied with its duties under 15 U.S.C. § 1681s–2(b).

2.

In his reply to Ocwen's motion for summary judgment, Lovegrove argued that Ocwen violated the FDCPA through its alleged inaccurate reporting to the CRAs under 15 U.S.C. § 1692e(8) and 15 U.S.C. § 1692c(b). None of Lovegrove's allegations in Count One of the Amended Complaint, the FDCPA claim, make any reference to Ocwen's reporting of his debt. Likewise, none of the allegations in Count Two of the Amended Complaint, the FCRA claim, incorporate the FDCPA. A plaintiff cannot rely on a response to a motion for summary judgment as an amendment to correct deficiencies in a complaint challenged by a defendant's motion for summary judgment. *See Wahi v. Charleston Area Med. Ctr., Inc.,* 562 F.3d 599, 617 (4th Cir.2009) (citing *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.,* 262 F. App'x 556, 563 (4th Cir.2008)). However, Lovegrove's counsel represented during oral argument that he made Ocwen aware of these claims through answers to interrogatories during discovery. *See* ECF No. 50–7 at *3–4. Thus, the court will address Lovegrove's inaccurate reporting claims under the FDCPA.

This claim fails on two grounds. As noted above, Lovegrove's claim under §§ 1692c(b) and 1692e(8) is precluded by the Bankruptcy Code. *See also Garfield,* 526 B.R. at 480. In addition, for the reasons stated below, this claim is time-barred.

a.

15 U.S.C. § 1692c(b) prohibits debt collectors from communicating with a consumer reporting agency in connection with the collection of a debt unless it is otherwise permitted by law. 15 U.S.C. § 1692e(8) prohibits debt collectors from "[c]ommunicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed." As a threshold issue, FDCPA claims must be brought "within one year from the date on which the violation occurs." 15 U.S.C. § 1692k.[4]

***15** Generally, an action under the FDCPA accrues "when a communication violating the FDCPA is sent." *Akalwadi v. Risk Mgmt. Alts., Inc.,* 336 F.Supp.2d 492, 501 (D.Md.2004) (citing *Peoples v. Wendover Funding,* 179 F.R.D. 492, 499 (D.Md.1998)). Courts across the country have grappled over whether the FDCPA encompasses continuing, or serial, violations of the same type or whether the action commences from the date of the first violation. *See Bey v. Shapiro Brown & Alt, LLP,* 997 F.Supp.2d 310, 316–17 (D.Md.2014) (collecting cases both agreeing and disagreeing with the continuing violation theory). The *Bey* court determined that "[d]eclining to restart the statute of limitations for related subsequent communications is consistent with the statutory text, Fourth Circuit precedent, and even the legislative history" of the FDCPA. *Id.* at 317.

In *Akalwadi,* the plaintiff obtained a credit report in October 2000 and realized it contained inaccurate debt information. In July 2002, the plaintiff obtained another credit report containing the same inaccurate information even though he had disputed the information with the creditor in May 2002. The court determined that the plaintiff's FDCPA claim based on the October 2000 credit report was time-barred because the complaint was filed in November 2002. The statute of limitations defense failed as to the plaintiff's FDCPA claim based on the July 2002 report. *Akalwadi,* 336 F.Supp.2d at 501.

In *Wilhelm v. Credico, Inc.,* 455 F.Supp.2d 1006 (D.N.D.2006), the plaintiff sued two separate debt collectors for allegedly violating 15 U.S.C. § 1692e(8). In 2003, one of the defendants, Credico Inc., mailed a letter to the plaintiff informing him of its intention to sue on an outstanding debt owned by the other defendant in that case, Pinnacle Credit Services. The plaintiff sent a letter to Credico disputing the debt and then filed suit against Credico and Pinnacle in 2005. The plaintiff's credit reports from 2004 listed the Pinnacle debt but did not indicate that the debt was disputed. Pinnacle claimed that Credico did not report to Pinnacle that the debt was disputed, and even if Credico had reported the debt as

disputed, the plaintiff's claim was untimely. Pinnacle argued that the suit was time-barred because it was filed almost two years after Pinnacle " 'knew or should have known' " the debt was disputed. *Wilhelm,* 455 F.Supp.2d at 1009. The plaintiff claimed the last violation occurred as late as March 2005 and that date should be used for statute of limitations purposes. The district court granted Pinnacle's motion for summary judgment and found that the plaintiff's claim under 15 U.S.C. § 1698e(8) accrued when the plaintiff first disputed the debt with Credico. *Id.* at 1009–10. The Eighth Circuit affirmed because there was "no evidence that these [credit] reports were made after Pinnacle learned of the dispute in mid-December [2003]. In any event, a claim based upon Pinnacle reports in December 2003 is clearly time-barred, and [the plaintiff] conceded at oral argument he presented no evidence that Pinnacle communicated any credit information about [the plaintiff] to any person within the one-year limitations period." *Wilhelm v.. Credico, Inc.,* 519 F.3d 416, 418 (8th Cir.2008).

***16** The Sixth Circuit Court of Appeals addressed similar claims as those raised here in *Purnell v. Arrow Financial Services, LLC,* 303 F. App'x 297 (6th Cir. Dec. 16, 2008) (per curiam). In that case, the plaintiff alleged FDCPA claims based on the defendant creditor's reporting of a disputed debt to Equifax. The defendant in that case, Arrow, sent automatic monthly reports to Equifax. The plaintiff disputed the debt owed to Arrow in 2001, and Arrow reported the debt to Equifax as disputed until June 2004 when the "dispute marker" stopped appearing in Arrow's reports to Equifax. The plaintiff filed suit in September 2005, and Arrow raised the statute of limitations as a defense. The district court dismissed the plaintiff's claims as to Arrow's reporting prior to September 1, 2004, but allowed the claims based on Arrow's reporting after September 1, 2004 to proceed. On appeal, the Sixth Circuit considered Arrow's monthly reports to Equifax as "discrete violations" of the FDCPA. Thus, the court concluded that any monthly reports to Equifax prior to September 1, 2004 were discrete violations barred by the statute of limitations, but any reports that violated the FDCPA and occurred within the limitations period were not time-barred. *Purnell,* 303 F. App'x at 303.

b.

When asked about a letter he wrote to **Ocwen** in November 2012, **Lovegrove** testified during his deposition that "I believe that right after **Ocwen** took over the note and then it showed up on my credit report, I wrote to [**Ocwen**] immediately and ... the agencies." **Lovegrove** Dep., at 37:6–13. Thus, **Lovegrove** himself was aware that **Ocwen** was reporting the debt, and **Ocwen** "knew or should have known" at least as early as November 2012 that **Lovegrove** disputed the debt. Under the *Bey* case and the cases it followed, November 2012 would be " 'the date of the first violation, and subsequent violations of the same type do not restart the limitations period.' " *Bey,* 997 F.Supp.2d at 316 (quoting *McGhee v. JP Morgan Chase Bank, N.A.,* No. DKC–12–3072, 2013 WL 4495797, at *7 n. 10 (D.Md. Aug. 20, 2013)); *see also Martin v. Sessoms & Rogers, P.A.,* No. 5:09–cv480–D, 2010 WL 3200015, at *3–4 (E.D.N.C. Aug. 12, 2010). **Lovegrove** filed suit in June 2014, more than one year after disputing the debt. As such, under the single violation theory, his claim regarding **Ocwen's** continued reporting of that debt is barred.

However, even if the court were to adopt the discrete violations theory from *Purnell,* **Lovegrove's** claim under § 1692e(8) is still time-barred because there is no dispute that **Ocwen** did not report or update any information to the CRAs after May 31, 2013. Exhibit C attached to **Ocwen's** supplement brief in support of its summary judgment motion is a Transunion credit report dated May 10, 2014. ECF No. 68–4. Under the **Ocwen** tagline, the "date updated" provides May 31, 2013 as the last date information was received from **Ocwen**.[5] *Id.* at *6. Exhibit 8 to **Lovegrove's** deposition is an Experian credit report from April 22, 2014. According to the **Ocwen** tradeline on that report, the status is "as of May 2013," and there is no indication that **Ocwen** provided any information regarding the debt after May 2013. The facts here are distinguishable from those in *Purnell.* Unlike in *Purnell,* there are no indications here that **Ocwen** provided automatic monthly reports to the CRAs. Rather, the credit reports all show the last date the **Ocwen** information was updated as May 2013. Thus, even under the discrete violations theory, there were no other reports made by **Ocwen** after May 31, 2013, and, therefore, **Lovegrove's** claims are time-barred because he filed this suit on June 30, 2014, more than one year after **Ocwen's** last report to the CRAs. Nor is this case like *Akalwadi* because

Footnotes

there is no evidence in the record that **Ocwen** provided any information to the CRAs within the one-year period before **Lovegrove** filed suit, and **Lovegrove** admits that he was aware of the inaccurate reporting as early as November 2012

and wrote to Ocwen again on June 15, 2013 about the inaccurate reporting. *See* ECF No. 50–6 at *9; ECF No. 53 at *40.[6] Indeed, just as in *Wilhelm,* there is no evidence here that Ocwen communicated any information to the CRAs within the one-year statute of limitations period. *See Wilhelm,* 519 F.3d at 418. This is simply not a case where the plaintiff was caught unaware of inaccurate information being reported on his credit report.

***17** Thus, Lovegrove cannot maintain a private right of action under 1681s–2(a), there is no genuine issue of material fact that Ocwen fully complied with its obligations under § 1681s–2(b), and Lovegrove's claim under § 1692(e)(8) is barred by the statute of limitations. Accordingly, Ocwen is entitled to summary judgment on Count Two.

IV.

In conclusion, Lovegrove's claims under the FDCPA fail, and there is no evidence from which a reasonable juror could conclude that Ocwen did not fulfill its obligations under the FCRA. As such, Ocwen's Motion for Summary Judgment, ECF No. 49, is **GRANTED,** and this case will be dismissed.

An appropriate Order will be entered this day.

The Clerk is directed to send copies of this Memorandum Opinion to counsel of record.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5042913

1 Ocwen has not waived any argument that the Bankrupcty Code precludes Lovegrove's claim under the FDCPA. While "preemption" is considered an affirmative defense, it only applies to conflicts between a state law and federal law, not a potential conflict between two federal laws. *Norfolk S. Ry. Co. v. City of Alexandria,* 608 F.3d 150, 156 (4th Cir.2010).

2 Even if FDCPA claims did provide for some sort of subjective inquiry as to the truth of any of these statements, the fact that the deficiency liability and tax ramification statements contain the word "may" is dispositive here because these statements do not indicate that Lovegrove "will" be responsible for any potential deficiency and resulting tax liability.

3 While *Anderson* and *Mele* were cases involving alleged violations of a bankruptcy discharge injunction, both courts were tasked with deciding whether the creditor's communications were an attempt to collect on a debt.

