PARTY APPEALING DECISION OF ARBITRATOR HAS BURDEN OF PROOF

Statewide Remodeling, Inc., v. Williams, 244 S.W.3d 564 (Tex. App.—Dallas 2008).

FACTS: John and Eddie Lee Williams contracted with Statewide Remodeling for the construction of a conservatory sunroom. The contract contained an arbitration clause. Dissatisfied with the work performed by Statewide, Williams filed a lawsuit for damages. In their original petition, the Williamses requested the trial court to enter an agreed order appointing an arbitrator and abating the suit. Arbitration proceeded according to the agreements made by the parties and was conducted primarily by written submission. The parties submitted position statements to the arbitrator which included affidavits of witnesses and other exhibits in support of their arguments. The arbitrator then conducted a hearing so the parties could offer testimony. No transcript of the arbitration hearing was made. The arbitrator awarded Williams $18,000 to "repair the room interior and take necessary steps to alter or replace the roof" and $15,500 in attorneys' fees and arbitration costs.

Statewide filed a motion in the trial court to vacate the arbitration award. Statewide argued the arbitrator's award was unsupported by the evidence. Further, Statewide argued that the Williamses did not ask for the cost of repair as a measure of damages. Rather, Statewide contended that the Williamses requested only rescission and a refund of the contract price of $52,656. Statewide attached to its motion to vacate: (1) both parties' position statements with attached affidavits and supporting exhibits which were submitted to the arbitrator; (2) a sworn affidavit of Statewide's attorney stating he had been present during the arbitration hearing and that Williams did not present any evidence of the cost of repair; and (3) numerous additional documents, including letters and the text of a voice mail message between counsel.

After the trial court heard arguments from the parties on the motion to vacate, the court denied Statewide's motion to vacate and sustained the arbitration award.

HOLDING: Affirmed.

REASONING: The court of appeals affirmed the trial court's holding because Statewide failed to provide a transcript of the arbitration hearing. When a non-prevailing party seeks to vacate an arbitration award, it bears the burden in the trial court of bringing forth a complete record that establishes its basis for vacating the award. Statewide had the burden to provide a complete transcript of the arbitration hearing to the trial court in order to receive an accurate review of the arbitrator's decision. Statewide only provided the trial court with the parties' position statements with attached affidavits and supporting exhibits, a sworn affidavit from Statewide's attorney, and other documents. These documents failed to constitute a complete record of the arbitration proceeding. Therefore, the court held that the trial court did not err in holding that Statewide had the burden of bringing forth a complete record of the arbitration proceedings, including a transcript of the arbitration hearing.

BANKRUPTCY

MEDICAL MALPRACTICE CLAIM AGAINST DOCTOR IS DISCHARGEABLE

Ditto v. McCurdy, 510 F.3d 1070 (9th Cir. 2007).

FACTS: John McCurdy performed an unsuccessful breast augmentation surgery on Janie Ditto. In 1989, Ditto sued McCurdy in state court for negligence and fraud alleging that McCurdy exercised inadequate care, failed to obtain informed consent because he did not disclose the risks of the surgery, and did not disclose his lack of qualifications to perform the surgery. In 1992, Ditto won judgment against McCurdy. McCurdy appealed the judgment and filed for bankruptcy.

In 1996, the bankruptcy court granted Ditto's motion for summary judgment under 11 U.S.C. § 523(a)(6), which grants exception to discharge for any debt "for willful and malicious injury by the debtor," holding that the debt was nondischargeable. The next year, the Hawaii Supreme Court affirmed the negligence claims, but reversed the fraud claim. McCurdy then filed a Rule 60(b) motion with the bankruptcy court to set aside the judgment of nondischargeability. Both the bankruptcy court and the district court denied this motion, but the appellate court remanded with instructions to grant the motion.

In 1998, after McCurdy filed the claim, but before it was granted, the United States Supreme Court in *Kawaauhau v. Geiger*, clarified the meaning of the § 523(a)(6) exemption from discharge. 523 U.S. 57 (1998). The Court held that § 523(a)(6) did not encompass debts arising from reckless or negligent afflictions of injury. On rehearing in the bankruptcy court, McCurdy moved for summary judgment. The bankruptcy court granted his motion and the district court affirmed. Ditto appealed.

