

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

In the matter of:)
)
HMH MOTOR SERVICES, INC.)
(Chapter 7 Case 89-20232))
)
Debtor)

Adversary Proceeding
Number 97-2072

ANNE MOORE)
CHAPTER 7 TRUSTEE)
)
Plaintiff)

FILED
at 2 O'clock & 23 min PM
Date 9-24-97

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia 

v.)
)
SOUTHEASTERN BANK)
LARRY BREWER)
HMH ENTERPRISES, INC.,)
and)
HMH TRANSPORT, INC.)
)
Defendants)

ORDER GRANTING PRELIMINARY INJUNCTION

This adversary proceeding was commenced by the filing of a complaint on August 26, 1997, by the Trustee. The complaint alleged that Defendant, Southeastern

Bank, holds in its possession a bank account which "may be property of the Debtor's estate." The complaint requested "that said bank account be frozen in place at Southeastern Bank pending a hearing in this Court to determine whether this is estate property." In response the bank filed an answer requesting "that the Court issue an *ex parte* temporary restraining order requiring the aforesaid funds to be frozen."¹ Thereafter, on August 28, 1997, I signed an *ex parte* Temporary Restraining Order staying an action in Superior Court pending a preliminary hearing on the Trustee's complaint which was scheduled for September 11. At that time the evidence revealed the following.

The Debtor, HMH Motor Services, Inc., filed a Chapter 11 case in 1989. On or about December 6, 1996, Debtor's Chapter 11 case was converted to a case under Chapter 7. Prior to the time of conversion, Defendant Larry Brewer had acted throughout the pendency of the Chapter 11 as president and chief executive officer of the Debtor, HMH Motor Services, Inc. The account which is the subject of this proceeding bears account number 0550108571 at Southeastern Bank in Hazlehurst, Georgia; from at least March 8, 1994, forward, the account carried the name HMH Motor Services, Inc., Atlanta Expense

¹ Defendants argue that the Bank is immune from liability over payments it might make from this account and thus can show no irreparable harm to sustain injunctive relief. That legal position was disputed by Bank's counsel and counsel for John Cady, a judgment creditor seeking to garnish these funds. It is not necessary for me to rule on the issue of irreparable harm in reference to the bank, however. The Trustee's suit asks that the funds be "frozen" pending a determination of ownership of the account. While the pleading could be more specific, I construe that request to "freeze" the account, under notice pleading to be a sufficient request for injunctive relief - to prohibit transfer of the funds pending further order of court.

Account (Exhibit D-5). On October 24, 1996, Larry Brewer signed a signature card under penalty of perjury revising the account name to read "HMH Enterprise." (Exhibit D-3). The account number did not change at any time.

Also on October 24, 1996, Defendant Larry Brewer executed an affidavit of sole ownership swearing and affirming that he is the sole owner of HMH Enterprise and "that no other person, firm, association, partnership or corporation, is entitled to the funds of said company." (Exhibit D-3). On that date, the Debtor, HMH Motor Services, Inc., was still a Chapter 11 debtor-in-possession and Defendant Larry Brewer was the individual charged with running the debtor corporation. Brewer did not obtain Court authority to change the title of the bank account from HMH Motor Services, Inc., to HMH Enterprise. Thereafter, Larry Brewer executed another revised signature card on December 20, 1996, renaming the account HMH Enterprises, Inc. (Exhibit D-1). That revised signature card cross-referenced a corporate resolution dated December 13, 1996, which Larry Brewer signed as president. It authorized the corporation to maintain a depository account with Southeastern Bank, authorized Larry C. Brewer and Sammy Smith to sign checks on behalf of the corporation, and authorized the secretary of the corporation to certify to Southeastern Bank that the corporate resolution and the provisions thereof are "in conformity with the charter and by-laws of this corporation" (Exhibit D-2). However, as of December 13 and

December 20, 1996, there was no duly organized corporation known as HMH Enterprises, Inc.

Notwithstanding the fact that HMH Enterprises, Inc., was never incorporated, a federal highway administration certificate was issued to HMH Enterprises, Inc., on February 5, 1997 (Exhibit HMH-14). Apparently, however, the name HMH Enterprises, Inc., was not a name which was available for use by Mr. Brewer's entity and a reentitled federal highway administration certificate was issued on May 8, 1997 in the name of HMH Transportation, Inc. (Exhibit HMH-15).

At the time the account ownership was changed from the Debtor, HMH Motor Services, Inc., to HMH Enterprise, that is, on October 24, 1996, the balance in the account was \$219.88 (Exhibit HMH-3). On December 6 when the case was converted from Chapter 11 to Chapter 7 the balance in the account was \$185.94 (Exhibit HMH-5). On December 20, 1996, when Larry Brewer purported to transfer the account from HMH Enterprise, a sole proprietorship owned by Larry Brewer to HMH Enterprises, Inc., the account balance was \$6,636.23 (Exhibit HMH-5). There was no evidence that the account title was ever changed from HMH Enterprises, Inc., a non-existent corporation.

