M B C NEWSLETTER

MISSISSIPPI BANKRUPTCY CONFERENCE

Editors: Robert Byrd and William P. Wessler **Fall 2022**

PRESIDENT'S MESSAGE

It has been an honor and pleasure to serve as President of the 2022 Mississippi Bankruptcy Conference. We are excited to be meeting in-person for the forty-second annual seminar at The Refuge Hotel & Conference Center Sheraton Flowood, on November 17 & 18, 2022. The Refuge is a new hotel/conference center in a great location in Flowood that will be a beautiful "fresh start" for our in-person conference.

The Seminar Committee Chairs, Rachel Coxwell and Jim Wilson, have put together an outstanding program for our first non-virtual conference since 2019. Allow me to extend a huge Thank You to everyone who has agreed to speak this year. The topics for the seminar include dynamic presentations on relevant topics that will be sure to provide new information and enhance your practice, including sessions we always look forward to, such as Case law Update, Clerks' Update and Judicial Town Hall. If you haven't registered yet, please stop and do so! You can register on-line at mississippibankruptcyconference.com.

To the Conference members, we thank you for your continued support of the Mississippi Bankruptcy Conference. It has been more than two years since we have been able to get together to learn and fellowship, and, if you are anything like me, you have missed it greatly and are ready to reconvene for what's sure to be a phenomenal seminar.

I want to also thank the Conference's Board of Directors, Jordan Ash, Jason Graeber, Christopher Meredith (Technology Committee Chair and Duberstein Chair), Stacey Moore Buchanan (President-Elect), Stephen Smith (Executive Director, Secretary and Treasurer) and James Wilson, with special thanks to Stephen Smith and Charlene Kennedy, both of whom are invaluable assets to the Conference. Looking forward to seeing you all in November!

Kim Bowling, President, Mississippi Bankruptcy Conference

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Opinion Summaries by JUDGE JAMIE WILSON[1]

[1]*These materials are designed to provide general information and should not be considered as a substitute for the actual text of the opinions. Unless noted otherwise, all references to code sections are to the U.S. Bankruptcy Code, and all references to rules are to the Federal Rules of Bankruptcy Procedure.*

In re Stokes, Case No. 21-00352-JAW (Jan. 20, 2022)

The Debtors obtained a loan from Nissan Motor Acceptance Corporation ("Nissan") in the amount of $16,429.75 to purchase a new car. Four years later, the Debtors filed a chapter 13 petition. At that time, the value of the car was $6,800, and the Debtors owed Nissan $11,698.15. The Debtors' confirmed plan "crammed down" Nissan's secured claim to $6,800. Later, the car was totaled in an accident, and the chapter 13 trustee received insurance proceeds of $10,128.25. By then, distributions under the plan had reduced Nissan's secured claim to $6,280.16. The chapter 13 trustee filed a motion seeking permission to disburse $6,280.16 of the insurance proceeds to Nissan. The Debt-ors agreed to this proposal. They disagreed, however, as to the disbursement of the remaining insurance proceeds of $2,834.27.

In the absence of any binding precedent, the Court adopted the analysis of the Missouri bankruptcy court in *In re Cotton,* No. 11-42420, 2015 WL 5601454 (Bankr. W.D. Mo. Sept. 22, 2015), and ruled that Nissan held an inchoate lien on the surplus insurance proceeds under § 1325(a)(5)(B)(i) pending the Debtors' successful completion of the plan and discharge. Until the release of Nissan's inchoate lien, the Debtors were not entitled to use the surplus insurance funds to buy another car without Nissan's consent. When and if the Debtors receive a discharge, the surplus insurance pro-ceeds would revest in the Debtors free of Nissan's lien.

Jones v. JC Enterprises, LLC (In re Jones), Adv. Proc. 21-00006-JAW (Apr. 27, 2022)

The Debtors leased a mobile home from JC Enterprises, LLC. The lease included an option to pur-chase the mobile home. The Debtors filed a chapter 13 petition. Their chapter 13 plan provided for ongoing monthly payments to JC Enterprises. On March 16, 2021, the Debtors completed their plan payments, which included $30,250 in payments made to JC Enterprises. The Debtors initiated an adversary alleging that: they had paid JC Enterprises in full for the mobile home through their chapter 13 plan; they were entitled to the title of the mobile home and the refundable security de-posit; they overpaid JC Enterprises through the plan; the excess funds paid JC Enterprises should be distributed to unsecured creditors; and JC Enterprises violated the automatic stay, discharge or-der, and discharge injunction. After the complaint was filed, the Debtors' counsel withdrew. The Debtors informed the Court at a status conference that they did not intend to retain new counsel and announced their intention to represent themselves in the adversary.

JC Enterprises served requests for admission on the Debtors, who did not respond. JC Enterprises filed a motion for summary judgment, arguing that the admissions by default established that: the Debtors did not properly exercise their option to purchase the mobile home; the Debtors had not paid JC Enterprises since their plan ended, causing arrears to accumulate; JC Enterprises did not violate the automatic stay or discharge injunction by attempting to collect those arrears post-discharge; and the Debtors did not overpay JC Enterprises. The Debtors did not respond to the motion.

The Court found that pursuant to Rule 36(a) of the Federal Rules of Civil Procedures, as made ap-plicable by Rule 7036, JC Enterprises' requests for admission were deemed conclusively estab-lished. Accordingly, there was no genuine issue that the Debtors did not own the mobile home and were not entitled to its title, the security deposit, or the allegedly overpaid funds. Also, JC Enter-prises' attempts to collect the arrears did not violate the discharge order or injunction because the Debtors admitted that the debt to JC Enterprises was scheduled as a "long-term debt" deemed non-dischargeable under § 1328(a)(1). The Court, therefore, granted the motion and dismissed the adversary.

In re Lindsey, Case No. 20-02316-JAW (May 2, 2022)

The Debtor filed a chapter 13 petition on September 3, 2020 and died on February 27, 2022 at the age of seventy-three. The Debtor's daughter and son-in-law, who the state court had appointed as the administrator of her estate, filed a motion for hardship discharge pursuant to § 1328. The chap-ter 13 trustee objected to the motion because "absent a thorough analysis and appraisal [of the home], it cannot be assumed unsecured creditors in a chapter 7 would receive less." The only issue in dispute, therefore, was whether there was equity in the Debtor's home to pay unsecured credi-tors more in a chapter 7 case than the zero percent of unsecured debt being paid through the chapter 13 plan as of the date of confirmation.

In Schedule A/B, the Debtor had valued her home at $125,000, and in Schedule C, the Debtor had claimed a homestead exemption of $70,067.97. The secured claim against the home was for $52,585.79. Based on these amounts, there appeared to be $2,346.24 of potential equity in the home on the date the Debtor's chapter 13 plan was confirmed.

The Court heard testimony from the Debtor's daughter and son-in-law as to the value of the home. Their testimony indicated that the value of the home was far less than $125,000. The Debtor's son-in-law testified that the home needed at least $58,500.00 to $62,500.00 in repairs. The Debtor's daughter testified that the Debtor had been unable to maintain the home after her husband's death in 2010. The Court found that the evidence and testimony convincingly showed that the home's need for significant repairs, in all probability, existed at the time of confirmation in an amount well in excess of $2,346.24. The Court, therefore, found that there was no equity in the home as of the date of confirmation that could have been distributed to creditors in a chapter 7 and granted the mo-tion for hardship discharge.

Opinion Summaries by JUDGE JAMIE WILSON (continued)

Charter 3 Development, LLC v. Hall (In re Hall), Adv. Proc. 20-00051-JAW and Charter 3 Development, LLC v. Warriner (In re Warriner), Adv. Proc. 20-00052-JAW (May 3, 2022)

Charter 3 Development, LLC ("Charter 3") and Castlerock Properties, LLC ("Castlerock") entered into joint ventures for the construction and sale of spec houses on three vacant lots in the Reunion subdivision in Madison, Mississippi. Charter 3 agreed to contribute the lots to the joint ventures and fund the construction of the spec houses, and Castlerock agreed, for its part, to be responsible for constructing the spec houses. They agreed to evenly split any profits from the proceeds of the sales realized "after paying any and all costs associated with the construction of the project." Those costs included: (1) the cost of the lot initially borne by Charter 3; (2) all interest expenses incurred by Charter 3 to finance the construction of the home; and (3) all money directly contributed by Charter 3 for construction costs. They also agreed that on the day of each closing, a "simultaneous conveyance" would occur where Charter 3 would convey the lot to Castlerock and Castlerock, in turn, would convey the lot and newly constructed home to the buyer.

Unfortunately, the joint ventures were unprofitable. The funds paid Castlerock at the closings to-taled only $511,297.35, but Charter 3's unreimbursed construction costs totaled $682,437.89. Un-der the joint venture agreements, that money belonged to Charter 3, but Castlerock deposited the checks it received at the closings into its general operating account and used the money to pay other expenses. Charter 3 did not receive any portion of the sales proceeds.

Castlerock and its members, Jerry Alvin Hall ("Hall") and Charles H. Warriner ("Warriner"), filed chapter 7 petitions for bankruptcy in late 2020. Charter 3 initiated separate adversary proceedings against Hall and Warriner, alleging that they were individually liable for $511,297.36 and that the debt was nondischargeable under § 523(a)(2)(A), § 523(a)(4) and/or § 523(a)(6). At trial, Hall and Warriner argued that they could not be held personally liable for a debt owed by Castlerock, an LLC, and otherwise had not engaged in any wrongdoing.

The Court ruled that Hall and Warriner could be held personally liable for Castlerock's debt for their own acts or omissions. In that regard, the Court found that Hall had engaged in false pretens-es to induce Charter 3 to sign the quitclaim deeds to the lots. Castlerock needed the quitclaim deeds to proceed with the sales of the houses. After the sales, Hall, who was Castlerock's accountant, made no effort to safeguard any of the proceeds to remit to Charter 3. Castlerock's bank statements showed that the money was spent quickly and some of it was paid to Hall when the business was struggling financially. Although Charter 3 contacted Hall demanding payment, Hall either ignored Charter 3, scheduled meetings that he later missed, or assured Charter 3 that payment was forth-coming. At one point, Hall assured Charter 3 that a check was in the mail when Castlerock's ac-count clearly had insufficient funds to pay Charter 3.

The Court viewed Warriner's liability differently. Warriner had attempted to resign as Castlerock's manager after the sale of the first house, and his role in the business diminished. The Court rejected Charter 3's attempt to impute Hall's fraud to Warriner and instead found Warriner liable for engag-ing in false pretenses only with respect to the first sale.

