

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
BROWARD DIVISION

IN RE:

CASE NO. 04-23562-BKC-PGH

GLOBAL VENDING, INC.,

CHAPTER 7

Debtor.

LESLIE S. OSBORNE, not individually
but as Chapter 11 Trustee for the
Estate of Global Vending, Inc.,

ADV. NO. 04-2368-BKC-PGH-A

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

**ORDER GRANTING UNITED STATES
OF AMERICA'S MOTION TO DISMISS**

THIS CAUSE came before the Court for a hearing on April 25, 2005 upon the Defendant, the United States of America's Motion to Dismiss and the Trustee's Response, Objection and Motion to Strike United States of America's Second Motion to Dismiss. Having reviewed the pleadings and considered the arguments of counsel, the Court hereby makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

On December 28, 2004, Plaintiff, Leslie S. Osborne, the appointed Chapter 11 Trustee (hereinafter “the Plaintiff” or “the Bankruptcy Trustee”) commenced an adversary proceeding against the United States seeking inter alia turnover of property claimed to be part of the Debtor’s bankruptcy estate and to enjoin the United States under the provisions of 11 U.S.C. § 362 from proceeding with the forfeiture against certain assets seized by the United States in a pending criminal case. On May 4, 2004, a 38 count federal indictment was unsealed charging Thomas J. Foley, III, Denise Foley and Paula Foley with violations of mail fraud, money laundering and structuring monetary transactions in United States v. Thomas J. Foley, et al., Case No. 04-60107-CR-COOKE (S.D.Fla.) (hereinafter “the Criminal Case”). Thomas J. Foley III was the Debtor’s President and its sole shareholder.

The United States seeks the forfeiture of certain assets identified in the criminal indictment, including bank accounts, real property, vehicles, and jewelry, as proceeds traceable to violations of the offenses charged in the Criminal Case.

Based on the criminal indictment, United States District Court Judge James I. Cohn entered a protective order on May 6, 2004 restraining all the property named for forfeiture in the Criminal Case, including bank accounts seized from Union Bank of Florida, MetroBank of Dade County and Sun Trust Bank (hereinafter “the Seized Bank Accounts”).

On January 15, 2004, United States District Court Judge Cohn ordered that all of the assets named for forfeiture, including the Seized Bank Accounts, shall remain in the custody

of the United States, pending the conclusion of the Criminal Case, pursuant to 21 U.S.C. § 853(e)(1)(A).

On June 3, 2004, an involuntary petition was filed against the Debtor. This Court entered an Order for Relief against the Debtor, placing the Debtor in Chapter 7 on June 7, 2004. On July 7, 2004, the Plaintiff was appointed Chapter 7 Trustee by the United States Trustee.

On January 18, 2005, the Bankruptcy Trustee challenged the seizure and forfeiture of the Seized Bank Accounts in the Criminal Case by filing an Emergency Motion To Compel Return of Property, For Related Relief And For Evidentiary Hearing. On January 26, 2005, the Bankruptcy Trustee filed an Emergency Motion to Set Aside Preliminary Orders of Forfeiture and a Request for Expedited Oral Argument in the Criminal Case. The Trustee's motions were denied by United States District Court Judge Marcia G. Cooke on February 7, 2005.

On February 24, 2005, a preliminary order of forfeiture as to Thomas J. Foley, III's interest in the seized assets was entered in the Criminal Case following the guilty verdict returned by the jury on February 15, 2005. The Bankruptcy Trustee filed a Verified Claim of Ownership And Request for Ancillary Evidentiary Hearing in the Criminal Case on March 29, 2005.

In this case, the Trustee argues that the seized assets currently in the custody and control of the United States are assets of the estate under 11 U.S.C. § 541 and therefore subject to turnover in accordance with 11 U.S.C. § 542. The United States maintains that the

Trustee is barred from bringing this adversary proceeding under the provisions of the criminal forfeiture statute, 21 U.S.C. § 853(k).

II. CONCLUSIONS OF LAW

A. Trustee's Turnover Action Is Barred By Criminal Forfeiture Statute.

A party seeking to assert an interest in assets subject to forfeiture can neither intervene in the criminal proceedings nor commence a separate action. 21 U.S.C. § 853(k). The sole remedy in which a third party such as the Bankruptcy Trustee may assert its alleged interest in property subject to forfeiture is to file a claim in the ancillary proceedings in the manner provided under 21 U.S.C. § 853(n). Indeed, the Plaintiff has already filed the required claim and such claim is pending in the Criminal Case in accordance with the procedures set forth in Section 853(n).

Section 853 prohibits any party claiming an interest in property subject to forfeiture from intervening in the criminal proceedings or commencing an action at law or equity against the United States concerning the validity of this alleged interest in the property **subsequent to the filing of an indictment** or information alleging that the property is subject to forfeiture under this section. 21 U.S.C. § 853(k) (emphasis added). See United States v. Gilbert, 244 F.3d 888 (11th Cir. 2001); United States v. Kennedy, 201 F.3d 1324 (11th Cir. 2000).

