UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re	)	
	)	
ADVANCED TELECOMMUNICATION NETWORK, INC.,	)	Case No. 6:03-bk-00299-KSJ
	)	Chapter 11
	)	
Debtor.	)	
	)	
ADVANCED TELECOMMUNICATION NETWORK, INC.,	)	
	)	
	)	Adversary No. 6:03-ap-122
Plaintiff,	)	
vs.	)	
	)	
DANIEL W. ALLEN, DAVID D. ALLEN,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION PARTIALLY GRANTING AND PARTIALLY DENYING POST-JUDGMENT MOTIONS

On July 10, 2009, the Court entered an Amended Final Judgment against the defendants, Daniel and David Allen, for $6,250,000 (Doc. No. 367). The defendants now have filed a Motion to Vacate or, in the Alternative, to Amend the Amended Final Judgment (Doc. No. 371). The plaintiff, Advanced Telecommunication Network, Inc. ("ATN"), has filed a Motion to Dismiss Counterclaim, With Prejudice (Doc. No. 372). Both parties submitted briefs arguing their respective positions, and a hearing was held on September 10, 2009, to consider the defendants' and the plaintiff's motions.

In this adversary proceeding, ATN, the plaintiff and debtor in this Chapter 11 case, sought to avoid transfers of over $6 million made to Daniel and David Allen, former owners of the debtor (Doc. No. 163). The transfers resulted from a settlement agreement (the "1999 Settlement Agreement") entered into by ATN and the Allens on January 12, 1999. After a multi-day trial, this Court entered a judgment in favor of the defendants finding that no avoidable transfer

occurred, and the District Court affirmed this decision[1] (Doc. Nos. 257, 258, and 318). On further appeal, the Eleventh Circuit Court of Appeals (the "Appellate Court") reversed in part and remanded in part requiring this Court to revisit whether ATN received reasonably equivalent value in exchange for the transfers to the Allens and to recalculate whether ATN was solvent at the time of the transfers (Doc. No. 330).

In connection with the remanded solvency calculations, ATN argued the Appellate Court's conclusions[2] entitled ATN to a judgment in its favor on two counts of its Amended Complaint, Counts 2 and 6, which asserted fraudulent transfer claims under Sections 25:2-27(a) and 25:2-25(b) of the New Jersey Statutes. The Allens argued the Appellate Court's opinion did not specifically require this Court to render judgment in favor of ATN and encouraged this Court to find again that no avoidable transfer occurred.

Consistent with its interpretation of the Appellant Court's guidance, this Court issued the Amended Final Judgment, concluding that transfers totaling $6,250,000 paid to the Allens on January 12, and June 1, 1999, were avoidable fraudulent transfers under both Counts 2 and 6 (Doc. No. 367). Specifically, the Amended Final Judgment determined that ATN did not receive reasonably equivalent value in exchange for the transfers to the Allens and that ATN was insolvent at the time of the transfers to the Allens or was made insolvent by the transfers.

In response to the Amended Final Judgment, the defendants filed the Motion to Vacate or, in the Alternative, to Amend the Amended Final Judgment (Doc. No. 371). The defendants first ask

[1] All definitions used in this Court's original Findings of Fact and Conclusions of Law (Doc. No. 258) and Supplemental Memorandum Opinion (Doc. No. 365) shall have the same meaning in this Memorandum Opinion.

[2] The Appellate Court stated "It is clear from the record that ATN received nothing in return at the actual time of the transfer, other than the (arguable) value of the cessation of Allens' and Carpenter's litigation." (Doc. No. 330, p. 21). Further, as to the possible value of Carpenter's promissory notes, the Appellate Court stated, "[T]hey do not present a 'reasonably equivalent value' to the $6 million transfer to the Allens." (Doc. No. 330, p. 22).

this Court to reconsider its ruling on reasonably equivalent value and insolvency, vacate the Amended Final Judgment, and enter a new judgment in their favor. Alternatively, the defendants ask the Court to specifically address their counterclaim and affirmative defenses asserted in their Amended Answer, Affirmative Defenses and Counterclaim (Doc. No. 128). As to the counterclaim, ATN has filed a Motion to Dismiss Counterclaim (Doc. No. 372), contending the parties had resolved the counterclaim in a later settlement agreement.

