Puerto Rico Bankruptcy Court

Cases of Interest for period of September 2010 to August 2011 By: José R. Carrión

BAR TO RE-FILE

In re Collazo Heredia, 10-06495 BKT, 2011 WL 2292280 (Bankr. D.P.R. June 9, 2011)

The Debtors made only one of eight payments currently due under a Chapter 13 plan. Since August 2002, Debtors have filed four bankruptcy cases (including the present case) in the District of Puerto Rico, all of which have been dismissed for failure to make plan payments. The United States Trustee requested that the granting of the Debtors' voluntary dismissal be conditioned upon a bar to re-file to prevent abuse of the bankruptcy process. This Court agreed.

"…Debtors have a history of failing to make plan payments, raising concern as to their motivation and sincerity in seeking Chapter 13 relief. To prevent further abuse of the bankruptcy process, this Court adopts the United States Trustee's position in Dkt. No. 28 conditions its dismissal of the Debtors' current case on a bar to re-file a bankruptcy petition in any jurisdiction for two (2) years."

COMMINGLING FUNDS

In re Torres Jimenez, 09-03849 ESL, 2011 WL 1758640 (Bankr. D.P.R. May 6, 2011)

The issue before this court is what sanctions and/or disciplinary action should be imposed on attorney Frederic Chardon Dubos for having violated Model Rule 1.15 of the Model Rules of Professional conduct of the American Bar Association.

Model Rule 1.15(a) states that "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation."

Debtor's attorney had the practice of receiving funds from the debtor to then make the chapter 13 plan payments. The funds were deposited in an ordinary bank account commingling with other funds. "Clearly, commingling of a client's funds with lawyer's funds is impermissible. Model Rule 1.15 mandates that a lawyer's property be kept separate from that of his clients." "There may be special circumstances which may warrant an attorney to open a separate trust account for a specific client because administering the same is crucial to the success of the litigation. The fact that a debtor does not have a checking account does not, by itself, warrant the opening of a trust account to deposit monies that in turn will be forwarded to the Chapter 13 trustee as a payment on a confirmed plan." In view of the foregoing, the court finds that counsel's past practice violated Model Rule 1.15 and that the opening of a trust account does not meet the requirements of Model Rule 1.15."

Income and Expenses

In re O'Neill Miranda, 449 B.R. 182 (Bankr. D.P.R. 2011) (March 9, 2011)

Chapter 13 trustee objected to above-median-income Chapter 13 debtors' proposed plan on "projected disposable income" and "good faith" grounds.

Christmas bonuses that above-median-income Chapter 13 debtors anticipated receiving during their applicable five-year commitment period had to be included on income side of calculation, in determining "projected disposable income" that debtors had to devote to payment of unsecured debt;

Debtors were entitled to take standard deductions allowed under National and Local Standards promulgated by the Internal Revenue Service (IRS), notwithstanding that debtors' actual expenses, as set forth on schedule, were less than the National and Local Standards; and for Chapter 13 plan to be proposed in "good faith," debtors did not need to contribute any more funds to payment of their unsecured creditors than was required by "projected disposable income" test. Objection granted in part and denied in part.

Proof of Claim "Filed Late"?

In re Quinones, 10-08219 MCF, 2011 WL 748115 (Bankr. D.P.R. Mar. 2, 2011)

On September 6, 2010, the debtor filed a Chapter 13 bankruptcy petition. The bar date, or last day, fixed to file a non-governmental proof of claim was January 16, 2011. On January

18, 2011, Castro Cros filed proof of claim number 12 in the amount of $7,495.00 as unsecured. On January 24, 2011, the Chapter 13 Trustee objected to claim number 12 on the grounds that it had been filed after the bar date established by Fed. R. Bankr.P. 3002(c). On January 31, 2011, Castro Cros filed an answer to the Trustee's objection to claim.

"The Bankruptcy Court has no discretion to allow an untimely proof of claim in a Chapter 13 case unless one of the exceptions in Rule 3002(c) apply, not even for equitable considerations." .."In order for filing to be complete and timely as to a proof of claim, the same must be received at the Clerk's office before expiration of the deadline. As such, the date the proof of claim was mailed is irrelevant for purposes of determining timeliness."

