

BANKRUPTCY RELATED DECISIONS
U.S. BANKRUPTCY COURT, DISTRICT OF NORTH DAKOTA
U.S. DISTRICT COURT, DISTRICT OF NORTH DAKOTA
EIGHTH CIRCUIT BANKRUPTCY APPELLATE PANEL
EIGHTH CIRCUIT COURT OF APPEALS & U.S. SUPREME COURT

Prepared by Judge William A. Hill
United States Bankruptcy Court
July 1, 2005 through January 18, 2008

ABSTENTION

In re Foss 328 B.R. 780 (B.A.P. 8th Cir. 2005)

The district court holds concurrent jurisdiction under § 523(a)(18) and abstention is appropriate where an appeal is pending.

ADMINISTRATIVE EXPENSE

In re Athens/Alpha Gas Corp., 332 B.R. 578 (B.A.P. 8th Cir. 2005)

Claimants were entitled to an administrative expense for their share of postpetition oil and gas revenues.

ADR

Lewallen v. Green Tree Servicing, LLC, 487 F.3d 1085 (8th Cir. 2007)

A party may be deemed to have waived its right to arbitration if its acts were inconsistent. In this case, Green Tree's actions were inconsistent with its right to arbitrate when it served discovery in an adversary proceeding, sought an extension of time to answer the complaint and participated in a joint motion to continue the trial date.

ANNUITY

In re Kukowski, 356 B.R. 712 (B.A.P. 8th Cir. 2006)

In this case, the BAP affirmed the court's interpretation of the North Dakota exemption statute (N.D.C.C. 28-22-03.1(3)). The meaning of, "upon the death of the insured" was given the correct construction.

APPEAL

In re Ruesch, 337 B.R. 203 (B.A.P. 8th Cir. 2005)

Failing to demonstrate Rule 60 relief, the court concludes that the appeal was not timely

nor was there a motion for Rule 52 or 59 relief.

Debold v. Case, 452 F.3d 756 (8th Cir. 2006)

Reviewing the legal issue, the court concluded that the B.A.P. authored a comprehensive opinion which was well reasoned and the B.A.P. was affirmed.

In re Hicks, 369 B.R. 420 (B.A.P. 8th Cir. 2007)

Because the notice of appeal was filed more than 10 days after entry of judgment, the B.A.P. lacked jurisdiction.

ATTORNEYS

In re Big Mac Marine, Inc., 326 B.R. 150 (B.A.P. 8th Cir. 2005)

An attorney cannot represent both creditor-principal and debtor in same case.

ATTORNEY FEES

Travelers Cas. And Sur. Co. Of America v. Pacific Gas and Elec. Co., 2007 WL 721776 (2007)

A creditor is not precluded from filing an unsecured claim for contracted attorney fees merely because fees sought had been accrued in litigating issues of bankruptcy law. This decision abrogates *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991).

BAD FAITH

Marrama v. Citizens Bank of Mass., 2007 WL 517340 (U.S.)

Chapter 7 Debtor who had acted in bad faith forfeited his right to proceed under Chapter 13. Debtors do not have an absolute right to convert their case to Chapter 13.

BANKRUPTCY FRAUD

United States v. Ryder, 414 F.3d 908 (8th Cir. 2005)

Fraudulent conduct of debtors constituted criminal fraud.

BOND

In re President Casios, Inc., 360 B.R. 267 (B.A.P. 8th Cir. 2007)

Here the BAP affirmed the bankruptcy court holding that the proper legal standard was used to determine the amount of the bond. No additional bond was required.

CASE ADMINISTRATION

In re Finch, 378 B.R. 241 (B.A.P. 8th Cir. 2007)

Debtors misunderstood the nature and effect of reopening a closed case. Reopening a closed case is to be little more than an administrative function.

CHAPTER 12 PLANS

In re Rice, 357 B.R. 514 (B.A.P. 8th Cir. 2006)

The BAP concluded that it was proper to dismiss a Chapter 12 case because there was little chance of feasibility, lack of proper cash flow analysis, lack of counsel was immaterial, and for failure to provide for any rate of interest on creditor claims.

CHECKS

In re Thomas, 428 F.3d 735 (8th Cir. 2005)

362(b)(1) provides an exception to the stay for presentment of negotiable instruments. The creditor did not violate the stay.

