BANKRUPTCY

WRONG SOCIAL SECURITY NUMBER VITIATES NOTICE

Ellett v. Stanislaus, 506 F.3d 774 (9th Cir. 2007).

FACTS: Debtor James Ellett petitioned for bankruptcy in 1994, under Chapter 13 of the Bankruptcy Code. The bankruptcy petition misstated the last number in Ellett's social security number ("SSN"). This same erroneous SSN was set forth in the 11 U.S.C. § 341(a) notice that was received by the creditor California Franchise Tax Board ("FTB"). After the FTB received the notice, it checked its records to verify that the SSN on the notice did not belong to a taxpayer who owed the FTB taxes. Because the taxpayer whose name matched the provided SSN did not owe any taxes, the FTB did not file a proof of claim or otherwise participate in the bankruptcy proceeding. In 1997, Ellett's debts were discharged pursuant to 11 U.S.C. § 1328(a). The FTB was unaware of the bankruptcy court's discharge order and sent Ellett a demand letter for payment of back taxes. Ellett responded by notifying the FTB that the taxes he owed were discharged because the FTB failed to file a timely proof of claim in the Chapter 13 proceedings.

Requiring a creditor to ferret out a debtor's correct identity when incorrect identifying information is provided would be overly burdensome and inappropriate.

Ellett filed an adversary proceeding against the FTB in order to determine the dischargeability of Ellett's tax debt to the FTB. The bankruptcy court held that the taxes were not discharged because the misstated SSN resulted in the FTB not receiving proper notice of the Chapter 13 bankruptcy. The district court affirmed the bankruptcy court's decision. Ellett appealed.
HOLDING: Affirmed.
REASONING: The court reasoned that Ellett was in the best position to list the correct SSN on the notice sent to the FTB. Requiring a creditor to ferret out a debtor's correct identity when incorrect identifying information is provided would be overly burdensome and inappropriate. It is not unreasonable to place the burden on the debtors to ensure that their creditors received proper notice of their bankruptcy filing.

The court held that due to Ellett's negligence in listing an erroneous SSN on his bankruptcy petition and section 341(a) notice, proper notice was not provided to the FTB. Consequently, Ellett's Chapter 13 plan did not "provide for" the FTB taxes. The FTB should not be punished because Ellett failed to provide proper notice which included his correct SSN.

BANKRUPTCY COURT MAY CONSIDER HIGH EXPENSES IN DECIDING BAD FAITH

Perlin v. Hitachi Capital Am. Corp., 497 F.3d 364 (3d Cir. 2007).

FACTS: Hitachi Capital America Corporation sought dismissal of the joint bankruptcy petition filed by the Perlins on the ground that the Perlins had filed the petition in bad faith. The bankruptcy court denied Hitachi's motion, reasoning that the Perlins had been truthful with the court and their creditors. In considering the motion to dismiss, the bankruptcy court refused to consider the Perlins' substantial income and expenses as evidence of bad faith. The bankruptcy court reasoned that the negative implication of the substantial modifications made to 11 U.S.C. § 707(b) by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which created a presumption of abuse against debtors having primarily consumer debts who have sufficient income to repay their debts, is that a bankruptcy court may not consider a debtor's income and expenses in deciding a motion to dismiss brought under section 707(a). Hitachi appealed from the bankruptcy court's order denying its motion to dismiss the voluntary joint bankruptcy petition filed by the Perlins under Chapter 7 of the Bankruptcy Code.
HOLDING: Affirmed.
REASONING: The first issue the court decided was whether the newly-added provisions in 11 U.S.C. § 707(b) imply that a bankruptcy court may not consider a debtor's income and expenses in adjudicating a motion to dismiss under section 707(a). Because the canon of negative implication does not apply in this case, the court concluded that the new provisions of section 707(b) did not impliedly prohibit a bankruptcy court from considering a debtor's income and expenses under section 707(a).

Having concluded that the 2005 Act's amendments to section 707(b) do not, by negative implication, preclude a bankruptcy court from considering income-and-expense factors in deciding whether to dismiss a bankruptcy petition under section 707(a), the court then considered the question of whether consideration of income-and-expense factors is consonant with section 707(a). Looking first to legislative history, the court found that Congress did not intend for a debtor's ability to repay his debts to be adequate cause for dismissal of a bankruptcy petition. The court concluded that Congress did not indicate that a bankruptcy court must ignore the economic reality of a debtor's financial situation in determining whether a valid cause for dismissal exists. The court further held that an assessment of a debtor's good faith required consideration of all of the facts and circumstances surrounding the debtor's filing for bankruptcy. In conclusion, the court found that when a debtor capable of at least partial repayment has made every effort to avoid payment of an obligation, lack of good faith sufficient to justify dismissal may be found.

STATUTORY ATTORNEY'S LIEN SURVIVES CLIENT'S BANKRUPTCY

Rhoads v. Sommer, 931 A.2d 508 (Md. 2007).

FACTS: In 1994, Lori Rhoads retained Fred Sommer to file an employment discrimination case against her employer. Three years later, the district court granted summary judgment to the employer. In March 1998, Rhoads filed for Chapter 7 bankruptcy. Any appeal on the employment discrimination case was automatically stayed pending the bankruptcy proceeding.