4 The FCRA carries a two-year statute of limitations. 15 U.S.C. § 1681p.

5 TransUnion provides a "Credit Report Explanation" interactive PDF on its website. That document explains that the "Date Updated" field "represents the last time the account information was updated/reported by the data furnisher." Credit Report Explanation, 4, http://www.t ransunion.com/docs/rev/personal/Credit—Report—Explanations—Interactive —2014–10–02.pdf (last visited August 18, 2015).

6 Lovegrove's May 2014 letter to Ocwen would not provide another starting point for the statute of limitations either because there is no evidence Ocwen provided any information to the CRAs after May 31, 2013.

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2016 WL 7404679
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

In the Matter of: Delta Produce, L.P.;
Staci Properties, Limited, Debtors
Kingdom Fresh Produce, Incorporated; I.
Kunik Company, Incorporated; Five Brothers
Jalisco Produce Company, Incorporated,
doing business as Bonanza 2001; Rio Bravo
Produce, Limited Company, L.L.C.; G.R. Produce,
Incorporated, Appellees Cross-Appellants
v.
Stokes Law Office, L.L.P., Appellant Cross-Appellee
In the Matter of: Delta Produce, L.P.;
Superior Tomato-Avocado, Limited; Atled,
Limited; Staci Properties, Limited, Debtors
Kingdom Fresh Produce, Incorporated; I.
Kunik Company, Incorporated; Five Brothers
Jalisco Produce Company, Incorporated,
doing business as 300Bonanza 2001; Rio
Bravo Produce, Limited Company, L.L.C.;
G.R. Produce, Incorporated, Appellees
v.
Stokes Law Office, L.L.P., Appellant

No. 14-51079
|
Consolidated with 14-51080
|
Filed December 21, 2016

Appeals from the United States District Court for the Western District of Texas, David A. Ezra, U.S. District Judge

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Before REAVLEY, PRADO, and COSTA, Circuit Judges.

Opinion

GREGG COSTA, Circuit Judge:

***1** The prior opinion is withdrawn and the following is substituted to clarify in response to the final argument made in Appellees Cross-Appellants' petition for panel rehearing. The motion is denied otherwise.

This attorney's fee dispute has its roots in the Perishable Agricultural Commodities Act (PACA), a Depression-era statute designed to protect sellers of perishable produce from delinquent purchasers. Two such purchasers filed for bankruptcy and the bankruptcy court appointed special counsel to collect and disburse funds to PACA-protected sellers that had claims against the purchasers-turneddebtors. When special counsel sought approval of his fees and expenses, which would be paid out of the PACA fund, some sellers objected and appealed the bankruptcy court's fee award to the district court, which vacated it. Now that this same chain of events—fee awards, objections, appeals, and vacaturs—has occurred twice more, this case is ripe for decision. The question is: can special counsel's fees and expenses be disbursed from the PACA fund?

I

A

We begin with some background on PACA.

The short lifespan of produce makes it a risky business. It has been described as an industry "engaged almost exclusively in interstate commerce, which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." *See* H.R. Rep. No. 84-1196 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3699, 3701. Sellers "must entrust their products to a buyer who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing." *Golman–Hayden Co. v. Fresh Source Prod. Inc.*, 217 F.3d 348, 351 (5th Cir. 2000); *see also Endico Potatoes, Inc. v. CIT Grp./Factoring, Inc.*, 67 F.3d 1063, 1067 (2d Cir. 1995) ("[D]ue to the need to sell perishable commodities quickly, sellers of perishable commodities are often placed in the position of being unsecured creditors of companies whose creditworthiness the seller is unable to verify."). Congress

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thus enacted PACA in 1930 to regulate and "promote fair dealing in the sale of fruits and vegetables," *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 413 (5th Cir. 2003) (internal citation and quotation marks omitted), in part by making it a violation of federal law for buyers of perishable commodities to "fail ... [to] make full payment promptly" to sellers. 7 U.S.C. § 499b(4).

In 1984, Congress strengthened the protections of the Act by requiring buyers—often brokers that purchase the produce from farmers and then sell it to grocery stores or restaurants—to hold either the produce or all proceeds or accounts receivable from a subsequent sale of the produce in trust for the benefit of unpaid suppliers until "full payment of the sums owing in connection with such transactions has been received by" the supplier. *See id.* § 499e(c)(2). These amendments were modeled after the statutory trust provisions that Congress added to the Packers and Stockyards Act in 1976, 7 U.S.C. §§ 196–197, so courts have often looked to those "parallel" provisions when interpreting PACA's trust provisions. *See In re Monterey House, Inc.*, 71 B.R. 244, 246 (Bankr. S.D. Tex. 1986); *In re Fresh Approach, Inc.*, 51 B.R. 412, 419–20 (Bankr. N.D. Tex. 1985); *see also Consumers Produce Co. v. Volante Wholesale Produce, Inc.*, 16 F.3d 1374, 1382 n.5 (3rd Cir. 1994).

***2** As intended by Congress, which was concerned that suppliers of produce were typically unsecured creditors who lost out when purchasers gave banks a security interest in their accounts receivable,[1] the PACA trust has had a significant effect in bankruptcy. *See In re Lombardo Fruit & Produce Co.*, 12 F.3d 806, 808–09 (8th Cir. 1993). Although buyers hold legal title to the assets in this "nonsegregated 'floating' trust in favor of unpaid sellers," *Bocchi Americas Assocs. Inc. v. Commerce Fresh Mktg. Inc.*, 515 F.3d 383, 388 (5th Cir. 2008), "the seller retains an equitable interest in the trust assets pending full payment." *C.H. Robinson Co. v. Alanco Corp.*, 239 F.3d 483, 487 (2d Cir. 2001). The trust assets are thus insulated from the buyer's bankruptcy estate.

See 11 U.S.C. § 541(d) ("Property in which the debtor holds, as of the commencement of the case, *only legal title and not an equitable interest*, ... becomes property of the estate ... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." (emphasis added)). Sellers therefore have a " 'superpriority' right that trumps the rights of the buyer's other secured and unsecured creditors." *Bocchi*, 515 F.3d at 388; *see also Golman–Hayden*, 217 F.3d at 351 ("We have recognized that PACA is a 'tough law.' ... An investor in a perishable commodities corporation 'should know at the beginning of his association with such a corporation that he is "buying into" a corporation which is strictly regulated by the federal government through PACA.' " (internal citations omitted)). To the extent PACA funds are insufficient to pay each seller in full, the assets are shared pro rata. *See Golman–Hayden*, 217 F.3d at 349.

The Ninth Circuit has provided a useful illustration of how this works:

> Farmer sells oranges on credit to Broker. Broker turns around and sells the oranges on credit to Supermarket, generating an account receivable from Supermarket. Broker then obtains a loan from Bank and grants Bank a security interest in the account receivable to secure the loan. Broker goes bankrupt. Under PACA, Broker is required to hold the receivable in trust for Farmer until Farmer was paid in full; use of the receivable as collateral was a breach of the trust. Therefore, Farmer's rights in the Supermarket receivable are superior to Bank's. In fact, as a trust asset, the Supermarket receivable is not even part of the bankruptcy estate.

Boulder Fruit Express & Heger Organic Farm Sales v. Transportation Factoring, Inc., 251 F.3d 1268, 1271 (9th Cir. 2001).

B

It is within this statutory framework that this litigation arose in late 2011 when various unpaid sellers of perishable produce sued Delta Produce, L.P. and Superior Tomato-Avocado—San Antonio-area "repackers" that purchased produce from farmers that they then sold to grocers—and Delta's individual owner in district court for claims arising under PACA. On January 3, 2012, Delta and Superior filed a voluntary petition for chapter 11 bankruptcy. The two cases were consolidated, with the PACA case being referred to

bankruptcy court. The PACA creditors that had filed suit in district court explicitly consented to the reference. The remaining PACA claimants filed their claims directly in the bankruptcy court.

Soon thereafter, the debtors, Craig Stokes—an attorney who had previously represented the debtors—and various PACA claimants moved to appoint Stokes as "Special PACA Counsel." A week before filing the motion, one of the PACA claimants emailed a draft of the motion to the other claimants, seeking any comments because "there would probably be a shortened amount of notice to respond" once the motion was filed. The email explained that Stokes "has the working relationship with the Debtor, and it is in the Debtors' and its principal's interest to maximize collections for the trust, so there is no conflict of interest." Although the record reflects that Kingdom Fresh's attorney responded with some "major concerns," none specifically dealt with the issue it raises now about the propriety of paying Stokes with trust funds. The motion was filed on January 19, a hearing was held five days later, and the order—which established a deadline to file claims, laid out the procedure for administering those claims, and appointed Stokes as "Special PACA Counsel"—issued the following day.

***3** As Special PACA Counsel, Stokes was deputized to "take those steps reasonably necessary to preserve and collect the PACA trust assets ... and to facilitate the distribution of the collected PACA trust assets." The order also provided for Special PACA Counsel's "fees and costs" at a rate of $350 an hour. Those fees and costs would be paid from the PACA trust funds.

In addition to being appointed as Special PACA Counsel, the debtors also moved to appoint Stokes as debtors' "PACA litigation counsel" pursuant to 11 U.S.C. § 327(e).[2] In an affidavit attached to the section 327(e) motion, Stokes attested that he held a $33,000 retainer from debtors as of the commencement of the case, and agreed to be paid $350 an hour for his section 327(e) services, except that any payment from chapter 11 or PACA trust assets "would require Court approval under the Bankruptcy Code." No one objected, and the court granted the motion requesting this alternative basis for Stokes's role.

As Special PACA Counsel, Stokes collected and liquidated the debtors' assets that were properly part of the PACA trust; reviewed and evaluated the PACA creditors' claims; filed objections to claims and resolved disputes among claimants; collected accounts receivable; and disbursed PACA funds to claimants. During the more than two years that Stokes acted as Special PACA Counsel, he collected over $4 million in PACA assets.

We have now arrived at the rulings that are the subject of this appeal. During the pendency of the PACA litigation, Stokes filed three fee applications: two interim applications for $95,978 plus $2,492.97 in expenses, and $62,807, respectively, and a third and final fee application for $206,371 plus $15,911.02 in expenses, which included $74,526 for a successful mediation. Kingdom Fresh and four other claimants[3] (hereafter "Kingdom Fresh") objected to all three applications, arguing that the bankruptcy court lacked jurisdiction to disburse PACA trust assets that are not part of the bankruptcy estate and that Stokes could not be paid out of the PACA trust but was instead limited to recovering from the debtor's estate.

At the hearing on the first application, the bankruptcy court concluded that it had proper jurisdiction over the PACA claims. The bankruptcy court, relying on the order appointing Stokes, awarded Stokes fees. Kingdom Fresh appealed to the district court.