Based on this same conduct, the Court found that Charter 3 had proved its claim for actual fraud but again ruled that Warriner's liability was limited to the debt owed from the first sale. The Court also found in favor of Charter 3 on its alternative claim for fiduciary fraud with the same limitation. Hall's conduct did not involve simple or even inexcusable negligence but demonstrated a level of culpability that amounted to a defalcation as well as embezzlement. As to Warriner, his presence at the first closing, his acceptance of the check, and his blind delegation of authority to Hall over those funds likewise constituted reckless conduct given his knowledge of Castlerock's financial problems. As to Charter 3's final claim, the Court also found that Hall and Warriner had committed a "willful and malicious injury."

In summary, the Court held that Hall and Warriner were jointly and severally liable for the debt owed to Charter 3 in the amount of $165,870.42 from the first sale and that Hall, in addition to his joint and several liability for $165,870.42, was individually liable for the debt owed to Charter 3 from the second and third sales in the amount of $345,426.94. The Court held that these respective amounts were excepted from discharge in the Hall's and Warriner's bankruptcy cases on the ground that the debts were either obtained by false pretenses and/or actual fraud under § 523(a)(2)(A), resulted from fraud or defalcation while acting in a fiduciary capacity and/or em-bezzlement under § 523(a)(4), and/or were caused by a willful and malicious injury to Charter 3 under § 523(a)(6).

Bacallao Granite & Marble, LLC v. Poseidon Indus., Inc. (In re Bacallao Granite & Mar-ble, LLC), Adv. Proc. 22-00003-JAW (July 5, 2022)

The Debtor installs granite, quartz, quartzite, and marble countertops in newly constructed and re-modeled homes. On occasion, the Debtor purchased machinery and equipment for cutting and pol-ishing natural stone from Poseidon Industries, Inc. ("Poseidon"). In 2019, the Debtor's owner, Yoel Bacallao ("Bacallao"), met with Poseidon to discuss the purchase of a new saw for $213,500. To finance the purchase, the Debtor obtained a loan from Engs Commercial Finance Co. ("Engs"). Poseidon required payment of all or some of the purchase price before the delivery of the saw, and Engs agreed to provide the payment on the condition that the Debtor commence making monthly payments to Engs immediately. Poseidon never delivered the saw. The Debtor filed a petition under subchapter V of chapter 11 on May 4, 2021. That same month, Engs persuaded Poseidon to return $176,000 of the purchase price paid for the saw.

Opinion Summaries by JUDGE JAMIE WILSON (continued)

The Debtor initiated an adversary proceeding against Poseidon and Engs seeking turnover and avoidance of the payments it made to Engs in the amount of $86,400.06. In addition, the Debtor alleged a separate claim against Poseidon for its refusal to make repairs to a machine known as the "T-Rex," which the Debtor had previously purchased from Poseidon. The Debtor viewed Posei-don's refusal to repair the T-Rex as a litigation strategy to force the Debtor into abandoning its claims related to the undelivered saw.

Invoking the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., Poseidon filed a motion ask-ing the Court to order the arbitration of the T-Rex claim. The arbitration provision in question ap-peared in an unsigned, untitled, undated, eight-page document. There was no signature page. The document did not provide any lines or spaces for a description of the machinery sold, the sale price, the buyer's name, the seller's name, or the date of the sale. The initials "YB" or "Y_B" appeared next to some of the paragraphs but Bacallao testified through a translator at the hearing that he does not read, write, or speak English and that he did not recall initialing the document. The Debtor's name and address appeared in handwriting on the first page, but Poseidon added that information after the sale of the T-Rex.

The Court found that the document was not sufficiently definite to be legally enforceable under Mississippi law. The Court also found that even assuming the document was sufficiently definite to constitute an offer, Poseidon failed to meet its burden of proving mutual assent or a "meeting of the minds." Even if the document constituted a valid contract, Poseidon failed to prove that the Debtor's refusal-to-repair claim fell within the scope of the arbitration provision given that there was no reference to the T-Rex in the document. Finally, the Court rejected the Debtor's argument that enforcement of the arbitration clause would inherently conflict with the purpose of the Bank-ruptcy Code, a finding in favor of Poseidon that did not change the outcome.

1st Franklin Financial Corporation v. Jenkins (In re Jenkins), Adv. Proc. 22-00002-JAW (Aug. 16, 2022).

1st Franklin Financial Corporation ("1st Franklin") loaned the Debtor $2,987.70 twelve days before he commenced a chapter 13 bankruptcy case, which he later converted to a chapter 7 case. 1st Franklin initiated an adversary proceeding seeking a determination that the debt owed was not "dis-chargeable pursuant to 11 U.S.C. § 727." 1st Franklin attempted to serve process on the Debtor by mail at an address that was not the address listed in the petition or the address set forth in the notice of address change filed in the bankruptcy case. Also, 1st Franklin did not serve process on Debt-or's counsel in the bankruptcy case. The Debtor filed a motion to dismiss because of 1st Franklin's failure to properly serve the summons or, in the alternative, for failure to state a claim for relief.

In its response, 1st Franklin asserted that the Debtor's actions rendered the debt non-dischargeable under § 523(a)(2)(C). It did not address the service errors. Instead, 1st Franklin again attempted to serve the summons and complaint on the Debtor by mail. This time, it used the Debtor's latest ad-dress. It also served a copy of the complaint (but not the summons) on the Debtor's counsel through the Court's CM/ECF system.

At the hearing on the motion to dismiss, 1st Franklin's counsel stated that the citation to § 523(a)(2)(C) in its response was a mistake and that the sole basis for 1st Franklin's claim was § 727(a)(4)(C). That statute denies a discharge of all debts of a debtor who accepts or offers a bribe or who commits or attempts to commit extortion.

Addressing the service errors first, the Court concluded that 1st Franklin's first attempt was defec-tive because it did not mail the summons and complaint to the Debtor at his then-current address or even the address listed in the petition as required by Rule 7004(b)(9) and because it did not serve the Debtor's counsel as required by Rule 7004(g). The Court next concluded that 1st Franklin's second service attempt was also defective. 1st Franklin served the Debtor with a stale summons in violation of Rule 7004(e) and more than ninety days after the complaint was filed in violation of Rule 4(m) of the Federal Civil Rules of Procedure, which Rule 7004(a) adopts by reference. Also, 1st Franklin failed to serve the Debtor's counsel with the summons and used a method for service not permitted by Local Rule 5005-1(a)(2)(A).

The Court recognized that these service issues could be remedied but declined to grant 1st Franklin a third opportunity to serve process because the complaint failed to state a plausible claim for relief. At bottom, 1st Franklin alleged that the Debtor obtained the loan on the eve of filing bankruptcy with no intention of repaying it. Section 727(a)(4)(C), however, applies only to conduct "in or in connection with the case." The purpose of the statute is to punish debtors who attempt to subvert the bankruptcy process, but 1st Franklin's complaint did not include any allegations about the Debtor's conduct after he filed bankruptcy and did not hint that the Debtor engaged in, or attempted to engage in, bribery or extortion.

1st Franklin did not seek leave to amend its complaint to restate its claim under a different subpara-graph of § 727(a) or under a subparagraph of § 523(a), and 1st Franklin's counsel demonstrated at the hearing his understanding of the difference between the two statutes. For this reason, the Court dismissed the complaint with prejudice without granting 1st Franklin leave to amend the complaint.***A/C A/C Supply Inc. v. Botsay (In re Botsay),*** Adv. Proc. No. 21-06001-KMS, ECF No. 24, 2022 WL 106580 (Bankr. S.D. Miss. Jan. 11, 2022).

Opinion Summaries by HONORABLE KATHARINE M. SAMSON

A/C Supply Inc. v. Botsay (In re Botsay), Adv. Proc. No. 21-06001-KMS, ECF No. 24, 2022 WL 106580 (Bankr. S.D. Miss. Jan. 11, 2022).

Ch. 7: On Debtor-Defendant Botsay's Motion for Summary Judgment on Complaint objecting to discharge under § 727(a)(4)(A) and to the discharge of a particular debt under § 523(a)(2)(A) and (a)(4).

Botsay owned and operated a heating-and-air-conditioning company. For more than twenty years, he bought goods and supplies for the company on credit from A/C Supply. In 2013, the debt was reduced to a note ("Note"), on which Botsay ultimately defaulted. A/C Supply filed a collection action in circuit court and got a $192,458.81 judgment ("Judgment"). Five months before A/C Supply filed that action, Botsay and his wife executed a warranty deed to themselves ("Deed") that changed how they held title to their home, from joint tenants to tenants by the entirety. Approximately three months after they executed the Deed, Botsay's attorney emailed A/C Supply's attorney a title report for the home, which included a copy of the Deed. A/C Supply then filed the collection lawsuit and a second action, in chancery court, seeking to set aside the Deed as a fraudulent transfer. The fraudulent transfer action was pending when Botsay filed his bankruptcy case. Notwithstanding the Deed, Botsay represented in his Statement of Financial Affairs (SOFA) that he had not sold, traded, or otherwise transferred any property other than in the ordinary course of business for the two years preceding his bankruptcy filing. The adversary proceeding challenged Botsay's motives for executing the Deed and his representations about the transfer in the SOFA.

Held: Summary judgment in favor of Botsay on all counts. The Deed could not have been a false representation, false pretense, or fraud by which Botsay obtained credit from A/C Supply, because the Deed was executed nearly six years *after* the Note on which the Judgement was based. Neither was the Deed a fraudulent transfer, because a transfer of exempt property is not fraudulent regardless of intent in Mississippi. And Botsay's interest in his home was exempt under the homestead and wildcard exemptions before it was transferred into the tenancy by the entirety. Botsay's representation in his SOFA that he had not transferred any property within the two years before filing bankruptcy was not a knowing and fraudulent false statement under oath. Botsay did not consider a transfer from himself to himself—meaning the execution of the Deed—to be within the scope of the SOFA's question. And when Botsay filled out the SOFA, he knew that A/C Supply already knew about the Deed because A/C Supply had filed the lawsuit seeking to have it set aside. And finally, the transfer was not material, because A/C Supply could not have reached Botsay's home in the previous joint tenancy. On these and its other arguments against summary judgment, A/C Supply failed to carry its non-movant's burden.

Greenway Envtl. Servs. LLC v. Green (In re Riverbend Envtl. Servs. LLC), Adv. Proc. No. 20-00050-KMS, ECF No. 72, 2022 WL 828304 (Bankr. S.D. Miss. Mar. 17, 2022).

Ch. 11: On cross-motions for partial summary judgment on the issue of whether provisions in two expired leases were enforceable against Plaintiff Greenway Environmental Services LLC, a non-lessee.

