

ORDERED.

Dated: November 13, 2019



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

Chapter 11

TAYLOR, BEAN & WHITAKER
MORTGAGE CORPORATION,
REO SPECIALISTS, LLC, and
HOME AMERICA MORTGAGE, INC.,

Case No. 3:09-bk-07047-JAF
Case No. 3:09-bk-10022-JAF
Case No. 3:09-bk-10023-JAF

Debtor.

(Jointly Administered Under
Case No. 3:09-bk-07047-JAF)

NEIL F. LURIA, as Trustee for the TAYLOR,
BEAN & WHITAKER PLAN TRUST,

Plaintiff,

Adv. Pro. No. 3:11-ap-0693-JAF

v.

THUNDERFLOWER, LLC,

Defendant.

ORDER DENYING RESPONDENTS' MOTION FOR RECONSIDERATION

This proceeding is before the Court on the Motion for Reconsideration (Doc. 109) filed by Non-Party Respondents ALAN BRIGGS ("Briggs") and BLAKE'S ON THE PARK, LLC

(“Blake’s on the Park”) (collectively, “Respondents”). Plaintiff NEIL F. LURIA, as the Chapter 11 Trustee (“Plaintiff”), filed a response in opposition. (Doc. 111). Respondents filed a reply. (Doc. 112). For the reasons set forth herein, the Court denies the Motion for Reconsideration.

Background

Debtor TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION (“Taylor Bean”) filed a Chapter 11 petition in August 2009. The Court confirmed Taylor Bean’s Chapter 11 plan and appointed Plaintiff as the Chapter 11 trustee in July 2011. (Doc. 3420 ¶ 68, case no. 3:09-bk-07047). Plaintiff filed this adversary proceeding in August 2011. (Doc. 1). Plaintiff sought to avoid preferences and fraudulent transfers against various defendants. A final judgment in the amount of \$6,176,787.75 was awarded against Defendant THUNDERFLOWER, LLC, a Florida limited liability company (“Florida Thunderflower”) in December 2018. (Doc. 97).

In June 2019, Plaintiff served post-judgment subpoenas on Respondents. (Doc. 103 at 13); (Doc. 103 at 24). Respondents objected to those subpoenas on several grounds and sought a protection order from this Court. The Court denied the motion for protective order (the “Prior Order”). (Doc. 106). Respondents now seek reconsideration of the Prior Order.

The subpoenas seek discovery related to the finances of: a) Blake’s on the Park, b) an entity named CPMG LLC (“CPMG”), and c) “Thunderflower,” among others. CPMG owns Blake’s on the Park. The subpoenas define “Thunderflower” to include both Florida Thunderflower and a separate entity named THUNDERFLOWER, LLC, an Illinois limited liability company (“Illinois Thunderflower”). (Doc. 103 at 17 & 29).

The issues for reconsideration “largely center[] on the issue of which Thunderflower entity [] owned CPMG.” (Doc. 112 at 3). Respondents contend that Florida Thunderflower never owned CPMG, that CPMG was transferred to Illinois Thunderflower in March 2004, and, therefore,

discovery related to CPMG and Blake's on the Park is irrelevant to collecting on the judgment against Florida Thunderflower. (Doc. 109 at 14). The Court's Prior Order focused on attorney-client privilege and did not substantively address the purported demarcation between Florida Thunderflower and Illinois Thunderflower. In light of this, the instant Order more fully addresses Respondents' concerns but denies the request for reconsideration of the Prior Order.

Prima facie evidence

Respondent Blake's on the Park is a bar/restaurant owned by CPMG. Respondent Briggs oversaw the operations of Blake's on the Park and received a regular salary paid by CPMG out of CPMG's bank account. (Doc. 105 at 129-132, 151-153). However, an individual named David Stark was the day-to-day on-site general manager of Blake's on the Park. It is not clear what work Briggs accomplished to benefit Blake's on the Park or CPMG.

Briggs was also the "managing member" of Florida Thunderflower but has never held an ownership interest in Florida Thunderflower. (Doc. 105 at 153). Florida Thunderflower was organized in March 2004 and was dissolved in September 2013. (Doc. 111 at 18, 21). Its initial members were Kurt Krueger and Lee Farkas. In April 2011, Lee Farkas was convicted on varying counts of criminal fraud related to his operation of Taylor Bean. Mr. Farkas is presently serving a thirty-year sentence.

