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BANKRUPTCY

In re Brayshaw, 912 F.2d 1255

Author: Judge Logan

Defendant, Brayshaw, filed his Chapter 7 bankruptcy petition claiming exempt property pursuant to 11 U.S.C. § 522(1). Pursuant to Fed. R. Bankr. P. 4003(b), objections to exempt property must be filed within thirty days after the creditors' meeting, unless the court grants an extension of time. On the thirtieth day, after the creditor's meeting, the trustee in bankruptcy filed a motion to extend the time for objections. This motion was granted by the bankruptcy court after the thirty day expiration period. The district court, however, granted Brayshaw leave to take an interlocutory appeal and reversed the bankruptcy court's extension order. Clark presented two issues on appeal: (1) whether the district court's order was an appealable final order; and (2) whether the bankruptcy court had power to grant a motion to extend time for objection after the expiration of the thirty day time period.

The Tenth Circuit affirmed the district court's denial of the extension of time. First, the court noted that it had jurisdiction in bankruptcy cases only when the district courts have exercised appellate jurisdiction and granted final orders. Accordingly, since the district court's reversal of the extension of time had the effect of granting Brayshaw's exemptions, it was a final appealable order. Second, the court held that the district court properly reversed the extension of time order granted by the bankruptcy court. The court reasoned that a bankruptcy court can extend the period for objections to exemptions only by acting within the original thirty day time period. Consequently, since the bankruptcy court granted Clark the extension after the thirty day time period expired, it acted improperly.

In re Bucyrus Grain Co., 905 F.2d 1362

Author: Judge Kane, sitting by designation

Bucyrus Grain Company ("Bucyrus") accepted money from Carl and Robert Anderson (the "Andersons") to place an order for commodity futures. Soon thereafter, Bucyrus filed bankruptcy. State Bank of Spring Hill motioned for relief from the bankruptcy stay to permit it to setoff the funds in Bucyrus's account against Bucyrus's outstanding debt to it. The bankruptcy court granted the bank's motion. The Andersons appealed, and the district court reversed. The court ruled that the Andersons had priority over the bank because Bucyrus was a "commodities broker," the Andersons were "customers," and certain funds in Bucyrus's accounts were "customer property." The district court remanded the case for valuation of the Andersons' claim. The bank subsequently appealed.

The Tenth Circuit dismissed the bank's appeal for lack of jurisdic-

tion. The court held that the appeal was premature because the district court's remand for valuation of the Andersons' claim constituted a remand for "significant further proceedings." The court added that the bank's notice of appeal was untimely because it was not filed until after the bankruptcy court entered its decisions on remand. Moreover, the proper appeal from that decision was to the district court.

In re Centric Corp., 901 F.2d 1514

Author: Judge Anderson

The Trustees of Centennial State Carpenters Pension Trust Fund notified Centric Corporation ("Centric") that it was found to have withdrawn from the fund and was accountable for withdrawal liability under ERISA. Centric sought a declaratory judgment that it incurred no liability. The Trustees counterclaimed for the amount of the assessed withdrawal liability. Centric's subsequent bankruptcy filing resulted in the district court proceedings being stayed and then terminated. The Trustees filed a proof of claim in bankruptcy court and were granted a relief from stay. After Centric objected to the Trustees' claim, the Trustees failed to respond until seven months after the time allowed. During the interim, the bankruptcy court approved a liquidation plan. When the Trustees belatedly moved to respond to Centric's objection, the bankruptcy court denied the motion and disallowed the claim. The Trustees moved to reopen the district court case twenty months after it had been dismissed. The district court ruled that their withdrawal claim was barred by the doctrine of laches and affirmed the bankruptcy court disallowance of their claim against Centric. The Trustees appealed both orders.

The Tenth Circuit upheld the district court orders. The bankruptcy court correctly reasoned that allowing the Trustees to respond after the seven month delay would prejudice Centric and delay the termination of the bankruptcy proceedings. Further, the Trustees had no reason not to respond promptly. The court also approved the district court's reasoning in its dismissal of the counterclaims. The court explained that the doctrine of laches could apply since the twenty month delay appeared unjustified and resulted in prejudice to Centric.

