ORIX FINANCIAL SERVICES, INC., formerly known as Orix Credit Alliance, Inc., Plaintiff-Appellee, versus WATER & SEWER UTILITY CONSTRUCTION, INC., ROD & ROD, INC., JOHN L. RODGERS, CHARLES F. RODGERS, CHARLES F. RODGERS, as tenancy by the entirety, as co-trustee of the Charles/Laura Trust, LAURA S. RODGERS, as tenancy by the entirety, as co-trustee of the Charles/Laura Trust, JOHN L. RODGERS, as tenancy by the entirety, RESSA C. RODGERS, as tenancy by the entirety, FOUR-A CONSTRUCTION, INC., a Florida corporation owned by the daughters of John and Ressa, and of which John serves as the sole officer and/or director, Defendants-Appellants.

No. 07-11638

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

274 Fed. Appx. 773; 2008 U.S. App. LEXIS 8628

April 18, 2008, Decided
April 18, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [1]**
Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 06-00312-CV-J-20-MCR.

CASE SUMMARY:

PROCEDURAL POSTURE: In a garnishment action arising from a New York federal district court default judgment, appellant debtors sought judicial review of the United States District Court for the Middle District of Florida's entry of judgment against five debtors. The debtors raised five issues on appeal, including whether the district court correctly determined that appellee creditor complied with Fla. Stat. §§ 77.041(3) and 77.061 (2005).

OVERVIEW: The debtors asked whether (1) under de novo review, the district court correctly determined that the creditor complied with the procedural statutory requirements of Fla. Stat. §§ 77.041(3) and 77.061 (2005) in order to prosecute the writ of garnishment, by filing an unsworn statement, and not a sworn statement, to the debtors' affidavits of exemption; (2) the district court was clearly erroneous in applying a four-year statute of limitations to the avoided transfers, and clearly erroneous in finding that the action to avoid the transfers was commenced within one year of the transfers; (3) under de novo review, the district court correctly applied Florida trust and homestead law in avoiding transfers to, and entering judgment against, two debtors, as co-trustees of a revocable trust; (4) under de novo review, the district court correctly avoided transfers to, and entered judgment against, two other debtors, as tenants by the entireties for the entire amount avoided, and not the lesser amount garnished; (5) the district court was clearly erroneous in concluding that the fifth debtor was made with actual intent to defraud. The five issues were without merit.

OUTCOME: The judgment of the district court was affirmed.

CORE TERMS: entirety, tenants, garnishment, exemption, trust accounts, revocable trust, de novo review, co-trustees, correctly, exempt, frozen, default judgment, federal district, security benefits, failed to comply, voidable transfers, fraudulent, garnished, checking

COUNSEL: For Water & Sewer Utility, Inc., Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Rod & Rod, Inc., Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For John L. Rodgers, Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Charles F. Rodgers, Appellant: Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Laura S. Rodgers, Appellant: Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Rodgers, Officer, Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Four-A Construction , Inc., Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Ressa C. Rodgers, Appellant: Adam Rowe, Rolfe & Lobello, P.A., JACKSONVILLE, FL.

For Orix Financial Services, Inc., Appellee: John B. Macdonald, Brooke B. Chadeayne, Akerman Senterfitt, JACKSONVILLE, FL.

JUDGES: Before EDMONDSON, Chief Judge, HILL and ALARCON, * Circuit Judges.

* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

OPINION

[*774] PER CURIAM:

In 2002, appellee Orix Financial Services, Inc. (Orix or creditor) obtained a default judgment in the amount **[**2]** of $ 337,821.26, against appellants Water and Sewer Utility Construction, Inc., Rod & Rod, Inc., John L. Rodgers (JLR) and Charles F. Rodgers (CFR), (collectively debtors), in a New York federal district court. In 2003, Orix registered that $ 337,821.26 default judgment in Florida federal district court. In 2005, the Florida district court granted Orix's motion for writ of garnishment, directed to Vystar Credit Union (Vystar). Vystar answered the writ by itemizing the debtors' various checking, savings and trust accounts.

On May 11, 2005, the debtors filed affidavits of exemption claiming that the accounts were exempt on the basis that they were: (1) proceeds from social security benefits; (2) trust accounts; and/or (3) accounts held by husbands and wives as tenants by the entirety. On May 13, 2005, Orix filed a written objection to the affidavits.

On May 17, 2005, the debtors filed a motion seeking to dissolve the writ, claiming again that the accounts garnished by Orix were exempt from garnishment. On May 19, 2005, Orix filed a response to the debtors' motion and the procedural finger-pointing began.

Orix claimed that the debtors failed to comply with Fla. Stat. § 77.041(1) (2005), **[**3]** which requires that a claim form be filed together with each affidavit. The debtors claimed that Orix failed to comply with Fla. Stat. § 77.041(3) (2005) because it failed to file its objection within two business days after receipt of the claim.

After hearing, the magistrate judge construed the debtors' original affidavits of exemption as the requisite claims of exemption. It construed Orix's objection as timely filed within two business days and denied the debtors' motion for summary judgment. The writs of execution issued on March 22, 2006. The next day Orix filed a motion for proceedings supplementary to execution and for impleader of **[*775]** third parties, as defendants in execution pursuant to Fla. Stat. § 56.29 (2005). **

** The impleaded defendants were JLR and his wife, as tenants by the entirety; CFR and his wife, as tenants by the entirety; CFR and his wife, as co-trustees of a revocable trust; and Four-A Construction, Inc. (Four-A), a trust corporation solely controlled by JLR.

The district court granted Orix's motion and held an evidentiary hearing to determine whether amounts frozen by Vystar were subject to garnishment as either the proceeds of fraudulent transfers from CFR or **[**4]** from JLR, or, were

exempt from garnishment because they were either proceeds from social security benefits, trust property or property held as tenants by the entirety. At hearing, evidence was presented by both the creditor and the debtors to enable the district court to determine whether the frozen Vystar monies should be released to the respective account holders or to Orix, and, whether any of the debtors should account to Orix as a recipient of a fraudulent transfer.

The district court issued its findings of facts and conclusions of law on March 29, 2007. The next day judgment was entered against CFR and his wife, as co-trustees of the revocable trust, in the amount of $ 57,933.32, on account of transfers to the trust; against JLR and his wife, as tenants by the entirety, in the amount of $ 69,374.68, on account of voidable transfers made by JLR; and against Four-A, in the amount of $ 30,000, on account of a voidable transfer. The district court ordered Vystar to pay the amounts frozen in the debtors' respective checking accounts and trust accounts to Orix.

The debtors now appeal the judgment of the district court. They raise the following five issues on appeal:

1. Whether, under *de* **[**5]** *novo* review, the district court correctly determined that Orix complied with the procedural statutory requirements of Fla. Stat. §§ 77.041(3) and 77.061 (2005) in order to prosecute the writ of garnishment, by filing an unsworn statement, and not a sworn statement, to the debtors' affidavits of exemption.

2. Whether the district court was clearly erroneous in applying a four-year statute of limitations to the avoided transfers, and clearly erroneous in finding that the action to avoid the transfers was commenced within one year of the transfers.

3. Whether, under *de novo* review, the district court correctly applied Florida trust and homestead law in avoiding transfers to, and entering judgment against, CFR and his wife, as co-trustees of a revocable trust.

4. Whether, under *de novo* review, the district court correctly avoided transfers to, and entered judgment against, JFR and his wife, as tenants by the entireties for the entire amount avoided, and not the lesser amount garnished.

5. Whether the district court was clearly erroneous in concluding that the Four-A transfer was made with actual intent to defraud.

We have carefully studied the entire record in this appeal, including the briefs **[**6]** and the arguments of counsel at oral argument. We find each of these five issues to be without merit. Finding no error, the judgment of the district court is AFFIRMED.

8 of 25 DOCUMENTS

UNITED STATES OF AMERICA, Appellant, vs. SONEET R. KAPILA, Appellee.

CASE NO. 08-60723-CIV-ALTONAGA

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

2008 U.S. Dist. LEXIS 107680

August 18, 2008, Decided
August 18, 2008, Filed

PRIOR HISTORY: Kapila v. United States (In re Taylor), 386 B.R. 361, 2008 Bankr. LEXIS 1127 (Bankr. S.D. Fla., 2008)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant government sought review of a decision of the United States Bankruptcy Court for the Southern District of Florida, which granted summary judgment in favor of appellee trustee and denied summary judgment to the government.

OVERVIEW: The debtor claimed a net operating loss (NOL) from two failed franchise businesses in the amount of $58,612 for the 2005 tax year. The debtor elected to carry forward the NOL to use in future tax years, pursuant to 26 U.S.C.S. § 172. When the debtor filed for relief under Chapter 7 of the United States Bankruptcy Code in January 2007, the trustee was not able to amend the debtor's 2005 tax return to claim a refund for the estate because of the debtor's waiver election. The trustee was subsequently able to avoid the NOL carryback waiver as a fraudulent conveyance under 11 U.S.C.S. § 548(a). The court held that the debtor's NOL carryback waiver could be avoided as a fraudulent transfer under § 548 when it was made within one year of the bankruptcy filing and it was made at a time when the debtor was insolvent. The NOL carryback waiver was a property right under 11 U.S.C.S. § 541(a)(1). The debtor's waiver of his right to receive a current refund could be considered a transfer under the broad definition set forth in 11 U.S.C.S. § 101(54). The fact that the NOL waiver was irrevocable as to the debtor did not preclude the trustee from exercising his avoidance power under § 548.

OUTCOME: The court affirmed the judgment of the bankruptcy court.

CORE TERMS: carryback, election, avoidance, refund, bankruptcy estate, bankruptcy trustee, tax refund, irrevocable, summary judgment, fraudulent transfer, undersigned, avoidable, tax year, insolvent, succeed, bankruptcy petition, tax attribute, property interest, bankruptcy law, matter of law, tax return, carry forward, transfer of property, taxable year, irrevocability, commencement, transferred, transferee, franchise, perfected

LexisNexis(R) Headnotes

Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > Elections

[HN1] Pursuant to 26 U.S.C.S. § 172(c), a taxpayer generates a net operating loss (NOL) during a tax year if his or her deductible business expenses exceed net income. Under the Internal Revenue Code, when this situation occurs the taxpayer may elect either to apply the loss to the two preceding tax years to offset past tax liability and possibly receive a tax refund (26 U.S.C.S. § 172(b)(1)), or to waive this option and carry forward the entire NOL to offset future tax liabilities (26 U.S.C.S. § 172(b)(3)). Once this election is made, it is deemed to be irrevocable.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review
[HN2] District courts have appellate jurisdiction over the judgments, orders, and decrees of bankruptcy courts. 28 U.S.C.S. § 158(a). A district court reviews a bankruptcy court's conclusions of law de novo. Moreover, the power of a trustee to avoid fraudulent transfers under 11 U.S.C.S. § 548 presents a question of law that must be reviewed de novo.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > Elements
[HN3] 11 U.S.C.S. § 548(a)(1)(B) of the Bankruptcy Code permits a trustee to avoid pre-petition transfers of property by a debtor where the trustee can show that : (i) there was a transfer of an interest of the debtor in property; (ii) the transfer occurred within two years preceding the petition date; (iii) the debtor received less than reasonably equivalent value in exchange for the transfer; and (iv) the debtor was either insolvent on the date of the transfer or became insolvent as a result of the transfer.

Bankruptcy Law > Estate Property > Content
[HN4] 11 U.S.C.S. § 541(a)(1) of the United States Bankruptcy Code defines property of the bankruptcy estate as all legal or equitable interests of the debtor in property as of the commencement of the case. The United States Supreme Court has held that, since the purpose of bankruptcy law was to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition, a debtor's interest in a tax refund was property of the estate, even though the net operating loss was sustained for the year in which the debtor filed his bankruptcy petition.

Bankruptcy Law > Estate Property > Content
[HN5] A number of federal appellate courts have recognized that Segal 's broad conception of "property" remains good law after the enactment of the United States Bankruptcy Code.

Bankruptcy Law > Estate Property > Content
[HN6] The legislative history of 11 U.S.C.S. § 541 demonstrates that Congress agreed with the result reached by the Segal Court. A bankruptcy estate is comprised of all legal or equitable interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action and all other forms of property currently specified in the predecessor statute to § 541. The result of Segal is followed, and the right to a refund is property of the estate.

Tax Law > Federal Income Tax Computation > Effects of Bankruptcy > Net Operating Losses
[HN7] See 26 U.S.C.S. § 1398(g)(1).

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
Tax Law > Federal Income Tax Computation > Effects of Bankruptcy > Net Operating Losses
[HN8] What a trustee "succeeds to" under 26 U.S.C.S. § 1398 is not the same as what he may avoid under 11 U.S.C.S. § 548; what property is part of the bankruptcy estate and what property may be recovered with a trustee's avoidance powers are two separate questions. 26 U.S.C.S. § 1398 merely allocates the net operating loss (NOL) as bankruptcy estate property. Whether the election to carry forward the NOLs is a fraudulent transfer is another question, and depends on § 548.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > Elections
Tax Law > Federal Income Tax Computation > Effects of Bankruptcy > Net Operating Losses
[HN9] The recognition of a net operating loss (NOL) carryback waiver as an interest in property which is avoidable by a bankruptcy trustee is consistent with Congress' clear intent that "property" and "an interest in property" be broadly defined under the United States Bankruptcy Code.

Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > General Overview
[HN10] A net operating loss (NOL) is an accounting device used to determine a taxpayer's entitlement to a tax refund. The manner in which a NOL is deemed to become property of the bankruptcy estate is inapposite to the issue of whether a debtor has transferred his present interest in a tax refund for less than equivalent value so as to put that property beyond the reach of his creditors.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
[HN11] See 11 U.S.C.S. § 548(d)(1).

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > Elements
[HN12] The United States Bankruptcy Code defines "transfer" as each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property; or an interest in property. 11 U.S.C.S. § 101(54)(D)(i-ii). The term is to be broadly construed.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
[HN13] A trustee's avoidance powers under 11 U.S.C.S. § 548 are frequently used to undo transactions that are "irrevocable" as to a debtor. A bankruptcy trustee's avoidance powers are exclusively geared toward protecting the rights of creditors via protection of the bankruptcy estate, and are so broad that they even enable trustees to avoid transfers considered irrevocable under state law.

Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > General Overview
Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > Elections
[HN14] The purpose underlying the irrevocability of a 26 U.S.C.S. § 172(b)(3)(C) election is to prevent a taxpayer from manipulating the United States Tax Code once the taxpayer discovers that a mistake has been made.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
Tax Law > Federal Income Tax Computation > Deductions for Losses > Net Operating Loss (IRC secs. 172, 382) > Elections
[HN15] Permitting a trustee to avoid a net operating loss (NOL) waiver is the most logical manner to reconcile 26 U.S.C.S. § 172 with the avoidance powers set forth in 11 U.S.C.S. § 548. The ultimate damage to the administration of the nation's tax policies that results from permitting a bankruptcy trustee to avoid a debtor's NOL waiver election is relatively minimal since absent an election by the taxpayer, the normal practice is for the IRS to carry NOLs back to previous taxable years to be applied against previous tax bills, normally resulting in a tax refund. In contrast, § 548 would be completely eviscerated by exempting a NOL carryback waiver from a trustee's avoidance powers.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
[HN16] The avoidance powers of 11 U.S.C.S. § 548 are an explicit expression of Congress' intent that a trustee be given an extraordinary exemption to undo transactions that may be otherwise irreversible under state or federal law. Congress has granted the bankruptcy trustee an extraordinary exemption to non-bankruptcy law by conferring § 548 avoidance powers to allow the trustee to avoid any number of transactions that would otherwise be final and irrevocable by the debtor under non-bankruptcy law. This power, however, is not unlimited. In creating the § 548 avoidance powers, Congress has explicitly stated that a trustee may void otherwise valid transactions only where the specified elements of constructive or actual fraud are present.

COUNSEL: [*1] For United States of America, Appellant: David Zisserson, LEAD ATTORNEY, United States Department of Justice, Tax Division, Washington , DC.

For Soneet R. Kapila, Trustee, Appellee: Patrick S. Scott, LEAD ATTORNEY, Law Office of Patrick Scott, Fort Lauderdale , FL.

JUDGES: CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE.

OPINION BY: CECILIA M. ALTONAGA

OPINION

ORDER

Appellant, the United States of America, appeals an Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Cross Motion for Summary Judgment (the "Order") entered by the United States Bankruptcy Court for the Southern District of Florida (the "bankruptcy court"). *See In re Taylor*, 386 B.R. 361 (Bankr. S.D. Fla. 2008). In its Order, the bankruptcy court granted summary judgment in favor of Appellee, Soneet R. Kapila ("Kapila"), Trustee for the Debtor, Daniel Taylor ("Taylor"), in the underlying bankruptcy proceeding, and denied summary judgment in favor of Appellant, the United States. The Court has carefully considered the briefs submitted by the parties, applicable law, and the pertinent portions of the record.

I. BACKGROUND [1]

1 The United States does not dispute the factual findings by the bankruptcy court for purposes of this **[*2]** appeal. The undersigned briefly recounts those findings as they relate to the legal issue presented.

Taylor purchased a sign manufacturing franchise called Sign-A-Rama in 2000 through Lula Corporation ("Lula"), an S-Corporation of which he was the sole shareholder. *See Taylor*, 386 B.R. at 363. In 2004, Taylor acquired a second Sign-A-Rama franchise which he operated through Dundee Corporation ("Dundee"), also an S-Corporation of which he was sole owner. *Id*. Shortly after purchasing the second franchise, Taylor's consolidated business operations began to fail. *Id*. He shut down operations of Dundee in September 2005. *Id*.

As a result of these business losses, Taylor incurred a net operating loss ("NOL") of $ 58, 612 for the tax year 2005. *Id*. [HN1] Pursuant to 26 U.S.C. § 172(c), a taxpayer generates a NOL during a tax year if his or her deductible business expenses exceed net income. Under the Internal Revenue Code ("IRC"), when this situation occurs the taxpayer may elect either to apply the loss to the two preceding tax years to offset past tax liability and possibly receive a tax refund (see 26 U.S.C. § 172(b)(1)), or to waive this option and "carry forward" the entire NOL to offset future **[*3]** tax liabilities (*see id*. at § 172(b)(3)). Once this election is made, it is deemed to be "irrevocable." *Id*.

