Case No. 10-11202

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Netsphere, Inc. et. al.,

Plaintiffs

v.

Jeffrey Baron,

Defendant / Appellant

Daniel J. Sherman
(Ondova Limited Company)

Defendant / Appellee

Interlocutory Appeal of Order Appointing Receiver
From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

APPENDIX A
TO MOTION TO STAY EX-PARTE ORDER APPOINTING RECEIVER OVER JEFFREY BARON

Respectfully submitted,

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FOR JEFFREY BARON

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TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW JEFF BARON, Appellant, and files this Appendix.

POINTS IN RELATION TO THE DISTRICT COURT'S RULE 8(A)(1) FINDINGS

A. RE: SPECIFIC FINDINGS OF THE DISTRICT COURT IN RULING ON JEFF BARON'S MOTION TO STAY

Abuse of Discretion to accept unverified allegations as facts

The district court abused its discretion in taking the unverified allegations of Mr. Urbanik's motion as evidence of which the judge has been "informed". (Exhibit P). A typical example (Exhibit P, page 15):

> "[T]he Trustee informed the Court that Mr. Thomas was terminating his legal representation of Baron because he had not been paid and Baron had filed a grievance against him."

These allegations, like so many in Mr. Urbanik's motion are pure fabrications, and it was an abuse of discretion for the district court to accept them as evidence of facts. Mr. Thomas was fully paid by Jeff Baron, and no grievance was filed against Mr. Thomas by Jeff. (Exhibit R).

Clear Error as to Factual Premises

The district court clearly erred in finding facts such as that the Friedman law firm were the both the fourth and ninth set of lawyers to represent Jeff Baron. (Exhibit P, pages 3 and 8). When the original attorney and his co-counsel withdrew, Mr. Friedman' stepped in. (Exhibit P, pages 7 and 8).

The Bankruptcy Filing

The district court clearly erred in finding that Jeff Baron took Ondova into bankruptcy in bad faith to avoid a contempt hearing heard July 28, 2009. The contempt hearing was taken off the docket **before** the bankruptcy was filed and the hearing held on that date was a status conference. (Exhibit S).

Moreover, prior to Ondova, Ltd. filing for bankruptcy, the district judge (without notice and without any hearing) ordering that 50% of the income of Ondova (which had been interplead in a related state case) would go to Mr. Friedman's law firm and would be forfeited if Jeff Baron tried to fire Mr. Friedman. (Exhibit T). At the same time the district court ordered that the remaining 50% of the income of Ondova would go to the plaintiffs.

Once this arrangement went into place, Ondova had no cash flow to pay its bills. 50% of its income went to the plaintiffs, and 50% went to the Friedman law firm.[1] Accordingly, Ondova was forced into bankruptcy.

In other words after the district court had ordered 100% of the income of a company be taken from it, the company went bankrupt. The judge then views that bankruptcy as an attempt to circumvent a contempt hearing which was taken off the docket before the bankruptcy was filed. No witness testified that the bankruptcy was filed in bad faith.[2]

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[1] Over $400,000.00 was taken by Mr. Friedman under this arrangement. Obviously, the attorney Friedman could have requested relief from the district court, but being the beneficiary of the order, he refused to do so.

[2] The district court's "judicial notice" that the bankruptcy court entered a finding that Mr. Baron filed the bankruptcy to avoid a contempt hearing are not supported by any hearing or finding entered in the docket of the bankruptcy court.

Changing Bankruptcy Counsel

As discussed above, the district judge forced Jeff Baron to use Mr. Friedman by *su sponte* ordering modification of Jeff's contract with his attorney and ordering (without notice or hearing) that Jeff to put up almost half a million dollars as a non-refundable retainer. That attorney, Mr. Friedman, was the instigator of the change of counsel in the bankruptcy court, not Jeff Baron.

Mr. Friedman pressured for replacement of the bankruptcy counsel for one which would 'work with him'. In the trial judge's findings, however, this is all proof that *Jeff Baron* as a vexatious litigant, swapping out lawyers in the bankruptcy court. (Exhibits U, P at pages 9-10).

B. RE: DISTRICT COURT'S POST-APPEAL EXPLANATION FOR THE REASONS FOR NECESSITATING THE RECEIVERSHIP ORDER

In rejecting Jeff Baron's plea to stay pending appeal, the district court explained an emergency was established by Mr. Urbanik'a motion (Exhibit P, page 5) because Jeff Baron failed to cooperate in the process outlined in the Court's October 13, 2010 Order to mediate the claims or legal fees. The district judge likely means his October 19, 2010 order [Doc#120], which ordered:

> As soon as practical Peter S. Vogel is ordered to mediate all claims against Jeffrey Baron on behalf of this Court and the In Re:Ondova Limited Company, Bankruptcy Case No. 09-34784SGJ-11 for legal fees and related expenses, and within 30 days of the date of this Order all lawyers who have claims for legal fees against Jeffrey Baron shall submit confidential reports of fees, expenses, and claims to Peter S. Vogel at 1601 Elm Street, Suite 3000, Dallas, Texas 75201 or by email

> atpvogel@gardere.com. At the date of this Order the attached list and Schedule F (Creditors Holding Unsecured Nonpriority Claims) includes all known claims for attorneys fees and expenses.

