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On Appeal for Alleged Debtor

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: §
§
JEFFREY BARON, § **Bankr. No. 12-37921-SGJ**
§
Alleged Debtor. §

**JEFFREY BARON’S REQUEST FOR LEAVE TO SEEK LIMITED RELIEF FROM
ORDER CLARIFYING APPLICATION OF STAY TO CERTAIN APPEALS
AND FOR LEAVE TO APPEAL**

Jeffrey Baron (the “Alleged Debtor”), by and through counsel, and pursuant to the Court’s Order Clarifying Application of Automatic Stay to Certain Appeals and for Leave to Appeal:

- (a) [Doc. 111, the “Order 111”], Partial Summary Judgment Order; and
- (b) [Doc. 112, the “Order 112”], Order Denying Alleged Debtor’s Motion To Dismiss For Lack Of Jurisdiction (together, “The Orders”).

A copy of the Orders are attached as Exhibit A.

In support of his request for relief from the Orders, the Alleged Debtor provides a summary of the following issues:

I. Whether the court erroneously relied on a contingent order from the District Court?

To obtain jurisdiction, this Court erroneously relied on the so-called Compromise Order, a non-determinative order from the district court, which approved disbursements of former attorney claims including Petitioning Creditors’ by the Receiver. In the Compromise Order, the district court

acknowledged that the motion requesting the order considered “a settlement and compromise of the Former Attorney Claims” *id.* at p. 5, ¶7, that his consideration was “summary” in nature, *id.* at pp. 6-7, ¶11, and that the Receiver was not required to collect or offer evidence or make arguments to controvert the Former Attorney Claims,” referred to as “the Defense Obligation.” *Id.* at p. 5, ¶8.

In addition to the clearly non-determinative language of the district court’s ruling in the Compromise Order, the district court did not treat this order as a “final judgment” on the claims for FRCP Rule 54(a) purposes. To wit, there was no “judgment” entered; there was no final disposition of *any* of the claims; there was no “severance” of the claims of and the mandatory procedure for certification of fewer than all claims or all parties for finality in FRCP Rule 54(b) was not followed. Thus, it is impossible for the requirements under *11 U.S.C. §303* to have been met.

Perhaps most critically, the Compromise Order to pay the claims was stayed by the district court, as further explained below.

II. Whether The Compromise Order was stayed by order of the District Court, and also upon the Fifth Circuit’s reversal of the receivership?

It is well-established that where creditors possess a stayed order, their claims are subject to a bona fide dispute. *In re Norris*, 183 B.R. 437, 453 (Bankr. W.D. La. 1995), *aff’d*, 114 F.3d 1182 (5th Cir. 1997); *In re Raymark Industries, Inc.*, 99 B.R. 298, 299 (Bankr. E.D. Pa. 1989) (holding that “a creditor who holds a stayed judgment holds a claim which is subject to a bona fide dispute, and hence, lacks standing to institute an involuntary bankruptcy case.”) This Court has defined a “stay” as “[a] stopping; the act of arresting a judicial proceeding by the order of a court. Also, that which holds, restrains, or supports. A stay is a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point *Tesfamichael v. Gonzales*, 411 F.3d 169 (5th Cir. 2005).

On June 18, 2012, the district court entered the Stay of Compromise Order. Exhibit C. In the order, the district court ordered that “no funds be distributed to the former Baron attorneys until the completion of the appeal.” Moreover, the district court expressly recognized that the claims were

subject to a dispute, and ordered that “*Baron should be able to contest the decision before funds are distributed.*” *Id.* at 3. (emphasis added).

In addition to the district court’s stay, the Fifth Circuit imposed its own stay in its Receivership Stay order, even while acknowledging that the status quo, and all prior orders of the district court (including its stay order above) remained in force. Document 00512097486.

III. The Fifth Circuit Court of Appeals Determined that Petitioning Creditors’ Claims are Not Final.

On December 18, 2012, the Fifth Circuit Court of Appeals issued an opinion vacating a receivership imposed over Petitioner and all of his assets (hereinafter “Opinion”). In the Opinion, the Fifth reversed the appealed orders and remanded the case to the District Court in *Netsphere, Inc., et al. v. Jeffrey Baron, et al.*, Civil Action No. 3:09-CV-0988-F, instructing the District Judge to wind down the receivership. Document no. 00512087819.

The Fifth Circuit’s Opinion stated that the Petitioning Creditor’s claims had “not yet been reduced to judgment” (*Id.* at pp. 20-21) and further found that “establishing a receivership to secure a pool of assets to pay Baron’s former attorneys, who were unsecured contract creditors, was beyond the court’s authority”. (*Id.* at p. 18.). Moreover, this court found that “the claims had not been reduced to judgment” (emphasis added). (*Id.* at p. 18). This Court ordered that the assets be returned to their owners through a wind-down procedure.

