U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **08-03453-hb**

ORDER ON APPLICATION FOR SETTLEMENT

The relief set forth on the following pages, for a total of 11 pages including this page, is hereby ORDERED.

FILED BY THE COURT
04/17/2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

US Bankruptcy Judge
District of South Carolina

Entered: 04/17/2019

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 08-03453-HB
International Payment Group, Inc.,	Chapter 7
Debtor(s).	**ORDER ON APPLICATION FOR SETTLEMENT**

THIS MATTER came before the Court for hearing on April 9, 2019, to consider the Application for Settlement and Compromise Regarding SunTrust Bank's prepetition claims against the bankruptcy estate of International Payment Group, Inc. ("IPG").[1]

FACTUAL AND PROCEDURAL HISTORY

IPG operated as a money service business, facilitating foreign currency transactions, including exchanging foreign currencies and related wire transfers and drafts. IPG contracted with SunTrust to facilitate its foreign currency business.[2]

> [T]he character of ***what*** IPG was doing through SunTrust's systems did not differ significantly from the average depositor's relationship with the bank. IPG was depositing funds into general, non-segregated accounts (creditor), creating a liability on the part of SunTrust (debtor), which would subsequently transmit those funds to IPG customers' beneficiaries in the appropriate foreign currency, less applicable fees and rate.[3]

In January 2008, Cliff J. Burgess, managing member and sole shareholder of IPG, discovered its CFO, who was responsible for IPG's currency transactions, financial reporting, accounting, and recordkeeping, was stealing from IPG. Burgess informed SunTrust officials the CFO may have stolen more than $1 million, and he was uncertain whether anyone else was involved in the theft. IPG had poor accounting and oversight

[1] ECF No. 180, filed Feb. 27, 2019.
[2] *Fort v. SunTrust Bank*, No. 16-2001, ECF No. 50 at 3-4 (4th Cir. May 30, 2018)
[3] *Fort v. SunTrust Bank*, C/A No. 7:13-cv-1883-BHH, ECF No. 106 at 34-34 (D.S.C. Aug. 25, 2016) (emphasis in original) (internal citations omitted), *aff'd,* No. 16-2001 (4th Cir. May 30, 2018).

practices, which contributed significantly to its financial demise.[4] IPG ceased operations in January 2008 and filed a voluntary petition for Chapter 7 relief on June 10, 2008. John K. Fort was appointed as Trustee.

Claims filed in the bankruptcy total more than $5 million, including claims filed by SunTrust. On October 17, 2008, SunTrust filed two claims: one in the amount of $30,271.57, secured by funds on deposit with SunTrust pre-petition in the same amount ("setoff funds") pursuant to 11 U.S.C. § 553; and another in an undetermined amount (collectively "Prepetition Claims").[5] The filings state the underlying claims are based on an indemnification provision in the account contract documents executed when IPG set up accounts at SunTrust, which are attached to the filings. The claim secured by setoff funds also includes an itemization of the charges that comprise the amount.[6] The other is filed as an unsecured claim in an undetermined amount for any remaining amounts owed based upon the indemnification provision.

On April 9, 2010, the Trustee filed an adversary proceeding against SunTrust in this Court on behalf of the bankruptcy estate asserting various causes of action and seeking damages allegedly incurred as a result of SunTrust's handling of account funds and its reaction to the report of defalcations by IPG's CFO.[7] The progression of the litigation was

[4] No. 16-2001, ECF No. 50 at 5. Additional details of IPG's history and bankruptcy can be found in orders issued by the Fourth Circuit and the District Court. *See id.*; C/A No. 7:13-cv-1883-BHH, ECF No. 106.
[5] POC Nos. 81-1 & 82-1.
[6] SunTrust sought instruction regarding funds on deposit in 2008. Remaining outstanding foreign exchange currency drafts issued by IPG, converted to U.S. dollars, were paid to the Trustee by SunTrust by check in December 2012 totaling $94,596.01. SunTrust retained the setoff funds. *Fort v. SunTrust Bank*, Adv. Pro No. 10-80049-hb, ECF No. 208 at 20 (Bankr. D.S.C. Apr. 25, 2013).
[7] Adv. Pro. No. 10-80049-hb. The Trustee alleged the following causes of action: (1) violation of S.C. Code Ann. §§ 36-4A-102 *et seq.*, specifically S.C. Code Ann. § 36-4A-204; (2) conversion; (3) breach of contract accompanied by a fraudulent act; (4) aiding and abetting breach of fiduciary duty; (5) negligence and gross negligence; (6) breach of fiduciary duty; (7) tortious interference with contractual relations; and (8) unfair trade practices under the South Carolina Unfair and Deceptive Trade Practices Act.

