No. 11-10501

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. ET AL,
Plaintiffs

v.

JEFFREY BARON,
Defendant – Appellant

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

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant

v.

PETER S. VOGEL; DANIEL J. SHERMAN,
Appellees

Interlocutory Appeal of Orders
in Receivership on Appeal

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

BRIEF FOR APPELLANTS NOVO POINT, L.L.C., QUANTEC, L.L.C., AND JEFFREY BARON

When the receivership was imposed, Baron immediately turned over his personal documents and files requested by the receiver.[10] Baron's estate consists essentially of some savings accounts and some Roth IRAs.[11] Accordingly, the receiver was not left with very much to do. Baron appealed the receivership order on Dec. 2, 2010.[12]

The receiver then moved to add a multitude of companies into his receivership (without lawsuits, service, evidence, or the normally expected process of law).[13] Those companies include:

1. NovoPoint, LLC.
2. Quantec, LLC.
3. Iguana Consulting, LLC.
4. Diamond Key, LLC.
5. Quasar Services, LLC
6. Javelina, LLC.
7. HCB, LLC, a Delaware limited liability company.
8. HCB, LLC, a USVI company.
9. Realty Investment Management, LLC.- Deleware.
10. Realty Investment Management, LLC – USVI.
11. Blue Horizon, LLC.
12. Simple Solutions, LLC.
13. Asiatrust Limited.
14. Southpac Trust Limited.
15. Stowe Protectors, Ltd.
16. Royal Gable 3129 Trust.

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[10] R. 3891.

[11] SR. v8 p1007.

[12] R. 1699-1700.

[13] R. 1717, 3952; SR. v1 p40, and sealed record Doc 609; SR. v2 pp365,405.

17. CDM Services, LLC
18. URDMC, LLC.

The District Judge made no findings in entering the original November 2010, *ex parte* receivership order against Baron and an initial set of companies. R. 1619-1632. Months later, in February 2011 the District Court entered findings in denying Baron's Fed.R.App.P. 8(a) motion for relief pending appeal. The post-appeal explanation in the Fed.R.App.P. 8(a) findings is essentially as follows: The District Court believes Baron was a vexatious litigant (although never appearing *pro se* and never sanctioned) who owed money in undetermined amounts to his former attorneys, and therefore should be denied the ability to hire an experienced trial lawyer to defend himself, and should be stripped of his possessions without trial "so that justice is done". SR v2 p358.

While this matter has been on appeal, the District Court has distributed essentially all of Baron's savings account balances to the receiver and his law firm.[14] The amount is staggering— almost a

[14] Around $400,000 in a stock portfolio, and IRAs remain, but the stocks are currently subject to a motion by the receiver to liquidate to pay additional fees, and the receiver did not pay 2010 taxes.

million dollars. SR. v8 p990-992.

The "Claims" Solicited by the Receiver

In addition to the receiver (and his firm's) personal fees, the receiver solicited claims (SR. v8 p1242-43) against Baron by former attorneys of the receivership entities and presented the "claims" to the District court **in a one-sided 'report' that intentionally excluded all of the exculpatory evidence.** SR. v7 p202. Baron moved the District Court for the opportunity to:

(1) retain experienced Federal trial counsel to defend the 'claims';

(2) the opportunity to conduct discovery with respect to the claims; and

(3) the opportunity to retain an expert witness with respect to the reasonableness of the alleged fees.

SR. v5 p139 [Doc 445].

