United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Loren B. Dunkley

Bankruptcy No. 97 B 34514

Adversary Caption: David E. Grochocinski as Trustee of the Chapter 7 Estate of Loren B. Dunkley, and not individually v. Loren B. Dunkley, Bold Business Forms, Inc., n/k/a Bold Solutions, Inc., Conorus, Inc., and John Heybach

Adversary No. 99 A 00015

Date of Issuance: August 24, 1999

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: LOREN B. DUNKLEY, Debtor.	)	Chapter 7 Case No. 97 B 34514 Judge John H. Squires
DAVID E. GROCHOCINSKI, as TRUSTEE of the Chapter 7 Estate of Loren B. Dunkley, and not individually, Plaintiff, v.	)	Adversary No. 99 A 00015
LOREN B. DUNKLEY, BOLD BUSINESS FORMS, INC., n/k/a BOLD SOLUTIONS INC., CONORUS, INC., and JOHN HEYBACH, Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of David E. Grochocinski, the Chapter 7 case trustee (the "Trustee") for partial summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056. For the reasons set forth herein, the Court grants the motion as to Count 1 of the Complaint. The Court finds that the subject proceeds received post-petition from the Covenant (a non-competition agreement Debtor/Defendant Loren B. Dunkley ("Dunkley") entered into pre-petition) are property of the bankruptcy estate, and any and all subject proceeds that Dunkley has received post-petition or will receive pursuant to the Covenant shall be turned over to the Trustee. Moreover, any proceeds currently being

held by or paid to the Trustee pursuant to the May 28, 1999 Agreed Judgment Order are deemed property of the estate. Dunkley is ordered to forthwith account to the Trustee for any and all of the payments he has received pursuant to the Covenant subsequent to the filing of his bankruptcy petition. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this matter for a pretrial conference on October 22, 1999 at 9:00 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(E) and (J).

II. FACTS AND BACKGROUND

Most of the following facts are contained in the Local Bankruptcy Rule 402.M statement filed in support of the motion. Dunkley filed a Chapter7 petition on November 7, 1997. The Trustee was appointed to the administer the assets of the bankruptcy estate. The Trustee filed an adversary proceeding against Dunkley seeking to bar his discharge pursuant to 11 U.S.C. § 727(a)(4)(A) (Count 2) and § 727(a)(5) (Count 3) and to have Dunkley turn over assets pursuant to 11 U.S.C. §§ 542(a) and 542(b) (Count 1). The instant motion only relates to the turnover relief sought in Count 1.

Dunkley was the 100% owner of the issued and outstanding stock of Bold Solutions, Inc., which was in the business of designing, selling and distributing custom printed business

forms. On or about October 19, 1995, Dunkley and Bold Business Forms, Inc. ("Bold") entered into an asset purchase agreement (the "Agreement") with Conorus, Inc. ("Conorus") in which Conorus agreed to purchase 100% of the assets and liabilities of Bold for a total purchase price of $780,000. See Trustee's Exhibit No. 2. Conorus agreed to pay Bold in monthly installments as payment of the promissory note signed and personally guaranteed by John Heybach ("Heybach").

In addition, pursuant to the Agreement, Dunkley and Bold entered into a non-competition agreement (the "Covenant") with Conorus. See Trustee's Exhibit No. 1. Pursuant to the Covenant, Dunkley and Bold were prohibited from competing with Conorus for four years, and in return, Conorus was to pay Dunkley and Bold $300,000 as an agreed allocated portion of the purchase price to be paid by Conorus under the Agreement. Id. Of the total purchase price of $780,000 reserved under the Agreement, Conorus was to pay $450,000 in sixty installments at 9% interest. The amount of the installments attributable to the Covenant was not specified. The parties expressly provided in the Covenant in pertinent part that: "the parties . . . have agreed to protect [Conorus] and the good will of the business to be acquired pursuant to . . . [the] Agreement from prospective competition . . . whereby [Bold and the Debtor] shall be restrained from engaging in certain business activities for a period of time and distance from the business being acquired by [Conorus]...." Id. at ¶s 4 and 5.