Debtor Riverbend Environmental Services LLC had owned and operated a landfill now owned and operated by Greenway, which bought substantially all Riverbend's assets in a § 363 sale. The sale excluded approximately 110 acres of land co-owned by Riverbend and certain of the Defendants ("Family Defendants"). Riverbend owns an undivided 2/3 interest in the property ("Co-Owned Property") and the Family Defendants own an undivided 1/3 interest. More than 28 years ago, a now-deceased forebear of the Family Defendants, Marrion Green, executed two leases (individually, "Dinelli Lease" and "Green Lease"; together, "Leases") with a corporation whose ownership interest in the Co-Owned Property preceded Riverbend's. In the Green Lease, Green leased his 1/3 undivided interest in the Co-Owned property—the interest the Family Defendants now own—to the corporation, Southern Landfill Management Inc. Green also executed the Dinelli Lease, which purported to lease Southern Landfill a tract whose connection with the undivided interests in the Co-Owned Property was unclear from the record. At issue in the adversary proceeding were provisions ("Covenants") in each Lease that, according to the Family Defendants, required Riverbend to convey to them its 2/3 interest in the Co-Owned Property.

Held: Summary judgment in favor of Greenway. Covenants having to do with land or the use of land are either real or personal. A real covenant runs with the land, that is, binds the heirs and assigns of the original covenantor. A personal covenant binds only the covenanting parties unless the covenant is specifically assumed and ratified. The Family Defendants could not show that the Covenants in either Lease met the conditions required to be real covenants. And Riverbend did not assume the Covenants, because it did not assume the Leases, both of which expired before Riverbend acquired its interest in the Co-Owned Property. Consequently, neither Covenant was enforceable against Riverbend.

In re Farris, Ch. 13 Case No. 21-50858-KMS, ECF No. 38, 2022 WL 962367 (Bankr. S.D. Miss. Mar. 30, 2022).

Ch. 13: On objection to confirmation by creditor Tower Loan of Mississippi LLC, challenging Debtors' proposed avoidance of Tower's nonpurchase money lien on its collateral for a $4340.18 installment loan.

Held: Objection sustained as to two televisions, a wordworking lathe, and a collection of model cars; and otherwise overruled. Lien was avoidable only as to personal property that was both exempt under Mississippi's exemption statute, Miss. Code Ann. § 85-3-1(a), and a "household good" as defined under §

Opinion Summaries by HONORABLE KATHARINE M. SAMSON (continued)

522(f)(4) of the Bankruptcy Code. Every item of the challenged collateral was exempt under the Mississippi statute as an item of tangible personal property worth less than $200 each. *See* Miss. Code Ann. § 85-3-1(a)(vi). But as to Debtors' three pledged televisions, lien could be avoided as to only one under the plain language of § 522(f)(4)(A)(v), which provides that "household goods" includes only one television. Lien was avoidable as to desktop computer as the "1 personal computer" permitted under § 522(f)(4)(A)(xv). Lien could also be avoided as to Chromebook, even though it, too, was a "personal computer," because Chromebook could be defined alternatively as "educational equipment primarily for the use of [the debtor's] minor dependent children," § 522(f)(4)(A)(xi). **Court held that "household goods" under the Code includes not only "1 personal computer and related equipment" under clause (xv) but also one additional personal computer and related equipment for each school-age child in the household as "educational equipment" under clause (xi).** Apple tablets were not "personal computers" subject to limitation under § 522(f)(4)(A)(xv) and (B)(v) but instead were "electronic entertainment equipment" subject to the limit on total fair market value under § 522(f)(4)(B)(ii). Court rejected Debtors' argument that lien was avoidable as to lathe as an "appliance" under § 522(f)(4)(A)(iii), because lathe's domestic use was not obvious and Debtors' nonspecific "useful for maintaining and upkeeping the home" did not sufficiently describe domestic use. Court also rejected Debtors' argument that NASCAR model cars were "personal effects" as to which lien could be avoided under § 522(f)(4)(A)(xiv).

Robertson v. Murray (In re Murray), Adv. **Proc. No. 20-00032-KMS, ECF No. 84, 2022 WL 982736 (Bankr. S.D. Miss. Mar. 31, 2022).**

Ch. 7: On cross-motions for summary judgment on whether a state court default judgment precluded dischargeability litigation in the bankruptcy court under § 523(a)(6).

Robertson filed an adversary proceeding under § 523(a)(6) against Murray based on Robertson's $500,000 default judgment against Murray by a Mississippi circuit court on a complaint alleging libel (both negligent and intentional) and intentional infliction of emotional distress. The judgment did not include findings of fact, did not specify the count on which it was rendered, and did not describe how the court calculated the damages. Robertson contended that issue preclusion applied to bar Murray from relitigating the damages award.

Held: Summary judgment in favor of Murray. Issue preclusion, formerly known as collateral estoppel, promotes judicial economy by treating as final and conclusive any issues of fact or law that have been validly and necessarily determined between the parties. A federal court follows the issue preclusion rules of the state from which the prior judgment emerged. Issue preclusion applies in bankruptcy to prevent relitigation of elements of a dischargeability claim that were actually litigated and determined in a prior action. Where the specific issue litigated cannot be identified, issue preclusion cannot apply. Here, it was impossible to identify whether the damages were awarded for a willful or malicious injury within the scope of § 523(a)(6), because the default judgment did not state the factual or legal grounds on which it was rendered and did not set out evidence supporting the damages. Without supporting evidence, an award of unliquidated damages is void under Mississippi law. Consequently, the default judgment would not be entitled to preclusive effect under Mississippi law and therefore should not be given preclusive effect in bankruptcy.

##End##

Opinion Summaries by HONORABLE SELENE D. MADDOX

(Case summaries prepared by Jace Ferraez and Erin McManus, Law Clerks to Judge Selene D. Maddox).

***In re: Ironwood Financial, LLC,* 21-10866-SDM, Dkt. #167. Order Approving Application to Employ Attorneys and Disclosure of Compensation. September 16, 2021.**

The Debtor, Ironwood Financial, LLC, filed chapter 11 bankruptcy on May 3, 2021. Soon after, on May 27, 2021, the Law Offices of Craig M. Geno, PLLC ("Geno") filed an Application to Employ, seeking to be employed as the Debtor's general bankruptcy counsel under 11 U.S.C. § 327. The application was approved and entered by the Court on June 23, 2021. Three months later, on September 14, 2021, the Debtor filed a second *Application to Employ,* also seeking to retain and employ the law firm of Mitchell, McNutt & Sams, P.A. ("Mitchell McNutt") as general counsel in the Debtor's chapter 11 bankruptcy case under 11 U.S.C. § 327. Worldpay ISO Inc. ("Worldpay") filed an objection to the application on August 10, 2021, arguing that (1) Mitchell McNutt was the recipient of a preference payment during the 90-day preference period and, therefore, was not "disinterested" within the meaning of 11 U.S.C. § 327(a); and (2) Mitchell McNutt would merely duplicate the services currently being provided by Geno.

HELD: The Court approved Mitchel McNutt's Application to Employ. The Court looked to *In re SMBC Healthcare,* 473 B.R. 871 (Bankr. S.D. Tex. 2012) to determine whether Mitchell McNutt should be employed under § 327. The inquiry was a two-part one: first, the Court had to determine whether Mitchell McNutt held or represented an interest adverse to the estate by looking to the Mississippi Rules of Professional Conduct; then, the Court, utilizing a totality of the circumstances approach, had to determine whether Mitchell McNutt qualified as "disinterested persons" under § 327. The Court found that Worldpay failed to present any evidence that a violation of the Mississippi Rules of Professional Conduct or the ABA Model Rules of Professional Conduct had occurred or that Mitchell McNutt held an interest adverse to the bankruptcy estate. Next, the Court considered several factors to determine whether Mitchell McNutt was a "disinterested person" under § 327(a), including whether Mitchell McNutt would serve as general or special counsel, was an "insider", held any other type of interest on property of the estate and whether Mitchell McNutt had any undisclosed relationship with the Debtor pursuant to Bankruptcy Rule 2014 or received potential preferential payments. In its analysis, the Court noted that while Mitchell McNutt held certain prepetition claims and received a potential preference payment, those factors were outweighed by the fact that there had been a long-standing professional relationship between the Debtor and Mitchell McNutt, which allowed Mitchell McNutt to provide knowledge and experience beneficial to the Debtor and the Debtor's additional counsel, Geno. Even though the Debtor and Mitchell McNutt had an established relationship prepetition, Mitchell McNutt fully disclosed that relationship. The Court held that this factor, coupled with the waiver of the prepetition claim for attorney's fees and Mitchell McNutt's knowledge and previous experience, outweighed the existence of prepetition claims and preference payments. The Court declined to rule on whether Mitchell McNutt's services would be duplicative because the Court could do so later under 11 U.S.C. § 330 once it filed the appropriate application.

In re: Terry Floyd, 21-10276-SDM, Dkt. #47. Memorandum Opinion and Order Overruling Objection to Confirmation of Chapter 13 Plan. October 22, 2021.

The Debtor, Terry Floyd ("Floyd") filed chapter 13 bankruptcy on February 10, 2021. According to Floyd's schedules, the total amount of all unsecured claims was $40,465.25, including two claims held by Southern Bancorp Bank ("Southern") in the amount of $15,436 and $3,737. On March 8, 2021, Floyd filed a proposed chapter 13 plan providing for payment of $0.00 to nonpriority unsecured creditors. The plan did not include a separate provision regarding payments to be made to Southern. On March 16, 2021, Southern filed a proof of claim indicating a total claim in the amount of $23,000.14, which consisted of an account secured by a lien on three items of collateral: a boat, a motor, and a boat trailer. That same day, Southern filed an objection to confirmation of Floyd's proposed chapter 13 plan, arguing that the plan made no provision for the payment of Southern's secured claim. The Court scheduled a hearing on the objection, and, during the hearing, the Court was informed that Floyd sold the three pieces of boat collateral prepetition without Southern's consent. Therefore, Southern argued its claim should be treated as nondischargable and paid through the plan as a "special claim" under 11 U.S.C. § 1322(b)(1). The chapter 13 Trustee disagreed, arguing that the claim was unsecured and not property of the bankruptcy estate because of the collateral's disposition prepetition. The Trustee further argued that that the separate classification of Southern's claim based on the claim's status as "nondischargeable" unfairly discriminated against the remaining unsecured claims. The issues presented before the Court were: (1) whether Southern's claim was secured or unsecured and whether the claim should have been bifurcated under 11 U.S.C. § 506(a)(1); and (2) whether the designation of a separate, special class of Southern's claim was unfairly discriminatory, conflicting with 11 U.S.C. § 1322(b)(1).