"Upon review, the Court notes, a matter not alleged by either party in the controversy at bar: that the deadline for filing the proof of claim was Sunday, January 16, 2011 and the following day, Monday, January 17, 2011 was a legal holiday commemorating the birthday of Martin Luther King, Jr. Pursuant to Bankruptcy Rule 9006(a)(3)(A), unless the court orders otherwise, if the clerk's office is inaccessible, the last day for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday. In the instant case, the first accessible day for filing was Tuesday, January 18, 2011, the same day that Claimant filed his proof of claim." … In light of the aforementioned, the Court denies the Chapter 13 Trustee's objection to claim 12 and orders that claim 12 be allowed as unsecured."

Deadline by which any non-dischargeability complaint had to be filed

In re Cintron, 447 B.R. 82 (Bankr. D.P.R. 2011) Jan. 28, 2011

Chapter 13 debtor moved to set aside prior order of court extending deadline for creditor to file nondischargeability complaint, and also moved to dismiss creditor's subsequently filed complaint as untimely.

The Bankruptcy Court, held that mere fact that, in notice that creditor received of debtor's Chapter 13 filing and of first meeting of creditors, the space for insertion of deadline by which any nondischargeability complaint had to be filed was left blank did not in any way effect creditor's ability to calculate when that deadline was, and did not permit bankruptcy court to extend deadline for creditor to file such a complaint on application filed after deadline had already expired. Motion granted.

No Second Home Mortgage Payment

In re Camacho, 10-06358 BKT, 2011 WL 280857 (Bankr. D.P.R. Jan. 21, 2011)

Debtors cannot expense mortgage payments on second home in which adult son, age 22, and minor daughter, age 19, lived; Puerto Rico Civil Code does not obligate debtors to support adult child who is not in school. $948 monthly payment for daughter's housing expense excessive. "Debtor have not presented a legally compelling reason that justifies maintaining a second residence, in prejudice of their unsecured creditors. The convenience in maintaining a second home for their daughter is not above Debtor's[sic] obligation to pay their unsecured creditors."

"CH13 ABSOLUTE RIGHT TO VOLUNTARY DISMISS?"

In re Mangual, 10-00124, 2010 WL 5185392 (Bankr. D.P.R. Dec. 20, 2010)

On January 12, 2010, the Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code. This petition stayed certain litigation, identified in the Debtors' Statement of Financial Affairs (SOFA), pending in state court between the Debtors and the Movants On January 26, 2010, the Debtors filed a Chapter 13 plan. On July 21, 2010, the Movants filed the instant motion to convert the case to Chapter 7, alleging non-feasibility of the Debtors' plan and various instances of bad faith. Specifically, the Movants directed the Court's attention to the Debtors' (1) failure to include certain creditors in his SOFA; (2) misrepresentation of the status of pending state court litigation; and (3) filing a plan based upon a favorable outcome in pending litigation. On August 11, 2010, the Debtors filed his motion requesting voluntary dismissal. On August 23, 2010, the Movants filed their objection to the Debtors' motion requesting voluntary dismissal. At the close of testimony by the sole witness, Manuel Allen Fernandez Mangual, given at the evidentiary hearing the Court concluded the following: (1.) The Schedules and Statement of Financial Affairs were inaccurate in failing to report all of the Debtors' information. (2.) The Debtors did not attend either of the noticed § 341 Meeting of Creditors, nor were they excused. (3.) The 2007, 2008 and 2009 state tax returns were filed 6, 18 and 30 months late, respectively. (4.) The 2008 and 2009 state tax returns were, at a minimum, inconsistent with the information provided in the bankruptcy documents filed. (5.) Debtors' failed to comply with the 11 U.S.C. § 704(8) reporting requirements.

"Courts have distinguished *Marrama* from cases based upon dismissal under section 1307, in that there is no eligibility requirement in section 1307(b) that is analogous to the requirement in section 706(d). *In re Polly,* 392 B.R. 236, 246 (Bankr.N.D.Tex.2008)" …"In the absence of controlling [*First Circuit*] precedent, this Court finds the rational expressed in *In re Polly,* 392 B.R. 236, 246 (Bankr.N.D.Tex.2008), to be the most persuasive and adopts that Court's legal reasoning.

"Congress carefully drafted the Bankruptcy Code to ensure that Chapter 13 could only be entered into and continued by a debtor voluntarily. The Bankruptcy Code provides a Chapter 13 debtor with an absolute right to dismiss his or her case at any time, even if a motion to convert the case to Chapter 7 is pending. In addition, the *Polly* Court found that other tools are available to punish a debtor for an abuse of the process. Among which, 11 U.S.C. § 349 provides considerable latitude to the court in conditioning dismissal of a case under § 1307(b). "Thus, the court may dismiss with prejudice to refiling to prevent a revolving door approach to bankruptcy."

