



ORDERED in the Southern District of Florida on July 17, 2015.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

Case No. 12-30081-EPK
CHAPTER 7
(Substantively Consolidated)

CLSF III IV, Inc. *et al.*,

Debtors.

_____/
PARCSIDE EQUITY, LLC,

Plaintiff,

Consolidated
ADV. PROC. NO. 13-01479-EPK

v.

DEBORAH MENOTTE, THE CHAPTER 7
TRUSTEE FOR THE IBRAHIM RABADI
TR DTD 02/03/2011 a/k/a IBRAHIM RABADI
TRUST DATED 02/03/2011, THE ALTER
EGO OF CLSF III IV, INC,

Defendant.

_____/
DEBORAH C. MENOTTE, CHAPTER 7
TRUSTEE,

Plaintiff,

v.

PHILIP LIAN,

Defendant.

_____ /

PROPOSED CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court upon the *Parcside Equity, LLC and Phillip Lian's "Second" Joint Motion for Partial Summary Judgment on Counts 1-8 and Count 10 of the Second Amended Counter-Claim of the Trustee Against Parcside and All Counts of the Complaint Filed Against Philip Lian Concerning Whether the Parcside Transfers at Issue are Property of the Estate* [ECF No. 316] (the "Motion") filed by Parcside Equity, LLC and Phillip Lian. As discussed more fully below, because there is a dispute of material fact as to whose funds were used to make the transfers that form the basis for all of the claims at issue in the Motion, the Motion should be denied.

Background

Parcside Equity, LLC ("Parcside") and Phillip Lian ("Lian" and together with Parcside, "Defendants") move for partial summary judgment on Counts 1-8 and 10 of the Trustee's Second Amended Counterclaim against Parcside [ECF No. 243] and on all counts of the Amended Complaint against Lian [ECF No. 41, Adv. Proc. No. 14-1600]. The two adversary proceedings are consolidated. The counts at issue present fraudulent transfer and unjust enrichment claims.

Deborah C. Menotte, Chapter 7 Trustee (the "Trustee), seeks to recover the sum of \$39,098,174.00 from Parcside. This amount represents the aggregate transfers Parcside received within the six years prior to the petition date. [ECF No. 292 ("Joint Stip. 1") ¶ 10] The transfers were allegedly received as part of what the Trustee terms the "Quality Investment Scheme".

The Quality Investment Scheme involved the sale to investors in Europe of indirect interests in life insurance policies insuring the lives of American individuals. European

investors purchased participation interests in Dutch investment funds. Each Dutch investment fund became the beneficiary of a United States trust that either held directly a single life insurance policy on an American individual along with related reinsurance and funds necessary to service the policy, or was the sole owner of a United States corporation that held such assets. The debtors and substantively consolidated entities in these jointly administered bankruptcy cases are some of the trusts and corporations involved in the Quality Investments Scheme. In theory, at least, the funds invested by the European investors were to be used by the debtors and related entities to acquire and maintain the subject life insurance policies. The transfers at issue in these consolidated adversary proceedings are payments made in connection with the acquisition of the life insurance policies by the debtors and related entities via Parcside.

The Quality Investment Scheme was primarily orchestrated by Dennis Edward Moens ("Moens"). Moens utilized Frank Laan and Laan's company, Quality Investments, B.V., as the public face of the scheme in Europe for purposes of sales and marketing. [Joint Stip. 1 ¶ 13]

Quality Investments, B.V. created and marketed, to investors primarily from Belgium and the Netherlands ("European Investors"), participation interests in Dutch funds. Each fund was known either as a "CLSF Fund" or a "BGI Fund" (collectively, the "QI Funds").

To purchase a participation interest in a QI Fund, European Investors wired money into New Jersey IOLTA bank accounts (the "Peck P.A. Accounts") operated and administered by Deborah Peck ("Peck") through her law firm Deborah C. Peck, Esq., P.A. ("Peck P.A."). [Joint Stip. 1 ¶ 15] The Peck P.A. Accounts were held first at TD Bank, as successor to Commerce Bank, and then at Wells Fargo Bank, P.A. [ECF No. 369 ("Joint

Stip. 2”) ¶ 2] Ms. Peck is a debtor in these cases and Peck P.A. is a non-debtor entity substantively consolidated in these cases.