HELD: While the Court declined to determine the dischargeability status of Southern's claim, the Court held that, because Southern's lien was not attached to property in which the bankruptcy estate had an interest, Southern's claim should be treated as an allowed unsecured claim. Further, the Court held that the proposed treatment of Southern's claim as a "special claim" was unfairly discriminatory and, therefore, would not be approved. The Court looked to other courts for guidance in determining whether Southern's

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

proposed treatment was unfairly discriminatory and, in noting that different factors are considered by courts on a case-by-case basis, considered two primary factors: (1) the extent and proportion of the discrimination between the classes that would result upon separation, and (2) the underlying reasons for the discrimination and whether they are reasonable. The Court found that the separation of Southern's unsecured claim from the other scheduled unsecured claims would result in Southern's claim being paid in full and the remaining claims being paid on a pro rata basis at 0% and ultimately discharged. On the other hand, absent separate classification, all unsecured claims would be treated equally. Ultimately, the Court determined that Southern's proposal to pay Southern 100% and all other unsecured creditors 0% for no reason other than Floyd's prepetition disposition of the boat collateral was, on its face, unfair.

***In re: Express Grain Terminals, LLC,* 21-11832-SDM, Dkt. #1468. Memorandum Opinion and Order Finding the Individual Grain Contracts are Severable and are Not Contracts for Financial Accommodations under 11 U.S.C. § 365. December 14, 2021.**

Express Grain Terminals, LLC ("Express Grain") filed its chapter 11 bankruptcy petition on September 29, 2021. Express Grain operated as a grain storage facility, physically storing crops (grain and soybeans) purchased from its contracted farmers. Express Grain was also a manufacturer, operating a "crushing facility" where certain delivered crops were processed to yield byproducts that were then sold for a profit over and above the crop purchase price. Concerning the grain storage aspect, Express Grain would contract with farmers to store their grain through individual contracts called "grain contract confirmations," which consisted of one- to two-page documents containing an agreed-upon price, commodity description, destination, the contract date of execution, and certain "terms and conditions." On October 8, 2021, two farming entities filed an emergency motion pursuant to 11 U.S.C. §§ 105, 365, and 557 seeking an expedited determination that the grain contracts were executory in nature and, if so, an immediate deadline for Express Grain to assume the contracts. The Court partially granted the emergency motion and determined the contracts at issue were "executory" under 11 U.S.C. § 365. The Court also established certain deadlines for Express Grain to either assume or reject the executory contracts and for all other parties to challenge Express Grain's acceptance of any contract. By November 1, 2021, Express Grain filed motions to assume contracts with over 100 farmers or farming entities. Several parties, including various farming entities and production lenders, filed responses and objections to many of the motions to assume. Through these responses and objections two issues were brought before the Court: (1) whether the executory contracts were part of a "single contract," i.e., whether these executory contracts were part of a larger master trading agreement (the "MTA") that should be assumed or rejected in its entirety; and (2) whether the executory contracts were contracts for "financial accommodations" under 11 U.S.C. § 365(c)(2).

The parties made several arguments. First, with respect to the issue of the grain contract severability, certain farming entities argued that the MTA—drafted by Express Grain—was created as a "single contract with different transactions defined as 'contracts' for the sale of grain," and that the individual grain contracts within the MTA were not severable. In support of their inseverable arguments, the objecting parties argued that the payment terms were set forth in the MTA rather than the individual contracts; the contract terms for "basis contacts" and "hedge to arrive" contracts were defined in the MTA; and the existence of a netting provision related to Express Grain's right to net various contracts of the farmers. Express Grain disagreed and argued that the MTA could not be the contract to be assumed or rejected because of the parties' prior conduct. Specifically, Express Grain argued that out of the hundreds of individual grain contracts executed between Express Grain and farmers, only a "relatively small" number of MTAs were executed in connection with the individual grain contracts. Express Grain further argued that, throughout Express Grain's course of business with the farmers, the parties rarely relied on the MTAs in connection with prior agreements, transactions, or negotiations entering into grain sale contracts. With respect to the financial accommodations issue, several of the farming groups pointed to a particular provision of the MTA, alleging that it was clearly a financial accommodation that rendered the grain contracts credit agreements that may not be assumed in bankruptcy under 11 U.S.C. § 365 regardless of the intent of the parties. Again, Express Grain disagreed, arguing that (1) the Court had already ruled that the contracts were executory in nature and, as no party appealed this decision, the finding was final; and (2) contracts for financial accommodations were limited to contracts for loan agreements, loan commitments, and letters of credit—not for contracts for the sale of goods or providing services. One creditor, UMB Bank, N.A. ("UMB") agreed with Express Grain on this issue, arguing that determining whether a contract is a financial accommodation required an inquiry into whether the primary purpose of the agreement was to provide financing or whether any provided financing was incidental to the overall agreement.

HELD: The Court ultimately held that (1) the individual grain contracts were severable from the MTA under Mississippi contract law and could be rejected or assumed under 11 U.S.C. § 365, and (2) the contracts were not for financial accommodations under 11 U.S.C. § 365(c)(2). As to the Court's severable determination, the Court looked to Mississippi state law and relied on *In re Dowdy,* 2015 WL 393412 (Bankr. S.D. Miss. 2015). The Court concluded that the issue of severability relied upon the parties' intent found in the language of the contract, and, if relevant, the conduct

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

of the parties. In this case, it was clear that the parties intended the individual grain contracts and the MTA to operate separately and independently based on the language contained in the MTAs. The language of the individual grain contracts further supported this finding, including terms that stated that the grain contracts "confirmed the terms of the contract between the seller and buyer," and referenced itself in the singular "this contract" rather than referencing the MTA. The most glaring term found in the individual grain contracts supporting their severability was an integration provision like the one in *Dowdy,* which read that the contract would represent the "final, complete, and exclusive statement of agreement between the parties" and could not be "modified, supplemented, or waived." Even if the language in the MTA and individual contract was ambiguous, the parties' conduct further supported severability: more than half of the parties recognized that only a handful of MTAs were executed and signed by the farmers. In fact, the parties identified only six fully executed MTAs connected to the grain contracts. In addition, the parties produced evidence demonstrating that the MTAs and individual grain contract would be executed at separate times, some over ten months apart. The Court reach its second holding (that the individual grain contracts were not contracts for financial accommodations) by looking to the main purpose and "true legal nature" of the agreements. The Court found that the contracts at issue were not contracts to make a loan or to extend other debt financing or financial accommodations; rather, they were contracts for the supply and purchase of grain, corn, soybeans, sorghum, and other movable, tangible goods. The Court also found that the contracts in no way involved the extension of lines of credit, loans, or other debt financing. Because of the language of the agreements, the conduct of the parties, and the true legal nature of the contracts, the Court found that the individual grain contracts were severable in nature and were not contracts for financial accommodations. Thus, the contracts could be assumed or rejected by Express Grain under 11 U.S.C. § 365(a).

***In re: John Coleman,* 21-11833-SDM, Dkt. #94. Order Denying the Debtor's Motion to Dismiss and Ordering the Appointment of an Examiner under 11 U.S.C. § 1104(c). January 12, 2022.**

John Coleman ("Coleman"), the Debtor and President of Express Grain Terminals, LLC ("Express Grain"), filed his chapter 11 case on September 29, 2021. Two months later, on November 24, 2021, the Debtor filed *a Motion to Dismiss,* seeking to dismiss his chapter 11 bankruptcy due to the dismissal of state receivership litigation initiated against Coleman by UMB Bank, N.A. ("UMB"). The Court had been previously made aware of Coleman's reluctance to cooperate with the bankruptcy proceeding, including his willful failure to participate in the § 341 creditors' meeting and other matters before the Court. The parties filed several objections and responses to the *Motion to Dismiss,* including the Mississippi Department of Agriculture and Commerce, Bank of Commerce, First South Farm Credit, Planters Bank & Trust Company, and various farming entities. The parties made three arguments against dismissal: (1) several payments made by Express Grain on behalf of Coleman appeared to have been made on the eve of Express Grain's own chapter 11 bankruptcy case and that these claims, as well as potential claims for conversion, fraudulent conveyance, and breach of fiduciary duty should be conserved; (2) a pending administrative proceeding regarding Express Grain's warehouse licenses implicated Coleman and, therefore, the case should stay in a chapter 11 or converted to a chapter 7 for the Court to hear and determine the issue of the warehouse licenses; and (3) although cause may have existed due to Coleman's failure to satisfy his obligations as a Debtor in a chapter 11 case, it would be improper to allow a debtor to seek the Bankruptcy Code's protections and then obtain bankruptcy dismissal by intentionally refusing to cooperate with the requirements necessary to comply with the Bankruptcy Code. All parties objecting to Coleman's *Motion to Dismiss* sought either retention in chapter 11, conversion to a chapter 7, or the appointment of an examiner.

HELD: While cause existed to neither convert Coleman's case to a case in chapter 7 nor dismiss, the Court chose to utilize its discretion and appoint an examiner under 11 U.S.C. § 1104(c). The Court first began by finding "cause" under 11 U.S.C. § 1112(b)(4)'s non-exhaustive list. Specifically, the Court found that the Debtor had engaged in bad faith conduct throughout the pendency of his bankruptcy by continuously and willfully failing to participate in Court proceedings, willfully failing to participate in the § 341 creditors' meeting, and failing to timely file required monthly operating reports or paying fees due to the United States Trustee. Despite finding that cause existed to either convert Coleman's chapter 11 case or convert it to a case under chapter 7, the Court determined that it would be in the best interests of the creditors and the estate to appoint an examiner under 11 U.S.C. § 1104(c). The Court's decision stemmed from Coleman's own conduct pre- and postpetition, namely Coleman's failure to cooperate with the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure and the numerous allegations made against Coleman concerning potential prepetition monetary transfers, fraud, and misconduct. These facts, coupled with Coleman's own bad faith conduct asserted to justify dismissal of his own case, supported the Court's decision to appoint an examiner to investigate Coleman, his assets, all payments made on behalf of Coleman prepetition, and any other transfer of assets by Coleman or on his behalf.

***In re: Express Grain Terminals, LLC,* 21-11832-SDM, Dkt. #1767. Memorandum Opinion and Order Approving Amended Application for Final Employment of CR3 Partners, LLC in Part and Denying Motion for Appointment of a Chapter 11 Trustee. January 25, 2022.**

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

As described above, Express Grain operated as a grain storage facility, physically storing crops (grain and soybeans) purchased from its contracted farmers. Express Grain was also a manufacturer, operating a "crushing facility" where certain delivered crops were processed to yield byproducts that were then sold for a profit over and above the crop purchase price. In the Second Interim Cash Collateral Order, the Court approved the interim employment of CR3 Partners ("CR3"), which included Dennis Gerrard ("Gerrard") as interim Chief Restructuring Officer ("CRO"). The Court continued to allow the interim employment of CR3 and Gerrard in several subsequent cash collateral orders over the objections of multiple parties, mainly farmers and farming entities and their crop production lenders. To address several of the objecting parties' concerns, Express Grain amended its original employment application and engagement letter, which included compensation caps for CR3's personnel, the CRO's broader decision-making authority and control over Express Grain's operations, a fiduciary obligation, and employment under 11 U.S.C. § 327(a), as opposed to §§ 105(a) and 363(b).

