Selected New Jersey Consumer Bankruptcy Cases
June 1, 2017 – May 31, 2018

Supreme Court

Lamar, Archer & Cofrin, LLP v. Appling, --- U.S. --- (2018)

The Supreme Court has ruled that a single statement made concerning a debtors' financial condition must be in writing to be actionable under 11 U.S.C. §523(a)(2). Mr. Appling owed the Lamar law firm a bill of more than $60,000. When pressed for payment, Appling represented to the firm that he was expecting a tax refund of about $100,000 that would pay present and future legal fees. In reliance thereon, the firm continued to perform services for Appling. When the tax refund was received, Appling received about $60,000 and used the funds for other purposes. Appling then represented he had not received the refund. The firm completed its services to Appling but was not paid. In 2011 the firm obtained a judgment against Lamar for the unpaid fees. Appling filed Chapter 7 and the firm objected to the dischargeability of the debt owed to it. The Bankruptcy and District courts found for the plaintiff, holding that a statement regarding a single asset does not qualify as a statement respecting financial condition. The Eleventh Circuit reversed finding that a statement about a single asset must be in writing to be actionable. The Supreme Court affirmed, stating: "A single asset has a direct relation to and impact on aggregate financial condition, so a statement about a single asset bears on a debtor's overall financial condition and can help indicate whether a debtor is solvent or insolvent, able to repay a given debt or not. Naturally then, a statement about a single asset can be a 'statement respecting the debtor's financial condition.' (Slip Opinion at 9).

Exemptions- Lien Avoidance

In re Zullo, 581 B.R. 417 (Bankr. N.J. 2017)

The Debtor and his non-debtor spouse acquired real estate in 2003 as tenants by the entireties. In 2012, New Jersey filed a judgement lien against the non-debtor spouse in the amount of $42,404.88. In 2014, a second lien was filed by New Jersey in the amount of $258,500. Several hours before filing Chapter 13, the non-debtor transferred her interest in the real property to the Debtor for a consideration of $1. The Debtor then brought a motion in the Chapter 13 seeking to avoid the liens under Bankruptcy Code Section 522(f)(1) to the extent the liens impaired the Debtors' exemptions to the property. The Debtor contended that he could avoid $19,276.11 from the smaller lien and could avoid the larger lien in its entirety.

The court framed the issue as whether or not the debtor could even take advantage of 522(f)(1) given the change in ownership between the attachment of the judgment lien and the bankruptcy filing. The Court holds that a debtor may not use Section 522(f) to avoid a lien on an interest acquired after the lien has attached citing to *Farrey v. Sanderfoot*, 500 U.S. 291 (1991), which determined "…that a debtor cannot use §522(f)(1) to avoid a lien on an interest after the lien attached." 500 U.S. at 299.

Condominium Fees

In re Holmes, 573 B.R. (Bankr., N.J. 2017)

This case is a remand from the District Court to determine the extent to which a homeowners association condominium lien may be consensual and therefore not subject to modification or the extent to which the lien may be statutory, and if so, to determine if the obligation can be modified. "It is not clear that a security interest in the sense of a lien arising by a contract, perfected and secured by equity in the unit, even exists."

Chapter 13 debtor's home is worth $85,000. Bank of America holds senior mortgage owed in excess of $200,000. The Community Hills Condominium Associations holds a claim for unpaid homeowner fees. The debtor proposes a plan that does not propose to pay the secured claim of Condominium Association. The Association objects to the plan contending that because its claim for unpaid fees is partially secured, the debtor may not modify the claim pursuant to Bankruptcy Code Section 1322(b)(5). The Bankruptcy Court held that the claim could not be modified and the debtor appealed.

Holmes contends that 1322(b) (2) applies only to consensual liens and not to statutory liens. He also contends that to the extent the lien may be statutory it is collateral other than a security interest in the residence, which also renders Section 1322(b)(2) inapplicable.