In re Elec. Metal Products, Inc., 916 F.2d 1502

Per Curiam

In consideration for two payments on antecedent debt totalling \$5,100, defendant, attorney Bittman, agreed to continue working on a case for plaintiff, Electronic Metal Products, Incorporated ("EMP"). This case resulted in a \$42,000 gain to EMP. EMP thereafter declared bankruptcy and brought suit to recover \$5,100 as a preferential transfer. The bankruptcy court granted summary judgment to EMP, but the district court reversed, holding that the payments constituted "new value" and thus were insulated from recovery. EMP subsequently appealed.

The Tenth Circuit reversed the district court and reinstated the

bankruptcy court's order granting summary judgment to EMP. In regard to legal representation, the court extended the general rule that a creditor's promise to continue to do business with a debtor, if its bills are paid, is not new value. This is because: (1) to hold otherwise would allow attorney payments on antecedent debt to be insulated from recovery; (2) there was no evidence that the \$42,000 settlement was directly attributable to Bittman's promise to continue working; and (3) although continuing Bittman's legal representation may have been more efficient, it was indistinguishable from the efficiency of continuing certain business relationships covered by the general rule. The court also held that even though Bittman released his charging lien to the extent of the payments, new value was not given. The court explained that liens are enforceable against third parties only if notice of the lien is filed with the court. Bittman failed to do this. Thus, the release of the lien did not constitute a release of security to third parties such as EMP's other creditors. Finally, the court refused to recognize the "net result rule" utilized under the 1898 Bankruptcy Act. The court reasoned that legislative history of the 1978 Bankruptcy Code does not support application of the rule to the 1978 Code.

In re First Capital Mortgage Loan Corp., 917 F.2d 424

Author: Judge Seymour

Plaintiff, Research-Planning Incorporated ("Research") appealed a bankruptcy and district court decision which held that certain funds placed in escrow constituted part of the bankruptcy estate. Research, which placed \$260,000 in escrow with First Capital Mortgage, sought the return of \$62,000 after it declared bankruptcy. Research claimed that the funds were not available for creditors as part of the bankruptcy estate. A divided panel of the Tenth Circuit reversed the decision of the bankruptcy and district courts. The court held that the funds never became part of the bankruptcy estate and, thus, were recoverable as funds held in trust for the escrow depositor.

The Tenth Circuit vacated the panel decision. Accordingly, the court affirmed the district court's decision, holding that the funds recovered by the trustee in settlement of his preference actions comprised part of the bankruptcy estate. The court held that Research was not entitled to preferential status of the funds. The court based its decision on the character of the funds once they were recovered and the specific language of the Bankruptcy Code, § 550(a), which allows recovery of the property "for the benefit of the estate."

In re Gardner, 913 F.2d 1515

Per Curiam

Defendant, United States, appealed a district court decision affirming a bankruptcy court order. The order ruled that a tax lien on defendant Billie Gardner's property was extinguished by an award of the property to plaintiff, Terryl Gardner, in a state court divorce proceed-

ing. Mrs. Gardner's interests in the property were, therefore, held superior to those of the United States. On appeal, the government claimed the bankruptcy court lacked jurisdiction to determine the priority of two competing third party lienors over exempt property.

The Tenth Circuit affirmed the bankruptcy court's decision that Mr. Gardner had no interest in the marital property after the divorce decree. The court, however, vacated and remanded that part of the ruling adjudicating the rights of the government and Mrs. Gardner. The court ruled that once the bankruptcy court determined Mr. Gardner had no interest in the property following the divorce decree, the bankruptcy court lacked further jurisdiction. Essentially, the bankruptcy court did not have the authority to determine whether Mrs. Gardner's interests in the property were superior to the interests of the United States. The court explained that bankruptcy courts have jurisdiction only over core and related proceedings. Determining the rights of third parties is not a core proceeding. Moreover, it was not a related proceeding because the case involved a conflict over property no longer a part of the bankruptcy estate.

In re Gerlach, 897 F.2d 1048

Author: Judge Logan

Plaintiff, John Deere Company ("John Deere"), appealed the district court's order that the entire debt of defendant, Gerlach, was dischargeable. On appeal, John Deere contended that the debt Gerlach owed was not dischargeable because it was procured through fraud.

