

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at ___ O'clock & ___ min. ___ M
AUG 27 2008

United States Bankruptcy Court
Columbia, South Carolina (6)

In re,

Derivium Capital, LLC,

Debtor(s).

Kevin Campbell, Chapter 7 Trustee,

Plaintiff(s),

v.

Jerry C. Pryor,

Defendant(s).

C/A No. 05-15042-JW

Adv. Pro. No. 07-80171-JW

Chapter 7

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, the Trustee's motion for summary judgment is granted. The Trustee is entitled to summary judgment on his First Cause of Action seeking declaratory relief to enforce the Consent Order. Pursuant to the terms of the Consent Order, Pryor shall relinquish his lien on the Charleston Aluminum membership interest and he shall be treated as a general unsecured creditor in Debtor's bankruptcy case.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
August 27, 2008

ENTERED
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J.G.S.

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ORDER

This matter comes before the Court on Motion for Summary Judgment ("Motion") filed by Kevin Campbell ("Trustee"), as chapter 7 trustee for Derivium Capital, LLC ("Debtor"). This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.¹

FINDINGS OF FACT

1. Debtor filed the above-captioned bankruptcy case under Chapter 11 of the Bankruptcy Code on September 1, 2005 in the United States Bankruptcy Court for the Southern District of New York.

2. The Bankruptcy Court in New York subsequently converted this case to a case under Chapter 7 and transferred venue to this District.

¹ To the extent any of the Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent any of the Conclusions of Law constitute Findings of Fact, they are so adopted.

ENTERED

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3. On November 7, 2005, the Trustee was appointed as the chapter 7 trustee for Debtor.

4. Prior to the petition date, Debtor is alleged to have operated a “stock-loan” program whereby borrowers could pledge publicly traded stock to Debtor in exchange for a loan in the amount of 90% of the value of the stock.

5. According to the allegations in this adversary, Debtor liquidated the pledged stock, using 90% of the proceeds to fund the loans to the borrowers. The remaining 10% of the proceeds were allegedly transferred by Debtor’s principals through a chain of entities controlled by Debtor’s principals, including Spencer Partners Limited (“Spencer”), an entity organized under the laws of the Isle of Man, and Shenandoah Holdings Limited (“Shenandoah”), and into various start-up businesses located in South Carolina, including Charleston Aluminum, LLC (“Charleston Aluminum”). Of the many start-up businesses created by Debtor’s principals, Charleston Aluminum is alleged to be the only one that has been profitable.

6. Shenandoah allegedly received a majority membership interest in Charleston Aluminum from Debtor for no consideration.

7. Shenandoah allegedly pledged its membership interest in Charleston Aluminum to Spencer in consideration for a loan from Spencer. Following a default on the loan, Shenandoah then allegedly transferred the membership certificate in Charleston Aluminum to Spencer in April of 2004. Spencer has claimed to be the owner of Shenandoah’s interest in Charleston Aluminum by virtue of its security interest and as a result of Shenandoah’s surrender of its membership interest in Charleston Aluminum to Spencer. Through various proceedings discussed herein, the Trustee has sought to undo these transfers that have allegedly sheltered the membership interest in Charleston Aluminum from Debtor’s creditors.

8. Prior to Debtor seeking bankruptcy relief, many of the start-up businesses filed for relief under the Bankruptcy Code in this Court. Defendant Jerry C. Pryor (“Pryor”) commenced an adversary proceeding in the bankruptcy case of Scienda, LLC and obtained a default judgment against Shenandoah in the amount of \$470,000.00 by virtue of an order and judgment entered in this Court on March 31, 2004 (“Pryor Judgment”).² Pryor subsequently enrolled the Pryor Judgment in Orangeburg County, South Carolina.

9. Following his appointment to this case, Trustee has actively sought to recover assets of Debtor. Trustee filed an adversary (Adv. Pro. No. 06-80032) seeking injunctive relief against Shenandoah and Charleston Aluminum and others on February 2, 2006. Trustee sought and obtained a preliminary injunction in that matter so that the records of these entities would be preserved for Trustee so that he could identify assets of Debtor.