The substantively consolidated debtors and related entities include various trusts and corporations formed over several years. [Joint Stip. 1 ¶ 12] Moens operated entities known as Watershed, LLC and Crystal Life Capital, S.A. (collectively, “Watershed”). [Joint Stip. 1 ¶ 16] Watershed settled Florida trusts with Peck named the trustee of each trust. Each trust was an American business entity. Initially, each trust purchased and owned a single, non-variable life insurance policy on a single American insured. The corpus of each trust consisted of the policy, reinsurance, and monies to pay for premiums. [Joint Stip. 1 ¶¶ 12-14 (quotations omitted)] Each QI Fund was made a beneficiary of the related trust.

After the trusts acquired the life insurance policies, in many cases Peck formed corporations. In cases where Peck formed a corporation, the associated trust then transferred title to its life insurance policy and related assets to the corporation. The transferor trust then became the sole shareholder of the related corporation. The QI Fund that was affiliated with the transferor trust remained the beneficiary of that trust. [Joint Stip. 1 ¶ 14] The European Investors who invested in the QI Funds thus held an indirect interest in the life insurance policy owned by the corporation.

The acquisition of each life insurance policy involved multiple steps. According to the documents now before the Court, each policy at issue in these cases was to be originally acquired by Parcside from the insured or other policy owner, then re-sold to Watershed, then re-sold to the relevant trust, and then (where relevant) transferred to the related corporation.

Parcside located potential life insurance policies for acquisition and presented them to Peck and/or Joe Kelly Bloomer (Peck's husband), who then presented them to Moens.

[Joint Stip. 1 ¶ 23] In theory, Watershed purchased life insurance policies from Parcside and then re-sold the policies to the trusts. [Joint Stip. 1 ¶ 16] Based on the contracts now before the Court, Peck utilized the funds in the Peck P.A. Accounts to, among other things, purchase life insurance policies from a Moens entity. [Joint Stip. 1 ¶ 15] Every transfer Parcside received for the purchase of a life insurance policy originated from a Peck P.A. Account. [Joint Stip. 2 ¶ 3]

Parcside prepared all of the contracts involved in the process. Parcside prepared contracts of sale between the policy insured or its owner and Parcside. Parcside prepared contracts for sale between Parcside and Watershed. Parcside prepared a template for a contract of sale between Watershed and the trust that would acquire the policy for the benefit of the related QI Fund. Parcside prepared transfer documents to effectuate the transfer of the subject policies directly from the insured or other policy owner to the applicable trust.¹ Parcside also prepared "rescission documents" enabling Parcside to, in effect, void Parcside's sale of the policy to Watershed and Watershed's sale to the trust. With the exception of the life insurance policy insuring the life of Ibrahim Rabadi, Parcside never exercised a right to rescind the transfer of any of the policies sold to Watershed and ultimately re-sold to the trusts. [Joint Stip. 1 ¶ 24]

The transfers at issue in these adversary proceedings are payments made from the Peck P.A. Accounts to Parcside in payment for insurance policies ultimately acquired by the trusts. The transfers are consistent with the sale contracts entered into by Parcside and

¹ In spite of the several levels of arbitrage inherent in the transfer of each life insurance policy, Parcside's own documents reveal that the policies themselves were to be transferred directly to the trust set up to hold the policy for the investment scheme. Indeed, with regard to each policy acquired by a trust other than the one insuring the life of Ibrahim Rabadi, Parcside eventually tendered a transfer notice to the relevant insurance company indicating a transfer directly from the insured or policy owner to the relevant trust. [Joint Stip. 1 ¶ 25]

Watershed in each instance. [Joint Stip. 2 ¶ 2, 4] Pursuant to the contracts before the Court, Watershed resold each policy it acquired from Parcside to a trust. [Joint Stip. 2 ¶ 6]