HOLDING: Affirmed.

REASONING: Prior to *Geiger*, § 523(a)(6) was governed by *In re Cecchini*, 780 F.2d 1440 (9th Cir. 1986). Under *Cecchini*, the debtor need not have acted with a specific intent to injure. Ditto contended that the old *Cecchini* standard should apply rather than applying the new *Geiger* decision retroactively. The court stated that Supreme Court rulings of federal law apply to cases still open on direct review. When a judgment has been set aside pursuant to Rule 60(b), the case stands as if that judgment had never occurred in the first place. Because Ditto's judgment was set aside pursuant to Rule 60(b), the case was still open on direct review and therefore the *Geiger* ruling applied.

Alternatively, Ditto argued that she met the enhanced standard of *Geiger* because McCurdy's failure to disclose vitiated her consent to the procedure, rendering his actions a battery. The court distinguished between medical battery and negligent failure to disclose. The former occurs when a doctor fails to get any authorization or has gone well beyond the authorization given. The latter is a breach of the doctor's duty to disclose all material risks a patient would need to make an informed decision. The court held that informed consent sounded in negligence rather than in battery, therefore, failure to obtain informed consent,

without evidence of intent to injure, did not give rise to a willful and malicious injury within the meaning of § 523(a)(6).

HOMESTEAD PROTECTION EXTENDS TO PROCEEDS OF SALE

In re Cunningham, 513 F.3d 318 (1st Cir. 2008).

FACTS: Cunningham designated his residence at 795 Johnson Street in North Andover, Massachusetts as his homestead. In Massachusetts, once property is claimed as a homestead, up to $300,000 is shielded from most of an owner's creditors. Mass. Gen. Laws Ann. ch. 188, § 1 (West 2004). A judgment for $191,000 was entered against Cunningham in favor Pasquina based on a breach of fiduciary duty. Pasquina obtained a $250,000 writ of attachment against the Johnson Street property.

Subsequently, Cunningham filed for bankruptcy under Chapter 7 of the Bankruptcy Code, and claimed in the bankruptcy proceedings a $300,000 homestead exemption on the Johnson Street property. He also disclosed Pasquina's lien on the residence. Cunningham attempted to discharge the $250,000 lien against him in the bankruptcy proceeding but the bankruptcy court held that the debt could not be discharged because he acted fraudulently while in a fiduciary capacity, and he caused willful and malicious financial injury to Pasquina.

By the plain language of the statute, exemptions under § 522(c) persist beyond the termination of the case, making the property subject to an exemption unavailable for the satisfaction of pre-petition debt.

Cunningham wanted to sell the Johnson Street property and filed a motion for order confirming sale proceeds as exempt. The Johnson Street property was sold for $150,000. The bankruptcy court held that the proceeds from the sale of the Johnson Street property were exempt from liability for Pasquina's debt based on 11 U.S.C § 522(c), which states that "property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case." Pasquina appealed to the district court, which affirmed the bankruptcy court's decision. The district court held that the conversion of the homestead property into proceeds by means of voluntary sale does not remove the protections of § 522(c) from the property. Pasquina appealed.

HOLDING: Affirmed.

REASONING: Property that is properly exempted under § 522 is immunized against liability for pre-bankruptcy debts, subject only to a few exceptions, none of which apply in this case.

The court held that Pasquina's claim that the post-petition voluntary sale of the exempt property made the proceeds of the sale available to satisfy a non-dischargeable pre-petition debt was at odds with the immunizing effect of § 522(c). Section 522(c) states that "property exempted under this section is not liable *during or after* the case for any debt of the debtor that arose . . . before the commencement of the case . . ." (emphasis added). By the plain language of the statute, exemptions under § 522(c) persist beyond the termination of the case, making the property subject to an exemption unavailable for the satisfaction of pre-petition debt.

