Denver Law Review

Volume 67
Issue 4 *Tenth Circuit Surveys*

Article 17

February 2021

Bankruptcy

Denver University Law Review

Follow this and additional works at: https://digitalcommons.du.edu/dlr

Recommended Citation
Denver University Law Review, Bankruptcy, 67 Denv. U. L. Rev. 631 (1990).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

BANKRUPTCY

C.I.T. Financial Services, Inc. v. Posta, 866 F.2d 364
Per Curiam

Plaintiff, C.I.T. Financial Services, Inc. ("C.I.T."), appealed the dismissal of its complaint objecting to the discharge in bankruptcy of defendant, Posta's debt, which was secured by a mobile travel trailor. C.I.T. argued that Posta acted maliciously in selling the trailor in violation of the terms of the security agreement. Consequently, 11 U.S.C. § 523(a)(6) (1978) was applied, which excepts from discharge any debt "for. . .malicious injury by the debtor. . .," including conversion of property subject to a creditor's security interest.

The Tenth Circuit affirmed the decisions of the bankruptcy court and the district court. The court reasoned that because Posta did not read the security agreement, they did not have any knowledge of C.I.T.'s rights and, therefore, did not establish malicious intent. The court held that because Posta did not knowingly violate C.I.T.'s rights by selling the trailor, the conversion was not "malicious."

Fidelity Savings & Investment Co. v. New Hope Baptist, 880 F.2d 1172
Per Curiam

In a bankruptcy action, plaintiff, Fidelity Savings & Investment Company ("Fidelity"), sought to recover distributions made on savings certificates from the defendants, New Hope Baptist ("New Hope"), claiming that the distributions qualified as preferences under 11 U.S.C. § 547(b). New Hope asserted that the distributions were protected as transfers made in the ordinary course of business under section 547(c)(2). The bankruptcy court granted summary judgment in favor of New Hope and the district court, sitting as an appellate court in bankruptcy, affirmed.

The Tenth Circuit rejected Fidelity's argument that the ordinary course of business exception protected only short-term trade credit payments. The statutory language contains no express limitation, and the legislative history of section 547(c)(2) indicates that a broader application was intended. The court held that the payments to New Hope were a necessary part of Fidelity's daily business and, therefore, met the requirements for the ordinary course of business exception. The court affirmed the district court's judgment.

Hall v. Vance, 887 F.2d 1041
Author: Judge Moore

Plaintiffs filed for reorganization under Chapter 11 of the Bankruptcy Code. United States trustee, Vance, moved to dismiss asserting that the plaintiffs' reorganization plan was deficient. The bankruptcy

court, relying on 11 U.S.C. § 1112(b)(2)-(4), dismissed the case with prejudice, and the district court affirmed. Plaintiffs appealed.

The Tenth Circuit held that a bankruptcy court may dismiss a Chapter 11 case if the debtor is unable to effectuate a plan, meaning that the debtor lacks the ability either to formulate a plan or to carry one out. The bankruptcy court correctly held that Hall was unable to formulate a plan. The court further held that dismissal with prejudice is a severe sanction to which the courts should resort infrequently. Because plaintiffs were appearing *pro se*, their tardiness in filing reports did not rise to the level of bad faith necessary to warrant dismissal with prejudice. The case was remanded to the bankruptcy court for the entry of an order vacating the dismissal with prejudice.

Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939
Author: Judge McKay

Debtors appealed from the district court's order, affirming the decision of the bankruptcy court to award creditor, Silver Wings Aviation, Inc. ("Silver Wings"), attorney fees as an administrative expense.

The Tenth Circuit found that the former rule of appellate standing embodied in section 39(c) of the Bankruptcy Act of 1898, 11 U.S.C. § 67(c) (repealed 1978), still applies to all appeals from bankruptcy court proceedings. This rule limits the right to appellate review to those persons whose rights or interests are directly and adversely affected pecuniarily by a bankruptcy court order. Since the order awarding attorney fees to Silver Wings did not affect the total payout the debtors agreed to under their Chapter 13 plan, the court dismissed the appeal, holding that the debtors lacked standing to contest the award of attorney fees.