Conorus has allegedly paid Dunkley, individually, monies pursuant to the Agreement. The checks that Conorus has sent to Dunkley allegedly pursuant to the Agreement have been

made payable to Dunkley, individually. See Trustee's Exhibit No. 3, pp. 14-15. Dunkley has denied these facts. Dunkley listed as personal income in his Statement of Financial Affairs, monies that he is receiving from Heybach, but denies same are pursuant to the Agreement.

On May 28, 1999, the Trustee, Conorus and Heybach entered into an Agreed Judgment Order. Pursuant to the Order, Conorus and Heybach agreed that as of the date of the entry of the Order, they would send all future monies pursuant to the Agreement directly to the Trustee rather than Dunkley. In addition, pursuant to that Order, the Trustee agreed that if Dunkley is successful in his defense to the adversary proceeding, he would turn over all monies that he received from Conorus back to Dunkley.

III. CONTENTIONS OF THE PARTIES

The Trustee contends that the monies Dunkley received from Conorus post-petition under the Agreement are property of the bankruptcy estate pursuant to 11 U.S.C. § 541 and that Dunkley should be ordered to turnover those monies to the Trustee pursuant to 11 U.S.C. § 542.

Dunkley makes five arguments in opposition to the Trustee's motion for summary judgment: (1) in filing and prosecuting the adversary proceeding, the Trustee and his attorneys made "false and misleading statements," and therefore, the adversary proceeding should not proceed; (2) the Covenant was breached by the purchaser, thereby "nullifying" it; (3) a court reporter should be appointed to keep a record of all future "comment, conversation,

communication, and other correspondence;" (4) Dunkley asserts that he is entitled to a jury trial; and (5) the Court should sanction the Trustee and his attorneys because Dunkley has demonstrated to the Court that the Trustee and his attorneys "made false filings and misleading statements to the court." None of Dunkley's arguments has any legal merit as a viable defense with respect to the Trustee's motion for summary judgment.

IV. APPLICABLE STANDARDS

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of

law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

The United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990).

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial summary judgment. Particularly pertinent here is the point that partial summary judgment is available only to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959);

Biggins v. Oltmer Iron Works, 154 F.2d 214, 216-17 (7th Cir. 1946); Quintana v. Byrd, 669 F. Supp. 849, 850 (N.D. Ill. 1987); Arado v. General Fire Extinguisher Corp., 626 F. Supp. 506, 509 (N.D. Ill. 1985); Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25, 28 (N.D. Ill. 1985); In re Network 90°, Inc., 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); Strandell v. Jackson County, 648 F. Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a Rule 56 motion. Capitol Records, 106 F.R.D. at 29.

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Trustee filed a 402.M statement that substantially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out assertedly uncontested facts with reference to parts of the record and other supporting materials relied upon to support the facts set forth in each paragraph.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically

referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Dunkley, who is not represented by counsel, attempted to comply with this rule. The Court recognizes that Dunkley is a pro se litigant. As a general rule, pro se litigants are entitled to more lenient treatment by the Court. See generally Kincaid v. Vail, 969 F.2d 594, 598-99 (7th Cir. 1992), cert. denied, 506 U.S. 1062 (1993). As such, the Court will not penalize Dunkley because he did attempt to comply with Rule 402.N by filing his response to the Trustee's 402.M statement.

V. DISCUSSION

The ultimate issue for purposes of the instant motion is whether or not the post-petition payments on behalf of Conorus and Heybach, pursuant to the Covenant made in conjunction with the Agreement, are part of the bankruptcy estate and thus subject to the turnover requested by the Trustee.

Section 541 of the Bankruptcy Code defines property of the estate in relevant part:

> (a) The commencement of a case under section 301, 302, or 303 of this tile creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> . . .
>
> (6) Proceeds, product, offspring, rents, and or profits of or from property of the estate. . . .