On July 24, 2006, Taylor filed his tax return for the 2005 tax year. *See Taylor*, 386 B.R. at 363. The bankruptcy court accepted Kapila's assertion that had Taylor not waived the NOL carryback, he would have been entitled to apply it to the 2003 tax year for a refund of $ 11, 201. Instead, Taylor elected to carry forward the entire NOL to use in future tax years on the advice of his accountant. Taylor's accountant advised him to make that election because Taylor had informed him that he expected to sell his businesses in the near future for between $ 100,000 and $ 150,000. On July 16, 2006, Taylor entered into an agreement (the "Sales Agreement") for the sale of Lula's assets for $ 285,000. *See id*. at 364. The Sales Agreement contained a number of contingencies including the absence of any outstanding judgment against Lula, and a due diligence period during which the buyer could back out of the sale and be refunded his deposit if he was "unsatisfied with the business." *Id*. A $ 3,930 judgment had been entered against Lula in Florida state court on February 7, 2006, which remains **[*4]** unsatisfied. *See id*. at 365. The Sales Agreement was supposed to close on July 26, 2006, the same day Taylor signed his 2005 tax return. *See id*. at 364. However, the buyer backed out of the sale and it was never consummated. *See id*. On January 22, 2007, Taylor filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. Kapila was subsequently appointed Trustee of Taylor's estate.

As a result of Taylor's NOL waiver election, Kapila was unable to amend Taylor's 2005 tax return to claim a refund for the estate, a refund which Taylor would have been entitled to absent the waiver election. Kapila, therefore, commenced an adversary proceeding against the United States on August 31, 2007 seeking to avoid Taylor's NOL carryback waiver as a fraudulent transfer pursuant to 11 U.S.C. § 548(a) ("Section 548"). He subsequently filed a motion for summary

judgment before the bankruptcy court on December 20, 2007. The United States, in turn, cross-moved for summary judgment in its favor on January 9, 2008.

In its Order granting summary judgment in favor of Kapila, the bankruptcy court observed that "although [Taylor] may subjectively have believed that there was a reasonable prospect **[*5]** of selling Lula's assets . . . at the time he executed the waiver of the NOL carryback on July 24, 2006, the failure of each of [the contingencies set forth in the Sales Agreement] meant that there was . . . no reasonable objective prospect that the sale . . . would close." *Taylor*, 386 B.R. at 365. Thus, Taylor "was insolvent at the time of his election to waive the NOL carryback." *Id*. In light of these findings, the bankruptcy court granted summary judgment in favor of Kapila and avoided Taylor's NOL carryback waiver as a fraudulent transfer.

The court premised this holding on a series of legal conclusions. First, "as a matter of law the pre-transfer NOL carryback tax attribute is an interest in property held by the Debtor." *Id*. at 369. Second, "Debtor's waiver operated as a matter of law as a transfer of property to the United States." *Id*. Third, the Court acknowledged "[t]he sound tax policy for irrevocability under the Tax Code" but concluded that policy was "not offended or harmed by the avoidance of the NOL carryback waiver under bankruptcy law," and thus Kapila was entitled to recover Taylor's transfer of his NOL carryback under Section 548. *Id*. at 372.

The United States filed **[*6]** its Notice of Appeal on May 15, 2008. The sole issue presented is purely one of law: whether an insolvent taxpayer's irrevocable election of a waiver of NOL within a year of filing a bankruptcy petition is avoidable as a fraudulent transfer under 11 U.S.C. § 548. The United States asserts the bankruptcy court's determination that a NOL carryback waiver is avoidable by a trustee is incorrect as a matter of law. In support of this assertion, it raises three specific reasons the bankruptcy court's conclusion is in error: (1) a taxpayer's net operating loss is not a property right; (2) waiving a NOL carryback does not constitute a transfer to the United States; and (3) a trustee cannot use Section 548 to avoid Taylor's NOL carryback waiver because the IRC mandates this tax election is irrevocable. The undersigned considers each of these arguments in turn.

II. ANALYSIS

A. Standard of Review

[HN2] District courts have appellate jurisdiction over the judgments, orders, and decrees of bankruptcy courts. 28 U.S.C. § 158(a). A district court reviews a bankruptcy court's conclusions of law *de novo. In re Citation Corp*., 493 F.3d 1313, 1317 (11th Cir. 2007). Moreover, the power of a trustee to avoid fraudulent **[*7]** transfers under Section 548 presents a question of law that must be reviewed *de novo. See In re Cannon*, 277 F.3d 838, 849 (6th Cir. 2002).

B. Whether Taylor's NOL Carry-Back Waiver is Avoidable as a Fraudulent Transfer under Section 548

[HN3] Section 548(a)(1)(B) of the Bankruptcy Code permits a trustee to "avoid" pre-petition transfers of property by a debtor where the trustee can "show that (i) there was a transfer of an interest of the Debtor in property, (ii) the transfer occurred within two years preceding the Petition Date, (iii) the Debtor received less than reasonably equivalent value in exchange for the transfer, and (iv) the Debtor was either insolvent on the date of the transfer or became insolvent as a result of the transfer." *In re Clarkston*, 387 B.R. 882, 888 (Bankr. S.D. Fla. 2008) (citing 11 U.S.C. § 548(a)(1)(B)) (additional citations omitted). For purposes of this appeal, the United States does not dispute that Taylor was insolvent at the time he made the NOL carryback waiver, nor that the waiver occurred within two years of his bankruptcy petition. Instead, the United States contends that the waiver fails because it is neither a property interest, nor does it constitute a **[*8]** transfer to the United States.

1. Whether a NOL Carry-Back Waiver is a Property Right under Bankruptcy Law

[HN4] "Section 541(a)(1) [of the Bankruptcy Code] defines property of the bankruptcy estate as 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *In re Bracewell*, 454 F.3d 1234, 1237 (11th Cir. 2006) (quoting 11 U.S.C. § 541(a)(1)). In *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966), a pre-Bankruptcy Code decision, the Supreme Court held that, since the purpose of bankruptcy law was "to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition," a debtor's interest in a tax refund was property of the estate, even though the NOL was sustained for the year in which the debtor filed his bankruptcy petition. The United States contends that the bankruptcy court was in error to

rely upon *Segal* in support of its conclusion that Taylor's NOL carryback waiver was an interest in property subject to Kapila's avoidance powers.

As an initial matter, [HN5] a number of federal appellate courts have recognized that *Segal 's* broad conception of "property" remains good law after the enactment of the Bankruptcy **[*9]** Code. *See, e.g., In re Fruehauf Trailer Corp.*, 444 F.3d 203, 211 (3rd Cir. 2006) (holding that right of employer under ERISA to recoup future surpluses in pension plan was a transferable property interest subject to a trustee's avoidance powers); *In re Feiler*, 218 F.3d 948, 955-56 (9th Cir. 2000) (stating that Congress explicitly adopted *Segal's* holding into the Bankruptcy Code and concluding that NOL carryback waiver was avoidable by bankruptcy trustee); *In re Bakersfield Westar, Inc*., 226 B.R. 227, 233-34 (9th Cir. BAP 1998) (holding that trustee was entitled to avoid debtor's "irrevocable" election to be treated as subchapter S corporation); *In re Barowsky*, 946 F.2d 1516, 1518-19 (10th Cir. 1991) (relying upon *Segal* in holding that portion of tax refund attributable to pre-petition portion of a taxable year was property of the bankruptcy estate); *In re Prudential Lines, Inc*., 928 F.2d 565, 572 (2nd Cir. 1991) (concluding that NOL carryforward was property of bankruptcy estate). Moreover, as the Second Circuit observed, [HN6] "[t]he legislative history of § 541 demonstrates that Congress agreed with the result reached by the *Segal* Court[:]"

> [T]he estate is comprised of all legal or equitable **[*10]** interest of the debtor in property, wherever located, as of the commencement of the case. The scope of this paragraph is broad. It includes all kinds of property, including tangible or intangible property, causes of action . . . and all other forms of property currently specified in [the predecessor statute to § 541] . . . . The result of *Segal v. Rochelle*, 382 U.S. 375 [86 S. Ct. 511, 15 L.Ed.2d 428] (1966), is followed, and the right to a refund is property of the estate.

Prudential, 928 F.2d at 571 (quoting H.R. Rep. No. 95-595, 367 (1978)).

The United States acknowledges that the only two federal appellate courts to have considered the same issue raised here have concluded that a NOL carryback waiver is an interest in property avoidable by a bankruptcy trustee. *See In re Feiler*, 218 F.3d at 955-56; *In re Russell*, 927 F.2d 413, 416-17 (8th Cir. 1991). It contends, however, that these cases were wrongly decided for reasons it now explains on appeal.

In support of its position that NOL carryback waivers are not property under the Bankruptcy Code, the United States relies on the operative language of 26 U.S.C. § 1398(g) ("Section 1398(g)") which details the tax attributes of a debtor **[*11]** to which a bankruptcy estate will succeed. In relevant part, [HN7] Section 1398(g)(1) provides that the bankruptcy estate "shall succeed to and take into account the following items (determined as of the first day of the debtor's taxable year in which the case commences) of the debtor . . . (1) Net operating loss carryovers. - - The net operating loss carryovers determined under section 172." The United States contends the enactment of Section 1398(g) indicates Congress did not consider NOLs to be property that automatically passes to a bankruptcy estate under Section 541 of the Bankruptcy Code. Thus, it submits that Section 1398(g) only permits the bankruptcy estate to succeed to NOLs as they existed at the time of the bankruptcy since Congress made no provision to permit a bankruptcy trustee to modify or reverse a debtor's prior NOL elections.

In addressing the identical argument in *Feiler*, the Ninth Circuit noted:

> [HN8] What a trustee "succeeds to" under I.R.C. § 1398 is not the same as what he may avoid under B.C. § 548; what property is part of the bankruptcy estate and what property may be recovered with a trustee's avoidance powers are two separate questions. I.R.C. § 1398 merely allocates **[*12]** the NOLs as bankruptcy estate property. Whether the election to carry forward the NOLs is a fraudulent transfer is another question, and depends on B.C. § 548.

218 F.3d at 953.

Although the *Feiler* and *Russell* decisions are not binding, their reasoning is nevertheless persuasive. [HN9] The recognition of a NOL carryback waiver as an interest in property which is avoidable by a bankruptcy trustee is consistent with Congress' clear intent that "property" and "an interest in property" be broadly defined under the Bankruptcy Code. The undersigned is not persuaded by the United States' argument that Section 1398(g) alters this analysis. Even if the Court were to accept the United States' position that a bankruptcy trustee only succeeds to NOLs as they existed at the time of the bankruptcy petition, that would not resolve the question of whether Taylor's NOL carryback waiver is avoidable by Kapila as recognized by *Feiler*.

The practical effect of Taylor's election to waive his NOL carryback was to relinquish his interest in a present tax refund of $ 11,201 in favor of a speculative future refund. In light of Taylor's insolvency at the time of his election, and the likelihood that the value of the present **[*13]** refund he waived would far outstrip the value of any potential future

refund, the bankruptcy court correctly concluded that all of the elements of a fraudulent transfer were satisfied. *See Taylor*, 386 B.R. at 370-71. It is the transfer of Taylor's present right to a refund for less than equivalent value that Kapila is entitled to avoid under Section 548. [HN10] A NOL is an accounting device used to determine a taxpayer's entitlement to a tax refund. The manner in which a NOL is deemed to become property of the bankruptcy estate is inapposite to the issue of whether a debtor has transferred his present interest in a tax refund for less than equivalent value so as to put that property beyond the reach of his creditors. Accordingly, the bankruptcy court was correct in concluding that a NOL waiver is a property interest subject to a bankruptcy trustee's avoidance powers.

2. Whether Taylor's Waiver of the NOL Carry-Back was a Transfer to the United States

The United States also argues that even if a NOL carryback waiver is deemed to be a property interest, all of the elements of a fraudulent transfer were not satisfied because there was no actual transfer of that interest. In support of this position, **[*14]** it relies upon [HN11] Section 548(d)(1), which provides:

> For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 548(d)(1).

The United States contends that based on this description, a transfer requires the existence of a "transferee." It submits that Taylor's NOL carryback waiver did not transfer anything of value to the United States, and thus the waiver does not constitute a transfer of property subject to a trustee's avoidance powers under Section 548.

[HN12] The Bankruptcy Code defines "transfer" as "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with . . . property; or . . . an interest in property." 11 U.S.C. § 101(54)(D)(i-ii). Contrary to the United States' assertions, the term is to be broadly construed. **[*15]** *In re Shingledecker*, 242 B.R. 80, 82 (Bankr. S.D. Fla. 1999) ("[T]he term 'transfer' under § 727(a)(2) and § 101(54) is to be broadly construed."); *accord In re Bajgar*, 104 F.3d 495, 498 (1st Cir. 1997) ("[T]he legislative history of Section 101(54), which defines 'transfer,' explains that '[t]he definition of transfer is as broad as possible.'") (quoting S. Rep. No. 989, 95th Cong. 27 (1978)); *In re Dereve*, 381 B.R. 309, 326 (Bankr. N.D. Fla. 2007).

Although the United States contends that characterizing Taylor's election of the NOL waiver as a "transfer" risks stretching this definition "beyond recognition" (*Appellant's Brief* [D.E. 4] at 10), it is the United States' reading of the term that risks departing farthest from Congress' intent. The United States argues it did not receive anything of value as a result of Taylor's NOL carryback waiver since the waiver "does not forever rid the taxpayer of the benefits of an NOL." (*Id*. at 11). This assertion, however, ignores the practical effect of the NOL waiver.

As previously discussed, by electing to carry-forward his NOL, Taylor waived his right to a present tax refund of $ 11, 201 in favor of a future tax attribute. Had Taylor failed **[*16]** to make an affirmative election, the United States would have been required to pay him a tax refund. Thus, Taylor's NOL waiver absolved the United States of its obligation to pay a refund it would otherwise have been required to make. *See In re Feiler*, 218 F.3d at 956 (Debtors "traded [their] right to a refund to the IRS in exchange for the right to carry the NOLs forward, and as a result, the IRS was no longer required to pay the $ 287,493 refund. Rather than require that the IRS actually pay itself the amount of the tax refund to be considered a "transferee" of the benefit, it is enough that the IRS traded one obligation for another . . . ."). As Taylor was insolvent at the time of the election, the effect of his NOL carryback waiver was to constructively place that refund amount in the possession of the United States and out of the reach of Taylor's creditors. The United States' contention that it did not physically receive a transfer of cash amounts to little more than semantics. The undersigned therefore concludes Taylor's waiver of a present tax refund falls within the undisputably broad definition of "transfer" under the Bankruptcy Code.

3. Whether Section 548 Permits a Trustee [*17] to Avoid an Irrevocable Tax Election by a Debtor

Finally, the United States argues that regardless of whether Taylor's NOL carryback waiver is an interest in property which he transferred to the United States, it is not subject to Kapila's avoidance powers because Taylor's election of the waiver is "irrevocable" under 26 U.S.C. § 172(b)(3)). The United States' argument ignores the fact that Kapila is not seeking to "revoke" Taylor's NOL carryback waiver but rather to avoid it as a fraudulent transfer under Section 548. This is a critical distinction. [HN13] A trustee's avoidance powers under Section 548 are frequently used to undo

transactions that are "irrevocable" as to the debtor. *Russell*, 927 F.2d at 416 (A bankruptcy trustee's avoidance powers "'are exclusively geared toward protecting the rights of creditors via protection of the bankruptcy estate,' and are so broad that they even enable trustees to avoid transfers considered 'irrevocable' under state law.") (internal citations omitted).

The undersigned is in agreement with the bankruptcy court that the United States' focus on the fact that the NOL carryback waiver is irrevocable as to Taylor is misplaced since "the bankruptcy trustee **[*18]** is not constrained by only being able to act as the debtor could . . . ." *Feiler*, 218 F.3d at 952. Indeed, "had Congress only intended that a trustee be able to avoid transactions that were otherwise revocable by the debtor, there would be no reason to grant the trustee extraordinary B.C. § 548 avoidance powers at all." *Id*.

As the bankruptcy court observed, preventing Kapila from avoiding Taylor's NOL carryback waiver would essentially permit Taylor to protect a future tax attribute from his creditors and thereby commit "money laundering through the kind auspices of the United States." *Taylor*, 386 B.R. at 370. [HN14] "The purpose underlying the irrevocability of a § 172(b)(3)(C) election is to prevent a taxpayer from manipulating the Tax Code once the taxpayer discovers that a mistake has been made." *Russell*, 927 F.2d at 416. No such interest is implicated here by Kapila's attempt to avoid Taylor's NOL carryback waiver. The undersigned is therefore in agreement with the bankruptcy court that the "irrevocable" nature of the waiver under the IRC does not impact Kapila's ability to avoid the election under Section 548.

Moreover, [HN15] permitting a trustee to avoid a NOL waiver is the most logical manner **[*19]** to reconcile Section 172 of the IRC with the avoidance powers set forth in Section 548. The ultimate damage to the administration of the nation's tax policies that results from permitting a bankruptcy trustee to avoid a debtor's NOL waiver election is relatively minimal since "absent an election by the taxpayer, the normal practice is for the IRS to carry NOLs back to previous taxable years to be applied against previous tax bills, normally resulting in a tax refund." *Feiler*, 218 F.3d 955. In contrast, Section 548 "would be completely eviscerated by exempting a [NOL carryback waiver] from [a trustee's] avoidance powers" particularly since the United States' interpretation of I.R.C. § 1398(g) would also preclude a trustee's avoidance of "transfers made with the 'actual intent to hinder, delay, or defraud' the debtor's creditors." *Id*.

The undersigned is also unpersuaded by the United States' reliance on *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot*., 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986). In *Midlantic*, the Supreme Court observed that "[i]f Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, 'the intention would be clearly expressed, not left to be collected **[*20]** or inferred from disputable considerations of convenience in administering the estate of the bankrupt.'" *Id*. at 501 (quoting *Swarts v. Hammer*, 194 U.S. 441, 444, 24 S. Ct. 695, 48 L. Ed. 1060 (1904)). The United States cites this language for the proposition that Congress' failure to explicitly exempt bankruptcy trustees from Section 172(b)(3) demonstrates they, too, are subject to the irrevocability of the NOL waiver.