The Tenth Circuit reversed and remanded. The court stated that pursuant to § 523(a)(2) of the Bankruptcy Code, an objecting creditor need only prove that credit was obtained by fraud for the debt to be nondischargeable. Consequently, the court remanded for the district court to determine the amount of guaranty debt Gerlach obtained through fraud.

In re Grey, 902 F.2d 1479

Per Curiam

Plaintiff, Coats State Bank (the "Bank"), challenged the dischargeability of defendant Grey's loan obligation. The bankruptcy court determined that Grey's obligation to the Bank was exempt from discharge in the amount of \$71,000. Grey appealed on four grounds: (1) the security agreement did not include after-acquired property; (2) the bankruptcy court's determination of damages was erroneous; (3) the bankruptcy court erred in determining debtor's sale of collateral was malicious; and (4) the bankruptcy court erred in admitting the altered security agreement into evidence.

First, the Tenth Circuit ruled that the district court did not err in determining the included after-acquired property. The court explained that even though a security agreement does not specifically use the

phrase "after-acquired property," the security agreement will include it if that was the intent of the parties. Second, the court held that Grey's sale of collateral was malicious. The court explained that maliciousness was established because it was reasonably foreseeable that Grey's conduct would result in injury to the bank. Third, the bankruptcy court properly admitted the security agreement into evidence, even though it allegedly contained written alterations. The court explained that Grey failed to meet his burden of proof in establishing error. Moreover, the court noted that authentication of a document is left to the discretion of the trial judge and will not be disturbed without a showing of an abuse of discretion. Finally, the court rejected Grey's contention that the bankruptcy court's factual determination of damages was unduly speculative. The court upheld the damages because Grey failed to demonstrate that the damages were erroneous.

In re Johnson, 904 F.2d 563

Author: Judge Brorby

The district court reversed defendant Johnson's Chapter 13 Plan. On appeal, the fundamental issue considered was whether a debtor whose liability has been discharged on a secured debt in Chapter 7 proceedings may then reschedule that debt in a Chapter 13 proceeding under the Bankruptcy Code.

The Tenth Circuit held that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. Therefore, plaintiff, Home State Bank (the "bank"), no longer held a claim against Johnson for default on his mortgage with the bank. The court reasoned that Johnson's liability was discharged under his prior Chapter 7 petition. Further, although the Bankruptcy Code does not expressly prohibit what this debtor sought to do, Congress did not intend such a result. The court explained that 11 U.S.C. § 102(2) applies only to nonrecourse loans. Because the bank and Johnson never bargained for a nonrecourse loan, and since the bank was given an opportunity to refuse to agree to reaffirmation of the mortgage in the Chapter 7 proceeding, it cannot subsequently be forced to agree to reaffirmation by a Chapter 13 plan.

In re Kaiser Steel Corp., 911 F.2d 380

Author: Judge Tacha

Defendants, Frates, Holmes, Merrick, Doyle and Perma/Frates Joint Venture ("Defendants"), appealed the district court's order which affirmed an interlocutory order of the bankruptcy court. The bankruptcy court's order struck Defendants' jury demands. Alternatively, Defendants petitioned for a writ of *mandamus*. Defendants contended that the lower courts erred in holding: (1) that by filing an indemnity counterclaim in an adversary bankruptcy proceeding, a defendant consents to bankruptcy court jurisdiction, thereby waiving his seventh amendment right to a jury trial; and (2) by filing such proofs of claim or counter-

claims, the resolution of all claims between the parties was a core proceeding under 28 U.S.C. § 157(b)(2).

The Tenth Circuit dismissed the appeal but granted the petition for a writ of *mandamus*. First, the court determined that it did not have jurisdiction. The court explained that it found no basis for exercising appellate jurisdiction under 28 U.S.C. §§ 158(a), 1291, or 1292(b). The court, however, construed the request for appellate review as a petition for a writ of *mandamus*. In making this determination, the court used a five part test: (1) was another adequate means to secure relief available when the appellate jurisdiction was denied; (2) did the district court's order raise new and important problems or issues of law; (3) was the petitioning party damaged or prejudiced in a way not correctable on appeal; (4) did the district court's order represent an often repeated error, or manifest a persistent disregard of federal rules; and (5) did the district court's order, denying a jury trial, constitute an abuse of discretion. Further, although bankruptcy judges may have authority to conduct jury trials under the 1978 Bankruptcy Act, the 1984 Bankruptcy Act limits judges' powers to hearings and determinations. Thus, where the seventh amendment requires a jury trial to be held in a bankruptcy hearing, the jury trial must take place in district court.