In re Allen, 888 F.2d 1299
Author: Judge Seth

Plaintiff, Spears, trustee of the debtor in bankruptcy, appealed the judgment of the district court affirming the bankruptcy court's decision to grant summary judgment to the defendant, Michigan National Bank ("National"). At issue was whether Spears could avoid a preferential transfer of the debtor's interest under a Purchase and Escrow Agreement ("Agreement") pursuant to 11 U.S.C. § 547(b).

The Tenth Circuit affirmed the lower courts, holding that the debtor's interest in the Agreement was a "general intangible," and that National had properly perfected its security interest in the Agreement under Oklahoma law. In the alternative, the conveyance from the debtor to National met the "contemporaneous exchange" exception to Section 547(c) as found in 11 U.S.C. § 547(c).

In re First Capital Mortgage Loan Corp., 872 F.2d 335
Per Curiam

Plaintiff, Research-Planning, Inc., appealed from an order of the

district court affirming the bankruptcy court's dismissal of its complaint. Funds, which were originally held in trust by First Capital Mortgage Loan Corporation ("First Capital"), pending a real estate transaction between Research-Planning and a third party, were placed in First Capital's general account in violation of an escrow agreement with Research-Planning. The funds were then used to cover pre-existing debts, before First Capital declared bankruptcy. Defendant, Segal, trustee in bankruptcy for the estate of First Capital, recovered a portion of these funds, which were placed in First Capital's estate under the bankruptcy laws.

The Tenth Circuit held that the bankruptcy and district courts' disposition of the case was in error. The court found that the district court erred in assuming that a metamorphosis occurred as possession of the funds was transferred. Research-Planning was not divested of ownership of the funds simply because the funds were transferred to cover pre-existing debts. The court stated that the trustee in bankruptcy held the funds not as part of the estate but for the benefit of Research-Planning.

In re Heape, 886 F.2d 280
Per Curiam

Under 11 U.S.C. § 522, debtors may avoid having a lien put on their property if such property is considered a "tool of the trade." The bankruptcy court held that debtors' breeding stock did not qualify for lien avoidance under the statute and the district court affirmed.

The Tenth Circuit reversed, holding that breeding stock to a livestock farmer is indeed a "tool of the trade," as a means to produce agricultural products. The court favored the "use" test long employed by the state of Kansas: tools of the trade must be used for the purpose of carrying on the trade or business. The court noted that since the term was neither defined in the statute itself nor in its legislative history, courts have been inconsistent in their interpretations, but Tenth Circuit case law has followed a practical application of the statute.

In re Leonard, 866 F.2d 335
Author: Judge Brorby

Debtors, Leonard and Weiss, sought to avoid a nonpossessory, nonpurchase-money security interest that creditor, Aetna Finance Company ("Aetna"), held in their property. Both filed a motion pursuant to the lien avoidance provision of the Bankruptcy Code asking that their property be exempt from Aetna's lien. The district court held for Leonard and Weiss stating that both could avoid the lien. Aetna appealed, arguing that when Colorado limited the types of property that could be exempted, the use of state law was mandated, thereby precluding use of the federal lien avoidance provision.

The Tenth Circuit affirmed the district court's decision holding that states may not "opt out" of the lien avoidance provision simply by limiting exemptions to unencumbered property. Furthermore, the court

stated that since the property fell under Colorado's list of exemptions, then any nonpossessory, nonpurchase-money lien on the property could be avoided under the federal provision.

In re Mueller, 867 F.2d 568
Author: Judge Moore

The bankruptcy court denied Mueller a personal exemption for the value of a life insurance policy he purchased immediately prior to filing bankruptcy. Mueller appealed the district court order which held that Mueller purchased the policy to defraud his creditors.

The Tenth Circuit held that the value of Mueller's life insurance policy was not exempt from creditor's claims because Mueller filed bankruptcy within one year after the policy was issued, and had obtained the policy for the purpose of defrauding his creditors. The court further held that the district court correctly applied the "badges of fraud" test in determining whether Mueller purchased the life insurance policy with intent to defraud. The order was affirmed.