However, the District Court did not grant Baron any of the requested relief, and instead sealed from the public view Baron's motion, objections, and response to the one-sided receiver's 'report'. SR. v7 p379; and see Doc 458 (itself also sealed). Baron then filed a detailed

briefing rebutting the alleged claims (SR. v5 p1313 [Doc 577]). The District Court sealed that too. SR. v7 p379. Baron had also filed additional evidence. SR. v5 p1369 [Doc 507]; SR. v6 p70 [Doc 523]. The evidence was rejected by the District Court. SR. v6 pp116, 124. The receiver's initial motion for 'approval' of the claims against Baron was denied by the District Court. SR. v6 p94 [Doc 527]. The receiver then filed a new motion seeking approval of the 'former attorney' alleged claims against Baron. SR. v7 p194. Five business days later, the District Court granted the new motion (ignoring the defensive evidence previously filed by Baron), and before Baron was able to file a response to the new motion. SR. v7 p349. Notably, although Baron had previously directed the District Court's attention to evidence refuting the fee allegations made by claimants, the District Court did "not question the evidence presented by the Receiver". SR. v6 p94. The issues involving the unpleaded 'claims' awarded[15] (in the total sum of $870,237.19) by the District Court against Baron include, for example,

[15] The District Court did not evaluate the claims *per se* but decided that the claims would "likely" be successful if tried, ordered Baron to settle with the claimants in the amount set by the District Judge, and authorized the receiver to pay the claims out of any of the receivership estates. SR. v7 p349.

the following:[16]

1. Mr. Broome 'claimed' more than the $10,000.00 per-month capped fee he was paid by Baron. 'Exhibits 4-5b' referenced at SR. v7 p363.[17] Broome's argument is that Mr. Baron paid him based on a $10,000.00 monthly fee cap but his contract did not contain any term limiting the amount of fees that may be *incurred* in any month. SR. v5 pp426, 427. However, Broome's contract (submitted by Broome) clearly contains (in writing) an explicit and unambiguous provision limiting the amount of fees that may be *incurred* to $10,000.00 per month. There is no ambiguity. Broome's contract expressly states a capped monthly fee limit setting the maximum amount of fees that could be "incurred", and expressly

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[16] The nine "claims" discussed below constitute approximately 80% of the total dollar amount in "claims" presented. The factual underpinnings of the remaining 16 "claims" are similar to the nine discussed below. However, a full factual discussion of each of the remaining claims would exceed briefing length limitations. See 'Exhibits' referenced at SR. v7 p362-369. Notably, the District Court made no specific factual findings with respect to any individual "claim". SR. v7 p349.

[17] The attorney's allegations were filed as sealed documents, and the Appellants' motion for access to the sealed portions of the record on appeal was denied by the appellate motion panel. Accordingly, Appellants are unable to provide more detailed citation to the record with respect to the 'claim' allegation documentation, (hereinafter referenced as 'Exhibit __').

requires formal written authorization to exceed the capped amount. SR. v8 p1212 (and see SR. v7 p379). No written authorization to exceed the monthly fee cap was alleged in Broome's "claim", and no written authorization to exceed the agreed upon monthly cap has been produced by Broome. Rather, Broome falsely swore that his contract did not contain any provision to limit the amount of fees that could be incurred monthly. SR. v5 pp426-427.

2. Ms. Crandall 'claimed' fees based on her allegation that she had a written contract (which she could not produce) at an hourly fee of $300/hour. 'Exhibit 16' referenced at SR. v7 p364. However, per Crandall's own invoice, Crandall billed (and was paid), at a flat monthly fee. SR. v6 p77; SR. v6 p70-76. There is no ambiguity. Crandall's invoice (which was paid) clearly states that "60.1" hours of work were performed and the "Flat Rate" due was $5,000.00. SR. v6 p77.

3. Mr. Pronske was paid $75,000.00 up front for his work in the bankruptcy court, and later alleged that the $75,000.00 was

just an initial retainer. 'Exhibit 24' referenced at SR. v7 p365. Pronske demanded an additional fee of $241,912.70. Id. However, Pronske admitted that "There are no engagement agreements relating to the representation" and for almost a year after receiving the $75,000.00 fee and working on the case, Pronske sent no contract, no engagement letter, no bill, no invoice, no demand for payment, and no hourly work report alleging that the flat fee payment was actually a 'retainer'. SR. v8 p1218 and 'Exhibit 24'. Also, the only "invoices relating to the Representation" (which Pronske alleges ended in July 2010), were printed up in February 2011, after the claims were solicited by the receiver, and some **seven months** after Pronske's representation ended. Id.

