

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: CASE NO.: 3: 11-BK-1002-JAF
BEN H. WILLINGHAM, Chapter 7
Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Motion for Turnover of Property of the Estate filed by Alexander G. Smith, Chapter 7 Trustee (the “Motion for Turnover”). On October 17, 2012 the Court conducted an evidentiary hearing on the Motion for Turnover.¹ In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

On March 15, 2007 the United States District Court for the Middle District of Florida, Jacksonville Division entered a Consent Judgment in favor of a number of parties (the “Judgment Creditors”) and against Ben Willingham in the amount of \$25,707,605.00, arising from a business arrangement between Mr. Willingham and the Judgment Creditors.

On February 17, 2011 Mr. Willingham (“Debtor”) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On Schedule F of his bankruptcy

¹ The transcript of the hearing will be hereinafter referred to as “Tr.” followed by the appropriate page number.

petition, Debtor listed Abdullah M. Al-Rayes, one of the Judgment Creditors, as holding an unsecured claim in the amount of \$25,707,605.00 (Trustee's Ex. 6).

Between December 13, 2007 and November 22, 2010, approximately 68 wire transfers totaling \$255,740.00 were made from a Swiss bank account (the "Swiss Account") into a checking account at USAA Federal Savings Bank (the "USAA Account")(Tr. at 15; Trustee's Ex. 1). The Swiss Account is titled solely in the name of Erika Willingham, Debtor's non-filing spouse of thirty-three years (Tr. at 6, 11). The USAA Account is a joint account owned by Debtor and Erika Willingham, which they use to pay their monthly living expenses (Trustee's Ex. 2; Tr. at 15).

According to Debtor, Erika Willingham opened the Swiss Account when she was 18 (Tr. at 14). Debtor also testified that Erika Willingham's parents left her an inheritance, which went into the Swiss Account, and that Erika Willingham's Swiss social security goes into the Swiss Account (Tr. at 14). Debtor testified that he has never owned an interest in the Swiss Account and has never put any money from his business dealings with the Judgment Creditors into the Swiss Account (Tr. at 14, 23).

Debtor testified that the Swiss Account has between \$100,000.00 and \$500,000.00 in it (Trustee's Ex. 5 at 15). Kirby Willingham, Debtor's son, testified that during 2010, pursuant to a discussion with his father concerning his father's finances, he observed on his father's computer screen a balance of 450,000 in the Swiss Account (Trustee's Ex. 4 at 12). Kirby Willingham did not know if the 450,000 was in Swiss Francs or U.S. dollars. (Id.)

At the hearing on the Motion for Turnover Debtor testified that he transfers funds online from the Swiss Account to the USAA Account "in the sense that my fingers on the

computer push the right buttons, yes, at the direction of my wife.” (Tr. at 16, 30).

However, at a deposition in aid of execution taken on January 9, 2008, when Debtor was asked “[d]o you know how [Erika Willingham] monitors it, does she do it herself or does she have someone managing these two accounts?”, Debtor replied “[s]he does it herself.” (Tr. at 32). When asked, “[h]ow does she make the transfer?”, Debtor responded “I don’t know if she does it by phone or on the Internet.” (Id.) At the hearing on the Motion for Turnover, Debtor reconciled his inconsistent testimony by explaining that Erika Willingham made the transfers “in the sense that she told me what to transfer.” (Tr. at 31.) The following exchange then occurred:

- Q Didn’t you testify today to this Court that you performed the transfers by the Internet?
- A When it was done by the Internet, yes.
- Q Is it your testimony today that [Erika] Willingham had previously done transfers?
- A She has previously talked with the bank.
- Q And she has actually made those transfers?
- A I don’t have access to a bank account, and when a conversation takes place with the bank, she has to do it. I can’t call up and say: Hey, I’m So and So’s husband. I won’t get to first base with it.

(Tr. at 33-34).

Erika Willingham’s testimony at her December 8, 2011 deposition directly contradicted Debtor’s testimony. Erika Willingham denied owning a bank account in Switzerland and denied transferring any money from the Swiss Account to the USAA account. When presented with one of the wire transfer statements and asked whether she was familiar with it, Erika Willingham indicated she was not. The following exchange then occurred:

- Q Do you know anything about a bank account in your name that is transferring money into the USAA account?
- A No.

Q Who would know about that money in your name?
A I don't know. My husband probably.
Q Does your husband actually make these transfers?
A I don't know. I guess.
Q Have you spoken with your husband about these transfers?
A No.
Q Did you know that transfers were being made from an account in your name into the USAA account?
A No.
Q Who actually pays the bills in your household?
A Ben.
Q I'm sorry?
A My husband.
Q Ben pays all the bills?
A Yes.
Q Do you ever write any checks?
A No.
Q So you never look at a checkbook?
A No. Only for the house and cooking and cleaning, since 30 years. I trust him.
Q So were you aware that monies coming in were to pay bills from an account in your name?
A No.
Q Does Ben control all the transactions--
A Yes.
Q --in the USAA bank account?
A Yes.
Q Have you seen any paperwork regarding the transactions?
A No. I never look at the paperwork.
Q Did you even know the transactions were happening?
A No. I guess they did, but, no.
Q Did you know?
A No.
Q Because Ben handles all of that?
A Yes. Always did.
Q Ben always handled all of the finances--
A Yes.
Q --for the household?
A He's a good man.
Q Did he ever mention to you that there was money in a trust account that was paying bills?
A No.
Q Did he ever mention to you that there were wire transfers being made--
A No.
Q --from you?
Q Do you have any idea how much money is transferred in each month--

- A. No.
Q. --in your name?
Q. Did you even know that this account existed?
A. Which account?
Q. That is transferring money into USAA.
A. No ... I left everything to Ben because I trust him.
Q. So you gave him control over the account in Switzerland?
A. Yes. Always.
Q. So he would have dealt with actually using the money to purchase the house?²
A. Yeah.
Q. Yes?
A. Because I wanted him to.
Q. So you have no idea how long these transfers have been happening?
A. No.
Q. Have you ever heard about the transfers before today's deposition?
A. No.

