

Civil Action No. 3:12-cv-00367-F (O)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

JEFF BARON,

Appellant,

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

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CONTENTSii
TABLE OF AUTHORITIES iii
REPLY ISSUES PRESENTED 1
ARGUMENT AND AUTHORITIES 1
 REPLY ISSUE 1. BARON HAS STANDING. 1
 REPLY ISSUE 2. THE ‘RECEIVERSHIP ORDER’ IS VOID. 2
CONCLUSION.....3
CERTIFICATE OF SERVICE.....3

TABLE OF AUTHORITIES

Armstrong v. Manzo,
380 U.S. 545, 552 (1965)..... 2

Boddie v. Connecticut,
401 U.S. 371, 379 (1971)..... 2

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

Gannett Co. v. DePasquale,
443 U.S. 368, 412 (1979)..... 2

Goss v. Lopez,
419 U.S. 565, 579 (1975)..... 2

In re Coho Energy Inc.,
395 F.3d 198, 203 (5th Cir. 2004) 1

Landy v. Federal Deposit Insurance Corporation,
486 F.2d 139 (3rd Cir. 1973)..... 1

Pennoyer v. Neff,
95 U.S. 714, 737 (1878)..... 2

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

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

Securities & Exchg. Com'n v. Spence & Green Chemical,
612 F.2d 896, 903 (5th Cir. 1980)..... 1

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286, 291 (1980)..... 2

REPLY ISSUES PRESENTED

REPLY ISSUE 1. Baron has standing.

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

ARGUMENT AND AUTHORITIES

REPLY ISSUE 1. Baron has standing.

Jeff Baron is clearly “directly and adversely affected pecuniarily by the order of the bankruptcy court” and therefore has standing to appeal. *In re Coho Energy Inc.*, 395 F.3d 198, 203 (5th Cir. 2004). The District Court in the ‘receivership’ proceedings expressly ordered that the undersigned counsel was authorized to represent Baron in the District Court, for “all purposes”. Here, Baron seeks to protect an asset that Vogel, as receiver, refused and failed to defend. Even in statutory SEC receivership cases (which the instant receivership is not) the Fifth Circuit has recognized the right of 'some sort' of derivative action to enforce the rights of a company that the receiver has failed or refused to protect. *See e.g., Securities & Exchg. Com'n v. Spence & Green Chemical*, 612 F.2d 896, 903 (5th Cir. 1980), citing with approval *Landy v. Federal Deposit Insurance Corporation*, 486 F.2d 139 (3rd Cir. 1973). Notably, as discussed below, as a legal matter Baron’s rights were not seized by the ‘receiver’ because the receivership order is void for lack of Due Process and want of subject matter jurisdiction and is therefore is incapable of binding persons or property in any other tribunal, *Pennoyer v. Neff*, 95 US 714, 722-723 (1878).

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,

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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.

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