None of Watershed, the QI Funds, or any of the European Investors are debtors in these chapter 7 cases, nor have Watershed, the QI Funds, or any of the European Investors been adjudicated as "alter-egos" of any of these chapter 7 debtors. [Joint Stip. 2 ¶ 9] Some of the trusts that held title to life insurance policies purchased from Parcside are the sole owners of debtors in these cases but such trusts are not themselves chapter 7 debtors nor have they been adjudicated as alter-egos of the debtors here.² [Joint Stip. 2 ¶ 10]

With the exception of the Peck P.A. Accounts, none of the chapter 7 debtors or substantively consolidated entities in these cases have or had their own bank accounts. [Joint Stip. 2 ¶ 11] Peck acted as trustee for the trusts and any and all funds received by her or Peck P.A. for the trusts or related corporations were also deposited in the Peck P.A. Accounts.

Summary Judgment Standard

Federal Rule of Civil Procedure 56(a), made applicable to this matter by Federal Rule of Bankruptcy Procedure 7056, provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). “An issue of fact is ‘material’ if it is a legal element of the claim under the

² On July 16, 2015 this Court granted the *Trustee’s Motion for Substantive Consolidation of Additional Non-Debtor Trust Entities with Debtors* [ECF No. 1078]. The result is that some of such trusts are now substantively consolidated in these bankruptcy cases.

applicable substantive law which might affect the outcome of the case.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). In considering a motion for summary judgment, the Court must construe all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *Id.*

The moving party has the burden of establishing that there is an absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets that burden, the burden shifts to the non-movant, who must present specific facts showing that there exists a genuine dispute of material fact. *Walker v. Darby*, 911 F.2d 1573, 1576 (11th Cir. 1990) (citation omitted). “A mere ‘scintilla’ of evidence supporting the opposing party’s position will not suffice; there must be enough of a showing that the jury could reasonably find for that party.” *Id.* at 1577 (citing *Anderson*, 477 U.S. at 252).

At the summary judgment stage, the Court will not weigh the evidence or find facts; rather, the Court determines only whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003).

Analysis

In these consolidated adversary proceedings, the Trustee pursues claims of fraudulent transfer and unjust enrichment against Parcside and subsequent transferee liability against Lian. A basic requirement of each of the Trustee’s claims is that the property at issue (here cash from bank accounts) was at the time the transfer took place property of a person or entity that is now a debtor or substantively consolidated entity in these bankruptcy cases. The Defendants argue that the funds they received were not property of any of the parties that later became debtors or substantively consolidated

entities in these chapter 7 cases because Peck P.A. had only a legal interest in such funds and no beneficial interest, and such funds were either property of Watershed or property of the European Investors. As such, the Defendants argue, the Trustee may not pursue any of her claims against the Defendants based on the transfers of funds to Parcside.³

Citing New Jersey law, the Defendants argue that Peck P.A., a substantively consolidated entity here, was acting as an escrow agent for Watershed and, therefore, held only bare legal title to the funds in the Peck P.A. Accounts, which were held for the benefit of Watershed. They argue that Peck P.A. did not possess a sufficient interest or control in the funds as a matter of law to have the funds characterized as property of Peck P.A. for purposes of the Trustee's claims.

On August 6, 2014, this Court entered an order in which the Court substantively consolidated the bankruptcy estate of Deborah Catherine Peck and non-debtor Peck P.A.