4. Mr. Ferguson's 'claim' sought more than the $22,000.00 capped fee he agreed to in writing and that was paid. SR. v8 p1220. Ferguson offered several conflicting factual scenarios, the latest being that he is allowed to violate his engagement

agreement and charge more than the agreed upon (and paid in full) capped fee because he was 'defrauded'. Id. Ferguson alleged that Baron 'fraudulently' represented that the money would be paid from his million dollar trust and not from his pocket personally because he was personally "destitute" (according to Ferguson). Id. It is, however, undisputed that the trust's money is just as green and in US Dollars, just the same as if it had come from Baron's pocket, and Ferguson was paid the agreed upon fee. Notably, in his original sworn testimony before the District Court at a Fed.R.App.P. 8(a) hearing, Ferguson offered a different story. R. 4443, 4445. At the FRAP 8(a) hearing, to explain the additional fee 'claimed' in light of the agreed fee at which Ferguson was paid, Ferguson claimed the agreed fee was only to August 21 and based on a 33% time demand. Id. In his new 'claim' Ferguson tells a new story to avoid the written agreed upon fee cap. Ferguson's new story contradicts his original version and now admits that the cap *did* apply through

August 31, and with full time work contemplated (as is stated in Ferguson's written agreement), but should not apply since Ferguson claims Baron 'fraudulently' represented the money (which was paid in full) was coming from Baron's million dollar trust. SR. v8 p1220.

5. Mr. Lyon submitted a 'claim' for more than the $40/hour fee he charged and was paid. His argument is that his fee was really $300/hour (and around $260/hour is due him), although he could not produce his written contract. 'Exhibit 19' referenced at SR. v7 p361. However, Lyon's own email (distributed to other attorneys) states his rate was the $40/hour rate he was paid. SR. v5 p1376. In this undisputed evidence, Lyon bragged– in writing– that his rate of $40/hour gave Baron 'more bang for the buck' so that Lyon should be given more work to do. Id.

6. Mr. Taylor submitted a 'claim' for additional fees beyond the money he was paid (in full) pursuant to the $10,000.00 per month fee cap expressly called for in his written contract.

'Exhibit 18' referenced at SR. v7 p365. Unlike Broome, Taylor did not deny his fees were capped at $10,000/month (as stated in his written contract). Instead, Mr. Taylor claims entitlement to a contingency fee even though the contingency provided for in his contract was not met. Id. When the case settled at a substantial loss, Taylor made no claim that the contingency in his contract was met, and made no disclosure of any contingency amount which would be due; rather, Taylor confirmed in writing that only a very small (hourly) fee would be billed. SR. v5 pp1370, 1380. Subsequently, Taylor decided he wanted a contingency fee payment after all, and asked for $42,000.00. SR. v5 p 1378. The District Court, although no suit was filed in the District Court, and with no explanation of how the 'contingency' amount had been calculated, awarded Taylor $78,058.50. SR. v7 p365.

7. Ms. Schurig submitted a 'claim' for more than the million dollar fee she has been paid. Her 'claim' was for work performed– without any contract– for a company neither owned nor managed by Baron—AsiaTrust. SR. v8 p1223. Schurig does not allege that Baron ever agreed or undertook to pay the debts of AsiaTrust, yet the District Court awarded her $93,731.79 "claim" for unpaid fees. Id.; SR. v7 p364.

8. Bickel-Brewer submitted a 'claim' for more than the $200,000.00+ fee it was paid nearly half a decade ago. The current amount claimed due is around $40,000.00– the amount of the work billed by Bickel-Brewer, without explanation, for fees preceding its representation of Baron plus additional fees for seeking payment of the claimed fees. Bickel-Brewer's contract does not call for payment of any pre-engagement work, and there is no explanation of what the work was for, or why Baron is in any way liable to pay it. SR. v8 pp1224-1235; 'Exhibit 20' referenced at SR. v7 p365.

