National Consumer Bankruptcy Rights Center

Cases in Review
April, 2016

"Cases in Review" highlights recent cases that may be of particular interest to consumer bankruptcy practitioners. It is brought to you by Consumer Bankruptcy Abstracts & Research (www.cbar.pro) and the National Consumer Bankruptcy Rights Center (www.ncbrc.org).

Chapter 7—Surrender of collateral for secured debt: Disagreeing with courts that had ruled to the contrary, the court held that a Chapter 7 debtor who indicates surrender of real property in his statement of intention is not obligated to surrender that property to the lienholder, whether or not the property is administered by the Chapter 7 trustee. Compulsory surrender of real property collateral by a debtor to a lienholder in Chapter 7 is not supported by, and indeed ignores, the express provisions of the Bankruptcy Code. Here, the debtor performed his stated intention to surrender with respect to certain residential real property because he did not interfere with the Chapter 7 trustee's administration of the property. Accordingly, the court denied a mortgage creditor's motion to reopen the case and compel the debtor to discontinue his defense of the creditor's foreclosure action. *In re Elkouby*, 2016 WL 798177 (Bankr. S.D. Fla., Feb. 29, 2016) (case no. 1:14-bk-23934).

Chapter 13—Confirmation of plan—Good faith—Fee-only plan: A fee-only Chapter 13 plan proposed by the below-median-income debtor, under which $4,000 of the $4,320 that the debtor would pay into the plan over its 36-month term would be paid as a no-look fee to his attorney and the Chapter 13 trustee would receive $285.12 of the remainder, was proposed in good faith under § 1325(a)(3). While the debtor appeared to be an ideal candidate for a Chapter 7 filing, Chapter 13 offered the debtor something that Chapter 7 could not, and that he desperately needed—a discharge of his debt owed to the City of Chicago for parking tickets so that he could keep his driver's license. Accordingly, "special circumstances" existed to warrant the debtor's filing a Chapter 13 case instead of one under Chapter 7. *In re Banks*, 545 B.R. 241 (Bankr. N.D. Ill., Feb. 8, 2016) (case no. 1:15-bk-9819).

Chapter 13—Modification of confirmed plan: Where the Chapter 13 debtor's confirmed plan included a special provision requiring a $21,768 payment to general unsecured creditors that was inconsistent with the other provisions of the plan and that rendered the plan infeasible at the outset, and the debtor had been represented at the time by an attorney who was later suspended from the practice of law before the bankruptcy court, the court granted the debtor's motion, filed after he had made 61 monthly payments, to modify the plan by removing the special provision, thereby permitting the debtor to receive his discharge. *In re Love*, 2016 WL 768850 (Bankr. N.D. Ill., Feb. 25, 2016) (case no. 1:10-bk-40266).

Chapter 13—Stripping unsecured lien: Neither the Bankruptcy Code nor the Bankruptcy Rules establish a time limitation for filing a motion to avoid a lien as wholly unsecured in a Chapter 13 case. However, in order to bring a motion to avoid a lien under Code § 506(a) after a Chapter 13 debtor has received a discharge or the case has been closed, at a minimum, the following must be satisfied: first, the confirmed plan must call for avoiding the wholly-unsecured junior lien and treat any claim as unsecured; second, the Chapter 13 trustee must treat the claim as unsecured pursuant to the plan; and third, the creditor must not be sufficiently prejudiced so that it would be inequitable to allow avoidance after entry of discharge or the closing of the case. Here, these conditions were satisfied, and the bankruptcy court erred in denying the debtors' motion to avoid an unsecured junior lien. *In re Chagolla*, 544 B.R. 676 (9th Cir. B.A.P., Feb. 9, 2016) (case no. 15-1142).