10. On June 7, 2006,³ the Trustee commenced an adversary proceeding (Adv. Pro. No. 06-80111) against Shenandoah (“Shenandoah Adversary”). The Trustee alleged numerous causes of action in the Shenandoah Adversary to recover Shenandoah’s assets for the benefit of the estate including actions seeking: 1) a declaration that Shenandoah’s assets were property of Debtor’s estate; 2) an order pursuant to 11 U.S.C. § 542 directing Shenandoah to turnover its assets as property of Debtor’s estate; 3) an order that Shenandoah is the alter ego of Debtor and that its assets should be available to Debtor’s creditors; 4) an order substantively consolidating Shenandoah’s estate with Debtor’s estate *nunc pro tunc* to Debtor’s petition date; and 5) an order avoiding Debtor’s transfers to Shenandoah pursuant to 11 U.S.C. §§ 544, 547, and 548. Finally,

² See Pryor v. Cathcart (In re Scienda, LLC), C/A No. 02-02693-W, Adv. Pro. No. 02-80128-W, slip op. (Bankr. D.S.C. Mar. 31, 2004).

³ The records of this Court indicate that Trustee filed the Shenandoah Adversary at 10:30 a.m. on June 7, 2006.

the Trustee sought to impose a constructive trust on Shenandoah's assets for the benefit of Debtor's estate.

11. Two years after obtaining judgment against Shenandoah, Pryor commenced an action in state court to enforce his judgment against Shenandoah by obtaining a charging lien in the Charleston Aluminum membership interest held by Shenandoah. Since the Trustee considered Shenandoah's assets to be property of Debtor's estate, the Trustee and Pryor negotiated a Consent Order, filed in the state court in Orangeburg County,⁴ which allowed Pryor to proceed with his action in state court subject to all of the Trustee's claims against Shenandoah.

The Consent Order provides in relevant part:

The hearing on the charging order will proceed, however, any property, assets or interests which are awarded to Plaintiff [Pryor] shall be held *subject to any* claim or interest the Chapter 7 Trustee and/or other creditors may have to the property, assets or interest which claim or interest will be determined by the United States Bankruptcy Court.... If the Chapter 7 Trustee and/or other creditors prevail on their claims and interests, the Plaintiff will cooperate in relinquishing possession and control to the Chapter 7 Trustee of any property, assets or interest awarded and the Plaintiff [Pryor] agrees that he will be treated as a creditor with the status he held at the time of Derivium's bankruptcy filing.

Pryor v. Cathcart, Jud. Roll 04-0524, Consent Ord. (S.C. Ct. C.P. 1st Jud. Cir. O'burg County Jun. 7, 2006) (emphasis added).

12. On June 9, 2006, the Trustee filed a notice of settlement with this Court seeking approval of the terms of the Consent Order. The notice of settlement provided in part that the Trustee had provided notice to Pryor that the automatic stay may stay the state court proceeding in Orangeburg County and that the proposed settlement, represented by the Consent Order, preserved the estate's ability to claim a superior right to Shenandoah's assets.

⁴ The Consent Order and the order granting Pryor a charging lien indicate that the state court entered those orders at 2:57 p.m. on June 7, 2006.

13. The Consent Order was approved by order of this Court entered on August 23, 2006.

14. The Shenandoah Adversary was withdrawn to the United States District Court by an order dated May 21, 2007.

15. Pursuant to a consent order entered by United States District Court Judge David C. Norton, the Trustee settled his action with Shenandoah on October 30, 2007. Without making findings of fact or conclusions of law as to the Trustee's allegations in the Shenandoah Adversary, the District Court found "it is equitable and in the interests of justice for the Trustee to succeed to the ownership of Shenandoah, and any and all of its tangible and intangible assets or interests, for the benefit of the estate of Derivium."

