Civil Action No. 3:12-cv- 00416-F (O)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

GARY N SCHEPPS,
PETFINDERS, LLC,
NOVO POINT, LLC, AND
JEFFREY BARON
Appellants,

v.

CHAPTER 11 TRUSTEE DANIEL J. SHERMAN
Appellee

Appeal from the United States Bankruptcy Court
For the Northern District of Texas, Dallas Division
Bankruptcy Petition No. 09-34784-sgj11

APPELLANTS' REPLY BRIEF

Respectfully submitted,

/s/ Gary N. Schepps
Gary N. Schepps
Texas State Bar No. 00791608
Drawer 670804
Dallas, Texas 75367
(972) 200-0000 - Telephone
(214) 347-4031 - Facsimile
Email: legal@schepps.net

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY ISSUES PRESENTED 1

REPLY STATEMENT OF THE CASE AND FACTS 1

ARGUMENT AND AUTHORITIES 1

REPLY ISSUE 1. CORROBORATIVE EVIDENCE IS REQUIRED TO DRAW A NEGATIVE INFERENCE. 1

REPLY ISSUE 2. THE ‘RECEIVERSHIP ORDER’ IS VOID. 6

CONCLUSION 7

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

FEDERAL CASES

Armstrong v. Manzo,
380 U.S. 545, 552 (1965)........ 6

Baxter [Baxter v. Palmigiano,
425 U.S. 308 (1976)], 425 U.S. at 318, 96 S.Ct. at 1558 4

Boddie v. Connecticut,
401 U.S. 371, 379 (1971)........ 6

Cochrane v. WF Potts Son & Co.,
47 F.2d 1026, 1029 (5th Cir. 1931) 6

Ferrante v. United States,
516 U.S. 806, 116 S.Ct. 50, 133 L.Ed.2d 15 (1995)........ 4

Gannett Co. v. DePasquale,
443 U.S. 368, 412 (1979)........ 6

Goss v. Lopez,
419 U.S. 565, 579 (1975)........ 6

In re Winstar Communications, Inc.,
348 BR 234, 281 (D.Del. 2005)........ 3

Pennoyer v. Neff,
95 U.S. 714, 737 (1878)........ 6

Petroleos Mexicanos v. Crawford Enterprises, Inc.,
826 F.2d 392, 401 (5th Cir.1987) 4

Phillips v. Vandygriff,
711 F.2d 1217, 1227 (5th Cir. 1983) 6

Registration Control Systems v. Compusystems, Inc.,
922 F.2d 805, 807 (Federal Cir. 1990) 6

United States v. Private Sanitation Industry Ass'n,
899 F.Supp. 974, 982 (E.D.N.Y.1994), aff'd 47 F.3d 1158........ 4

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286, 291 (1980)........ 6

REPLY ISSUES PRESENTED

REPLY ISSUE 1. Corroborative Evidence is Required to Draw a Negative Inference.

REPLY ISSUE 2. The 'receivership order' is void.

REPLY STATEMENT OF THE CASE AND FACTS

The Facts argued by the Appellee are erroneous and not supported by the record. Each and every factual averment of the Appellee is contested.

ARGUMENT AND AUTHORITIES

REPLY ISSUE 1. Corroborative Evidence is Required to Draw a Negative Inference.

The Appellee, having lined his and his counsel's pockets with over two million dollars of Baron's money, constructs a conspiracy theory picture of Jeff Baron with long arms somehow reaching from beyond the grave to conspire against justice in America. There is no evidence to support the groundless fabrications of alleged misconduct alleged by the Appellee against the undersigned. Yet, the Appellee feels compelled to accuse the undersigned counsel of criminal wrongdoing. Perhaps the Appellee feels the need to attempt to delegitimize an opposing attorney who has shown on appeal that:

(1) The Appellee induced Baron to fund the Bankruptcy Estate with a net <u>three million dollars</u> by promising to immediately pay off all the creditor claims (mostly attorneys) and return Ondova to Baron with around $1 Million in the bank and all the non-cash assets intact;