First of all, the order does not require Jeff Baron to do anything. Secondly, the reports of attorneys who choose to assert claims for more fees were required, pursuant to an amended order entered October 25 [Doc#122], to submit reports to the mediator[3], by November 24, 2011. Accordingly, when the receivership was ordered, **the period for submitting reports to the mediator had not passed, and the mediation had not yet started.**

C. THE GROUNDS ASSERTED IN MR. URBANIK'S MOTION FOR RECEIVER

The first 'failure to cooperate' (with the mediation) alleged by Mr. Urbanik was that an unnamed attorney stated Jeff Baron's attorney did not communicate with him regarding the mediation procedure. (Exhibit C, paragraph 6). No evidence of such event was ever produced. In any case, that was not Jeff Baron's obligation. Further, there is no showing that Jeff's counsel knew the procedure, and there is no allegation that the unnamed attorney ever attempted to contact Jeff's counsel to inquire about the procedures. Obviously, the unnamed attorney could, and likely did, make his inquiry about the mediation procedures with the mediator. In any case, this 'emergency' is clearly not a ground for an emergency receivership of an individual and seizure of his all property— exempt and non-exempt.

[3] Peter S. Vogel, who was also employed by the district judge as a special master in the case and, who is also the receiver.

The second 'failure to cooperate' alleged, was that the same unnamed attorney made a report that Mr. Broome had been hired by Baron to participate in the fee mediations and had resigned. (Exhibit C, paragraph 6). Since a party is fully entitled to represent themselves, even if that hearsay within hearsay allegation from an unknown source were true, it does not violate the Court's mediation order in any way.

Notably, at the January 4, 2011 hearing on Jeff Baron's Rule 8(a)(1) motion the uncontroverted testimony disproved the unnamed attorney's supposed statements. Sid Chesnin testified that he actively represented Jeff with respect to the mediation. (Exhibit Q, page 105).[4]

The third 'failure to cooperate with the mediation' allegation was that another unnamed attorney was frustrated that Jeff Baron's attorney was not responsive to that unnamed attorney's efforts **not** to participate in the mediation sessions that the district court ordered the attorneys must participate in. (Exhibit C, paragraph 7). No evidence of this was ever produced. In any case, Jeff Baron's attorney's insistence in following the court's order and not assist some unnamed attorney in circumventing the order is clearly not grounds for an emergency receivership and seizure of all Jeff's assets.

For good measure Mr. Urbanik also alleged (to support his emergency, *ex parte* order seizing all of Jeff Barons assets and legal rights) that other unnamed attorneys held personal beliefs that Jeff Baron would not cooperate and would delay mediation efforts. (Exhibit C, paragraph 7). No evidence of that was ever produced. In any case,

[4] Mr. Chesnin, made repeated efforts to communication with the mediator. (Exhibit Q, page 105). Mr. Chesnin expressed to the mediator Mr. Baron's interest in participating, and requested documentation to assist in that participation. (Id. at page 106). Moreover, multiple inquiries made to the mediator, such as scheduling issues, and received no reply. (Id. at page 106-7). In fact, the uncontroverted testimony established that the mediator failed to reply to any of Mr. Chesnin's communications. (Id.)

the unnamed attorneys are entitled to their own personal beliefs. That is not any action on Jeff's part and not a grounds for an emergency motion to seize all of Jeff's property, cell phones, documents, mail, etc.

If the emergency is not Jeff Baron's failure to cooperate with the mediation (why this would be an emergency is also unclear, even if it had occurred), Mr. Urbanik's motion does suggest the real emergency need for the receivership. (Exhibit C, paragraph 4). Jeff Baron hired a new attorney and **"This new attorney may have assisted Mr. Lyon in the pleading filed on November 19, 2010 entitled: Jeffrey Baron's Limited Objection to the Third Interim Fee Application of Munsch Hardt Kopf & Harr, P.C."** (Id.) Munsch Hardt Kopf & Harr, P.C. is Mr. Urbanik's firm.