With that first appeal pending, Stokes filed his second interim fee application. Kingdom Fresh again objected, reiterating its concerns. When the bankruptcy court again approved Stokes's fees, Kingdom Fresh again appealed. Both appeals were consolidated.

In reviewing both interim applications, the district court agreed that the bankruptcy court had proper jurisdiction over the PACA trust but vacated the fee awards. *Kingdom Fresh Produce v. Bexar Cty. (In re Delta Produce, LP)*, 498 B.R. 731 (W.D. Tex. 2013). With respect to the fees, the district court relied on the language of the statute and

C.H. Robinson Co. v. Alanco Corp., 239 F.3d 483 (2d Cir. 2001), to hold that because Stokes "[e]ssentially ... acted as a trustee for the PACA trust," he was not entitled to attorney's fees paid out of the trust unless and until the trust beneficiaries were paid in full. *Id.* at 745. In its view, the award of any fees "before PACA trust beneficiaries receive full payment would directly violate the language of PACA and its regulations." *Id.* at 746.

***4** While that first appeal to the district court was still pending, Stokes filed his third and final fee application. Kingdom Fresh objected for the same reasons but also argued that Stokes labored under a conflict of interest. Before the bankruptcy court held a hearing on the third application, the district court issued its ruling vacating the first and second fee applications. The bankruptcy court nevertheless again found in Stokes's favor and approved his final request. It found that a number of PACA claimants—not including Kingdom Fresh— waived their objections to Stokes's fee applications by signing a consent form and thus Kingdom Fresh could not object to the portion of Stokes's fee associated with those consenting PACA claimants. That portion of the fee was thus disbursed to Stokes, but the bankruptcy court stayed the portion of the fee allocable to Kingdom Fresh —$14,518.20 in fees and $1,135.24 in expenses—pending appeal.

Again Kingdom Fresh appealed and again the district court vacated the bankruptcy court's opinion, reiterating the reasoning from its earlier orders that PACA beneficiaries are entitled to "full payment" before any others—including Special PACA Counsel—can be paid from the PACA trust assets. *See Kingdom Fresh Produce v. Bexar Cty. (In re Delta Produce, LP)*, 521 B.R. 576, 583 (W.D. Tex. 2014). The district court also clarified that Stokes had other avenues for compensation: "(1) he can seek payment from the buyer/debtor, or (2) he can seek payment from the PACA trust but *only after all PACA beneficiaries have received full payment*." *Id.* at 593 (emphasis in original). Given its fee finding, the district court declined to decide whether Stokes labored under a conflict of interest. *Id.* at 599. Stokes appeals both of the district court's orders, which have been consolidated, and Kingdom Fresh cross appeals on the conflict of interest issue.

II

Before turning to the merits of this fee dispute, we address two jurisdictional questions: (1) whether in light of *Stern v. Marshall*, 564 U.S. 462, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), the bankruptcy court had jurisdiction over the PACA case that was transferred from the district court, and (2) if so, whether the district court had appellate jurisdiction over the two interim fee applications.

A

Although the bankruptcy court raised the issue of its authority to resolve PACA claims, neither party raises it here. We nonetheless have an obligation to address a jurisdictional question like this one. In *Stern*, the Supreme Court held that although the bankruptcy court had statutory authority to enter final judgment on a state law counterclaim, it lacked constitutional authority to do so. 131 S.Ct. at 2620. It explained that "Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or in admiralty." *Id.* at 2609 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284, 15 L.Ed. 372 (1856)). To determine whether a bankruptcy court has the constitutional authority to decide a claim, the question is not whether "a proceeding may have *some* bearing on a bankruptcy case," but rather "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id.* at 2618 (emphasis in original).

Stern's impact on what has been a common practice—litigating PACA claims in bankruptcy court—presents a difficult question. To be sure, PACA's trust provisions have a direct and significant effect on bankruptcy by creating "superpriority" status for sellers of produce. Yet the effect of these provisions is that trust assets are "not even part of the bankruptcy estate." *Boulder Fruit Express & Heger Organic Farm Sales*, 251 F.3d at 1271. PACA claims can be and are litigated outside of bankruptcy. *See, e.g.*, *Bocchi Americas*, 515 F.3d at 383 (case involving PACA trust claims litigated in district court). Although the source of a PACA claim is federal statutory law rather than state common law, what was true of the counterclaim in *Stern* is also true of PACA claims—they "exist[ ] without regard to any bankruptcy proceeding." *Stern*, 131 S.Ct. at 2618.

***5** But we need not resolve doubts about the bankruptcy court's constitutional authority to adjudicate PACA claims because there was consent for it to act. The Supreme Court recently held that "allowing bankruptcy litigants to waive the right to Article III adjudication of *Stern* claims does not usurp the constitutional prerogatives of Article III courts." *Wellness Int'l Network, Ltd. v. Sharif*, ––– U.S. ––––, 135 S.Ct. 1932, 1944–46, 191 L.Ed.2d 911 (2015). Such consent may be implied, so long as " 'the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the nonArticle III adjudicator." *Id.* at 1948 (quoting *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003)).

The original PACA claimants that filed in federal district court consented to adjudication of their claims, which necessarily implicated the entire PACA trust, in bankruptcy court. Claimants like Kingdom Fresh later filed PACA claims in this proceeding in which the docket sheet put them on notice that the original filers had consented to bankruptcy court adjudication. They raised no constitutional objection when joining the case. This consent—express from some parties and implied from others—thus vested the bankruptcy court with jurisdiction to preside over the PACA claims even if doing so posed a *Stern* problem. *See Wellness Int'l Network, Ltd. v. Sharif*, 617 Fed.Appx. 589 (7th Cir. 2015) (holding on remand from the Supreme Court that appellant had forfeited a *Stern* claim when he did not raise it until his reply brief in the district court appeal of the bankruptcy order he was challenging).

B

The scope of the bankruptcy court's constitutional authority to adjudicate the PACA claims is not the only jurisdictional issue in this case. Stokes asserts that the district court lacked appellate jurisdiction to review the bankruptcy court's two interim fee awards because they were not final orders. We agree.

"Virtually all decisions agree that the concept of finality applied to appeals in bankruptcy is broader and more flexible than the concept applied in ordinary civil litigation." 16 Charles Alan Wright & Arthur R. Miller, FED. PRAC. & PROC. § 3926.2 (3d ed.). This circuit has expressly rejected a "rigid rule of finality" in bankruptcy appeals and instead views finality "in a practical, less technical light." *ASARCO, Inc. v. Elliott Management (In re ASARCO, L.L.C.)*, 650 F.3d 593, 600 (5th Cir. 2011) (citation omitted). A "case need not be appealed as a 'single judicial unit' at the end of the entire bankruptcy proceeding, but the order must constitute a 'final determination of the rights of the parties to secure the relief they seek in this suit,' or the order must dispose of a discrete dispute within the larger bankruptcy case for the order to be considered final." *Tex. Extrusion Corp. v. Lockheed Corp. (In re Tex. Extrusion Corp.)*, 844 F.2d 1142, 1155 (5th Cir. 1988) (internal citations omitted).

Yet even under this "flexible" approach, *In re ASARCO, L.L.C.*, 650 F.3d at 600, we have held that interim fee awards are interlocutory orders—the very term interim denotes that such an award is not the end of the fee dispute—and thus not subject to automatic review. *See Cluck v. Osherow (In re Cluck)*, 101 F.3d 1081, 1082 (5th Cir. 1996) ("Every circuit which has addressed this issue has concluded that an interim award of compensation granted by a bankruptcy court in an ongoing bankruptcy proceeding generally is an interlocutory order which is not subject to review."); *see also* 1 COLLIER ON BANKRUPTCY ¶ 5.08[5] (16th ed.) (providing that "order[s] fixing interim compensation for professionals" have been held to be interlocutory); 16 Wright & Miller, § 3926.2 (same).

***6** These interlocutory orders were nonetheless still subject to review if the district court granted Kingdom Fresh leave to appeal under 28 U.S.C. § 158(a)(3). Although Kingdom Fresh did not seek such leave, it invokes the bankruptcy rule providing that "[i]f an appellant timely files a notice of appeal ... but does not include a motion for leave, the district court ... may order the appellant to file a motion for leave, or treat the notice of appeal as a motion for leave and either grant or deny it." FED. R. BANKR. P. 8004(d). Kingdom Fresh contends that by issuing a lengthy order on the merits, the district court impliedly granted leave to appeal. But this court recently rejected that reasoning in an unpublished decision. *Stansbury v. Holloway (In re Holloway)*, 370 Fed.Appx. 490, 493 (5th Cir. 2010) (citing *Clark v. First State Bank (In re White Beauty View, Inc.)*, 841 F.2d 524, 527 (3d Cir. 1988), for the proposition that "a district court cannot impliedly grant leave to appeal by merely ruling on an appeal before it from the bankruptcy court"). We adhere to that view. In allowing a district court to treat a notice of appeal as a request for leave to appeal, Rule 8004(d) still contemplates some exercise of discretion by the district court—it must "either grant or deny" leave to appeal. FED. R. BANKR. P. 8004(d). This makes sense given that interlocutory appeals are still disfavored, despite the more lenient view of finality in the bankruptcy context. *See In re White Beauty View*, 841 F.3d at 526. The multiple appeals in this case demonstrate the burden of hearing interlocutory appeals. The district court issued more than a hundred pages in three almost identical orders: the first order vacating the bankruptcy court's first and second fee awards, a denial of a motion to reconsider that first order, and the last order vacating the bankruptcy court's final fee order.

Nowhere in the orders on the interim appeals is there an indication that the district court realized these were interlocutory orders and believed there was a benefit to hearing them in this piecemeal manner. That absence means the district court did not have appellate jurisdiction over the first two interim fee orders. And Kingdom Fresh did not seek

to appeal all three fee orders in its final, timely appeal to the district court. We therefore vacate for lack of jurisdiction the district court's order vacating the first and second fee awards, *see In re Delta Produce, LP*, 498 B.R. 731, and remand with instructions to dismiss the appeal, *see Smith v. Gartley (In re Berman–Smith)*, 737 F.3d 997, 1003 (5th Cir. 2013) (finding that the "proper remedy" when the district court is left without jurisdiction to hear an appeal "is to vacate the decision of the district court and remand with instructions to dismiss the appeal" (citing *Hollingsworth v. Perry*, ––– U.S. ––––, 133 S.Ct. 2652, 2668, 186 L.Ed.2d 768 (2013))).

III

With these jurisdictional issues peeled away, we are down to only an appeal of the order granting Stokes's final fee application in the amount of $206,371. But before getting to the core of the dispute, a bit more paring is warranted. Kingdom Fresh is the only claimant objecting to Stokes's fees; the other PACA claimants consented to paying his fee from the trust assets. Stokes therefore argues that Kingdom Fresh has no standing to challenge the entire fee award of more than $200,000, but rather is limited to the 6.68% of the Superior PACA trust assets and 7.81% of the Delta trust assets that Kingdom Fresh holds. We agree.

