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.,	)	
	)	
	)	
Plaintiff,	)	Adversary No. 6:03-ap-122
vs.	)	
	)	
DANIEL W. ALLEN, DAVID D. ALLEN,	)	
	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION PARTIALLY GRANTING
PLAINTIFF'S MOTION TO REINSTATE REPATRIATION ORDER

Defendants, Daniel and David Allen, are brothers and former shareholders of the debtor, Advanced Telecommunication Network, Inc. ("ATN"). The Allens also owe ATN $6 million based on this Court's final judgment in this adversary proceeding.[1] ATN now wants to begin proceedings supplementary to collect the judgment and asks this Court to adopt factual findings made by an earlier judge in this lengthy litigation requiring the defendants to turn over all funds held in two offshore trusts. The Court will partially grant the plaintiff's requests finding that ATN is entitled to utilize any and all available collection tools against *Daniel* Allen. However,

[1] In the final judgment and related opinions, the Court concluded that the Allens had received $6 million from ATN as an avoidable fraudulent transfer (Doc. Nos. 365, 383, 384, and 385). The Eleventh Circuit Court of Appeals recently affirmed the finality of the judgment on June 8, 2011(Doc. No. 491, Ex. A).

given the pending Chapter 7 bankruptcy case filed by *David* Allen[2] and the attendant automatic stay, the Court will partially deny ATN's request to proceed with collection efforts against him.

In order to understand the parties' position on ATN's request to proceed with collection against the defendants, a little history is needed. In December 1998, ATN, the Allens, and the then sole remaining shareholder, Gary Carpenter, settled litigation between them resulting in the transfer from ATN to the Allens of the $6 million at issue in this adversary proceeding. Later, in October 2000, Carpenter lost control of ATN after more litigation with a competitor, WATS/800, Inc., and Damian Freeman, the then-president of WATS. After Freeman became the president of ATN, he launched a scorched earth effort to recover the $6 million paid by ATN to the Allens under the earlier settlement between the two parties.

Under Freeman's direction, ATN filed a Chapter 11 reorganization case on January 10, 2003.[3] ATN eventually confirmed its Amended Plan of Reorganization[4] and, as contemplated under the plan, continued its efforts to undo ATN's settlement and to collect the $6 million paid to the Allens. ATN filed this adversary proceeding on April 28, 2003.

At first, the Honorable Arthur B. Briskman administered this bankruptcy case and related adversary proceeding. ATN repeatedly sought orders forcing the Allens to sequester or to return ATN's settlement monies. ATN twice sought an *ex parte* temporary restraining order prohibiting the Allens from dissipating ATN's assets while this litigation was pending.[5] Judge Briskman denied the initial request for an *ex parte* order and scheduled a hearing on notice to the Allens.[6] Next, the Allens requested a continuance of the hearing, which Judge Briskman granted.[7] At the continued hearing, Judge Briskman heard substantial evidence from the Allens

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[2] David Allen filed his Chapter 7 case on March 28, 2011, Case No. 11-bk-4309-KSJ. ATN has not sought to modify the automatic stay or filed any adversary proceeding relating to their claims against David Allen in this adversary proceeding.
[3] Doc. No. 1 in the Main Case.
[4] Doc. No. 215 in the Main Case.
[5] Doc. Nos. 4 and 49.
[6] Doc. No. 14.
[7] Doc. Nos. 7, 21, and 25.

and then granted ATN's request entering a preliminary injunction prohibiting the Allens from transferring the settlement monies pending trial.[8]

The Allens, however, already had transferred or spent the settlement monies. Between the time the Allens learned of ATN's motion to freeze the settlement monies and the continued hearing on ATN's request, .i.e., between August 28, 2003, and October 2, 2003, the Allens had liquidated all of their stock accounts in the United States and wired at least $2.2 million to two self-settled offshore trusts: the Shingle Oak Family Trust created by Daniel Allen and the Southern Breeze Trust created by David Allen.[9] Daniel Allen also used $470,000 of the settlement monies to pay off a mortgage encumbering his Florida home.

Judge Briskman then entered an order directing the Allens to return the monies to the United States.[10] Once again, the Allens refused to comply, asserting they did not understand the terms of the seemingly clear initial repatriation order.[11] With growing frustration, Judge Briskman eventually held the Allens in contempt of court for failing to return the transferred monies to the United States.[12]

ATN next sought an *ex parte* hearing on its request to appoint a receiver to assume control of the Allens' finances,[13] and Judge Briskman held a hearing on September 15, 2004. When the Allens learned of the ex parte communication, they demanded the transcript of the hearing,[14] which was given a few days later.[15] Judge Briskman reassigned the case, and both this Court and the Eleventh Circuit Court of Appeals have held that no improper judicial conduct occurred.[16] In this Court's ruling, I held that ATN "reasonably believed that the defendants

