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 TO VOGEL MOTION TO LIQUIDATE JEFF BARON'S IRAS

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, makes this response, objection and motion for relief with respect to Vogel's motions to liquidate Jeff Baron's IRAs.[1]

I. ARGUMENT AND AUTHORITY

1. IRAs Are Exempt by Law from Execution and Seizure

Pursuant to Texas Law, Baron's IRA accounts[2] are exempt from seizure and execution. Tex.Prop.Code §42.0021; *E.g., In re Youngblood*, 29 F.3d 225, 226 (5th Cir. 1994); *Janvey v. Alguire*, 628 F.3d 164,180 (5th Cir. 2010). As a matter of long-standing law, receivership is authorized only over non-exempt property. *E.g.*, *Booth v. Clark*, 58 U.S. 322, 331 (1855); *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010). The public policy behind the exemption of IRAs from execution and seizure is a significant one— allowing individuals to feel secure in their ability to be supported in their old age. If the IRA accounts could be lost like any other non-exempt asset, there would be no real 'security' and the entire public policy behind encouraging the accounts would be defeated. Accordingly, Texas law mandates that the IRAs are exempt from execution and seizure.

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[1] 9-15-11 SEALED MOTION filed by Appellee Mr. Peter S. Vogel in 11-10113 to Liquidate the Baron IRA's based on newly discovered evidence and changed circumstances. [10-11202, 11-10113].

[2] Vogel concedes the IRAs are Baron's and does not contest Baron's legal right to the funds in the IRAs. See also Exhibit A, incorporated herein by reference.

2. Vogel's Erroneous Argument: Withdrawal from IRAs Waives Exemption over Remaining IRA funds

Vogel's Erroneous Citation of the Law

Vogel's argument is based on his misciting of the holding of *In re Pulliam*, 279 B.R. 916, 923 (Bankr.M.D.Ga.2002). Contrary to Vogel's recitation, the holding of *Pulliam* is that an IRA distribution check that was "rolled over" into an IRA ten days before filing bankruptcy by an insolvent debtor could be considered a fraudulent transfer in bankruptcy if the "roll over" was made with the intent to hinder, delay or defraud creditors prior to filing bankruptcy.[3] Because the attempt to "roll over" money into an IRA was found to be a fraudulent transfer, *that* money was taken out of the IRA and considered part of the debtor's general estate. Accordingly, the holding of *Pulliam* does not support Vogel's argument that if funds are taken out of an IRA by a party such withdrawal waives the exempt status of the funds remaining in the IRA. **There is no authority in law for the argument made by Vogel.** Notably, Vogel does not contend that Baron attempted to "roll over" any funds into any IRA, nor that any particular fraudulent transfer into any IRA is involved. Accordingly, *Pulliam* has no application with regard to Baron.[4]

[3] The only finds that were found non-exempt where those funds that had been taken out of an IRA, and then attempted to be "rolled over" back into an IRA just prior to filing bankruptcy.

[4] *See e.g., Barber v. Dunbar (In re Dunbar)*, 313 B.R. 430, 434 (Bankr. C.D.Ill.2004)(explaining the holding of Pulliam: "[T]he court's determination in *In re Pulliam*, 279 B.R. 916 (Bankr.M.D.Ga.2002), that the debtor's return of funds withdrawn from his individual retirement account within the sixty-day period permitted for tax-free rollovers constituted a transfer for purposes of Section 548(a). Because possession of the withdrawn funds changed from the debtor to the custodian of the IRA, placing the funds beyond the reach of the debtor's creditors, the court found that a transfer had been made.")

Vogel's Erroneous Citation of the Facts

If it were relevant for any purpose under the law, it is notable that Baron did not withdraw funds from any IRA to pay an attorney's fees. Rather, Vogel erroneously attempts to pass off the pre-receivership payment to an attorney of the IRA as a withdrawal of IRA funds *by Baron*. Specifically, Vogel has failed to disclose that **the fees were paid directly by the IRA for attorney's services rendered on behalf of the IRA, as a client of the attorney who was paid**.[5] The IRA was, on its own behalf, a party to the lawsuit and was represented by the attorney in court. See Exhibit C. Similarly, the primary client signatory to the attorney's contract was the IRA (through its custodian, the Equity Trust Company).[6] See Exhibit B, page 5. Moreover, the attorney expressly stated that he was representing and working on behalf of the IRA, and was paid by the IRA on that basis. See Exhibit A. Accordingly, as a factual matter Baron did not withdraw funds from an IRA, but rather, the IRA itself paid its attorney for directly representing the IRA.