Contrary to the United States' assertions, [HN16] the avoidance powers of Section 548 are an explicit expression of Congress' intent that a trustee be given an extraordinary exemption to undo transactions that may be otherwise irreversible under state or federal law. *See Feiler*, 218 F.3d at 954 ("Congress *has* granted the bankruptcy trustee an 'extraordinary exemption' to non-bankruptcy law by conferring B.C. § 548 avoidance powers to allow the trustee to avoid any number of transactions that would otherwise be final and irrevocable by the debtor under non-bankruptcy law.") (emphasis in original). This power, however, is not unlimited. In creating the Section 548 avoidance powers, Congress has explicitly stated that a trustee may void otherwise valid transactions only where the specified elements of constructive **[*21]** or actual fraud are present. Moreover, as discussed, to exempt NOL carryback waivers from these avoidance powers would run counter to the underlying rationale for Congress' creation of this power. Accordingly, the undersigned concludes the bankruptcy court's decision was not in error.

III. CONCLUSION

For all of the foregoing reasons, it is

ORDERED AND ADJUDGED that the United States Bankruptcy Court for the Southern District of Florida's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Cross Motion for Summary Judgment is **AFFIRMED**. The Clerk of the Court is instructed to **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of August, 2008.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

9 of 25 DOCUMENTS

DON WOOD, individually, CAREY EBERT, as trustee of the Chapter 7 Bankruptcy Proceeding for Donald and Kay Wood, Plaintiffs, v. DONALD RICKEY GREEN, individually; EMILY MELINDA GREEN, individually; and FLORIDA CLAIMS CONSULTANTS, INC. n/k/a GREEN STATE PUBLIC ADJUSTERS, INC., a Florida Corporation, Defendants/Third-Party Plaintiffs, v. KAY WOOD; SUNCOAST CLAIMS, INC., a Florida Corporation, STORM CONTRACTING, INC., a Florida Corporation; SYLVENTION, INC., d/b/a HABITECH, Third-Party Defendants.

3:07cv95/MCR/EMT

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION

2008 U.S. Dist. LEXIS 60265; 60 Collier Bankr. Cas. 2d (MB) 287

August 4, 2008, Decided
August 4, 2008, Filed

PRIOR HISTORY: Wood v. Green, 2008 U.S. Dist. LEXIS 14762 (N.D. Fla., Feb. 27, 2008)

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a Chapter 7 debtor and the Chapter 7 trustee, filed a motion for summary judgment in their breach of contract action against defendants, two public adjusters, and the one adjuster's company. Defendants filed a motion for summary judgment based on the doctrine of judicial estoppel.

OVERVIEW: The debtor entered into a contract with the company to perform adjusting services. The debtor and his wife later filed for Chapter 7 bankruptcy. The debtor did not disclose in his bankruptcy petition his contract with the company or the income he had received and was due to receive from the company. The debtor received a discharge and then brought the instant breach of contract action. The trustee was later joined as a plaintiff. The court held that the trustee had standing to pursue claims for earnings derived from the debtor's pre-petition services and the debtor had standing to pursue claims for earnings derived from post-petition services. The court held that the trustee was not judicially estopped from pursuing pre-petition claims because the debtor's misconduct could not be imputed to her. The court held that there were issues of material fact as to whether it was appropriate to apply judicial estoppel as to the debtor's post-petition claims because it was not clear from the record whether the debtor had made sworn statements in his bankruptcy petition which were clearly inconsistent with the positions he had asserted in the instant case regarding his post-petition claims.

OUTCOME: The court denied plaintiffs' motion for summary judgment. The court granted in part and denied in part defendants' motion for summary judgment, granting only the motion as to one of the adjusters.

CORE TERMS: summary judgment, bankruptcy estate, judicial estoppel, post-petition, pre-petition, issues of material fact, bankruptcy petition, judicial notice, causes of action, bankruptcy trustee, bankruptcy case, genuine, earnings, judicial system, nonmoving party, deposition, adjusting, disclose, personal liability, moot, standing to assert, personally, mockery, oral arguments, breach of contract, cross-motion, adjusters, failure to disclose, quotation marks omitted, commencement

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1] Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is "material" if it may affect the outcome of the case under the applicable substantive law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Summary Judgment > Evidence
[HN2] When a motion for summary judgment is made and properly supported by affidavits, depositions, or answers to interrogatories, the adverse party may not rest on the mere allegations or denials of the moving party's pleadings. Instead, the nonmoving party must respond by affidavits or otherwise and present specific allegations showing that there is a genuine issue of disputed fact for trial. Fed. R. Civ. P. 56(e). When assessing the sufficiency of the evidence, the court must view all the evidence, and all factual inferences reasonably drawn therefrom, in the light most favorable to the nonmoving party. A mere scintilla of evidence in support of the nonmoving party's position will not suffice to demonstrate a genuine issue of material fact and thereby preclude summary judgment. If the adverse party fails to show a genuine issue of material fact, summary judgment, if appropriate, may be entered against the nonmoving party.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Bankruptcy Law > Estate Property > Content
[HN3] When an individual petitions for bankruptcy under Chapter 7 of the Bankruptcy Code, a bankruptcy estate is created which includes all legal or equitable interests of the debtor in property as of the commencement of the case, such as legal causes of action the debtor had against others at the commencement of the bankruptcy case. After the creation of the bankruptcy estate, the bankruptcy trustee becomes the representative of the estate and the estate's interests. The bankruptcy trustee thus is the proper party with standing to prosecute causes of action belonging to the estate.

Bankruptcy Law > Estate Property > Content
[HN4] A debtor's bankruptcy estate also includes all proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case. 11 U.S.C.S. § 541(a)(6). Thus amounts owed to a debtor under pre-petition contracts, for which the debtor has performed the services required to receive payment pre-petition, are the property of the bankruptcy estate. Post-petition payments for services performed post-petition, however, are not the property of the estate, even if the contract from which the payments are derived was entered into pre-petition.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
[HN5] Judicial estoppel is an equitable doctrine invoked at a court's discretion. It precludes a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. When determining whether to apply the doctrine of judicial estoppel, courts must begin with a consideration of two primary factors. First, the allegedly inconsistent positions must have been taken under oath in a prior proceeding, and second, they must have been calculated to make a mockery of the judicial system. A party's intent to make a mockery of the judicial system can be inferred from the record where the party both knew about the undisclosed information and had a motive to conceal this information from the bankruptcy court. To apply judicial estoppel, however, the party's intent must be cold manipulation rather than some unthinking or confused blunder The above factors, however, are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Duties & Functions > Capacities & Roles
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
[HN6] While it is correct that once a debtor files for bankruptcy, the bankruptcy trustee, rather than the debtor, becomes the real party in interest on claims related to the property of the bankruptcy estate, the trustee does not become tainted or burdened by the debtor's misconduct. Judicial estoppel against the trustee is only appropriate if the trustee himself has made inconsistent statements which were calculated to make a mockery of the judicial system.

COUNSEL: [*1] For DON WOOD, CAREY EBERT, AS TRUSTEE OF THE CHAPTER 7 BAKRUPTCY PROCEEDING FOR DONALD AND KAY WOOD, Plaintiffs: GREGORY D SMITH, LEAD ATTORNEY, GREGORY D SMITH PA, PENSACOLA, FL.

For DONALD RICKEY GREEN, EMILY MELINDA GREEN, FLORIDA CLAIMS CONSULTANTS INC, other GREEN STATE PUBLIC ADJUSTERS INC, Defendants: JAMES SCOTT DUNCAN, T.A. BOROWSKI JR., PA, PENSACOLA, FL.

For KAY WOOD, SUNCOAST CLAIMS INC, STORM CONTRACTING INC, SYLVENTION INC doing business as HABITECH, Third Party Defendants: GREGORY D SMITH, GREGORY D SMITH PA, PENSACOLA, FL.

For FLORIDA CLAIMS CONSULTANTS INC, Third Party Plaintiff: JAMES SCOTT DUNCAN, T.A. BOROWSKI JR., PA, PENSACOLA, FL.

JUDGES: M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE.

OPINION BY: M. CASEY RODGERS

OPINION

ORDER

This cause comes before the court on defendants' Motion for Summary Judgment (doc. 70), plaintiffs' Motion for Summary Judgment (doc. 63), and defendants' Motion to Strike (doc. 105). Upon consideration of the parties' written and oral arguments and for the reasons given below, defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part, plaintiffs' Motion for Summary Judgment is DENIED, and defendants' Motion to Strike is DENIED as moot.

Background

Defendants **[*2]** Donald and Emily Green are public adjusters in the state of Florida. Emily Green is the president and sole shareholder of Defendant Florida Claims Consultants, Inc. n/k/a Green State Public Adjusters, Inc. (hereinafter, "FCC"), which performs public adjusting services in Florida. In September and October 2004, Donald Green, who performed public adjusting and appraisal services on his own behalf and on behalf of FCC, contacted Plaintiff Don Wood about moving to Florida to help handle the large number of claims FCC was adjusting in the aftermath of Hurricane Ivan.

On October 6, 2004, shortly after arriving in Florida, Wood entered into a contract, signed by Wood and Emily Green, in which FCC agreed to "compensate Don Wood for damage appraisal and estimating Hurricane Ivan losses. Each estimate provided by Wood will be paid by Florida Claims Consultants on a 60% of settlement amount as received." Four days later, on October 10, 2004, Wood entered into a second contract, signed by Wood and Donald Green, in which FCC agreed to "provide to Don Wood clients that have damage to properties caused by Hurricane Ivan. Don Wood will receive compensation of 60% of net funds received." This agreement **[*3]** also identified Wood's responsibilities under the contract. [1]

1 The parties dispute whether this second contract was intended to replace the first contract. The parties also dispute whether these agreements pertained to all claims for which Wood performed some work or only those claims for which Wood fully handled. Finally, the

parties also dispute whether these were the only agreements between the parties or whether Wood entered into separate oral contracts, either with Donald Green or FCC, for specific claims.

During the course of his work for defendants, Wood received cash advances to cover his costs. In addition, after a claim settled, Wood or the defendants would draft an invoice documenting Wood's compensation for that claim. FCC would then issue Wood a check for this amount. These checks were either issued directly to Wood or, at Wood's request, to Third-Party Defendants Storm Contracting, Inc., Habitech, or Suncoast Claims, Inc. (hereinafter, the "related businesses"). [2] Most of the checks issued directly to Wood were deposited into the accounts for Habitech or Suncoast Claims. All checks issued to Storm Contracting, Inc. were transferred into accounts for Habitech or Suncoast **[*4]** Claims.

2 Wood, or one of his family members, was directly affiliated with each of these businesses.

On July 28, 2005, while still performing services for FCC, Wood and his wife, Kay Wood, filed for Chapter 7 bankruptcy. [3] Wood, assisted by counsel, did not disclose in his bankruptcy petition his contracts with FCC or the income he had received and was due to receive from FCC. Wood's petition for bankruptcy was granted and the bankruptcy court appointed Plaintiff Carey Ebert as bankruptcy trustee. On November 9, 2005, Wood was granted a no-asset discharge.

3 References in this order to "Wood" refer to Don Wood, unless specifically noted.

Procedural History

Wood filed his complaint in this case on March 1, 2007, and his amended complaint on April 20, 2007, in which he asserted claims for breach of contract against Donald and Emily Green and, in the alternative, breach of contract against FCC. Wood alleges that after entering into the October 6, 2004, and October 10, 2004, contracts, the Greens (or FCC) paid Wood less than the 60% promised in those contracts. On May 11, 2007, defendants filed their answer and affirmative defenses, in which they asserted that Wood's claims were barred by the **[*5]** doctrine of judicial estoppel. [4] On May 25, 2007, Wood petitioned to reopen his bankruptcy case and amend his schedules to include his claims against the defendants. On August 1, 2007, Wood filed a motion in this court to join Ebert as a party, which the court granted. Wood then filed a second amended complaint adding two claims paralleling the original claims, brought by Ebert as trustee for Wood's bankruptcy estate.

4 Defendants also filed third-party claims against Kay Wood, Suncoast Claims, Inc., Storm Contracting, Inc., and Sylvention, Inc., d/b/a Habitech, seeking restitution and indemnification in the event a judgment was entered against the defendants requiring them to pay Wood or Wood's bankruptcy trustee.

Defendants have now moved for summary judgment against both plaintiffs based on the doctrine of judicial estoppel. [5] Defendants' motion also seeks summary judgment on plaintiffs' claim against Emily Green personally. Plaintiffs have also filed a motion for summary judgment asserting that there are no issues of material fact as to the Greens' personal liability for breaching the contracts, or in the alternative, no issue of material fact as to FCC's liability for breaching the **[*6]** contracts. Plaintiffs further assert that there is no issue of material fact as to the measure of Wood's damages caused by defendants' breach. [6] Defendants have also filed a motion to strike certain portions of Wood's affidavits submitted in support of plaintiffs' motion for summary judgment and in opposition to defendants' motion for summary judgment. [7]

5 In connection with their motion for summary judgment, defendants have requested that the court take judicial notice of certain filings in Wood's bankruptcy case. (Doc. 78). Plaintiffs have not objected to this request and have confirmed much of the information contained in these filings. Thus, to the extent it is necessary, the court will take judicial notice of these filings.

6 Both parties have requested that the court take judicial notice of certain facts and documents relating to the administrative dissolution and reinstatement of FCC. (Docs. 69 and 102). At oral argument, plaintiffs abandoned their argument related to this information and thus these

requests will be denied as moot. The defendants' request, however, that the court take judicial notice that FCC has changed its name to Green State Public Adjusters, Inc. (doc. 102) **[*7]** will be granted.

7 At oral argument, the court noted that Wood's standing to assert the claims in this case was a threshold issue. This issue had been raised by defendants in a previously filed motion to dismiss, but had not yet been addressed by the court. The court invited the parties to submit supplemental memoranda on this issue. After receiving the parties' briefs, the court noted that the second amended complaint did not clearly state the basis for Wood's standing. The court thus granted the defendants' motion to dismiss the second amended complaint and dismissed the complaint without prejudice. The court granted plaintiffs leave to file a third amended complaint clearly setting forth the factual basis for Wood's standing. The court directed plaintiffs that any amended complaint should pertain only to the plaintiffs' standing allegations and thus the amended complaint would not affect the parties' pending motions for summary judgment. The court therefore applies the parties' motions for summary judgment to plaintiffs' third amended complaint.

Summary Judgment Standard

[HN1] Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, **[*8]** and affidavits, if any, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). "The mere existence of *some* alleged factual dispute between the parties," however, "will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) (emphasis in original). A dispute about a material fact is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. A fact is "material" if it may affect the outcome of the case under the applicable substantive law. See id.

[HN2] When a motion for summary judgment is made and properly supported by affidavits, depositions, or answers to interrogatories, the adverse party may not rest on the mere allegations or denials of the moving party's pleadings. Instead, the nonmoving party must respond by affidavits or otherwise and present specific allegations showing that there is a genuine **[*9]** issue of disputed fact for trial. Fed. R. Civ. P. 56(e). When assessing the sufficiency of the evidence, the court must view all the evidence, and all factual inferences reasonably drawn therefrom, in the light most favorable to the nonmoving party. See Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 918 (11th Cir. 1993). A mere scintilla of evidence in support of the nonmoving party's position will not suffice to demonstrate a genuine issue of material fact and thereby preclude summary judgment. See Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the adverse party fails to show a genuine issue of material fact, summary judgment, if appropriate, may be entered against the nonmoving party.

Discussion

I. Standing

At the outset, the court must decide whether Wood has standing to assert the claims in this case. [8] Both parties believe Wood has standing, but for different reasons. According to defendants, Wood has standing because the bankruptcy trustee has agreed to distribute to him thirty-five percent (35%) of the proceeds from any judgment in this case as well as any amount above the sum claimed by Wood's creditors plus attorney's fees. Plaintiffs maintain instead that Wood **[*10]** only has standing to pursue a post-petition claim for breach of contract because that claim is not part of the bankruptcy estate and thus cannot be pursued by the trustee.

8 Both parties agree that Ebert, as bankruptcy trustee, has standing to assert the claims in this case.

[HN3] When an individual petitions for bankruptcy under Chapter 7 of the Bankruptcy Code, a bankruptcy estate is created which includes "all legal or equitable interests of the debtor in property as of the commencement of the case," such as "legal causes of action the debtor had against others at the commencement of the bankruptcy case." Mennen v. Onkyo Corp., 248 Fed.Appx. 112, 113 (11th Cir. 2007) (per curiam) (citing 11 U.S.C. § 541(a); quoting In re Icarus Holding, LLC, 391 F.3d 1315, 1319 (11th Cir. 2004)); see also Witko v. Menotte (In re Witko), 374 F.3d 1040, 1042 (11th Cir. 2004) ("Pre-petition causes of action are part of the bankruptcy estate and post-petition causes of action are not."); Miller v. Shallowford Cmty. Hosp., Inc., 767 F.2d 1556, 1559 (11th Cir. 1985) (per curiam) (holding that a debtor's bankruptcy estate includes causes of action "arising from contract"). After the creation of the bankruptcy estate, **[*11]** the bankruptcy trustee becomes the representative of the estate and the estate's interests. See Parker v. Wendy's

Int'l, Inc., 365 F.3d 1268, 1272 (11th Cir. 2004) (citations omitted). The bankruptcy trustee thus is the proper party with standing to prosecute causes of action belonging to the estate. Id.

[HN4] A debtor's bankruptcy estate also includes all "[p]roceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case." 11 U.S.C. § 541(a)(6). Thus amounts owed to a debtor under pre-petition contracts, for which the debtor has performed the services required to receive payment pre-petition, are the property of the bankruptcy estate. See Grochal v. Ocean Tech. Servs. Corp. (In re Baltimore Marine, Indus., Inc.), 476 F.3d 238, 240 (4th Cir. 2007) (citing Ralar Distribs., Inc. v. Rubbermaid, Inc. (In re Ralar Distribs., Inc.), 4 F.3d 62, 67 (1st Cir. 1993)). Post-petition payments for services performed post-petition, however, are not the property of the estate, even if the contract from which the payments are derived was entered into pre-petition. See Clark v. First City Bank (In re Clark), 891 F.2d 111 (5th Cir. 1989); **[*12]** see also Andrews v. Riggs Nat'l Bank of Washington, D.C., (In re Andrews), 80 F.3d 906, 910 (4th Cir. 1996) ("[Section 541(a)(6)] allows the debtor to exclude from his estate any compensation or salary he might earn after the date of the petition."). In this case, therefore, earnings derived from Wood's pre-petition services to defendants are the property of the bankruptcy estate and only Ebert, as trustee for Wood's bankruptcy estate, is the real party in interest with standing to pursue claims for these funds (hereinafter, Wood's "pre-petition claims"). [9] Any earnings derived from Wood's post-petition services to defendants, however, are not part of the bankruptcy estate under § 541(a)(6) and thus Wood has standing to pursue claims for these funds (hereinafter, Wood's "post-petition claims"). [10]

9 Defendants' argument that Wood has standing to assert pre-petition claims because of his settlement agreement with the trustee is unconvincing. The mere possibility that Wood "may realize some benefit from the Estate's prosecution of this lawsuit is not sufficient to confer standing." See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig., 375 B.R. 719, 725 (S.D.N.Y. 2007) (quoting **[*13]** Ardese v. DCT, Inc., 2006 U.S. Dist. LEXIS 92051, 2006 WL 3757916 *5 (E.D.Okla. Dec. 19, 2006)). If Wood had standing to assert his pre-petition claims under these circumstances, so too would any of his creditors. See id.