In 2016, *In re Rones*, 551 B.R.162 (D.N.J. 2016) held that a condominium association has a statutory lien for six months of unpaid assessments pursuant to N.J.S.A. §46:8B-21, thereby rendering the lien partially secured, and: "…because a portion of the Lien was secured by a security interest in the debtor's principal residence, no portion of the Association's lien could be stripped off under Section 1322." (551 B.R. at 171). The Court follows *Rones*, stating: "…the Master Deed created a single consensual lien that is a 'security interest' under the Bankruptcy Code, with a 6-month priority status by operation of the Act, not two separate liens. The fact that the Act provides a statutory priority lien for a portion of Community Hills' claims does not change the character of the lien as a security interest."

Bankruptcy Code Section 101(51) defines security interest as a lien created by agreement. A statutory lien is therefore by definition not a security interest because it is not a lien created by an agreement.

In re Smiley, 569 B.R. 377 (Bankr. N.J. 2017)

Decided while *Holmes, supra*, was on remand, Judge Meisel followed Judge Kaplan's ruling of *In re Keise*, 564 B.R. 255 (Bankr. N.J. 2017) the Court finds that there are two liens, a consensual lien created by the homeowners association and a statutory lien for up to six months of unpaid assessments. The consensual lien may be reduced to judgment for the entire balance of unpaid assessments while there remains a lien for up to six months of unpaid assessments. However, because there are two liens: "…the claim is secured by both a security interest (consensual lien) and a statutory lien; accordingly it is not afforded the protections of §1322(b)(2)". The existence of the statutory lien is in addition to the consensual lien. The court confirms the plan as proposed and permits bifurcation of the homeowners association claim.

Dischargeability Issues

Canonico v Canonico, 2017 Bankr. Lexis 1685 (Bankr. N.J. 2017)

Creditor brought action in state court against debtor. Debtor filed Chapter 7 and Court set March 21, 2017 as the deadline to file complaints objecting to the dischargeability of debts. Creditor was listed in schedules, filed a notice of appearance, appeared at the meeting of creditors and conducted a Rule 2004 exam of the Debtor. Creditor did not seek an extension of the dischargeability deadline, opting instead, to commence filing a complaint at 11:57 p.m. on March 21, 2017. The complaint was not docketed in the main case until 12:02 a.m. on March 22, 2017. The adversary proceeding was not docketed until 12:44 a.m. The Debtor filed a motion to dismiss, claiming the filing was untimely. The Court agreed, stating: "Here, the Plantiffs were not prevented from filing the Complaint in a timely manner by any circumstances other than counsel's own failure to allow more than three minutes to file a complaint, notwithstanding that Plaintiffs had been on notice of the deadline for sixty days." Counsel attempted to blame the ECF system for the delay but the court found no evidence of any problems associated with the ECF system.

Bankruptcy Petition Preparers

Vara v. Martin (In re Womack), 576 B.R. 798 (Bankr. Del., 2017)

The UST filed a complaint for injunctive relief, fines, disgorgement and civil contempt, alleging that the Defendant, Robert Martin, provided petition preparer services to chapter 13 debtors in violation of 11 U.S.C. § 110. The Defendant had entered into two prior Consent Orders agreeing to comply with Section 110. The UST alleged that the Defendant repeatedly solicited and encouraged individuals whose homes were imminently scheduled for short sale to file for chapter 13 relief , but did not adequately inform them of the potential consequences of a bankruptcy filing. The Defendant would instruct a Debtor how to fill out the forms and then claimed he did not prepare them. The Court agreed that the Defendant's conduct posed a serious risk of harm to desperate and vulnerable individuals who were facing the loss of their homes and found that the Defendant's "business model" was based upon practices that violated federal law and prior orders of the Court. Accordingly, the Court entered judgment against the Defendant in favor of the UST on all counts, requiring disgorgement of all fees in each of the relevant cases and imposing injunctive relief, treble fines, and civil sanctions in the amount of $25,000.