16. Following Debtor's petition date, Spencer became subject to a liquidation proceeding in the Isle of Man. On May 2, 2007, Spencer filed a petition for recognition of a foreign proceeding pursuant to Title 15 of the Bankruptcy Code.

17. On August 31, 2007, the Trustee filed a civil action against Spencer and others in the United States District Court, case number 2:07-cv-02992-DCN. Among other causes of action, the Trustee sought to avoid fraudulent conveyances made to Spencer by Debtor through Shenandoah and to substantively consolidate Spencer's estate with Debtor's estate.

18. The Trustee sought the approval of this Court and the court in the Isle of Man to settle his causes of action with Spencer pursuant to a notice of settlement filed in Debtor's case on September 12, 2007 ("Spencer Settlement").

19. Pryor objected to the Spencer Settlement since he believed that the Spencer Settlement would avoid the opportunity for him to claim priority in the Shenandoah membership interest.

20. With Pryor's consent, the Spencer Settlement was approved by order entered November 26, 2007. The order approving settlement provided: "the validity, extent, and priority of Pryor's purported lien will be determined by a separate adversary action and/or contested matter (as may be appropriate under applicable law) in which Pryor will have the opportunity to respond and participate in any hearing." The settlement order also provided that the Trustee acquired all of Spencer's rights, title, and interests in Charleston Aluminum, including the alleged original membership certificate.

21. Following the Spencer Settlement, the Trustee sold the membership interest in Charleston Aluminum for \$4 million dollars. The order approving the sale provided that the Trustee would escrow a sufficient sum to pay Pryor if his charging lien is entitled to priority.

22. On December 28, 2007, the Trustee brought this adversary against Pryor for a declaratory judgment to enforce the Consent Order and to declare Pryor's charging lien as void under the Bankruptcy Code or subordinate to the Trustee's interest.

23. Pryor admits the terms of the Consent Order and the terms of the order approving the settlement with Spencer but contends that the Trustee must prove in this adversary proceeding that Shenandoah was the "alter-ego" of Debtor at the time of Debtor's petition. Pryor further contends that he is entitled to an evidentiary hearing on the issues raised by the Trustee. On brief, Pryor also contends that the Trustee has not "prevailed" in his causes of action since he obtained the assets of Spencer and Shenandoah through settlement and that the Trustee takes subject to Pryor's charging lien since he acquired his interest in Shenandoah after the entry of the charging lien in state court.

24. Following Pryor's answer, the Trustee moved for summary judgment on three of his five causes of action on grounds that the Consent Order precludes Pryor from disputing the Trustee's priority in the Charleston Aluminum membership interest.

25. Although Pryor opposes the Trustee's motion for summary judgment neither Pryor nor the Trustee offered affidavits pursuant to Fed. R. Civ. P. 56 and each party relies on the orders previously entered in this Court and in the District Court regarding their respective rights.

CONCLUSIONS OF LAW

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When a motion for summary judgment is filed, the Court does not weigh the evidence, but determines if there is a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). If no material factual disputes remain, then summary judgment should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party bears the burden of proof at trial." Listak v. Centennial Life Ins. Co., 977 F.Supp. 739, 742 (D.S.C. 1997) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986)). "The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact." Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 522 (4th Cir. 2003). Once the moving party has met this burden, the burden shifts to the non-moving party to come forward with specific facts demonstrating that a genuine issue exists for trial. See T 2 Green, 363 B.R. at 763.

In this case, the parties have not raised a genuine issue of material fact and the Trustee has met his burden of proof. Each party relies on the various orders entered in this Court and the District Court. In particular, each party relies on the terms of the Consent Order entered by the state court in Orangeburg County and approved by this Court. The Consent Order is to be interpreted according to principles governing the interpretation of contracts. See U.S. v. Armour & Co., 402 U.S. 673, 681-682, 91 S.Ct. 1752 (1971) (“the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it”). Accordingly, since the terms of the Consent Order are plain, there are no genuine issues of material fact and the Court’s interpretation of the order is a matter of law that may be determined on a motion for summary judgment. See Holland v. U.S., 74 Fed. Cl. 225, 237 (Fed. Cl. 2006).