11 U.S.C. § 541(a)(6).

The Seventh Circuit has stated that monies paid pursuant to a covenant not to compete are property of a debtor's bankruptcy estate. See In re Prince, 85 F.3d 314 (7th Cir.), cert. denied, 519 U.S. 1040 (1996). Specifically, the court noted:

> The value of [the Debtor's] goodwill represents future cash flows not from earnings for future services actually performed by [the Debtor], but from return on an intangible capital asset that could be sold and transferred with the sale. . . . The value of [the Debtor's] goodwill is therefore not excluded from the estate by virtue of § 541(a)(6). . . .

Id. at 324.

Moreover, in In re Schneeweiss, 233 B.R. 28 (Bankr. N.D. N.Y. 1998), the court addressed the same issue regarding whether payments received from a non-compete covenant were property of the estate. The Schneeweiss court stated:

> [U]pon executing the Agreement, the Debtor obtained rights to installment payments conditioned upon future adherence to the non-compete covenant contained in the Agreement. Those rights to payment, obtained pre-petition, are property of the estate. . . . As a result, the Court concludes that the payments themselves under the Agreement are "sufficiently rooted in the Debtor's pre-bankruptcy past" to constitute property of the Debtor's bankruptcy estate.

Id. at 31 (citation and footnote omitted).

The Court agrees with and will follow Prince and Schneeweiss. The payments made post-petition by Conorus and Heybach pursuant to the Covenant as part of the installment sale price per the Agreement constitute property of Dunkley's bankruptcy estate. Dunkley testified that pursuant to the Agreement, he received checks made payable to him individually

in the amount of approximately $6,600.00 every month and the amount of the Covenant was part of the selling price established in the Agreement. See Trustee's Exhibit No. 3, pp. 14-15 and 45 and Exhibit No. 4. This evidence contradicts Dunkley's denials. Dunkley's denials raise the doctrine of judicial estoppel, also known as the doctrine of inconsistent positions. Application of this doctrine precludes a party from asserting a position in a subsequent legal proceeding inconsistent with a position taken by that party in the same or prior litigation. In re Cassidy, 892 F.2d 637, 641 (7th Cir.), cert. denied, 498 U.S. 812 (7th Cir. 1990); Kale v. Obuchowski, 985 F.2d 360, 361 (7th Cir. 1993). It is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories. Levinson v. United States, 969 F.2d 260, 264 (7th Cir.), cert. denied, 506 U.S. 989 (1992) (citation omitted).

The doctrine extends to inconsistent positions of law as well as fact. Cassidy, 892 F.2d at 642 ("[W]e think that the change of position on the legal question is every bit as harmful to the administration of justice as a change on an issue of fact."). The applicability of the doctrine rests with the Court's discretion and should not be used to work injustice, such as where the party's former position was the product of inadvertence or mistake, or where there is only the appearance of inconsistency between two positions but both may be reconciled. Id.

Judicial estoppel is a flexible standard not reducible to a pat formula. Levinson, 969 F.2d at 264. The Seventh Circuit has set some boundaries for the application of judicial estoppel.

> First, the later position must be clearly inconsistent with the earlier position. Also, the facts at issue should be the same in both cases. Finally, the party to be estopped must have convinced the first court to adopt its position; a litigant is not forever bound to a losing argument.

Id. at 264-65 (citations omitted). As further observed in Cassidy, "an appellate court may raise [judicial] estoppel on its own motion in an appropriate case." 892 F.2d at 641 (citation omitted).

The Court opts to exercise its discretion at the trial level. Dunkley testified that he gets money for the payments under the Covenant. See Trustee's Exhibit No. 3, pp. 14-15 and 45. In his pleadings filed in this matter, however, Dunkley denied that is why he is receiving the money. Dunkley should be judicially estopped from changing his position in this proceeding and contending that he was not receiving the payments under the Covenant in light of his contrary testimony in his deposition.

Because the Covenant effectively transferred Dunkley's interest in Bold's goodwill to Conorus, any proceeds that Dunkley has received subsequent to the filing of his bankruptcy petition and will receive in the future pursuant to the Covenant constitute property of his bankruptcy estate. Dunkley has not presented any case law or other authority to the contrary. Thus, he has forfeited the point. See LINC Finance Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir.1997); Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023 (7th Cir.1990). The Court does not have a duty to research and construct legal arguments available to a party. Head Start Family Educ. Program, Inc. v. Cooperative Educ. Serv. Agency 11, 46 F.3d 629, 635 (7th Cir.1995). Accordingly, the Trustee is entitled to summary judgment as a matter of law.