"910" Secured Vehicle Claims

In re Fayson, 573 B.R 531 (Bankr. D. Del., 2017)

The Debtor purchased a used Mercedes Benz in 2014 and filed a chapter 13 petition in 2016. She proposed and had confirmed a plan proposing to retain the vehicle and pay the secured claim in full. Six months into the confirmed plan, however, the Debtor, claiming maintenance and warranty issues, returned the vehicle to the secured creditor and sought to modify her plan to surrender the vehicle and convert any deficiency claim into an unsecured claim. The secured creditor objected, contending that a "910 claim" may not be modified. A 910 Claim is the colloquial term for a claim secured by a motor vehicle purchased by the debtor within 2-1/2 years (910 days) of the petition date. If the debtor chooses to retain the vehicle, a 910 Claim

must be treated as fully secured and paid in full under a chapter 13 plan. The creditor also contended that even if the Debtor could so modify the plan, the Debtor was not acting in good faith. Following the majority view on this issue, the Court held that under section 1329(a), a debtor may modify a confirmed chapter 13 plan that originally sought to retain a motor vehicle as collateral securing a "910 Claim" to surrender the motor vehicle and reclassify the any deficiency as unsecured, so long as the modification is proposed in good faith as required by section 1325(a)(3). In holding that the vehicle could be surrendered, the Court noted that surrender is a form of payment and that numerous other provisions of the Bankruptcy Code supported this proposition. The Court also held that it would require a further evidentiary hearing to determine whether the Debtor had proceeded in good faith.

Chapter 13 Vehicle Turnover and Adequate Protection

In re Denby-Peterson, 576 B.R. 66 (Bankr. N.J. 2017)

Debtor purchased a used 2008 Corvette but failed to timely pay $2,491 for taxes and license. Contract provided that if the payment not made, weekly payments would be applied to the taxes and fees until paid. Creditor did not properly apply the payments and instead repossessed the car. The Debtor filed Chapter 13 one week later and moved for a return of the vehicle to her. The creditor opposed, taking the position that Debtor never had title to the car and that it was not property of the estate. Relying upon the theory of equitable title, where circumstantial evidence may tend to establish the fact of ownership, the Court finds that the Debtor had an equitable interest in the car at the time of filing and that it therefore was property of the estate and the automatic stay applied. The Court then held that the creditor is entitled to adequate protection before the car may be released and found no stay violation in maintaining the status quo following *Carr v. Security Sav. & Loan Ass'n*, 130 B.R. 434 (D. N.J. 1991). The creditor also contended that the Debtor had waived any right to redeem the car because she had signed a waiver but the Court held that waivers of the right to redeem are prohibited in consumer transactions. The creditor was also ordered to account for the Debtors' personal property that was in the car when it was repossessed.

Chapter 13 Number of Plan Payments

In re: Klaas, 858 F.3d 820 (3rd Cir. 2017)(per Krause, J.)

The Third Circuit affirmed decisions of the Bankruptcy and District Courts allowing Chapter 13 debtors to "cure" a shortfall of Plan payments after the expiration of the 60 month Plan term. "[W]e conclude the Bankruptcy Code does permit a bankruptcy court to grant such a grace period" and did not abuse its discretion in this case.Debtors, having paid over $174,000 in plan payments, found themselves "short" $1,123, after the 60 months. The Trustee filed a Motion to Dismiss1 but agreed to withdraw the Motion upon payment which they did within 16 days of the Motion. However, a creditor joined in the Motion and pressed it forward, seeking dismissal of the case.

While Section 1322(d)(1) confirmation of a plan that exceeds 60 months, *the issue is whether the Bankruptcy Court may deny a motion to dismiss and/or grant a completion discharge*

where there remains at the end of the Plan term a shortfall the debtor is ready, willing and able to cure.

The Court held that bankruptcy courts have discretion to deny dismissal and allow a grace period, so that if such payment is made within that grace period, the debtors will then have completed "all payments under the plan" and only then would be statutorily entitled to a discharge. 11 U.S.C. § 1328(a).