(2) The Appellee then broke the agreement—an agreement which has been admitted on the record— and started running up, in the space of 30 days, hundreds of thousands of dollars in attorneys fees instead of paying off the attorney creditors and closing the bankruptcy;

(3) Baron objected and then, within just three business days, the Appellee secretly consulted *ex parte* with the Special Master Peter Vogel over in the District Court, to have the District Judge act in secret, without notice or an opportunity for Baron to be heard, to issue a complete and total receivership order over Baron to seize all of Baron's exempt and non-exempt assets, and to prevent Baron from earning any money, and to prevent Baron from hiring an attorney to defend himself;

(4) The Appellee then participated in off-the-record *ex parte* proceedings before the District Court to implement the plan worked out with Vogel, and to convince the Court that Baron was a menace to society (or at least to Attorneys) by painting a false picture for the Court including, by the following:

a. Falsely representing to the Court that Baron didn't pay his bankruptcy lawyer Thomas and thus forced Thomas to withdraw;

b. Falsely representing to the Court that the Bankruptcy Judge recommended a receiver be placed over Baron should Thomas withdraw (in reality, Thomas neither withdrew nor was owed unpaid fees);

c. Falsely representing that Baron caused the Court ordered mediation to fail;

d. Failing to disclose to the Court that Ondova had more than sufficient cash in the bank to pay ALL of the attorney creditors who filed claims with Ondova, plus ALL of the attorney claimants who had not so filed; and

e. Participating in a concerted effort to mislead the District Court into believing that under the bankruptcy code, a creditor such as Baron was liable to indemnify the bankruptcy estate for the substantial contributions of his counsel—when no such law exists and the law is exactly opposite, i.e., the bankruptcy estate and not the creditor must ultimately pay for qualifying substantial contributions.

(5) Then, after obtaining the *ex parte* receivership order in secret proceedings, the Appellee made concerted efforts to cover-up and deny the existence of the *ex parte* proceedings and to conceal the fact that the receivership order [Doc 124]

had been signed hours before the Appellee's motion for such an order was filed [Doc 123]; and

(6) Since Baron has been locked down and prohibited from retaining trial counsel to defend himself against the economic rape of himself and his property and the property of Ondova, the Appellee has engaged in a round-the-clock, non-stop blizzard of billing so massive that the Appellee has nearly completely emptied the bank accounts of Ondova. The Appellee has placed into his own pockets and the pockets of his attorney all of the money that the he had promised Baron would be used to immediately pay the bankruptcy court attorney claimants, as well the surplus money that could have been used to pay non-claimant attorneys had they made claims. In fact, one attorney who made a claim in the bankruptcy court has even objected to the Appellee's actions and has pointedly noted that the Appellee is taking the reserved funds that would have been used to pay attorney claimants should they prevail on their claims in the bankruptcy proceedings.

(7) After using secret off-the-record *ex parte* proceedings to secure an *ex parte* order preventing Baron from having any paid counsel to represent him, the Appellee and Vogel have gorged themselves on the assets of Baron, Ondova, and the other receivership entities, emptying the estate of Ondova and lining their and their firms' pockets with nearly **five million dollars in 'fees'.** No claimant has received a penny, and the funds of Ondova are essentially fully drained. The Appellee of course, attempts to place the blame on the whipping boy, Baron—tied by the Court's order and helpless without paid counsel or trial counsel to defend himself so that the Appellee and Vogel can have their way with him, and the estates' assets.

Now, to support the completely unsubstantiated claims fabricated against the undersigned, the Appellee seeks to rely upon 'negative inference'. However, as succinctly explained by the Judge Rosenthal in *In re Winstar Communications, Inc.*, 348 BR 234, 281 (D.Del. 2005):

> Before an adverse inference may be drawn from a party's refusal to testify in a civil case, **there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege.** *See Baxter* [*Baxter v. Palmigiano, 425 U.S. 308 (1976*)], 425 U.S. at 318, 96 S.Ct. at 1558. ("the Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify **in response to probative evidence offered against them**"); "**[L]iability should not be imposed based solely upon the adverse inference.**" *United States v. Private Sanitation Industry Ass'n*, 899 F.Supp. 974, 982 (E.D.N.Y.1994), aff'd 47 F.3d 1158 (2d Cir.), cert. denied sub. nom., *Ferrante v. United States*, 516 U.S. 806, 116 S.Ct. 50, 133 L.Ed.2d 15 (1995).

