MEMORANDUM

To: Mississippi Bankruptcy Conference

From: Chambers of the Honorable Jason D. Woodard,
United States Bankruptcy Court, Northern District of Mississippi

Date: Original Submission August 2020; Updated Document Submitted September 2020

Re: Case Summaries

These case summaries were prepared by Amanda L. Burch, former Law Clerk, and Andrew P. Cicero, III, current Law Clerk to the Honorable Jason D. Woodard. These are simply case summaries and have no precedential effect. The published opinions speak for themselves.

***In re Antonio Barragan and Erica L. Barragan*, Case No. 18-12591-JDW, Memorandum Opinion and Order, September 3, 2019.**

The debtors executed two universal notes to a bank. The first note was secured by a deed of trust on their home and included a future advance clause. Approximately one year after executing the first note, Mr. Barragan executed a second note, payable to a bank, to purchase business equipment for Bim Bam Burgers. Mr. Barragan pledged the equipment as collateral and personally guaranteed the loan. The debtors argued that the bank did not afford them a three-day right to rescind on the secured loan as required by the Truth in Lending Act ("TILA") and as such, the bank's interest should be treated as unsecured. The bank argued that TILA's three-day right to rescind does not apply to business loans. The bank is correct.

TILA was enacted to promote consumers' informed use of credit and included a three-day right to rescind in any consumer loan secured by a borrower's home. But, TILA's right to rescission does not apply to loans made primarily for a business or commercial purpose, even if the loan is secured by the borrower's residence or personal property. Because Mr. Barragan explicitly represented that the second note was to purchase business equipment, the loan was primarily for a business purpose and therefore, TILA's three-day right of rescission did not apply and the future advance clause was enforceable.

In re Terry W. Richey, II, Case No. 18-14484-JDW, Memorandum Opinion and Order, September 23, 2019.

A putative creditor sued the debtor in state court alleging fraud and negligence arising from a 2014 contract. The creditor was represented in state court, and all documents filed in the state court litigation were noticed to that attorney. That attorney received notice of the initial creditor's meeting at the same address he received all notices in the state court litigation. In fact, he received all notices in the bankruptcy case at that same address, including the notice to file a claim in the bankruptcy case. The creditor also testified that he received notice of the meeting and attended the initial meeting. The Trustee later filed a Notice of Change of Status to Asset and the Clerk of Court entered a Notice of Need to File Proof of Claim. The notice made clear the deadline for filing claims. The creditor filed his proof of claim approximately three months after the deadline. He also filed a handwritten Notice of Change of Address on that same day, stating that he had received notice of the initial meeting, but received other correspondence at an old address, thereby causing him to miss the deadline.

The court held that actual knowledge of a bankruptcy proceeding necessary to permit a creditor to take steps to protect his rights is sufficient notice. It further held that there is a duty on the part of a creditor to make an inquiry to protect his rights. When a creditor is aware of a critical stage of the bankruptcy proceeding from which the bar date can be computed, that creditor has actual knowledge of the bankruptcy proceeding, and thereby has sufficient notice. Because this creditor had actual knowledge of the bankruptcy proceeding, both personally and via his state court litigation counsel, he was required to file his proof of claim by the bar date. The proof of claim was untimely and therefore time-barred.

The Official Committee of Unsecured Creditors of Aluminum Extrusions, Inc. v. Triumph Bank, A.P. No. 18-01034-JDW, Dkt. # 95, Memorandum Opinion and Order Denying Cross-Motions for Summary Judgment, October 31, 2019.

Prior to filing bankruptcy, the debtor entered into a loan and security agreement with a bank. The bank had a perfected, first-priority security interest in the debtor's inventory, but not its equipment. A dispute arose as to whether racks or dies were inventory or equipment. If inventory, the bank was entitled to $800,000 in sales proceeds. If equipment, the proceeds would be paid to unsecured creditors. The bank and the committee litigated the issue in an adversary proceeding.