10 It is not clear from the record what portion of Wood's alleged damages derive from Wood's pre-petition versus his post-petition services for the defendants. In the event that all of Wood's work for the defendants on these contracts was completed before he filed his petition for bankruptcy, Wood would not have standing to remain a party in this case. Further, Donald Green has asserted that he entered into a number of additional oral contracts with Wood, some on his own behalf and some on behalf of FCC. If any of these alleged contracts were entered into post-petition, then those contracts and their proceeds would not be the property of the bankruptcy estate and Wood would have standing to pursue claims for those funds. These issues will be addressed at trial.

II. Judicial Estoppel

Defendants argue that both Wood and Ebert should be judicially estopped from pursuing the claims in this case based on Wood's failure to disclose his business relationship with and income from the defendants in his bankruptcy **[*14]** petition and the fact that Ebert had knowledge of Wood's failure to disclose.

[HN5] Judicial estoppel is an equitable doctrine invoked at a court's discretion. Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282, 1285 (11th Cir. 2002) (citing New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)). It precludes a party "from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." Id. (internal quotation marks omitted). "The purpose of the doctrine, is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." Id. (internal quotation marks omitted). When determining whether to apply the doctrine of judicial estoppel, courts in the Eleventh Circuit must "begin with a consideration of two primary factors." Ajaka v. Brooksamerica Mortgage Corp., 453 F.3d 1339, 1344 (11th Cir. 2006). "First, the allegedly inconsistent positions must have been taken under oath in a prior proceeding, and second, they must have been calculated to make a mockery of the judicial system." Id. (internal quotation marks omitted). A party's intent **[*15]** to make a mockery of the judicial system can be inferred from the record where the party both knew about the undisclosed information and had a motive to conceal this information from the bankruptcy court. See Burnes, 291 F.3d at 1287-88. To apply judicial estoppel, however, the party's intent must be "cold manipulation" rather than some "unthinking or confused blunder." Ajaka, 453 F.3d at 1345 n.7 (quoting Johnson Serv. Co. v. Transamerica Ins. Co., 485 F.2d 164, 175 (5th Cir. 1973)); see also Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1294 (11th Cir. 2003) (holding that the intent necessary to justify the application of judicial estoppel must be "purposeful contradiction-not simple error or inadvertence"). The above factors, however, are "not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case . . . ." Burnes, 291 F.3d at 1286.

A. Judicial Estoppel Against Plaintiff Ebert on Wood's Pre-Petition Claims

The court readily concludes that Wood made sworn statements in his bankruptcy petition which are inconsistent with the positions he has taken in this case regarding his pre-petition claims. In this case Wood **[*16]** admitted in deposition to having been paid by the defendants at least $ 56,000 for his services in the first three months of 2005. Moreover, in support of his claims in this case, Wood asserts that he has been paid $ 384,636.97 by the defendants and is entitled to approximately $ 1.4 million more. [11] This stands in stark contrast to his bankruptcy petition, in which Wood stated that as of July 1, 2005, he had not received any income so far that year. Wood further stated that his projected income at that time was only $ 1,500 per month. Additionally, the court further notes that Wood's bankruptcy petition contains no mention of his relationship with the defendants; he did not list the subject contracts in any section of the petition nor list any of the defendants as employers. Wood also failed to disclose that at the time he submitted his petition he had transferred most of the money he received from the defendants into his related businesses and had also directed FCC to issue checks directly to his related businesses. Ebert testified in her deposition that such actions could potentially constitute fraudulent transfers. (Ebert dep. at 44).

> 11 It is not clear from the record exactly how **[*17]** much money Wood had received or was projected to receive from the defendants at the time he filed his bankruptcy petition; however, the record is clear that it was significantly greater than the "zero" amount he swore to in his bankruptcy petition.

The court can infer from the record that Wood's omissions were not inadvertent, but rather were intended to conceal his relationship with defendants, including the attendant income. At the time he submitted his sworn bankruptcy petition, Wood clearly had knowledge the income he had derived and was due to derive from his work for FCC. Further, Wood had a clear motive to conceal this information. By omitting from his petition any mention of his relationship with and income from defendants, Wood was able to obtain a complete, no-asset discharge of his debts in Chapter 7 while keeping all of the income he had derived and was due to derive from his work for FCC. The position he has taken in this case regarding his entitlement to these monies is "clearly inconsistent" with his position in bankruptcy. See Ajaka, 453 F.3d at 1344 (holding that judicial estoppel is only appropriate where the two positions are "clearly inconsistent"). The court thus **[*18]** finds that by his conduct in these two cases Wood has intended to make a mockery of the judicial system and judicial estoppel against him is therefore appropriate. [12] See Burnes, 291 F.3d at 1287-88.

> 12 Against this finding, Wood argues he did not report the income from the defendants because it constituted business, rather than personal, income. This argument, however, is not supported by the record. The record shows instead that (1) only Wood, not any of the related businesses, entered into contracts with the defendants; (2) FCC issued a number of checks made out to Wood personally, which Wood then deposited into the related businesses; (3) FCC issued checks to Wood's related businesses at Wood's request; and (4) Wood filed suit on his own behalf claiming that he, not any of the related businesses, is entitled to recover on the contracts. Further, although Wood stated in his deposition that he informed Ebert of his "Florida income," this is insufficient to prevent the application of judicial estoppel against Wood, especially given Wood's complete failure to disclose his relationship with and income from the defendants in his bankruptcy petition. See Barger, 348 F.3d at 1296.

Judicial **[*19]** estoppel cannot be invoked against Ebert, however, because Wood's misconduct cannot be imputed to her. See Parker, 365 F.3d at 1272. [HN6] While it is correct that once a debtor files for bankruptcy, the bankruptcy trustee, rather than the debtor, becomes the real party in interest on claims related to the property of the bankruptcy estate, the trustee does not become "tainted or burdened by the debtor's misconduct." Id. at 1273. Judicial estoppel against the trustee is only appropriate if the trustee himself has made inconsistent statements which were calculated to make a mockery of the judicial system. Id. Defendants have produced no evidence that Ebert has committed any actions which warrant application of judicial estoppel against her and therefore defendants' motion for summary judgment as to Wood's pre-petition claims is due to be denied. [13]

> 13 The court is not persuaded by defendants' arguments to the contrary. There is no evidence that Ebert herself made any inconsistent statements under oath.

Based on Wood's conduct, for which he should receive no benefit, the court finds it appropriate to limit any potential recovery by Ebert in this case to that necessary to satisfy the unsecured **[*20]** creditors in Wood's bankruptcy case. See Parker, 365 F.3d at 1273 n. 4 ("[I]n the unlikely scenario where the trustee would recover more than an amount that

would satisfy all creditors and the costs and fees incurred, then, perhaps judicial estoppel could be invoked by the defendant to limit any recovery to only that amount and prevent an undeserved windfall from devolving on the non-disclosing debtor."). This limitation on recovery is an appropriate balance of the equities in this case because it ensures that Wood's lack of disclosure does not harm the interests of his third-party creditors while also ensuring Wood does not enjoy a windfall from his manipulation of the judicial system. Failing to limit any potential recovery in this case would diminish debtors' necessary incentive to truthfully and fully disclose their assets, income, and transfers, and would suggest that debtors should only fully disclose this information if their lack of disclosure is discovered. [14] Burnes, 291 F.3d at 1288; see also In re Brooks, 2008 Bankr. LEXIS 1169, 2008 WL 1721876 *4 (Bnkr.N.D.Ala. Apr. 10, 2008) (relying on Parker to limit a trustee's recovery); In re Williams, 310 B.R. 442, 444 (Bnkr.N.D.Ala. 2004) (same).

14 In **[*21]** his Affidavit in Support of Plaintiffs' Motion for Summary Judgment, Wood disclosed that he has received $ 384,636.97 from FCC for his services. As determined in Section I, the portion of this amount attributable to pre-petition services, minus any applicable exemptions, is the property of the bankruptcy estate. Should recovery in this case be insufficient to satisfy creditors in Wood's bankruptcy case, the court assumes that the portion of these funds which is property of the bankruptcy estate, including those amounts which have been transferred into Wood's related businesses, may be available to satisfy the creditors' claims. Because of this, as well as the possibility that Wood engaged in a series of fraudulent transfers, see supra page 8, it may be necessary for Mr. Smith to reassess whether he faces a conflict of interest in representing both Wood and Ebert in this case.

B. Judicial Estoppel Against Plaintiff Wood on Wood's Post-Petition Claims

[15]

15 Defendants did not address application of judicial estoppel to Wood's post-petition claims in their motion for summary judgment, presumably because they assumed that all of Wood's earnings from his work for the defendants constituted **[*22]** property of the bankruptcy estate.

It is not clear from the record whether Wood made sworn statements in his bankruptcy petition which are clearly inconsistent with the positions he has asserted in this case regarding his post-petition claims. See Ajaka, 453 F.3d at 1344. Wood was not required to disclose any causes of action based on post-petition earnings, as such causes of action are not the property of the estate. See Witko, 374 F.3d at 1042; Carroll v. Henry County, Ga., 336 B.R. 578, 583-84 (N.D.Ga. 2006). Further, it is not clear whether Wood's statements in his bankruptcy petition as to his current income and any expected change in his current income pertain to pre-petition or post-petition earnings. Because there are issues of material fact as to whether it is appropriate to apply judicial estoppel as to Wood's post-petition claims, defendants' motion for summary judgment as to these claims is due to be denied.

III. Parties' Cross-Motions for Summary Judgment as to Emily Green's Liability

The parties have filed cross-motions for summary judgment as to Emily Green's personal liability for breaches of the October 6, 2004, contract. This contract states that "we Florida Claims Consultants, **[*23]** Inc., agree to compensate Don Wood for damage appraisal and estimating Hurricane Ivan losses." Based on this plain language and the absence of any evidence to the contrary, the court finds that no reasonable jury could conclude that Emily Green was acting in any capacity other than on behalf of FCC when she signed the contract with Wood. [16] Defendants' motion for summary judgment as to Emily Green's personal liability is therefore due to be granted and plaintiffs' cross-motion for summary judgment is due to be denied.

16 Plaintiffs' reliance on Fla. Stat. § 626.8738 is not persuasive. While this section makes it a felony to perform public adjusting services without a license and an appointment, nothing in the statute implies that a non-licensed individual (or company) cannot enter into and enforce employment contracts. Plaintiffs have provided no case law to the contrary.

IV. Plaintiffs' Motion for Summary Judgment as to Donald Green's Liability

Plaintiffs argue that summary judgment should be granted as to Donald Green's personal liability for breaches of the October 10, 2004, contract because Donald Green is not an officer or employee of FCC. Plaintiffs have presented no evidence that **[*24]** Donald Green lacked the authority to bind FCC when he signed the contract. To the contrary, while

Donald Green may not have been an officer or employee of FCC, it is clear from the record that he acted as FCC's agent in a number of areas relating to the company's public adjusting business. Moreover, as was pointed out at oral argument, the contract does not personally obligate Donald Green to do anything. Thus, at a minimum, there is an issue of fact as to whether Donald Green signed the contract on FCC's behalf and summary judgment in plaintiffs' favor is not appropriate on this claim. [17]

17 Defendants have not filed a cross-motion for summary judgment as to Donald Green's personal liability because they believe there are issues of material fact as to whether Donald Green entered into contracts with Wood, separate from the initial contracts of October 6, 2004, and October 10, 2004, for which Donald Green would be personally liable.

V. Plaintiffs' Motion for Summary Judgment as to FCC's Liability

Plaintiffs argue that if Emily and Donald Green are not individually liable for the asserted breaches of contract, then summary judgment should be granted as to FCC's liability for these breaches. **[*25]** Plaintiffs' motion for summary judgment as to FCC's liability, however, will be denied because there are clear issues of material fact as to whether FCC breached the contracts with Wood.

VI. Plaintiffs' Motion for Summary Judgment as to Damages

Plaintiffs argue that summary judgment should be granted as to Wood's damages in this case. Plaintiffs argue that the measure of Wood's damages can be calculated by totaling the funds defendants received on claims for which Wood performed work and multiplying this amount by the 60% he was promised in his contracts. Just as there are clear issues of material fact as to whether defendants breached the contracts with Wood, there are also clear issues of material fact as to Wood's damages. Plaintiffs' motion for summary judgment as to damages therefore will be denied.

VII. Defendants' Motion to Strike

Finally, the court need not address defendants' motion to strike. Wood's affidavits in opposition to defendants' motion for summary judgment and in support of plaintiffs' motion for summary judgment had no impact on the court's findings and thus the defendants' motion to strike is denied as moot.

Accordingly, it is hereby ordered:

1. Plaintiffs' and Defendants' **[*26]** requests to take judicial notice are GRANTED in part and DENIED in part;

   A. Plaintiffs' and Defendants' requests to take judicial notice of certain facts and documents related to FCC's administrative dissolution and reinstatement (docs. 69 and 102) are DENIED as moot;

   B. Defendants' request to take judicial notice of certain filings related to Wood's bankruptcy case (doc. 78) is GRANTED.

   C. Defendants' request to take judicial notice that FCC has changed its name to Green State Public Adjusters, Inc. (doc. 102) is GRANTED.

2. Defendants' motion for summary judgment (doc. 70) is GRANTED in part and DENIED in part;
   A. Defendants' motion for summary judgment against the plaintiffs based on judicial estoppel is DENIED, but the court will limit any recovery Plaintiff Ebert receives at trial to the amount necessary to satisfy Wood's creditors;

   B. Defendants' motion for summary judgment as to Emily Green's liability is GRANTED.

3. Plaintiffs' motion for summary judgment (doc. 63) is DENIED.

4. Defendants' motion to strike (doc. 105) is DENIED as moot.

5. The clerk is directed to terminate Defendant Emily Green as a party to this case.

DONE AND ORDERED on this 4th day of August 2008.

/s/ *M.* **[*27]** *Casey Rodgers*

M. CASEY RODGERS

UNITED STATES DISTRICT JUDGE

11 of 25 DOCUMENTS

PHILIP BARASH , as preliminary executor of the Estate of CELIA KATES, Plaintiff, v GLORIA KATES, a/k/a GLORIA HABERMAN, Defendant.

Case No. 04-80159-Civ-HOPKINS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

586 F. Supp. 2d 1323; 2008 U.S. Dist. LEXIS 95442

June 25, 2008, Decided
June 25, 2008, Entered

SUBSEQUENT HISTORY: Sanctions allowed by Barash v. Kates, 585 F. Supp. 2d 1368, 2008 U.S. Dist. LEXIS 106809 (S.D. Fla., Oct. 23, 2008)

PRIOR HISTORY: Barash v. Kates, 2008 U.S. Dist. LEXIS 21928 (S.D. Fla., Mar. 19, 2008)

CASE SUMMARY:

PROCEDURAL POSTURE: After the court found in favor of defendant former trustee of a decedent's trust and against plaintiff executor on claims to recover the proceeds of a brokerage account, and the court had taken the issue of sanctions against the executor under advisement, the trustee filed a motion to enjoin frivolous filings by the executor.

OVERVIEW: The court had already found that the executor had used the case to continue his long history of attacks upon the trustee and her family. The executor or his wife had have been litigating against the trustee and her family over money for eight years, in several state and federal courts. He had filed countless pleadings, all of which were ramblings with few or no citations to relevant legal authorities. Since the date the court decided it would order sanctions, the executor had filed 9 motions attempting to relitigate the ruling. Finally, and perhaps most importantly, many of the pleadings also contained inappropriate personal attacks upon the trustee and her counsel with no citation to legal authority. The numerous filings, attempts to relitigate the sanctions issue, and personal attacks served only to harass the trustee and her counsel, and to flood the court with a deluge of papers in an effort to preclude a decision on the only remaining issue of the amount of sanctions for the executor's purposefully deceptive testimony at the bench trial. Further filings had to have court approval.

OUTCOME: The trustee's motion was granted and the executor was prohibited from submitting further pleadings without court approval.

CORE TERMS: case number, dollar, probate, pgs, abusive, signature, detective, lawsuit, enjoin, injunction, attorneys's fees, corporate trustee, sanctioned, frivolous, concert, promissory note, condominium, pro se, enjoining, behest, affirming, causes of action, personal attacks, private investigator, counterclaim, unspecified, purportedly, proceeded, subtrust, chambers

LexisNexis(R) Headnotes

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Sanctions > Baseless Filings > General Overview
[HN1] The United States Court of Appeals for the Eleventh Circuit has long recognized the court's ability to protect itself from abusive litigants. District courts have the authority to impose serious restrictions on a litigant's ability to

bring matters to court without an attorney. Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out U.S. Const. art. III functions. As a result, considerable discretion is necessarily reposed in the district court to draft orders enjoining abusive litigation tactics. Such orders may be appropriate to protect both the courts and its staff, as well as the rights of all litigants in the federal system.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Remedies > Injunctions > General Overview
Civil Procedure > Sanctions > Baseless Filings > General Overview
[HN2] Courts can be creative in fashioning appropriate injunctions against abusive litigation tactics. For example, courts have entered orders which (1) enjoin prisoner litigants from relitigating specific claims or claims arising from the same set of factual circumstances; (2) require litigants to accompany all future pleadings with affidavits certifying that the claims being raised are novel, subject to contempt for false swearing; and, (3) direct the litigant to seek leave of court before filing pleadings in any new or pending lawsuit. Moreover, courts may enjoin not only the abusive litigant, but also those working in concert with them, or at the behest of the litigant. The only limitation on the court's discretion to enjoin abusive litigation is that courts are not permitted to completely bar all access to the courts. Should an injunction be entered, abusive litigants may be sanctioned for violating the injunction.

COUNSEL: [1]** Philip Barash, as executor of Celia Kates' estate, Plaintiff, Pro se, Muttontown, NY.