³ On July 16, 2015, at oral argument on the Trustee's third motion for substantive consolidation in the main bankruptcy case [ECF No. 1078], Parcside presented its objections to the proposed substantive consolidation of certain trusts, including trusts at issue here, based primarily on potential prejudice to Parcside's position in these adversary proceedings. At that hearing, counsel for Parcside suggested that in the Motion here before the Court the Defendants had argued that the only debtor-related entities that could have had a property interest in the funds used to make the transfers to Parcside were Florida trusts that were neither debtors in these cases nor previously substantively consolidated, and so the Trustee could not satisfy the most basic requirements of her claims in these adversary proceedings. Yet this argument does not appear anywhere in the Motion. The closest the Defendants come to this argument is in paragraph 19 and footnote 3 of the Motion, where the Defendants state that the trusts that became direct or indirect owners of the policies are not debtors nor have they been substantively consolidated previously in these cases. That the trusts that ended up with the policies were not debtors or substantively consolidated at the time of the Motion does not mean that no funds of the debtors or substantively consolidated entities were used to pay Parcside. The eventual owners of the policies may not have been the parties who paid for them. Based on the evidence before the Court at this stage of the proceedings, funds of various entities were commingled in the same Peck P.A. Accounts, and so at present it is not possible to determine whose funds were paid to Parcside, but it appears likely that some funds of debtors and/or substantively consolidated entities were involved. In any case, the Defendants failed to make this argument in the Motion or support it with evidence sufficient to merit summary judgment. At the hearing on July 16, 2015, the Court suggested it would set the Motion for hearing to consider this argument. However, after reviewing the Motion and determining that the argument was not there presented, the Court determined that no hearing was required.

with a number of previously substantively consolidated entities. [ECF No. 857, Case No. 12-30081-EPK] Pursuant to that order, substantive consolidation for Peck P.A. was effective *nunc pro tunc* to September 25, 2012. In that motion for substantive consolidation, the Trustee had also requested a finding that certain bank accounts maintained in the name of Peck P.A., which include the accounts referred to here as the Peck P.A. Accounts, were property of Peck P.A. rather than Deborah Peck, individually. [ECF No. 837, Case No. 12-30081-EPK] Consistent with that request, the Court specifically found that each of the bank accounts identified on Exhibit "A" to the Motion and admitted as Exhibit "1" into evidence (which includes the Peck P.A. Accounts) was deemed to be property of Peck P.A. Importantly, in that order the Court found only that the subject accounts were then, or at the earliest were as of the effective petition date, property of Peck P.A. and subject to administration as property of that entity. The Court did not find that funds previously placed in such accounts were property of any particular party at such prior times.

The Trustee's avoidance claims and unjust enrichment claim seek to recover funds paid to Parcside years before the Court considered or ruled on the substantive consolidation motion and years before the effective petition date of Peck P.A. As Parcside points out, this Court has made no finding with regard to the ownership of funds in the Peck P.A. Accounts long before the effect of substantive consolidation in these cases, and so the Defendants are not precluded from making the arguments in the Motion.

The evidence shows that Peck, through Peck P.A., handled all money involved in the Quality Investments Scheme. It matters not whether Peck was acting as trustee for the various trusts, or as escrow agent for Watershed, or in some other capacity, any and all funds she received were placed in the same Peck P.A. Accounts.

Based on the evidence presented here, there was only one source for funds paid into the Peck P.A. Accounts – wire transfers from the European Investors who were purchasing participation interests in the QI Funds. Those funds were paid to the debtors and related entities to permit them to obtain life insurance policies from Watershed, and Watershed was to purchase such policies from Parcside, and Parcside was to purchase such policies from their original owners or insureds. Funds invested by the European Investors were to funnel down through these various parties, Watershed and Parcside taking sizeable portions as their profit, with the end result being that policies once owned by original owners or insureds were held by the debtors and related entities for the benefit of the QI Funds and thus the European Investors. Under the documents prepared by Parcside, the insurance policies were to be transferred directly from the original owners or insureds to the relevant trusts. There is no evidence now before the Court to suggest that Watershed or Parcside used any of their own funds in these transactions. It appears undisputed that funds paid by the European Investors and held in the Peck P.A. Accounts would flow through the intended waterfall of parties with the purchased insurance policies becoming lodged in the debtors and related entities.

Theoretically, each sale transaction affecting a policy involved a discrete seller and buyer and a separate purchase price. If one reads the various agreements presented in connection with the Motion, one would get the impression that Parcside used its own funds to purchase a policy, and then Watershed used its own funds to purchase the policy from Parcside (indeed, Watershed explicitly agreed to “finance” the acquisition of policies), and then the trusts used funds received from the European Investors to purchase the policy from Watershed. Yet, from the evidence at present, neither Parcside nor Watershed used their own funds to effectuate the acquisition of policies. The sole source of funds was the

pot of money held by Peck P.A., which it had received from the European Investors. These separate sale and purchase transactions did not occur in a chronological series as the documents suggest. They were intended to be collapsed, and were in fact collapsed, into a single transaction.