[8] Doc. Nos. 51 and 71, p. 10.
[9] Trial transcript at 610-614; Doc. No. 71.
[10] Doc. No. 71.
[11] Doc. No. 81.
[12] Doc. No. 137.
[13] Doc. No. 205
[14] Doc. No. 200
[15] Doc. No. 214
[16] Doc. No 312; *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1264, 1266-67 (11th Cir. 2009).

would take further actions to hide assets if they had notice of the possible appointment of a receiver,"[17] and further stated:

> Here, the Allens had failed to comply with two prior contempt orders. ATN believed that, given notice, the Allens could take further evasive action. ATN filed their Emergency Motion properly seeking an *ex parte* hearing to address their concerns. *Ex parte* hearings, while discouraged, are sometimes appropriate. In this case, the decision to allow ATN to proceed with a hearing without notice to the Allens does not appear improper. Moreover, the hearing was held on the record. The Allens, although absent from the hearing, received the Emergency Motion as well as a complete transcript of the hearing.[18]

In the end, the Allens' continual harping on this one hearing is a red herring. Neither counsel for ATN nor Judge Briskman did anything wrong. Every decision he made was based on notice to the Allens and after hearing. Rather, if any party is to be criticized for improper behavior, it is the Allens for secreting assets out of the United States in anticipation of an injunction prohibiting them from the transfer and then failing to repatriate the assets as clearly directed by Judge Briskman. The Allens were the parties acting contemptuously, not ATN, and certainly not the judge. (For ease of reference, the Court will refer to the various orders entered by Judge Briskman at issue as the "Repatriation Orders").[19]

After the reassignment of this matter to me, I held a three-day trial and entered an initial final judgment in favor of the Allens.[20] The Court also vacated the Repatriation Orders

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[17] Doc. No. 312 at p. 3.
[18] Doc. No. 312 at p. 8.
[19] Doc. Nos. 32, 51, 70, 71, 137 and 139. The orders relating to the Court's efforts to force the Allens to return monies held in the offshore trusts include: Order Granting, In part, Verified Motion for Ex Parte Temporary Restraining Order and Preliminary Injunction (Doc. No. 32); Order Granting Verified Emergency Ex Parte Motion for Temporary Restraining Order and Scheduling Further Preliminary Injunction Hearing (Doc. No. 51); Order Granting Modified Preliminary Injunction (Doc. No. 70) and related Memorandum Opinion (Doc. No. 71); Order Granting Motion Holding Daniel W. Allen in Contempt for Failure to Provide Court-Order Accounting (Doc. No. 137); and Order Granting Motion Holding Daniel W. Allen and David D. Allen in Contempt for Failure to Repatriate Assets and Setting Deadline for Daniel W. Allen and David D. Allen to Designate Expert and Submit Expert's Report (Doc. No. 139).
[20] Doc. Nos. 257 and 258.

consistent with the ruling at that time in favor of the Allens.[21] ATN appealed the final judgment. On September 25, 2007, the Eleventh Circuit Court of Appeals reversed this Court's initial final judgment, and remanded the litigation for further proceedings consistent with the appellate ruling.[22] Following the strict directives of the Eleventh Circuit, I reversed my holding and entered a judgment in favor of ATN.[23]

ATN now wants to collect upon its judgment pursuant to proceedings supplementary allowed by Bankruptcy Rule 7069(a)(1).[24] In addition, ATN asks me to adopt the prior findings of Judge Briskman made in connection with the Repatriation Orders, to declare both offshore trusts void as to creditors of the Allens, such as ATN, to direct the Allens to repatriate all funds in the Shingle Oak and Southern Breeze trusts, to enjoin the Allens from further use of monies in those trusts, and to retain jurisdiction to adjudicate disputes in their on-going collection efforts. The Court will grant each of these requests as to *Daniel* Allen, particularly since the judgment against him is now final.

Specifically, the Court will adopt all of the previous findings of fact and conclusions of law made by Judge Briskman, including the following:

- Based upon Daniel Allen's testimony and a review of the respective trust documents as to the Shingle Oak Trust and the Southern Breeze Trust, Daniel and David Allen retain control over the Assets, respectively, in the Shingle Oak Trust and the Southern Breeze Trust. Each has the power and ability to repatriate Assets held in their respective trusts (Doc. No. 71, ¶ 22).

[21] Doc. Nos. 238, 267 and 285,
[22] Doc. No. 330.
[23] Doc. Nos. 365, 366, and 367. The judgment was later reduced to $6 million. Doc. Nos. 371, 383, 384, and 385.
[24] Doc. Nos. 445 and 490. As a judgment creditor, ATN wants to proceed with discovery in aid of execution on its final judgment consistent with Fla. Stats. § 56.29, which pursuant to Fed. R. Civ. P. 69(a)(1) is applicable in this adversary proceeding. *In re Hinton*, 378 B.R. 371, 382-84 (Bankr. M.D. Fla. 2007).