The court rejected Pasquina's argument that it was unfair to limit his ability to collect on his judgment against Cunningham. When Congress chose to impose limits on the fresh start policy, it did so by providing explicitly that certain debts are non-dischargeable. In fact, Pasquina successfully argued to the bankruptcy court that Cunningham's debt arising from the Massachusetts Superior Court judgment in favor of Pasquina was non-dischargeable because of Cunningham's fraudulent conduct. However, in deciding which pre-petition debts could be satisfied from otherwise exempt property, Congress did not list such a non-dischargeable debt in the itemization set forth in § 522(c)(1)-(3). The court held that they could not limit the protections afforded Cunningham by § 522(c) because he was a dishonest debtor.

Therefore, the court affirmed the district court's judgment that the post-petition sale of Cunningham's home, for which he had obtained a homestead exemption under the law of Massachusetts, did not cause the proceeds of the sale to lose their exempt status under the Bankruptcy Code and become subject to Pasquina's pre-petition nondischargeable debt.

BANKRUPTCY EXEMPTION CAP DOES NOT APPLY TO HOMESTEAD INTEREST ESTABLISHED WITHIN 1215-DAY PERIOD IF DEBTOR ACQUIRED TITLE BEFORE PERIOD

In re Rogers, 513 F.3d 212 (5th Cir. 2008).

FACTS: On January 17, 1994, Sarah Rogers inherited a 72.5 acre tract of real property ("Forney Property") from her mother. Rogers was single when she inherited the property. Subsequently, Rogers married George Rogers, and they purchased a 5.1 acre tract of real property ("Rockwall Property"). They constructed a residence on the Rockwall Property and claimed it as their homestead. In January 2004, Rogers separated from her husband, moved into a mobile home on the Forney Property, and claimed the Forney Property as her homestead. On April 6, 2004, Rogers and her husband divorced. Pursuant to the divorce decree, Rogers was divested of all right, title and interest in the Rockwall Property, and no equity from the Rockwall Property was rolled-over into the Forney Property. Prior to their divorce, Rogers and her husband had borrowed money from Jack Wallace. Their intent was to use the funds toward a business venture that was ultimately unsuccessful. Wallace eventually sued and recovered the unpaid loan balance judgment against both Rogers and her then ex-husband.

On September 28, 2005, Rogers filed for relief under Chapter 7 of the Bankruptcy Code. She claimed a $359,000 homestead exemption on the Forney Property. Wallace filed a timely objection to the debtor's claimed homestead exemption. Wallace argued that 11 U.S.C. § 522(p)(1) capped the exemption at the federal statutory amount of $125,000, because the debtor acquired her homestead interest in the Forney Property within the 1,215-day period preceding the filing of her bankruptcy petition. The objection was overruled in bankruptcy court, affirmed in the district court, and the judgment creditor appealed.

HOLDING: Affirmed.

REASONING: Enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act, 11 U.S.C. § 522(p)(1) limits the state law homestead exemption under certain circumstances. Section 522(p)(1) prevents the debtor from exempting certain interests from the bankruptcy estate if they were acquired by the debtor during the statutory period and their aggregate value exceeds a certain dollar threshold.

The court concurred with the *Reinhard* court's observation that "Congress could have defined all [the] debtors' exemptions to be whatever they would have been 1215 days before the filing of the petition. Instead, Congress defined the cap more narrowly." *Venn v. Reinhard*, 377 B.R. 315, 321 (Bankr. N.D. Fla. 2007). The court relied on the presumption that Congress was concerned with the timing of the establishment of the homestead when it enacted § 522(p)(1). The statutory text and legislative history indicate the term "interest" refers to vested economic interests in the property that were acquired by the debtor within the 1,215-day period preceding the filing of the petition. Rogers was therefore entitled to her full homestead exemption under Texas state law.

CONVENIENCE CHECKS CONSTITUTE A TRANSFER OF DEBTOR'S PROPERTY

In re Wells, 382 B.R. 355 (B.A.P. 6th Cir. 2008).

FACTS: Sharrene Wells made four payments to reduce her credit card debt with MBNA America Bank ("MBNA") using convenience checks from her credit card account with Chase Bank. Shortly thereafter, Wells filed for Chapter 7 bankruptcy. The bankruptcy trustee commenced an adversary proceeding to recover the payments made to MBNA as preferential transfers under 11 U.S.C. § 547(b). The trustee filed a motion for summary judgment.