CLAIMS

In re Hollingsworth, 331 B.R. 399 (B.A.P. 8th Cir. 2005)

In this case a creditor was entitled to surplus Chapter 7 funds where excess funds existed to pay all creditors in full.

Howard Delivery Serv. v. Zurich Am. Ins. Co., ___ U.S. ___, 126 S.Ct. 2105 (2006)

Insurance company claim was not entitled to priority status since workers' compensation coverage was not a wage substitute, abrogating *Employers Ins. Of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605.

CONSOLIDATION

In re Midwest Agri Development Corp., 369 B.R. 408 (B.A.P. 8th Cir. 2007)

In this complex case, the B.A.P. determined that the court should consider consolidation or perhaps pierce the corporate veil.

CURE

In re Olsen, 363 B.R. 908 (B.A.P. 8th Cir. 2007)

“Cure” of a default means to restore matters to status quo.

DAMAGES

In re Tri-River Trading, LLC, 329 B.R. 252 (B.A.P. 8th Cir. 2005)

Here, a limited liability company’s (debtor) managing member was entitled to 7/8 of gross settlement proceeds from a prepetition lawsuit.

DISCHARGE

In re Church, 328 B.R. 544 (B.A.P. 8th Cir. 2005)

A creditor bears the burden of proving that a debt is nondischargeable under § 523 (a)(2)(A). A mere promise to pay is not a misrepresentation made by borrower if he fails to do so. A person must prove that there was an intentional misrepresentation.

International Paper v. MCI WorldCom Network, 442 F.3d 633 (8th Cir. 2006)

Under Chapter 11, confirmation discharges any debt that arose before confirmation.

In re Griffin, 352 B.R. 475 (B.A.P. 8th Cir. 2006)

Interpreting section 727(a)(9), the court held that the language is clear on its face and the court granted the debtor a discharge under section 727.

In re Nelson, 357 B.R. 508 (B.A.P. 8th Cir. 2006)

The court reviewed the elements for a finding of fraud under section 523(a)(2)(A) and concluded that fraud was not established.

In re Braathen, 364 B.R. 688 (Bkrcty. D.N.D. 2006)

The debtor was granted a discharge despite section 727 with the court holding that elements essential to a section 727 claim were not established.

DISMISSAL

In re Hedquist, 450 F.3d 801 (8th Cir. 2006)

The Bankruptcy Court did not abuse its discretion when the Chapter 11 case was dismissed due to the debtors inability to effectuate a Chapter 11 plan under § 1112(b)(2).

In re Willis, 345 B.R. 647 (B.A.P. 8th Cir. 2006)

The debtor was estopped from seeking dismissal on fact that she had not signed the original petition and schedules.

EQUITABLE SUBORDINATION

In re Racing Services, Inc., 340 B.R. 73 (B.A.P. 8th Cir. 2006)

The Court did not abuse its discretion when it equitably subordinated the claimant's administrative expense claim.

ERISA

In re Falcon Products, Inc., 497 F.3d 838 (8th Cir. 2007)

Debtor may terminate pension plans when it is shown that debtor would be unable to pay its pension plans and continue in business.

ESTOPPEL

Liberty Mut. Fire Ins. Co. v. Scott, 486 F.3d 418 (8th Cir. 2007)

Debtor failed to satisfactorily explain the great disparity in her claim of property value. This was considered a material misrepresentation.

EXEMPTIONS

In re Sutton, 365 B.R. 900 (B.A.P. 8th Cir. 2007)

The application for a vehicle title does not meet the requirements for a security agreement.

FALSE PRETENSES

In re Preece, 367 B.R.647 (B.A.P. 8th Cir. 2007)

The B.A.P. outlines the elements of false pretenses under section 523(a)(2)(A).

FARMERS

In re Marlar, 432 F.3d 813 (8th Cir. 2005)

Under § 303(a), a debtor's status as a farmer is an affirmative defense that is waived if not timely raised.

FEDERAL RULES OF CIVIL PROCEDURE

In re Carlson, 373 B.R. 32 (B.A.P. 8th Cir. 2007)

Rule 60(b) authorizes the summary disposition of an appeal if it is entirely without merit.

In re Valley Food Services, LLC, 377 B.R. 207 (B.A.P. 8th Cir. 2007)

In this case, defendant was denied relief under Rule 60(b) for excusable neglect because she willfully ignored the requirement to file an answer to a complaint.