[5] **Vogel's failure to fully disclose in his motion is troubling** because Vogel is a receiver, acting as an officer of the Court. "[T]he court, as well as all the interested parties have 'the right to expect that all its officers,' including the receiver, will not fail to reveal any pertinent information". *Phelan v. Middle States Oil Corporation*, 154 F.2d 978, 991 (2nd Cir. 1946).

[6] Baron, moreover, signed the lawyer's employment contract only in his capacity as a beneficial interest holder in the IRA, and *expressly* not in his individual capacity. Exhibit B, page 6.

3. Vogel's Erroneous Argument: IRAs Funded through Fraud Waives Exception

Vogel's Erroneous Citation to the Law of IRA Exemptions

Vogel miscites the holding of *Janvey v. Alguire*, 628 F.3d 164 (5th Cir. 2010). *Janvey* expressly holds that "IRA accounts are exempt from seizure" and that was not the issue in *Janvey*. *Id.* at 180. Rather, the issue in *Janvey* was whether "the Employee Defendants received these funds as a fraudulent transfer from the Stanford Ponzi scheme". *Id.* at 181. If the funds were transferred into employees' IRAs by a fraudulent transfer (ie, by an insolvent debtor with intent to hinder his creditors) then the money by law can be returned to the estate of the insolvent debtor. This has nothing to do with the IRAs *per se*, and everything to do with the law of fraudulent transfers. *Janvey* holds that the normal law of fraudulent transfer applies to IRAs. ***Janvey* does not base an IRA's exemption from execution and seizure upon the general conduct of the person originally funding the retirement accounts.** *Jarvey* simply holds that just like money can be recovered from any other recipient of a fraudulent transfer, money can similarly be recovered from IRAs. With respect to Baron, there is not even an *allegation* that the IRAs were funded recently, or while Baron was insolvent. To the contrary, when Baron was placed into receivership he was solvent and had over a million dollars in his savings accounts, plus another half million dollars in stock. Baron's IRAs were set up years ago,[7] and there is no claim that Baron made any fraudulent

[7] See Exhibit A. incorporated herein by reference.

transfer to the IRAs. Accordingly, *Janvey* has no application with respect to Baron's IRAs.

Vogel's "Fraud" Issue is Groundless and Manufactured by Vogel

Notably, there is not even any factual scenario alleged that the IRA funds belong to any other person than Baron. It is uncontroverted that Baron funded the IRAs over half a decade ago. (See Exhibit A). Vogel, moreover, has admitted the IRAs are Baron's. Vogel has offered no evidence and **has not asserted any factual basis of any alleged fraud involving the IRAs**.[8] The legal rule of "negative inference" allows inferences only when someone refuses to "testify in response to probative evidence offered against them". *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Since there was no probative evidence offered against Baron, there can be no "negative inference". *Id.* Moreover, Baron did not refuse to testify about the IRAs. Instead, the "refusal" relied upon by Vogel was Baron's refusal to be personally interrogated by Vogel's attorneys at a meet & confer between Baron's counsel and Vogel's counsel. The meeting was notably neither a hearing nor a deposition.

4. Vogel Lacks Standing and Authority to Make His Motion

As a fundamental, and long-stating principle of law, a receiver "[O]wes a duty of strict impartiality, of 'undivided loyalty,' to all persons interested in the receivership estate, and must not 'dilute' that loyalty." *E.g., Phelan v. Middle*

[8] If there were any such 'fraud' it would have long ago been barred by the statute of limitations.

States Oil Corporation, 154 F.2d 978, 991 (2nd Cir. 1946). Accordingly, **a receiver may not become "[A] partisan, with power to back one litigant against the other with the assets of the estate**. ... As between these two contending litigants, the receiver is a neutral. ... [A]nd he has ordinarily no justification for engaging in a controversy with one who claims adversely to him". *In re Marcuse & Co.*, 11 F.2d 513, 516 (7th Cir.1926). As a fundamental rule of law of equity receiverships, **the receiver is prohibited from being heard seeking reconsideration of a court ruling concerning the disposition of receivership assets.** *E.g, Bosworth v. St. Louis Terminal Railroad Assn.*, 174 U.S. 182, 187 (1899). Notably, the Supreme Court held in *Bosworth* that:

> "Neither can he [a receiver] question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties."

