

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-80468-CIV-MIDDLEBROOKS/BRANNON

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JCS ENTERPRISES, INC. d/b/a JCS
ENTERPRISES SERVICES, INC., T.B.T.I., INC.,
JOSEPH SIGNORE, and PAUL L. SCHUMACK, II,

Defendants.

**MOTION FOR ORDER TRANSFERRING ASSETS TO THE RECEIVERSHIP ESTATE
WITH INCORPORATED MEMORANDUM OF LAW**

James D. Sallah, Esq., not individually, but solely in his capacity as the Receiver (“the Receiver”) for JCS Enterprises Inc. d/b/a JCS Enterprises Services Inc. (“JCS”), T.B.T.I. Inc. (“TBTI”), My Gee Bo, Inc. (“GeeBo”), JOLA Enterprise Inc. (“JOLA”), PSCS Holdings, LLC (“PSCS”), and their affiliates, subsidiaries, successors and assigns (collectively, the “Receivership Entities” or “Estate”), respectfully requests an order transferring all funds held in the TBTI Inc. Defined Benefit Pension Plan, a purportedly exempt or qualified account, held at AssetMark Trust Company (“AssetMark”) with account number XXX3894 (“Pension Plan account”) to the Receivership Estate, and provides the following in support.

As explained below, in September 2014, Defendant Paul L. Schumack, II (“Schumack”) and his wife, Christine Schumack, voluntarily assigned the beneficiary rights in the Pension Plan account by a Court-approved Assignment and Assumption Agreement. (*See* DE 118-1). In *Sallah v. Schumack, et al.*, No. 16-CV-80303-Middlebrooks (S.D. Fla. March 2, 2016) (the “*Schumack Case*”), the Receiver also obtained separate, consent judgments against Schumack and Christine

Schumack each in the principal amount of \$5,129,806.94 plus post-judgment interest for which they are jointly and severally liable. (*Schumack* Case, DE 6-2, 8-2, 12, and 13).

I. RELEVANT BACKGROUND

A. Court-Appointed Receiver

On April 7, 2014, the Securities and Exchange Commission (“SEC”) initiated the instant emergency enforcement action alleging that the defendants were engaged in a multi-million dollar Ponzi scheme and that Defendants Joseph Signore and Schumack had misappropriated investor funds for their personal use, among other things. In addition to other relief, the SEC sought the appointment of a receiver over “all of the assets, properties, books and records, and other items of JCS and TBTI in their names or their principals’ name.” (DE 19 at p.2). In granting the SEC’s motion seeking the appointment of a receiver, on April 7, 2014, the Court issued an Amended Receivership Order appointing James D. Sallah, Esq. as Receiver over JCS and TBTI. (*Id.*) On April 14, 2014, this Court expanded the Receivership to include GeeBo. On December 12, 2014, the Court expanded the Receivership over JOLA and PSCS. On December 15, 2014, the Court reappointed Mr. Sallah as Receiver for the Receivership Entities (the “Reappointment Order”).

B. Defendant Paul Schumack Operated a Ponzi Scheme

The Reappointment Order directed the Receiver to conduct an investigation, which remains ongoing. During the course of the investigation, it became clear that Schumack caused TBTI to make transfers to the Pension Plan account with actual intent to defraud a creditor, TBTI. As argued herein, those transfers are avoidable as fraudulent transfers notwithstanding the fact that the funds were transferred to a purportedly qualified account.

The Receiver determined that TBTI is a Florida corporation, and that during the events at issue, Schumack was TBTI’s vice president and Christine Schumack was its president. (*Sallah v.*

Signore, et al., No 15-CV-80946-Middlebrooks (July 10, 2015) (“*Signore Case*”) (*Signore Case*, DE 93-1 at ¶8). The Receiver further determined that from approximately December 2011 to April 2014, Schumack operated TBTI as a Ponzi scheme. (DE 200-1, Ex. A to the Receiver’s Third Report at pp. 29, 56); (*Signore Case*, DE 93-1 at ¶20); (*See also, Sallah v. Barnes, et al.*, No. 16-80781-Civ-Marra (S.D. Fla. Nov. 11, 2016) (DE 15, “Declaratory Judgment”) (The Honorable Kenneth A. Marra finding that “Paul L. Schumack, II operated TBTI as a Ponzi scheme”)). Similarly, the Court in the *Signore Case* made findings of undisputed fact that “[Joseph] Signore and Schumack operated JCS and TBTI, respectively, as part of a single, continuous Ponzi scheme.” (*Signore Case*, DE 125 at p.8).