FIDUCIARIES

In Re Hrabik, 330 B.R. 765 (Bnkrtcy. D. N.D. 2005)

The Debtor acted in a fiduciary capacity. He held a durable power of attorney which was to be used only for “just debts and expenses.” The fiduciary capacity was abused under 11 U.S.C. 523 (a)(4).

In re Brook Valley IV, 347 B.R. 662 (B.A.P. 8th Cir. 2006)

The parties breached fiduciary duties by consenting to relief from stay and purchasing properties without disclosure to the court.

FRAUDULENT TRANSFER

In Re Sun Valley Products, Inc., 328 B.R. 147 (Bkrtcy. D. N.D. 2005)

Under § 548, the court determined that the property was sold for reasonably equivalent value. Appraisal testimony was not persuasive.

In Re Rosen Auto Leasing, Inc., 346 B.R. 798 (B.A.P. 8th Cir. 2006)

In this case the BAP defines the concept of “insider” concluding that Mr. Gratton was not an “insider.” Additionally, under § 548(a), Mr. Gratton received a reasonably equivalent value. No fraudulent conveyance occurred under §548.

In re Phongsisattanak, 353 B.R. 594 (B.A.P. 8th Cir. 2006)

Under Minnesota law, the BAP determined that the transaction did not constitute a fraudulent conveyance because the debtors were solvent.

In re Tyrrell, 363 B.R. 581 (Bkrtcy. D.N.D. 2005)

Here, the plaintiff failed to prove the essential elements of false pretenses. The elements of material falsity, intent to deceive, and willful injury were not met.

HOMESTEAD

In re Morlock, 364 B.R. 684 (Bkrctcy. D.N.D. 2006)

The debtors did not abandon their homestead despite having left for four months.

In re Addison, 368 B.R. 791 (B.A.P. 8th Cir. 2007)

Under 522(o) limitations, debtor retained control of his § 529 tuition accounts and they were property of the estate. Because debtor knew of a pending judgment, lawsuit and his potential liability under 727(a)(2), the court used this extrinsic evidence and determined that his actions of turning non-exempt property into exempt property, i.e. paying on his home mortgage, was a “badge of fraud.”

JUDGMENT

In re Dale, 332 B.R. 574 (B.A.P. 8th Cir. 2005)

Judgment as a matter of law would not be disturbed when based on proper application of law to findings of, Judgment was not clearly erroneous.

JURISDICTION

In re Young, 336 B.R. 775 (B.A.P. 8th Cir. 2006)

The bankruptcy court retained subject matter jurisdiction and had jurisdiction over the involuntary Chapter 7 case.

In re Farmland Industries, Inc., 378 B.R. 829 (B.A.P. 8th Cir. 2007)

Court lacked subject matter jurisdiction over entirely state law claimed where action was between non-debtor parties.

LIEN AVOIDANCE

In re Rick's Auto Outlet of Monticello, LLC, 327 B.R. 650 (B.A.P. 8th Cir. 2005)

The deed did not provide sufficient notice that individuals who had signed it were acting on behalf of the LLC. Failure to provide constructive notice allowed the trustee to avoid it.

MORTGAGE

In re Vondall, 364 B.R. 668 (B.A.P. 8th Cir. 2007)

A mortgage was defective, and could be avoided under section 544 because it was not facially defective. There was nothing to alert a purchaser on the mortgage's face that it was

defective.

ORDERS

In re U.S. Commodity Futures Trading Comm. v. NRG Energy, Inc., 457 F.3d 776 (8th Cir. 2006)

In this case the court declined to extend the court's authority under § 105. Bankruptcy courts may not eliminate the Commodity Futures Trading Commission's ability to pursue enforcement actions.

ORDINARY COURSE OF BUSINESS

In re Western Iowa Limestone, Inc., 375 B.R. 518 (B.A.P. 8th Cir. 2007)

Under Iowa law, in order to maintain constructive possession of property under a theory of buyers in the ordinary course of business, the possession must be visible, apparent, and actual to strangers to the transaction.

PARTIES

In re Smith, 212 Fed. Appx. 577 (8th Cir. 2006)

Bankruptcy court had authority under section 105 and its inherent power to sanction vexatious conduct notwithstanding Article I.