The funds in the Peck P.A. Accounts were no longer property of the European Investors, who had then purchased participation interests in the relevant QI Funds. The QI Funds had transferred those funds to Peck, who acted as trustee for the trusts, which would then use the funds to purchase life insurance policies. In light of the obvious intent that each insurance policy be acquired by the relevant trust, indirectly through Watershed and Parcside, in a simultaneous closing, it seems unlikely that any funds in the Peck P.A. Accounts were property of anyone other than the trusts until such funds were actually received by the relevant payee.

Parcside argues that all of the funds in the Peck P.A. Accounts were held on behalf of Watershed, and so property of Watershed, because Watershed had an escrow agreement with Peck P.A. It is undisputed that Watershed provided no independent funds to Peck P.A. for deposit in the accounts. And Peck was simultaneously trustee for the trusts to whom she also owed a fiduciary duty. Based on the evidence here before the Court, Peck acted on behalf of multiple entities, each of which could claim to be owed her undivided loyalty, and placed all of their assets in one pot. Yet the Defendants ask the Court to believe that once the European Investors money made it into the Peck P.A. Accounts, Peck was wearing only one hat, that of escrow agent for Watershed. There is nothing in the evidence now to permit the Court to reach this conclusion. Similarly, a notation on certain of the wire transfer reports from the Peck P.A. Accounts to Parcside that the funds originated with "Watershed" does not make it so.

At best, from Parcside's perspective, there is a dispute as to whose funds were used when they were paid to Parcside. This is a dispute of material fact.

Accordingly, the Court proposes the following:

1. The Motion [ECF No. 316] should be DENIED.
2. This Order constitutes the Court's proposed conclusions of law consistent with the *Order on Plaintiff's Motion to Withdraw Reference* entered in District Court Case No. 14-cv-80919-MIDDLEBROOKS.⁴
3. The clerk is directed to submit to the District Court, pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033 the following:
 - a. this Order;
 - b. the second amended counterclaims of the Trustee [ECF No. 243, Adv. Proc. No. 13-1479-EPK] and the amended complaint against Lian [ECF No. 41, Adv. Proc. No. 14-1600-EPK];
 - c. the instant Motion [ECF No. 316, Adv. Proc. No. 13-1479-EPK] and the response [ECF No. 342] and reply [ECF No. 354] thereto;
 - d. the joint stipulation of facts relative to the Motion [ECF No. 369];
 - e. the incorporated joint stipulation of facts [ECF No. 292]; and

⁴ Prior to consolidation of these two adversary proceedings, this Court's Adv. Proc. No. 14-1600 was subject to an order withdrawing the reference entered by Judge Marra in District Court Case No. 14-81501-CIV-MARRA, while this Court's Adv. Proc. No. 13-01479-EPK was subject to a similar order entered by Judge Middlebrooks in District Court Case No. 14-cv-80919-MIDDLEBROOKS. The primary difference between the withdrawal orders entered by Judge Marra and Judge Middlebrooks is that the order entered by Judge Marra would have permitted this Court to enter final orders on dispositive motions (such as the one now before the Court) to the extent such orders did not constitute a final determination terminating the action, while the order entered by Judge Middlebrooks requires the filing of proposed findings of fact (where appropriate) and conclusions of law on all dispositive motions even where the proposed ruling would not constitute a final ruling terminating the action. Because these cases are now consolidated with Judge Middlebrooks, this Court will issue proposed findings of fact (where appropriate) and conclusions of law on all pending dispositive motions.

- f. any objections filed pursuant to Fed. R. Bankr. P. 9033.
- 4. The parties shall comply with Fed. R. Bankr. P. 9033.

###

Copies furnished to:

Zachary P Hyman, Esq.

Zachary P Hyman, Esq. is directed to serve a conformed copy of this order on all appropriate parties and to file a certificate of service.