

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

In the matter of:)
)
ROBERT RAY GREENBERG)
(Chapter 7 Case Number 01-42188))

Debtor

ROBERT RAY GREENBERG,)
JAMES B. WESSINGER, III,)
Chapter 7 Trustee)

Plaintiffs

v.)

REYNOLD H. GREENBERG)
Individually and as Trustee of)
The Reynold H. Greenberg Sr. Trust,)
The Dora W. Greenberg Trust, and)
The Lois Greenberg Trust)

Defendant

Adversary Proceeding

Number 02-4095

FILED

at 10 O'clock & 24 min A M

Date 6/4/04

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

MH

ORDER ON MOTION FOR SUMMARY JUDGEMENT

Robert Ray Greenberg ("Debtor") filed a Chapter 7 bankruptcy case on July 25, 2001. On July 22, 2002, Debtor filed this Adversary Proceeding against Reynold H. Greenberg ("Defendant"), individually and as Trustee of The Reynold H. Greenberg Sr. Trust, The Dora W. Greenberg Trust and The Lois Greenberg Trust. In filing the adversary complaint, Debtor originally sought an accounting of the above referenced trusts as a

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beneficiary of said trusts. Defendant filed a Motion for Summary Judgment on February 11, 2004.

DISCUSSION

Debtor and Defendant are brothers. The trusts that are the subject of this adversary proceeding were established under the wills of Debtor and Defendant's parents, Reynold H. Greenberg, Sr., and Dora W. Greenberg and their sister, Lois Greenberg. Defendant has served as trustee for over fifteen years. Defendant contends that, prior to this adversary, he always provided information and accountings to Debtor by way of hand-written correspondence as distributions were made from the trusts.

Debtor originally filed the adversary complaint seeking an accounting. However, Debtor amended his pleadings on February 13, 2003, to allege, inter alia, that Defendant had violated his fiduciary duty as Trustee by diverting, commingling, and failing to properly disburse funds from the trusts. In making his allegations in the amended pleading, Debtor seeks \$500,000.00 from Defendant. My Order granting Debtor's motion to amend the pleadings was filed on May 9, 2003. In addition, the Chapter 7 Trustee, James B. Wessinger, III, filed a motion to intervene as a party Plaintiff in the adversary on February 20, 2003, and the motion was granted by an Order filed May 9, 2003.

Defendant admitted that there has been a commingling of the trust funds with his personal accounts, but he denies taking any actions that have resulted in harm to

Debtor. Defendant explained that he deposits funds into his personal account that are sent to him by the various trust fund money market accounts and then disburses the funds to Debtor for his proportionate share pursuant to the various trusts and wills. Because he is the trustee of a family trust, Defendant did not deem it necessary to establish a separate account into which to deposit the money he received. Further, he has handled the money received this way for the past fifteen years and has, prior to this adversary complaint, encountered no problems.

While Defendant had provided Debtor with volumes of statements and information related to the trusts, he contends that he failed to provide a "formal accounting" in a prompt manner for two reasons. First, he was a family trustee and had never provided a formal accounting in the past. Second, he is over eighty years old and has experienced a series of health problems that have impaired his ability to comply with Debtor's requests. Defendant did, however, submit to a Rule 2004 examination. In addition, Defendant submitted his Responses to Omnibus Discovery Request on February 20, 2003, in which Defendant responded to Debtor's discovery requests in a very detailed manner. Finally, in November of 2003, David F. Dotson, tax manager with the accounting firm Deloitte & Touche, prepared an accounting of the various trust accounts.¹ However, this Court was not

¹The audit performed by David F. Dotson included the following Trusts accounts:

- PNC Advisors (Account Number 86-0249-9355), Estate of Reynold H. Greenberg, Sr.;
- Janney Montgomery Scott (Account Number PHJ9 3826-2609/PH22 3826-2609), Estate of Reynold H. Greenberg, Sr.;
- Janney Montgomery Scott (Account Number PHJ9; 3826-2407/PH22 3826-2407), Dora W. Greenberg Trust; and
- The Vanguard Group (Account number 9936626180), Estate of Reynold H. Greenberg, Sr.

provided with a copy of the accounting and Debtor protested that he never received any such document. Response to Motion for Summary Judgment, ¶13 (Feb. 27, 2004).