In bankruptcy cases, courts follow a "person aggrieved" test, which is "more exacting ... than traditional constitutional standing." *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 203 (5th Cir. 2004). "Because bankruptcy cases typically affect numerous parties," which is also true of this PACA litigation that ended up being litigated in bankruptcy court, "the 'person aggrieved' test demands a higher causal nexus between act and injury; appellant must show that he was 'directly and adversely affected pecuniarily by the order of the bankruptcy court' in order to have standing to appeal." *Id.* (citation omitted).

Kingdom Fresh cannot claim to be affected financially by the other PACA claimants' consent to pay Stokes. Although PACA claimants share PACA funds pro rata when there is an insufficient "pot" of money to pay each claimant in full, *see Golman–Hayden*, 217 F.3d at 349, the disbursements were already distributed on that pro rata basis and the fees were charged in the same manner. Allowing Stokes to be paid the fees and expenses allocable to these other PACA claimants does not affect Kingdom Fresh's share of the PACA trust, which has already been set aside at the direction of the bankruptcy court. Put another way, we see no reason why Kingdom Fresh has any say in how the other claimants chose to spend their PACA funds. Assuming the district court is correct that the trust funds cannot be used to pay Stokes until all claimants have been paid (we are almost to the point of deciding that question), the PACA claimants can do what they wish with funds to which they are legally entitled. They can use the PACA funds to pay business expenses, expand their produce-growing operations, or (subject to any fiduciary duties owed to investors) try their luck in Vegas. Likewise, they can chose to use the funds to pay a lawyer like Stokes. We thus find that Kingdom Fresh has no standing to dispute the percentage of Stokes's fee allocable to the nonobjecting parties. Only the small percentage of Stokes's fee apportionable to Kingdom Fresh is at issue in this appeal; Stokes is free to keep the remainder.

IV

***7** Although a smaller pot of money is now at stake (only the $15,653.44 that was Kingdom Fresh's share of the final fee award), the question remains: can Stokes's fees be deducted from the PACA trust assets before all claimants are made whole?

PACA's trust provision evinces no exceptions. It states that buyers of perishable agricultural commodities must hold receivables or proceeds from the sale of those commodities in trust for the benefit of all unpaid sellers "until full payment of the sums owing in connection with such transactions has been received" by the sellers. 7 U.S.C. § 499e(c)(2). This strict directive was not accidental. Congress's 1984 amendments aimed at remedying the "burden on commerce in perishable agricultural commodities and to protect the public interest" by doing away with financing arrangements in which buyers would give lenders a security interest in the produce, thus subordinating the often unsecured sellers. *See id.* § 499e(c)(1); *see also Endico Potatoes*, 67 F.3d at 1067 ("Due to a large number of defaults by the purchasers, and the sellers' status as unsecured creditors, the sellers recover, if at all, only after banks and other lenders who have obtained security interests in the defaulting purchaser's inventories, proceeds, and receivables."). The "full payment" requirement is thus paramount in protecting sellers of perishable produce.

This court has never interpreted the breadth of this PACA provision but case law from other circuits provides guidance.

The district court relied primarily on *C.H. Robinson Co. v. Alanco*, in which an attorney who represented a produce purchaser in a PACA lawsuit —litigated outside the bankruptcy context—sought to collect unpaid attorney's fees by withholding a portion of the PACA settlement proceeds being disbursed to a seller.[4] 239 F.3d at 485. The attorney argued that "his services were in fulfillment of [the purchaser's] duty to the PACA trust beneficiaries and solely for their benefit, and, therefore, he [was] entitled to be paid out of the trust res under general principles of trust law." *Id.* at 486. The Second Circuit disagreed. It pointed out that "[u]nlike most common law trusts, a PACA trust entitles the trust beneficiary to a sum certain," which means that the sellers, as trust beneficiaries, "are entitled to full payment before trustees may lawfully use trust funds to pay other creditors." *Id.* at 487–88. It thus held that "a PACA trustee may not use PACA funds to pay attorney's fees incurred in collecting accounts receivable held in trust for a seller of perishable agricultural commodities." *Id.*

There is some authority that points in the other direction. In *Bank of Los Angeles v. Official PACA Creditors' Committee (In re Southland + Keystone)*, 132 B.R. 632 (9th Cir. BAP 1991), for example, a bank liquidated collateral of a defaulting creditor but it was later determined that PACA creditors had priority over the bank to those funds. The bank argued that it should be compensated for its collection costs given that it had done all the legwork required to collect the PACA trust assets. *Id.* at 642. The court agreed:

> ***8** When a bankruptcy trustee collects receivables and those moneys are subsequently turned over to PACA claimants, it should be allowed to offset its collection costs. The Bank here collected the receivables before they became stale. This undoubtedly resulted in a higher recovery than if the receivables had not been promptly collected. To deny the Bank any recovery would be unfair to the Bank and provide a windfall to the PACA claimants.

Id. at 643. That analysis relied on *In re United Fruit and Produce Co., Inc.*, 119 B.R. 10 (Bankr. D. Conn. 1990), for the proposition that because a "bankruptcy trustee of the debtor's estate [had] rendered substantial services in collecting the PACA receivable for the benefit of the PACA beneficiaries ... [t]he non-PACA creditors of this estate should not pay for these services and the trustee should not be forced to donate them." *Id.* at 13.

Our best reading of the cases is that they draw a distinction, admittedly a somewhat blurred one, between individuals who are PACA trustees or their functional equivalents—who owe fiduciary duties to the PACA claimants and are thus aware of the trust provision—and those whose primary role is outside the PACA trustee framework and do not owe duties to the claimants. *See C.H. Robinson*, 239 F.3d at 488 ("Even if we were to adopt the rule announced in *In re Southland + Keystone* for non-PACA trustees, we would not extend it to the case at bar because Alanco is a PACA trustee.... [A] PACA trustee has a fiduciary obligation under PACA to repay the full amount of the debt owed to the PACA beneficiary. Bankruptcy trustees and other collecting agents may not owe the same fiduciary duties to PACA beneficiaries, and therefore the law governing them is inapplicable."); *see also Six L's Packing Co. v. Post & Taback, Inc.*, 132 F.Supp.2d 306, 309 (S.D.N.Y. 2001)[5] (ordering that fees incurred by PACA trustee in fulfilling its obligations "shall *not* be paid, directly or indirectly, from PACA trust funds," but appointing special master pursuant to Rule 53 to "assist the Court in evaluating the claims," and ordering payment to be drawn from PACA trust account). We thus examine Stokes's duties as Special PACA Counsel.

We recognize that Stokes's role was somewhat different than Mandell's in *C.H. Robinson*, likely not unintentionally—the court appointed Stokes to be Special PACA Counsel whereas Mandell directly represented the buyer-turned-PACA trustee. Those involved in this litigation were also careful not to pin him as a "trustee," instead opting for the "Special PACA Counsel" title. Additionally, Stokes did not simply withhold his fees from the PACA claimants' disbursements, but rather followed the procedure for fee motions set out in the order appointing him, which including a clause stating that he was "entitled" to fees and costs from the PACA trust fund.

But as hard as Stokes endeavored to avoid the application of *C.H. Robinson*—which he was no doubt familiar with given the doubtless small "broccoli bar"[6] and the fact that his attorney Mandell played an active role in that case —he was the functional equivalent of a PACA trustee. The Order appointing Stokes as Special PACA Counsel authorized him to "take those steps reasonably necessary to preserve and

collect that PACA trust assets as defined at 7 U.S.C. § 499e(c) [the PACA trust provision].” Stokes was authorized to accomplish this goal by:

> ***9** (a) attempting to determine the extent to which assets are PACA trust assets, including filing or defending adversary proceedings including declaratory judgment actions, (b) examining PACA trust claims filed by alleged PACA trust beneficiaries, and objecting to those claims where appropriate, (c) collecting the Debtors' accounts receivables, including filing adversary actions, and (d) liquidating PACA trust assets other than the accounts receivables into cash.

These are the fundamental duties of a PACA trustee. *Coosemans Specialties, Inc. v. Gargiulo*, 485 F.3d 701, 705 (2d Cir. 2007) (“As a PACA trustee, a produce buyer is charged with a duty ‘to insure that it has sufficient assets to assure prompt payment for produce and that any beneficiary under the trust will receive full payment.’ ” (citation omitted)); *Boulder Fruit Express*, 251 F.3d at 1271 (“[A] commercially reasonable sale of accounts for fair value is entirely consistent with the trustee's primary duty under PACA ... to maintain trust assets.”). Most critically, as Stokes concedes, his “sole purpose was to benefit the PACA trust.” Appellant Brief at 19; *see also id.* (“Appellant was envisioned by the Judge, the Debtors, the Principal, the U.S. Trustee and the PACA claimants ... to work for ‘the trust itself.’ ”). Despite the different form, the substance of Stokes's work therefore is indistinguishable from the work of the *C.H. Robinson* trustee. *See C.H. Robinson*, 239 F.3d at 488 (distinguishing the trustee in that case from parties in other cases who did not owe duties to the PACA claimants). And we agree with the Second Circuit that PACA's unequivocal language requires that a PACA trustee—or in this case, its functional equivalent—may not be paid from trust assets “until full payment of the sums owing” is paid to all claimants. 7 U.S.C. § 499e(c)(2).

We recognize that fidelity to the inviolable nature of the PACA trust Congress created gives rise to a free rider concern. It will often take the work of an attorney or other professional to maximize a PACA recovery, and it is not desirable for some claimants but not others to bear this burden. But there are other options for equitable allocation of collection efforts. The most straightforward method in a bankruptcy case is the alternative procedure the bankruptcy court ordered: appointment under section 327 of the Bankruptcy Code which allows a “professional ... (A) reasonable compensation for actual, necessary services rendered.” 11 U.S.C. § 330. Section 327 professionals are not relegated to the end of the bankruptcy line but are instead “afforded second priority in the distribution of an estate.” *See* 3 COLLIER ON BANKRUPTCY ¶ 330.01. Although this avenue may not lead to full recovery, the prevalence of professionals willing to bear that risk by taking section 327 appointments dispels the amicus's fear that no one will want to assist PACA claimants. *Cf. C.H. Robinson*, 239 F.3d at 488 (“[The trustee's] prediction that a ruling against it will have dire consequences for the produce industry is hyperbole.”). Second, had the case remained in district court, the judge would have had the authority to appoint a special master whose expenses could be shared by the parties. *Compare* FED. R. CIV. P. 53 (procedure for appointing special master in district court), *with* FED. R. BANKR. P. 9031 (“Rule 53 F. R. Civ. P. does not apply in cases under the Code.”). Finally, a majority of courts —including the only district court to have considered the issue—allow PACA producers to recover attorneys' fees related to collection efforts from the PACA trust if entitlement to those fees is included in the sales contract. *See* Mark Duedall, *The Interaction Between the Bankruptcy Code and the Perishable Agricultural Commodities Act*, 2006 ANN. SURV. BANKR. LAW 4 (“Most cases hold that PACA Trust beneficiaries are entitled to attorney's fees paid from the PACA Trust if their governing contractual documents or invoices call for such charges.” (citing *Country Best v. Christopher Ranch, LLC*, 361 F.3d 329 (11th Cir. 2004))).