"Having determined (1) that the decision in *Marrama* as applied to a motion requesting voluntary dismissal under section 1307 is subject to a split of authority; (2) that no such authority controls this Court's decision on this issue; and (3) that the Debtors committed numerous questionable acts which may not have risen to the level of bad faith but at a minimum demonstrate an abuse of the bankruptcy process, this Court will extend the right of section 1307(b) to the Debtors in this instance, however, Debtors will be barred from further filings of any bankruptcy petition for a period of one year, from the entry date of this order.

UNCLAIMED FUNDS

In re Montalvo, 05-0006917ESL, 2010 WL 5072120 (Bankr. D.P.R. Dec. 7, 2010)

The Debtors allege that the unclaimed funds deposited with the clerk of the U.S. Bankruptcy court by the Chapter 13 trustee belong to them as the creditor has not claimed them. The court disagrees.

"Section 347 of the bankruptcy code, 11 U.S.C. § 347, governs unclaimed property, including funds distributed by a chapter 13 trustee pursuant to a confirmed chapter 13 plan and not cashed by the creditor. Fed. R. Bankr.P. 3011 complements section 347(a). See: 3 Collier on Bankruptcy, 16th Edition, ¶ 347.01–347.03, pgs. 347–3 to 347–10. The trustee

shall stop payment of any check remaining unpaid ninety days after the final distribution under chapter 7, 12 or 13, and the amounts will be paid into the registry fund of the bankruptcy court as unclaimed funds, and shall be disposed of in accordance with 28 U.S.C. §§ 2041, 2042. 11 U.S.C. § 347(a). The payment of the property or unclaimed funds is governed by 28 U.S.C. § 2041, and the procedure for their withdrawal is set forth in 28 U.S.C. § 2042."

"…the unclaimed funds deposited by the trustee in the court's registry fund are held in trust for the person legally entitled to the same."

"Unclaimed funds do not become "surplus funds" when they are not claimed by the creditor who did not cash the check. *In re Bradford Production, Inc.,* 375 B.R. 356, 360 (Bankr.E.D.Mich.2007). The creditor retains a property interest in the unclaimed funds. *In re Applications for Unclaimed Funds Submitted in Cases Listed on Exhibit "A",* 341 B.R. 65, 69 (Bankr.N.D.Ga.2005). The creditor is the rightful owner of the funds when the trustee made the distribution based on a confirmed plan and an allowed proof of claim. In this case, the Debtors have failed to show that they are the rightful owners of the unclaimed funds and not the creditor Associates Financial."

Social Security Income, Disposable Income and Bad Faith

In re Cruz, 09-06219 ESL, 2010 WL 3942728 (Bankr. D.P.R. Oct. 7, 2010)

This case is before the court upon the Chapter 13 Trustee's motion objecting the confirmation of Debtors' Chapter 13 plan based upon the allegedly excessive educational expenses for Debtors' two (2) children. Debtors filed their reply to the Chapter 13 Trustee's objection to their plan confirmation arguing that; (i) the auxiliary benefits both children receive under the Social Security Act are excluded from disposable income pursuant to 11 U.S.C. § 101(10A)(B) and thus, Debtors may use these auxiliary benefits exclusively for the education of their children; (ii) the educational expenses incurred for Debtors' two (2) children are reasonable given the inadequacy of the Puerto Rico public school system. For the reasons stated herein the court denies the Chapter 13 Trustee's objection to Debtors' plan confirmation and orders Debtors to submit evidence regarding the $200.00 of the prorated monthly expense for school books, materials, uniforms listed as part of line item # 17—Other on Schedule J–Current Expenditures Of Individual Debtor(s) and evidence of the annual school tuition expense for both children."

“Notwithstanding, Debtors' exclusion from plan payments of the Social Security benefits received by their two (2) children does not, by itself, contribute to a finding that the plan was proposed in bad faith pursuant to Section 1325(a)(3).” ..”At this juncture, this court concludes that benefits received under the Social Security Act is not a component of disposable income under Sections 101(10A) or 1325(b)(2), given that the same is statutorily excluded. However, this statutory exclusion does not impede a debtor from contributing such monies to the plan for feasibility purposes.” …”This court holds that the Chapter 13 Trustee's sole indication that Debtors are not contributing all of the benefits received under the Social Security Act does not by itself warrant a finding of bad faith under Section 1325(a)(3).”