Because this Court was not in possession of the accounting produced by Mr. Dotson and because Debtor denied receiving the information, I issued an Order on March 25, 2004, requesting that Defendant supply Debtor and file with this Court a copy of the accounting performed by David F. Dotson as well as other relevant documents. Further, I gave Debtor twenty (20) days to respond after receiving such documents. Defendant filed a Supplement to Motion for Summary Judgment on March 31, 2004. Such motion contained the following documents:

1. Accounting of The Estate of Reynold H. Greenberg, Sr. Trust located at the brokerage firm of Janney Montgomery Scott;
2. Accounting of The Dora W. Greenberg Trust located at the brokerage firm of Janney Montgomery Scott;
3. Accounting of The Estate of Reynold H. Greenberg, Sr. Trust located at the brokerage firm of PNC Advisors;
4. Accounting of The Estate of Reynold H. Greenberg, Sr. Trust located at the brokerage

Affidavit David F. Dotson (Feb. 11, 2004)

The auditing, however, did not include the Estate of Lois Greenberg account. Such account is maintained by Janney Montgomery Scott (account number PH223828-1240) and as of 12/31/02 it consisted of only a small money market balance of \$859.15. See Responses to Omnibus Discovery Request, p. 2 (Feb. 20, 2003)

firm of The Vanguard Group;

5. Distribution accounting for the real property known as 1801 Chestnut Street as well as the final settlement statement and breakdown of proceeds of the sale of such property which took place on April 24, 2003.

On April 14, 2004, Debtor filed his Response to Defendant's Filing of Accounting in which he points to specific transactions in the accounting that he deems suspect. Debtor alleges, *inter alia*, that, "[d]efendants' Exhibit C accounts for a loan to Defendant for \$9,867.48. The accounting fails to suggest a reason for the loan and the terms of the pay-back. Further, such a loan is inappropriate and should be repaid immediately. A disbursement of \$42,451.89 is paid to someone without a name or reason." Response to Defendant's Filing of Accounting, ¶ 4 (April 14, 2004). In addition, Debtor, for the first time, mentioned the Trust of August 1931 which "[f]or some unknown reason has disappeared[.]" Id. at ¶1. Debtor now seeks an accounting of the August 1931 Trust.²

CONCLUSION

Federal Rule of Civil Procedure 56, made applicable to bankruptcy practice pursuant to Federal Rule of Bankruptcy Procedure 7056, governs a summary judgment

²I allowed Debtor to amend his complaint in an Order filed on May 9, 2003. After a hearing and on September 19, 2003, this Court issued a Rule 16 Scheduling Order in which October 31, 2003, was set as the date by which discovery should be completed. Debtor's first made mention of the Trust of August 1931 in his April 14, 2004, Response to Defendant's Filing of Accounting. However, Debtor was undoubtedly aware of the Trust when he first filed his complaint and when it was later amended. Thus, I hold that allowing Debtor to assert a cause of action related to the Trust of August 1931 at this time would result in undue delay and prejudice to Defendant.

motion. Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties indicate that there is no genuine issue of material fact and show that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In analyzing a motion for summary judgment, the Court must view all the evidence and factual inferences drawn therefrom in a light most favorable to the nonmoving party. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party bears the initial burden of showing no such issues exist. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). However, Rule 56(e) provides that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, once the moving party has met its burden, the burden then shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial. *See Allen* 121 F.3d at 646.

There still exist issues of material fact concerning whether Defendant breached his fiduciary duty such that Defendant's motion for summary judgment is denied. It is true that by providing the accounting Defendant has supplied Debtor and this Court

with a seemingly comprehensive "summary" of the transactions occurring in the various trusts accounts. However, the accounting is just that, a summary. This Court is unable to determine solely from the accounting whether distributions were properly made and whether Debtor properly received his allotted share of each trust. Without more information, there is no way to understand certain transactions contained in the accounting. For example, Debtor raised the following questions in his April 14, 2004, response which demonstrate that material facts remain in dispute: (1) Whether the sum of \$24,399.18 was ever paid to Debtor as set forth in Defendant's Exhibit "A;" (2) Why \$24,530.07 was paid to the law firm representing the Defendant (Wolf, Block, Schorr, Solis); (3) Whether the sum of \$12,821.96 was ever paid to the Debtor as set forth in Exhibit "B;" (4) Why the attorneys for the Defendant were paid \$48,769.00; (5) Whether a loan of \$9,867.48 made to the Defendant was proper and whether it has been paid back; (6) An identification and explanation for disbursements in the amount of \$42,451.89 set forth as being to "unknown" recipients; (7) An identification of the location of the sum of \$742,827.27 held in trust and an explanation as to why interest has not been disbursed to the Debtor from that fund.