Both parties moved for summary judgment. The court found that neither party met its burden on its motion because a material question of fact remained as to whether the dies and racks met the definition of inventory under the UCC and were considered "materials used or consumed in a business". There was competing deposition testimony regarding whether the racks and dies were used or consumed

in the business. Deposition testimony was provided by the former owner of the debtor who was also a guarantor of the loan and had an interest in seeing the sale proceeds paid to the bank. This necessitated a credibility determination the court could not make based on the deposition testimony at the summary judgment stage. Accordingly, the court denied both motions for summary judgment so that the adversary proceeding could go to trial to more fully develop the record. The parties settled before trial.

In re Ashley Powell Tillman, **Case No. 19-12224-JDW, Memorandum Opinion and Order Denying Motion to Convert Case to Chapter 13, November 19, 2019.**

The debtor filed a chapter 7 bankruptcy case. In her sworn schedules, filed under penalty of perjury, she certified that she owned no "legal or equitable interest in any residence, building, land, or similar property." The debtor actually owned 4.5 acres, deeded to her by her parents years earlier. The property was non-exempt property available for sale by the trustee with the proceeds to be distributed to creditors. When the trustee confronted her with this asset at the creditors' meeting, the debtor professed ignorance that the property had been deeded to her. At an evidentiary hearing, the debtor testified that she had been unaware she co-owned the land and sought to convert to chapter 13 in an attempt to keep it. That testimony was belied by the fact that the debtor mortgaged the property to secure a loan in 2013. The debtor testified that she received loan proceeds of $15,800.00 and detailed the way she spent those proceeds six years ago. The debtor's memory of the loan, how she spent the proceeds, and that she repaid the loan over time, did not align with her testimony that she did not know she owned the property that secured the loan, especially given that she had signed the loan documents, including the deed of trust.

Section 521 requires a debtor to file a schedule of assets and liabilities. That schedule must be filed in good faith and with full disclosure. If incomplete or filed to abuse the provisions of the Bankruptcy Code, a debtor may be ineligible for the protections of the Bankruptcy Code. In *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. 365 (2007), the Supreme Court held that there is no absolute right of conversion pursuant to Section 706, and further, bankruptcy courts may authorize an immediate denial of a motion to convert if the debtor engaged in bad faith conduct. The debtor's conduct was directly analogous to the facts in *Marrama*, and her testimony was not credible. She knew she owned the property, omitted it from her schedules, and was ineligible to be a chapter 13 debtor. Her motion to convert was denied.

In re Robert E. Jackson, Jr. and Patricia A. Jackson, Case No. 17-13753-JDW, Order Denying Motion to Modify Plan, December 2, 2019.

The trustee received $4,075.92 in unencumbered, non-exempt insurance proceeds that the parties agreed was to be paid to creditors. The debtors wished to use the proceeds to cure delinquent plan payments. The trustee argued the proceeds should go to unsecured creditors. The debtors' confirmed plan provided for payment of 100% of all creditor claims.

Ruling in favor of the trustee, the court held that 11 U.S.C. § 1325(a)(4) required all non-exempt property of the estate to be considered in the liquidation analysis. In this case, the lion's share would be paid to secured creditors, parties already protected by their collateral. Because the debtors' plan was delinquent and would be even if the proceeds were paid towards the delinquency, the unsecured creditors bore substantial risk if they were not paid using the proceeds. Further, the debtors offered no authority showing why they were entitled to direct the trustee, the party charged with collecting and distributing assets, has to distribute funds. The motion to modify was denied.

In re Joe Clyde Tubwell, Case No. 19-12163-JDW, Order Denying Motion to Reconsider, December 2, 2019.

A motion for relief from stay was filed by the creditor. The debtor failed to respond. Instead, the debtor filed a motion requesting an additional 14 days to research and prepare a response. As the debtor had sought multiple extensions during the case, the extension request was denied and the motion for relief was granted. The debtor then filed a motion to reconsider where he alleged for the first time that the creditor had served him with an illegible copy of the motion for relief.