PREFERENCE

In re Bridge Information Systems, Inc., 447 F.3d 1076 (8th Cir. 2006)

A preferential transfer is excepted from avoidance if the transfer was incurred by the debtor in the ordinary course of business or financial affairs of the debtor and transferee; made in the ordinary course of business or financial affairs of the debtor and transferee; and was made according to ordinary business terms. 11 U.S.C. § 547 (c)(2). It is an objective test. In this case, the court discusses the "new value" defense.

In re Bridge Information Systems, Inc., 460 F.3d 1041 (8th Cir. 2006)

Citing the case of *In re USA Inns of Eureka Springs*, the court defines what constitutes a preferential transfer and what constitutes an "ordinary course of business" defense.

In re Racing Services, Inc., 363 B.R. 911 (B.A.P. 8th Cir. 2007)

A creditor may not bring avoidance action under section 548 unless trustee cannot be relied upon to pursue the claim.

In re Bohjanen, 365 B.R. 916 (Bkrtcy. D. N.D. 2006)

The Court concluded that the transfer was in the ordinary course of business.

PROBATE

Marshall v. Marshall, 2006 WL 1131904 (U.S.2006)

In this case, the U.S. Supreme Court ruled, reversing the 9th Circuit, that state probate court's jurisdiction is reserved.

PROCESS

In re Dixon, 338 B.R. 383 (B.A.P. 8th Cir. 2006)

Here, the BAP refused to recognize that "exigent circumstances" existed. No waiver of the new BAPCPA requirements.

PROPERTY OF THE ESTATE

In re Law, 336 B.R. 780 (B.A.P. 8th Cir. 2006)

The federal child tax credit that debtors received post-petition was included in property of the estate. Tax refunds are property of the estate.

REMOVAL

In re Refco, Inc., 354 B.R. 515 (B.A.P. 8th Cir. 2006)

Thirty-day time limit on motion to remand was inapplicable to action removed based on debtor bankruptcy.

SCANDALOUS

In re Neal, 461 F.3d 1048 (8th Cir. 2006)

In determining whether a filing is "scandalous" under 11 U.S.C. § 107(b)(2), the court ruled that courts must look at the filer's purpose and not what a third party's purpose would be in obtaining the filing.

SECURITY INTEREST

In re Master Services, 172 Fed. Appx. 697 (8th Cir. 2006)

A PMSI is perfected when the debtor receives possession of the collateral or within 20 days.

SETTLEMENT

In re Racing Services, Inc., 332 B.R. 581 (B.A.P. 8th Cir. 2005)

Objector had a right to a hearing on its settlement objection.

In re La'Teacha Tigue, 363 B.R. 67 (B.A.P. 8th Cir.2007)

Bankruptcy Court had the right to approve a settlement as long as it is found to be in the best interests of the estate.

In re Y-Knot Const. Inc., 369 B.R. 405 (B.A.P. 8th Cir. 2007)

It was an abuse of discretion to approve settlement without taking evidence or making any findings of fact. The trustee failed to show that the settlement was in the best interest of the estate. In determining whether a settlement fits within the range of reasonableness, the court must consider the likelihood of success at trial, any difficulties the trustee may encounter in collecting the judgment, the complexity of the litigation and the expense, inconvenience and delay, and the paramount interest of creditors and a proper deference to their reasonable views concerning litigation.

STANDING

In re Senior Cottages of America, LLC, 482 F.3d 997 (8th Cir. 2007)

The Chapter 7 trustee had standing to assert a claim against the debtor's attorney. Here, the court recalled that a trustee has standing to reduce to money all legal and equitable interests of the debtor.

In re Zahn, 367 B.R. 654 (B.A.P. 8th Cir. 2007)

Order denying a confirmation plan is not a final order.

STATUTE

In re Osborn, 363 B.R. 72 (B.A.P. 8th Cir. 2007)

When statutory language is plain, courts sole function is to enforce it according to its terms.

In re Fredrickson, 375 B.R. 829 (B.A.P. 8th Cir. 2007)

When a statute's language is plain, the function of the court is to enforce it. The term "applicable commitment period" means the period during which a debtor must pay his projected disposable income.

STAY

In re Ealy, 148 Fed. Appx. 564 (8th Cir. 2005)

A stay protects all legal and equitable interests from actions by creditors including foreclosures.