***10** These options may seem like they are just elevating form over substance, something we just decried in rejecting the significance of Stokes not receiving the “trustee” title. But there is one difference: unlike Stokes's fee application in this case or the trustee's fee request in *C.H. Robinson*, in neither the section 327 bankruptcy professional or district court special master scenarios are the costs coming directly out of the PACA trust. The superpriority status of PACA claimants is preserved and the attorney claimants bear the greater risk of nonpayment. That difference is the very one Congress sought to achieve with the trust amendments to PACA. *See C.H. Robinson*, 239 F.3d at 488 (observing that “the intent of Congress in enacting PACA's trust provision was to provide unpaid produce sellers with greater protection from the risk of default by buyers”).

V

There remains a little bit of juice to squeeze out of this case. Stokes also argues that even if PACA prevents paying him with trust funds until all produce suppliers are compensated, Kingdom Fresh should be estopped from objecting to the fees.[7] Estoppel is an equitable doctrine and "the decision whether to invoke it [is] within the court's discretion." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999). This court thus reviews the district court's rejection of the doctrine for abuse of discretion. *Id.*

Stokes points out that Kingdom Fresh did not object to his appointment or his duties as Special PACA Counsel until he filed his first fee application, which happened about eight months after he was first appointed. The district court rejected this as a basis for estoppel. It pointed out that Kingdom Fresh never joined the proposed PACA claim procedure motion that appointed Stokes and that although it appeared at the hearing on the motion, it "had *two days* to prepare for the expedited hearing." *In re Delta Produce, LP*, 521 B.R. at 597 (emphasis in original). It also believed that Kingdom Fresh's eventual objection to the first fee request was timely, as it was made "less than eight months after Special Counsel had been appointed." *Id.* We do not conclude that the district court abused its discretion in rejecting the estoppel argument. *See* *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) ("To constitute an abuse of discretion, the district court's decision must be either premised on an application of the law that is erroneous, or on an assessment of the evidence that is clearly erroneous.").

Lastly, because we rule on other grounds that Stokes's fees could not be paid with trust assets, we need not reach Kingdom Fresh's contention that Stokes was operating under a conflict of interest.

* * *

The district court's order vacating the first two fee awards is itself VACATED for lack of jurisdiction, and we REMAND with instructions to dismiss the appeal of that order. The district court's order vacating the final fee award is AFFIRMED but only as to the pro rata share of the fees allocated to Kingdom Fresh and the other four claimants that appealed.

All Citations

--- F.3d ----, 2016 WL 7404679

Footnotes

1 Congress made the following findings:

> It is hereby found that a burden on commerce in perishable agricultural commodities is caused by financing arrangements under which commission merchants, dealers, or brokers, who have not made payment for perishable agricultural commodities purchased, contracted to be purchased, or otherwise handled by them on behalf of another person, encumber or give lenders a security interest in, such commodities, or on inventories of food or other products derived from such commodities, and any receivables or proceeds from the sale of such commodities or products, and that such arrangements are contrary to the public interest. This subsection is intended to remedy such burden on commerce in perishable agricultural commodities and to protect the public interest.

7 U.S.C. § 499e(c)(1).

2 Section 327(e) of the Bankruptcy Code allows the bankruptcy trustee—not to be confused with the PACA trustee—to employ, with the court's approval, "for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e).

3 The other claimants that objected and appeal are I. Kunik Company, Inc.; Five Brothers Jalisco Produce Company; Rio Bravo Produce, Limited Company, L.L.C.; and G.R. Produce, Inc.

4 The attorney in question in *C.H. Robinson* was none other than Mark Mandell, the attorney representing Stokes in this litigation.

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5 Mandell also represented the purchasers in *Six L's Packing Co.*, 132 F.Supp.2d at 307. The “broccoli bar” appears to be an exclusive one. See *infra*, —— at n.5.

6 In their motion to appoint Stokes as § 327(e) counsel, debtors pointed out that Stokes is a “leading member of the ‘broccoli bar,’ ” which apparently refers to attorneys specializing in PACA.

7 Stokes also invokes waiver, but we find no intentional relinquishment of Kingdom Fresh's right to oppose a fee request. *See Home Ins. Co. v. Matthews*, 998 F.2d 305, 309 (5th Cir. 1993) (explaining that “the elements of waiver and estoppel are different.... [W]aiver [is] the intentional relinquishment of a known power or privilege. Equitable estoppel is founded on detrimental reliance on the representations of the other party.” (internal citations and quotation marks omitted)).

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843 F.3d 1179
United States Court of Appeals, Ninth Circuit.

In re Steven D. Molasky, Debtor,
Augustine C. Bustos, Appellant,
v.
Steven D. Molasky, Appellee.

No. 14-60080
|
Argued and Submitted November 17, 2016, San Francisco, California
|
Filed December 12, 2016

Synopsis

Background: Order was entered by the United States Bankruptcy Court for the District of Nevada, dismissing intervenor from nondischargeability proceeding against Chapter 11 debtor after original complaining creditor was dismissed for failure to prosecute. Intervenor appealed. The District Court, James C. Mahan, J., 2010 WL 5419058, reversed and remanded, and appeal was taken. The Court of Appeals, 492 Fed.Appx. 801, vacated and remanded. On remand, the Bankruptcy Court, Mike K. Nakagawa, Chief Judge, dismissed intervenor's claim, and intervenor appealed. The Bankruptcy Appellate Panel (BAP), 2014 WL 5334735, affirmed, and intervenor appealed.

[Holding:] The Court of Appeals, Thomas, Chief Judge, held that an intervenor can continue to litigate as the sole remaining party in a bankruptcy proceeding involving his own nondischargeability claim, when the original party who represented his interest, and whose timely adversary complaint he adopted without filing his own, was dismissed for failure to prosecute.

Reversed and remanded.

West Headnotes (17)

[1] **Bankruptcy**
Conclusions of law; d e novo review

Court of Appeals reviews decisions of the Bankruptcy Appellate Panel (BAP) de novo and applies the same standard of review that the BAP applied to the bankruptcy court's ruling.

Cases that cite this headnote

[2] **Bankruptcy**
Conclusions of law; d e novo review
Bankruptcy
Clear error

In reviewing decisions of the Bankruptcy Appellate Panel (BAP), the Court of Appeals reviews conclusions of law de novo and findings of fact for clear error.

Cases that cite this headnote

[3] **Federal Courts**
Questions of Law in General

Because interpretation of a prior decision is a question of law, the Court of Appeals reviews de novo a lower court's compliance with the mandate of an appellate court.

Cases that cite this headnote

[4] **Bankruptcy**
Pleading

To utilize the section of the Bankruptcy Code excepting from discharge certain debts obtained through fraud or false representation, the Code requires a creditor to file an exception-to-discharge claim in the bankruptcy court. 11 U.S.C.A. §§ 523(a)(2)(A), 523(c).

Cases that cite this headnote

[5] **Bankruptcy**
Time for Proceedings

There is a 60-day deadline for filing an exception-to-discharge claim in the bankruptcy court, beginning on the date of

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the first creditor meeting. 11 U.S.C.A. § 523(c); Fed. R. Bankr. P. 4007.

Cases that cite this headnote

[6] **Bankruptcy**

Parties; s tanding

Intervenor can continue to litigate as the sole remaining party in a bankruptcy proceeding involving his own nondischargeability claim, when the original party who represented his interest, and whose timely adversary complaint he adopted without filing his own, was dismissed for failure to prosecute. 11 U.S.C.A. § 523(c); Fed. R. Civ. P. 24; Fed. R. Bankr. P. 4007, 7024.

Cases that cite this headnote

[7] **Federal Civil Procedure**

Effect of dismissal of original parties

Under the Ninth Circuit's *Benavidez* test, intervenor may continue to litigate an action after the dismissal of the original party when: (1) an independent basis for jurisdiction exists, and (2) unnecessary delay would otherwise result. Fed. R. Civ. P. 24.

Cases that cite this headnote

[8] **Bankruptcy**

Intervention

Because the bankruptcy rule governing intervention simply incorporates the federal civil rule governing the same matter, courts apply jurisprudence construing the federal civil rule to intervention in bankruptcy proceedings. Fed. R. Civ. P. 24; Fed. R. Bankr. P. 7024.

Cases that cite this headnote

[9] **Courts**

Previous Decisions in Same Case as Law of the Case

Federal Courts

Intervening judicial decision

There are exceptions to the mandate rule and to the law of the case doctrine for an intervening change in controlling authority.

Cases that cite this headnote

[10] **Federal Civil Procedure**

Proceedings for intervention

Intervenor need not file his own complaint in order for the court to have jurisdiction over his claim if intervenor is content to stand on the pleading an existing party has filed. Fed. R. Civ. P. 24.

Cases that cite this headnote

[11] **Federal Civil Procedure**

Effect of dismissal of original parties

Federal Courts

Matters of Procedure in General

First, "independent basis for jurisdiction" prong of the Ninth Circuit's *Benavidez* test for when an intervenor may continue to litigate an action after the dismissal of the original party stems from the Article III necessity of ensuring continued subject-matter jurisdiction over the intervenor's claim, and thus may be understood as a temporal extension of the case-or-controversy requirement, applied at the point where the intervenor is the lone remaining party. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 24.

Cases that cite this headnote

[12] **Federal Civil Procedure**

Effect of dismissal of original parties

Ninth Circuit's *Benavidez* test for when an intervenor may continue to litigate an action after the dismissal of the original party, and the analysis supporting it, do not draw a distinction between permissive intervenors and intervenors of right. Fed. R. Civ. P. 24, 24(a), 24(b).

Cases that cite this headnote

[13] **Federal Civil Procedure**

Effect of dismissal of original parties

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Under the Ninth Circuit's *Benavidez* test for when an intervenor may continue to litigate an action after the dismissal of the original party, although the "independent basis for jurisdiction" requirement demands higher scrutiny where the original party's claim was dismissed on the merits or for lack of jurisdiction, the analysis is somewhat different where the original party was dismissed for a procedural reason, such as for failure to prosecute; in such cases, a claim joined by an intervenor may survive the dismissal of the original party if the court retains jurisdiction over the claim and the intervenor has standing to continue litigating it. Fed. R. Civ. P. 24.

Cases that cite this headnote

[14] Bankruptcy
Time for Proceedings

Purpose of the bankruptcy rule governing when an exception-to-discharge complaint must be filed is to ensure that after the 60 days are over, all the demands for non-discharge that can be made, have been made, and that the debtor can relax. Fed. R. Bankr. P. 4007.