Accordingly, even had the proceedings below not been to vindicate the Court's authority with "$50,000.00" being the pre-declared punishment necessary to 'get the attention' of the alleged offenders and to prevent the violation of future orders, negative inference does not support the Bankruptcy Court's findings because there is no independent corroborative evidence of the underlying findings. For example, there is no corroborative evidence that the undersigned had knowledge of the content of the orders alleged to have been contemptuously violated. Rather, the testimony uniformly established that the undersigned was not provided a copy of the orders before taking allegedly contemptuous action. The Bankruptcy Court erred in failing to use the clear and convincing standard in reaching its findings, and there is no clear and convincing evidence of record to support even civil contempt. *See Petroleos Mexicanos v. Crawford Enterprises, Inc.*, 826 F.2d 392, 401 (5th Cir.1987).

Notably, the Appellee has routinely offered completely fictitious claims directed personally against opposing counsel as the basis for the Appellee's arguments, as discussed below. The Appellee has used this technique in the Fifth Circuit, and for example, argued the undersigned fabricated a forged bill of sale to substantiate the transfer of domains from Ondova to Novo Point, LLC. It was then shown that the Appellee previously acknowledged

the very same document in prior filings before the Bankruptcy Court. The Appellee again uses this technique in his current briefing. For example, the Appellee argues (without any evidence) that SouthPac Trust did not hire the undersigned. While that groundless argument is made here, concurrently in the main District Court case and before the Fifth Circuit, Vogel takes the opposite position and argues that Baron controls SouthPac Trust. Notably, the Appellee references the order by which the undersigned was ordered to file documentation of the corporate authority for his employment, but the Appellee fails to mention—in contravention of the Appellee's current argument—that the documentation was filed, and the formal corporate authorization for Novo Point LLC to retain the undersigned was executed by its Cook Islands manager and filed of record in the Bankruptcy Court.

REPLY ISSUE 2. The 'receivership order' is void.

An *ex parte* order such as the 'receivership order' that was signed without a motion on file to support it, and without notice, opportunity to be heard, sworn affidavits, or bond to protect the rights of those adversely affected by the order, etc., is an order fundamentally devoid of due process and void as a matter of law. As a matter of well-established law, failure to afford a party the opportunity to be heard on a motion seeking relief against them is fundamentally inconsistent with the notion of due process, and orders issued without such an opportunity are void. *See e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Phillips v. Vandygriff*, 711 F.2d 1217, 1227 (5th Cir. 1983); *Registration Control Systems v. Compusystems, Inc*., 922 F.2d 805, 807 (Federal Cir. 1990). Thus, the Supreme Court has described secret judicial proceedings as "a menace to liberty". *Gannett Co. v. DePasquale*, 443 U.S. 368, 412 (1979). Because the 'receivership order' was signed in secret, off-the-record proceedings before a motion requesting the order was filed and failed to provide the most basic aspects of Due Process, the order is void *ab initio* and subject to collateral attack in the Bankruptcy Proceedings. *See e.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 737 (1878) ("such proceeding is void as not being by due process of law"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("rendered in violation of due process is void in the rendering").

The 'receivership order' is also void for lack of subject matter jurisdiction. The district court lacked subject matter jurisdiction to enter the receivership order because no claim for relief regarding the property ordered into receivership was pled before that court. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (absent pleadings asserting a claim in and to the property subject of the receivership, an order appointing a receiver over that property is "absolutely void in the strictest sense of the term").

CONCLUSION

The Bankruptcy Court's order should be reversed.

Respectfully submitted,

/s/ Gary N. Schepps
Gary N. Schepps
Texas State Bar No. 00791608
Drawer 670804
Dallas, Texas 75367
(972) 200-0000 - Telephone
(214) 347-4031 - Facsimile
Email: legal@schepps.net

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing system.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANTS