UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 8:05-bk-11953-PMG

SKYWAY COMMUNICATIONS HOLDING CORP.,
f/k/a I-Teleco.com, Inc.,
f/k/a Mastertel Communications Corp.,

Debtor. Chapter 11

WORLD CAPITA COMMUNICATIONS, INC.,

Plaintiff,

vs. Adv. No. 8:07-ap-217-PMG

KENNETH BRUCE BAKER,

Defendant.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CASE came before the Court to consider the Motion for Summary Judgment filed by the Plaintiff, World Capita Communications, Inc., f/k/a Skyway Communications Holding Corp. (Doc. 65).

The Plaintiff commenced this adversary proceeding by filing a Complaint against the Defendant, Kenneth Bruce Baker (Baker). In the Complaint, the Plaintiff seeks to avoid and recover certain

transfers of stock to Baker as constructively fraudulent conveyances. The Plaintiff also seeks an award of damages against Baker for breach of a promissory note.

In the Motion currently under consideration, the Plaintiff contends that there is no genuine issue as to any material fact, and that the Plaintiff is entitled to judgment as a matter of law, with respect to the fraudulent transfer claims set forth in Counts I, II, and III of the Complaint. The Plaintiff also contends that judgment should be entered in its favor as to Count V of the Complaint based on Baker's failure to comply with the Plaintiff's discovery requests.

The Motion for Summary Judgment should be denied.

I. Counts I, II, and III

In Counts I, II, and III of the Complaint, the Plaintiff seeks to avoid and recover certain transfers of stock to Baker as constructively fraudulent transfers pursuant to §544 and §550 of the Bankruptcy Code, and §726.106(1) and §726.108 of the Florida Statutes.

A. The Complaint

In its Complaint, the Plaintiff alleges that Baker held himself out as an agent of Skyway Communications Holding Corp. (Skyway). (Complaint, ¶ 9).

Specifically, the Plaintiff alleges that Baker and Skyway entered into a Consulting Agreement on July 1, 2003, pursuant to which Baker agreed to provide consulting services to Skyway for six months in exchange for 1,000,000 shares of Skyway's common stock. (Complaint, ¶ 15).

The Plaintiff further alleges that Baker and Skyway entered into a second Consulting Agreement on December 23, 2003, pursuant to which Baker agreed to provide consulting services to Skyway for an additional six months in exchange for 2,000,000 shares of Skyway's common stock. (Complaint, ¶ 16).

The Plaintiff alleges, however, that Baker did not provide any services to Skyway that could be considered reasonably equivalent value for the stock that he received under the Consulting Agreements. (Complaint, ¶ 18). Although Baker located investors for Skyway by "creating a misleading perception" of Skyway's viability, the Plaintiff alleges that such conduct was specifically excluded from the Consulting Agreements. (Complaint, ¶¶ 13, 17, 18).

In Counts I, II, and III, therefore, the Plaintiff alleges that the transfers of the stock to Baker are avoidable because "Skyway did not receive fair consideration or reasonably equivalent value in exchange for these transfers," and because Skyway was insolvent on the dates of the transfers. (Complaint, ¶¶ 27, 28, 35, 36, 43, 44). The Counts are actions to recover constructively fraudulent transfers under §544 and §550 of the Bankruptcy Code, and §726.106(1) and §726.108 of the Florida Statutes.

B. The Motion for Summary Judgment

In the Motion under consideration, the Plaintiff asserts that there is no genuine issue of material fact, and that the Plaintiff is entitled to the entry of a summary judgment in its favor as a matter of law. The Plaintiff's Motion for Summary Judgment is based largely on an Order entered by the United States District Court on July 29, 2010.

The District Court Order was entered in an action filed by the Securities and Exchange Commission against Baker and five other defendants (the SEC Action).

In the SEC Action, the SEC alleged that Skyway had hired Baker to locate investors, and that Skyway paid Baker commissions of at least $1.9 million, primarily in stock, for his promotional efforts.

The only count of the SEC's Complaint that is directed to Baker is Count VII. In Count VII, the SEC asserts that Baker violated §15(a) of the Securities and Exchange Act of 1934 in connection with his work for Skyway, by effecting transactions in securities "for the accounts of others" without registering as a broker-dealer in accordance with the Act. Consequently, the SEC sought to enjoin Baker from acting as an unregistered broker-dealer in violation of the registration provisions of the federal Securities laws, and also sought Baker's disgorgement of any "ill-gotten profits or proceeds" from his conduct.

The SEC filed a motion for a default judgment against Baker in the SEC Action, and the District Court entered an Order on the Motion on July 29, 2010. Based on Baker's default, the District Court found:

> Baker promoted investment in Sky Way Global, actively solicited investors for securities transactions, received a commission for each transaction, and earned approximately $2 million. Baker never registered as a broker or a dealer as required by Section 15(a)(1) of the Exchange Act (15 U.S.C. § 78o(a)). Baker demonstrates a high degree of scienter (1) by acting as an unregistered broker-dealer for several years and (2) by acquiescing in Sky Way Global's concealing the improper use of S-8 stock to pay Baker's commission.