On or about October 4, 2013, the Schumacks established the Pension Plan with Genworth Financial Trust Company, which is now known as AssetMark. Attached as Composite Exhibit “1” is a true and correct, redacted copy the account opening forms, certain statements, monetary transfers, communications, and other documents. Schumack and Christine Schumack are the only trustees of the Pension Plan and its sole beneficiaries. From October 21, 2013 to January 31, 2014, after establishing the Pension Plan account, the Schumacks caused TBTI to transfer more than \$2.7 million in investor funds to a company named W.C.F.S., Inc. (“WCFS”). WCFS is an entity related to TBTI and PSCS, as WCFS is owned by Christine Schumack’s son, Schumack’s stepson. (DE 114-1 at ¶25). On or about January 27, 2013, the Schumacks caused WCFS to transfer \$825,000 of investor funds to PSCS, a receivership entity whose member-managers were the Schumacks. (*See Composite Exhibit 2, infra*); (DE 114-1 at ¶¶ 20-23). The same day, on January 27, 2013, the Schumacks caused PSCS to transfer \$400,000 in investor funds to the Pension Plan account for their ultimate benefit. Attached as Exhibit Composite Exhibit “2” is the affidavit of

Melissa Davis, CPA, which evidences the tracing of the investor funds from TBTI to the Pension Plan account along with documents reflecting the transfers described above.

C. The Schumacks' Assignment to the Receivership Estate

During the course of the Receivership Estate in September 2014, Schumack and his wife, Christine Schumack, voluntarily assigned certain assets to the Receivership Estate by entering into a Court-approved Assignment and Assumption Agreement. (DE 118-1). Defendants included the beneficiary rights in the Pension Plan account in the Assignment and Assumption Agreement *only* to the extent that any such right, title, or interest in the Pension Plan account was assignable. The Receiver did not (and does not) concede that the Pension Plan would be validly qualified or an exempt account, as stated in footnote 2 of the Assignment and Assumption Agreement. (*Id.* at Schedule 1, p.3, n.2) (the Receiver provided that he “makes no statement or judgment as to the validity of the Defined Benefit Plan in question or the assignability of rights thereunder”).

D. The Schumacks Consented to Monetary Judgments Based on Florida's Uniform Fraudulent Transfer Statute

On March 2, 2016, because, in part, the funds were deposited into a purportedly qualified account, the Receiver filed a complaint against the against the Schumacks in the *Schumack* Case, seeking, among other things, the avoidance of all transfers from the Receivership Entities, or any of them, made for the benefit of the Schumacks (the “Complaint”). (*Schumack* Case, DE 1). Specifically, under Count I of the Complaint, the Receiver brought a cause of action under Fla. Stat. § 726.105(1)(a), which provides that “[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation . . . **[w]ith actual intent** to hinder, delay, or **defraud** any creditor of the debtor.” (Emphasis added). Among other remedies, the Receiver sought the avoidance of over \$5 million in fraudulent transfers and the imposition of a constructive trust and/or equitable lien.

On March 4, 2016 and May 7, 2016, Schumack and Christine Schumack, respectively, consented to the entry of separate Final Judgments as to Count I of the Complaint without admitting or denying the allegations of the Complaint. (*Schumack* Case, DE 6-2 and 8-2). The Court entered separate Final Judgments as to Count I of the Complaint against Schumack and Christine Schumack, jointly and severally, in the principal amount of \$5,129,806.94 plus prejudgment interest. (*Id.*, DE 12 and 13). Thus, under the Final Judgments, the transfer of funds from TBTI to WCFS to PSCS to the Pension Plan account are avoidable, because these transfers were made with actual intent to defraud. (*Schumack* Case, DE 1-3, Ex. B.1 at p.3).

E. The Pension Plan Account

The Pension Plan account currently holds approximately \$400,000 in money market funds. The Receiver certifies that the assets he has collected from the Schumacks, including through the assignments described above, have been insufficient to satisfy the judgments and that the Schumacks remain judgment debtors for amounts far exceeding the \$400,000 in the Pension Plan account.

To avoid any issues of whether the funds in the Pension Plan account would be protected as exempt funds, subject to penalties for withdrawal, or assignable, the Receiver is respectfully requesting that the Court issue an order deeming the funds as non-exempt from legal process and directing AssetMark to transfer such funds in the Pension Plan account to the Receivership Estate. Clearly, the Receivership Estate is entitled to the requested relief because, as part of a Ponzi scheme, TBTI transferred \$400,000 in investor funds indirectly through other companies to the Pension Plan account for the personal benefit of Schumack and Christine Schumack. As argued herein, the Receivership Estate has an immediate and exclusive property interest in the investor funds that the Schumacks caused TBTI to transfer ultimately to the Pension Plan account. As a

result, the Receiver seeks findings of the facts based on the information set forth above and requests the Court enter an order substantially similar to the attached proposed order.

