

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Statesboro Division**

In the matter of:)

JOHN DOUGLAS GALBREATH)
(Chapter 7 Case Number 99-60517))

Debtor)

JAMES B. WESSINGER, III,)
TRUSTEE)

Plaintiff)

v.)

JOEL SPIVEY and RONNIE SPIVEY,)
DOUGLAS ASPHALT COMPANY)

Defendants)

Adversary Proceeding

Number 00-6017

FILED
at 3 O'clock & 52 min PM
Date 10/3/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia *MB*

**ORDER ON SPIVEY DEFENDANTS' MOTION TO AMEND COURT'S
PRE-TRIAL MEMORANDUM AND AMENDED SCHEDULING ORDER**

Before the Court is Spivey Defendants' Motion to Amend the Court's Pre-Trial Memorandum and Scheduling Order. Therein, the Spiveys request the Court to enter an order amending the Court's ruling in the August 27 Pre-Trial Memorandum and Scheduling Order that all evidence from the trial of Phase One of this bifurcated trial shall be admissible into the record to be considered in adjudicating the remaining claims against

the Spiveys. The Motion is granted notwithstanding the following factors:

1) Intent of the Consent Bifurcation Order. The terms of the November 15, 2001, Consent Bifurcation Order clearly demonstrate that the parties and the Court contemplated two phases of a single trial. The requirement that witnesses who testified, and were subject to cross-examination in Phase One, be recalled and have identical questions propounded to them will not serve the interests of convenience, efficiency and judicial economy which were the driving forces behind the Consent Bifurcation Order. Indeed, it will make the bifurcation a pointless exercise and serve to delay and further complicate these proceedings.

2) Lack of any apparent benefit to Movant. No motion similar to the one before the Court was filed on behalf of DAC. Accordingly, the record of Phase One would have become part of the record in Phase Two with regard to the relief sought against DAC if this motion were granted according to its terms. To require that the same duplicative evidence be reintroduced against the Spiveys borders on an absurd result. This is particularly true when the Spiveys have not identified a single document, or any testimony, that was admitted in Phase One that would not be admissible against them. Finally, it ignores the reality that in a bench trial, the receipt of inadmissible evidence (as to the Spiveys) over an objection is not ordinarily grounds for reversal if there was other admissible evidence in the record sufficient to support the findings. *See McCormick on Evidence* § 60 (5th ed. 1999); *see also Gov't of Canal Zone v. Jiminez G.*, 580 F.2d 897, 898 (5th Cir. 1978)(noting that

judge sitting as trier of fact is presumed to have rested verdict on admissible evidence before him and disregarded inadmissible evidence).

3) Lack of Prejudice to Movants. In the August 27 Order the Court held that additional evidence or testimony will be permitted in Phase Two to supplement or rebut the evidence in the record of Phase One. Furthermore, the Court recognizes that it must consider any appropriate motions to strike evidence that may be inadmissible against the Spiveys. Certainly, by not requiring the reproduction of the same testimony, the trial would be expedited by treating the record to date as part of the record of Phase Two, and the rights of the Spivey Defendants would be fully protected to the extent supplemental or rebuttal evidence is received or motions to strike, when appropriate, are granted.

4) Absence of any lack of due process. The contention that neither the Spiveys nor their counsel were present or represented in Phase One of the trial is incorrect. Joel Spivey was permitted to remain in the courtroom throughout the trial. Admittedly, the record at the beginning of the trial concerning whether Ronnie Spivey would be permitted to remain in the courtroom is unclear. Trustee made a motion to sequester him to which his counsel objected.¹ The Court engaged in a colloquy with counsel for both parties until counsel announced that Ronnie Spivey would not be called as a witness. Upon that

¹ In some ways, both Trustee and Defendants take contrary positions now in that Trustee argued then that no relief was being sought against the Spiveys in the counts that were to be tried, and therefore they had no right to remain in the courtroom as parties. On the other hand, Spiveys' counsel argued then that the litigation of Phase One "has a substantial impact on the rest of the case." (Tr.4, UNITED STATES BANKRUPTCY COURT Dkt. 87).