Cases that cite this headnote

[15] Bankruptcy
Parties; s tanding

When two creditors share a claim against a debtor, there is no reason why the procedural dismissal of one creditor should divest the court of jurisdiction over the other party, when it retains jurisdiction over the claim. 11 U.S.C.A. § 523.

Cases that cite this headnote

[16] Federal Civil Procedure
Effect of dismissal of original parties

Second prong of the Ninth Circuit's *Benavidez* test for when an intervenor may continue to litigate an action after the dismissal of the original party asks whether refusing to allow the intervenors to continue would lead to senseless delay, because a new suit would inevitably bring the parties, at a much later date, to the point where they are now. Fed. R. Civ. P. 24.

Cases that cite this headnote

[17] Federal Civil Procedure
Effect of dismissal of original parties

Underlying goal of Ninth Circuit's *Benavidez* rule, permitting an intervenor to continue an action after the dismissal of the original party when an independent basis for jurisdiction exists and unnecessary delay would otherwise result, is to promote judicial economy and preserve litigant resources. Fed. R. Civ. P. 24.

Cases that cite this headnote

Appeal from the Ninth Circuit Bankruptcy Appellate Panel Pappas, Jury, and Houle, Bankruptcy Judges, Presiding, BAP No. 14–1109

Attorneys and Law Firms

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Before: Sidney R. Thomas, Chief Judge, and Ronald Lee Gilman* and Michelle T. Friedland, Circuit Judges.

OPINION

THOMAS, Chief Judge:

In this case we are asked to decide whether an intervenor can continue to litigate as the sole remaining party in a bankruptcy proceeding involving his own claim, when the original party who represented his interest, and whose adversary complaint he adopted without filing his own, was dismissed for failure to prosecute. Because we conclude that he can proceed, we reverse and remand.

I

This appeal, the second in this bankruptcy proceeding, concerns Augustine Bustos's ongoing efforts to pursue an exception-to-discharge claim under 11 U.S.C. § 523(c) against Steven **Molasky**, the debtor.[1] In May 2007, a corporate entity controlled by **Molasky** took out a loan and executed a promissory note for $17 million in favor of OneCap Funding Corporation ("OneCap"). **Molasky** also executed a Continuing Guarantee that obligated him personally on this debt. Bustos was an investor in this debt instrument through OneCap; his funds accounted for $800,000 of the $17 million loaned to **Molasky**.

The loan-servicing agreement between Bustos and OneCap provided that OneCap would represent Bustos in any court proceedings as long as the agreement was still in effect and "while any amounts [we]re still outstanding under the Note(s)." It provided that Bustos was "not to represent [himself] in any courts unless [the] agreement is terminated."

Molasky filed for chapter 11 bankruptcy on May 3, 2008. Under the deadline set by Federal Rule of Bankruptcy Procedure 4007(c), creditors received notice that the last day to file a complaint objecting to the discharge of a debt under 11 U.S.C. § 523(c) was August 11, 2008. In accordance with the loan-servicing agreement, OneCap filed a timely § 523 complaint on behalf of the lenders who had invested in the promissory note. In its adversary complaint, OneCap raised a claim under § 523(a)(2)(A), alleging that **Molasky's** debt on the promissory note was not dischargeable because **Molasky** had knowingly made false representations on which OneCap had relied when making the loan.

A number of parties subsequently reached a settlement with **Molasky** in the main bankruptcy case regarding a separate group of debts that indirectly related to Bustos. As part of that settlement, the parties stipulated that Bustos would be allowed to intervene in the § 523 adversary proceeding initiated by OneCap. At a hearing on whether to approve the settlement agreement, counsel for OneCap explained that **Molasky** had "agreed ... that Mr. Bustos may ... file a motion to intervene in the OneCap adversary proceeding regarding the 523 claim[ ] ..., and the debtor will not raise any affirmative defenses regarding timeliness or Statute of Limitations." Bustos's counsel further described the agreement as providing that Bustos would "be treated as if he filed the complaint with the OneCap representatives." **Molasky's** counsel agreed with this description of the settlement terms, and the bankruptcy court approved them as part of the settlement agreement.

Bustos moved to intervene in the § 523 adversary proceeding on September 8, 2008, filing his own § 523 adversary complaint in accordance with Federal Rule of Civil Procedure 24(c). Bustos's complaint almost exactly mirrored the portions of the OneCap complaint relating to the promissory note disputed here. **Molasky** did not object to Bustos's intervention but objected to his filing this separate complaint in intervention.

Looking to the terms of the settlement agreement, the bankruptcy court allowed Bustos "to intervene in the complaint in the action brought by OneCap" under

Bankruptcy Rule 7024,[2] but it did not allow Bustos to file his own, separate complaint. In granting Bustos's motion, the bankruptcy court ordered that Bustos be "afforded all the rights and remedies as those granted to OneCap Holding Corporation in this Adversary Proceeding insofar as they pertain to any and all of the claims of Augustine C. Bustos against the Debtor/ Defendant."[3]

Several months later, the bankruptcy court allowed counsel for OneCap to withdraw, and no replacement counsel appeared on OneCap's behalf at a status conference the following month. The court ordered OneCap to appear and explain why it should not be dismissed from the adversary proceeding for failure to prosecute. When OneCap did not appear at the showcause hearing, the court "dismiss[ed] OneCap from the proceeding" and explained that this situation "le [ft] Mr. Bustos ... as the lone party ... to carry the flag in this matter."

Molasky then moved to dismiss Bustos and the adversary proceeding entirely. The motion alleged that, following OneCap's dismissal, "there [was] no party for Bustos to assist" as an intervenor in the action. Because Bustos had not filed his own § 523 claim, **Molasky** argued that Bustos could show "no independent basis for jurisdiction against **Molasky**." Bustos opposed the motion to dismiss, arguing that he should be able to proceed on the basis of the OneCap complaint, which he had effectively adopted when the court allowed him to intervene but prohibited him from filing his own complaint.

After holding a hearing, the bankruptcy court granted **Molasky's** motion to dismiss. Looking to *Benavidez v. Eu,*

34 F.3d 825, 830 (9th Cir. 1994), the bankruptcy court explained that an intervenor "can proceed after dismissal of [the] original party only if ... an independent basis for jurisdiction exists," and it concluded that there was no such basis here because Bustos had not filed his own § 523 complaint. Bustos appealed to the district court, which reversed the dismissal, concluding that "[t]he adversary proceeding underlying this appeal and the bankruptcy court's subject matter jurisdiction survived the dismissal of OneCap as a plaintiff."

Molasky then appealed to this Court, and a three-judge panel issued a memorandum disposition vacating the district court's order. The panel held that the bankruptcy court had correctly stated the applicable legal standard under *Benavidez*. *Molasky v. Bustos (In re Molasky) ("Molasky I")*, 492 Fed.Appx. 801, 802 (9th Cir. 2012) (citing *Benavidez*, 34 F.3d at 830). But in applying this standard to Bustos—in light of his failure to file a timely § 523 complaint—the panel concluded that the bankruptcy court had erred in failing to consider equitable factors that might justify extending the § 523 deadline or otherwise allowing Bustos to pursue the OneCap complaint. *Id.* at 802–03. As an example, the panel pointed to *Fasson v. Magouirk (In re Magouirk)*, 693 F.2d 948, 951 (9th Cir. 1982), which laid out five equitable factors that courts have previously considered in deciding whether to extend bankruptcy deadlines. *Molasky I*, 492 Fed.Appx. at 802– 03. The panel therefore remanded "to the bankruptcy court for a determination of jurisdiction over Bustos" under Bankruptcy Rule 4007, which sets the deadline for § 523 claims. *Id.* at 803.

On remand, the bankruptcy court considered an intervening precedential decision from this Court, *Anwar v. Johnson*, 720 F.3d 1183 (9th Cir. 2013), which clarified that bankruptcy courts do not have equitable discretion to extend the Rule 4007 deadline retroactively. In light of this intervening precedent, the bankruptcy court concluded "that equitable relief from the deadline under FRBP 4007(c) [was] not available to Bustos" and that, having "failed to timely assert a separate objection to dischargeability" before the deadline expired, Bustos could not continue to prosecute the action. On appeal, the Bankruptcy Appellate Panel ("BAP") affirmed this decision in all respects. Bustos timely appealed to this Court. We have jurisdiction to hear his appeal under 28 U.S.C. § 158(d).

[1] [2] [3] "We review decisions of the Bankruptcy Appellate Panel *de novo* and apply the same standard of review that the Bankruptcy Appellate Panel applied to the bankruptcy court's ruling." *Wolfe v. Jacobson (In re Jacobson)*, 676 F.3d 1193, 1198 (9th Cir. 2012) (citing *Americredit Fin. Srvs. v. Penrod (In re Penrod)*, 611 F.3d 1158, 1160 (9th Cir. 2010)). In doing so, "[w]e review conclusions of law de novo and findings of fact for clear error." *Id.* (citing *Countrywide Home Loans, Inc. v. Hoopai (In re Hoopai)*, 581 F.3d 1090, 1095 (9th Cir. 2009)). Because interpretation of a prior decision is a question of law, we "review[ ] de novo a [lower] court's compliance with the mandate of an appellate court," such as the bankruptcy court's interpretation of our *Molasky I* decision here. *United States v. Perez*, 475 F.3d 1110, 1112 (9th Cir. 2007) (citation omitted).

II

[4] [5] Section 523 of the Bankruptcy Code provides that certain categories of debts may not be discharged in a bankruptcy proceeding. 11 U.S.C. § 523(a). Specifically, § 523(a)(2)(A) excepts from discharge certain debts obtained through fraud or false representation. To utilize this provision, § 523(c) requires a creditor to file an exception-to-discharge claim in the bankruptcy court. Bankruptcy Rule 4007 sets a 60–day deadline for filing such a § 523(c) claim, beginning on the date of the first creditor meeting.

[6] In the present case, it is undisputed that OneCap filed its § 523(c) complaint within the 60–day deadline set by Rule 4007 and that Bustos did not move to intervene or file his own complaint until after that period had passed. The primary question, then, is whether Bustos's intervention and adoption of the OneCap complaint allow him to continue prosecuting the action even after OneCap's dismissal. We answer this question in the affirmative.

A

[7] **[8]** As we explained in *Molasky I*, our precedent establishes that an intervenor may continue to litigate an action after the dismissal of the original party "when 1) an independent basis for jurisdiction exists, and 2) unnecessary delay would otherwise result," such that allowing the intervenor to continue "promotes judicial economy and preserves litigant resources."[4] *Benavidez*, 34 F.3d at 830–31.