For Gloria Kates, also known as Gloria Haberman, Defendant: Julie S. Ferguson, Lorin Louis Mrachek, Roy Edmund Fitzgerald, III, LEAD ATTORNEYS, Page Mrachek Fitgerald & Rose, West Palm Beach, FL.

JUDGES: JAMES M. HOPKINS, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JAMES M. HOPKINS

OPINION

[*1324] ORDER GRANTING DEFENDANT'S MOTION TO ENJOIN FRIVOLOUS FILINGS BY PLAINTIFF, PHILIP BARASH (DE 141)

THIS CAUSE comes before the Court upon receipt of Defendant's Motion to Enjoin Frivolous Filings by Plaintiff, Philip Barash. (DE 141). After review of such motion, and having been advised on the premises, this Court **GRANTS** Defendant's Motion. (DE 141).

BACKGROUND

After the parties consented to trial by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c), this Court conducted a two day non-jury trial in March of 2005, in West Palm Beach, Florida. (DEs 37, 42, 48, 49). Plaintiff, Philip Barash ("Barash"), as the preliminary executor for the estate of Celia Kates ("Celia") sought recovery of the proceeds of a joint brokerage account from Defendant, Gloria Kates ("Kates"), on the basic theory that the account constituted a gift **[**2]** in contemplation of death (or *donatio causa mortis*) made to Kates by the Celia but revoked prior to Celia's death. (DEs 13, 30).

At the conclusion of the trial, this Court found in favor of Defendant Kates. (DE 58). This Court also ordered Barash's counsel to show cause why sanctions should not be imposed after this Court observed that (1) Barash committed perjury in previous litigation he brought in the United States District Court for the Eastern District of New York, wherein he had sought to recover the funds at issue in the instant case; and, (2) Barash may have also been purposefully deceptive in his testimony before this Court in an attempt to gain control over the account at issue. (DE 60). Subsequently, Defendant Kates moved the Court to impose sanctions upon both Barash and his counsel for their continued misstatements of fact and taking of positions which were inconsistent with prior judicial findings and their own testimony. (DEs 68, 69, 70, 79). Kates sought sanctions in the form of attorneys's fees and costs, and noted that Kates incurred more than four hundred thousand dollars ($ 400,000.00) in attorney's fees and costs in various actions brought by Barash and/or his wife, **[**3]** and more than eighty-three thousand dollars ($ 83,000.00) in attorney's fees and costs in defending this action. (DE 69, pg. 11).

After conducting an evidentiary hearing, on October 12, 2006, **[*1325]** this Court determined that although Barash's counsel should not be sanctioned, Barash should be sanctioned pursuant to the Court's inherent authority in amount to be determined at a later date. (DEs 88, 89). Counsel for Barash withdrew from representation prior to the issuance of such order, and Barash has proceeded *pro se* since such time. (DEs 62, 91, 90, 93).

In March of 2007, this Court entered a stay of proceedings after Barash filed a bankruptcy petition in the United States Bankruptcy Court for the Eastern District of New York. (DE 99). The stay was lifted on March 19, 2008, and this Court is now attempting to determine the amount of sanctions to be imposed. (DE 109).

DISCUSSION

In her motion, Kates moves the Court for the entry of an injunction enjoining Barash from making future filings without prior Court approval. In the alternative, Kates asks that the Court excuse Kates from having to respond to any of Barash's filings unless ordered by the Court. (DE 141, pgs. 1-6) (*citations omitted*).

[HN1] The **[**4]** 11th Circuit has long recognized the court's ability to protect itself from abusive litigants. *See Procup v. Strickland,* 792 F.2d 1069, 1071-1074 (11th Cir. 1986) (*en banc*) (affirming in part order of district court enjoining pro se litigant from filing any cases unless represented by counsel). *See also United States v. Hintz,* 229 Fed. App'x 860, 861 (11th Cir. 2007) (*citing Procup,* 792 F.2d at 1073-1074). The Court has also stated that district courts have the authority to impose "serious restrictions" on a litigant's ability to bring matters to court without an attorney. *See Procup,* 792 F.2d at 1070. "Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *Martin-Trigona v. Shaw,* 986 F.2d 1384, 1386-1387 (11th Cir. 1993) (*quoting Procup,* 792 F.2d 1069)). As a result, "considerable discretion is necessarily reposed in the district court" to draft orders enjoining abusive litigation tactics. *See Martin-Trigona,* 986 F.2d at 1387 (*citing Procup,* 792 F.2d at 1074). *See also May v. Hatter,* No. 00-4115-Civ-Moore, 2001 WL 579782, *4 (S.D. Fla. May 15, 2001) (*quoting* **[**5]** *Martin-Trigona,* 986 F.2d at 1387) (*citing Procup,* 792 F.2d at 1074). Such orders may be appropriate to protect both the courts and its staff, as well as the rights of all litigants in the federal system. *See Procup,* 792 F.2d at 1071-1072 (noting that the claims of all other litigants suffer when a single litigant files "upwards of a lawsuit a day," and that every lawsuit filed, no matter how frivolous or repetitious, requires the investment of court time, whether the pleadings are reviewed by a law clerk, staff attorney, magistrate, or judge).

[HN2] Courts can be creative in fashioning appropriate injunctions against abusive litigation tactics. *See Procup,* 792 F. 2d at 1072-1073. *See also Hintz,* 229 Fed. App'x at 861 (*citing Procup,* 792 F.2d at 1073-1074). For example, courts have entered orders which (1) enjoin "prisoner litigants from relitigating specific claims or claims arising from the same set of factual circumstances;" (2) require "litigants to accompany all future pleadings with affidavits certifying that the claims being raised are novel, subject to contempt for false swearing;" and, (3) direct "the **[**6]** litigant to seek leave of court before filing pleadings in any new or pending lawsuit." *Procup,* 792 F.2d at 1072-1073) (*citations omitted; other examples of court orders omitted*). *See also Hintz,* 229 Fed. App'x at 861 (noting that the court has approved order limiting further pleadings without order of the court, after the complaint has been filed); *Martin-Trigona,* 986 F.2d at 1387 **[*1326]** (noting that the Eleventh Circuit "has upheld pre-filing screening restrictions on litigious plaintiffs.") (*citing Copeland v. Green,* 949 F.2d 390 (11th Cir. 1991); *Cofield v. Alabama Public Serv. Comm.,* 936 F.2d 512, 517-18 (11th Cir. 1991)).

Moreover, courts may enjoin not only the abusive litigant, but also those working in concert with them, or at the behest of the litigant. *See Martin-Trigona,* 986 F.2d at 1387-1389 (affirming order of district court which applied equally to Martin-Trigona and "persons or entities acting at his behest, at his direction or instigation, or in concert with him.") The only limitation on the court's discretion to enjoin abusive litigation is that courts are not permitted to completely bar all access to the courts. *See Procup,* 792 F.2d at 1074. Should an injunction be entered, **[**7]** abusive litigants may be sanctioned for violating the injunction. *See Martin-Trigona,* 986 F.2d at 1389 (affirming order dismissing lawsuit filed by the mother of Martin-Trigona, because the mother acted in concert with her son to violate previous court order); *May,* 2001 WL 579782 at *5 (dismissing lawsuit with prejudice after abusive litigant violated injunction three times) (*citing World Thrust Films, Inc. v. Int'l Family Enter., Inc.,* 41 F.3d 1454, 1456 (11th Cir. 1995)).

In its previous order imposing sanctions upon Barash, this Court has already found that Barash used the instant case to continue his long history of attacks upon Defendant and her family. (DE 89, pgs. 8-16). Either Barash or his wife Sandra ("Sandra") have been litigating against Kates and her family over money since the year 2001, in both state and federal courts in Florida, Colorado, and New York. Specifically, this Court recalls that:

(1) In March of 2001, Gloria retained the firm of Page, Mrachek, Fitzgerald & Rose, P.A. to represent her and her two sons, Paul and Eric Siler ("Paul" and "Eric"). (DE 70).

(2) On April 30, 2001, in case number CA-01-4172-AI, Barash and his wife, Sandra, filed an action against Gloria **[**8]** and her son Paul in the Fifteenth Judicial Circuit in and for Palm Beach County, asserting causes of action for defamation and breach of fiduciary duty with respect to alleged improper administration of the Irving Kates Trust. (DE 66, pg. 2; DE 70, pg. 2, exh. A). The defamation claim related to a letter that Gloria and Paul had sent to Solomon Smith Barney on March 12, 2001, wherein Gloria stated that she believed her signature had been forged on a document which would have allowed Sandra to transfer funds from the Celia Kates and Irving Kates trusts into Sandra's own account. (DE 70, pg. 2). In the counterclaim filed by Gloria and Paul in the action, Gloria alleged that she did not sign the letter that Sandra submitted to Solomon Smith Barney, and that she did not consent to the transfer of the funds from the trust accounts to the personal account of Sandra. (DE 70, pg. 2, exh. A). In addition, Gloria alleged that Sandra and Philip had repeatedly attempted to remove her as trustee from the trusts so that they could have total control and transfer the funds into their own accounts. (DE 70, pg. 2, exh. A). On March 19, 2001, after receiving unauthorized requests to transfer from Sandra, **[**9]** and after being notified that Gloria did not consent to the transfer of funds out of the Celia Kates Trust account, Solomon Smith Barney froze the accounts. (DE 70, pg. 3). On September 26, 2001, the action was settled, along with another lawsuit, case number CP-01-2330-IB. (DE 66, pg. 2; DE 70, exh. B).

(3) In case number CP-01-2330-IB, which was also filed on April 30, 2001, **[*1327]** Celia sought to remove both Gloria and Sandra as trustees of the Irving Kates Trust. (DE 66, pg. 2; DE 70, pgs. 3-4). The litigation began after Gloria refused a request by Sandra and Barash to approve disbursements in the amount of one hundred and fifty seven thousand dollars ($ 157, 000.00) from the Irving Kates Trust to renovate Celia's Palm Beach oceanfront condominium and for the purchase of a Cadillac. (DE 70, pg. 4). The matter finally settled with the appointment of corporate trustee to replace Celia, Sandra, and Gloria as trustees, and the creation of three subtrusts, one each for Celia, Sandra, and Gloria. (DE 66, pg.2; DE 70, pg. 4, exh. B). A provision of the settlement provided that certain funds could not be used from the Celia Kates Trust, directly or indirectly, for the purposes of Sandra and Barash **[**10]** unless Gloria received an equivalent amount during that year. (DE 70, pg. 4, exh. B).

(4) In October of 2001, in case number CV01-6990, Sandra, acting under a power of attorney for Celia, filed an action against Gloria in the United States District Court for the Eastern District of New York, again complaining about Gloria's alleged refusal to provide for Celia out of the Irving Kates Trust. (DE 66, pg. 2; DE 70, pg. 9). In that action, Sandra and Barash submitted affidavits, [1] wherein they swore to the existence of an oral contract between Gloria, Sandra and Celia concerning the joint accounts and the Irving Kates Trust (a theory inconsistent with the *gift causa mortis* theory four years later developed in this case). (DE 70, pg. 9). The New York action was dismissed by the court before Gloria was served with the complaint because the court ruled that Sandra could not represent Celia under a power of attorney. (DE 66, pgs. 2-3; DE 70, pg. 9).

(5) In November of 2001, in case number CV 01-7828, Barash filed an action in the United States District Court for the Eastern District of New York against two of Gloria's sons, Paul and Eric, in an attempt to recover on a promissory note executed **[**11]** in 1975 in favor of their grandfather, Irving Kates. (DE 66, pg. 3; DE 70, pg. 9, exh. J). After the court granted a motion for summary judgment filed on behalf of Eric and Paul, Barash appealed to the United States Court of Appeals for the Second Circuit. (DE 70, pg. 9). The Second Circuit, in case number 02-9161, remanded the matter for the district court to consider whether the "probate exception" to federal diversity jurisdiction or equitable tolling principles applied to the case. (DE 70, pg. 9). On remand, the court dismissed the action, finding that although the "probate exception" did apply, equitable tolling did not toll the claims. (DE 66, pg. 4; DE 70, pg. 9, exh. K). Once again, Barash appealed the order of the District Court to the Second Circuit. (DE 66, pg. 4; DE 70, pg. 9). In case number 04-2430-CV, the Second Circuit affirmed the order of the District Court. (DE 66, pg. 4; DE 70, pg. 9).

(6) On an unspecified date in the year 2005, in case number 05-010624, on behalf of Celia's estate, Barash filed another action in the New York State Supreme Court against Paul and Eric in an attempt to recover on the promissory note executed in 1975. (DE 66, pg. 4; DE 70, pg. 10). **[**12]** At the time that Barash and defense counsel submitted their affidavits in response to the Court's Order **[*1328]** to Show Cause, the court had yet to rule on a motion to dismiss filed by Paul and Eric. (DE 66, pg. 4; DE 70, pg. 10).

(7) In January of 2003, Barash filed an action against Todd Siler ("Todd"), a third son of Gloria's. (DE 66, pg. 6; DE 70, pg. 10). In case number 03-00616AD, filed in the Fifteenth Judicial Circuit in and for Palm Beach County, Barash sought to recover on a 1998 promissory note allegedly signed by Todd in favor of his grandmother, Celia, in the amount of forty thousand dollars ($ 40,000.00). (DE 66, pg. 6; DE 70, pg. 10). The court dismissed the matter for lack of jurisdiction over Todd, who was a resident of Colorado. (DE 66, pg. 6; DE 70, pg. 10).

(8) Thereafter, on an unspecified date in the year 2003, in case number 03CV2356, Barash filed the same cause of action against Todd in Colorado state court. (DE 66, pg. 6; DE 70, pg. 10). After the action was commenced, Todd filed an affidavit in response, wherein he stated that he had neither signed, nor seen, the note at issue. (DE 66, pg. 6; DE 70, pg. 10). Barash hired a forensic examiner who ultimately concluded **[**13]** that the signature on the note did not belong to Todd. (DE 66, pg.6; DE 70, pg. 10). Barash thereafter dismissed the action against Todd. (DE 66, pg. 6; DE 70, pg. 10). However, Barash filed an action to recover on the same note against Eric, which will be discussed momentarily. (DE 66, pg. 6; DE 70, pg. 10).

(9) On July 7, 2003, in case number 03 CP 3317, Sandra filed a petition in probate court seeking to invalidate the Last Will and Testament of Irving Kates, despite the fact that Irving Kates' estate had been probated in Palm Beach County in 1983 with no contests to the will. (DE 66, pg. 5; DE 70, pg. 5). After the corporate trustee of the Irving Kates trust filed a counterclaim, Gloria filed a motion to intervene, which was granted. (DE 70, pg. 5). After Sandra dismissed her claim, the case proceeded on Gloria's counterclaim. (DE 70, pg. 5). Following an evidentiary hearing, the probate court issued an order describing how Barash and Sandra used funds from the Celia Kates Trust for their own benefit. (DE 70, pg. 5, exh. D). First, the probate court noted that Sandra issued checks totaling more than one hundred and eighty-seven thousand dollars ($ 187,000.00) for improvements to **[**14]** the Palm Beach condominium, which was jointly owned by Sandra and Celia, and that because Celia had not been to the Palm Beach condominium since sometime during the year 2001, it was unlikely that the improvements at the condominium would

have benefitted anyone other than Sandra or Barash. (DE 70, pg. 5, exh. D). Next, the probate court noted that Sandra and Barash benefitted from over eighty-six thousand dollars ($ 86,000.00) in credit card payments from the trust account, that no evidence showed that such payments were for the benefit of Celia. (DE 70, pg. 6, exh. D). In addition, the court noted that almost two hundred thousand dollars ($ 200,000.00) worth of stocks were transferred out of the Celia Kates Trust, and that the law firm representing Sandra and Barash was paid over eleven thousand dollars ($ 11,000.00) from the Celia Kates Trust account. (DE 70, pg. 6, exh. D). Finally, the probate court ordered that the attorney's fees for the corporate trustee should be paid out of Sandra's subtrust. (DE 70, pg. 6, exh D). Although Barash and Sandra appealed the probate court's order that the attorney's fees for the corporate trustee be paid out of Sandra's subtrust, in case number **[**15]** 4D04-3353, the appellate court affirmed the order of the probate court. (DE 66, pg. 5; DE 70, pg. 6, exh. E).

(10) Turning back now to Barash's efforts to collect on the forty-thousand **[*1329]** dollar ($ 40,000.00) promissory note, on an unspecified date in the year 2004, in case number 04-F796 (CBS), in the United States District Court for the District of Colorado, Barash filed an action against Eric, wherein Barash claimed that Eric had forged Todd's signature on the promissory note. (DE 66, pg. 6; DE 70, pg. 11). Subsequent to commencement of the action, Barash executed an agreement with Gloria, whereby Gloria agreed to opt out of any action against the corporate trustee for the Irving Kates trust for the alleged mismanagement of trust funds, in exchange for Barash's dismissal of his action against Eric. (DE 65, pg. 7; DE 70, pg. 8).

However, prior to dismissal of the action, Barash moved for leave to amend the complaint to add a cause of action for the homicide of Richard Howsam ("Howsam"), Eric's former business partner, as well as to add additional parties unrelated to the promissory note. (DE 70, pg. 11). Upon learning of Barash's allegations that Eric was involved with the death of Howsam, **[**16]** counsel for Gloria obtained a copy of the police file from the Greenwood Police Department of Greenwood, Colorado. (DE 70, pg. 11). In the file, counsel found a letter dated July 11, 2001, drafted by Barash, with an attached letter containing a forged signature of Paul by Barash. (DE 70, pg. 11; DE 50, Defendant's exh. 20). [2] A review of the police file showed that Barash had been trying to convince the police to investigate both Paul and Eric for the death of Howsam, and that Barash sent letters to both Howsam's widow and son in an attempt to obtain information about Howsam's death. (DE 70, pg. 11). The police file also contained three additional letters: (a) a letter from Barash to the United States Securities and Exchange Commission wherein he stated that certain documents filed with the SEC had been examined to ascertain a motive for the unsolved homicide of Howsam, and that such documents appeared "suspect;" (b) a letter from Barash to Metropolitan Life Insurance, wherein Barash represented that he was a private investigator investigating the death of Howsam; and, (c) a letter from Barash to Travelers Insurance wherein Barash again represented himself as a private investigator **[**17]** investigating Howsam's death, and requesting information regarding certain insurance policies. (DE 70, pg. 11, exhs. L, M). In an affidavit submitted by Barash in response to the Court's Order to Show Cause, Barash readily admits to portraying himself as a private investigator in such letters. (DE 71, pg. 31). [3]

1 On cross examination at the bench trial herein, Barash admitted that he knew that the affidavits were false at the time they were filed in the New York action. (DE 52, pgs. 175-176, 178).