The defendants' motion to vacate or amend a previous judgment falls within the ambit of either Federal Rule of Civil Procedure Rule 59(e) (motion to alter or amend a judgment) or Federal Rule of Civil Procedure Rule 60(b) (motion for relief from judgment). Region 8 Forest Serv. Timber Purchases Council v. Alcock, 993 F.2d 800, 806, n. 5 (11th Cir. 1993). Under either rule, the decision to grant such a motion for reconsideration is committed to the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. Id. at 806. The purpose of a motion for reconsideration is to correct manifest errors of law, to present newly discovered evidence, or to prevent manifest injustice. In re Kellogg, 197 F.3d 1116 (11th Cir., 1999); Burger King Corp. v. Ashland Equities, Inc., 181 F.Supp.2d 1366, 1369 (S.D. Fla. 2002). In order to reconsider a judgment, there must be a reason why a court should reconsider its prior decision, and the moving party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Sussman v. Salem, Saxon & Nielsen, P.A., 153 F.R.D. 689, 694 (M.D. Fla. 1994). A motion for reconsideration should not be used to reiterate arguments previously made. Burger King Corp., 181 F.Supp.2d at 1369. Reconsideration of a previous order is an extraordinary remedy to be employed sparingly. Id.

January 1999 Transfer vs. June 1999 Transfer

The 1999 Settlement Agreement provided for ATN to transfer $250,000 to the Allens on January 12, 1999, and an additional $6,000,000 to the Allens on June 1, 1999. The Amended Final Judgment avoided as a fraudulent transfer the transfer of the total $6.25 million from ATN to the Allens. At oral argument and in its supporting briefs with respect to these proceedings, ATN's attorney waived seeking avoidance of the $250,000 transfer made on January 12, 1999. Consequently, the defendants' motion is partially granted to eliminate the avoidance of the $250,000 transfer. A Second Amended Final Judgment will be entered avoiding only the $6 million transfer made on June 1, 1999.

Further Reconsideration Denied

Defendants next ask this Court to reconsider her interpretation of the Appellate Court's opinion to correct clear error or prevent manifest injustice and to find in their favor. The defendants specifically want this Court to recalculate reasonably equivalent value and insolvency and revert to its original conclusions; namely, that ATN received reasonably equivalent value for the transfers, and ATN was conclusively solvent under a balance sheet test at the time of the transfers.

The defendants had their chance to persuade the Court with respect to its options following remand from the Appellate Court. This Court concluded the plaintiff was entitled to judgment based on the Appellate Court's guidance. The defendants introduced no new evidence, and cited no new or changed law. A motion for reconsideration should not be used to reiterate arguments previously made. Burger King Corp., 181 F.Supp.2d at 1369. They are attempting to relitigate matters already decided by the Court. Further reconsideration of the Amended Final Judgment is denied.

The Defendants' Counterclaim

The defendants' asserted one counterclaim against ATN (Doc. No. 128). This Court's original Findings of Fact and Conclusions of Law (Doc. No. 258) found in favor of the defendants and abated any further action on their counterclaim. Because the Amended Final Judgment changed the result and found in favor of the plaintiff, the defendants now argue their counterclaim is ripe for decision, citing Federal Rule of Civil Procedure 54(b), which states: "any order or other decision, however designated, that *adjudicates fewer than all the claims* or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time* before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." (Emphasis added). They argue the Amended Final Judgment is not final because it did not dispose of all the claims. The plaintiff's motion simply seeks to dismiss the defendants' counterclaim with prejudice (Doc. No. 372).

Upon review of the record in this proceeding, this Court finds it was unnecessary to address the defendants' counterclaim because, on May 26, 2006, the parties filed a Joint Stipulation of Dismissal with Prejudice (Doc. No. 320), agreeing the counterclaim asserted by the defendants in this adversary proceeding was dismissed *with prejudice*. Consequently, the defendants' argument regarding the viability of their counterclaim is without merit. Both ATN and the defendants have agreed that the counterclaim is dismissed. Plaintiff's motion to dismiss the counterclaim is denied as moot.

