

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re)
)
SEMINOLE WALLS & CEILINGS) Case No. 6:01-bk-01966-KSJ
CORP.,) Chapter 7
)
Debtor.)
_____)

CARLA MUSSELMAN, TRUSTEE,)
)
Plaintiff,) Adversary No. 6:04-ap-77
vs.)
)

DEBBIE JASGUR,)
JOSEPH JASGUR,)
ROBERT L. FOX,)
DARTLIN J. AFRICH,)
AFRICH MAINTENANCE, INC.,)
AFRICH MANAGEMENT &)
INVESTMENT, INC.,)
VINTAGE PARTNERS, INC.,)
BRADLEY E. WHITTLE,)
THE FUNDING SOLUTIONS, INC.,)
JOSEPH YARON,)
PITA CORPORATION,)
PAUL PHILIPSON,)
)
Defendants.)

_____)
CARLA MUSSELMAN,)
)
Plaintiff,) Adversary No. 6:04-ap-79
vs.)
)

AFRICH MANAGEMENT &)
INVESTMENTS, INC.,)
AFRICH MAINTENANCE, INC.,)
DARTLIN J. AFRICH,)
ROBERT L. FOX,)
PITA CORPORATION,)
)
Defendants.)
_____)

ORDER GRANTING JOINT MOTIONS FOR RECONSIDERATION

On August 27, 2009, the Court ruled¹ that PITA's shareholder(s)² received legal and equitable title to any assets PITA held on the date it dissolved³ subject to an equitable lien/constructive trust in favor of PITA's creditors to secure any unpaid, pre-dissolution claims.⁴ The plaintiff, Carla Musselman, the Chapter 7 trustee, and one of the defendants, Tom Endre, the representative of the estate of Joseph Jasgur (collectively, the "Movants"), ask the Court to reconsider this ruling raising two issues.⁵ First, Movants argue that the Court's determination that a constructive trust or equitable lien would attach to any PITA assets transferred to its shareholders was not properly briefed by the parties and was premature, or, alternatively, that the Court erred in rendering its decision, insofar as the Court failed to properly consider an amended version of a relevant Texas statute. Second, Movants argue that the trustee does not rely exclusively on claims for piercing the corporate veil and for substantive consolidation to obtain PITA's assets, but, also directly seeks ownership of those assets as the alleged shareholder of PITA. The Africh Defendants oppose the Motions for Reconsideration (Adv. Pro. 04-77, Doc. No. 410; Adv. Pro. 04-79, Doc. No. 262). For the reasons explained below, the Motions for Reconsideration are granted.

¹ The same memorandum opinion was entered in two adversary proceedings in connection with cross motions for summary judgment filed by the parties in both cases. (6:04-ap-79, Doc. Nos. 248 and 249 memorandum opinion and related order); 6:04-ap-77, Doc. No. 394 and 393 (memorandum opinion and related order)).

² The identity and number of shareholders of PITA is a disputed and unresolved issue.

³ The date of PITA's final dissolution occurred on February 12, 2002.

⁴ The identity of PITA's assets and its creditors, if any, and the amount of their claims are disputed and unresolved issues.

⁵ On September 9, 2009, Musselman and Endre filed Joint Motions for Reconsideration of Order Denying Cross Motions for Summary Judgment and Memorandum Opinion in Adv. Pro. 04-77, Doc. No. 398 and in Adv. Pro. 04-79, Doc. No. 251 (collectively referred to as the "Motions for Reconsideration").

The Court initially notes that its prior Memorandum Opinion *denied* all parties cross-motions for summary judgment. *No relief was granted to any party.* In an abundance of caution, however, and because the parties understandably will treat the prior ruling as the law of this case and plan their litigation accordingly, the Court will address the merits of the Motions for Reconsideration.

Although reconsideration is an extraordinary remedy to be employed sparingly, Federal Rules of Civil Procedure 59 and 60, made applicable in bankruptcy cases by Bankruptcy Rules 9023 and 9024, allow reconsideration when justified. In re Mathis, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004); Taylor Woodrow Construction Corp. v. Sarasota/Manatee Airport Authority, 814 F. Supp. 1072, 1073 (M.D. Fla. 1993). Here, Movants argue that the Court's prior decision went beyond the framed issues and erred in interpreting the law.