The accountant employed by Defendant, David F. Dotson, made no representations concerning the truthfulness of the figures contained in the accounting or whether the distributions made were in conformity with the various wills and trust agreements. Instead, Dotson merely stated in his affidavit that, "[t]he accountings were prepared based on unaudited and unverified representations, information and other facts specifically made or submitted to Deloitte & Touche by Reynold Greenberg or his

representatives.” Affidavit David F. Dotson, ¶ 4 (Feb. 11, 2004). Debtor’s charges against Defendant are very serious and he has been vociferous in his assertions that Defendant has breached his fiduciary duty. In light of the factual issues raised, the accounting, standing alone, cannot support Defendant’s motion for summary judgment. The motion is, therefore, denied.

JURISDICTION

Debtor was denied a discharge as a result of his perjurious testimony and omissions from his bankruptcy schedules. Ironically, such omissions included Debtor’s failure to properly disclose the trusts that are the subject of this adversary complaint and from which he now seeks to collect. *See* Brief in Support of Motion for Summ. J. at 7, Wessinger v. Greenberg (In re Greenberg), Adver. Num. 02-4055 (Bankr. S.D. Ga. June 5, 2002) (Davis, J.) (“Defendant testified at the 11 U.S.C. §341(a) meeting of creditors that no one owed him any money that was collectible.”). Debtor’s Chapter 7 case remains open nearly two years after he was denied a discharge August 2, 2002. This fact is likely due, at least in part, to the existence of this adversary complaint. However, Debtor here is not invoking a bankruptcy-specific right. Instead, he is seeking damages for Defendant’s breach of fiduciary duty (traditionally a state law claim) and Defendant may be entitled to a trial by jury.³ Further, the trusts that are the subject of this adversary complaint are

³28 U.S.C. § 157(e) was created by the Bankruptcy Reform Act of 1994 and states:

If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district

located in Pennsylvania and governed by Pennsylvania law. Finally, Debtor's ex-wife, Lois Greenberg, has previously undertaken litigation regarding the trusts in the Court of Common Pleas, First Judicial Circuit of Pennsylvania, Civil Trial Division. All of these factors lead this Court to question whether a nexus remains between Debtor's bankruptcy case and his complaint for breach of fiduciary duty such that this Court retains core jurisdiction over the adversary proceeding. *See, e.g. Continental Nat'l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1349 (11th Cir. 1999) ("If the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding[.]"). If the adversary complaint is not a core proceeding, it may be appropriate that I abstain from hearing it pursuant to 28 U.S.C. § 1334(c).

"Matters concerning the administration of the estate" is a listed example of a core proceeding. 28 U.S.C. § 157(b)(2)(A). Thus, it is noteworthy that the Chapter 7 Trustee has intervened as a co-plaintiff in this adversary complaint in an effort to administer any assets recovered in this litigation. However, his role in this litigation has been limited. Now that discovery has progressed and I have ruled on the motion for summary judgment, it is appropriate for the Trustee to evaluate this claim and determine whether a bankruptcy purpose would be served by continued prosecution of this case or whether the claim should

court and with the express consent of all the parties.

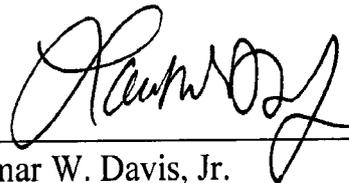
Thus, all parties must consent and the District Court must grant this Court special authority before I may conduct a jury trial. However, no Order exists that gives this Court the general power to conduct jury trials.

be abandoned as burdensome or of inconsequential benefit to the estate. Depending on the Trustee's decision, this adversary complaint may be beyond the jurisdictional reach of this Court. Therefore, I order that the parties submit briefs to this Court by June 23, 2004, on the question of whether the current adversary proceeding remains within 28 U.S.C. § 157(b) and the core jurisdiction of this Court.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Defendant Reynold H. Greenberg's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that the parties submit briefs to this Court by June 23, 2004, on the question of whether the current adversary proceeding remains within 28 U.S.C. § 157(b) and the core jurisdiction of this Court.



Lamar W. Davis, Jr.
Chief United States Bankruptcy Judge

Dated at Savannah, Georgia

This 4th day of June, 2004.

cc: Debtor Greenberg
Debtor's Atty. Grant
Creditor Reynold Greenberg
Creditor's Atty. Chisholm
Trustee Messinger
U. S. Trustee Jarles
M. Smith
D. Stern

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6/4/04