

## DEBTOR/CREDITOR

July 2011

*Loan Not in Good Faith*

CCM loaned \$155,000 to 1st Financial, secured by a mortgage on 1st Financial's real property. CCM failed to obtain any financial information about 1st Financial, failed to conduct a thorough title search, and failed to follow many other customary lending practices.

Unbeknownst to CCM, the mortgaged property had been fraudulently transferred by a prior owner to his brother in order to keep the property away from creditors. After the prior owner filed a Chapter 7 case, the bankruptcy trustee sought to strip CCM's lien from the property, because CCM was a subsequent recipient of the fraudulently transferred property.

CCM opposed the trustee based on the statute protecting a recipient that "takes for value, ... in good faith, and without knowledge of the voidability of the transfer." A federal appeals court ruled against CCM, holding that CCM acted without good faith by failing to follow normal, routine lending practices.

*Goldman v. Capital City Mortgage Corp. (In re Nieves)*, 2011 U.S. App. LEXIS 11704 (4<sup>th</sup> Cir. June 10, 2011).

*Lapsed Corporate Charter Bars Discharge*

Phil Mader formed a corporation to conduct his masonry business in 1985. Like many small businessmen, Phil didn't pay his annual franchise tax, and the state involuntarily dissolved his corporation. Phil continued to operate the dissolved corporation and timely filed both personal and corporate tax returns, without paying employee withholding and other tax obligations.

Phil filed a personal bankruptcy case in 2007. The IRS filed a claim in his bankruptcy case for nondischargeable assessments for tax years 1995 through 1999. Phil objected to this claim, arguing that the IRS could not assess taxes more than three years after the return was filed.

A Chicago bankruptcy judge rejected Phil's argument, because the tax returns filed by Phil in the 1990s did not qualify as "returns" which would start the 3-year period running. In order to qualify as "returns", they had to contain enough information to enable the Phil's liability to be calculated. Because Phil's corporation had been dissolved, he was operating as a sole proprietor, and his personal tax returns had to show his business income in order to calculate his tax. His personal returns did not show the corporate income and were not "returns" that would have triggered the 3-year limitation on the IRS's right to assess a tax.

*In re Mader*, 444 B.R. 409 (Bankr. N.D. Ill. 2011).

*Lease Assumption Deadline Enlarged*

If a tenant under a commercial real estate lease files a Chapter 11 case, the bankruptcy statute gives the tenant 60 days to decide whether to assume or reject the lease. For other types of ongoing contracts, such as franchise agreements, the debtor has until confirmation of its reorganization plan to decide whether to assume or reject the contract.

A New York bankruptcy judge recently determined that, where a Dunkin' Donuts franchisee leased its store from Dunkin' Donuts as part of a single integrated agreement, the debtor/tenant would have until plan confirmation to decide whether or not to assume the lease.

*In re FPSDA I, LLC*, 2011 Bankr. LEXIS 1071 (Bankr. E.D.N.Y. Mar. 22, 2011).

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*This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.*

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