Pryor asserts in his answer and on brief that the Trustee bears the burden of proving in this adversary proceeding that Shenandoah was the alter-ego of Debtor at the time of the petition; however, nothing in the plain language of the Consent Order required an evidentiary hearing on the Trustee’s claims against Shenandoah or any other party. As drafted, the Consent Order merely requires the Trustee to be the prevailing party on his claims. The “prevailing party” standard is routinely applied in actions under federal law for purposes of determining whether a party is entitled to an award of attorneys’ fees. See Combs v. Sch. Bd. of Rockingham County, 15 F.3d 357, 360 (4th Cir. 1994) (discussing the various federal statutes using the prevailing party standard). Under this standard, the Supreme Court and various Circuit Courts have recognized that a party “may prevail through a settlement embodied in a consent decree.” See Sinajini v. Bd. of Educ. of San Juan Sch. Dist., 233 F.3d 1236, 1240 (10th Cir. 2000) (citing Maher v. Gagne, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)). “The touchstone

of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.” Texas State Teachers Assn. v. Garland Independent School Dist., 489 U.S. 782, 792-93, 109 S.Ct. 1486, 1494, 103 L.Ed.2d 866 (1989). Like the federal law interpreted in the foregoing cases, nothing within the four corners of the Consent Order requires an evidentiary hearing on the Trustee’s claims against Shenandoah or Spencer⁵ nor does the language prohibit the Trustee from being considered the prevailing party merely because the Trustee settled his causes of action. Applying the Supreme Court’s standard to the plain language of the Consent Order, the Trustee is the prevailing party in his actions against Shenandoah and Spencer. In each action, the Trustee sought through his pleadings and acquired through settlement every asset of these entities; thus, materially altering the legal relationship among the parties.⁶ The fact that the assets were acquired through settlement, much like Pryor obtaining victory against Shenandoah by default, does not alter the Trustee’s status as the prevailing party in his actions against Shenandoah and Spencer.

Pryor also contends that the Court must still determine the relative priority of his lien compared with the interests acquired by the Trustee and that his interest is senior because he perfected his lien prior to the Trustee recovering the estate’s interest in Shenandoah. This position ignores the plain language of the Consent Order in which Pryor expressly agreed to subordinate his lien by taking “subject to any claim or interest” of the Trustee.⁷ In order to

⁵ Though the order approving the Spencer Settlement also indicates that the priority of Pryor’s lien will be determined by motion or adversary, that order also does not indicate that the Trustee will be required to prove his case against Spencer or Shenandoah but merely requires the Trustee to bring a motion or adversary, which he has done through this proceeding.

⁶ Pryor did not put forth any facts showing that the settlements were the product of collusion by the Trustee and Spencer and Shenandoah, that the settlements lacked a causal connection to the Trustee’s actions against these parties, or that the settlement was a gratuitous act by Spencer or Shenandoah. See Nanetti v. University of Illinois at Chicago, 867 F.2d 990, 992-93 (7th Cir. 1989).

⁷ Pryor contends on brief that he agreed to relinquish his rights if the Trustee prevailed under the avoidance provisions of the Bankruptcy Code. This stipulation is not contained in the plain language of the Consent Order, which clearly subordinates Pryor’s lien to all of the Trustee’s claims against Shenandoah.

obtain the charging lien and faced with opposition from the Trustee, Pryor entered into the Consent Order, which allowed Pryor's state court action to proceed but which bargained away his ability to claim a superior interest in the Charleston Aluminum membership interest if the Trustee prevailed. As previously discussed, the Trustee prevailed on his claims against Shenandoah⁸ and therefore, under the language of the Consent Order, Pryor's interest is not entitled to priority.