slowed after the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), holding that even though a determination of a state law counterclaim filed by a trustee or debtor in response to a proof of claim filed by a creditor is within the bankruptcy court's statutory "core" jurisdiction, it does not have the constitutional jurisdiction to finally determine such matters, which is reserved for Article III courts. This decision affected this Court's jurisdiction and ability to issue a final decision in the litigation because, through the adversary proceeding, the Trustee asserted state law counterclaims to SunTrust's Prepetition Claims.[8]

On September 22, 2011, SunTrust filed a motion to dismiss for lack of subject matter jurisdiction. This Court entered an order on November 3, 2011, denying the motion to dismiss, finding the requested relief was more appropriately directed to the United States District Court for the District of South Carolina through a motion to withdraw the reference.[9] Thereafter, on November 17, 2011, SunTrust filed a motion to withdraw the reference and the record was transmitted to the District Court for consideration.[10] On April 2, 2012, Judge Timothy M. Cain entered an order returning the case to this Court to conduct all pretrial matters, including dispositive motions, by submitting proposed findings of fact and conclusions of law to the District Court for final determination.[11] The order directed that a new case would be opened in the District Court when any proposed findings of fact and conclusions of law were ready for review or when the case was ready for trial.

The litigation involved extensive, contentious, and lengthy discovery proceedings. On November 5, 2012, SunTrust filed a motion for summary judgment in this Court and

[8] *See* No. 16-2001, ECF No. 50 at 3 n.1.
[9] *See* 28 U.S.C. § 157(d); Fed. R. Bankr. P. 5011.
[10] *Fort v. SunTrust Bank*, C/A No. 7:11-cv-03363-TMC (D.S.C. Dec. 12, 2011).
[11] *Id.* at ECF No. 10.

after several consensual extensions, a hearing was held on February 21, 2013.[12] On April 25, 2013, the Court entered its recommendations in Proposed Findings of Facts and Conclusions of Law ("Recommended Order").[13] The Recommended Order determined that summary judgment should be granted in favor of SunTrust to dispose of all causes of action except negligence, gross negligence, and breach of fiduciary duty and a trial should proceed on those claims in the District Court. Both parties filed objections and shortly thereafter, the matter was transmitted to the District Court for consideration. On July 9, 2013, the District Court opened a new proceeding to consider the Recommended Order and otherwise finally determine the litigation.[14]

On August 26, 2016, Judge Bruce H. Hendricks of the District Court entered an order adopting the Recommended Order's findings of fact, but not all conclusions of law. The judge instead granted SunTrust's motion for summary judgment as to **all** causes of action, finding the Trustee, on behalf of the bankruptcy estate of IPG, was not entitled to any recovery from SunTrust.[15] The Trustee appealed and on May 30, 2018, the Court of Appeals for the Fourth Circuit affirmed the decision,[16] issued its Mandate,[17] and the case was returned to the District Court. On October 17, 2018, Judge Hendricks entered an Order granting SunTrust's request for an award of costs against the Trustee for the bankruptcy estate under Rule 54(d)(1) of the Federal Rules of Civil Procedure in the amount of

[12] The Trustee previously filed a motion for partial summary judgment on May 2, 2012, to which SunTrust objected. (Adv. Pro. No. 10-80049-hb, ECF Nos. 120, 132, & 149). A hearing on that motion was held on July 21, 2012, and by order entered on August 9, 2012, the Court denied the Trustee's motion. *Id.* at ECF No. 160.
[13] *Id.* at ECF No. 208.
[14] C/A No. 7:13-cv-1883-BHH.
[15] *Id.* at ECF No. 106.
[16] No. 16-2001, ECF No. 50.
[17] *Id.* at ECF No. 53, entered Jun. 21, 2018.

$18,458.56.[18] In summary, after years of litigation in several courts, no recovery for the estate resulted from the litigation and in fact, SunTrust was allowed to recover its post-petition costs from the bankruptcy estate of IPG.