II. MEMORANDUM OF LAW

The Court's power to supervise an equity receivership and determine the appropriate action to be taken in the administration of the receivership is extremely broad. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) *rev'd in part on other grounds*, 998 F.2d 922 (11th Cir. 1993). "In equity receiverships resulting from SEC enforcement actions, district courts have very broad powers and wide discretion to fashion remedies" *SEC v. Homeland Communs. Corp.*, No. 07-80802 CIV-MARRA, 2010 U.S. Dist. LEXIS 57961 (S.D. Fla. May 24, 2010) (citations omitted). The Court's wide discretion derives from the inherent powers of an equity court to fashion such relief. *Elliott* at 1566 (citing *SEC v. Safety Fin. Serv., Inc.*, 674 F.2d 368, 372 (5th Cir. 1982)). Here, the Court should use these equitable powers to make findings of fact, impose relief, and to direct funds to be transferred to the Receiver immediately.

A. The Assets in the Pension Plan are Not Exempt From Post-Judgment Collection

From the outset, there is no issue that the Schumacks assigned their beneficiary rights, to the extent assignable, in the Pension Plan account as part of the Assignment and Assumption Agreement. It is also undisputed that the Schumacks, without admitting or denying the allegations of the Complaint, voluntarily consented to monetary final judgments. Despite these facts, the Receiver believes that obtaining a court order deeming the funds in the Pension Plan account as non-qualified or non-exempt funds and instructing the custodian of the funds to transfer them to the Estate is the prudent course of action under the circumstances.

The Receiver submits that the funds in the Pension Plan account are neither qualified nor exempt from post-judgment collection under Florida law because the Schumacks have consented

to a final judgment for a claim under Fla. Stat. § 726.105(1)(a), and that as a result, Fla. Stat. § 222.29 precludes protection from legal process and satisfying the final judgments.

To explain, while Fla. Stat. § 222.21, entitled “Exemption of pension money and certain tax-exempt funds or accounts from legal processes,” typically protects pension accounts from judgments and legal process, Fla. Stat. § 222.29, entitled “No exemption for fraudulent transfers,” clearly states: “[a]n exemption from attachment, garnishment, or legal process provided by this chapter is **not effective if it results from a fraudulent transfer or conveyance as provided in chapter 726.**” (Emphasis added). As a result, the investor funds that were transferred from TBTI to WCFS to PSCS to the Pension Plan account are not exempt from legal process. In addition to the Assignment and Assumption Agreement, the Schumacks have consented to a final judgment for a claim under § 726.105(1)(a). They are thus statutorily precluded under Fla. Stat. § 222.29 from claiming any exemption from legal process to satisfy the Receiver’s final judgments.

Accordingly, the Court should issue an order deeming such funds as non-exempt under Fla. Stat. § 222.29 and directing AssetMark to transfer such funds to the Estate as partial satisfaction of the final judgments.

B. In the Alternative, the Receiver Seeks the Imposition of a Constructive Trust and Equitable Lien over the AssetMark Account

In the alternative to a finding that the Pension Plan account funds are non-exempt under Florida law, the Court should find that the Receiver is entitled to the establishment of a constructive trust and/or equitable lien over the assets in the Pension Plan account, based on findings of fact that the Schumacks caused TBTI to make fraudulent transfers, and those transfers were made with actual intent to defraud a creditor, the Receiver.

A court may impose both an equitable lien and a constructive trust for a violation of § 726.105 “if the general considerations of right and justice dictate” and there is “no adequate

remedy at law.” See *In re Bifani*, 493 B.R. 866, 871 (Bankr. M.D. Fla. 2013), *aff’d* 580 F. App’x 740 (11th Cir. 2014) (imposing equitable lien for violation of Fla. Stat. § 726. 105); *In re Fin. Federated Title & Trust, Inc.*, 347 F.3d 880, 881 (11th Cir. 2003) (order imposed an equitable lien and constructive trust when residence purchased with fraudulently obtained funds); *see also*, *Hirchert Family Trust v. Hirchert*, 65 So. 3d 548, 551-52 (Fla. 5th DCA 2011) (stating that “[t]he courts recognize an exception to the homestead protection if the property was acquired with funds generated by fraudulent activity and a constructive trust is necessary to prevent unjust enrichment.”). Here, the funds deposited into the Pension Plan account must be traceable to the fraudulently obtained funds. *Havoco of Am., Ltd. v. Hill*, 790 So.2d 1018 (Fla. 2011); *In re Bifani*, 580 F. App’x 740, 747 (11th Cir. 2014).