In March 2011, Briggs testified that Florida Thunderflower owned CPMG and that he had never heard of Illinois Thunderflower. According to Briggs' 2011 testimony, Florida Thunderflower's business operations comprised: a) ownership of CPMG; b) ownership of an entity named Chisholm Properties of Atlanta; and c) ownership of two apartments in Fort Lauderdale, Florida. (Doc. 105 at 138-41). Briggs now attests he later "learned that Illinois Thunderflower actually owned CPMG" and that CPMG was transferred to Illinois Thunderflower

in March 2004. (Doc. 109-4 at 5, ¶ 9). CPMG was apparently conveyed to Illinois Thunderflower by an individual named John L. Chisholm. (Doc. 109-3 at 2-4).

Briggs testified that he undertook being Florida Thunderflower's managing member "because it might be easier for other people to have someplace to go with regard to Thunderflower's business other than to [Mr. Farkas]" in light of Mr. Farkas' then-pending criminal trial. (Doc. 105 at 141). However, Briggs admits that he had no understanding of what this entailed and did nothing to prepare himself for this role. (Doc. 105 at 141-42, 149). Briggs testified that Mr. Farkas fully controlled Florida Thunderflower and that Mr. Farkas received Florida Thunderflower's revenue. (Doc. 105 at 141). Briggs testified he was a "paralegal" "assisting in the preparation of" Mr. Farkas' criminal trial even though Briggs had never previously served as a paralegal. (Doc. 105 at 130-31). Mr. Farkas and Briggs resided together at Briggs' home for "several months" in the lead-up to Mr. Farkas' criminal trial and eventual conviction. (Doc. 105 at 128, 174). The fact they resided at the same residence for several months before Mr. Farkas' incarceration and worked together on his criminal case, despite Briggs having no prior legal experience whatsoever, is sufficient to establish prima facie evidence of a close relationship.

In August 2011, Briggs formed a company named RNB Holdings, LLC for the purpose of purchasing CPMG from Illinois Thunderflower. (Doc. 109-4 at 6). The sale was completed around that same time pursuant a promissory note under which RNB Holdings agreed to make regular "installment" payments to Illinois Thunderflower for the purchase of CPMG. Thus, it appears Briggs now controls CPMG.

Finally, Plaintiff relies on Florida Thunderflower's federal tax return for tax-year 2006 (after the purported transfer of CPMG and Blake's on the Park to Illinois Thunderflower) and argues the return shows that Florida Thunderflower owned/operated CPMG and Blake's on the

Park. The Form 1065 states that Florida Thunderflower’s principal business activity is “rentals/bars” and that its principal product or service is “apartments/bars.” (Doc. 111 at 24). Additionally, the Form 4562 Statement lists various restaurant fixtures for depreciation and includes the dates the fixtures were put into service—with CPMG. (Doc. 111 at 40). According to Florida Thunderflower’s tax form, items placed into CPMG’s service in May and June 2005 included a crisper cooler, a stand freezer, beer coolers, and a pizza oven. Florida Thunderflower’s tax form lists other assets put into CPMG’s service as late as 2006, such as audio equipment, bottle coolers, an HVAC unit, bar stools, and an ice maker.

These tax forms, however, are not supported by an affidavit. An affidavit could have demonstrated authenticity and offered a fuller explanation of the data by an affiant with personal knowledge and/or appropriate expertise. Respondents’ reply brief takes issue with the lack of a supporting affidavit and Plaintiff has yet to file an affidavit in response to this argument. Therefore, the Court will disregard Plaintiff’s tax-form evidence for lack of a supporting affidavit.

Analysis

“The rules governing discovery in post-judgment execution proceedings are quite permissive.” Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 138 (2014). “Federal Rule of Civil Procedure 69(a)(2) states that, ‘[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in the rules or by the procedure of the state where the court is located.’” Id. at 139.

“The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting the judgment.” EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207 (2d Cir. 2012), aff’d, 573 U.S. 134 (2014). “It is not uncommon to seek asset discovery from third parties, including banks, that possess information pertaining to the judgment debtor’s assets.”

EM Ltd., 695 F.3d at 207. “The presumption is in favor of full discovery of any matters arguably related to the creditor’s efforts to trace the debtor’s assets and otherwise to enforce its judgment.” E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc., 286 F.R.D. 288, 291 (E.D. Va. 2012).