The Trustee is now in the process of concluding the bankruptcy case in this Court and distributing any funds on hand. The Trustee reports he does not have sufficient funds to make any payment to general unsecured claims, even if the setoff funds are returned to the bankruptcy estate. The Trustee's Application indicates he has reached an agreement with SunTrust to allow it to apply the setoff funds in full and final satisfaction of the Prepetition Claims.[19] The Application and Notice were served on approximately 200 creditors and counsel for SunTrust provided that service.[20] The Notice required objecting parties to file a response within twenty-one days of service of the Notice and attend the hearing on April 9, 2019. Timely objections were filed on behalf of Arco Industries, Inc., Cottonwood Holdings LLC, and Adventures in Wine ("Objecting Parties"). The objections were almost identical and stated:

> We object to any payment going to SunTrust on any grounds especially on the grounds of a prepetition claim. The prepetition claim is a common legal defense tactic being used by banks in fraud cases around the country. We object to their demands as they did not ever produce, support or surrender all records of International Payment Group per regulatory requirements. They wasted and insulted the time of the court sending in incomplete, unorganized, unfiltered repetitive useless paper documents. This all amidst claims to Federal authorities and the Court that electronic records were not available. In no way should they be reimbursed for this garbage. Delay, deny and obfuscate was their ongoing tactic. The claimants look forward to addressing the court come April 9th.

[18] C/A No. 7:13-1883-BHH, ECF No. 115. On January 10, 2019, after due notice and without objection, this Court entered an Order granting SunTrust's request that the $18,458.46 in costs be treated as an administrative priority claim pursuant to § 503(a) and (b)(1). (ECF No. 179, entered Jan. 10, 2019). This amount does not include attorney's fees.
[19] SunTrust's administrative claim of $18,458.46 is not affected by the Application.
[20] ECF No. 181, filed Feb. 27, 2019.

John K. Fort, Chapter 7 Trustee, and Julio E. Mendoza, Jr., counsel for SunTrust, were present at the hearing to pursue the Application and address the filed objections. When the case was called for hearing, the Objecting Parties failed to appear.

Burgess did not file any documents prior to the hearing – timely or otherwise – stating any basis for objection. However, he attended the hearing and stated creditors were upset the Application arrived in an envelope indicating it was served by counsel for SunTrust. He also expressed his frustrations with SunTrust, its former employees, the Trustee, the attorneys on both sides of the litigation, the various courts and judges involved with the litigation, IPG's bankruptcy attorney, IPG's former CFO, the Federal Bureau of Investigation, the United States Attorney, local solicitors, and others. He stated these proceedings have been filled with corruption and were a "joke" and a "shell game." Burgess asked that SunTrust not be allowed to retain the setoff funds and approval of the agreement set forth in the Application be denied. He submitted correspondence signed by Mitchell S. Nathanson on Wine Markets International Inc. letterhead that asserts unsupported conspiracy theories about the progress and results in this case and the related litigation.[21] Burgess also asserted "missing funds" are available somewhere and should be recovered for creditors. The Trustee stated his willingness to follow up with any contacts provided to him by Burgess to determine if there is any genuine lead to discover further funds for distribution.

[21] Neither Nathanson nor Wine Markets International Inc. is one of the Objecting Parties. This correspondence was marked as an exhibit over the objection of SunTrust's counsel. The Court agreed to review the exhibit and give it whatever consideration it was due.

APPLICABLE LAW

This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B). Venue is properly before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Sections 506 and 553 of the Code recognize that to the extent a debtor and creditor hold pre-petition debts against each other, the obligation is secured and entitled to payment when one party files for bankruptcy relief. Section 506 states:

> [a]n allowed claim of a creditor . . . that is subject to setoff under section 553 of this title, is a secured claim . . . to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that . . . the amount so subject to setoff is less than the amount of such allowed claim.

11 U.S.C. § 506(a)(1). Section 553 provides:

> this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that . . . the claim of such creditor against the debtor is disallowed[.]

11 U.S.C. § 553(a)(1). In order to maintain a right to setoff, the creditor must demonstrate that: (1) the creditor holds a "claim" against the debtor that arose before the commencement of the case; (2) the creditor owes a "debt" to the debtor that also arose before the commencement of the case; (3) the claim and debt are "mutual;" and (4) the claim and debt are each valid and enforceable. *See* 11 U.S.C. § 553.

> Where its requirements are met, § 553 allows a bankruptcy court to recognize a creditor's pre-existing right of setoff in a bankruptcy case. Section 553 does not create any rights of setoff, but merely recognizes and preserves setoff rights that exist under other applicable law, and then only to the extent that the conditions of § 553 have been satisfied.

In re Georgetown Steel Co., LLC, 318 B.R. 313, 326 (Bankr. D.S.C. 2004) (citing *Durham v. SMI Indus. Corp.*, 882 F.2d 881, 883 (4th Cir. 1989)). A creditor's exercise of its right to setoff is subject to the automatic stay. *See* 11 U.S.C. § 362(a)(7).