announcement, the Court concluded that he could remain in the courtroom without any express finding as to whether he was being allowed to remain as a party to the litigation or simply because he was a non-witness and thus entitled to remain in the courtroom as an observer. The point is, however, that Ronnie Spivey was allowed to remain in the courtroom at all times, and whether he exercised that right throughout the trial is irrelevant.² Finally, the assertion that the Spiveys were not represented during the trial of Phase One is fatuous in that the objection to the sequestration of Ronnie Spivey was asserted by the attorneys who then and now serve as his counsel, his brother's counsel, and counsel to DAC.

Notwithstanding what this Court believes to be the clear intention of the Consent Bifurcation Order, despite the fact that the purpose of the bifurcation would be utterly destroyed by the grant of the Spiveys' Motion, despite the fact that any potential prejudice would be cured as set forth in paragraph three above, and despite the fact that neither of the Spiveys was barred from the courtroom nor deprived of any due process during Phase One, nevertheless I grant the Motion for the following reasons:

This case has been more stubbornly contested than reason should permit. If litigation were sport, this case would rival the World Series and the Superbowl. It has been marked by a blizzard of pleadings and briefs, and endless pre-trial motions which appear to have no purpose other than to frustrate the proceedings and to delay the ultimate

² The Spiveys' motion inexplicably omits reference to the full text of this colloquy, leaving the false impression that Ronnie Spivey was not permitted to remain in the courtroom.

day of reckoning when a trial will be held.³ However, the trial must be tried on as perfect a

³ The proliferation of pleadings in this case has been noted in previous orders in which I have found good cause to allow Trustee's out of time motions to amend (Pre-Trial Mem. and Am. Scheduling Order, p.27, n.7 (filed Aug. 27, 2003)). An understanding of the reasons for this conclusion can be gleaned by a review of the motions and briefs filed by Defendants in the post-Phase One judgment phase in the United States Bankruptcy Court of the Southern District of Georgia:

Defendant Douglas Asphalt Company's Objection to Plaintiff's Motion to Modify Judgment (Dkt. 107)
Defendant Douglas Asphalt Company's Supplemental Objection to Plaintiff's Motion to Modify Judgment (Dkt. 117)
Spivey Defendants' Emergency Motion for Stay of Briefing Schedule on Jury Trial Issue (Dkt. 118)
Motion of Defendants Joel Spivey and Ronnie Spivey for Withdrawal of the Reference of all Claims Asserted Against the Spiveys and the Related Defenses (Dkt. 119)
Memorandum of Law in Support of Motion of Defendants Joel Spivey and Ronnie Spivey for Withdrawal of all Claims Asserted Against the Spiveys and the Related Defenses (Dkt. 120)
Motion of Spivey Defendants for Exclusion of Trustee's Valuation Expert Testimony and Report and Memorandum in Support (Dkt. 127)
Defendant DAC's Motion for Partial Summary Judgment as to Counts I, IX and X of the Trustee's Complaint (Dkt. 128)
Spivey Defendants' Motion for Summary Judgment and Memorandum of Law in Support (Dkt. 130)
Reply in Support of Motion of Defendants Joel Spivey and Ronnie Spivey for Exclusion of Trustee's Valuation Expert Testimony and Report and Memorandum in Support (Dkt. 149)
Defendant DAC's Reply to Plaintiff's Response to DAC's Motion for Partial Summary Judgment as to Counts I, IX, and X of the Trustee's Complaint (Dkt. 150)
Notice of Appeal by Defendants Joel Spivey and Ronnie Spivey from Order Denying Defendants' Motion for Exclusion of Trustee's Valuation, Expert Testimony, and Report for Lack of Relevance (Dkt. 157)
Motion of Defendants Joel Spivey and Ronnie Spivey for Leave to Appeal from Order Denying Defendants' Motion for Exclusion of Trustee's Valuation Expert Testimony and Report and Memorandum in Support (Dkt. 158)
Reply of Defendants' Joel Spivey and Ronnie Spivey in Support of for Leave to Appeal from Order Denying Defendants' Motion for Exclusion of Trustee's Valuation Expert Testimony and Report (Dkt. 164)
Objection of Douglas Asphalt Company, Joel Spivey, and Ronnie Spivey to Trustee's Oral Motion to Amend Complaint (Dkt. 195)
Spivey Defendants' Motion for Exclusion of Inconsistent Valuation Evidence (Dkt. 196)
Spivey Defendants' Motion for Exclusion of Certain "Expert" Evidence Regarding Partitioning and Subdividing (Dkt. 197)
Objection of Joel Spivey and Ronnie Spivey to Plaintiff's Motion for Leave to Amend Complaint for Third Time and to Amend Plaintiff's Portion of Proposed Consolidated Pre-Trial Order for Trial of Claims Against Spiveys under Counts I and X (Dkt. 207)
Joel Spivey and Ronnie Spivey's Reply in Support of their Motion for Exclusion of Inconsistent Valuation Evidence (Dkt. 210)
Spivey Defendants' Response to Plaintiff's Motion for Clarification of Court Order (Dkt. 218)
Spivey Defendants' Motion to Amend Court's Pre-Trial Memorandum and Amended Scheduling Order (Dkt. 219)
Motion for Reconsideration of Order Granting Plaintiff's Motion for Leave to File Third Amendment to First Amended Complaint (Dkt. 220)