The Defendants' Affirmative Defenses

The defendants' lastly asserted 49 purported "affirmative defenses" (Doc. No. 128), although many were improperly pleaded.[3] The original Findings of Fact and Conclusions of Law (Doc. No. 258) found in favor of the defendants, making it unnecessary to address many of the defendants' affirmative defenses at that time. Because the Amended Final Judgment changed the result and found in favor of the plaintiff, however, the defendants argue their affirmative defenses are now ripe for decision. The defendants specifically argue the following affirmative defenses were overlooked by this Court and shield the defendants from liability: release, waiver, unclean hands, estoppel, setoff, recoupment, and the affirmative defenses provided by Bankruptcy Code[4] Section 550(b)(1) and New Jersey Statute Section 25:2-30(b)(2).

In response, ATN argues the later settlement agreement (the "2005 Settlement Agreement") entered into by ATN and the Allens, among others, and approved by the Court on November 30, 2005 (Main Case Doc. No. 344), is dispositive with respect to the defendants' affirmative defenses. ATN claims the 2005 Settlement Agreement contained a broad, general, unconditional release on the defendants' behalf, eliminating their ability to assert affirmative defenses in this adversary proceeding. The Court disagrees.

Section 2.2 of the 2005 Settlement Agreement states:

[3] The original Findings of Fact and Conclusions of Law (Doc. No. 258) addressed two of the defendants' affirmative defenses: failure to comply with the applicable statute of limitations, and failure to first sue the initial transferee before suing the defendants.

[4] Unless otherwise stated, all references to the Bankruptcy Code refer to Title 11 of the United States Code.

> This Settlement Agreement shall not affect the Adversary Appeal through any level of appeal. The Parties acknowledge that ATN shall continue to prosecute the Adversary Appeal and the Allen Parties shall continue to defend that appeal through all levels thereof.

The "Adversary Appeal" referenced in Section 2.2 of the 2005 Settlement Agreement refers to the appeal of this adversary proceeding to the Appellate Court, which resulted in remand to this Court and the current proceedings. The 2005 Settlement Agreement explicitly states the defendants "shall continue to defend" this dispute "through all levels thereof." While it may be true that the 2005 Settlement Agreement contains a broad, general, unconditional release by the Allens in favor of ATN, it also specifically provides that such release does not affect this adversary proceeding or limit any issue raised herein. Rather, Section 2.2 of the 2005 Settlement Agreement operates to protect the Allens' ability to continue their defense of this adversary proceeding and to assert their affirmative defenses. Consequently, the Court disagrees with ATN's contention that the 2005 Settlement Agreement eliminates the defendants' ability to assert their affirmative defenses, and the Court agrees that the defendants are entitled to have the Court address their affirmative defenses. Nonetheless, the affirmative defenses relied upon by the defendants, in the end, do not alter the ultimate outcome of the case. The Court will discuss each defense in order.

First, defendants rely on release and waiver as affirmative defenses. The June 1999 transfer at issue in this proceeding resulted from the 1999 Settlement Agreement entered into by ATN and the Allens. The Allens assert the 1999 Settlement Agreement contained a broad release by ATN in favor of the Allens, as well as a waiver by ATN of its rights to pursue any claims against the Allens resulting from the settlement terms. Because ATN released the Allens from and waived claims such as those brought in this proceeding, the Allens argue ATN cannot recover the transfer made under the agreement.

The defendants' reliance on the release provisions of the 1999 Settlement Agreement is misguided. A pre-petition release or waiver is "itself a transfer of property of the estate that is subject to being avoided under applicable law." In re NuMed Home Health Care, Inc., 326 B.R. 859, 866 (Bankr. M.D. Fla. 2005) (*citing* In re e2 Communications, Inc., 320 B.R. 849, 855 (Bankr. N.D. Tex. 2004)). A "release [or waiver], which likewise bars further pursuit of causes of action, constitutes a transfer of the Debtor's claims" and a debtor's claims belong to creditors in bankruptcy. Id. The transfer of the release and waiver from ATN to the Allens in connection with the 1999 Settlement Agreement is no different than and, in fact, was part and parcel of the June 1999 transfer from ATN to the Allens. The Court already has determined the June 1999 transfer is an avoidable fraudulent transfer as are the related release provisions. The Court concludes the release and waiver also are avoidable fraudulent transfers, and the defendants' affirmative defenses based on release and waiver are without merit.