Molasky I remanded for a determination of jurisdiction under the first prong of this test. 492 Fed.Appx. at 803. The bankruptcy court and the BAP correctly concluded

that our intervening decision in *Anwar* precluded extension of the Rule 4007 deadline to allow Bustos to file his own complaint. That conclusion leaves open the question of whether some other source of jurisdiction might allow Bustos to continue litigating the action even without his own complaint. *See Anwar*, 720 F.3d at 1187; *see also Willms v. Sanderson*, 723 F.3d 1094, 1100 (9th Cir. 2013) (confirming *Anwar*'s strict interpretation of Rule 4007).

[9] [10] The bankruptcy court and the BAP seemed to assume that the court necessarily lacked jurisdiction if the Rule 4007 deadline could not be extended to allow

Bustos to file his own complaint.[5] This assumption is not supported by precedent; our case law does not require an intervenor such as Bustos to file his own complaint in order for the court to have jurisdiction over his claim. Rather, an intervenor need not file separate pleadings "[i]f the intervenor is content to stand on the pleading an existing party has filed." *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1914 (3d ed. 2009)). We therefore conclude that the bankruptcy court and the BAP interpreted *Molaksy I* too narrowly, erroneously foreclosing the ultimate question of whether the court retained jurisdiction over Bustos without a deadline extension.

B

[11] [12] Here, the bankruptcy court retained an independent source of jurisdiction over Bustos after OneCap's dismissal, thereby satisfying the first prong of the *Benavidez* test. The "independent basis for jurisdiction" prong of the test stems from the Article III necessity of ensuring continued subject-matter jurisdiction over the intervenor's claim. *Benavidez*, 34 F.3d at 830; *see also Diamond v. Charles*, 476 U.S. 54, 68, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."). The first *Benavidez* prong can therefore be understood as a temporal extension of the case-orcontroversy requirement, applied at the point where the intervenor is the lone remaining party.[6]

[13] This requirement demands higher scrutiny where the original party's claim was dismissed on the merits or for lack of jurisdiction, but the analysis is somewhat different where the original party was dismissed for a procedural reason, such as for failure to prosecute. In such cases, a claim joined by an intervenor may survive the dismissal of the original party if the court retains jurisdiction over the claim and the intervenor has standing to continue litigating it. *See Westchester Fire Ins. Co.*, 585 F.3d at 1189 (holding that "the district court should not have entered a default judgment" against an intervenor based on the original party's failure to appear).

There is no question that OneCap timely filed its § 523 complaint and that the bankruptcy court initially had jurisdiction over this claim. *See Rein v. Providian Fin. Corp.*, 270 F.3d 895, 904 (9th Cir. 2001) ("Bankruptcy courts have exclusive jurisdiction over nondischargeability actions brought pursuant to 11 U.S.C. § 523(a)(2)...."). The bankruptcy court, in its own words, permitted Bustos to "intervene in the complaint in the action brought by OneCap Holding Corporation." At that point, as explained above, Bustos necessarily adopted OneCap's complaint—he had a valid claim against **Molasky** and was not required to file his own § 523 complaint because he was "content to stand on the pleading an existing party ha[d] filed." *See Westchester Fire Ins. Co.*, 585 F.3d at 1188 (quoting 7C Wright, Miller & Kane, *supra*, at § 1914).

Thus, OneCap's timely filing satisfied the Rule 4007 deadline, and Bustos is simply "treated as if he filed the complaint with the OneCap representatives," in accordance with the parties' settlement agreement. We note that there is no unfairness in this result, particularly given that **Molasky** expressly agreed to waive any timeliness defense in his settlement agreement with Bustos; **Molasky** cannot now argue that it is too late for Bustos to pursue *his own* § 523 claim that originally formed part of OneCap's complaint. *See Doi v. Halekulani Corp.*, 276 F.3d 1131, 1138 (9th Cir. 2002) (first citing *Sargent v. Dep't of Health & Human Servs.*, 229 F.3d 1088, 1090 (Fed. Cir. 2000); then citing ***In re** Christie*, 173 B.R. 890, 891 (Bankr. E.D. Tex.1994)) (explaining that the parties are bound by the terms of a settlement agreement once it is announced to the court).

[14] [15] Logic and equitable principles counsel the same result. In a similar case where a creditor sought to be substituted for the original party after the Rule 4007 deadline had run, the Seventh Circuit aptly recognized that the thrust of the timeliness inquiry as to § 523 claims "should fall first and foremost on whether a complaint was

filed against a specific debt, not so much on who makes the complaint." *FDIC v. Meyer (In re Meyer)*, 120 F.3d 66, 68 (7th Cir. 1997). This approach serves Rule 4007's purpose of ensuring that "[a]fter the 60 days are over, all the demands for non-discharge that can be made, have been made. The debtor can relax." *Id.* Our Circuit has similarly recognized the need for flexibility in allowing § 523 claims to go forward despite issues requiring party substitution or other procedural adjustments, even after the deadline for filing a new claim has passed. *Boyajian v. New Falls Corp. (In re Boyajian)*, 564 F.3d 1088, 1092 (9th Cir. 2009). When two creditors share a claim against a debtor, there is no reason why the procedural dismissal of one creditor should divest the court of jurisdiction over the other party, when it retains jurisdiction over the claim.

Applying those principles to the current case—even if Molasky had not agreed to waive timeliness defenses—OneCap's timely filed complaint gave Molasky notice of the § 523 claim within the time prescribed by Rule 4007. Bustos's intervention and adoption of that complaint did not prejudice Molasky or expose him to any additional claims after the expiration of the deadline. When the bankruptcy court dismissed OneCap from the proceeding for failure to appear, it did not dismiss or otherwise adjudicate the § 523 claim itself. Thus, that claim remained live and justiciable.

Ultimately, the bankruptcy court's intervention order gave Bustos "all the rights and remedies as those granted to OneCap" to adjudicate this claim. The court's dismissal of OneCap as a party did not divest the court of jurisdiction over the § 523 claim as it pertained to Bustos.

Bustos has therefore satisfied the "independent basis for jurisdiction" prong of the *Benavidez* test, and the bankruptcy court and BAP erred in concluding otherwise.

C

[16] [17] Bustos also satisfies the second prong of the *Benavidez* test. The second *Benavidez* prong "asks whether refusing to allow the intervenors to continue would lead to senseless delay, because a new suit would inevitably bring the parties, at a much later date, to the point where they are now." 34 F.3d at 830–31. *Benavidez* also emphasized that the underlying goal of the rule is to "promote[ ] judicial economy and preserve[ ] litigant resources." *Id.* at 831. Delay and refiling as described in *Benavidez* are not the only ways in which judicial resources may be wasted, and thus we understand *Benavidez* to counsel against other forms of judicial waste as well.

In a § 523 case, as Bustos correctly points out, creditors should be entitled to rely on their representatives to litigate the adversary proceeding on their behalf. Here Bustos has a direct financial interest in the claim initiated by OneCap on behalf of Bustos and the other investors, and he timely intervened to protect that interest. If an intervenor like Bustos cannot pursue an action initially filed by his or her representative at the point when the representative fails to prosecute the action, it creates an incentive for *all* of the individual creditors in a fractionalized debt instrument to hedge their bets by filing their own § 523 complaints before the 60–day deadline, just in case their representative later fails to prosecute adequately. Such an outcome could vastly increase the number of complaints filed in these cases, creating an unnecessary administrative burden for bankruptcy courts.

This result runs counter to the *Benavidez* goals of "judicial economy and preserv[ation of] litigant resources," *see* 34 F.3d at 831, and would impose exactly the type of administrative burden that the *Benavidez* rule seeks to avoid. For these reasons, we believe the goal of judicial economy is best served by allowing a party in Bustos's position to continue litigating the timely filed § 523 claim that is before the court. We therefore conclude that Bustos has satisfied this second prong of the *Benavidez* test.

III

In sum, Bustos was permitted to intervene in the action initially filed by OneCap and was "afforded all the rights and remedies as those granted to OneCap." By adopting OneCap's timely filed § 523 complaint, Bustos satisfied the Rule 4007 deadline and established that the court had subject-matter jurisdiction over his claim. Both precedent and common sense dictate that Bustos should be permitted to continue litigating the claim after OneCap's dismissal on procedural grounds. Ultimately, Bustos satisfies the *Benavidez* test because the court retains a subject-matter jurisdiction over his claim, and allowing him to pursue the claim promotes judicial economy. Accordingly, Bustos is entitled to continue prosecuting the § 523 claim originally

filed by OneCap. The bankruptcy court and BAP erred in concluding otherwise.

REVERSED and REMANDED.

All Citations

843 F.3d 1179, 63 Bankr.Ct.Dec. 126

Footnotes

[*] The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

1 Unless otherwise specified, all section and chapter references are to the Bankruptcy Code, 11. U.S.C. §§ 101 *et seq.*

2 Bankruptcy Rule 7024 incorporates Civil Rule 24 into adversary proceedings in bankruptcy.

3 At around the same time, the bankruptcy court approved a stipulation allowing another party, the W. Leslie Sully, Jr., Chtd. Profit Sharing Plan, to intervene in the OneCap adversary proceeding. The Sully Plan proceedings largely mirrored the Bustos appeals, but the Sully Plan has since voluntarily dismissed its claims against **Molasky**, so we do not discuss those proceedings further here.

4 This standard originally arose in the context of Civil Rule 24 intervention, but it applies equally in the bankruptcy context. Because Bankruptcy Rule 7024 simply incorporates Civil Rule 24, courts apply Rule 24 jurisprudence to intervention in bankruptcy proceedings. *Educ. Credit Mgmt. Corp. v. Bernal (**In re** Bernal)*, 207 F.3d 595, 597 (9th Cir. 2000).

5 **Molasky** argues that the mandate from our court after the first appeal "limited the scope of remand to assessing whether there was an independent basis for jurisdiction in light of *Magouirk*." We do not think the mandate was so limited. But even if it were, there are exceptions to the mandate rule and to the law of the case doctrine for an intervening change in controlling authority, as **Molasky** concedes. See *United States v. Bad Marriage*, 439 F.3d 534, 537–38 (9th Cir. 2006). Under those exceptions, the intervening precedent of *Anwar*, 720 F.3d 1183, defeats any argument that the bankruptcy court on remand was limited by our prior decision to applying *Magouirk*, which *Anwar* overruled.

6 Although *Benavidez* involved a permissive intervenor, the test itself and the analysis supporting it do not draw a distinction between permissive intervenors under Civil Rule 24(b) and intervenors of right under Rule 24(a). *See* 34 F.3d at 830– 31. Similarly, the decisions from other Courts of Appeals cited by *Benavidez* do not distinguish between permissive intervenors and intervenors of right. *See, e.g.*, *Arkoma Assoc. v. Carden*, 904 F.2d 5, 7 (5th Cir. 1990); *Horn v. Eltra Corp.*, 686 F.2d 439, 440 (6th Cir. 1982); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). Thus, while the parties dispute whether Bustos should be considered an intervenor of right or a permissive intervenor, in fact Bustos would need to demonstrate continued jurisdiction in either case. The ***Molasky** I* panel impliedly reached this conclusion when, after repeated questioning at oral argument about whether Bustos was a permissive intervenor or an intervenor of right, it ultimately concluded that the *Benavidez* test applied without reaching this question. *See* 492 Fed.Appx. at 802.