Dischargeability of debt—Student loan debt under Code § 523(a)(8): The debtor, a 56-year-old attorney, established undue hardship under Code § 523(a)(8), entitling him to discharge more than $250,000 in student loan debt, although the debtor had no dependents and had briefly held two high-paying jobs, where the debtor did not have the present ability to repay the debt out of his modest gross monthly income of $700; the debtor's diligent efforts to obtain higher-paying jobs and 28 years of only sporadic success as a practicing lawyer demonstrated that it was unlikely that his situation would dramatically improve and that he would be able to pay even the $1,166 per month in interest accruing on the student loan debt; and the debtor had made a good-faith effort to repay the student loans by actively managing the debt and paying more than $16,000 after his loans were consolidated. *In re Barrett*, --- B.R. ----, 2016 WL 549377 (Bankr. N.D. Cal., Feb. 10, 2016) (case no. 4:14-bk-43516; adv. proc. no. 4:14-ap-4161).

Means test—Expenses: Because the IRS no longer provides local standards for Guam, and has not done so since October 2011, above-median-income debtors must complete the means test by entering their actual expenses in categories for which there are local standards under the means test. The sole exception is for the class of

vehicle expenses, which, although designated as local standards, are national or regional in character and may be used in Guam. The transportation ownership expense standard is the same nationally, while transportation operating expense standards are stated for regions, and the standards for the West region should be used in Guam. In the absence of local standards, above-median-income debtors' expenses will be subject to judicial review to determine whether they are "reasonably necessary" as is the case for below-median-income debtors. The court noted that the IRS also discontinued providing local standards for the Northern Mariana Islands and the Virgin Islands. *In re Tydingco*, 2016 WL 1033878 (Bankr. D. Guam, Jan. 27, 2016) (case no. 1:14-bk-70).

Means test—Expenses: In what may be the first decision to reach this position, at least in a written decision, the court held that a debtor may claim a vehicle ownership expense as a deduction in the means test for an automobile secured only by a non-purchase money loan unrelated to the acquisition of the car. Whether the obligation secured by a vehicle has its origin in a purchase-money loan or a title loan is irrelevant to the debtor's ability to retain the vehicle. *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011) stands for the simple proposition that a debtor may not deduct loan or lease expenses when he does not have any. Here, the Chapter 13 debtors had a car loan that, regardless of its origin, now constituted a legitimate ownership expense. *In re Brunck*, 2016 WL 770571 (Bankr. S.D. Ind., Feb. 24, 2016) (case no. 4:15-bk-91209).

Property of the estate—Exemptions—Under state law: A nearly 200-year-old Book of Mormon that was last appraised as being worth at least $10,000 was exempt under Illinois law as a "bible"; a dollar-value limitation could not be read into a statute exempting "necessary wearing apparel, bible, school books, and family pictures" where one did not appear. *In re Robinson*, 811 F.3d 267 (7th Cir., Feb. 4, 2016) (case no. 14-3585).

Violation of discharge injunction—Damages: Where the Chapter 7 debtor's new mortgage servicer began attempting to collect the mortgage debt from the debtor three and a half years after he received his discharge, the court awarded the debtor $500 per violation of the discharge injunction, for a total of $4,500, as well as $1,905 for economic harm, namely, the time and effort the debtor expended prosecuting his claim, and $65,500 in attorney's fees. Although the attorney's fees might be disproportionate to the economic damage, the record made it apparent that the servicer intended to continue its collection efforts without any regard to the discharge injunction. This left the debtor with a Hobson's choice: suffer the consequences of the discharge violations, or engage in litigation. *In re Fauser*, --- B.R. ----, 2016 WL 660166 (Bankr. S.D. Tex., Feb. 16, 2016) (case no. 4:10-bk-31501; adv. proc. no. 4:14-ap-3018).

Violation of stay—Damages: Where the Chapter 13 debtors' mortgage servicer called the debtors multiple times a day, every day of the week, over a period exceeding six months, sent the debtors at least two letters advising of a non-existent delinquency, and even initiated a foreclosure proceeding in state court, the servicer's willful disregard for the automatic stay was egregious. The court awarded punitive damages of $100 per phone call for 540 phone calls made to the debtors, for a total of $54,000, as well as $3,300 in attorney's fees. *In re Johnson*, 2016 WL 659020 (Bankr. W.D. N.C., Feb. 17, 2016) (case no. 5:15-bk-50053).