In Credit Lyonnais, Credit Lyonnais (a French bank) had prevailed in a civil suit against an entity named SGC. Credit Lyonnais, S.A. v. SGC Intern., Inc., 160 F.3d 428, 431 (8th Cir. 1998). Franz Sedelmayer was SGC’s president and sole employee. Credit Lyonnais sought to depose both SGC and Sedelmayer. The deposition notice sought information about Sedelmayer’s personal assets and asset transfers. Critical to the overall determination, Credit Lyonnais presented evidence depicting the close relationship between Sedelmayer and SGC. Credit Lyonnais wanted to scrutinize this relationship, but SGC argued this discovery was irrelevant and outside the scope because Sedelmayer had resigned from SGC by the time post-judgment discovery had commenced. The circuit court held that “Sedelmayer cannot use his resignation as a complete excuse to avoid the deposition” and that “[i]nquiring into the circumstances of Sedelmayer’s resignation will help shed light on the relationship” between he and SGC. Id. at 431. The circuit court remanded the case for the trial court to “fine tune” the appropriate inquiry. Id. Importantly, the circuit court “stress[ed] that the presumption should be in favor of full discovery of any matters *arguably related* to Credit Lyonnais’ efforts to trace SGC assets and otherwise to enforce its judgment.” Id. (emphasis added).

In Falicia, judgment creditors sought bank records of two non-party companies owned by the same family who owned the judgment debtor. Falicia v. Advanced Tenant Services, Inc., 235 F.R.D. 5, 8 (D.D.C. 2006). The two respondent companies were Single Point and Dixie Dale. The plaintiffs “submitted evidence which suggests that Single Point and Dixie Dale are mere extensions of [the judgment debtor] Advanced Tenant, thereby raising *colorable suspicion* regarding the

relationship between Single Point's and Dixie Dale's assets and Advanced Tenant." Id. at 9 (emphasis added). The court explained, "their creations appear to be thinly veiled attempts to transfer assets from Advanced Tenant to Dixie Dale and Single Point in order to render Advanced Tenant judgment proof." Id. The court concluded: "[D]ue to the suspicion raised by the evidence presented by the plaintiffs, the Court concludes that it is permissible for them to obtain the requested discovery for both non-parties—Dixie Dale and Single Point." Id.

While the instant facts are unique, the analysis is informed by the close relationship discussed in Credit Lyonnais and the thinly veiled attempts at creating artificial barriers to hide assets as discussed in Falicia.

Here, Respondents seek to prevent discovery targeted at CPMG and Blake's on the Park by drawing a barrier between a) Florida Thunderflower and b) Illinois Thunderflower, CPMG, and Blake's on the Park. Briggs was the managing member of Florida Thunderflower and now effectively owns and controls CPMG (which owns Blake's on the Park). In 2011, Briggs thought Florida Thunderflower owned CPMG. It is unclear why the managing member of Florida Thunderflower mistakenly believed his company owned CPMG and did not know that the true owner, Illinois Thunderflower, even existed. This is significant given that Briggs now contends Florida Thunderflower never owned CPMG and that Briggs now owns CPMG. More importantly, it is unclear exactly *why* Briggs thought Florida Thunderflower owned CPMG. The implication is that Briggs must have been told that Florida Thunderflower owned CPMG because he admits he undertook no effort to learn about Florida Thunderflower's operations and assets. Taken together, these facts constitute prima facie evidence that the two Thunderflower entities were, on some level, treated as the same entity.

Further, the specter of duplicitousness permeates this bankruptcy case because the bankruptcy was necessitated by the criminally fraudulent actions of Lee Farkas. Mr. Farkas was an original owner/member of Florida Thunderflower, was the person who actually controlled Florida Thunderflower while Briggs was the managing member, and was a person with whom Briggs was closely associated. The prima facie evidence shows Briggs was a figurehead of Florida Thunderflower in that he had no prior experience with the company and made no effort to learn about the company. This figurehead status coupled with the close relationship between Briggs and Mr. Farkas raises a colorable suspicion that Briggs was used to create an artificial barrier, façade, or artifice between Florida Thunderflower and Illinois Thunderflower.

While the full facts are not yet clear, there is sufficient evidence to support all the post-judgment discovery sought against Respondents through the instant subpoenas, including discovery pertaining to CPMG and Blake's on the Park. It appears additional transfers have occurred since this case and proceeding were both filed. It is not yet clear whether and to what extent Plaintiff will be able to trace any of Florida Thunderflower's assets flowing through the various individuals and entities involved. However, the door is clearly open. Accordingly, it is hereby ORDERED that the motion for reconsideration (Doc. 109) is DENIED.