The Court also simultaneously considered a *Motion to Appoint a Chapter 11 Trustee* joined in by the same parties objecting to CR3's employment. The Court was tasked with deciding whether to appoint a trustee or continue to allow restructuring with CR3 and its personnel at the helm. In addition to the amended employment application, Express Grain made several other concessions at the hearing on the motions; nevertheless, certain farmers and production lenders continued to argue that CR3's employment was cost prohibitive, CR3's services do not provide for liquidation in the event of a sale, and Express Grain did not provide a sufficient basis for CR3's final employment. Some of the farmers and farming entities also argued that CR3 was not sufficiently disinterested, and that CR3, Express Grain, and one of Express Grain's largest Creditors, UMB Bank, N.A. ("UMB") were engaged in some type of collusive behavior. Further, the United States Trustee (the "UST") and other production lenders argued that empowering the CRO with ultimate decision-making authority runs afoul of 11 U.S.C. § 1104, and CR3 and the CRO should be employed under § 327 rather than §§ 105(a) and 363(b). As to the appointment of a trustee, the parties in support argued that Express Grain's former management's prepetition activities and management deficiencies were still being perpetuated postpetition by CR3, that the CRO will not likely pursue potential claims against John Coleman, Express Grain's president. In summary, the parties advocating for the appointment of a trustee argued that it would be in the best interest of the Creditors because a trustee would (1) be an independent and stabilizing party in control; (2) reduce administrative expenses; (3) assist in lien priority determination in the prepetition grain and grain proceeds in dispute; and (4) coordinate an orderly liquidation of Express Grain's assets. On the other hand, Express Grain and some of its secured Creditors argued that a trustee appointment would have a chilling effect for potential buyers and drive down a future purchase price. Further, opponents of a trustee's appointment argued that a trustee would need to catch up and spend significant time and resources to do so, which included getting up to speed on all operations, bringing in additional personnel with operational knowledge, and basically provide no additional services than what CR3 and the CRO were already providing. In summary, Express Grain and other parties argued that no party had shown fraud or gross mismanagement of Express Grain's affairs by CR3, its current management, and CR3's knowledge of Express Grain would be in the best position to implement a process to market and sell the Debtor as a going concern because of CR3's operational knowledge. In addition to the above legal issues, the Court considered an additional argument under 11 U.S.C. § 557(i) as to whether Express Grain should be forced to sell the prepetition grain in its possession under § 557(i)'s mandatory provision. In support of that argument, several production lenders and farmers argued that, regardless of the ownership interest in the prepetition grain, because Express Grain is operating a grain storage facility holding over ten thousand bushels of grain, it should be required to immediately sell that grain rather than manufacture the grain and sell the byproducts. Express Grain and its other Creditors argued that Express Grain is complying with the mandate because it was selling the prepetition grain at a set price at the future prices plus the Court's mandated bonus and setting aside those funds for determination of ownership.

HELD: The Court ultimately approved CR3's employment under 11 U.S.C. §§ 105(a) and 363(b), although it acknowledged and preferred that future employment applications be made under § 327 if there has been no prepetition involvement (i.e., no issue with disinterestedness) with professionals and a debtor. The Court weighed the arguments made by various farmers who alleged prepetition collusion in CR3's hiring process with Gerrard's testimony that the hiring process was fair. The Court also mandated that CR3 and Express Grain file an application for approval of fees and expenses as they would have been required to do under §§ 330 and 331 before any fees may be awarded or expenses paid. The Court further found that Express Grain, through Gerrard's testimony, showed a legitimate business justification for CR3's final employment, which included Gerrard's employment as CRO. Specifically, the Court found Gerrard's testimony persuasive that he had improved Express Grain's operations, reduced overhead and expenses, and provided stability to its employees. In addition, the Court did not see a conflict with Gerrard's ultimate operational control and 11 U.S.C. § 1104. As to the appointment of a trustee, the Court noted that the prevailing view is that a trustee appointment is an extraordinary remedy and allowing the debtor to remain in control is favored. The Court discussed the movants' failure to sufficiently prove fraud or gross mismanagement of Express Grain's affairs

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

under CR3's management and concluded that any alleged fraud or mismanagement was perpetuated by prior management, not CR3. Because the alleged fraud or mismanagement did not "taint" current management, the Court did not see grounds for a trustee appointment. Further, the Court found that appointment of a trustee would not reduce administrative expenses because a trustee would bring in his or her own professionals, many of which would duplicate the work already performed by CR3. Finally, the Court addressed the applicability of 11 U.S.C. § 557(i) and found that while Express Grain qualifies as a grain storage facility and the mandate to sell prepetition grain is clear in the statute, the Court has discretion to determine the timing of the mandatory sale provision in the expedited § 557 procedures.

***In re:* Express Grain Terminals, LLC, 21-11832-SDM, Dkt. #2695. Memorandum Opinion and Order Granting in Part and Denying in Part Motion for Relief from the Automatic Stay and Denying Amended Joint Motion to Convert to Chapter 7 or in the Alternative Appoint a Trustee. April 7, 2022.**

During the pendency of Express Grain's bankruptcy case, the Mississippi Department of Agriculture and Commerce (the "State of Mississippi") filed a ***Motion for Relief from the Automatic Stay*** based on alleged fraudulent conduct committed prepetition by Express Grain's president and CEO, John Coleman ("Coleman"). Specifically, the State of Mississippi alleged that Coleman altered, or caused to be altered, financial audit reports issued by Express Grain's accounting firm and submitted those altered financial reports to the State of Mississippi to secure renewal of grain warehouse and dealer licenses. After conducting an administrative proceeding, the State of Mississippi came before the Court seeking to revoke or cancel Express Grain's licenses to operate under Miss. Code Ann. § 75-44-1, et seq. In support of its motion for relief, Andy Gibson, the Commissioner of Agriculture, testified that Express Grain's licenses were only obtained through materially altered financial audit reports, which is in violation of the laws and regulations overseeing the licensure process for grain warehouseman and dealers. Farmers and farming entities supported the revocation of the licenses and argued that the State of Mississippi should retroactively terminate the licenses thereby voiding certain transactions between Express Grain and the farmers. Several production lenders argued that the State of Mississippi did not need the Court's permission to revoke the licenses because revocation of the licenses is an exercise of governmental police and regulatory powers under 11 U.S.C. § 362(b)(4). Other secured Creditors, namely UMB Bank, N.A. ("UMB"), argued that revocation of Express Grain's licenses does not fall within any exception to the automatic stay because revocation does not protect public safety and health and fails to advance a public policy goal. UMB also argued that even if revocation falls within an exception, the Court should exercise its discretion under 11 U.S.C. § 105(a) to prohibit the licensure revocation because revocation would shutter Express Grain's operations.

The Court also considered an *Amended Motion to Convert* the bankruptcy case to a case under Chapter 7 filed by certain famers and farming entities. Those parties argue that because Express Grain's procured its licenses through fraud, all operations should immediately cease. The farmers further argued that ceasing operations would result in Express Grain's inability to propose a meaningful plan of reorganization or liquidation and CR3 and the CRO's services would no longer be necessary because a chapter 7 or a chapter 11 trustee would be better positioned to wind down Express Grain's operations and conduct a sale of its assets. Express Grain's CRO, Gerrard, testified to numerous aspects of Express Grain's winddown plan which had previously been approved by the Court and articulated many of the same arguments against conversion or the appointment of a trustee that had previously been made in earlier filings.

HELD: The Court held that the State of Mississippi's attempted revocation of Express Grain's licenses was excepted from the automatic stay under 11 U.S.C. § 362(b)(4). In its analysis, the Court found that the State of Mississippi was a governmental unit under § 101(27), but following Fifth Circuit precedent, the Court applied two tests to determine whether the State of Mississippi sought to exercise its police and regulatory power: the pecuniary test and the public policy test. Put simply, the pecuniary test asks whether the government primarily seeks to protect a pecuniary interest in the debtor's property, as opposed to protecting public safety and health. The public policy test, on the other hand, asks whether the government is effectuating public policy rather than adjudicating private rights. The governmental police and regulatory powers exception would not apply if the State of Mississippi's license revocation and subsequent enforcement were merely aimed at protecting a pecuniary interest or adjudicating private rights. After considering the testimony, relevant case law, and legislative history, the Court ultimately held that the State of Mississippi failed to sufficiently prove it was acting to protect public safety and health. Nevertheless, because only one test need be satisfied, the Court found that the State of Mississippi's license revocation supported its public policy goal to deter future fraudulent conduct. The Court also addressed the conversion motion and found that the movants failed to establish cause under 11 U.S.C. § 1112(b)(1). Specifically, the Court held that no party presented evidence that demonstrated a substantial or continuing loss to the bankruptcy estate postpetition. The parties failed to present evidence for the actual value of the bankruptcy estate's assets, namely the prepetition grain, before the grain was manufactured into byproducts. Further, several of Express Grain's monthly operating reports indicated a positive cash flow and operating balance. To end its analysis, the Court briefly surmised that CR3 and the CRO were not perpetuating any fraud that may have occurred prepetition.

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

***In re:* Express Grain Terminals, LLC, 21-11832-SDM, Dkt. #2738. Memorandum Opinion and Order Granting UMB Bank, N.A.'s Motion to Enforce Protective Order and for an Order to Show Cause. April 15, 2022.**

Shortly after the initiation of Express Grain's bankruptcy case, the Court adopted an expedited procedure to determine the interest in or ownership of grain as provided under 11 U.S.C. § 557, which included an expedited discovery process. The Court established the parameters for an expedited discovery process in its "Phase 2 Scheduling Order" in January of 2022. Due to the sensitive and confidential nature of documents being produced by various participating parties, the Court entered a Protective Order, which contained several key provisions including: (1) any party receiving documents must treat those documents as confidential; (2) documents produced and the sensitive information contained in those documents should not be "given, shown, made available to, disclosed or communicated in any way, except for individuals who need access for the purposes of the § 557 procedures"; (3) documents produced shall be limited to "attorneys for, employees of, or agents of the Participating Parties"; (4) documents must be used and disclosed "solely for the purposes of the discovery and final determination hearing under the § 557 discovery procedures; and (5) the Protective Order was binding on all counsel of record, their law firms, and all Participating Parties, among others. During the pendency of Express Grain's bankruptcy case, Barrett Law Group, P.A., on behalf of its farmer clients, initiated a civil case against one of Express Grain's Creditors, UMB Bank, N.A. ("UMB"), in another forum. John W. Barrett ("Barrett") had previously entered an appearance in the bankruptcy case attempting to modify the Court's order concerning questionnaires in which farmers were encouraged to fill out in the § 557 procedures.