2 Defendant introduced a copy of the letter into evidence at the bench trial herein, and it was designated as Defendant's Exhibit 20. (DE 70, pg. 11; DE 50, Defendant's exh. 20). The letter will be discussed in more detail below.

3 It should be noted that during his cross and redirect examination at trial, Barash admitted that he sent the letter to Detective John Carr of the Greenwood Police Department in Greenwood, Colorado. (DE 52, pgs. 172-174, 216-218; DE 50, Defendant's exh. 20). In the letter, referring to the unsolved investigation into Howsam's death, Barash stated that "the only way to crack this difficult case, [*sic*] might be with some trickery." (DE 50, Defendant's exh. 20). Barash **[**18]** continued, "[t]he following suggestions are only that. It is what I might resort to if I were faced with the situation." (DE 50, Defendant's exh. 20). Among the suggestions given to Detective Carr, Barash suggested that the detective call in Eric Siler for an interview, and that during the interview, the detective should show Eric a .45 caliber handgun, marked as if it were a piece of evidence in the case, and tell Eric that his DNA was found on the gun to "bluff" him. (DE 50, Defendant's exh. 20). Barash then suggested that Detective Carr show Eric a statement purportedly given by Paul and ask Eric for any comments on the statement. (DE 50, Defendant's exh. 20). In his letter to the detective, Barash acknowledged that the statement purportedly signed by Paul was "phony." (DE 50, Defendant's exh. 20). In the "phony" statement, Paul purportedly stated that he was with Eric when Eric murdered Howsam, and that Eric offered to pay Paul one million dollars ($ 1,000,000.00) for Paul's silence. (DE 50, Defendant's exh. 20). Moreover, although in his letter to the detective, Barash stated that he traced Paul's signature from an SEC document, during cross examination at trial, Barash testified, **[**19]** "I did not trace his signature, I copied the signature from an SEC document." (DE 50, Defendant's exh. 20; DE 52, pg. 173).

[*1330] Barash proceeded *pro se* in nine (9) of the above detailed actions. (DE 66, pgs. 2, 3, 4, 6; DE 70, exh. D, pg. 8; DE 70, exh. E; DE 70, exh. J).

Moreover, since obtaining his *pro se* status in this case, Barash has filed countless pleadings, all of which are ramblings with few or no citations to relevant legal authorities. Since the date that this Court ordered Barash to be sanctioned, he has filed no less than nine (9) motions attempting to relitigate the ruling. (DEs 94, 97, 103, 105, 112, 114, 118, 120, 134). Almost every motion filed by Barash is accompanied by an unnecessary notice of a motion, thereby cluttering the docket even more. (DEs 96, 104, 110, 113, 115, 117, 119, 121, 131). Barash has ignored previous Orders of this Court. (DE 95; ordering Barash to cease sending all correspondence to chambers directly; DE 129; *same*).

Finally, and perhaps most importantly, many of Barash's pleadings also contain inappropriate personal attacks upon Defendant and her counsel. Barash has repeatedly called Defendant and her counsel liars and has accused them of intentionally **[**20]** submitting fraudulent documents to the court. (DE 112, 118, 133, 134, 137, 138, 140, 142). Some of his pleading contain titles such as "Notice to the Court of Proof that Defendant Lied . . .", or "Motion Pursuant to the Inherent Power of the Court to Punish the Defendant's Attorney for Lying to the Court . . .", and contain statements such as "[t]he Defendant, having been caught lying to this Court," and "in a desperate effort to cover up the lies about the ownership of this property . . ." (DE 134; DE 140; DE 142, pgs. 1-2). Such pleadings contain nothing other than personal attacks upon Defendant and her counsel, with no citation to legal authority. (DE 134, 140, 142).

Eleventh Circuit precedent and the foregoing circumstances lead to a conclusion that Defendant's Motion to Enjoin Frivolous Pleadings by Plaintiff, Philip Barash, should be **GRANTED.** (DE 141). Barash's numerous filings, attempts to relitigate the issue of whether sanctions ought to be imposed, and personal attacks upon Defendant and her counsel serve only to harass Defendant and her counsel, as well as to flood the Court with a deluge of papers in an effort to preclude this Court from deciding the one legal issue which **[**21]** remains: how much of a sanction to impose upon Barash for his purposefully deceptive testimony before this Court in the underlying bench trial.

CONCLUSION

In conclusion, **IT IS HEREBY ORDERED THAT** Defendant's Motion is **GRANTED.** (DE 141). **IT IS FURTHER ORDERED THAT:**

1.) Philip Barash is **ORDERED** to cease filing any further pleadings unless Ordered by this Court, or unless prior approval is obtained by this Court.

2.) In order to obtain court approval to file any pleading, Philip Barash is **ORDERED** to abide by the following procedure. Failure to follow such procedure may result in the dismissal, striking, or denial of the Motion or offending pleading, or other sanctions.

[*1331] First, Barash shall file with the Court a "Motion for Court Approval to File Pleading," wherein he shall (a) state that he seeks the Court's approval to file a particular pleading; (b) explain the legal purpose or basis of the pleading; and, (3) describe the nature of the pleading with specificity.

Second, Barash shall attach as a clearly labeled exhibit to the "Motion for Court Approval to File Pleading" the pleading he seeks to file.

Third, the filing of any "Motion for Court Approval to File Pleading" shall also comply with **[**22]** all aspects of the Federal Rules of Civil Procedure, as well as the Local Rules for the Southern District of Florida (including service on Defendant, the submission of motions only to the Clerk of Court, and no direct correspondence to Chambers).

3.) This Order shall apply to Barash and anyone working in concert with him, at his direction, or at his behest, including, but not limited to his wife Sandra, or any other family members, friends, associates, or acquaintances.

4.) **IT IS FURTHER ORDERED THAT** Defendant Kates need not respond to any of Barash's filings which may be filed subsequent to this Order, unless Ordered by this Court.

5.) Any violations of this Order may result in sanctions.

DONE and ORDERED in Chambers this 25 day of June, 2008, at West Palm Beach in the Southern District of Florida.

/s/ James M. Hopkins

JAMES M. HOPKINS

UNITED STATES MAGISTRATE JUDGE

13 of 25 DOCUMENTS

In re: ARIZEN HOMES, INC., Debtor. SONEET R. KAPILA, TRUSTEE, Plaintiff, vs. TIMOTHY C. ARNEL, KELLY WADE-ARNEL, and ARNEL ARIZEN LLC, Defendants.

Case No.: 07-15650-BKC-RBR, Chapter 7, ADV CASE NO.: 08-01639-RBR

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

2009 Bankr. LEXIS 344

January 22, 2009, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: A debtor filed for relief under Chapter 7 of the United States Bankruptcy Code. Plaintiff trustee filed an action against defendants, related entities, alleging liability because defendants were insiders, because of fraudulent transfers, and other misconduct. Defendants filed a motion to dismiss or for a more definite statement.

OVERVIEW: The trustee alleged that defendants were all insiders of the debtor and the trustee set forth specific allegations in the complaint of at least one allegedly improper transfer of estate assets that were made to the debtor. The court held that the fraud claims should not be dismissed based on the trustee's alleged failure to comply with the pleading requirements of Fed. R. Civ. P. 9 because the trustee was given some flexibility in the application of the Rule 9 requirement and the trustee's pleadings were sufficient. Even if the trustee had some detailed information about the debtor's relationship and transactions with defendants the trustee, as a third party to the transactions, was still afforded some flexibility. The court found that the complaint sufficiently identified the circumstances constituting fraud so that defendants could prepare adequate responses to the allegations. The allegations in the complaint satisfied Fed. R. Civ. P. 8 and the particularity requirement. The Rule 9 pleading requirements did not comply to the two causes of action under 11 U.S.C.S. § 547 and Fla. Stat. § 726.106(2). A motion for a more definite statement was not required.

OUTCOME: The court denied defendants' motion to dismiss or for a more definite statement.

CORE TERMS: pleading requirements, particularity, definite, relaxed, fraudulent transfers, constructive, fraudulent, conclusions of law, trustee in bankruptcy, bankruptcy trustee, preferential transfers, notice, fraudulent intent, allegations contained, legally sufficient, fraud claims, detailed information, civil fraud, reasonable opportunity, non-bankruptcy, unintelligible, constituting, purportedly, flexibility, ambiguous, veracity, entirety, pleaded, prepare, frame

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN1] A complaint should only be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) if no set of facts could be proven that would support a claim for relief. In considering a motion to dismiss, a court should accept all well-pleaded allegations as true and view the motion in the light most favorable to the non-moving party. A court's function on a motion to dismiss is not to weigh the evidence that might be presented at trial but merely to determine whether a complaint itself is legally sufficient. To determine whether the complaint contains sufficient factual allegations, courts must look only at the complaint and the supporting documents submitted with the complaint.

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Commencement

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN2] Flexibility in the application of the particularity requirement of Fed. R. Civ. P. 9 has been recognized as being particularly appropriate in the context of fraud claims brought by a statutory trustee in bankruptcy. Courts should relax the specificity requirements where the plaintiff is a trustee in bankruptcy. Such flexibility afforded to trustees in bankruptcy with respect to the pleading requirements is appropriate given the inevitable lack of knowledge concerning the acts of fraud previously committed against the debtor, a third party.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > General Overview
Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Commencement
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN3] A trustee in a bankruptcy case is subject to a less stringent pleading requirement than in the non-bankruptcy civil fraud context.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Fraudulent Transfers > Constructively Fraudulent Transfers
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN4] With respect to claims of constructive fraudulent transfers, as opposed to actual fraudulent transfers, the authorities indicate that the Fed. R. Civ. P. 9(b) requirement to plead fraud with particularity is at least relaxed, and at best is inapplicable altogether. When a plaintiff pleads a constructive fraud claim, such as a claim to avoid and recover fraudulent transfers under 11 U.S.C.S. § 548(a)(2), which does not require proof of fraudulent intent, the requirements of pleading fraud with particularity are relaxed. Claims of constructive fraud whereby certain transactions are fraudulent as a matter of law because of when and for what consideration they were made, and not because they were undertaken with fraudulent intent is not the kind of fraud to which Fed. R. Civ. P. 9(b) applies.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Contracts Law > Defenses > Fraud & Misrepresentation > Constructive Fraud
[HN5] With respect to state law constructive fraud claims, a claimant must comply only with the more liberal pleading requirements of Fed. R. Civ. P. 8, and plaintiff has met the bare-bones pleading requirements of Rule 8 by alleging the basic elements of each statute.

Civil Procedure > Pleading & Practice > Pleadings > Complaints > Requirements
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN6] A pleading satisfies the particularity requirement if the person charged with fraud will have a reasonable opportunity to answer the complaint and adequate information to frame a response or if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers > Elements > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > General Overview
Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
[HN7] Fed. R. Civ. P. 9(b) is inapplicable to a preference allegation for the reason that the particularity requirement of rule 9(b) pertains to fraud or mistake, neither of which need be pleaded in an action to recover preferential transfers under 11 U.S.C.S. § 547.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Defects of Form
[HN8] A motion for a more definite statement will only be required when a pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself. A motion for a more definite statement is intended to provide a remedy for an unintelligible pleading, rather than a vehicle for obtaining greater detail.

COUNSEL: [*1] For Soneet R. Kapila, Plaintiff (08-01639-RBR): Robert N Gilbert, Esq., LEAD ATTORNEY, West Palm Beach, FL.

Timothy C. Arnel, Kelly Wade-Arnel, Arnel Arizen LLC, Defendants (08-01639-RBR): Mark R. Osherow, Esq., LEAD ATTORNEY, Boca Raton, FL.

For Arizen Homes, Inc., Debtor (07-15650-RBR): Leslie Gern Cloyd, Esq, Ft. Lauderdale, FL.

For Soneet Kapila, Trustee (07-15650-RBR): Robert N Gilbert, Esq, West Palm Beach, FL.

JUDGES: Raymond B. Ray, Judge.

OPINION BY: Raymond B. Ray

OPINION

ORDER AND MEMORANDUM DECISION DENYING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT OR, ALTERNATIVELY, MOTION FOR A MORE DEFINITE STATEMENT

This cause came before the Court on December 30, 2008, upon Defendants Timothy C. Arnel, Kelly Wade-Arnel and Arnel Arizen, LLC's Motion to Dismiss Plaintiff's Complaint, or Alternatively, Motion for More Definite Statement with Incorporated Memorandum of Law (the "Dismissal Motion") (D.E. 12), filed by Defendants Timothy C. Arnel, Kelly Wade-Arnel and Arnel Arizen, LLC ("Defendants"). Plaintiff Soneet R. Kapila, Trustee ("Trustee"), filed Plaintiffs Response to Defendants' Motion to Dismiss Plaintiff's Complaint or, Alternatively, Motion for a More Definite Statement (the "Trustee's Response") **[*2]** (D.E. 18) on December 19, 2008. This Court, having considered the Dismissal Motion and the Trustee's Response, and having heard and considered the arguments of counsel for the Defendants and for the Trustee, and otherwise being fully advised in the premises, good cause having been shown and proper notice given, makes the following findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

I. *FINDINGS OF FACT*

1. This Chapter 7 case was commenced on July 19, 2007, with the filing of a voluntary petition for relief under Title 11, United States Code.

2. Trustee is the Chapter 7 trustee of the Chapter 7 bankruptcy estate of Arizen Homes, Inc. ("Debtor").

3. Defendants seek to dismiss Counts I through VII of the Trustee's Complaint to Avoid and Recover Fraudulent and Preferential Transfers (the "Complaint") (D.E. 1) on the theory that Counts I though VI fail to state a cause of action for which relief can be granted as they do not meet the pleading requirements of Rule 9(b) of the *Federal Rules of Civil Procedure* and, due to such infirmity, Defendants further contend that Count VII of the Complaint is ineffectual and must be dismissed as well.

4. Defendants contested the **[*3]** veracity of P 12 of the Complaint and attached an exhibit which purportedly conflicts with said P 12. Dismissal Motion p. 7, footnote 1 and Exhibit "A."

5. The allegations contained in the Trustee's Complaint specified the following: (i) the relationship of the Defendants to the Debtor and the fact that all of the Defendants were insiders of the Debtor (Complaint PP 8-9), (ii) the nature of the Debtor's transactions with Defendants which constituted the alleged fraudulent transfers (Complaint PP 10-15), (iii) the amounts paid by the Debtor to the Defendants (Complaint PP 13, 17, 18, 24, 25, 26 and 34), (iv) the time periods when such amounts were paid by the Debtor to the Defendants (Complaint PP 13, 14, 17, 18, 24, 25, 26 and 34), (v) the specific mechanics of the Lot Transfer Payments (Complaint P 12), (vi) the fact that certain allegations of the Complaint are based upon an analysis of the Debtor's accounting records by the Trustee (Complaint P 14), (vii) the fact that the Debtor was undercapitalized (Complaint PP 10, 19, 22, 28, 31 and 35), and (viii) the statutory indicia of intent as they related to the relationship between the Defendants and the Debtor and the conduct of the **[*4]** respective parties (Complaint PP 19, 21, 22, 28 and 31).

II. *CONCLUSIONS OF LAW*

A. Standard On Motion to Dismiss

[HN1] A complaint should only be dismissed for failure to state a claim under Rule 12(b)(6) if no set of facts could be proven that would support a claim for relief. *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1357 (S.D. Fla. 2006), citing

Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, a court should accept all well-pleaded allegations as true and view the motion in the light most favorable to the non-moving party. *Frazier*, 434 F. Supp. 2d at 1357. A court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). "To determine whether the complaint contains sufficient factual allegations, courts must look only at the complaint and the supporting documents submitted with the complaint." *In re Reliance Financial & Investment Group, Inc*., 2006 U.S. Dist. LEXIS 82945, 2006 WL 3663243 (S.D.Fla. 2006), citing *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Defendants' **[*5]** Dismissal Motion went outside of the four corners of the Complaint by contesting the veracity of P 12 of the Complaint and attaching an exhibit which purportedly conflicts with said P 12. Dismissal Motion p. 7, footnote 1 and Exhibit "A." Since this Court can only consider the facts as alleged in the Complaint, Defendants' argument concerning the alleged conflict between the Complaint and Exhibit "A" to the Dismissal Motion is improper on a motion to dismiss and, as such, is disregarded. As will be discussed in Section C, below, the Trustee has met his pleading requirement, the Trustee's complaint is otherwise legally sufficient and, as such, the Dismissal Motion is without merit and is denied in its entirety.

B. The Rule 9(b) Special Pleading Requirement Is Relaxed For Bankruptcy Trustees.

The Court rejects the Defendants' argument that Counts I through VI of the Complaint should be dismissed as the Trustee failed to plead with sufficient particularity to satisfy the pleading requirements of Rule 9(b) of the *Federal Rules of Civil Procedure* concerning allegations of fraud. [HN2] "Flexibility in the application of the particularity requirement of [Rule 9] has been recognized as being particularly **[*6]** appropriate in the context of fraud claims brought by a statutory trustee in bankruptcy." *In Re Sverica Acquisition Corp*., 179 B.R. 457, 463 (Bankr.E.D.Pa. 1995). In *Profilet v. Cambridge Financial Corp.*, 231 B.R. 373 (S.D.Fla. 1999), the Court held that "courts should relax the specificity requirements where the plaintiff is a trustee in bankruptcy." *Profilet*, 231 B.R. at 379. Such flexibility afforded to trustees in bankruptcy with respect to the pleading requirements is appropriate "[g]iven the inevitable lack of knowledge concerning the acts of fraud previously committed against the debtor, a third party ...". *Profilet*, 231 B.R. at 379, quoting *Sverica*, 179 B.R. at 463.

The Court further rejects the Defendants' argument that the particularity requirement of Rule 9(b) should not be relaxed and, by implication that *Profilet* is not applicable here "...because the Trustee has direct knowledge of the alleged fraudulent transfers, especially if the Trustee is able to include the total amounts of the purported transfers he seeks to void and recover from the Defendants." (Dismissal Motion p. 7). The Defendants cite no authority for Defendants' assertion that the relaxed pleading requirement **[*7]** confirmed in *Profilet* should not apply where, as here, a bankruptcy trustee has some detailed information regarding the transactions underlying the alleged fraud. Notwithstanding his possession of some detailed information regarding the Debtor's relationship and transactions with the Defendants, the Trustee here is still a third party outsider to such relationship and such transactions and, accordingly, the rationale of *Profilet* is equally applicable to the Trustee here.