Movants first argue that neither party previously sought summary judgment on the issues of when, if ever, the shareholders of PITA (whoever they may be) obtained PITA's assets (whatever they may be), or whether or not the assets were encumbered by a possible constructive trust or equitable lien in favor of PITA's pre-dissolution creditors (whoever they may be). Factual disputes certainly exist as to the identity of PITA's shareholders, its creditors, and its assets. The issue of whether PITA's assets are subject to any possible future trust or lien was tangential at best to the cross-motions for summary judgment and may never require resolution. The parties were not given adequate notice of the need to formally brief this issue, and the Court's prior ruling went too far in reaching this holding.

Moreover, the Court relied on a case decided under Article 6.04 of the Texas Business Corporation Act—North American Sav. Ass'n v. Metroplex Development Partnership, 931 F.2d 1073, 1078 (5th Cir. 1991)—to conclude that any assets obtained by PITA's shareholders were subject to an equitable lien/constructive trust to protect pre-dissolution claims of PITA's

creditors. See also, U.S. v. Wallace, 961 F.Supp. 969 (N.D. Tex. 1996). Movants argue that no such pre-dissolution claims can survive under another Texas statute—Article 7.12 of the Texas Business Corporation Act—that was amended in 1989 to provide that “[a]n existing claim by or against a dissolved corporation shall be extinguished unless an action or proceeding in such existing claim is brought before the expiration of the three-year period following the date of dissolution.” If a claim is finally extinguished when no action is brought within three years, the Movants argue that PITA’s creditors, who did not assert any such claim, cannot now trace any entitlement to PITA’s assets upon their transfer to a shareholder, citing Askanase v. Fatjo, 828 F. Supp 461 (S.D. Tex. 1993) and Pellow v. Cade, 900 S.W.2d 307 (Ct. Apps. Tex., Texarkana 1999).

At this juncture, the Court will not resolve whether Article 6.04 or the amended Article 7.12 of the Texas Business Corporation Act governs the issue of whether PITA’s assets are subject to any constructive trust or equitable lien upon their transfer to PITA’s shareholders. The issue remains ripe for briefing and argument by the parties in the future, if needed. The Court will grant the Motions for Reconsideration to retract the portion of the prior Memorandum Opinion stating that PITA’s shareholders would receive PITA’s assets subject to a constructive trust/equitable lien held to protect the claims of PITA’s creditors.

On the second issue, the Movants contend that the trustee is not limited to claims for substantive consolidation or piercing the corporate veil in her attempt to obtain PITA’s assets as implied by the last paragraph of the prior ruling. The Court did not intend to alter the trustee’s

pleadings or in any way limit her pled causes of action. Therefore, the Court further will grant the Motions for Reconsideration to clarify that the prior order does not restrict the trustee from pursuing any and all pled claims she has filed in these related adversary proceedings.

DONE AND ORDERED in Orlando, Florida, on January 7, 2010.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies provided to:

Debtor: Seminole Walls & Ceilings Corp., 333 E. Landstreet Road, Orlando, FL 32824

Debtor's Counsel: Frank M. Wolff, 1851 West Colonial Drive, Orlando, FL 32804

Trustee: Carla Musselman, 1619 Druid Road, Maitland, FL 32751

Trustee's Counsel: Bradley M. Saxton, Jennifer A. Jones, P.O. Box 1391, Orlando, FL 32802-1391

Africh Defendant's Counsel: Roy S. Kobert, 390 North Orange Avenue, Suite 1100, Orlando, FL 32801

Defendant Jasgur's Counsel: Elizabeth A. Green, Esquire, 390 N. Orange Avenue, Suite 600, Orlando, FL 32801

Robert L. Barrett, Barrett Chapman & Ruta PA, 18 Wall Street, Orlando, FL 32801

Tucker Byrd, Esquire, 450 S. Orange Avenue, Suite 650, Orlando, FL 32801-3311

United States Trustee, 135 W. Central Blvd., Suite 610, Orlando, FL 32801