- The Defendants have the ability to give a full accounting in this matter (Doc. No. 71, ¶ 23).
- As to Daniel Allen, the Assets under his control were used to fund the Shingle Oak Family Trust and the Shingle Oak Family Limited Partnership (Doc. No. 71, ¶ 27).
- Daniel Allen failed to satisfactorily explain either why his "estate planning" required the liquidation and transfer of the Assets during the pendency of this case or why it required the formation of an offshore asset protection trust in the first place (Doc. No. 71, ¶ 28).

This Court's adoption of Judge Briskman's findings is consistent with the principals set forth by the Eleventh Circuit Court of Appeals in *In re Lawrence*.[25] Indeed, the facts of this case are nearly identical to the facts in *Lawrence*. Both involve a self-settled trust created or funded in a remote foreign jurisdiction during pending litigation, funded with over 90% of the settler's assets for "estate planning" purposes, and administered by a stranger supposedly having total control over the trust *res*. Both also involve settlers who, when pressed by the Bankruptcy Court to turn over trust assets, implausibly claimed their inability to do so under the provisions of the trust documents, including the choice of law provisions designating foreign law as controlling. Finally, both cases involve reviewing courts relying upon the trust's determination that the settler's impossibility defense to turnover was itself impossible to believe because the alleged impossibility was self-created.[26] Accordingly, consistent with *Lawrence*, and because Judge Briskman's findings were made after a full evidentiary hearing on adequate notice to the parties, this Court adopts Judge Briskman's previous findings as set forth above and orders Daniel Allen *again* to repatriate any funds held in the Shingle Oak Family Trust.

[25] 279 F.3d 1294 (11th Cir. 2002).
[26] *Id.* at 1300.

For these reasons, the Court will also deny the defendants' motion for reconsideration of this Court's finding that the Allens "control what the [Shingle Oak Trust and the Southern Breeze Trust are] doing."[27] As already explained, this Court has properly relied upon Judge Briskman's finding that the Allens' impossibility defense is unbelievable. The Allens have not presented any persuasive reason for this Court to overturn this finding.

ATN, however, is not entitled to any relief against *David* D. Allen. The automatic stay arising from his pending Chapter 7 bankruptcy is in effect. Section 362(a) of the Bankruptcy Code[28] prohibits any collection efforts of any kind against him until a creditor properly obtains relief from the stay. Accordingly, ATN's efforts to collect from David D. Allen in this adversary proceeding are stayed.

ATN also asks this Court to wholly reinstate the Repatriation Orders and vacate my prior order vacating the Repatriation Orders.[29] I regrettably do not hold any magic wand that can turn back time. The Repatriation Orders were properly vacated because, at that time, the Allens had won their case. With the reversal of the judgment and ATN's now valid claims against the Allens, I lack the ability to reinstitute an order whose effectiveness has lapsed. However, as to the underlying findings and conclusions initially made by Judge Briskman, the Court will adopt and enforce his rulings, as tempered by the passage of time.

Finally, ATN has moved[30] to strike paragraphs 10 and 11 in the Allens' motion for reconsideration.[31] The Court denies ATN's motion, finding it unnecessary to strike any portion of the motion for reconsideration. The Court has given the Allens' allegations of past impropriety the weight they are worth—none.

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[27] Doc. No. 469.
[28] All references to the Bankruptcy Code shall refer to 11 U.S.C. § 101 *et. seq*.
[29] Doc. Nos. 445, 490, and 285.
[30] Doc. No. 478.
[31] Doc. No. 469.

In conclusion, the Court will partially grant ATN's motions[32] to direct Daniel Allen (i) to repatriate all monies currently held in his Shingle Oak Trust to counsel for ATN within 30 days of the entry of this order, (ii) to provide an accounting of all monies deposited in and transferred from the Shingle Oak Trust within 60 days of the entry of this order, and (iii) to otherwise immediately freeze any other use or transfer of any monies in the Shingle Oak Trust. The Court will retain jurisdiction to adjudicate any future disputes involved in ATN's collection efforts but will otherwise deny ATN's motion. Finally, the Court will deny the Allens' motion for reconsideration[33] and ATN's motion to strike.[34] A separate order consistent with this Memorandum Opinion shall be entered simultaneously.

DONE AND ORDERED in Orlando, Florida, on July 28, 2011.

KAREN S. JENNEMANN
United States Bankruptcy Judge

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[32] Doc. Nos. 445 and 490.
[33] Doc. No. 469.
[34] Doc. No. 478.