Jeff Baron was poised to cut off Mr. Urbanik's income source from the bankruptcy, while at the same time cut off Mr. Urbanik's income source from the district court case— it had settled and Munsch Hardt Kopf & Harr, P.C. was required by the settlement agreement to file with the court below the executed dismissal papers it was holding in escrow.

If that was the emergency, the receivership over Jeff resolved it. The objection to the bankruptcy fee application was immediately withdrawn by the particular receiver that Mr. Urbanik had requested be appointed, and the district court case came back to life with the receivership, providing $147,727.00 in billing for Mr. Urbanik in January alone. (Exhibit Y).

It is worth noting that this is not the first time Mr. Urbanik and Mr. Sherman attempted to drag out their role. The two attempted to torpedo settlement negotiations

on the eve of their finalization, seeking to avoid resolution of the district court lawsuit and settlement of the bankruptcy claims. When the parties were literally hours away from closing a global settlement, Mr. Sherman and Mr. Urbanik withdrew their participation and sought an order from the bankruptcy court allowing them to break up the settlement process. (Exhibit W).

The bankruptcy court was so stunned that in a rare opinion the court described Mr. Sherman's desires as "unreasonable". (Exhibit X). Over the objection of Mr. Urbanik, the bankruptcy court continued the court ordered settlement negotiations as requested by Jeff Baron. Almost immediately thereafter, the final settlement was reached.

D. RE: NEGATIVE INFERENCE

The district court's reliance on a negative inference from Jeff Baron's refusal to participate with the district court's 'proceedings' is an abuse of discretion and erroneous as a matter of law.

Firstly, a negative inference only arises where a party who invokes the Fifth Amendment refuses to testify "in response to probative evidence offered against them". *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). That is not the case here.

In the Rule 8(a)(1) hearing held below, **before** Jeff Baron testified the district judge openly shared his prejudice toward Jeff. The Court explained his view that (Exhibit Q at 227):

> "So we were coming to a head, and there was going to be a contempt hearing. And based upon everything I knew, it was very clear to me that

> Jeff Baron was in contempt of my orders. And there was no question about that."

Followed (Exhibit Q at 229) by the court's candid disclosure:

> "**I'm sure I am going to hear Jeff Baron say 'It never happened that way, I was good to them. I paid them everything. They breached their agreements with me.'** Etcetera, etcetera. **I might believe that if it was one lawyer or maybe two. But not twenty.** Somewhere along the line you have to consider that not twenty lawyers are the problem."

After hearing the judge state that the court had a firm pre-formed bias against Jeff Baron and had already decided he was not going to believe Jeff's testimony, Jeff was advised not to testify. (Exhibit Q at 230).

The plaintiff's counsel (notably the plaintiff did not file the receivership motion) then suggested putting Jeff on the stand to get him to take the Fifth Amendment so that the Fifth Circuit could be shown the district court's conclusions based on negative inference from Jeff Baron's taking the Fifth Amendment. (Exhibit Q at 231). **The district judge then** put Jeff on the stand and **instructed him** "And remember **your answer to each question is 'I refuse to answer based upon my Fifth Amendment privilege**.' " (Exhibit Q at 232). Jeff refused to participate and did not invoke his Fifth Amendment privilege.

Where a court is so biased against a party that it announces to the party, before that party testifies, that the party's testimony is not going to be believed, where the party accordingly refuses to participate further in the hearing, no negative inference is raised.

The Supreme Court has ruled, "[f]ailure to contest an assertion . . . is considered

evidence of acquiescence" only if it "would have been natural under the circumstances to object to the assertion". *Baxter v. Palmigiano*, 425 U.S. 308, 319 (1976).

E. VIOLATION OF THE NON-EXISTENT COURT ORDER

The overriding reason offered by the district judge for the receivership was that the Court had entered an order forbidding Jeff Baron from hiring any attorneys and Jeff was violating the order. The district judge reasoned, if Jeff Baron was allowed to do that, it put the Ondova bankruptcy at risk because those attorneys might make claims against the estate. (Exhibit P at 5-6). This theme is repeated throughout the district court's opinion.

The first problem with this emergency ground is that there is nothing new alleged that presents an emergency. If Jeff Baron has all along been hiring and firing lawyers in violation of the Court's Order, there is no sudden new threat requiring emergency relief.

The second problem is that the court order entered prohibiting Jeff Baron from hiring any lawyers is a phantom. It does not exist. The district judge may sincerely believe such an order was entered. However, it does not.

The third and fundamental problem is that Jeff Baron's lawyers can only make claims for substantial contribution in the bankruptcy court if on Jeff's behalf they made substantial contribution to the benefit of the Ondovo bankruptcy case. *In re DP Partners, Ltd. P'shi*p, 106 F.3d 667, 673 (5th Cir.1997).

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