Contrary to these clear duties, Vogel has become an aggressive and partisan advocate against Baron. **The District Court announced that it was not going to allow the liquidation of Baron's IRAs.** Vogel has exceeded his authority and violated his fundamental duties as a receiver in seeking reconsideration and review of the ruling of the District Court. A receiver does not have the authority or standing of an advocate and a receiver is "without authority to participate in the

litigation". *In re Marcuse,* 11 F.2d at 516. As the Supreme Court ruled in *Bosworth*, "It is nothing to him [the receiver] whether all of the property is given to the mortgagee or all returned to the mortgagor. **He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties.**"

5. There Are No *In Rem* Claims Against the IRAs

Contrary to the entire underlying basis of Vogel's motion, there are no *in rem* claims against Jeff Baron's property being held in receivership. Vogel's motions to liquidate Baron's assets are based upon Vogel's erroneous underlying vision of receivership as an independent remedy that disposes individuals of their property without trial and transmutes the property into "equitable property" that can then be redistributed to alleged general creditors based on a judge's personal sense of "equity". To Vogel's view, the Constitution and a citizen's right to jury trial can be bypassed by a court simply invoking the magic wand of "receivership power". However, as discussed below, receivership is a special equitable remedy that can be used only as an ancillary remedy to preserve property so that property can be disposed of pursuant to some other remedy— recognized by law— pled before the court and which the court has jurisdiction to impose.

As a long-established rule of law, the sole function of equity receivership is to preserve property pending disposition pursuant to some other remedy. *E.g.,*

Forgay v. Conrad, 47 U.S. 201,204-205 (1848) (the remedy of receivership is "interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree"); *Gordon v. Washington*, 295 U.S. 30, 37 (1935) ("[E]quity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give."); *Tucker v. Baker*, 214 F.2d 627, 632 (5th Cir. 1954) (a court "may appoint a receiver to preserve and protect the property pending its final disposition" but "receivership can accomplish no end, but must merely be an end in itself [to preserve the property]."). Receivership is not a substitute for trial nor a substantive remedy. *See Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). The Supreme Court held in *Pusey* that:

> "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."
> *Id.*

Equity receivership is solely a tool to preserve property pending trial to determine how that property should be disposed. *E.g., Kelleam v. Maryland Casualty Co. of Baltimore*, 312 U.S. 377, 381 (1941)("This Court has frequently admonished that a

federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant."). Similarly, receivership does not endow a court with subject matter jurisdiction it did not already possess by "proper pleadings already before the court". *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1028 (5th Cir. 1931)("[S]eizing the securities did not, unless the subject-matter was by proper pleadings already before the court, aid its jurisdiction.").

Critically for the issue presented here, **a receivership action is an *in rem* action**. *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980). Whereas the establishment of liability for the claims against Baron requires adjudication of *in personam* actions against Baron and such claims do not touch the receivership *res*. *See Hawthorne Savings v. Reliance Ins. Co.*, 421 F.3d 835, 855 (9th Cir. 2005). Only the attempt to levy against the *res* made in connection with a judgment that has been obtained *in personam* is an *in rem* action that relates to a court's dominion over a receivership *res*. *Id.* There is a fundamental distinction between *in rem* claims against property held by a receiver and *in personam* claims against the owner of such property. *Riehle v. Margolies*, 279 U.S. 218, 224 (1929). The Supreme Court again explained this distinction in *Underwriters Assur. Co. v. NC Guaranty Assn.*, 455 U.S. 691, 718 (1982), holding that a receivership is an action of control over assets *in rem*, not of control over *in personam* claims. The Supreme Court held in Underwriters *Underwriters Assur*. that:

> "The Court adopted a two-fold distinction between control over claims and over assets: "In so far as [a court order] determines, or recognizes a prior determination of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. [This] function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam*…" … "[T]he distribution of assets of a debtor among creditors ordinarily has a `twofold aspect.' It deals `directly with the property' when it fixes the time and manner of distribution. . . . **But proof and allowance of claims are matters distinct from distribution.**"'

The distinction made between *in rem* claims and *in personam* claims in the context of receivership is a fundamental *jurisdictional* distinction. *E.g., Chicago Title & Trust Co. v. Fox Theatres Corporation*, 69 F.2d 60, 62 (2nd Cir. 1934)("Since liquidation of a debt does not directly deal with distribution, a suit seeking such liquidation does not interfere with the jurisdiction of the receivership court*"*). This Honorable Court has recognized this fundamental distinction. *E.g., North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1102 (5th Cir. 1985)[9]; *Cf. Morrison-Knudsen Co., Inc. v. CHG Intern., Inc.*, 811 F.2d 1209, 1217 (9th Cir. 1987)[10].