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2016 WL 7448760
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generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-
3. United States Court of Appeals, Ninth
Circuit.

S. Sadlowski, Plaintiff-Appellant,
v. Michaels Stores, Inc., a
Delaware corporation,
Defendant-Appellee.

No.
14
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56654
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Argued and submitted October
17, 2016 Pasadena, California
|
Filed December 28, 2016

Appeal from the United States District Court for the Central District of California, George H. Wu, District Judge, Presiding, D.C. No. 8:13-00455-GW-AGR

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Before: TALLMAN and CHRISTEN, Circuit Judges, and KENNELLY,* District Judge.

MEMORANDUM**

***1** Sophia Sadlowski appeals the district court's decision to grant summary judgment barring her wage-and-hour claims against Michaels Stores, Inc. based on the doctrine of judicial estoppel. We have jurisdiction under 28 U.S.C. § 1291, and we reverse the district court's ruling.

1. We review a district court's application of judicialestoppel for an abuse of discretion. *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 270 (9th Cir. 2013). “The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard.” *Id.* (ellipses and internal quotation marks omitted) (quoting *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012)).

2. The district court's ruling was based on Sadlowski'sfailure to disclose her wage-and-hour claims during her Chapter 13 bankruptcy case, which was ultimately dismissed due to her failure to make required payments. “Although judicial estoppel is ‘probably not reducible to any general formulation of principle, ... several factors typically inform the decision whether to apply the doctrine in a particular case.’ ” *Id.* (Quoting *New Hampshire*, 532 U.S. at 750-51). These factors include: (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party had succeeded in persuading a court to accept its earlier position, such that accepting an inconsistent position in a later proceeding would create the perception that the one court or the other was misled; and (3) whether the party asserting an inconsistent position would derive an unfair advantage or impose an unfair detriment on its opponent if not estopped. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

3. In applying this doctrine in the present context,the default rule is that “[i]f a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action.” *Ah Quin*, 733 F.3d at 271. This is not what occurred here. Although Sadlowski did not disclose her wage-and-hour claim as an asset in her bankruptcy case, the bankruptcy was filed long before her wage-and-hour lawsuit. There was no basis in the record for a finding that Sadlowski was aware of enough facts to know that she had a legal claim against Michaels until she retained legal counsel for the wage-and-hour case in September 2011, about a month before her bankruptcy case was dismissed in October 2011.

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More importantly, the bankruptcy court never "accepted" or relied upon Sadlowski's nondisclosure of her wage-and-hour claim. She did not receive a discharge, a favorable ruling, or any other benefit; rather, her bankruptcy case was dismissed due to her noncompliance with the Chapter 13 payment plan.

4. The district court's ruling amounted to a determination that simple nondisclosure of a potential claim during bankruptcy, without more, estops a party from asserting the claim in a civil suit. The court applied an incorrect legal standard, because it essentially reduced *New Hampshire v. Maine*'s three-factor analysis to a single factor: whether the party took inconsistent positions. No case decided by this Court supports this.

***2 5.** For these reasons, we conclude that the district court abused its discretion by barring Sadlowski's claims against Michaels on the basis of judicial estoppel. The case is remanded with instructions to deny Michaels's motion for summary judgment. Each party shall bear its own costs on appeal.

REVERSED AND REMANDED.

All Citations

--- Fed.Appx. ----, 2016 WL 7448760 (Mem)

Footnotes

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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2016 WL 7367783

2016 WL 7367783
This case was not selected for publication in West's Federal Reporter.
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. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

In re: OCEAN 4660, LLC., Debtor.
KENNETH A. FRANK, OCEANSIDE LAUDERDALE, INC., EL MAR ASSOCIATES, INC., Plaintiffs-Appellants,
v.
MARIA YIP, Defendant-Appellee.

No. 16-12056
|
Date Filed: 12/20/2016

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15cv-60732-WJZ

Bkcy No. 0:13-bkc-23165JKO

Before HULL, MARTIN and ANDERSON, Circuit

Judges.

Opinion

PER CURIAM:

***1** Appellants Kenneth A. Frank, Oceanside

Lauderdale, Inc. ("Oceanside"), and El Mar Associates, Inc. ("El Mar") appeal the district court's judgment affirming the bankruptcy court's order resolving a disputed Chapter 7 trustee election pursuant to 11 U.S.C. § 702. After review, we affirm.[1]

As a threshold matter, we address Appellee Maria Yip's contention that we lack jurisdiction to hear this appeal because the bankruptcy court's order is not a final decision under 28 U.S.C. § 158(d)(1). "Although a district court, at its discretion, may review interlocutory judgments and order of a bankruptcy court, see 28 U.S.C. § 158(a), a court of appeals has jurisdiction over only final judgments and orders entered by a district court or a bankruptcy appellate panel sitting in review of a bankruptcy court, see § 158(d)." In re Celotex Corp., 700 F.3d 1262, 1265 (11th Cir. 2012) (quotation marks omitted); see also 28 U.S.C. § 158(d)(1) ("The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered" by the district court under subsection (a)). While a final decision generally "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," In re Celotex Corp., 700 F.3d at 1265, this Court has concluded that "[f]inality is given a more flexible interpretation in the bankruptcy context ... because bankruptcy is an aggregation of controversies and suits." In re Donovan, 532 F.3d 1134, 1136 (11th Cir. 2008). Thus, "[i]n the bankruptcy context, this Court has concluded that it is generally the particular adversary proceeding or controversy that must have been finally resolved rather than the entire bankruptcy litigation." In re Walker, 515 F.3d 1204, 1210 (11th Cir. 2008).

This Court has held that an order removing or appointing a Chapter 7 trustee is a final order. See id. at 1210-11 & n.4 (reviewing a bankruptcy court's order removing a permanent trustee for an undisclosed conflict of interest). In so doing, we acknowledged a split among the Circuits on this issue and concluded that we were "persuaded by the logic" of the Third Circuit in In re Marvel Entertainment Group, Inc., 140 F.3d 463, 470-71 (3d Cir. 1998), as follows:

> In that case, the court wrote that the purpose of the finality requirement is judicial economy but that judicial efficiency would be turned on its head if the court were to delay reviewing the trustee appointment until after the entire bankruptcy proceeding concluded. The court [in In re Marvel] noted that liberal finality considerations in orders appointing bankruptcy trustees are necessary because these orders cannot be meaningfully postponed to the bankruptcy's conclusion. The [In re Marvel] court wrote that if it did not have jurisdiction no meaningful review of the order appointing the trustee could ever take place. It would strain credulity to suggest that a reviewing court

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WESTLAW

would jettison years of bankruptcy infighting, compromise, and final determinations solely for the purpose of reversing on the issue of the identity of the trustee.

*2 Id. at 1210-11 & n.5 (quotation marks, alterations and citations omitted).

In re: OCEAN 4660, LLC., Debtor. KENNETH A. FRANK,..., --- Fed.Appx. ---- (2016)

2016 WL 7367783

Here, at an initial meeting of the debtor's three creditors, two of the creditors—Appellants El Mar and Oceanside — requested the election of a permanent trustee. Over the objection of the third creditor, Comerica Bank, and the interim trustee, Appellee Yip, Appellants El Mar and Oceanside nominated and elected William Brandt to serve as trustee. After a hearing on the disputed election, the bankruptcy court entered an order that: (1) concluded that no valid election took place because Appellants El Mar and Oceanside were ineligible under 11 U.S.C. § 702(a)(1) and Bankruptcy Rule 2003(b)(3) to request the election because their claims were disputed; and (2) appointed Appellee Yip to serve as the permanent Chapter 7 trustee.

Appellants then appealed to the district court. The district court affirmed the bankruptcy court's order, concluding that Appellants El Mar and Oceanside "were not entitled to participate in election of the Chapter 7 trustee," and therefore "no valid election took place, leaving Maria Yip as trustee for the case."

Based on our binding precedent in In re Walker, we conclude that the district court's decision, which affirmed the bankruptcy court's order resolving the election dispute and appointing Appellee Yip as the Chapter 7 permanent trustee, was a "final decision" within the meaning of 28 U.S.C. § 158(d)(1). See id. at 1210-11.

Footnotes

Appellant Yip cites decisions from other Circuits, In re Klein, 940 F.2d 1075 (7th Cir. 1991), and In re St. Charles Preservation Investors, Ltd., 916 F.2d 727 (D.C. Cir. 1990), both of which fall on the other side of the Circuit split acknowledged in In re Walker.[2] Indeed, the Third Circuit in In re Marvel, with which In re Walker expressly agreed, explicitly rejected the position of the Seventh and

D.C. Circuits on this finality issue. See In re Marvel, 140 F.3d at 470. In short, we are bound by our prior precedent in In re Walker. See Smith v. GTE Corp., 236 F.3d 1292, 1300 n.8 (11th Cir. 2001) ("Under the well-established prior panel precedent rule of this Circuit, the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court.").[3]

*3 Having concluded that we have appellate jurisdiction, we affirm the district court's judgment based on its wellreasoned order filed on March 30, 2016.

AFFIRMED.

All Citations

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1 We review our appellate jurisdiction de novo. In re Donovan, 532 F.3d 1134, 1136 (11th Cir. 2008). As "the second appellate court to review" the bankruptcy court, we "assess the bankruptcy court's judgment anew, employing the same standard of review the district court itself used." In re Failla, 838 F.3d 1170, 1174 (11th Cir. 2016). Accordingly, we review the bankruptcy court's conclusions of law and mixed questions of law and fact de novo and its fact findings for clear error. In re Cox, 493 F.3d 1336, 1340 n.9 (11th Cir. 2007).

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2 As Appellants note, these two cases are also distinguishable in that the district court orders reversed the bankruptcy courts' rulings as to the trustee and remanded to the bankruptcy court for further proceedings. See In re Klein, 940 F.2d at 1076-77; In re St. Charles Pres.Inv'rs, Ltd., 916 F.2d at 728. Here, as in In re Walker, the district court affirmed the bankruptcy court's ruling as to the trustee. See In re Walker, 515 F.3d at 1213.

3 Appellee Yip also argues that Appellant Frank lacks standing to appeal because he did not participate in the trustee election and thus is not a "person aggrieved" by the bankruptcy court's order. See Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.), 764 F.3d 1321, 1325-26 (11th Cir. 2014). Because Appellee Yip does not dispute that Appellants Oceanside and El Mar have the requisite standing, we need not resolve the issue of Appellant Frank's standing in order to entertain this appeal.

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