The Court found that the debtor failed to timely raise his argument or meet his burden under Rule 59 or Rule 60. The debtor failed to cite any legal authority or procedural rule as to why he was entitled to the relief requested. Rule 59(e) and Rule 60 of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Rules 9023 and 9024 of the Federal Rules of Bankruptcy Procedure, apply to motions to alter or amend a judgment or to provide relief from a judgment or order. The burden of proof is on the party seeking relief from the judgment or order. *In re Koper*, 552 B.R. 208, 215 (Bankr. E.D.N.Y. 2016). The United States Court of Appeals for the Fifth Circuit has held that a Rule 59(e) motion "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). Instead it "serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Id.* The debtor failed to provide any adequate grounds to set aside or alter the judgment under Rule 59(e). He presented no newly discovered evidence. Instead,

the debtor made arguments that could have been offered or raised before the creditor's motion was granted. He also failed to raise any grounds that would have entitled him to relief under Rule 60. The motion to reconsider was denied.

In re Sharrell D. Reed, Case No. 16-12995-JDW, Dkt. # 77, Memorandum Opinion and Order Holding the United States Department of Education in Contempt, March 20, 2020.

The debtor's chapter 13 plan, filed August 31, 2016, included student loan debt owed to two servicers of the U.S. Department of Education. The Department was previously held in contempt in this case for its "repeated violation [of] the automatic stay provisions of the Bankruptcy Code" and was ordered to cease "any and all" communications with the debtor. Despite that order, months later, the debtor received two additional letters from the Department. In the latest letter, the Department threatened to garnish the debtor's wages.

As an initial matter, the court found that the Department was not protected by sovereign immunity pursuant to 11 U.S.C. §§ 106(a) and 101(27). The court then found that the Department had intentionally and willfully violated the automatic stay of 11 U.S.C. § 362(a), and it was in contempt of the court's previous order. The court awarded compensatory damages in favor of the debtor pursuant to 11 U.S.C. § 362(k) and debtor's counsel was also awarded reasonable attorney's fees. The court was inclined to enter punitive damages, however, 11 U.S.C. § 106(3) prevented such an award.

In re Piggly Wiggly Alabama Distributing Company, Inc. v. Michael E. Mansel, A.P. No. 19-01028-JDW, Dkt. # 49, Memorandum Opinion and Order Granting Motion to Strike Jury Demand, April 29, 2020.

Prior to filing bankruptcy, the debtor, who is the sole shareholder and principal of a company that operated a grocery store, bought inventory and goods on credit. The debtor guaranteed repayment of the debt owed to the creditor by the company. The creditor sought a determination that undisputed debt owed to the creditor was nondischargeable because the debtor misrepresented his financial condition on his loan application. The debtor filed an answer and counterclaim and made a jury demand as to all issues raised in the complaint and counterclaim. The creditor filed a motion to strike the jury demand as to the dischargeability claim only.

The court found that the debtor had no right to a jury trial to determine whether the debt was nondischargeable. In *Matter of Merrill*, 594 F.2d 1064 (5th Cir. 1979) the United States Court of Appeals for the Fifth Circuit found that there was no right to a jury trial on the issue of dischargeability, but that once the bankruptcy court determined that the debt was not dischargeable, a right to a jury trial existed on the issues of liability and amount. The court found that the debtor had already

admitted, under oath, the existence and amount of the debt owed to the creditor. The court found that the debtor clearly had no right to a jury trial to determine whether the debt was nondischargeable, and while later Fifth Circuit precedent further suggests that the debtor had no right to a jury trial on the amount of the debt, *In re Jenson,* 946 F.2d 369 (5th Cir. 1991), that was an issue for another day. The Motion to Strike Jury Demand was granted.