The bankruptcy court found that: 1) Wells had sufficient dominion and control over monies made available to her by Chase bank; and 2) the payments were a diminution of Well's estate. The bankruptcy court granted the motion for summary judgment and entered a judgment against MBNA in the amount of the four payments. MBNA appealed.

HOLDING: Affirmed.

REASONING: Bankruptcy Code § 547(b) authorizes a trustee to avoid certain preferential transfers to creditors. MBNA argued that § 547(b) was not applicable because 1) the debtor had no property interest in funds that were the subject of a bank to bank transfer; 2) the earmarking doctrine applies such that the transferred funds did not constitute property of the debtor; and 3) because there was no diminution in Wells' estate, there was no preferential transfer.

As a general rule, the use of borrowed funds to discharge a debt is a transfer of property of the debtor.

The court found that Wells could have purchased assets with the convenience checks instead of paying the debt owed to MBNA. Chase Bank did not control how Wells used the convenience checks. The court noted that as a general rule, the use of borrowed funds to discharge a debt is a transfer of property of the debtor.

The court found that the earmarking doctrine did not apply because the lender, Chase Bank, made no stipulation on the disbursement of the proceeds of the convenience checks. The earmarking doctrine requires the lender to stipulate that the loan funds be used for payments to a designated creditor. Wells had sufficient interest and control over the convenience checks to constitute an interest of the debtor in property per § 547(b).

The court found there was a diminution in Wells' estate. Wells converted the offer of credit into a loan by use of the convenience checks. Wells' estate was diminished when she used the proceeds of the loan to pay her debt to MBNA. The court noted that two bankruptcy courts had reached the opposite conclusion on similar facts, however, these courts were in different circuits. For all of the reasons above, the court affirmed the lower court's ruling on summary judgment for the trustee.

STRIKING BANKRUPTCY PETITION, RATHER THAN DISMISSING CASE, WAS PERMISSIBLE REMEDY FOR NONCOMPLIANCE WITH 109(h)

Wyttenbach v. C.I.R., ____ B.R. ____ (S.D. Tex. 2008).

FACTS: Wyttenbach had petitioned for Chapter 7 bankruptcy as a "trust" in 2006. The bankruptcy court dismissed the petition with prejudice on grounds of improper party and lack of jurisdiction. In 2007, Wyttenbach petitioned for Chapter 7 bankruptcy as a "man." On the day of Wyttenbach's second petition, the appellees purchased his condominium at a foreclosure sale. The appellees motioned to strike Wyttenbach's petition and retroactively annul the automatic stay because: 1) Wyttenbach failed to comply with 11 U.S.C. § 109(h)(1) which requires an individual receive pre-petition counseling 180 days before filing; and 2) Wyttenbach failed to disclose that his prior bankruptcy petition was dismissed on the grounds that he was ineligible to be a debtor pursuant to § 109. The bankruptcy court granted the appellees' motion because Wyttenbach had failed to file his credit-counseling certificate.

HOLDING: Affirmed.

REASONING: Wyttenbach's appeal challenged the bankruptcy court's decision because he petitioned as a "man" instead of a "trust," and so his failure to disclose his prior bankruptcy dismissal was erroneous. Wyttenbach did not dispute that he had not fulfilled his credit-counseling requirement, nor did he argue that any of the exceptions to § 109(h) were applicable to him.

The court examined the plain language of § 109(h)(1) and found that an individual may not be classified as an eligible debtor for bankruptcy petition unless he complies with the statute. Wyttenbach failed to provide proof of pre-petition counseling and therefore did not comply with § 109(h)(1).

The court addressed the appropriateness of striking a case rather than dismissing it where the petitioner is found ineligible to be a debtor under § 109(h). The court cited *In re Hubbard*, and found that the filing of a petition by an individual ineligible under § 109(h) does not commence a case. 333 B.R. 377, 383 (Bankr. S.D. Tex. 2005). Because no case was commenced, there was no case to dismiss. Therefore, striking the case was appropriate. The court stated that while striking a petition rather than dismissing it is a minority position, it is reasonable. The court therefore affirmed the bankruptcy court's holding.