(Doc. 65, Exhibit 3). Based on these findings, the Court permanently enjoined Baker from acting as a broker-dealer without first registering with the Commission. The Court also ordered that Baker should "disgorge any ill-gotten gain," and retained jurisdiction to enter a money judgment in an amount to be determined.

In the Motion for Summary Judgment presently before the Court, the Plaintiff asserts that "[b]y virtue of the SEC Order, Baker is liable under the doctrine of collateral estoppel for the fraudulent transfer of the Stock." (Doc. 65, p. 8). According to the Plaintiff, "[p]ursuant to the SEC Order, the District Court determined that Baker's receipt of the Stock was improper and illegal. Under the

doctrine of collateral estoppel, Baker is barred from contesting that the transfer to him was illegal and thus is avoidable." (Doc. 65, p. 8).

C. Collateral estoppel

The SEC Order was entered by the United States District Court. Consequently, the federal law of collateral estoppel applies to determine whether the Order has preclusive effect in this case. In re Gosman, 382 B.R. 826, 839 (S.D. Fla. 2007)(Federal preclusion principles apply to prior federal decisions.).

Under federal law, "collateral estoppel bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had 'a full and fair opportunity' to litigate that issue in an earlier case." Allen v. McCurry, 449 U.S. 90, 94-95 (1980)(quoted in United States v. Weiss, 467 F.3d 1300, 1308 (11th Cir. 2006)). For collateral estoppel to apply to a prior federal decision, the moving party must establish four elements: (1) the issue in the pending case is identical to the issue decided in the prior proceeding; (2) the issue was necessarily decided in the prior proceeding; (3) the party to be estopped was a party or was adequately represented by a party in the prior proceeding; and (4) the precluded issue was actually litigated in the prior proceeding. United States v. Weiss, 467 F.3d at 1308.

In this case, the SEC Order has no collateral estoppel effect in the current litigation, and the Order does not preclude Baker from contesting the Plaintiff's fraudulent transfer claims.

1. Identity of issues

First, the issue in this fraudulent transfer action is not identical to the issue decided in the SEC Action. The causes of action asserted against Baker in Counts I, II, and III of the current action are claims "to recover fraudulent transfers pursuant to 11 U.S.C. §§ 544(b) and 550, and Fla. Stat. §§

726.106(1) and 726.108." (Complaint, ¶¶ 25, 33, 41). Section 726.106(1) of the Florida Statutes provides:

> **726.106. Transfers fraudulent as to present creditors**
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Fla. Stat. §726.106(1). "Transfers made for less than reasonably equivalent value that were made when the Debtor was insolvent, or caused the insolvency, are . . . avoidable" under the statute. In re Aqua Clear Tech., Inc., 361 B.R. 567, 584 (Bankr. S.D. Fla. 2007)(quoted in In re Amelung, 2010 WL 1417742, at 3 (S.D. Fla.)).

The transfers at issue in the current litigation are the transfers of stock to Baker under the Consulting Agreements. The Plaintiff asserts that Skyway did not receive reasonably equivalent value in exchange for the stock transfers, and that the transfers are therefore avoidable.

The only cause of action asserted against Baker in the SEC Action, on the other hand, was an action for violation of the federal broker-dealer registration provisions. In Count VII of its Complaint, the SEC alleged that Baker had violated Section 15(a)(1) of the Securities and Exchange Act by effecting transactions in securities without registering as a broker-dealer. Generally, Section 15(a)(1) provides that it is unlawful for any broker or dealer to effect any transactions in any security "unless such broker or dealer is registered in accordance with subsection (b) of this section." 15 U.S.C. §78o(a)(1). The issue under §15(a) is typically whether an individual had acted as a broker within the meaning of the Act by engaging in the business of "effecting transactions in securities for the account of others." 15 U.S.C. §78c(a)(4)(A). The purpose of the registration provision is to allow the SEC to

regulate those who engage in the securities business and to establish the necessary standards regarding training, experience, and records. United States Securities and Exchange Commission v. Benger, 697 F.Supp.2d 932, 943-45 (N.D. Ill. 2010).

The primary relief sought against Baker in the SEC Action was a permanent injunction prohibiting Baker from acting as an unregistered broker-dealer in violation of the Act.

In the SEC Order, the District Court found that Baker "promoted investment in Sky Way Global, actively solicited investors for securities transactions, received a commission for each transaction, and earned approximately $2 million." The District Court further found that Baker had not registered as a broker or dealer as required by the Act, and that Baker's scienter was shown by the duration of his activity, and by his acquiescence to the improper use of S-8 stock to pay his commission. (Doc. 65, Exhibit 3).

In entering the SEC Order, the District Court never decided or considered whether Skyway received reasonably equivalent value in exchange for the stock transferred to Baker as compensation for his services. The only issue for the District Court was whether Baker had registered as a broker-dealer before conducting the securities transactions for which he was paid. The question of whether Skyway obtained any benefit from Baker's services was irrelevant to the SEC's claim for violation of the federal registration provision.

The fraudulent transfer issue in the pending case is not identical to the "unregistered broker" issue in the prior SEC Action. The SEC Order has no collateral estoppel effect in the current litigation.