In re Rasmussen, 888 F.2d 703
Per Curiam

Debtor, Rasmussen, filed for Chapter 7 bankruptcy and all his unsecured debts were discharged except his debt to Pioneer Bank of Longmont. This exception was made because Rasmussen obtained the loan from Pioneer through fraud. Rasmussen then filed a reorganization plan under Chapter 13 to pay Pioneer 1.5% of the amount due, over a three year period. The bankruptcy court confirmed the plan and the district court affirmed.

The Tenth Circuit *de novo* reviewed the legal conclusions of the lower courts on appeal. The court stated that Rasmussen's successive filings did not, by itself, constitute bad faith in the Chapter 13 filing. When judged by the "totality of the circumstances," however, the court found the Chapter 13 filing was not made in good faith. The court reversed the district court and dismissed the debtor's Chapter 13 reorganization plan.

In re Robinson Bros. Drilling, Inc., 877 F.2d 32
Per Curiam

Plaintiff, Robinson Bros. Drilling, Inc. ("Robinson"), paid defendant, U.P.G., Inc. ("U.P.G."), $40,000 during the ninety-day preference period prior to bankruptcy. U.P.G. accepted the money as payment in full for a $49,000 debt, and released valid liens totalling $7,884.97. Lowery, trustee in bankruptcy for Robinson, brought an action to recover a portion of the sum paid by Robinson as a preference under federal statute. U.P.G. claimed a complete defense to the preference action under federal law which provided, "a transfer which is a contemporaneous exchange for new value is not avoidable as a preference."

The Tenth Circuit stated that transfers are protected only to the extent that they are contemporaneous exchange for new value. New Value is defined as, "money or money's worth in goods, services, or new credit." Outside the $7,884.97 in released liens, U.P.G. failed to show anything qualifying as new value. Therefore, the Tenth Circuit held, only the $7,884.97 was protected by federal statute, and the remaining $32,115.03 must be treated as preference and thus forfeited by U.P.G.

In re Sweetwater, 884 F.2d 1323
Author: Chief Judge Holloway

Pursuant to defendant, Sweetwater's, Chapter 11 reorganization, plaintiff, Robison, was named trustee of a fund responsible for paying Sweetwater's administrative claimants. Robison brought an avoidance action under 11 U.S.C. § 1123(b)(3)(B) (1978). The district court dismissed Robison's claim despite a finding that it had subject matter jurisdiction. Robison appealed the dismissal and co-defendant, Citicorp, Inc., cross-appealed the jurisdictional finding.

The Tenth Circuit affirmed the district court's ruling on juridiction, holding that the district court's determination was thorough and proper. The court reversed the dismissal of Robison's complaint, finding that the district court erred in determining that Robison did not qualify as a "representative" under section 1123(b)(3)(B). Robison had been properly appointed and his responsibilities and authority under the plan further qualified him as a representative. Additionally, the plan specifically allowed Robison to enforce avoidance claims. Finally, carrying out the effect of the plan would further the efficient and fair administration of the Chapter 11 proceeding.

Lowry Federal Credit Union v. West, 882 F.2d 1543
Author: Judge Moore

Debtors ("West"), filed a complaint for declaratory judgment and injunctive relief against defendant, Lowry Federal Credit Union ("Lowry"), to determine whether Lowry could legally repossess their vehicle. Lowry claimed it had a right to repossess the vehicle since West failed to reaffirm the debt or redeem the collateral after filing for relief under Chapter 7 of the Bankruptcy Code. The bankruptcy court held for West, and Lowry subsequently appealed.

First, the Tenth Circuit held that West's failure to file the notice of election, as required by 11 U.S.C. § 521(2)(A), did not give Lowry, a secured creditor, an automatic right to repossess collateral. Second, the court held that section 521 does not state that redemption or reaffirmation is the exclusive means by which a bankruptcy court can allow a debtor to retain secured property. Because the debtors were current on their payments and maintained adequate insurance on the vehicle, the court found that neither West nor Lowry were prejudiced. Thus, the court concluded that the bankruptcy court acted within its discretion by

allowing West to retain the collateral without requiring a redemption or reaffirmation.