Avoiding Powers- Fraudulent Transfers

In re Hackler, 571 B.R. 662 (Bankr. N.J. 2017)

In 2013, the Debtors' home was sold at a tax sale for unpaid municipal liens. Phoenix Funding purchased the certificate for $13,500. In 2016, the holder of the certificate proceeded with a tax sale foreclosure action and obtained a judgement in October, 2016. The Debtors filed chapter 13 valuing their home at $335,000 and scheduling the lien claim at approximately $45,000. The Debtor then filed an adversary complaint seeking to set aside the sale as a preference. The court framed the issue as whether a tax foreclosure sale may constitute a fraudulent conveyance or preference where the amount of the underlying tax sale certificate being foreclosed is significantly lower than the value of the property. The Court distinguishes this case from *BFP vs. Resolution Trust Corporation*, 511 U.S. 531 (1994) where the Supreme Court held that a mortgage foreclosure sale conducted in accordance applicable underlying local law is not avoidable as a fraudulent transfer. The Court found that the considerations with respect to tax sales were different from mortgage foreclosures and cited to dicta in *BFP, supra*: "…the considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." 511 U.S. at 537. The Court found the facts to fit within a preference analysis subject to Section 547 of the Bankruptcy Code and denied the creditors' motion for summary judgment.

Preclusion Issues

In re Ehsan, 579 B.R. 722 (Bankr. N.J. 2018)

Prepetition, as a result of failure to respond to discovery in a state court litigation, the Debtor's answer was stricken and judgment entered against him in the amount of $599,828.31. No findings of fact or conclusions of law were made in the state court matter. The judgment creditor filed a complaint objecting to dischargeability in the Debtor's chapter 7 case and sought summary judgment based upon the prepetition judgment. The court framed the issue as whether a New Jersey state court judgment based upon a complaint pleading fraud, which judgment was the result of a party's failure to provide discovery responses, collaterally estops the losing party from further litigating the underlying facts in this nondischargeability action.

The court finds on the facts of the case that the issue of fraud was never actually litigated and so collateral estoppel does not apply. Collateral estoppel requires proof of four elements: the issue is identical to the issue decided in the prior proceeding; the issue was actually litigated in the prior proceeding; the court issued a final judgment in the prior proceeding; determination of the issue was essential to the prior judgment; and, the party against whom collateral estoppel is

asserted was a party to or in privity with a party to the earlier proceeding. Under New Jersey law, collateral estoppel does not apply to default judgments because such judgments have not been actually litigated. The court also took note of the fact that the Debtor did nothing in the state court matter: "Defendants did not participate in the motion practice that led to the state court discovery violation judgment against them, and thus were unable to present a defense to the fraud claim in an adversarial context. Therefore the issue of fraud was not actually litigated." 579 B.R. at 734.

In re Tzanides, 574 B.R. 489 (Bankr. N.J. 2017)

In 1993, Mr. Tzanides transferred his interest in the property to his wife for $100. In 1997 he filed Chapter 13 which was converted to a Chapter 7 in 1998. The trustee in the Chapter 7 case filed suit to avoid the 1993 transfer as fraudulent. In 1998, the trustee settled the matter by dismissing it. Pleadings filed in the case noted that the Debtor was solvent at the time of the transfer and therefore the transfer was not fraudulent. In 2002 a corrected deed was filed to correct statutory references in the document. The property is sold in 2005 and another property was purchased in the wife's name. In 2016, Mr. Tzanides filed chapter 7 again. The trustee in the 2016 case filed a fraudulent transfer action seeking to recover against the second property. The Debtor moved for dismissal or summary judgment. The court explored two issues. First, whether the action was timely, and second, the effect of the settlement of the fraudulent transfer action in the first chapter 7 case.

As to the first issue, following New Jersey version of the Uniform Fraudulent Transfer Act, the court finds that the statute of limitations is one year from the discovery of the alleged fraudulent conduct. Since the 2016 trustee did not exist in 1997, he could not have discovered the transfer until his appointment. However, the trustee must show the existence of an actual creditor who could have moved to set aside the transfer and this was not alleged. The court grants the trustee leave to amend the complaint.

As to the second issue, the court finds that there is no privity between the two trustees and that as a result, the 1998 settlement is not collateral estoppel against the 2016 trustee. Among other things, each case has its own unique set of creditors: "…the Previous Trustee and the Current Trustee are not in privity because they represent an entirely different body of creditors."