Section 502(a) of the Code and Bankruptcy Rule 3001(f) provide that a properly filed proof of claim constitutes *prima facie* evidence of the validity and the amount of the claim unless a party in interest objects. The Trustee has the statutory duty to examine proofs of claim and to object to the allowance of improper claims except when the objection would serve no purpose. 11 U.S.C. § 704(a)(5); *see also In re McFadden*, 471 B.R. 136, 145-46 (Bankr. D.S.C. 2012) ("A trustee, while having the right to investigate claims without court authority, must exercise this right judiciously. The trustee cannot engage in fishing expeditions when no purpose would be served." (quoting *In re Riverside–Linden Inv. Co.*, 85 B.R. 107, 111 (Bankr. S.D. Cal. 1988)).

Bankruptcy Rule 9019 provides "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct." Fed. R. Bankr. P. 9019(a).

> While private parties may settle their disputes on any terms which may be mutually satisfactory, that is not the case in bankruptcy proceedings. Where a settlement affects the assets of a bankruptcy estate or their distribution, the settlement must be approved by the bankruptcy court. Doing so is a matter committed to the court's discretion.

In re Witt, 473 B.R. 284, 287-88 (Bankr. N.D. Ind. 2012) (internal citations omitted). The party seeking approval of the settlement must show that the proposed settlement is fair, equitable, and in the best interests of the estate. *In re Rich Global, LLC*, 652 F. App'x 625, 631 (10th Cir. 2016). The proposed settlement does not need to present the best possible outcome; however, it cannot be approved if it "falls below the 'lowest point in the range of

reasonableness.'" *U.S. ex rel. Rahman v. Oncology Assocs., P.C.*, 269 B.R. 139, 149 (D. Md. 2001) *aff'd sub nom. U.S. ex rel. Rahman v. Colkitt*, 61 F. App'x 860 (4th Cir. 2003) (discussing Fed. R. Bankr. P. 9019) (citations omitted). "[T]he essential inquiry which this Court must make . . . is to determine whether the compromise reached by the parties is 'fair and equitable' and in the best interests of the estate." *Id.* (citation omitted). Although the Court gives the Trustee a great deal of discretion to exercise his or her business judgment, the Court:

> may not simply accept the trustee's word that the settlement is reasonable, nor may [it] merely "rubberstamp" the trustee's proposal. The bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an "informed and independent judgment" about the settlement.

LaSalle Nat'l Bank v. Holland (In re Am. Reserve Corp.), 841 F.2d 159, 162-63 (7th Cir. 1987) (citing *Protective Commonwealth. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S. Ct. 1157, 20 L. Ed.2d 1 (1968)).

"Generally, a motion may be denied for failure to prosecute when a movant fails to appear at the scheduled hearing . . . Similarly, bankruptcy courts have often held that a party who wishes to prosecute an objection must appear at the hearing or the objection is deemed waived or abandoned." *In re Stevenson*, 399 B.R. 289, 293 (B.A.P. 1st Cir. 2009) (citing various cases)); *see also* Fed. R. Civ. P. 41(b) ("If a plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it."). "Pro se litigants are entitled to some deference from courts. But they as well as other litigants are subject to the time requirements and respect for court orders without which effective judicial administration would be impossible." *Ballard v. Carlson*, 882 F.2d 93, 96 (4th Cir. 1989) (citing *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972))).

CONCLUSION

After a review of relevant facts and authorities, all objections to the Application are overruled. Burgess' objection was untimely, and the remaining objections are denied for lack of prosecution. Even if considered, the objections lack merit. The record before the Court supports SunTrust's right to the setoff funds and the objections do not offer credible facts or applicable legal authority to challenge the Trustee's decision to agree to the setoff. In exchange, the Trustee negotiated the elimination of any further amounts that could be due as a result of the Prepetition Claims. Although no funds are currently available for distribution to general unsecured creditors, that portion of the agreement has value as it will allow the case to move forward toward resolution without additional expense or expenditure of time and it will remove any uncertainty regarding the Trustee's proposed distributions. Should Burgess' assertions prove correct and additional assets are discovered, the agreement is worth more as it will exclude SunTrust from any further distributions on account of its Prepetition Claims. Considering prior rulings and the record before the Court, the terms of the agreement proposed in the Application appear fair, equitable, and in the best interests of the estate.

IT IS, THEREFORE, ORDERED that any objections are overruled and the Application for Settlement and Compromise is approved.

Pursuant to SC LBR 5075-1, service of this Order on the parties entitled to notice is delegated to the Applicants.