Porter v. Yukon National Bank, 866 F.2d 355
Author: Judge Moore

Debtor, Porter, transferred certain property to creditor, Yukon National Bank ("Yukon"), to collateralize a preexisting debt. Subsequently, Porter's trustee filed an action pursuant to section 547(b) of the Bankruptcy Code to recover the transferred property for the benefit of the estate. The district court voided the transfer and Yukon appealed. Yukon claimed that the trustee failed to satisfy two Bankruptcy Code requirements: Porter was not insolvent at the time of the transfer, and the transfer would not have enabled Yukon to receive more than it would have received under Porter's Chapter 7 liquidation.

The Tenth Circuit affirmed the district court's decision, stating that Porter's insolvency was shown and it was unnecessary to introduce expert testimony. Instead, any appropriate means would suffice. Also, the court stated that Porter's transfer had the effect of changing Yukon's status from an unsecured creditor to that of a fully secured creditor. This change of status to a preferred creditor would enable Yukon to receive more money than it would have received under Chapter 7 liquidation.

Reiss v. Hagmann, 881 F.2d 890
Author: Judge Logan

Plaintiff, Reiss, filed a voluntary petition in bankruptcy, listing one creditor, the Bank of Woodward. The bankruptcy trustee sought court approval for a compromise settlement to which the bank objected and offered to pay litigation costs. The bankruptcy court approved the settlement and the district court affirmed. The bank appealed, arguing that the bankruptcy court had abused its discretion.

The Tenth Circuit held that the bankruptcy court had abused its discretion in approving the compromise settlement because it failed to make an informed decision based on an objective evaluation of the situation before it. Neither the trustee nor the courts did any legal research or attempted to separate the issues and evaluate the facts. The court further held that where there would have been no cost to the estate and nothing to pay creditors without success of the lawsuit, the bankruptcy court abused its discretion in approving a settlement objected to by the sole creditor. The court reversed and remanded for further proceedings.

Sylvester v. Sylvester, 865 F.2d 1164
Per Curiam

Debtor plaintiff, Wendell Sylvester ("Wendell"), brought an adversary proceeding to determine the dischargeability of certain obligations

owed to his former spouse, Jane Sylvester ("Jane"), pursuant to a divorce settlement. The district court affirmed the bankruptcy court's determination that Wendell's monthly payments were "alimony" or "maintenance." Consequently, the district court held that the payments were not dischargeable under 11 U.S.C. § 523(a)(5).

The Tenth Circuit affirmed, holding that the intent of the parties at the time they entered into their agreement is determinative of dischargeability under § 523(a). The court stated that the Sylvesters' agreement indicated an intent that the payments be considered alimony, maintenance or support. There was no intent that the payments be considered a property settlement. The court also upheld the district court's refusal to analyze Jane's present need for support in order to determine dischargeability of obligations.

Yukon Self Storage Fund v. Green, 876 F.2d 854
Author: Judge Moore

Plaintiff, Yukon Self Storage Fund ("Yukon"), filed a complaint to determine whether a debt was dischargeable. The district court affirmed the bankruptcy court's decision to dismiss the complaint as untimely. Yukon appealed, asserting that the district court erred in dismissing the complaint. Yukon reasoned that it did not receive formal notice.

The Tenth Circuit held that a creditor who does not receive formal notice of a petition for bankruptcy relief under Chapter 7, but who had actual notice shortly after the filing, is bound by the bar date for filing complaints. The language of 11 U.S.C. § 523(a)(3)(A), allows the debt owing to a creditor to be discharged if the creditor has actual, timely notice, notwithstanding the failure of formal notice. When a creditor receives notice of a bar date with sufficient time to act, the requirement of due process is satisfied. The court affirmed the dismissal of the complaint.