

No. 10-11202
In the
United States Court of Appeals
for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs

v.

JEFFREY BARON,
Defendant-Appellant

v.

ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

Cons. w/ No. 11-10113

NETSPHERE INC., Et Al, Plaintiffs

v.

JEFFREY BARON, Et Al, Defendants

v.

QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants

v.

PETER S. VOGEL,
Appellee

Appeal of Order Adding Non-Parties Novo Point, LLC
and Quantec, LLC as Receivership Parties

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

**RESPONSE AND MOTION FOR RELIEF WITH RESPECT TO
VOGEL MOTION TO LIQUIDATE JEFF BARON'S STOCKS**

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW JEFFREY BARON, Appellant, and subject to the preliminary Fifth Amendment objection and motion previously filed in this cause, make this response, objection and motion for relief with respect to Vogel's motions to liquidate Jeff Baron's stocks.¹ Vogel's motion to liquidate Baron's IRAs was denied by the District Court and has been withdrawn by Vogel, and this response addresses Vogel's motion to liquidate Baron's stocks.

I. ARGUMENT AND AUTHORITY

There Are No In Rem Claims Against Jeff Baron's Property

Contrary to the underlying basis of Vogel's motion, there are no *in rem* claims against Jeff Baron's property being held in receivership. As a preliminary matter, an unsecured creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his alleged debtor. This is true, whatever the nature of the property. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. Accordingly, a court does not have equitable jurisdiction to use receivership to enforce unsecured creditors' *in personam* claims (against the owner of the

¹ The three motions involved are (1) 07/05/2011 MOTION filed by Appellee Mr. Peter S. Vogel of The Receiver's Omnibus Motion to Permit Cashing Out of Stocks and IRAs (Pending Before the District Court and Filed with the Fifth Circuit Pursuant to District Court Order) [6850979-2]; (2) 07/05/2011 MOTION filed by Appellee Mr. Peter S. Vogel Withdrawing the preceding Motion [6850979-2]; and (3) 7-07-11 Motion to permit liquidation of non-exempt stocks-but not the liquidation of the IRA's.

receivership property) before those claims have been reduced to judgment. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923); e.g., *Williams Holding Co. v. Pennell*, 86 F.2d 230 (5th Cir. 1936).

Vogel is ignoring a fundamental principle of law— the distinction between equitable *in rem* claims against receivership property and *in personam* claims at law against the owner of the receivership property individually. Receivership actions are *in rem* actions over specific property. E.g. *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980). *In personam* actions to establish liability on claims against individuals do not involve the receivership *res*. *Hawthorne Savings v. Reliance Ins. Co.*, 421 F.3d 835, 855 (9th Cir. 2005) (noting the fundamental distinction between “the liquidation of a claim and the enforcement of the claim after it has been reduced to judgment”). After an *in personam* action has been liquidated and reduced to judgment, an attempt to execute the judgment against property is then normally *in rem* (and, thus, an attempt to execute on a judgment would seek an interest in the receivership *res*). *Id.* Accordingly, only an attempt to levy against the *res* made after a judgment has been obtained *in personam* is an *in rem* action that relates to a court's dominion over the receivership *res*. *Id.* Vogel is attempting to create an interest in property that does not exist. The ‘claimants’ against Baron have not asserted any legally cognizable *in rem* claims against the *res* property— rather, the claimants allege that Mr. Baron personally is obligated *in personam* to pay them money for breach of contract. The crucial step of adjudication of *in personam* liability against Baron has not occurred. The District

Court's order to pay 'claimants' against Baron has been appealed and the District Court has been stayed from further proceedings. Notably, a fundamental step of adjudicating *in personam* liability is a constitutionally protected step and, with claims at law, invokes a citizen's right to trial by jury. *E.g., Ross v. Bernhard*, 396 U.S. 531, 531 (1970). Accordingly, it is premature to seek to liquidate Baron's stocks. The matter is currently on appeal and there are no *in rem* claims to the receivership *res*, only unliquidated *in personam* 'claims' against Baron. Notably, the District Court lacks subject matter jurisdiction over those non-diverse *in personam* state law claims against Baron personally.