Finally, the Court will address Dunkley's five arguments raised in his response to the

motion. Dunkley's first, third and fifth arguments go hand in hand. They speak to the alleged misconduct of the Trustee and his attorneys. If in fact there has been any wrongdoing on the part of the Trustee or his attorneys, then a separate motion requesting that sanctions be imposed against the Trustee and his attorneys must be properly noticed, filed and set for separate hearing. See Fed. R. Bank. P. 9011 and 9013 and Local Bankruptcy Rule 402. Additionally, Dunkley's response in opposition to the motion for summary judgment failed to comply with the requirement of Federal Rule of Bankruptcy Procedure 9011. Whether or not the Trustee and his attorneys should be sanctioned is not relevant to or outcome determinative of the issue of whether the funds from the Covenant are property of the bankruptcy estate.

As for Dunkley's third argument, which requests a court reporter to record all conversations regarding this matter, it too has no relevance for purposes of this motion. This Court conducts all in-court proceedings on the record in the presence of an official court reporter. Dunkley's request to have a court report appointed to record all other conversations he may have with the Trustee or the Trustee's attorneys is disingenuous and immaterial and not a defense to the motion at bar.

Moreover, Dunkley's request for a jury trial is not relevant to the instant motion. When a motion for summary judgment is granted, it takes the place of a trial on the merits, whether before a jury or a judge. Because the Court is granting the motion, the request for a trial by jury on this Count is moot.

Finally, Dunkley's second argument regarding whether the purchaser breached the

Agreement is immaterial to the issue of whether the proceeds from the Covenant are property of Dunkley's estate.

The Court finds that there are no material issues of fact present and as a matter of law, the Trustee is entitled to judgment.

IV. CONCLUSION

For the foregoing reasons, the motion for partial summary judgment is granted as to Count 1 of the Complaint. The Court finds that the proceeds paid post-petition pursuant to the Covenant are property of the bankruptcy estate, and any and all proceeds that Dunkley has received post-petition from Conorus or Heybach or will receive pursuant to the Covenant shall be turned over forthwith to the Trustee. Moreover, any proceeds currently being held by or paid to the Trustee pursuant to the May 28, 1999 Agreed Judgment Order are deemed property of the estate. Dunkley is ordered to account to the Trustee for any and all of the payments he has received pursuant to the Covenant subsequent to the filing of the bankruptcy petition. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this matter for a pretrial conference on October 22, 1999 at 9:00 a.m.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: LOREN B. DUNKLEY, Debtor.	)	Chapter 7 Case No. 97 B 34514 Judge John H. Squires
DAVID E. GROCHOCINSKI, as TRUSTEE of the Chapter 7 Estate of Loren B. Dunkley, and not individually, Plaintiff, v. LOREN B. DUNKLEY, BOLD BUSINESS FORMS, INC., n/k/a BOLD SOLUTIONS INC., CONORUS, INC., and JOHN HEYBACH, Defendants.	)	Adversary No. 99 A 00015

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 24th day of August, 1999, the Court hereby grants the motion of David E. Grochocinski, the Chapter 7 case Trustee for partial summary judgment on Count I of the Complaint. The Court finds that the subject proceeds received post-petition from the Covenant (a non-competition agreement Debtor/Defendant Loren B. Dunkley entered into pre-petition) are property of the estate, and any and all subject proceeds that Dunkley has received post-petition or will receive pursuant to the Covenant shall be turned over to the Trustee. Moreover, any proceeds currently being held by or paid to the Trustee pursuant to the May 28, 1999 Agreed Judgment order are

deemed property of the estate. Dunkley is ordered to forthwith account to the Trustee for any and all of the payments he has received pursuant to the Covenant subsequent to the filing of his bankruptcy petition. Concurrently entered herewith is the Court's Preliminary Pretrial order setting this matter for a pretrial conference on October 22,1999 at 9:00 a.m.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List