In re Baldwin, 362 B.R. 413 (B.A.P. 8th Cir. 2006)

A debtor cannot file a pro se case on the eve of foreclosure and then absent himself so he cannot be found particularly when this is not the first foreclosure stayed. A debtor has a duty to keep himself apprised of events in his case.

In re Everly, 346 B.R. 791 (B.A.P. 8th Cir. 2006)

The court declined to impose sanctions, concluding that under §523(a)(7) no violation had occurred. The creditor did not have actual knowledge of the debtor's bankruptcy case.

In re Suggs, 377 B.R. 198 (B.A.P. 8th Cir. 2007)

A stay violation occurs when repossession is done before a court order is issued despite a local rule to the contrary. Where a local rule is in conflict with the federal rules, it has no effect.

STUDENT LOANS

In re Woodcock, 326 B.R. 441 (B.A.P. 8th Cir. 2005)

There was no "undue hardship" as regards the discharge of student loans.

In re Parker, 328 B.R. 548 (B.A.P. 8th Cir. 2005)

Reversing the bankruptcy court, the BAP held that it would not pose an undue hardship to require the debtor to payback student loans where a 51-year-old art teacher who had no dependents, is single and has a medical condition filed Chapter 7 petition.

In Re Reynolds, 425 F3d 526 (8th Cir. 2005)

In this case the court determined that based on the "totality of the circumstances" coupled with an examination of fairness and equity and the unique facts of the case, the debtor was

entitled to a discharge of her student loans.

In re Cumberworth, 347 B.R. 652 (B.A.P. 8th Cir. 2006)

The undue hardship test is fact intensive and the court must consider the totality of the circumstances. It is not a rigid test but is fact intensive under section 523(a)(8).

In re Lee, 352 B.R. 91 (B.A.P. 8th Cir. 2006)

Despite income of \$1,132.00 per month, the court considered it to be an undue hardship under section 523(a)(8) for debtor to make an income contingent payment of \$13.03 per month on her student loans.

SUMMARY JUDGMENT

Murray v. American Family Mut. Ins. Co., 429 F.3d 757 (8th Cir. 2005)

Underinsured motorist coverage is discussed in detail, with the court concluding that the concept of stacking does not apply.

In re D'Amato, 341 B.R.1 (B.A.P. 8th Cir. 2006)

No collateral estoppel effect where the findings were overstated and there was no evidence in the record of existence or cause of plaintiff's injuries.

TAXES

In re Colsen, 446 F.3d 836 (8th Cir. 2006)

1040 returns qualified as "returns" and were dischargeable. Honesty of filers attempt to satisfy tax laws should be determined from the face of the form itself.

In re Hicks, 377 B.R. 889 (B.A.P. 8th Cir. 2007)

Tax liability, for which no tax returns were filed, are nondischargeable under section 523(a)(1)(B).

TRADEMARK

A & L Laboratories v. Bou-matic, LLC, 429 F.3d 775 (8th Cir. 2005)

Here the issue centered upon ownership of trademarks of chemicals. Summary judgment was properly entered in this case, with the court finding no error.

TRUSTEES

In re Morgan, 375 B.R. 838 (B.A.P. 8th Cir. 2007)

In this case, the court discusses the standard for trustee removal. Removal is an extreme remedy. The court also discusses the requirements of notice and hearing.

TRUTH IN LENDING ACT (TILA)

In re Groat, 369 B.R. 413 (B.A.P. 8th Cir. 2007)

The Truth in Lending Act contained an obvious error and the acts in this case did not constitute a TILA violation.

TURNOVER

In re Pyatt, 486 F.3d 423 (8th Cir. 2007)

Only a trustee is authorized to recover postpetition transfers.

WILLFULNESS

Safeco Ins. Co. of America v. Burr, 2007 WL 1582951 (2007)

In this case the Supreme Court held that insurers did not violate the Fair Credit Reporting Act. They did not act recklessly under 15 U.S.C.A. § 1681(n)(a).

WORKERS' COMPENSATION

Howard Delivery Service, Inc. v. Zurich American Ins. Co., 2006 WL 1639224 (U.S.)

Insurance company claim is not entitled to priority status since workers' compensation coverage is not a wage substitute, abrogating *Employers Ins. Of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605.