In addition to the motions before this Court, the parties were vigorously pursuing appeals and motions in the District Court and Court of Appeals.

record as possible. Despite this Court's belief that it is clear that the parties knew and understood that the evidence from the record of Phase One would be admitted subject to supplementation in Phase Two, and that its admission would not constitute error, the record surrounding the colloquy when the sequestration of Ronnie Spivey was originally sought - and ultimately not obtained - creates the possibility of a contrary interpretation by a higher court.

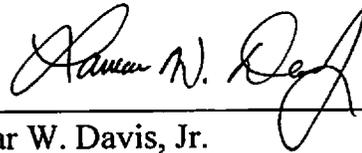
Moreover, in the final analysis, live testimony is preferable to reference to a written transcript. Thus, although I find the prior record to be admissible, out of an abundance of caution, I will exercise the discretion I have as trial judge to control the manner of presenting evidence at this trial, and require all witnesses to appear in person. Unless it later appears that a Phase One witness is unavailable or some other prejudice exists which Trustee cannot overcome by a stipulation of facts, or by responses to requests for admission which Trustee is free to propound, or otherwise, I hold that the record of Phase One in its entirety will not be admitted. Counsel for all parties are directed to produce all witnesses in support of their contentions as to Counts 1 and 10 through live testimony.

Pursuant to the foregoing IT IS THE ORDER OF THIS COURT that Defendants' Motion to Amend Court's Pre-Trial Memorandum and Scheduling Order is GRANTED.

IT IS FURTHER ORDERED that the parties are granted until October 31,

2003, to propound requests for admission if they so desire. Counsel are ORDERED to carefully consider the provisions of Bankruptcy Rule 7037(c)(2) in responding to any requests for admission.

The deadline for filing a joint consolidated pre-trial report now scheduled for November 17, 2003, is extended to December 8, 2003. The Trial previously scheduled for December 29, 2003, is vacated and reassigned for January 28, 2004.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 3rd day of October, 2003.

C: Debtor - GALBREATH
Debtor Atty - BULLOVIC
Plaintiff
Pltf Atty STILLWELL/DILLARD
Defendant Atty MARBES
Def't Atty HORNE/MILLS
Trustee WESSINGER
U. S. Trustee

10/3/03
JB

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