In addition to *Profilet*, the Defendants cited three other cases in Section II of the Dismissal Motion to support Defendants' position that the Trustee's Complaint was not pleaded with adequate particularity. Two of those cases, *Ziemba v. Cascade International, Inc*., 256 F. 3d 1194 (11th Cir. 2001), and *Brooks v. Blue Cross and Blue Shield of Florida, Inc*., 116 F. 3d 1364 (11th Cir. 1997) are distinguishable because the complaints analyzed by the court in those cases concerned non-bankruptcy civil fraud and, as discussed above, [HN3] the trustee in a bankruptcy case is subject to a less stringent pleading requirement than in the non-bankruptcy civil fraud context. The third case cited by Defendants in Section II of the Dismissal **[*8]** Motion, *In re Servico, Inc*., 144 B.R. 557 (Bankr.S.D.Fla. 1992), is cited to support the proposition that "[t]he complaint must identify the circumstances constituting fraud so that the defendant can prepare an adequate response to the allegations." Dismissal Motion p. 5. As will be discussed in Section C, below, the Trustee has met this requirement.

Moreover, [HN4] with respect to claims of constructive fraudulent transfers, such as those contained in Counts II and IV of the Trustee's Complaint, as opposed to actual fraudulent transfers, the authorities indicate that the Rule 9(b) requirement to plead fraud with particularity is at least relaxed, and at best is inapplicable altogether. "When a plaintiff pleads a constructive fraud claim, such as a claim to avoid and recover fraudulent transfers under 11 U.S.C. § 548(a)(2), which does not require proof of fraudulent intent, the requirements of pleading fraud with particularity are relaxed." *In Re Art & Co., Inc*., 179 B.R. 757, 763 (Bankr.D.Mass 1995). It has further been held that claims of constructive fraud "...whereby certain transactions are fraudulent as a matter of law because of when and for what consideration they were made, and not **[*9]** because they were undertaken with fraudulent intent...is not the kind of fraud to which Rule 9(b) applies." *Eclaire Advisor Ltd. v. Daewoo Engineering & Construction Co., Ltd*., 375 F. Supp.2d 257, 268 (S.D.N.Y.

2005). In *Eclaire*, the Court held that, [HN5] with respect to state law constructive fraud claims, "a claimant must comply only with the more liberal pleading requirements of Rule 8," and that the plaintiff "met the bare-bones pleading requirements of [Rule 8] by alleging the basic elements of each statute". *Eclaire*, 375 F. Supp.2d at 268.

C. The Trustee's Allegations Are Sufficient

The allegations contained in the Complaint, especially when viewed in the context of the relaxed pleading requirements applicable to a bankruptcy trustee, are more than sufficient as they provide the Defendants a reasonable opportunity to answer and adequate information to frame a response. [HN6] "A pleading satisfies the particularity requirement if the person charged with fraud will have a reasonable opportunity to answer the complaint and adequate information to frame a response...or if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." **[*10]** *Servico*, 144 B.R. at 559, quoting *Zuckerman v. Franz*, 573 F. Supp. 351 (S.D.Fla. 1983) and *Deutsch v. Flannery*, 823 F. 2d 1361, 1365 (9th Cir. 1987) (internal quotations omitted). The Trustee has met these requirements in his Complaint.

D. Rule 9(b) Is Not Applicable To Counts V and VI Of The Complaint.

The Court rejects the Defendants' argument that Counts V and VI of the Complaint should be dismissed based upon the Trustee's alleged failure to plead with sufficient particularity to meet the requirements of Section 9(b) of the *Federal Rules of Civil Procedure*. Counts V and VI of the Complaint (which state a claim under 11 U.S.C. § 547 and Fla. Stat. § 726.106(2), respectively) do not allege fraud or fraudulent conveyances and, accordingly, Rule 9(b) is inapplicable to Counts V and VI. *In re The King's Place, Inc*., 6 B.R. 305, 308 (Bankr.E.D.Pa. 1980) ("... [HN7] Fed.R.Civ.P. 9(b) is inapplicable to [a preference allegation] for the reason that the particularity requirement of rule 9(b) pertains to fraud or mistake, neither of which need be pleaded in an action to recover preferential transfers under [§] 547."). As Rule 9(b) is inapplicable, Counts V and VI need only meet the notice pleading **[*11]** requirement of Rule 8, and are therefore sufficient.

E. Defendants Are Not Entitled To A More Definite Statement.

Finally, the Court finds that the Defendants are not entitled to a more definite statement. [HN8] "A motion for a more definite statement will only be required when the pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself." *Campbell v. Miller*, 836 F.Supp. 827, 832 (M.D.Fla. 1993). A motion for a more definite statement is "intended to provide a remedy for an unintelligible pleading, rather than a vehicle for obtaining greater detail." *Aventura Cable Corp. v. Rifkin/Narragansett South Florida CATV Ltd. Partnership*, 941 F.Supp 1189, 1195 (S.D.Fla. 1996). As discussed in Section C above, the allegations in the Complaint are neither so vague and ambiguous as to deprive the Defendants of fair notice of the nature and basis of Trustee's claim, nor is the Complaint an unintelligible pleading. As such, Defendants' request for a more definite statement is denied.

ORDER

Based on the findings of fact and conclusions of law set forth above, it is Ordered and Adjudged as follows:

1. The Defendants' Dismissal **[*12]** Motion is hereby denied in its entirety, and;

2. Defendants shall file an answer to the Trustee's Complaint to Avoid and Recover Fraudulent and Preferential Transfers (D.E. 1) within ten (10) day of the date of this Order.

ORDERED in the Southern District of Florida on 01/22/09

/s/ Raymond B. Ray, Judge

Raymond B. Ray, Judge

United States Bankruptcy Court

20 of 25 DOCUMENTS

MILES BRUNDAGE, NANCY J. HUGHES, DIANE BRUNDAGE SETTLE and LEWIS F. CONCKLIN, Appellants, v. BANK OF AMERICA, TRUSTEE u/a DOROTHY S. GUTGSELL AMENDED AND RESTATE REVOCABLE TRUST AGREEMENT dated March 26, 1992, Appellee.

No. 4D07-1932

COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

996 So. 2d 877; 2008 Fla. App. LEXIS 16801; 33 Fla. L. Weekly D 2551

October 29, 2008, Decided

PRIOR HISTORY: [1]**
Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol-Lisa Phillips, Judge; L.T. Case No. 03-14824 25.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, the remaindermen of a revocable trust, sought review of a final judgment of the Circuit Court for the Seventeenth Judicial Circuit, Broward County (Florida), based on the involuntary dismissal of the remaindermen's claims for declaratory judgment and breach of fiduciary duty in the distribution of assets by appellee co-trustees from the trust of the deceased settlor/beneficiary.

OVERVIEW: The settlor had executed an amended revocable trust in 1992. Upon the settlor's death, the residue was to go to first co-trustee, a niece, with a specific distribution of shares of stock to the remaindermen, her other nephews and nieces. After a stock split in 1995, the trust was amended to increase the specific distribution of shares. However, no amendment was made when the stock split again in 1998. In 2001, the co-trustees, allegedly with the settlor's consent, transferred the shares of stock, except for the amount designated in the trust for distribution to the remaindermen after the 1995 split, to family partnerships. The court affirmed the declaratory judgment disallowing the distribution of additional shares as the trust did not own those additional shares on the date of the settlor's death; thus, the gift was considered adeemed under § 736.1107, Fla. Stat. However, the co-trustees did owe fiduciary duties to the settlor and the trust to properly manage the trust and not engage in self-dealing which the remaindermen could sue to enforce after the settlor's death. An issue existed as to the competency of the settlor at the time that the family partnerships were set up.

OUTCOME: The court affirmed the declaratory judgment against the remaindermen but reversed the dismissal of the count for breach of fiduciary duty and remanded for a new trial on that count.

CORE TERMS: co-trustees, beneficiary, stock, settlor, partnership, stock split, lifetime, fiduciary duty, revocable trust, reply, incapacity, shares of stock, contingent beneficiaries, gift, owed, distributed, involuntary dismissal, declaratory, split, owe, amount of stock, planning, remainderman, contingent, ademption, breached, testator's, settler, conform, vested

LexisNexis(R) Headnotes

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] The appellate court reviews a judgment entered on a trial court's decision to grant a motion for involuntary dismissal at the close of a plaintiff's case de novo. An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a prima facie case on the non-moving party's claim.

Estate, Gift & Trust Law > Trusts > Administration
Estate, Gift & Trust Law > Wills > Failure of Bequests > Ademptions
[HN2] Florida follows the general rule that where a will bequeaths stock to a beneficiary and the stock splits, because the split is a mere change in form and not in substance, a beneficiary is entitled to the shares generated by stock splits that occur between the date of execution and demise. Where the stock devise made in the will is no longer in the estate at the time of the testator's death, the gift is considered adeemed. For securities, however, this issue is controlled by section 736.1107. Fla. Stat. (2007). Section 736.1107 codifies the rule of ademption and provides that gifts of securities are limited to the securities owned by the trust at the time of death: A gift of specific securities, rather than their equivalent value, shall entitled the beneficiary only to (1) as much of the gift securities of the same issuer held by the trust estate at the time of the occurrence of the event entitling the beneficiary to distribution.

Estate, Gift & Trust Law > Trusts > Administration
Estate, Gift & Trust Law > Wills > Failure of Bequests > Ademptions
[HN3] Section 736.1107, Fla. Stat. (2007) does not require or allow for an inquiry into the intent of the testator. It creates a clear rule of ademption where the trust does not hold the securities at the date of death.

Evidence > Inferences & Presumptions > Inferences
[HN4] One can rely on an inference upon an inference as proof of a fact only if the first inference is established to the exclusion of all other reasonable inferences.

Estate, Gift & Trust Law > Wills > Failure of Bequests > Ademptions
[HN5] The testator's intent is irrelevant regarding the rule of ademption if a statute controls.

Estate, Gift & Trust Law > Trusts > Beneficiaries > Successive Beneficiaries
Estate, Gift & Trust Law > Trusts > Revocable Living Trusts
[HN6] The beneficiaries of a revocable trust other than the settlor do not come into possession of any of the trust property until the event of the settlor's death, and even this interest is contingent upon her not exercising her power to revoke. When the settlor is the sole beneficiary of the trust during her lifetime, she has the absolute right to call the trust to an end and distribute the trust property in any way she wishes.

Estate, Gift & Trust Law > Trusts > Beneficiaries > Successive Beneficiaries
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against
[HN7] During a settlor/beneficiary's lifetime, a trustee owes a fiduciary duty to the settlor/beneficiary and not the remainder beneficiaries, who not only have no vested interest but whose contingent interest may be divested by the settlor prior to her death.

Estate, Gift & Trust Law > Trusts > Beneficiaries > Successive Beneficiaries
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against
[HN8] Once the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary.

Estate, Gift & Trust Law > Trusts > Beneficiaries > Successive Beneficiaries
Estate, Gift & Trust Law > Trusts > Trustees > Duties & Powers > Claims By & Against
[HN9] A trustee owes a lifetime beneficiary the duty to properly manage the assets of the trust, and a breach of that duty can be enforced by the remainderman.

Estate, Gift & Trust Law > Trusts > Administration
Estate, Gift & Trust Law > Trusts > Revocable Living Trusts

[HN10] While a settlor can consent to any actions regarding the revocable trust, including termination, that ability ceases if the settlor becomes incapacitated.

COUNSEL: Philip M. Burlington and Andrew A. Harris of Burlington & Rockenbach, P.A., West Palm Beach, and Charles M. Eiss of Law Office of Charles Eiss, P.L., Weston, for appellants.

John H. Pelzer and Rubin F. Hazel of Ruden, McClosky, Smith, Schuster & Russell, P.A., Fort Lauderdale, for appellee.

JUDGES: WARNER, J. STONE and DAMOORGIAN, JJ., concur.

OPINION BY: WARNER

OPINION

[*878] WARNER, J.

This is an appeal from a final judgment in which the trial court involuntarily dismissed appellants' claims for declaratory **[*879]** judgment and breach of fiduciary duty in the distribution of assets from a trust of the settler/beneficiary. The appellants received a specific gift of stock from the trust but claimed that they should have been entitled to a greater amount of stock because of a stock split. As the stock was not held by the trust at the time of settlor's death, the court declared that the appellants were not entitled to any greater distribution from the trust. It also found that the trustee had no duty to the appellants during the settlor's lifetime and breached no fiduciary duty. We hold that the **[**2]** court properly entered a declaratory judgment against the appellants, but we reverse the count for breach of fiduciary duty because the trial court erred in refusing to admit evidence of the settlor's incapacity to consent to the disputed transfers from the trust.

Dorothy Gutsgell and her husband, who had no children of their own, executed a series of estate planning documents, using the law firm of Ruden McClosky for their planning. In 1992 Dorothy, as settler, executed an amended revocable trust of which she was both the lifetime beneficiary and trustee. The trust provided that should she predecease her husband, the residue would go to her husband, but if he predeceased her, the residue of the trust would go to her niece, appellee Lucy Brundage, whom she treated like a daughter. In addition, the trust provided that upon Dorothy's death, a specific distribution of 6,000 shares of American Home Products ("AHP") stock would be made to each of her four other nephews and nieces, the appellants in this case (hereinafter referred to as the Brundages), and 3,000 shares to a godson. Lucy is the sister of the Brundages.

After the stock of AHP split in 1995, Dorothy executed an amendment to her **[**3]** trust increasing to 12,000 shares the amount of stock to be distributed to the Brundages, and 6,000 to the godson. The stock split again in 1998, while Dorothy was still trustee, but this time she did not execute an amendment increasing the stock to be distributed to the Brundages.

After Dorothy's husband died in April 2001, she met with Ruden McClosky attorney Joseph Ducanis to revisit her estate plan with the goal of minimizing estate taxes on her sizeable financial holdings, because the marginal tax rate on her estate approximated 55%. Ducanis developed a plan to save taxes by transferring the assets of the trust to a family partnership. He created various partnerships and a charitable foundation. The Gutsgell-Brundage Corporation became the general partner of the family partnerships, owning 0.5% of the partnerships, and the revocable trust became the limited partner, owning 99.5% of the partnerships. Different amounts of stock in AHP were transferred from the trust to each of the partnerships.

Dorothy instructed Ducanis to retain in the trust the 54,000 shares of AHP to be distributed to her nieces, nephews, and godson upon her death. Ducanis did not know that the stock had split **[**4]** in 1998. Around that same time, Dorothy resigned as trustee of her trust. The trust provided that Lucy and Bank of America would become co-trustees upon Dorothy's inability or refusal to serve as trustee.

To accomplish the estate planning and transfers of stock to the partnerships, both Lucy and Beverly Rogers, a trust officer at Bank of America, signed three transfers of the AHP stock in the trust, save for the 54,000 to be distributed to the Brundages, to the partnership. Dorothy signed a joinder and consent to these transfers. The Brundages claim that at the time of the transfer Lucy knew of the 1998 stock split of AHP, although the record is not clear on this point. Nevertheless, for the purposes **[*880]** of this appeal we will assume that she did.

Dorothy died in 2003. After her death, the co-trustees of the trust distributed the 54,000 AHP shares among the Brundages in accordance with the terms of the trust. As residuary beneficiary of the trust, Lucy became the owner of the partnerships to which the rest of the AHP shares had been transferred in the estate planning of 2001.

The Brundages demanded that Lucy and Bank of America distribute the additional 54,000 shares of AHP generated by the **[**5]** 1998 stock split. The co-trustees refused, because the trust had no additional AHP shares. All other shares had been assigned to the partnerships in 2001.

The Brundages filed suit for declaratory judgment against Bank of America and Lucy, claiming that as a result of the 1998 stock split, they were entitled to double the amount of stock mentioned in the trust. They later amended their complaint to allege a breach of fiduciary duty against the co-trustees. They alleged that because Lucy was a residuary beneficiary of the trust, and thus the ultimate beneficiary of the stock transfer, her approval of the stock transfer constituted a violation of article IX.M.2. of the trust which provides that "any person . . . eligible to receive any property" under the trust may not make any discretionary decisions, in her capacity as trustee, which will determine "the propriety or amount of payments of income or principal" to herself.

Significant discovery ensued, including the deposition of a doctor who saw Dorothy in late 2001 and concluded that she was not competent to manage her affairs. However, the case was set for trial without further requests to amend the complaint. During a pre-trial conference **[**6]** between the attorneys, the Brundages' attorney noted that the co-trustees had never answered the amended complaint. Within days prior to the trial, the co-trustees answered with a general denial and affirmatively alleged that Dorothy herself consented to the transfers. The Brundages immediately filed a reply in which they alleged that Dorothy was not competent to consent to the transactions.

At trial the co-trustees moved in limine to exclude evidence of Dorothy's mental competency, because the Brundages had not raised it in pleadings. The court granted the motion, concluding that the co-trustees' defense of consent constituted a "simple denial." The Brundages also moved to conform the pleadings to the evidence. [1] The court denied this motion, concluding that raising the mental incapacity of Dorothy only a few days prior to trial when the information regarding any incapacity was available to the Brundages at least a year prior to the trial was prejudicial to the co-trustees in the preparation of their case.

1 This is actually an improper use of a motion to conform as the trial had not yet started and no evidence had been presented at the time of the motion. *See* Fla R. Civ. P. 1.190(b). **[**7]** Thus, the issue had not been tried by implied consent of the parties.

During the trial, Ducanis testified that Dorothy had instructed him to preserve the stock distributions to the Brundages in the trust and had signed the joinder and consents to the transfers of stock to the partnerships. At the close of the case, the Brundages again moved to conform the pleadings to the evidence so that they could raise a claim of mental incapacity, arguing that the evidence presented had opened the door to such a claim. Again concluding that the claim could not be raised at trial to the prejudice of the co-trustees, the court denied the motion.

Upon motion for involuntary dismissal by the co-trustees, the court declared that the Brundages were not entitled to the **[*881]** additional shares of stock generated from the stock split in 1998, because the trust did not own any additional shares on the date of Dorothy's death. It concluded that the co-trustees did not owe a fiduciary duty to the Brundages, who were contingent beneficiaries under the revocable trust during Dorothy's lifetime, nor did they show any breach of any duty. The Brundages appeal the final judgment.