Irreparable Injury and Costs

Vogel's motion fails to apprise the Court of the irreparable injury and costs involved with the liquidation of the stocks. As a primary matter there is a substantial tax liability which will be incurred with the stock's sale. Additionally, because the stock market is extremely depressed in value at this time, there is a very real likelihood that should the Court at a later time determine that Baron's assets should not have been liquidated to pay the alleged 'claims' solicited against Baron by Vogel, it will not be possible to restore ownership of the stocks currently held because their market value will have vastly appreciated.

Equitable Considerations

As a matter of equity, the Court should examine, at least on a *prima facie*

basis the underlying ‘claims’ for which the stock sale is sought.² These claims have not been tried before any court, the claims were solicited by Vogel and were presented to the District Court below in a one-sided ‘report’ that intentionally excluded all of the exculpatory evidence. SR. v8 p1242-43; SR. v7 p202.

A Better Alternative

Jeff Baron had a million dollars in his savings accounts. He voluntarily turned over his banking information and material to the receiver immediately upon imposition of the receivership. Still, the receiver emptied Baron’s savings accounts in ‘fees’. It is not comprehensible how reasonable costs of protecting a handful of bank accounts and IRAs (that were voluntarily turned over to the receiver) could reach a million dollars, emptying the bank accounts where were ordered conserved by the receivership order. In any case, the only remaining assets of Jeff Baron in receivership are his exempt IRAs³ and the stocks receiver now seeks to liquidate.

If the receivership as to Jeff Baron’s property is now dissolved or stayed pending appeal, Baron can borrow and pay into the receivership cash in the amount of the liquidation value of the stocks. There is no reason to keep Baron in

² A compelling *prima facie* case is established in the record that the ‘claims’ solicited by Vogel against Baron are absolutely groundless. SR. v8 p 1197-1201, 1212- 1243. For example, Doc 522 should be examined. SR. v6 p64. The issues presented in that filing are issues of law based upon the “claimant’s” own evidence and statements and establish that the ‘claim’ is clearly groundless, even frivolous. The District Court’s response to being presented with the clear argument establishing the groundless of the claim was to seal the revelation as if it were some state secret. SR. v6 p64 (sealing Doc 522).

³ Pursuant to Texas Law, the Roth IRA accounts are exempt from execution. Tex.Prop.Code §42.0021; *E.g.*, *In re Youngblood*, 29 F.3d 225 (5th Cir. 1994). The IRAs were not property subject to seizure by the receiver as it is a longstanding principle of law that a receiver may take into his possession only “property which may be taken in execution”. *Booth v. Clark*, 58 U.S. 322, 331 (1855).

receivership— his savings accounts have been fully emptied by the receiver. Allowing Baron to provide a bond in order to be released from the receivership works no hardship to any party, eliminates the necessity to liquidate the stocks (should such a necessity exist), and prevents further irreparable injury. Such a remedy also eliminates the continuing costs of receivership as to Jeff Baron's property. Further, there is no reason Baron should not be allowed to work and engage in business transactions as he is currently prohibited from doing by the receivership order.

II. CONCLUSION & PRAYER

There are no *in rem* claims asserted against Jeff Baron's property held in receivership, and there is accordingly no basis in law to liquidate his stocks. Liquidation of the stocks involves costs including taxes and substantial risk of irreparable injury. The stocks should not be sold until the appeal of the District underlying issue of the denial of Jeff Baron's right to paid counsel and jury trial (or any trial) to defend the *in personam* 'claims' asserted against him is resolved.

Jointly, and in the alternative, Jeff Baron prays that the receivership as to him personally be dissolved or stayed pending appeal and that he be allowed to post bond in the amount of the stocks sought to be liquidated in return for release of the stocks and his exempt property from the receivership, and the restoration of his right to enter business transactions, work, and earn wages.

Respectfully submitted,

/s/ Gary N. Schepps

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COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that this motion 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 APPELLANT

CERTIFICATE OF CONFERENCE

Counsel for the Vogel and Sherman oppose.

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