Paul v. Monts, 906 F.2d 1468
Per Curiam

The Chapter 7 trustee for International Plastics, Incorporated ("IPI"), appealed a summary judgment order for defendant, Travenca Development Corporation ("Travenca"). IPI argued that Travenca breached its obligations under a failed Chapter 11 reorganization plan which was previously confirmed by the bankruptcy court.

The Tenth Circuit reversed and remanded. The court ruled that 11 U.S.C. § 1141, which details the effect of confirmation of a reorganization plan, did not bind Travenca to the plan until it acquired property under the reorganization plan. The court held, however, that there was evidence in the record creating an issue of material fact that Travenca may have agreed to be bound by the terms of the reorganization plan under general contract principles. Further, enforcement and modification provisions in the Bankruptcy Code pertaining to Chapter 11 plans of reorganization did not preempt a claim for breach of contract premised on a plan of reorganization. Finally, Travenca's affirmative defense of estoppel could not be maintained without showing a detrimental change in position as a result of reasonable reliance on IPI's inconsistent conduct during bankruptcy proceedings.

In re Republic Trust and Sav. Co., 897 F.2d 1041
Author: Judge Baldock

Plaintiff, the bankruptcy trustee, filed adversary proceedings against defendants, Hackler and others, in an attempt to recover payments made to them as avoidable preferences. Defendants were holders of

thrift and passbook savings certificates, issued by the debtors. These certificates represented the debtors' promise to repay the defendants money they had invested in the debtors. Defendants redeemed their certificates and received money from the debtors a short time before the debtors filed a Chapter 11 bankruptcy petition. The bankruptcy court and the district court held that all money paid by the debtors to the defendants, within ninety days of the bankruptcy petition, was an avoidable preference. The defendants appealed on grounds that they were entitled: (1) to judgment as a matter of law because exemptions in the bankruptcy code negated the trustee's avoidance power; (2) to offset the debtors' payments against the preferential transfers because they were denied due process; and (3) to a jury trial.

The Tenth Circuit reversed, reasoning that the defendants were entitled to a jury trial. The court ruled that since the defendants did not have or file a claim against the bankrupt's estate, they had a right to a jury trial when sued by the trustee to recover the transfer. The trustee's actions to avoid the transfers were plenary and did not arise as part of the process of allowance and disallowance of claims. On the other issues, the court explained that the certificates were merely evidence of an underlying indebtedness, similar to promissory notes. A creditor's transfer of a note upon receipt of a debtor's final payment did not constitute a contemporaneous exchange for new value and, therefore, did not meet the requirements of 11 U.S.C. § 547(c)(1). The court also found that the defendants had sufficient notice and opportunity to be heard, so they were not denied due process.

In re Roberts, 906 F.2d 1440

Author: Judge Anderson

Plaintiff, United States, appealed the district court's ruling in favor of defendant, Roberts. The government contended that a discharge in bankruptcy does not discharge tax penalties related to nondischargeable tax liabilities.

The Tenth Circuit affirmed the district court's holding that these penalties are dischargeable. The court said that the plain meaning of the Bankruptcy Code, 11 U.S.C. § 523(a)(7)(B), is enough to justify discharging the tax penalties related to nondischargeable tax liabilities. The court also stated that it is not appropriate to refer to the legislative history since the statutory language is plain and unambiguous. Moreover, the Bankruptcy Code is an extensive series of compromises requiring strict adherence to the statutory language.

In re Robinson, 921 F.2d 252

Author: Judge Logan

Defendant, Edward Robinson ("Edward"), sought discharge of an obligation to make payments on a second deed of trust, under which he became solely liable in a divorce proceeding. The deed was subsequently refinanced and assumed by plaintiff, Charlotte Robinson

("Charlotte"), after Edward ceased making payments. The bankruptcy judge treated the original obligation as alimony, maintenance, or support and, thus, nondischargeable in bankruptcy. The bankruptcy court also found that Charlotte's refinancing discharged Edward's obligation. The district court affirmed the bankruptcy court's conclusion that the obligation was nondischargeable, but it reversed that bankruptcy court's decision on the issue of refinancing. The district court ruled that the current status of the underlying debt had no effect on Edward's original obligation to be solely liable. Edward subsequently appealed.