After Barrett participated in a radio interview the same day as the parties participating in the § 557 procedures were set to begin mediation to resolve most, if not all, legal issues pending before this Court, UMB filed a *Motion to Enforce* the Court's protective order, alleging that Barrett violated many of the protective order's provision. Barrett argued that he did not reference any specific documents or quote any documents, the documents Barrett generally referenced were public record or public knowledge, and no protected information was disseminated. Barrett also acknowledged that he was aware of the protective order, did not intentionally violate the order, and intended to comply with it. Shockingly, at the hearing on the motion to enforce, Barrett admitted that attorneys in his law firm had looked at documents produced in the interest data room and that he, Barrett, had reviewed summaries of those documents. Despite the fact that only participating parties to the § 557 procedures could view documents produced in the interest data room, Barrett admitted that he and his law firm were monitoring it.

HELD: The Court held that Barrett and his law firm willfully violated the Court's protective order warranting imposition of sanctions. The Court looked to the Fifth Circuit case of *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.,* 685 F.3d 486 (5th Cir. 2012), and found that the Court's protective order was an order to provide or permit discovery under Federal Rule of Civil Procedure, Rule 37(b)(2) and the Court had authority to impose sanctions for violations of protective orders under Rule 26(c). While UMB filed its motion to enforce primarily in response to Barrett's radio interview, the Court did not impose sanctions for that interview. The Court imposed sanctions because Barrett admitted at the hearing that attorneys not participating in the § 557 procedures were accessing the interest data room and reviewing documents in connection with a civil case in another forum—actions that were expressly prohibited by the Court's protective order. The Court found that Barrett and his law firm willfully violated clear terms in the protective order was and awarded sanctions based on UMB's reasonable attorney's fees expended to prosecute its motion.

***In re:* Express Grain Terminals, LLC, 21-11832-SDM, Dkt. #2785. Memorandum Opinion and Order Approving Joint Application to Compromise Controversy. May 2, 2022.**

As a result of extensive negotiations and a mediation led by former U.S. Bankruptcy Judge William H. Brown, on April 8, 2022, the parties involved in the § 557 procedures announced that a settlement had been reached in principle. The Court stayed all § 557 deadlines in its previous orders to allow time for the parties to file a settlement application by April 11, 2022. But on April 11, 2022, the parties informed the Court that a development had arisen, and as such, the Court conducted a status hearing the next day to address any issues. At the status hearing, the parties informed the Court that some farmers were seeking to withdraw from the terms of the settlement. The next day, a Joint Application to Compromise Settlement was filed by Express Grain, several secured Creditors, and the participating production lenders. Based on the positions of some of the farmers and farming entities, the farmers' counsel filed limited objections or responses. In support of the settlement application, the movants filed a supplemental brief which outlined several options for the farmers and farming entities: (1) farmers could consent to the settlement agreement and become "Consenting Farmers", a status that would have allowed them to receive payment in the future in exchange for mutual releases with settling parties, recover attorneys' fees paid to date via the farmer settlement fund, and save money by opting out of pursuing litigation related to the grain assets under § 557; (2) farmers could elect to become "Disclaiming Farmers" by withdrawing from the § 557 proceedings and disclaim any interest in the grain assets at issue in the § 557 proceedings in exchange for the Disclaiming Farmers' receipt of attorneys' fees paid to date via the farmer settlement fund as well as releases of all claims by

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

the bankruptcy estate; (3) farmers could elect to pursue their assertions of interest in bankruptcy court, essentially becoming "Non-Consenting Farmers", although they would not receive a release from the bankruptcy estate but may pursue any civil litigation if desired; and (4) those farmers who had an assertion of interest in the grain assets but did not elect to be a Consenting, Disclaiming, or Non-Consenting Farmer ("Non-Participating Farmers") could appear at any initial claims hearing, where they could either (a) appear to make an election into the Consenting or Non-Consenting Farmer elections or (b) fail to appear and be afforded only a general unsecured claim in the non-objected to amount. According to the settlement agreement, the Disclaiming, Non-Consenting, and Non-Participating Farmers had the option to change their election to a Consenting Farmer, but the option expired at 5:00 p.m. CST—10 days after entry of an order approving the settlement.

Certain thresholds had to be met by either Consenting or Disclaiming Farmers and were dependent on farmers executing a farmer election form. Farmers' counsel advised the movants' counsel that the required thresholds had been met, but sometime between April 8 and April 11 of 2022, counsel for the farmers involved in the civil action in another forum against UMB Bank, N.A. ("UMB") notified movants that their clients intended to withdraw their election forms. In any event, none of the parties to the settlement agreement substantively opposed the settlement agreement. The parties objecting to the settlement agreement opposed the resolution based on the terms as proposed by the movants in the settlement application and the proposed settlement order approving the application and how both of those documents would affect the rights, claims, and defenses of parties in the civil action in another forum. Specifically, some farmers were concerned that the Disclaiming Famers' election could create a new defense for UMB to use against them in the civil action. UMB argued that while the settlement agreement did not create new defenses for UMB or any other party, the execution of the election forms and any waiver or disclaimer in those election forms may carry a legal consequence the Court should not address. UMB also opposed allowing the Disclaiming Farmers to withdraw their election forms.

HELD: The Court approved the settlement application and held that (1) the Disclaiming Farmers were parties to an enforceable settlement agreement under Mississippi law and could not withdraw their acceptance; and (2) the settlement is fair, equitable, and in the best interests of the bankruptcy estate. In reaching its conclusion, the Court addressed Mississippi contract law and the six necessary elements of contract formation. The Court found that the parties to the settlement agreement had a meeting of the minds because the real dispute over the settlement agreement did not occur until after the Disclaiming Farmers discussed the settlement terms with counsel and executed the farmer election forms. The Court noted that the only events which occurred after the elections were that counsel for farmers in the civil litigation raised an issue with the language in the farmer election forms and, likely in response, UMB added additional language in the settlement application that was not present in the farmer election forms. As to the scope of the settlement agreement, the Court determined that the § 557 procedures only concerned the parties' claims to ownership interest in and priority to the prepetition grain and grain proceeds, and that no party contemplated a resolution beyond that scope. The Court found that no release was given by the Disclaiming Farmers for any claims they could make in the civil action and no release was given by UMB for any defenses it may have to the claims asserted by the Disclaiming Farmers in the civil action. The Court decided that the outcome of any other action or proceeding will not affect the administration of the bankruptcy estate in the bankruptcy case. Finally, the Court considered the facts surrounding the settlement under the Federal Rules of Bankruptcy Procedure, Rule 9019 and the three-part test in *Rivercity v. Herpel (In Re Jackson Brewing Co.),* 624 F.2d 599 (5th Cir. 1980), and found that (1) the litigation involved in the § 557 procedures is highly complex; (2) continued litigation, based on testimony from Express Grain's CRO, could likely result in attorney's fees totaling over 2 million dollars; and (3) the settlement was not obtained through fraud or collusion—all of which favored the Court's approval of the settlement application.

***In re: Helena Chemical Company v. Hood et al,* Case No. 16-14511-SDM, A.P. No. 19-01065-SDM, A.P. Dkt. #159. Memorandum Opinion and Order Denying as Moot Defendants' Motion for Summary Judgment (Dkt. #45) and Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment (Dkt. #141). June 1, 2022.**

The Plaintiff, Helena Chemical Company ("Helena"), filed an adversary proceeding complaint on October 22, 2019, against Odelle Hood ("Odelle"), the mother of the Debtor Kenneth Hood, and Mary Lou Dilworth ("Dilworth"), the Debtor's sister, claiming that the Defendants violated the automatic stay under 11 U.S.C. § 362 when Dilworth, acting as power of attorney for Odelle, transferred agricultural property known as the "Home Place" to Hood Family Farm, LLC, a limited liability company wholly owned by Dilworth and a non-debtor brother. At the time the Debtor filed his underlying Chapter 12 bankruptcy case, Helena alleged that the Debtor had a vested remainder interest, subject to defeasance, in the Home Place, with Odelle being the life tenant. According to Helena, the Debtor's vested remainder interest was property of the bankruptcy estate, and so when Dilworth executed and recorded the quitclaim deed transferring the Home Place to Hood Family Farm, those acts divested the Debtor of his remainder interest and stripped the bankruptcy estate of that interest. As a result of the alleged automatic stay violation, Helena argued that the Court should void any

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

conveyance of the quitclaim deed to Hood Family Farm. The Defendants asserted that the Home Place was not a part of the bankruptcy estate, and the Debtor's bankruptcy case had no effect on Odelle's right to transfer the Home Place in fee simple to Hood Family Farm under the will of Odelle's late husband and Mississippi law.

At some point during the prosecution of the adversary proceeding, Odelle died. Helena moved to substitute the bankruptcy estates of several of the Debtor's brothers who were also in Chapter 12 bankruptcy cases and had arguably similar interests in the Home Place. At the same time, the Defendants moved to dismiss the adversary proceeding for lack of subject matter jurisdiction. The Court found that Odelle's estate was the proper party to substitute, the Court had subject matter jurisdiction to determine whether an automatic stay violation occurred, and that Hood Family Farm (the transferee of the Home Place) was a necessary party that must be joined to the adversary proceeding. After ancillary discovery, and before Helena filed its amended complaint, the Defendants filed their motion for summary judgment. Helena then filed an amended complaint adding the necessary parties and requesting similar relief, including sanctions against the Defendants for willfully violating the automatic stay. Later, Helena filed its motion for summary judgment, arguing that even if Odelle and Dilworth validly exercised their state law rights to transfer the Home Place, the Defendants' acts to obtain possession of, or to exercise control over, bankruptcy estate property violated the automatic stay. The acts in question here were Dilworth's execution and recording of the quitclaim deed which transferred the Home Place. Helena further disputed that Odelle had a right to transfer the Home Place under the terms of the will because the transfer was not a sale, lease, or exchange. Helena also argued that (1) Dilworth acted outside the scope of the terms of her power of attorney because there was not an established pattern of giving gifts and (2) Mississippi law on inter vivos transfers mandates that the transfer is void. In response, the Defendants asserted that Odelle's life estate interest could be conveyed "at her discretion" without the requirement to account for the disposition of the proceeds. The Defendants also argued that any interest the Debtor had in the Home Place could have been sold, but that remainder interest was unmarketable and without value, which is why the Defendants claim the Chapter 12 Trustee never attempted to liquidate the Debtor's remainder interest.