[9] Holding that 12 U.S.C. §1464(d)(6)(C) switches claims to the administrative track and therefore by statute empowers the FSLIC receivership to do what a receivership normally could not— adjudicate *in personam* claims against a debtor because "the adjudication of claims against a debtor, as opposed to the allocation of assets to satisfy those claims, is not a receivership function".

[10] Agreeing with the Fifth Circuit that adjudication of *in personam* claims goes beyond the authority of a receivership but disagreeing with the Fifth Circuit as to whether "Congress intended the agency's [FSLIC] receivership powers to go beyond those of an ordinary receiver."

Vogel's argument obfuscates the fundamental distinction between the *in rem* receivership proceedings seizing Jeff Baron's assets and *in personam* claims against Jeff Baron. Vogel attempts to circumvent a fundamental step— the adjudication of Mr. Baron's *in personam* liability on the underlying alleged state law "claims". Notably, the 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, since the 'claims' have not been tried and reduced to final judgments, it is premature to seek to liquidate Baron's IRAs.

Further, the matter is currently on appeal and there are no *in rem* claims to the receivership *res*, only the *in personam* 'claims' against Baron. If a receivership had been imposed against a corporation, the claims against the corporation would have been claims against the receivership *res* because a corporation is itself property. Baron, however, is not property, and the *in personam* claims against him are not claims *in rem*. Accordingly, the District Court lacks subject matter jurisdiction over the non-diverse *in personam* state law claims against Baron. Even though it lacked subject matter jurisdiction, **out of a "sense of justice" the District Court below attempted to create an interest in property that does not exist.** *See e.g. Meyerson v. Council Bluffs Sav. Bank*, 824 F. Supp. 173, 177 (S.D. Iowa 1991) (An interest in property "may be created only by contract ... or by

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and holding that FSLIC receiverships had no statutory grant of authority to adjudicate *in personam* claims.

some statute or fixed rule of law; it can not be created by the court merely from a sense of justice."). The "claims" against Baron are not equitable claims against Baron's property. Rather, the "claims" are nothing more than unsecured claims of alleged simple creditors. **An unsecured creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his alleged debtor.** *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). This is true, whatever the nature of the property. *Id.* The only substantive right of a simple contract creditor is to have his debt paid in due course and his recourse for non-payment is a suit at law. *Id.* Such a creditor has no right whatsoever in equity until he has exhausted his legal remedy. *Id.* Accordingly, as matter of well-established law, a court does not have equitable jurisdiction to use receivership to enforce the unsecured creditors' *in personam* claims (against the owner of the receivership property) before those claims have been reduced to judgment. *Id.; e.g., Williams Holding Co. v. Pennell*, 86 F.2d 230 (5th Cir. 1936).

6. Irreparable Injury and Costs

Vogel's motion erroneously fails to apprise the Court of the irreparable injury and costs involved with the liquidation of the IRAs. As a primary matter there is a substantial tax liability which will be incurred with the IRAs' liquidation. In addition to income and social security taxes, a 10% additional tax penalty must be paid. If the IRAs are liquidated wrongfully, the taxes and penalties cannot be recovered. The loss would be substantial and irreparable.

7. Equitable Considerations

As a matter of equity, the Court should examine, at least on a *prima facie* basis the underlying 'claims' for which the IRA sale is sought.[11] 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.

II. CONCLUSION

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 IRAs. Liquidation of the IRAs controverts the public policy reasons for exempting individual's IRAs from seizure and involves costs including taxes and substantial risk of irreparable injury. The IRAs are exempt by law and should not be executed upon.

[11] 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).

Respectfully submitted,

/s/ Gary N. Schepps

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AUTHORITIES CITED

FEDERAL CASES

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