In her bankruptcy schedules, Rhoads listed Fred Sommer as a creditor holding a claim for legal services. Sommer was served with Rhoads' petition, but he did not file any response in the bankruptcy proceedings. After reviewing Rhoads' petition, the bankruptcy trustee concluded there was "no property available for distribution from the estate." The trustee filed a report of no distribution, releasing to Rhoads any interest she might have in the stayed litigation. In July 1998, the bankruptcy court granted Rhoads a discharge under 11 U.S.C. § 727.

Rhoads and Sommer then exchanged several letters concerning Sommer's representation of Rhoads in the employment discrimination suit. Disagreements between Sommer and Rhoads continued. As a result, Sommer officially withdrew as Rhoads' attorney. On September 28, 1998, Sommer sent notice of his attorney's lien to Rhoads and to counsel for the Federal Deposit Insurance Corporation.

Rhoads filed notice that she was appealing the judgment of the district court in the employment discrimination case. In 2001, the appellate court remanded the case for a new trial. More than four years after Sommer withdrew as Rhoads' attorney, a federal jury found in favor of Rhoads and awarded Rhoads damages of $120,006. As a prevailing party, Rhoads moved for an award of attorney's fees and costs. In her memorandum in support of her claim for attorney's fees, Rhoads cited Sommer's statutory lien.

The federal district court denied Rhoads' claim for fees and costs and denied Sommer's motion to intervene. The Court of Special Appeals of Maryland reversed, holding that the lien took effect upon the commencement of Sommer's services, was not lost by Sommer's failure to serve written notice under Maryland Rule 2-652 before the bankruptcy petition, was not dependent on the viability of an *in personam* claim, and was not extinguished in the bankruptcy despite the fact that Sommer did not file proof of claim in bankruptcy. Rhoads filed a petition for writ of certiorari.

HOLDING: Affirmed.

REASONING: The court first considered when the lien was established and what notice, if any, was required to establish the lien. The court noted that the plain language of § 10-501 Maryland Business Occupations and Professions Code states that "an attorney at law *has* a lien on: (1) a cause of action or proceeding of a client of the attorney at law from the time the cause of action arises or the proceeding begins…". Before analyzing whether Sommer's lien survived Rhoads' bankruptcy discharge, the court considered whether the § 10-501 attorney's lien is an *in rem* or an *in personam* claim. The court found that an attorney's lien is an *in rem* claim.

The court held that a bankruptcy discharge releases the debtor from *personal* liability for pre-petition debts. Sommer's *in personam* claim was discharged after Rhoads' bankruptcy filing. The discharge did not affect Sommer's *in rem* claim. Because the *in rem* claim was abandoned and reverted to a status such that no bankruptcy had occurred, Sommer was not obligated to file any proof of claim in the bankruptcy estate in order to make his statutory attorney's lien claim. As a result, Sommer's lien, an *in rem* claim on any judgment or recovery in Rhoads' civil action, survived Rhoads' bankruptcy discharge of her *in personam* debts even though notice of the lien under Maryland Rule 2-652 was not provided until after the bankruptcy.

MISCELLANEOUS

PROPOSED CLASS ACTION SETTLEMENT REJECTED

Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

FACTS: Manuel Figueroa brought suit against Sharper Image as the named plaintiff in a class action. Figueroa alleged that the "Ionic Breeze" air purifier sold by Sharper Image did not perform as advertised and, in fact, exposed customers to dangerous levels of ozone. Figueroa sought relief on claims of breach of contract, breach of warranty, and unjust enrichment.

Sharper Image initially objected on the grounds that there were similar class-action suits already pending in California, and one was already pending in Florida. Sharper Image filed a motion to stay. Figueroa responded by adding the manufacturer of the units to the suit. Eventually, the manufacturer was released because of jurisdictional issues. Sharper Image's motion to stay was denied.

The day before the class was to be certified, the parties reached a settlement agreement. Due to various objections to, what was referred to as, a "coupon settlement" and a "reverse auction" by outside observers, two more versions of the settlement agreement were proposed. This proceeding was initiated by the parties to request final approval of the proposed settlement.

HOLDING: Denied.

REASONING: The court stated that "the issues presented that bear upon whether to grant final approval here are: (a) whether the settlement was procured by collusion among the parties or was the result of arms-length and informed bargaining; and (b) whether the proposed final settlement is fair, adequate and reasonable, applying the six *Bennett* factors. In addition, the Court is to evaluate the fairness of the parties' proposed settlement under the standards contained in the CAFA [("Class Action Fairness Act")]."

The court found no evidence of collusion. It did find that plaintiff's lawyers had drastically lowered their demands by more than 1000% very late in the settlement process. Plaintiffs had initially asked for an 80% coupon, which would have been about $280. One day before the settlement they dropped their demand to $19. The court reasoned that plaintiff's lawyers were negotiating from a position of weakness due to Sharper Image's threat to stay the settlement pending other class action claims against them.

Next the court considered the *Bennett* factors which are: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." *Bennett v.*