HELD: The Court denied as moot the Defendants motion for summary judgment because Helena's amended complaint superseded its original complaint and did not adopt or incorporate the original complaint. Even though the Court had discretion to consider a motion for summary judgment on the original complaint, that discretion is limited when the amended complaint fails to cure deficiencies of the original complaint. In this case, Helena's amended complaint became the operative pleading, and Helena complied with the Court's requirement to add a necessary party, i.e., Hood Family Farm. As to Helena's summary judgment motion, the Court conducted a three-part inquiry: (1) what was the Debtor's interest in the Home Place at the time of the filing of his bankruptcy petition; (2) whether that interest was property of the bankruptcy estate; and (3) whether the Defendants violated the automatic stay by executing and recording the quitclaim deed transferring the Home Place. The Court answered in the affirmative on all three. First, the Court found that under Mississippi law and the terms of the will, and despite Odelle's power of divestment, the Debtor still held a vested remainder interest. Mississippi law recognizes the right of a life tenant to covey fee simple title to property if granted that authority by a testator even if the life tenant transfers the property with the purpose of defeating the remaindermen's rights. *Kyle v. Wood,* 86 So.2d 881 (Miss. 1956). Second, the Court determined that the Debtor's remainder interest was property of the bankruptcy estate under an expansive interpretation of 11 U.S.C. § 541, and the fact that other courts have determined that vested reminder interests can be valued and sold by a trustee, albeit not free and clear of the life tenant's interest. Last, the Court found that a willful automatic stay violation did occur when the Defendants executed and recorded the quitclaim deed transferring the Home Place because the Defendants knew of the automatic stay's existence, intentionally transferred the Home Place to protect the property, take care of Odelle, and preserve rental income derived from the Home Place, and, at a minimum, sought to exercise control over the Debtor's vested remainder interest.

The Court then addressed the appropriate remedy (by operation of law or otherwise) and damages. The Court found that ordinarily in the Fifth Circuit, acts in violation of the automatic stay are voidable, not void, because bankruptcy courts have the power to annul the automatic stay under 11 U.S.C. § 362(d). In other words, if the Court can annul the automatic stay, then acts in violation of the automatic stay cannot be found to be void because they cannot be cured by subsequent court action. Indeed, the Fifth Circuit has clarified that the effect of the automatic stay itself is voidable, and the act invalid, subject to the broad discretion of the court under 11 U.S.C. § 362(d). *Jones v. Garcia,* 63 F.3d 411, 413 (5th Cir. 1995). The Court found that the general rule invalidating acts in violation of the automatic stay is not applicable because courts that have found such acts invalid concerned acts where bankruptcy estate property itself was transferred. Here, the Debtor's vested remainder interests were not transferred to the transferee Hood Family Farm. When Odelle and Dilworth executed and recorded the quitclaim deed, the Home Place was transferred in fee simple to Hood Family Farm and by consequence, the bankruptcy estate was stripped of the vested remainder interest. The Court further declined to set aside the transfer under other state law theories because the amended complaint only concerned whether an automatic

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

stay violation occurred, no other causes of action were pled, no party attempted to challenge the transfer in a state court, and the Court found that it would not be a proper exercise of its jurisdiction. Finally, the Court held that there were no facts or evidence to support a damage award to Helena for the automatic stay violation, and the damages issue, e.g., valuing the Debtor's vested remainder interest and what potential pro rata distribution Helena may have received, was ripe for trial.

***In re: Helena Chemical Company v. Hood et al,* Case No. 16-14511-SDM, A.P. No. 19-01065-SDM, A.P. Dkt. #164. Order Denying Plaintiff's Motion to Amend. June 22, 2022.**

Shortly after the Court's memorandum opinion and order granting in part Helena's summary judgment motion, Helena filed a motion to amend the Court's opinion and order, arguing that the Court failed to provide the appropriate remedy for, or accurately state the legal effect of, the Defendants' willful automatic stay violation. Specifically, Helena asserted that the distinction between void and voidable under the facts of the adversary proceeding is not relevant and alleged that because the Court found the Defendants' acts (execution and recording of the quitclaim deed and subsequent transfer) invalid, the Court's ultimate holding is incorrect. Helena further argued that the Court's ruling no transfer of bankruptcy estate property took place is inconsistent with the remainder of the Court's opinion and order. Finally, Helena argued that by not voiding the transfer, the Court was rewarding bad actors and depriving the bankruptcy estate of an asset, which does not benefit the Creditors.

HELD: The Court analyzed Helena's motion to amend under Rule 52 of the Federal Rules of Civil Procedure made applicable by Federal Rule of Bankruptcy Procedure Rule 7052. The purpose of motions to amend under Rule 52(b) is to correct manifest errors of law or fact or present newly discovered evidence, which may prompt the court to make new findings thereby reversing its judgment. Equally as important, motions to amend allow the court an opportunity to clarify its essential findings or conclusions and to help appellate courts obtain the necessary issues which may need to be determined on appeal. Citing to the relevant law, the Court made clear that parties should not move to amend for the purposes of relitigating issues, advancing new theories, or securing a rehearing on the merits. The Court addressed each of Helena's arguments and found that Helena did not meet its burden to show manifest error of law or fact. The Court began its analysis with the Fifth Circuit's distinction between "void" v. "voidable". The Court found it relevant to address the distinction in its opinion and order because Helena argued in its summary judgment motion for "voiding" either the quitclaim deed or the transfer, which is not the controlling law in the Fifth Circuit. The Court explained that the execution and recording of the quitclaim deed, which transferred the Home Place, would not be deemed void as if the Court can somehow undo the acts which violated the stay. To the contrary, the Court held that if the Court would have ruled differently, Fifth Circuit precedent stands for the proposition that the effect of the automatic stay would be voidable, and the acts in violation deemed invalid, unless the Court validates the act through its discretion under 11 U.S.C. § 362(d).

The Court then clarified its exception to the general rule concerning invalidating transfers in violation of the automatic stay in the form of a rule: where an act or transfer in violation of the automatic stay divests the Debtor of a future possessory interest in property, thereby stripping the bankruptcy estate of that future possessory property interest, the effect of the automatic stay is not deemed voidable, and the act or transfer is not deemed invalid as a matter of law. The Court based its exception on Fifth Circuit precedent where the Fifth Circuit only invalidated transfers or acts in violation of the automatic stay where bankruptcy property, itself, was transferred. In this case, the act of recording and executing the quitclaim deed did not transfer bankruptcy estate property, i.e., transfer the Debtor's vested remainder interest to the transferee, Hood Family Farm. Based on the prior case law where transfers violated the automatic stay, the Court limited its definition of what constitutes a transfer to "conveyance of property or title" from one person or entity to another person or entity. Based on that definition, the Court found that no such transfer under the facts presented took place, and therefore, the Court could not apply the general rule of invalidating the transfer of the Home Place to Hood Family Farm. Last, the Court found that Helena attempted to assert additional equitable arguments to support its motion to amend. Because Helena did not raise any equitable arguments in its summary judgment motion or supporting briefs, the Court declined to rule on those new arguments on a motion to amend.

***In re: Pamela L. Morgan v. Ditech Financial,* Case No. 19-12879-SDM, A.P. No. 20-01050-SDM, A.P. Dkt. #52. Order Denying Plaintiff's Motion for Summary Judgment. August 3, 2022.**

On August 26, 2020, the Plaintiff, Pamela Morgan ("Pamela") filed an adversary complaint against the named Defendant, Ditech Financial ("Ditech"), alleging that a promissory note and deed of trust executed by her husband, Jerry Morgan ("Jerry"), should be set aside and declared void under Miss. Code Ann. § 89-1-29 because, even though Pamela and Jerry were married at the time of the execution, Pamela did not sign either document. Pamela asserted that Ditech, as servicer of Pamela's mortgage, knew or should have known that Jerry and Pamela were married and, as such, sought to have all money and interest paid to Ditech returned to her. Service was effectuated upon Ditech on November 24, 2020; however, Ditech did not file an answer to the adversary complaint. The Court subsequently entered an Order Granting Motion for Default Judgment, ordering the setting aside of the deed of trust and promissory note and awarding Pamela all money paid to Ditech, including

Opinion Summaries by HONORABLE SELENE D. MADDOX (continued)

interest, and attorney fees in the amount of $1,500.00. The adversary proceeding was closed on April 5, 2021. On November 17, 2021, a lienholder and creditor in interest in the subject property, U.S. Bank, filed a motion to reopen the adversary proceeding. U.S. Bank filed a motion under Rule 60 of the Federal Rules of Civil Procedure to set aside the *Order Granting Motion for Default Judgment*. U.S. Bank alleged that Pamela failed to properly name and notice U.S. Bank of the adversary proceeding challenging its interest in the property. The Court entered an *Order Granting Motion to Vacate* on February 16, 2022. Several months later, on June 27, 2022, Pamela filed a Motion for Summary Judgment, recounting the procedural history surrounding U.S. Bank's motion to vacate and maintaining that the matters "had already been decided". U.S. Bank responded on July 19, 2022, asserting three arguments: (1) Pamela could not recover any relief against U.S. Bank because, after the Order Granting Motion to Vacate was entered and the case was reverted to its prior status, Pamela never filed a motion to join U.S. Bank nor did she request leave to file an amended complaint against U.S. Bank; (2) Mississippi Code Annotated § 89-1-29 did not apply because the subject property was not a "homestead" as the deed of trust and promissory note were executed before Pamela and Jerry acquired title or began residing in the property; and (3) Ditech's own chapter 11 plan, confirmed in September 2019 by the Southern District of New York, contained a permanent injunction prohibiting holders of claims arising prior to the plan's effective date from commencing any suit or action against Ditech.