The evidence shows that the Receiver is entitled to both an equitable lien and a constructive trust on the funds in the Pension Plan. Indeed, the affidavit of Melissa Davis, CPA traces all of the funds from TBTI indirectly into the Pension Plan account, as well as directly from PSCS into the Pension Plan. As described in Ms. Davis’s affidavit, Schumack caused TBTI to transfer more than \$2.7 million directly from TBTI, which he operated as part of a Ponzi scheme, to his stepson’s company, WCFS, which then transferred more than \$800,000 to PSCS, his and his wife’s company, which then transferred the \$400,000 at issue to the Pension Plan account. Schumack and his wife are also not only the trustees of the Pension Plan account that they created, they are also the beneficiaries of it. This is undisputed.

Further, the Receiver does not have an adequate remedy at law for the Schumacks’ fraudulent transfers because the Schumacks’ assets are inadequate to satisfy the judgments obtained in his favor. While the Receiver has attempted to recover as many assets as possible, his efforts have been unable to satisfy the judgments.

Finally, permitting the Schumacks to maintain or use the proceeds from fraudulently obtained and transferred to the Pension Plan account, while providing no remedy for the Receiver, would be unjust where neither TBTI nor PSCS received any benefit in exchange for the transfers.

As a result, the Receiver is entitled to an equitable lien on the Pension Plan account in the amount of \$400,000 *and* a constructive trust over the Pension Plan account in the event that the account has increased in value. The Receiver should be entitled to any increase in value of the Pension Plan account and no less than \$400,000 in the event that the Pension Plan account decreased in value.¹

Accordingly, in the alternative to the proposed order, this Court should recognize that the Pension Plan account is an instrument of fraud, and should establish an equitable lien and a constructive trust on such account.

III. CONCLUSION

WHEREFORE, based on the above, the Receiver respectfully requests an order substantially similar to the attached proposed order that provides that AssetMark shall transfer all assets in the Pension Plan account to the Receiver as the transfers to the Pension Plan were avoidable fraudulent transfers, based on the findings that:

1. Schumack operated TBTI as a Ponzi scheme;
2. Schumack caused TBTI, WCFS, and PSCS to transfer \$400,000 to the Pension Plan account in connection with the Ponzi scheme (“the transfers”);
3. The transfers that Schumack caused were made with actual intent to defraud TBTI;
4. The assets in the Pension Plan are traceable to TBTI;

¹ AssetMark advised the undersigned that it froze the Pension Plan account in 2014 and that any change in value has been small as the funds have remained in a money market account.

5. The transfers to the Pension Plan were avoidable fraudulent transfers;
6. Defendant Paul L. Schumack, II and his wife, Christine Schumack, voluntarily assigned all beneficiary rights in the Pension Plan account to the Receiver;
7. The Receiver possesses outstanding judgments against the Schumacks in excess of the funds in the Pension Plan;
8. The assets in the Pension Plan are the property of the Receivership Estate; and
9. Pursuant to Fla. Stat. § 222.29, the funds in the Pension Plan account are not exempt from legal process to satisfy the Receiver's final judgments.

LOCAL RULE 7.1(a)(3) CERTIFICATE

The undersigned has conferred with:

- 1) Anthony Natale, Esq., counsel for Paul L. Schumack, II, who without admitting or denying any of the allegations in the Motion or any factual findings in the proposed order, does not oppose the requested relief;
- 2) Non-Party Christine Schumack, who without admitting or denying any of the allegations in the Motion or any factual findings in the proposed order, does not oppose the requested relief;
- 3) Russell Koonin, Esq., counsel for the U.S. Securities and Exchange Commission, which does not oppose this motion; and
- 4) Counsel for AssetMark, Regina M. Fink, Esq., who provides that AssetMark, as custodian of the Pension Plan account, takes no position on the Motion, but will follow any resulting order of the Court.

The undersigned counsel has been unable to confer with Defendant Joseph Signore and Non-Party Laura Grande, who are both incarcerated.

Dated: March 31, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 31, 2017, I electronically filed the above document using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Jeffrey L. Cox

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