In the present case, the Plaintiff filed the turnover action against the United States **after** the indictment was returned in the Criminal Case. (emphasis added). The Plaintiff is

therefore barred from bringing the instant turnover action the against United States as mandated by Congress pursuant to 21 U.S.C. § 853(k).

In enacting Section 853(k), entitled “Bar on Intervention,” Congress used clear and unambiguous language. Section 853(k) bars all actions against the United States, including the instant action. Section 853(k) “imposes an absolute bar on **all** suits claiming an interest in forfeitable property unless the action is brought within the confines of an ancillary proceeding.” In re The American Basketball League, Inc., 317 B.R. 121, 129 (Bankr. N.D. Cal. 2004)(emphasis in original). See also, In re Jose I. Macia, Case No. 97-16383-BKC-AJC (Bankr. S.D. Fla. 1998). In Macia, United States Bankruptcy Court Judge A. Jay Cristol held that “the [Chapter 7] Trustee was not entitled to the requested turnover of the seized assets as it would result in interference with the lawful orders of the [district court judge] in the pending criminal proceedings in contravention of the clear statutory language found at 21 U.S.C. § 853(k).” See Order Denying Trustee’s Application for Turnover of Assets Seized By the United States at page 10.

Since the plain language of 21 U.S.C. § 853(k) bars the Bankruptcy Trustee from bringing the instant turnover action against the United States, the Plaintiff’s Complaint for turnover is subject to dismissal for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. Section 853(n) Provides Exclusive Means For Third Parties To Assert Interest in Seized Property.

Although statutorily barred from bringing the instant turnover action against the United States under the forfeiture statute, the Bankruptcy Trustee may however pursue his claims in the proper forum, namely the ancillary proceedings. See In re Thena, 190 B.R. 407 (D. Or. 1995)(holding that assets seized for forfeiture do not constitute estate property under § 542; the estate however retains the right to challenge the seizure of the assets in the criminal proceedings).

Section 853(n) provides for the adjudication of third party interests in the criminal action, also known as ancillary proceedings. See In re The American Basketball League, Inc., 317 B.R. at 126 (“The ancillary proceedings offer due process protections to innocent third parties that may have an interest in the forfeitable property by providing a forum to adjudicate the validity of their interest.”).

In Libretti v. United States, 516 U.S. 29 (1995), the Supreme Court rejected the defendant’s argument that a § 853(n) proceeding inadequately protected third parties’ interests. The Court emphasized that “Congress has determined that § 853(n) ... provides the means by which third-party rights must be vindicated.” Id. at 44. Not only is the proceeding under Section 853(n) adequate to protect third parties’ rights or claims to seized property, it is the **exclusive** means to do so. (emphasis added). “The petition authorized by § 853(n) is the exclusive avenue through which a third party may protect his interest in property that has been subject to a forfeiture order.” United States v. McHan, 345 F.3d 262, 269 (4th Cir. 2003).

To the extent that the Bankruptcy Trustee has an alleged claim in the Seized Bank Accounts, it must be and has been asserted in the proper and exclusive forum, namely the ancillary proceedings in the pending Criminal Case in accordance with the procedures set forth in 21 U.S.C. § 853(n). The Bankruptcy Trustee has filed a claim asserting the estate's interest in the Seized Bank Accounts and has requested a hearing in the Criminal Case in accordance with § 853(n).

Accordingly, the Bankruptcy Trustee's alleged claims to the Seized Bank Accounts must be adjudicated by the District Court in the ancillary proceedings pending in the Criminal Case. The ancillary proceedings in the pending Criminal Case is the exclusive means for adjudication of the Bankruptcy Trustee's claims. Simply stated this Court has no jurisdiction to entertain the instant adversary action against the United States. This Court will not sanction any interference with the lawful orders entered in the Criminal Case. The issues presented in this case are intricately related to the pending ancillary proceedings pending before United States District Court Judge Marcia G. Cooke.

III. CONCLUSION.

Based upon the findings of fact and applicable law, the Court hereby finds that the federal criminal forfeiture statute 21 U.S.C. § 853(k) bars the filing of the instant turnover and avoidance action. Accordingly, the Trustee's Complaint For Turnover of Property of the Estate And For Avoidance And Recovery of Fraudulent Transfers fails to state a claim which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

In accordance with the foregoing, it is therefore

ORDERED AND ADJUDGED that the Trustee's Complaint is hereby **DISMISSED WITH PREJUDICE**.

DONE AND ORDERED in Chambers, at Ft. Lauderdale, Florida, this 1st day of June, 2005.

PAUL G. HYMAN, JR.
U.S. BANKRUPTCY JUDGE