***In re Billy Cray Jones and Judy Carolyn Jones*, Case No. 15-14513-JDW, Dkt. # 112, Memorandum Opinion and Order Denying First Application for Compensation and Reimbursement of Necessary Expenses, June 22, 2020.**

The trustee and a creditor objected to an application for compensation filed by an attorney, who was not debtor's original counsel of record, but had stepped into the shoes of debtor's counsel and began performing legal work in the bankruptcy case. The parties arguments revolved around (1) whether the attorney was required to have his employment approved by the court, (2) whether attorney compensation for bankruptcy representation should be limited to the amount already paid to original counsel of record; and (3) if the requested compensation was approved, whether it rose to the level of an administrative expense.

The court denied the application. The court found that while the attorney may not have been required to have his employment approved under 11 U.S.C. § 327, he was still subject to court oversight pursuant to the disclosure requirements of 11 U.S.C. § 329 and FED. R. BANKR. P. 2016(b), which he failed to satisfy. The court found that failure to comply with these disclosure requirements was sufficient reason to deny compensation. Further, the attorney voluntarily stepped into the shoes of debtors' counsel and performed legal services that original counsel of record had already been fully paid to perform. The attorney then requested significantly more compensation than the standard fee paid routinely for representation of debtors for an entire chapter 13 case, when he performed post-confirmation work only. The court was mindful of its obligation to protect bankruptcy estates from unnecessary legal fees and found that the estate should not be required to bear the burden of paying for additional representation, when original counsel of record has already been paid to perform all services.

In re Carl Joseph Marascalco, A.P Case No. 20-01005-JDW, A.P. Dkt. # 40, Memorandum Opinion and Order Denying Motion for Summary Judgment, August 5, 2020.

The debtor built a cabin on his then-mother-in-law's land in 2011. The plaintiff, appearing in her individual capacity and as executrix of her mother's estate, and the debtor were married for many years, but divorced in 2016. After their divorce, the mother-in-law initially tolerated the debtor's use of the cabin; however, she eventually requested the debtor vacate the premises. He instead removed the cabin from the land. The question was whether the cabin was constructed to be removed from, or was to remain part of, the plaintiff's real property.

In denying summary judgment, this Court found that additional information was needed to determine the parties' original intent when the cabin was constructed. Under Mississippi law, whether a fixture is considered real property or personal property depends primarily on the parties' intent. The mother-in-law was deceased and the debtor's medical condition prevented him from giving deposition testimony. As the two parties whose intent matters were silent, summary judgment was inappropriate and a full evidentiary hearing necessary.

In re Darrell L. Smith, Case No. 20-10507-JDW, Dkt. # 41, Memorandum Opinion and Order Granting Motion for Relief from Automatic Stay and for other Relief, August 12, 2020.

The creditor filed a motion to lift the automatic stay asserting that a foreclosure sale had concluded prior to the bankruptcy petition being filed. The debtor argued that the bankruptcy petition was filed prior to the conclusion of the foreclosure sale and the automatic stay prohibited the transfer of title. The court found that the gavel fell and the memorandum of sale was signed prior to the bankruptcy petition being filed, while the substituted trustee's deed was signed and delivered the day after the petition was filed. The question was at what moment did the real property foreclosure sale become final under Mississippi law, or more specifically, at what point did the debtor lose both legal and equitable title to the property.

The court found that because Mississippi is an intermediate theory state, the debtor was divested of legal title once he defaulted on the loan. The court further found that the debtor lost the equitable right of redemption once the public auction sale concluded when the gavel fell and the memorandum of sale was signed, all of which occurred approximately twenty minutes before the bankruptcy petition was filed. Because the debtor had already lost the right of redemption before the bankruptcy petition was filed, no redemption was available under the Bankruptcy Code. The court concluded that the debtor had no legal or equitable interest in the property at the time the bankruptcy case commenced and therefore the property was

not property of the estate. The court granted the motion for relief to the extent necessary to record documents and commence eviction proceedings.