[HN1] We review a judgment entered on a trial court's **[**8]** decision to grant a motion for involuntary dismissal at the close of the plaintiff's case de novo. *Widdows v. State Farm Fla. Ins. Co.*, 920 So. 2d 149, 150 (Fla. 5th DCA 2006). "An involuntary dismissal or directed verdict is properly entered only when the evidence considered in the light most favorable to the non-moving party fails to establish a *prima facie* case on the non-moving party's claim." *McCabe v. Hanley*, 886 So. 2d 1053, 1055 (Fla. 4th DCA 2004) (quoting *Hack v. Estate of Helling*, 811 So. 2d 822, 825 (Fla. 5th DCA 2002)).

In their declaratory judgment action, the Brundages sought a declaration regarding the effect of the 1998 stock split on their right to distribution of the trust. [HN2] Florida follows the general rule that where a will bequeaths stock to a beneficiary and the stock splits, because the split is a mere change in form and not in substance, a beneficiary is entitled to the shares generated by stock splits that occur between the date of execution and demise. *See In re Vail's Estate*, 67 So. 2d 665, 667 (Fla. 1953). Where the stock devise made in the will is no longer in the estate at the time of the

testator's death, the gift is considered adeemed. *In re Estate of Walters*, 700 So. 2d 434, 436 (Fla. 4th DCA 1997). **[**9]** For securities, however, this issue is controlled by section 737.622, Florida Statutes (repealed and reenacted verbatim in the Florida Trust Code as section 736.1107, Florida Statutes (2007). *See* Ch. 2006-217, § 11, Laws of Fla.). That statute codifies the rule of ademption and provides that gifts of securities are limited to the securities owned by the trust at the time of death:

Change in securities; accessions; non-ademption

> A gift of specific securities, rather than their equivalent value, shall entitle the beneficiary only to:
>
> (1) As much of the gift securities of the same issuer held by the trust estate at the time of the occurrence of the event entitling the beneficiary to distribution.

§ 736.1107, Fla. Stat. As the trust did not hold any more than 54,000 shares of AHP stock on the date of Dorothy's death, the event entitling the beneficiaries to the distribution, the Brundages cannot claim a greater share. They argue that the court should have considered Dorothy's intent with respect to the distribution of the stock before ruling on the legal effect of the transfer. [HN3] The statute, however, does not require or allow for an inquiry into the intent of the testator. It creates a clear **[**10]** rule of ademption where the trust does not hold the securities at the date of death. [2]

> 2 Even if we considered her intent, we would have to conclude that the Brundages had not presented evidence to show that Dorothy would have intended for them to receive the additional shares of stock because they would be stacking inference upon inference. They infer that Dorothy did not know about the 1998 stock split and that had she known about it she would have executed an amendment to her trust as she did in 1995 to provide them with the additional shares of stock. However, the initial inference is not the only reasonable inference which can be drawn. Dorothy was trustee of her own trust in 1998 and thus was in charge of all of the assets. Therefore, it is equally reasonable to assume that she did know of the split, because she would have received all notices and statements regarding her stock account. [HN4] One can rely on an inference upon an inference as proof of a fact only if the first inference is established to the exclusion of all other reasonable inferences. *Nielsen v. City of Sarasota*, 117 So. 2d 731, 733 (Fla. 1960).

We find inapposite *In re Estate of Jones*, 472 So. 2d 1299 (Fla. 2d DCA 1985), **[**11]** and *In Re Estate of Budny*, 815 So. 2d 781 (Fla. 2d DCA 2002), which the Brundages cite for **[*882]** the proposition that the court may consider intent to preclude the rule of ademption when the property bequeathed is disposed of prior to the decedent's death. Both of those cases did not involve the disposition of securities, and thus did not interpret or apply the statute which controls in this case. In fact, *Jones*, one of the Brundages' principal cases, noted [HN5] "the testator's intent is irrelevant" *if a statute controls*. 472 So. 2d at 1301.

In their second count, the Brundages claim that the co-trustees breached their fiduciary duty by engaging in self-dealing. In particular, they alleged that because they would have been entitled to additional shares of stock because of the stock split as a matter of law had the shares remained in the trust at Dorothy's death, the transfer of those shares of stock out of the trust to the partnership amounted to self-dealing on the part of Lucy who benefitted from the transfer of title to the stock. The trial court determined that during Dorothy's lifetime, the co-trustees owed no fiduciary duty to the Brundages, the contingent beneficiaries. Moreover, the court **[**12]** found that the Brundages had not proved any breach of fiduciary duty. We agree that the co-trustees did not owe the contingent beneficiaries a duty during Dorothy's lifetime, but the co-trustees did owe duties to Dorothy and the trust which the Brundages could sue to enforce after Dorothy's death.

As settlor of her own revocable trust of which she was the sole beneficiary until her death, Dorothy reserved to herself the sole power to change beneficiaries or revoke her trust at any time. [HN6] "[T]he beneficiaries of [the] trust other than [the settler] . . . do not come into possession of any of the trust property until the event of [the settlor's] death, and even this interest is contingent upon her not exercising her power to revoke. Since she is the sole beneficiary of the trust during her lifetime, she has the absolute right to call the trust to an end and distribute the trust property in any way she wishes." *Fla. Nat'l Bank of Palm Beach County v. Genova*, 460 So. 2d 895, 897 (Fla. 1984) (emphasis omitted). The interest of the Brundages did not vest until Dorothy's death. *See In re Johnson's Estate*, 397 So. 2d 970 (Fla. 4th DCA 1981). It follows that [HN7] during the settlor/beneficiary's lifetime, **[**13]** a trustee owes a fiduciary duty to the settlor/beneficiary and not the remainder beneficiaries, who not only have no vested interest but whose contingent interest may be divested by the settlor prior to her death.

We have found no case which enforces on a trustee a duty owed to a contingent beneficiary of a revocable trust. [HN8] However, once the interest of the contingent beneficiary vests upon the death of the settlor, the beneficiary may sue for

breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and subsequently affects the interest of the vested beneficiary. *Smith v. Bank of Clearwater*, 479 So. 2d 755 (Fla. 2d DCA 1985), illustrates this principle. In *Smith* the court held that a contingent remainderman of a trust, whose interest vested with the death of the lifetime beneficiary, had standing to sue for mismanagement of trust assets during the lifetime of the income beneficiary, because such mismanagement diminished the value of the trust assets to which the remainderman was entitled. [HN9] The trustee owed the lifetime beneficiary the duty to properly manage the assets of the trust, and a breach of that duty could be enforced **[**14]** by the remainderman. *Cf. Siegel v. Novak*, 920 So. 2d 89 (Fla. 4th DCA 2006) **[*883]** (applying New York law and reaching a similar result).

The Brundages accuse the co-trustees of self-dealing in the assignment of the AHP shares to the family partnership. Specifically, both in the complaint and at trial, they attempted to prove a violation of article IX.M.2. of the trust, which prohibits a trustee from participating in the "exercise of any discretion to determine the propriety or amount of payments of income or principal" to himself or herself. This obligation constitutes a duty owed to the settlor/beneficiary, expressly contained within the trust instrument itself. Without Dorothy's consent, the establishment of the partnerships and the transfer of all of the AHP stock to those partnerships would constitute investment and management decisions which would require the exercise of discretion on the part of the co-trustees.

The co-trustees argue that they, and particularly Lucy, did not engage in any discretionary act in assigning the AHP stock to the partnership, because the assignment was all part of an estate plan that Dorothy controlled and implemented through her attorney's advice. Dorothy's **[**15]** joinder in the transaction indicates her consent to the transfer. The co-trustees merely exercised a ministerial function in signing documents prepared and requested by the settlor. The co-trustees' argument does not deny that Lucy benefitted from the transaction. If Dorothy had not consented to the transactions, then the Brundages would have presented sufficient evidence that the trustees engaged in investment and management decisions which may have violated the terms of the trust. The evidence was at least sufficient to overcome the motion for involuntary dismissal of the breach of fiduciary duty count.

Responding to the co-trustees' affirmative defense of consent, the Brundages claimed in their reply that Dorothy's consent was void because she was incompetent at the time. [HN10] While a settlor can consent to any actions regarding the revocable trust, including termination, that ability ceases if the settlor becomes incapacitated. *See Genova v. Fla. Nat'l Bank*, 433 So. 2d 1211 (Fla. 4th DCA 1983), *approved by Fla. Nat'l Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984). Thus, Dorothy's capacity to consent to the transfers, on which consent the co-trustees relied in seeking **[**16]** involuntary dismissal and in this appeal, was crucial. The trial court refused to permit evidence of her incompetency at trial. This was error because the claim was contained within the timely filed reply.

The co-trustees did not file an answer to the second amended complaint until days prior to trial in which they raised as an affirmative defense that Dorothy consented to the transactions. Their failure to file an answer appears to be an oversight, but the fact that the answer was late should not be charged against the Brundages. Indeed, they could have, but did not, move for a default on the entire matter because of the co-trustees' failure to answer the amended complaint. Instead, they filed a reply in avoidance of the consent, claiming that Dorothy was incapacitated at the time of its execution.

The trial court erred in concluding that the co-trustees' reliance on Dorothy's consent in their answer was nothing more than a denial of the allegations of the complaint. The co-trustees quite clearly relied on Dorothy's consent in proving their case. In reply, the Brundages should have been entitled to attack that consent on the ground of Dorothy's incapacity. It was an abuse of discretion **[**17]** to refuse to permit testimony regarding the capacity of the settlor when the issue had been properly raised in the reply.

When the issue of incapacity was introduced in the pleadings on the eve of trial, **[*884]** the co-trustees were not prepared with witnesses to meet that issue. Nevertheless, they could not affirmatively allege reliance on Dorothy's consent without permitting the Brundages to claim that the consent was void. A better solution to the prejudice to the co-trustees caused by their failure to answer in a timely manner would have been to continue the case.

Because the trial court abused its discretion in refusing to admit evidence of Dorothy's mental capacity to execute the consent, we reverse and remand for a new trial on count two of the complaint.

Affirmed in part, reversed in part, and remanded for proceedings in accordance with this opinion.

STONE and DAMOORGIAN, JJ., concur.

22 of 25 DOCUMENTS

RICE et al. v. PAGER et al.

S08A0909.

SUPREME COURT OF GEORGIA

284 Ga. 87; 663 S.E.2d 172; 2008 Ga. LEXIS 537; 2008 Fulton County D. Rep. 2142

June 30, 2008, Decided

PRIOR HISTORY: Wills. Fulton Superior Court. Before Judge Bedford.

DISPOSITION: [*1]** Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, a co-trustee of a testamentary trust, filed an action against appellee co-trustee to compel appellee to execute the closing documents necessary to sell certain real property. Appellee, who argued that the will did not give appellant the authority to sell the property, filed a counterclaim for a declaratory judgment. A Georgia trial court granted summary judgment for appellee. Appellant challenged the trial court's decision.

OVERVIEW: Item 6(E) of the will stated that the property in question should be held in trust for the benefit of appellee for seven and a half years. Items 6(K) and 7(J) dealt with the general category of "any home" held or acquired by the trustees. The court stated that the only reasonable construction of Items 6(K) and 7(J) was that the testatrix intended to give appellant absolute authority to direct the sale of any home that was not already the specific subject of a mandatory distribution elsewhere in the will. Because the intervention of a trust did not change the rules of construction of a will, the specific grant of the real property by the plain, mandatory language of Item 6(E) was not to be lessened by the far less clear and more general limitation in the other provisions. Although appellant alternatively relied on parol evidence regarding the knowledge and intention of the testatrix, such evidence was admissible only when the rules of construction failed to enlighten a court as to the meaning of a will. It was not admissible to show that the testatrix meant one thing when she said another.

OUTCOME: The court affirmed the judgment.

CORE TERMS: co-trustee, rules of construction, summary judgment, real property, shelter, mandatory language, particular property, parol evidence, unequivocal, admissible, lessened, residuary trust, individually

LexisNexis(R) Headnotes

Estate, Gift & Trust Law > Trusts > Interpretation
Estate, Gift & Trust Law > Wills > Interpretation > Rules of Construction > General Overview
[HN1] When a will leaves the testator's property to a trustee, the intervention of a trustee does not prevent application of the usual rules of construction, just as if the property had been devised in the form of legal estate.

Estate, Gift & Trust Law > Wills > Interpretation > Rules of Construction > General Overview
[HN2] An estate granted in plain and unequivocal language in one item of a will cannot be lessened or cut down by a subsequent item, unless the language therein is as clear, plain, and unequivocal as that in the former item.

Estate, Gift & Trust Law > Wills > Interpretation > Testator's Intent > Extrinsic Evidence

Estate, Gift & Trust Law > Wills > Interpretation > Testator's Intent > Plain & Unambiguous Language
[HN3] Parol evidence is not admissible to show that a testator meant one thing when he said another. Parol evidence is admissible only when the rules of construction fail to enlighten a court as to the meaning of a will, and this, whether the ambiguity was latent or patent. Where the terms of a will when legally construed are plain and unambiguous, parol evidence cannot be received for the purpose of showing an intention contrary to that which the language when properly construed necessitates.

COUNSEL: *Caldwell & Watson, Cullen C. Wilkerson, Bridget B. James*, for appellants.

Gaslowitz Frankel, Adam R. Gaslowitz, Craig M. Frankel, LeAnne M. Gilbert, Brian M. Deutsch, for appellees.

JUDGES: Carley, Justice. All the Justices concur.

OPINION BY: CARLEY

OPINION

[*87] [173] Carley**, Justice.

Margaret Louise Rice (Testatrix) died in 2003, and was survived by her husband Kenneth Malcolm Rice (Appellant) and by children from each of their former marriages. Testatrix's will established a credit shelter trust and a residuary trust, and named Appellant and **[*88]** her son Bradford L. Pager (Appellee) as co-trustees of each trust. Subsequent to the probate of the will, Appellant as executor transferred a 75% interest in certain real property (hereinafter "Lake House") into the credit shelter trust and the remaining 25% interest into the residuary trust. In 2007, Appellant entered into a contract to sell the Lake House and requested Appellee to execute the necessary closing documents, but Appellee refused to do so. Appellant, individually and in his capacity as co-trustee of the two trusts, filed a petition against Appellee, individually and as co-trustee, to compel him to perform his duties as co-trustee by executing the closing documents. In his answer, Appellee counterclaimed for declaratory judgment, seeking a ruling that the will does not give Appellant **[**174]** the authority to direct the co-trustees to sell **[***2]** the Lake House.

On cross-motions for summary judgment, the trial court held that Item 6 (E) of the will unambiguously carves the Lake House out from the property of the credit shelter trust and gives Appellee the option to receive it 7.5 years after Appellant's death. The trial court further held that, applying Georgia's rules of construction, Items 6 (K) and 7 (J), which permit Appellant to direct the trustees to sell any "home" held by the trusts, do not apply to the Lake House, which can only be sold during Appellant's lifetime under those provisions that allow the trustees to encroach upon the principal if they agree that the sale is necessary to provide for Appellant. Accordingly, the trial court granted summary judgment in favor of Appellee and denied Appellant's motion for summary judgment. Appellant appeals from this order.

Item 6 (E) is the only provision in the will which deals specifically with the Lake House. That provision gives Appellee two alternatives for distribution of trust property after the death of Appellant. The first alternative does not call the Lake House by that name, but rather identifies it as "real property," including a legal description, and states that, **[***3]** at Testatrix's death, it "shall pass to my Trustee." Item 6 (E) then states the following:

> My trustee shall hold said real property in trust for the benefit of [Appellee] for seven and one-half years from the latter of my spouse's or my death. During this time period, my Trustee shall hold said real property for the benefit and enjoyment of [Appellee].

[HN1] "The will leaves the [Testatrix's] property to a trustee, but the intervention of a trustee does not prevent application of the usual rules of construction, just as if the property had been devised in the form of legal estate. [Cits.]" *Lane v. C & S Nat. Bank*, 195 Ga. 828, 833 (1) (25 SE2d 800) (1943). See also *Barnes v. NationsBank*, 267 Ga. 234, 235 **[*89]** (476 SE2d 563) (1996).

The mandatory language of the first distribution alternative in Item 6 (E) and its application to a specific part of the corpus indicates that any discretion to sell that particular property cannot be absolute. See *Henderson v. Collins*, 245 Ga. 776, 779 (2) (267 SE2d 202) (1980). As noted, Items 6 (K) and 7 (J) deal with the general category of "any home" held or acquired by the trustee. Assuming that the Lake House may be described as a home, construing Items 6 (K) and **[***4]** 7 (J) so as to give Appellant alone the authority to sell it would be inconsistent with the requirement that that particular property be held in trust for Appellee subject to his election. The only reasonable construction of Items 6 (K) and 7 (J) is that Testatrix intended to give Appellant absolute authority to direct the sale of any home which was not

already the specific subject of a mandatory distribution elsewhere in the will. *Jordan v. Middleton*, 220 Ga. 903, 907 (1) (142 SE2d 806) (1965). Moreover,

> [HN2] an estate granted in plain and unequivocal language in one item of a will can not be lessened or cut down by a subsequent item, unless the language therein is as clear, plain, and unequivocal as that in the former item. [Cits.] This court has adopted this canon of construction. [Cit.]

Moore v. Cook, 153 Ga. 840, 843-844 (113 SE 526) (1922). Since the intervention of a trust does not change the rules of construction, the specific grant of the Lake House by the plain, mandatory language of Item 6 (E) should not be lessened by the far less clear and more general limitation in Items 6 (K) and 7 (J).

Appellant alternatively relies on parol evidence regarding the knowledge and intention of **[***5]** Testatrix. However, [HN3] "'[p]arol evidence is not admissible to show that the [Testatrix] meant one thing when [s]he said another.'" *Hall v. Beecher*, 225 Ga. 354, 357 (168 SE2d 581) (1969). Parol evidence is admissible only when "the rules of construction ... failed to enlighten the Court as to the meaning of the [will], and this, whether the ambiguity was latent or patent." *Hill v. Felton*, 47 Ga. 455, 465 (1872). Where, as here, "'the terms of a will when legally construed are plain and unambiguous, parol evidence can not be received for the purpose of showing an intention contrary to that which **[**175]** the language when properly construed necessitates.' [Cits.]" *Hall v. Beecher*, supra.

Accordingly, the trial court correctly granted summary judgment in favor of Appellee.

Judgment affirmed. All the Justices concur.