Second, the defendants assert unclean hands and estoppel as affirmative defenses. Essentially, the defendants argue that ATN's controlling party at the time it filed bankruptcy engaged in inequitable conduct, and, thus, the unclean hands doctrine should deny or estop ATN from pursuing claims against the Allens. However, "it is well established that [a bankruptcy trustee or] even a debtor-in-possession which is, in actuality, the same entity as the debtor is nevertheless deemed to be separate and distinct from the debtor under bankruptcy law, and is armed with Section 544 powers without regard to any notice or knowledge of the Debtor's practices." Matter of Intern. Gold Bullion Exchange, Inc., 60 B.R. 256, 260 (Bankr. S.D. Fla. 1986) (*citing* In re Great Plains Western Ranch Co., Inc., 38 B.R. 899, 904 (Bankr. C.D. Cal. 1984)). A trustee exercises his or her powers for the benefit and on behalf of the debtor's creditors, without imputation of knowledge as to any alleged acts of fraud committed by the debtor. Intern. Gold Bullion Exchange, 60 B.R. at 260. Fraud or inequitable conduct by ATN

would not impair a bankruptcy trustee's authority to recover fraudulent transfers pursuant to Bankruptcy Code Section 544's avoidance powers.[5] Consequently, the defendants' allegations of inequitable conduct do not provide an affirmative defense in this proceeding.

Third, the defendants assert set-off and recoupment as affirmative defenses. Set-off is an equitable right of a creditor to deduct a debt it owes to the debtor from a claim it has against the debtor arising out of a separate transaction. Recoupment differs only insofar as the opposing claims must arise from the same transaction. Section 553 of the Bankruptcy Code deals with set-off and provides that a creditor may "offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case . . . against a claim of the debtor that arose before the commencement of the case." 11 U.S.C. § 553(a). Recoupment is not specifically addressed in the Bankruptcy Code, but is generally allowed.

The defendants seek to have any judgment entered against them in this proceeding to be offset against their own claim against ATN as asserted in their counterclaim. The counterclaim, in turn, is based on ATN's alleged breach of the settlement agreement between the parties. The defendants seek recovery of all attorney fees and costs they have incurred in this adversary proceeding.

The defendants' argument for set-off and recoupment fails for at least two reasons. First, this Court has determined the release provided by the 1999 Settlement Agreement is an avoidable fraudulent transfer; thus, the defendants' claim based on the release is without merit. The release is not enforceable. Second, "[a] fraudulent conveyance cannot be offset against or exchanged for

[5] A bankruptcy trustee (or debtor-in-possession) generally is subject to any defenses that were available against the debtor prior to commencement of the bankruptcy case, because Bankruptcy Code Section 541 provides that the trustee steps into the shoes of the debtor. See Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1149 (11th Cir. 2006). In the instant situation, however, ATN (as debtor-in-possession) brought Counts 2 and 6 pursuant to Bankruptcy Code Section 544's avoidance powers and New Jersey fraudulent conveyance law. Because it did not have to rely on Section 541, the plaintiff debtor-in-possession is not subject to defenses such as *in pari delicto*, unclean hands or estoppel, which could have been used against the debtor pre-petition."

a general unsecured claim." In re Acequia, Inc., 34 F.3d 800, 817 (9th Cir. 1994) (*quoting* In re United Energy Corp., 944 F.2d 589, 597 (9th Cir.1991)). "It would defeat the purpose of the Bankruptcy Act's provisions relating to fraudulent transfers to allow [creditors] to offset the value of the property thus transferred to them by the amount of their unsecured claim against [the debtor]." Acequia, 34 F.3d at 817 (*quoting* Bustamante v. Johnson (In re McConnell), 934 F.2d 662, 667 (5th Cir. 1991)). Because the defendants' claim for reimbursement of attorney's fees and costs would be a general unsecured claim in bankruptcy, it is not eligible for set-off or recoupment.

Fourth, the defendants assert as affirmative defenses the protections provided by Bankruptcy Code Section 550(b)(1) and New Jersey Statute Section 25:2-30(b)(2). Both of these statutes provide that a trustee cannot recover an avoidable transfer from a good-faith transferee who took for value without knowledge of the voidability of the transfer. The Allens argue they were good-faith transferees, they provided value in exchange for the transfers, and they were unaware of the voidability of the transfers. However, the Appellate Court determined and this Court has now held that the Allens did not provide reasonably equivalent value for the June 1999 transfer: "It is clear from the record that ATN received nothing in return at the actual time of the transfer, other than the (arguable) value of the cessation of Allens' and Carpenter's litigation." (Doc. No. 330, p. 21). Additionally, with respect to the value of the cessation of Allen and Carpenter's litigation, the Appellate Court stated "it is evident from the record that the true beneficiary of the dispute's resolution was Carpenter, not ATN." (Doc. No. 330, p. 23). Given the Appellate Court's determinations, this Court cannot conclude the Allens "took for value" as is required by Bankruptcy Code Section 550(b)(1) and New Jersey Statute Section 25:2-30(b)(2). Consequently, neither statute provides a viable affirmative defense for the defendants. The defendants have no valid affirmative defense to ATN's claim against them.