9. Mr. Garrey submitted a 'claim' for two weeks work. Garrey originally demanded a million dollar fee for that alleged work. SR. v4 p104. Recently, Mr. Garrey has lowed his million dollar 'claim' to a $52,275.00 "claim" for the alleged two weeks work. 'Exhibit BLANK' referenced at SR. v7 p361. Garrey, however, has admitted that he agreed in writing to a fixed rate employment at $8,500.00 per month, for the period covering the two weeks he claims to have worked. Id. In his "claim" Garrey notably alleges that he expended a significant amount of time in representing Baron in part because he was "asked to object to the fee requests of the Receiver's counsel, and I was asked to devise a strategy to remove the Receiver and the Receiver's counsel." SR. v8 p1217. Garrey, however, admitted that his alleged two week representation ended on November 16, 2010, well before the application for the appointment of a receiver had been made. Id.

The 28 U.S.C. §144 Affidavit

On or about April 27, 2011, the District Judge issued sealed findings that statements made about an attorney in filings were 'unfounded'. Doc 458 (under seal). No hearing was held and no briefing was submitted on the issue. Accordingly, it appeared that the District Judge had no basis other than bias to make such findings. In light of the foregoing, after a careful review of a series of actions and statements by the District Judge, counsel for Baron came to believe that there was a good faith basis to conclude that due to the District Judge's personal bent of mind (developed well before the filing of the District Court lawsuit), Baron could not receive fair and impartial treatment. Doc 497 filed 4/27/11 (ordered under seal). Baron then submitted an affidavit pursuant to 28 U.S.C. §144, certified to by counsel. Id.

The District Judge Refused to Review the Legal Sufficiency of the Facts Stated in the Affidavit

The District Judge refused to review the legal sufficiency of the facts stated in Baron's §144 affidavit, and ruled that Baron could not submit an affidavit that made factual allegations, but must instead submit an affidavit that cited specific portions of the court record. SR.

v5 p1470. The District Court also sealed Baron's affidavit so that it was hidden from the public. Id. Baron filed a supplemental affidavit that added quotations from the record, including the quoted text and the hearing date, and removed the 'sealed' facts from the affidavit. Doc. 521 (also ordered under seal). The District Judge then struck and placed that affidavit under seal on the grounds that the affidavit "failed to give citation to the record as to every statement by the Court". SR. v6 p122. The District Judge ordered that any supplemental affidavit could not contain any off-the-record statements made by the District Judge, and must be confined to statements the Judge made on the record. Id.

ARGUMENT SUMMARY

This appeal presents core issues that have been authoritatively decided, as follows:

(1) The District Court below lacked jurisdiction to issue the orders challenged in this appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal).

(2) The District Court should have ceased all action in the case until the legal sufficiency of the factual allegations made in Baron's §144 affidavit had been ruled on. *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir. 1975).

(3) The District Court erred in holding that it could appoint a receiver over an individual and thereby waive the individual's Constitutional right to trial by jury. *Scott v. Neely*, 140 U.S. 106, 109-110 (1891) (Seventh Amendment right to jury trial cannot be

PRAYER

Appellants, jointly and in the alternative requests the following relief:

(1) That the challenged orders be reversed.

(2) That the challenged orders be found to be void *ab initio*.

(3) That costs be taxed against the Appellees.

Respectfully submitted,

/s/ Gary N. Schepps

Gary N. Schepps
Texas State Bar No. 00791608
5400 LBJ Freeway, Suite 1200
Dallas, Texas 75240
(214) 210-5940 - Telephone
(214) 347-4031 - Facsimile
Email: legal@schepps.net
FOR APPELLANTS

NOVO POINT, LLC.,
QUANTEC, LLC., and
JEFFREY BARON

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 12,836 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using MS Word 2000 in 14 and 15 point century font.

DATED: October 6, 2011.

CERTIFIED BY: /s/ Gary N. Schepps
GARY N. SCHEPPS
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