The Tenth Circuit affirmed the judgment of the district court on both issues. The court agreed that the record sufficiently supported the bankruptcy court's finding that the obligation was to be considered alimony, maintenance, or support. Moreover, Edward was still solely liable for the debt on the second deed, except that he was ordered to make payments to Charlotte rather than to the original creditor bank.

In re Seneca Oil Co., 906 F.2d 1445

Author: Judge Ebel

Seneca Oil Company ("Seneca") sold crude oil in violation of federal pricing regulations. The United States Department of Energy ("DOE") obtained judgment creating a constructive trust for the amount in excess of the statutory price after Seneca filed for bankruptcy. DOE appealed the bankruptcy court's plan for reorganization. The district court affirmed the payment of administrative fees but reversed the confirmation of the plan to the extent that it subordinated the unsecured portion of the DOE's claim to Bank of New York ("Bank"). The Bank, a secured creditor of Seneca, appealed, claiming that: (1) DOE did not establish sufficient wrongdoing by Seneca to justify the imposition of a constructive trust; (2) DOE did not sufficiently trace the funds in dispute; (3) the district court did not have jurisdiction to decide DOE's claim under the Bankruptcy Code; and (4) DOE's claim was a "fine, penalty, or forfeiture" under the Bankruptcy Code.

The Tenth Circuit affirmed the district court's finding that Seneca's overcharging was sufficient wrongdoing in order to establish a constructive trust. Since the excess funds were part of the trust, they were never part of the bankruptcy estates and, therefore, the payment of administrative fees from the trust was improper. Moreover, the court held that DOE sufficiently traced the funds in dispute using the "lowest intervening balance rule." The court then held that the district court had jurisdiction, since the DOE's claim did not arise under the Economic Stabilization Act or the Emergency Petroleum Allocation Act. The DOE's claim for recovery was held not to be a "fine, penalty, or forfeiture" under the Bankruptcy Code and, therefore, DOE's claim for the excess amounts was not to be subordinated to the claim by the Bank.

In re Burns, 894 F.2d 361

Author: Judge Seymour

Citizens National Bank brought an action pursuant to 11 U.S.C. § 523(a)(2), to have defendant Burns' debt declared nondischargeable in a bankruptcy proceeding. The bankruptcy court ruled that the debt was dischargeable, but denied Burns' motion for attorneys' fees. Burns subsequently appealed the denial of his motion, but the district court affirmed the bankruptcy court's decision. Burns once again appealed, alleging that he was entitled to attorneys' fees under 11 U.S.C. § 523(d).

Using a different rationale, the Tenth Circuit affirmed the district court's decision to deny attorneys' fees. The court noted that pursuant to 11 U.S.C. § 523(d), attorneys' fees can only be awarded if the debt is a consumer debt and the creditor's position was not substantially justified. The court concluded that Burns' debt was not consumer debt. The court explained that a credit transaction is not consumer debt when it is incurred with a profit motive. Since Burns took out the loan to play the stock market, this is clearly a transaction entered into with a profit motive. Accordingly, the debt was not a consumer debt, and Burns was not entitled to attorneys' fees under § 523(d).

In re Simons, 908 F.2d 643

Per Curiam

Defendants, Eugene and Jewell Simons, filed for Chapter 13 relief in bankruptcy court. The bankruptcy court, however, denied confirmation of the Simons' proposed reorganization plan. The district court affirmed the bankruptcy court's determination, and the Simonses appealed.

The Tenth Circuit held that it lacked appellate jurisdiction over the matter and consequently dismissed the appeal. The court stated that in a bankruptcy case, 28 U.S.C. § 158(d) limits appellate court review to district court orders which are final. Because the bankruptcy and district court orders denying the Simons' plan did not dismiss the underlying proceeding, its decision was not final for purposes of appeal. Moreover, the court explained that the district court order did not satisfy two basic principles of finality. The order becomes final if it either ends the litigation on the merits, leaving nothing for the court to do but execute judgment, or it does not contemplate significant further proceedings in the bankruptcy court. In addition, the district court order was not appealable under the collateral order exception to the final judgment rule. The court explained that the three requirements were not satisfied. The order appealed from must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment.