The Fifth Circuit Court of Appeals held that the district court was not allowed to establish a receivership to secure payment for an unsecured creditor, and stated that:

Baron’s former attorneys were free to make claims against the bankruptcy estate. Many had done so. Alternatively, to the extent that they represented Baron or his companies in matters unrelated to the Ondova bankruptcy, the attorneys could file suit in a court of appropriate jurisdiction to collect the fees owed, which many had done. Establishing a receivership to secure a pool of assets to pay Baron’s former attorneys, who were unsecured contract creditors, was beyond the court’s authority.

5th Cir. Opinion at 18 (emphasis supplied).

On December 18, 2012, the very day that the Fifth Circuit issued its Opinion, the involuntary bankruptcy petition was filed against Mr. Baron by receivership participants with the claims that the Fifth Circuit had determined were not final and had not been adjudicated.

IV. Claims Under 11 U.S.C. §303 are required to be non-contingent

On December 18, 2012, the very day that the Fifth Circuit issued its Opinion, the involuntary bankruptcy petition was filed against Mr. Baron by receivership participants with the claims that the Fifth Circuit had determined were not final and had not been adjudicated.

The Petitioning Creditors' claims under 11 U.S.C. §303 against a debtor with more than 12 creditors and the Court's jurisdiction thereunder, requires and is contingent upon a petition by three or more entities, each of which holds a claim against such debtor "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount". 11 U.S.C. §303(b)(1). Entities alleging a debt which is contingent or the subject of a bona fide dispute as to liability or amount lack standing to petition for the commencement of an involuntary case under §303 of Chapter 11. A person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue. E.g., *Whitmore v. Arkansas*, 495 U.S. 149, 154 (1990).

V. Res Judicata Bars the Petitioning Creditors Claims.

As set out in pleadings and oral argument on the Creditors' Motion for Partial Summary Judgment, the Alleged Debtor maintains that Judge Furgeson's order in Docket No. 575 was not final as the District Court specifically held: (a) that Mr. Baron had a right to litigate counterclaims against all claimants; (b) entered an order stating that funds to be paid under the Compromise Order could not be paid until the Fifth Circuit ruled on the appeals; and (c) the Order did not state that it was final. The Fifth Circuit held that the Compromise Order was not a final determination of the rights of these claimants and that final and binding on the parties. Based on the doctrine of res judicata or collateral estoppel, this finding by the appellate court precludes any claim that there is no bona fide dispute as to the Petitioning Creditors' claims.

The doctrine of res judicata (claim preclusion) requires the following elements: (1) The parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Swate v. Hartwell*, 99 F.3d 1282, 1286 (5th Cir.1996). The Fifth Circuit expressly held that the claims were not decided on the merits, and ruled that the appointment of the Receiver - - pursuant to which authority the Compromises embodied in that order were reached - - was improper. Thus, the Alleged Debtor maintains that res judicata or the doctrine of collateral estoppel must be applied *against* Petitioning Creditor's to preclude Petitioning Creditors' allegations that their claims are undisputed.

VI. The Bankruptcy Ruling Conflicts with the Fifth Circuit Decision.

As a practical matter, this Court's ruling is in direct conflict with the Fifth Circuit's decision holding that the claims of the attorney claimants in the receivership were not determined by the district court on the merits. This places the Bankruptcy Court in the anomalous position of actually or effectively overruling a decision by the Fifth Circuit by holding that a Compromise Order entered by the District Order somehow supersedes an order of the Fifth Circuit.

VII. Whether the bankruptcy court's exercise of jurisdiction interferes with the Fifth Circuit's jurisdiction over the assets?

The exercise of this Court's jurisdiction interferes with the ability of the Fifth Circuit to issue a mandate that can be carried out. After over two years of litigation, the Fifth Circuit held that the assets should be returned to the original owners—not turned over to an involuntary bankruptcy trustee after the Fifth Circuit held that the claims were *disputed* and were *not* determined on the merits by the district court in the Netsphere case. Proceeding forward on an involuntary bankruptcy despite the Fifth Circuit's holding in Netsphere undermines and essentially *nullifies* the Fifth Circuit's mandate and further encroaches on the power of the Fifth Circuit to render a meaningful

judgment in the Netsphere case. In effect, the bankruptcy court proceedings prevent the district court from carrying out the mandate---to return property to the original owners---and therefore prevents winding down of the receivership as ordered by the Fifth Circuit.

WHEREFORE, the Alleged Debtor requests an Order Granting Relief from Partial Summary Judgment Order (Docket 111) and Order Denying Alleged Debtor's Motion To Dismiss For Lack Of Jurisdiction (Docket 112) and granting leave to appeal the Orders.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF SERVICE

This is to certify that, on April 19, 2013, a copy of this Response was served on all counsel through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen R. Cochell