HELD: While the adversary proceeding was before the Court on a summary judgment motion, the most glaring problem that the Court found was Pamela's failure to join the proper party to the adversary proceeding under Rule 19 of the Federal Rules of Civil Procedure. The analysis under Rule 19 consisted of two parts; however, the Court only considered the first half of the inquiry: whether a party is a necessary party under Rule 19(a)(1). In this case it was clear to the Court that Pamela failed to join, or even name, the necessary party to the adversary proceeding. Upon review of Pamela's bankruptcy case docket, the Court found that seven days prior to the filing of the adversary complaint U.S. Bank's claim was transferred from Ditech to Shellpoint Mortgage Servicing. Additionally, five months prior to the filing of the adversary complaint, Jerry received a notice indicating that the servicing of the mortgage had been transferred from Ditech to Shellpoint Mortgage Servicing. Finally, as reflected in Proof of Claim #3-1 filed in Pamela's bankruptcy on January 16, 2020, U.S. Bank had always been listed as the creditor and primary lienholder of the mortgage securing the property. Based on these facts, the Court held that U.S. Bank and Shellpoint Mortgage Servicing were required and necessary parties that were required to be added to the adversary proceeding for the Court to afford any relief to the parties. The Court also briefly addressed the underlying Mississippi law and the legal standard for motions for summary judgment. It was abundantly clear that the Mississippi Supreme Court had repeatedly held that a deed of trust on a homestead executed by one spouse without the signature or consent of the other is absolutely void. However, the situation present on these facts was the same as the one in *Burks v. BAC Home Loans Serv., LP (In re Burks),* 421 B.R. 762 (Bankr. N.D. Miss. 2009), where a married spouse executed a deed of trust given to secure the purchase money of a homestead without the signature of their husband or wife. The Court did not definitively rule on this issue, but the Court cautioned the parties and encouraged them to review the relevant case law surrounding claims and defenses under Miss. Code Ann. § 89-1-29. Pamela's *Motion for Summary Judgment* was ultimately denied.

MEMORANDUM

To: Mississippi Bankruptcy Conference

From: Chambers of the Honorable Jason D. Woodard,

United States Bankruptcy Court, Northern District of Mississippi

Date: September 30, 2022

Re: Case Summaries

These case summaries were prepared by Jack Schultz, Cole Wood, and Ashley Pruitt, Law Clerks to the Honorable Jason D. Woodard. These are simply case summaries and have no precedential effect. The published opinions speak for themselves.

In re Elizabeth S. Clemons, Case No. 21-10668-JDW, Memorandum and Opinion disallowing exemption in ex-husband's retirement account, October 28, 2021.

The debtor amended her schedule A/B to list a checking account with a balance of $5,468.10 as exempt. She relied on Miss. Code Ann. § 85-3-1(e), which governs exemptions in retirement accounts. The chapter 7 trustee objected. The debtor testified that half of her ex-husband's pension is deposited into the account she claimed as exempt. The question was whether the funds in her account could be exempted as a retirement account. The Court held that the debtor could not exempt the retirement funds of another person and the exemption was disallowed.

In re Tyrone Jones, Case No. 19-13894-JDW, A.P. Case No. 20-01037-JDW, Memorandum Opinion and Order determining statute of limitations has run to reform deed of trust, December 21, 2021.

The debtor and his wife purchased a parcel of land, which they and the sellers thought included their home. They discovered after attempting to pay property tax that the home was not included in the parcel. The evidence showed that the original mortgagor along with other predecessors-in-interest were aware of the mistake. The question was whether the deed of trust could be reformed to add the parcel of land containing the home.

Because the original mortgagor sold the property to the debtor and took a deed of trust in 2005 and received notice of the issue in 2006, 2008, and 2009, the 10-year statute of limitations had run and the defendants, the new mortgagors, could not reform the deed of trust.

In re Delynn W. Burkhalter, Case No. 21-10444-JDW, A.P. Case No. 20-01037-JDW, Memorandum Opinion and Order deeming certain domestic debts nondischargeable, January 7, 2022.

The plaintiff held liquidated claims against the debtor for "lump sum installment alimony," employment severance benefits, cell phone charges, and health insurance coverage, which arose from an agreement the parties made as part of their divorce decree. The Court considered the Fifth Circuit Court of Appeals holding that ""[s]ection 523(a)(15) purports to apply to 'any debt . . . [not in the nature of alimony or child support] that is incurred in the course of a divorce or separation." *Matter of Gamble,* 143 F.3d 223, 225 (5th Cir. 1998) (quoting 11 U.S.C. § 523(a)(15)) (citing BFP v. Resolution Trust Corp., 511 U.S. 531, 566)). Because the debtor was obligated on those claims in connection with a divorce decree, the Court found each was nondischargeable pursuant to 11 U.S.C. § 523(a)(5) and (15).

In re Downing v. Reliant Loan Servicing, LLC et al., Case No. 21-11026-JDW, A.P. Case No. 21-01017-JDW, Memorandum Opinion and Order determining and applying statute of limitations on promissory note, May 24, 2022.

On December 6, 2001, the plaintiff executed a loan repayment and security agreement in the original principal amount of $26,949.84 and granted a deed of trust in favor of the Beneficial Mortgage of Mississippi. The promissory note designated a monthly installment repayment period of 180 months, with a maturity date of December 6, 2016. The parties agreed that the plaintiff made his monthly payments as required by the loan documents until June 6, 2006 but made no payments thereafter and the loan went into default. Despite the default and accruing arrears thereafter, there was no evidence that the loan ever was accelerated and it matured on December 6, 2016. After the maturity date, Beneficial assigned the loan documents to Reliant Loan Servicing, LLC, who then notified the plaintiff he was 4,604 days delinquent. At that time, the plaintiff owed a total of $56,476.20. The plaintiff filed for bankruptcy and subsequently filed this adversary proceeding, seeking to determine the extent or validity of the lien, asserting that the statute of limitations to enforce the lien had run.

MEMORANDUM (continued)

Because the loan was payable at a definite time, it was subject to the statute of limitations provided in Miss. Code Ann. § 75-3-118(a). The statute of limitations began running on the maturity date and would not expire until December 6, 2022. Accordingly, the statute of limitations had not expired, and Reliant's Motion for Summary Judgment was granted.

In re Fava v. Swick et al., Case No. 19-13234-JDW, A.P. Case No. 20-01070-JDW, Memorandum Opinion and Order awarding preference judgment, disallowing unsecured claim as late, allowing secured claim, and allowing setoff, July 26, 2022.

The debtor and defendant Bill Swick are close friends. They have been closely intertwined in a variety of issues throughout the pendency of the case. First, the defendant claimed to be a co-owner of a boat with the debtor. But the chapter 7 trustee previously obtained an order determining that the debtor was the sole owner of a boat. The trustee sold that boat for $123,200.00 for the benefit of the estate. After the Court ruled that the defendant did not have an ownership interest in the boat, the defendants, Mr. Swick and his company, filed identical proofs of claim for the work completed on the boat. The trustee then filed the complaint to avoid transfers the debtor made to the defendant. Those transfers were made to the defendant to repay a couple different loans and were made either within one year of to the debtor's bankruptcy petition or post-petition.

After all the evidence was presented, the Court found that Mr. Swick alone was entitled to a maritime lien for the work he completed on the boat and therefore had a valid claim to the proceeds of the sale of the boat. The Court determined that the remainder of the claim, which was unsecured, was disallowed as untimely. The Court also found that the transfers were avoidable as preferences. Given that the trustee and the defendant then had competing, unrelated claims, the parties were entitled to setoff.

In re Paula Reed, Case No. 20-12472-JDW, Order denying motion to avoid lien for lack of specificity, July 27, 2022.

On April 2, 2015, Greenwood Leflore Hospital enrolled a judicial lien against the debtor with the Circuit Clerk of Leflore County, Mississippi. The debtor filed her bankruptcy petition on August 4, 2020. She then filed her schedules, including Schedule C, which listed her claimed exemptions. The debtor filed her first motion to avoid the judicial lien of the hospital on September 30, 2021, and the hospital objected. A hearing was held, where the Court denied the debtor's motion because the motion failed to provide details as to the property against which the debtor sought to avoid the lien.

On the same day, the debtor filed an amended motion to avoid judicial lien. The only material change from the original motion was that instead of referring to Schedule C generally, the debtor attached it as an exhibit. The Motion still did not specify which exemptions were impaired by the judicial lien, or the amount of the claimed exemption. The Court found that significant notice concerns would be created by allowing the debtor to simply reference or attach her schedules to a motion and forcing the creditor to determine what parts of Schedule C are at issue. Accordingly, the Court denied the motion to avoid judicial lien for failure to state a claim for relief with sufficient particularity.

In re Kevin T. Boutin, Case No. 13-14699-JDW, Memorandum Opinion and Order granting in part, and denying in part, motion to reopen chapter 11 case and waive filing fee, September 1, 2022.

The debtor's chapter 11 plan was confirmed on October 3, 2016, and administratively closed on November 29, 2016. With the case administratively closed, the debtor was relieved of the obligation to tender quarterly fees or file monthly operating reports, provided with significant savings, and greatly aided with his completion of the plan. The parties agreed the case was due to be reopened but disagree whether the debtor must file monthly operating reports and pay the quarterly fees mandated by 28 U.S.C. § 1930 following the reopening of the case.

The Court found the statutes clear that monthly operating reports must be filed, and U.S. Trustee fees paid, in any open case until the case is closed, converted, or dismissed, whichever comes first.

In re Huntington National Bank v. Mosby, Case No. 21-11614-JDW, A.P. Case No. 21-01028-JDW, Memorandum Opinion determining debt to be dischargeable due to lack of reliance by creditor, September 1, 2022.

The debtor purchased a 2020 Dodge Challenger for $36,807.10 that was financed by the bank with a security interest in the vehicle. The vehicle was later repossessed and sold at auction, leaving a deficiency of $12,820.83 on the loan. After the debtor's filing of chapter 7, the bank argued the deficiency owed on the vehicle loan should not be discharged because the loan was obtained through false pretenses or a false representation and/or actual fraud by not disclosing her intended use of the vehicle, which was to lease it for profit on a short-term basis through TURO, an online service.

MEMORANDUM (continued)

"The elements for nondischargeability due to actual fraud when a representation is made by the debtor are: (1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such representations; and (5) that the creditor sustained losses as a proximate result of the representations." *RecoverEdge L.P. v. Pentecost,* 44 F.3d 1284, 1293 (5th Cir. 1995).

Although the loan agreement section with check boxes regarding the use of the vehicle were left unchecked by the debtor, she did make a representation when she signed the loan agreement that included terms of use prohibiting a lease of the vehicle in satisfaction of the first element. Because she is deemed to have known of the lease prohibition covenant in the loan agreement, and because she knew when she signed the loan agreement that she intended to lease the vehicle for commercial purposes, the second element is also satisfied. The debtor may have been charged with intentionally deceiving the bank because she knew she intended to lease the vehicle, but the Court did not need to evaluate this element because the final element failed. The Court found the bank failed when proving the final element because when the use of collateral boxes were not checked the bank examined other factors in order to fund the loan. A potential borrower's credit history, occupation, the collateral's value, state lien laws, and the location of the collateral were those factors, and each the bank found in the debtor's favor. Rather than require full disclosure, the bank instead funded the loan and therefore has not shown reliance on the intended use of the vehicle. The bank held a general unsecured claim for the deficiency balance, and, at the conclusion of the case, the remainder is dischargeable.

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