Further, the timing of the Trustee's interest is not material since Pryor agreed to subordinate his interest to that of the Trustee regardless of when the Trustee took title.⁹ The Consent Order in fact contemplated that there would be some further determination of Debtor's estate's interest in Shenandoah and, at the time Pryor obtained his charging lien, the Trustee had already filed an adversary to recover the estate's interest in Shenandoah. In lieu of expending this Court's resources, which had already acted on an emergency basis to enjoin action by Shenandoah, through seeking a stay of Pryor's state court action, the parties entered into the Consent Order allowing Pryor to proceed with the proviso that he acquired an interest that was expressly subordinate to any claim of the Trustee. Therefore, there are no genuine issues of material fact regarding the priority of Pryor's lien and the Trustee is entitled to summary judgment on his First Cause of Action. Pryor agreed to take subject to the Trustee's claims, regardless of when the Trustee succeeded and took title to Shenandoah's assets, and the Trustee has prevailed on his claims to recover Shenandoah's assets and the membership interest in Charleston Aluminum.

⁸ Though a party prevailing on a claim for constructive trust may take subject to previously perfected liens, the Court does not need to parse out the precise claims on which the Trustee prevailed since Pryor expressly agreed to take subject to any of the Trustee's claims and not just those claims that could have primed Pryor's lien. See Lone Star Milk Producers, Inc. v. Litzler, 370 B.R. 671, 679 (Bankr. N.D. Tex. 2007) (noting under Texas law that a constructive trust beneficiary takes subject to pre-existing valid liens).

⁹ Pursuant to 11 U.S.C. § 541, the Trustee's causes of action vested in Debtor's estate on the petition date and the Trustee took prompt action to recover Debtor's assets whereas Pryor took no action to enforce his judgment against Shenandoah's membership interest in Charleston Aluminum until after this case was filed.

Finally, the Court finds that Pryor is judicially estopped from claiming a superior interest in Shenandoah's assets and the membership interest in Charleston Aluminum. The doctrine of judicial estoppel prevents a party from adopting a position that is inconsistent with a stance taken in prior litigation. See Shadow Factory Films Ltd. v. Swilley (In re Swilley), 295 B.R. 839, 850 (Bankr. D.S.C. 2003). Though there is no specific formula for applying judicial estoppel, the Court considers factors such as: 1) a party taking a position that is factually incompatible with a position taken in a prior judicial proceeding; 2) the prior position was accepted by the tribunal; and 3) the party to be estopped took the inconsistent position for purposes of gaining an unfair advantage. See 1000 Friends of Maryland v. Browner, 265 F.3d 216, 226 (4th Cir. 2001). Each of these factors weighs in favor of applying judicial estoppel in this proceeding. First, Pryor is now seeking a determination that his lien is entitled to priority, but in state court and before this Court he has expressly agreed to subordinate his claim to any claim held by the Trustee if the Trustee prevailed. This position was accepted by both this Court and the state court. Allowing Pryor to now assert he is entitled to priority following the Trustee's successful settlement of his claims against Spencer and Shenandoah would be an unfair advantage for Pryor since he was only allowed to obtain the charging lien with the Trustee's cooperation and by entering into the Consent Order, which subordinated his interest to the Trustee's claims. Therefore, Pryor is judicially estopped from challenging the priority of his lien in this adversary.

Based on the foregoing, the Trustee's motion for summary judgment is granted. The Trustee is entitled to summary judgment on his First Cause of Action seeking declaratory relief to enforce the Consent Order.¹⁰ Pursuant to the terms of the Consent Order, Pryor shall

¹⁰ The Court does not need to make a determination, at this point, regarding Trustee's motion for summary judgment on his Fourth and Fifth Causes of Action since summary judgment on the First Cause of Action grants the Trustee complete relief.

relinquish his lien on the Charleston Aluminum membership interest and he shall be treated as a general unsecured creditor in Debtor's bankruptcy case.

AND IT IS SO ORDERED.

Columbia, South Carolina
August 27, 2008


UNITED STATES BANKRUPTCY JUDGE