Fifth, the defendants finally seek to reduce the judgment amount by relying on New Jersey Statute Section 25-2:30(d) and Bankruptcy Code Section 550(e). Section 25-2:30(d) of the New Jersey Statutes provides:

> d. Notwithstanding voidability of a transfer or an obligation under this article, a good-faith transferee or obligee is entitled, *to the extent of the value* given the debtor for the transfer or obligation, to
>
> (1) A lien or a right to retain any interest in the asset transferred;
> (2) Enforcement of any obligation incurred; or
> (3) A reduction in the amount of the liability on the judgment.

N.J. Stat. § 25-2:30(d) (emphasis added). The defendants argue New Jersey Statute Section 25-2:30(d)(3) mandates a reduction in the judgment amount to the extent of the value they gave ATN in exchange for the fraudulent transfer. Again, this Court must follow the conclusions of the Appellate Court: "It is clear from the record that ATN received nothing in return at the actual time of the transfer, other than the (arguable) value of the cessation of Allen and Carpenter's litigation." (Doc. No. 330, p. 21). With respect to the value of the cessation of Allens' and Carpenter's litigation, the Appellate Court stated "it is evident from the record that the true beneficiary of the dispute's resolution was Carpenter, not ATN." (Doc. No. 330, p. 23). Given the Appellate Court's determinations that the Allens gave no value, the Court cannot reduce the judgment amount under the New Jersey statute.

The defendants also rely on the provisions of Section 550(e) of the Bankruptcy Code, which provides in pertinent part:

> (e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of--
>
> (A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and
> (B) any increase in the value of such property as a result of such improvement, of the property transferred.

11 U.S.C. § 550(e). Subsection (2)(C) of Section 550(e) provides that "improvement" for purposes of Subsection (1) includes "payment of any tax on such property." The defendants assert they paid income taxes to the Internal Revenue Service, Florida and New Jersey totaling approximately half of the transfers they received from ATN. Of the $6,000,000 transfer deemed avoidable by this Court, the defendants claim they paid approximately $3,000,000 in income taxes. For the purposes of this opinion, the Court will accept the defendants' allegation as true.

The defendants argue Section 550(e)(2)(C) provides such payments of income tax constitute an "improvement" to the property transferred, and Section 550(e)(1)(A) provides a good faith transferee with a lien on the property recovered to secure the cost of any "improvement" of the property. The defendants argue they are entitled to a lien on the $6,000,000 judgment to secure the $3,000,000 they paid in income taxes.

Closer reading of Section 550(e)(1), however, clarifies that a good faith transferee is entitled to such a lien only to "secure *the lesser of*" subsections (A) and (B). (Emphasis added.) Section 550(e)(1)(B) refers to "any increase in the value of such property as a result of such improvement." The transferred property at issue is a money transfer of $6,000,000; the $6,000,000 did not increase in value as a result of the Allens' payment of income taxes. Section 550(e)(1), then, entitles the Allens to a lien on the recovered property to secure the lesser of (A) $3,000,000, and (B) zero. Consequently, the Allens are not entitled to a lien on the recovered property.

The defendants' motion to vacate or amend will be granted to the extent it seeks amendment of the Amended Final Judgment to reflect the avoidance of only the $6 million June 1999 transfer. The parties previously withdrew with prejudice the defendants' counterclaim. The defendants' motion to vacate or amend otherwise will be denied. After analyzing the defendants' affirmative defenses and their other grounds for reconsideration, this Court

concludes the ultimate outcome of this proceeding does not change. An order consistent with this Memorandum Opinion as well as a Second Amended Final Judgment shall be entered.

DONE AND ORDERED in Orlando, Florida, on January 15, 2010.

/s/ Karen S. Jennemann

KAREN S. JENNEMANN
United States Bankruptcy Judge

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