2. Actually litigated

Additionally, the Plaintiff did not establish that the issue to be precluded was "actually litigated" in the prior proceeding.

Under the general federal rule, a default judgment ordinarily will not support the application of collateral estoppel because the issues have not been "actually litigated." Bush v. Balfour Beatty Bahamas, Limited, 62 F.3d 1319, 1323 (11th Cir. 1995). "If federal collateral estoppel law is applied, then a pure default judgment, one which arose from no participation of the defendant, is insufficient to have a preclusive effect." In re Itzler, 247 B.R. 546, 548 (Bankr. S.D. Fla. 2000). The rationale for this rule is that "a party may decide that the amount at stake does not justify the expense and vexation of putting up a fight. The defaulting party will certainly lose that lawsuit, but the default judgment is not given collateral estoppel effect." Bush v. Balfour, 62 F.3d at 1324(quoting In re Gottheiner, 703 F.2d 1136, 1140 (9th Cir. 1983)).

In this case, the SEC Order was entered pursuant to the SEC's Motion for Entry of a Default Judgment. (Doc. 65, Exhibit 2). In the Motion for Default Judgment, the SEC alleged that Baker had not answered or otherwise opposed the Complaint. (Doc. 65, Exhibit 2, p. 8). A Clerk's Default had been entered against Baker. (Doc. 65, Exhibit 3).

In his written opposition to the Plaintiff's Motion for Summary Judgment, Baker asserts that he never consented to service by electronic mail in the SEC Action, that he had not seen the SEC's pleadings before the SEC Order was entered, and that he was denied the opportunity to defend himself in the SEC Action. (Doc. 74, ¶ 15; Doc. 75, ¶ 3-4).

The docket in the SEC Action does not reflect that Baker ever appeared in that Action or otherwise responded to the SEC's Complaint.

Under these circumstances, it appears that the SEC Order is a "pure default judgment" that had been entered without Baker's participation. According to the federal rule, the SEC Order should not have preclusive effect in the current litigation.

II. Count V

In Count V of the Complaint, the Plaintiff seeks an award of damages against Baker for breach of a promissory note.

According to the Plaintiff, on May 4, 2004, Baker signed a Promissory Note payable to Skyway in the amount of $325,000.00. The Plaintiff alleges that Baker defaulted under the Note, and that a judgment should therefore be entered against Baker for the sum of $325,000.00, plus interest and costs.

In the Motion for Summary Judgment, the Plaintiff asserts that a judgment should be entered in its favor because of Baker's "repeated failure to appear for a deposition after having filed an affidavit in opposition and failure to produce any document to support his claim that he paid to the Plaintiff more than the amount of the promissory note." (Doc. 65, pp. 2-3).

The Court previously entered an Order Denying the Plaintiff's Motion for Partial Summary Judgment on Count V of the Complaint. (Doc. 55). The Plaintiff did not submit any documentation to support its present contention that the Order should be reconsidered based on Baker's failure to provide any requested information.

The Plaintiff apparently seeks reconsideration of the Order as a sanction for Baker's failure to provide discovery. The imposition of sanctions for a party's failure to cooperate in discovery is governed by Rule 37 of the Federal Rules of Civil Procedure. In this case, the Plaintiff has not shown that it is entitled to sanctions pursuant to Rule 37. See In re Connolly North America, LLC, 376 B.R. 161, 192-93 (Bankr. E.D. Mich. 2007)(The Rule did not apply because no order to provide discovery was violated); and In re LTV Steel Co., Inc., 307 B.R. 37, 44-45 (Bankr. N.D. Ohio 2004)(The ultimate sanction of an adverse ruling should be imposed only if the failure to provide discovery was

due to willfulness, bad faith, or fault, and only if the party was warned that the sanction would be imposed.).

In this case, the Court cannot determine from the record whether an order was entered compelling discovery, whether Baker was properly served with notice of taking his deposition, whether the Plaintiff properly served Baker with a request for production of documents, or whether Baker's failure to comply with any specific discovery request was willful and in bad faith.

The Plaintiff has not shown that it is entitled to the entry of a judgment in its favor on Count V of the Complaint.

Conclusion

The Plaintiff asserts that it is entitled to a summary judgment in its favor as to Counts I, II, and III of the Complaint. According to the Plaintiff, Baker is precluded from contesting the fraudulent transfer claims in this case because of the collateral estoppel effect of an Order entered by the District Court in a prior SEC Action.

The Plaintiff's Motion for Summary Judgment should be denied. The SEC Order does not have preclusive effect in this litigation under the federal law of collateral estoppel, because the issue in the current action is not identical to the issue in the prior SEC Action, and because the Plaintiff's claims were not actually litigated in the SEC Action.

Additionally, the record does not support the entry of a judgment in favor of the Plaintiff as to Count V of the Complaint, because the Plaintiff did not show that Baker willfully failed to comply with a discovery order.

Accordingly:

IT IS ORDERED that the Motion for Summary Judgment filed by the Plaintiff, World Capita Communications, Inc., is denied.

DATED this _5 _ day of April, 2011.

BY THE COURT

PAUL M. GLENN
Chief Bankruptcy Judge