In re Thurman, 901 F.2d 839

Author: Judge Moore

Defendant, Thurman, previously secured a note payable to defendant, MBank Dallas, with a pledge of 500 shares of WAB, a corporation in which Thurman held a 50% interest. Thurman defaulted on the note, and MBank recovered a state court judgment for the amount of indebtedness. Before MBank's judgment became final, WAB transferred all of its assets to a wholly-owned subsidiary. Thurman then petitioned for relief under the Bankruptcy Act. MBank objected to the discharge and filed an action pursuant to 11 U.S.C. § 727(a)(2)(A). This statute provides that a discharge is not available where the debtor intended to hinder or defraud a creditor by transferring "property of the debtor" within one year before filing for the discharge. MBank further argued that the debt should not be dischargeable pursuant to 11 U.S.C. § 523(a)(6), which excepts from discharge a debt resulting from "willful and malicious injury by the debtor to another entity or to the property of another entity." The district court affirmed the conclusion of the bankruptcy court that the transfer of WAB assets did not constitute a transfer of Thurman's own property. Accordingly, the district court ruled that MBank failed to prove grounds for denial of Thurman's discharge. MBank subsequently appealed.

The Tenth Circuit affirmed the district court's judgment. First, the court stated that "property of the debtor" is distinct from "property in which the debtor has a derivative interest." Thus, since Thurman did not have a direct proprietary interest, the transfer did not constitute a transfer of his property. Second, the court stated that proof of a deliberate or intentional injury is required to except a debt from discharge. The court ruled that since Thurman was only a 50% shareholder, he could not have transferred the assets in his own authority. Consequently, he did not act deliberately and intentionally to injure the security interest held by MBank.

In re Western Real Estate Fund, Inc., 922 F.2d 592

Per Curiam

Third party defendants, Kevin Abel and Abel & Busch, Incorporated ("Abel"), appealed an order of the district court limiting attorneys' fees due from plaintiff, Landsing Diversified Properties-II ("LDP"), and enjoining Abel from collecting the remaining balance from a third party. Abel represented LDP when an Oklahoma Public Service transformer exploded and caused substantial property damage. After negotiating a hybrid hourly/contingency fee arrangement, Abel secured his contract fee by filing an attorney's lien under state law. Before settlement, however, LDP filed bankruptcy and discharged Abel.

The Tenth Circuit reversed and remanded in part and affirmed in part. On *de novo* review, the court held that Abel's claim against LDP should have begun by: (1) an acknowledgment of LDP's breach; (2) an

assessment of damages under applicable state law; (3) a determination under bankruptcy law of reasonableness of Abel's damage claim; and (4) a reduction of Abel's claim if deemed excessive. Neither the district court nor the bankruptcy court followed these procedures, so the bankruptcy court's decision was reversed and remanded for reconsideration in light of the appropriate principles described. Further, the bankruptcy court's injunction precluding Abel from proceeding against a third-party that LDP would have to indemnify was affirmed. The injunction, however, is only temporary during the pendency of the bankruptcy proceeding.

Zilkha v. Leighton, 920 F.2d 1520

Author: Judge Moore

Plaintiff, Zilkha Energy Company ("Zilkha"), appealed the district court's dismissal of its complaint in equity seeking recovery of alleged overpayments of oil and gas royalties. Zilkha's amended complaint averred that before it filed for Chapter 11 protection in September 1984, it overpaid royalties to defendant, Leighton, in July 1983. The district court granted Leighton's motion to dismiss, holding that the action was barred by the statute of limitations, and that the Bankruptcy Code was inapplicable because Zilkha was a debtor-in-possession, not a trustee.

The Tenth Circuit concluded that the district court incorrectly analyzed Zilkha's bankruptcy claims but, nonetheless, reached the proper result. The court found that the statute of limitations expired before the filing of the complaint. The court agreed with Zilkha, however, that the action may be equitable in nature, and the doctrine of laches might apply. The Tenth Circuit remanded the case for consideration of the equity issue because the district court did not consider the doctrine of laches.