(Trustee's Ex. 3 at 21-25).

Erika Willingham was served for her deposition with a Notice of Deposition Duces Tecum requesting the records for the Swiss Account. Mrs. Willingham did not produce any records pursuant to that request (Tr. at 41).

Conclusions of Law

By virtue of the Motion for Turnover, the Trustee seeks the entry of an order requiring Debtor, or anyone else in possession, to turn over to the Trustee all the proceeds of the Swiss Account, as well as all financial records of the Swiss Account which detail the transfers into the USAA Account, including bank statements, copies of checks, and wire transfers. The Trustee asserts that the Swiss Account is owned and controlled by Debtor and the proceeds must therefore be turned over to the Trustee.

Debtor argues that he has never acknowledged, and there is no evidence to support, that the Swiss Account is property of his estate. Debtor asserts that there is no

evidence that he owns the funds in the Swiss Account or that the Trustee would have an interest in the funds because the account was created for Erika Willingham's benefit before she met Debtor. Debtor contends that the Trustee failed to provide evidence or documents that the funds in the Swiss Account were derived from profits originating from Debtor's transactions with the Judgment Creditors and the Trustee is therefore not entitled to turnover of the Swiss Account records or proceeds.

At this juncture and upon the evidence before it, the Court is unable to determine whether the proceeds of the Swiss Account are property of the estate.³ Accordingly, the Court will deny without prejudice the Motion for Turnover as it relates to the proceeds of the Swiss Account. To the extent that the Motion for Turnover seeks the turnover of records related to the Swiss Account, it is in essence a motion to compel discovery. Rule 37 of the Federal Rules of Civil Procedure provides that a party may move for an order compelling discovery, including the production of documents.⁴ Rule 26 provides that "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense... For good cause, the Court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be

² Although the amount is unknown, Debtor testified that money from the Swiss Account was used for a down payment to purchase the home where Debtor and Erika Willingham live (Trustee's Ex. 5 at 10-12). The home is owned by Erika Willingham (Id. at 10).

³ Debtor's brief seeks reconsideration of the Court's determination that this matter is a core proceeding. That request is denied. "It is well established that proceedings to determine what constitutes property of the bankruptcy estate under section 541(a) of the Bankruptcy Code are core proceedings." In re Point Blank Solutions, Inc., 449 B.R. 446, 449 (Bankr. D. Del. 2011). While the motion before the Court is a Motion for Turnover, the Court must first determine whether the Swiss Account is property of the estate.

⁴ The rule also requires that a motion to compel "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed.R.Civ.P. 37(a)(1). Ordinarily, the Court requires strict compliance with the good faith certification requirement. In the instant case, however, the Court has already conducted a hearing on the matter and the parties have briefed the Motion for Turnover. Deferring a decision on the Motion for Turnover on this basis would merely further delay the proceedings. See In re Pfizer, Inc. v. Apotex, Inc., 744 F.Supp.2d 758, 763 (N.D. Ill. 2010).

admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed.R.Civ.P. 26.

The Court finds that the records related to the Swiss Account are relevant and indispensable to the Trustee’s claim that the proceeds of the Swiss Account are property of the estate. The only evidence before the Court related to the source of funds in the Swiss Account is Debtor’s testimony as to Erika Willingham’s inheritance, as to Erika Willingham’s Swiss social security, and as to the fact that neither he nor his companies put any funds from his business dealings with the Judgment Creditors into the Swiss Account.⁵ Erika Willingham’s incredible claim of total ignorance as to the existence of both the Swiss Account and the wire transfers sheds no light on the source of funds in the Swiss Account, but does suggest that Debtor has unfettered access to and control over the Swiss Account.

Absent a requirement that Erika Willingham turn over to the Trustee the records related to the Swiss Account, the Court is left only with Debtor’s self-serving testimony to establish that Debtor did not deposit any funds into the Swiss Account. The Court finds that it would be inequitable to permit Erika Willingham to refuse to produce documents related to the Swiss Account on the basis that she is a non-debtor while permitting Debtor to argue that the account is not property of his bankruptcy estate because the Trustee failed to prove that he put funds into the account. Accordingly, the Court will require Erika Willingham to turn over the records related to the Swiss

⁵ Aside from the self-serving nature of Debtor’s testimony, Debtor’s argument assumes that the Court cannot find that the funds or a portion of the funds in the Swiss Account are property of the estate unless it finds that those funds originated from Debtor’s business dealings with the Judgment Creditors. The Court makes no determination at this juncture whether the funds in the Swiss Account or any portion thereof are property of Debtor’s bankruptcy estate. The Court notes, however, that a later finding that none of the funds in the Swiss Account originated from Debtor’s business dealings with the Judgment Creditors does not compel a finding that the funds are not property of Debtor’s bankruptcy estate.

Account. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED this 15 day of February, 2013 at Jacksonville, Florida.

/s/

JERRY A. FUNK
United States Bankruptcy Judge