Almost immediately after December 20th, the activity in the account changed substantially. In the months preceding December, deposits had never exceeded \$7,000.00, and yet between December 6 and the end of the month, total deposits in excess of \$225,000.00 were processed through the account. As of the date of the entry of the Temporary Restraining Order, the balance in the account was approximately \$62,000.00.

Mr. Brewer's explanation concerning the manner in which he has dealt with this account of the debtor-in-possession was unimpressive. He testified that the account in question had been utilized not as the general operating account of the debtor-in-possession, but rather served as an expense account for the Atlanta operation of the debtor-in-possession and that HMH Motor Services, Inc., had operated a larger, more active debtor-in-possession account for its other operations. His testimony revealed that K-Mart was a major customer of the debtor-in-possession in the Atlanta area and that K-Mart is a major customer of HMH Enterprises, Inc., or HMH Transportation, Inc., since the date of conversion. Nevertheless, he testifies that none of the money in the account represented earnings of the Debtor, HMH Motor Services, Inc., but asserts that all of the deposits in December and since have come from earnings of HMH Enterprises or HMH Transportation, Inc. Based on those assertions, Mr. Brewer and his counsel assert that the Court should refuse to convert the Temporary Restraining Order into a preliminary

injunction. They argue that the elements necessary to satisfy the issuance of such a writ are not proven and that the resulting injury to HMH Transportation, Inc., or HMH Enterprises, Inc., would severely damage the viability of those corporations.

I have carefully considered those contentions and it will indeed be regrettable if this Court's action has that unfortunate result. Consideration of all of the evidence, however, supports the Trustee's contention that at a time when Mr. Brewer was operating a debtor-in-possession and had fiduciary obligations in that regard, he unilaterally and without Court authorization undertook to transfer the ownership of a debtor-in-possession account from the debtor-in-possession to himself personally. Not long thereafter he attempted to transfer the account from himself personally to a non-existent corporation, the result of which must be viewed as a nullity and must mean that the account remains personally vested in Mr. Brewer. While the ownership of the account was being thus maintained, the case was converted and the Trustee became vested with all property interests of the estate of HMH Motor Services, Inc., which included this bank account transferred from ownership of the debtor-in-possession to Mr. Brewer without Court authority. *See* 11 U.S.C. § 549. Almost immediately after the ineffective transfer from Brewer to HMH Enterprises, the account began to generate hundreds of thousands of dollars of depository activity.

There are four prerequisites for the extraordinary relief of preliminary injunction. Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972). They are as follows:

- (1) a substantial likelihood that plaintiff will prevail on the merits,
- (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted,
- (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and
- (4) that granting the preliminary injunction will not disserve the public interest.

Guaranty Financial Services v. Ryan, 928 F.2d 994 (11th Cir. 1991), quoting United States v. Lambert, 695 F.2d 536, 539 (11th Cir.1983). The primary justification for this remedy is to preserve the court's ability to render a meaningful decision on the merits. Canal Auth. v. Callaway, 489 F.2d 567 (5th Cir. 1974).

Viewing all of the evidence on a preliminary basis, I conclude that the Trustee has met its burden of showing that there is a substantial likelihood of the Trustee prevailing on the merits at final trial in establishing that some portion of the \$62,000.00 currently on deposit in this account belongs to the Debtor in this case. The Trustee

likewise has met its burden on the other three prerequisites as well. The Chapter 7 estate of HMH Motor Services, Inc., includes whatever portion of the \$62,000.00 belongs to the Debtor, and must be distributed through the liquidation process in bankruptcy as with the Debtor's other assets. An account such as this is fungible, and it will be extremely difficult to recover the money at a later point without the protection of the preliminary injunction. The "most compelling reason in favor of (granting a preliminary injunction) is the need to prevent the judicial process from being rendered futile by defendant's actions or refusal to act." Canal Auth., 489 F.2d at 573. If HMH Enterprises/HMH Transport, Inc. were allowed free and unrestricted use of the money in question, the funds which belong to the Debtor's estate might never be recovered and the court's ability to render a meaningful decision on the merits would be jeopardized. Granting this injunction thus serves, rather than disserves, the public interest, both in the payment to Debtor's creditors and in the efficient and fair administration of the bankruptcy process.

CONCLUSIONS OF LAW

Accordingly, the Defendants are restrained and enjoined until further Order of this Court from (1) transferring any of the funds in account number 0550108571 at the Southeastern Bank; (2) that said account is, until further Order of this Court, frozen and no funds shall be removed from or disbursed out of that account without specific Court

authority;² (3) that the parties are granted ninety (90) days discovery and that a final trial over the ownership of the funds in this account be scheduled for the December term of Court at a specific date and time in a notice to be issued by the Clerk.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 23rd day of September, 1997.

² Defendant Larry Brewer has requested that if a preliminary injunction were to issue, the Plaintiffs be required to post security as required by Federal Rule of Civil Procedure 65(c). Given that the Plaintiff in this action is the Trustee, and further given the plain language of Federal Rule of Bankruptcy Procedure 7065, such security is not required.