United States District Court
Southern District of Texas

Thomas Taylor III
as Receiver,
Plaintiff

Dkt. No. 12 cv 1491

v.

Daniel Frishberg, et al.
Defendants

DEFENDANTS DANIEL FRISHBERG AND ELISEA FRISHBERG'S
BRIEF IN OPPOSITON TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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COUNTER-STATEMENT OF SUMMARY JUDGMENT LEGAL STANDARD

It is respectfully submitted that the statement of the standard for summary judgment advanced by the Receiver, while not incorrect, is incomplete.

"The inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States* v. *Diebold,* 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962). *Cassy Enterprises, Inc*. v. *American Hardware Mutual Ins. Co.,* 655 F.2d 598 (5th Cir. 1981). "The district court ...must take care that no party will be improperly deprived of a trial of disputed factual issues. *Dassinger v. Central Bell Tel. Co.,* 505 F. 2d. 672 (5th Cir. 1974)."

"The duty of the court under Rule 56 is to determine whether a genuine issue remains for trial; once it determines that a triable issue exists the inquiry is at an end and summary judgment must be denied." Weinstein, Korn & Miller, *Federal Practice and Procedure,* § 2728, text preceding fn 7.

"*Although a motion for summary judgment under Rule 56 may be made in any civil action, it is not commonly interposed, and even less frequently granted, in negligence actions. This is not surprising given the fact that the judge and jury each have a specialized function in negligence actions. Indeed, particular deference has been accorded to the jury in this class of cases in light of its supposedly unique competence in applying the reasonable person standard to a given fact situation. Indeed, particular deference has been accorded to the jury in this class of cases in light of its supposedly unique competence in applying the reasonable person standard to a given fact situation." Id.,* § 2729, text preceding fns. 1-3. (Emphasis supplied.)

Summary judgment is not appropriate in negligence cases because the application of the

reasonable person standard normally requires a full exposition of all the underlying facts and circumstances. *Barron v. Honeywell, Inc. Micro Switch Div.,*69 F.R. D. 390, 392 (E.D. Pa. 1975).

LEGAL STANDARD APPLICABLE TO F.R. CIV. P. RULE 56 (D) OBJECTION

As set forth in the Declaration of the undersigned counsel, Defendants Daniel Frishberg and Elisea Frishberg noticed the Receiver's deposition over a year ago, and the undersigned has periodically attempted to arrange the deposition of the Receiver or to resolve a dispute over whether the Receiver was properly subject to deposition.

In a communication by the Receiver's co-counsel received today, the objection to the substantive relevance of the Receiver's testimony was combined with an argument that counsel for Daniel and Elisea Frishberg had waited too long, or not pursued with sufficient ardor, the resolution of this issue, and that raising it as a basis for delay of the Court's ruling on summary judgment is now untimely.

With regard to the relevance of the information personally known to the Receiver, this Court is respectfully referred to the Declaration of Daniel Frishberg, setting forth the personal involvement of the Receiver in blocking the recovery of BizRadio and the role of the Receiver's representations in inducing Daniel Frishberg as Chief Executive Officer of BizRadio not opposing its becoming a relief defendant, followed by an about-face by the Receiver once he had taken control of BizRadio as a receivership asset. Considering the discovery definition of relevance as consisting of anything which either is material or may lead to the discovery of material facts, it is submitted that Daniel Frishberg's account illustrates relevance of the Receiver's testimony.

With respect to the delay in seeking to resolve this issue, the declaration of the undersigned counsel sets forth some of the circumstances of that delay, including the fact that negotiations aimed at possible resolution of the case were occurring at the same time as the attempts to resolve the discovery issue. Had the Receiver's intransigence concerning settlement been as apparent at that time as it has become in the past weeks, it might have been more apparent that avoiding a

personally antagonistic fight on a sore point for the Receiver would not help to bring about settlement. Considerations of the legal principles guiding this Court in determining the merits of the objection to untimeliness in raising the issue are in order.

The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Conley* v .*Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 48 L. Ed. 2d 80 ((1957).

If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly possible guarantee, that bona fide complaints [and answers] should be carried to an adjudication of the merits....[The] civil rules [were] written to further, not defeat, the ends of justice. *Surowitz* v. *Hilton*, 383 U.S. 363, 373, 86 S. Ct. 845, 15 L.Ed. 2d 807 (1966).

The spirit of federal practice is to accord substantial justice over mere technical flaws. *Hartley & Parker, Inc*. v. *Florida Beverage Corp*., 348 F.2d 161, 163 (5th Cir. 1965).

While district courts enjoy a wide latitude of discretion in case management, this discretion is circumscribed by the court's overriding obligation to construe and administer the procedural rules consistent with Rule 1. *Acharchia* v. *Xenon Pictures, Inc.,* 624 F. 3e 1253, 1254-55 (9th Cir. 1990).

COUNTER-STATEMENT OF FACTS

A. Chronological narrative of events

Frishberg, Jordan and Stewart, later known as Frishberg, Jordan, and Kaleta, was the business entity incorporated under the name of its founder, Daniel Frishberg. (D. Frishberg Declaration.) It had four phases of growth, from a start-up based in San Antonio, TX, to an expanded operation with an office in Houston, to a further expansion to operate in San Antonio, Houston, and Dallas, to a final expansion involving the affiliation of new offices in Austin, TX and Denver, CO. (D. Frishberg Declaration). The use of Kaleta Capital Management funds to replace the credit line which had been guaranteed by Defendant Albert Kaleta followed upon the phase in which the company was expanding, However, it reached a point at which the revenues it was generating allowed it to operate without further loans, and to begin paying down its debt while continuing to expand through strategic alliances. (D. Frishberg Declaration, Exhs. 10, 11).

At one point, Jordan, as Chief Compliance Officer, told Daniel Frishberg that he believed Defendant Kaleta might be lending client money to the company. Daniel Frishberg spoke with Kaleta about this, and Kaleta denied it. Nonetheless, Daniel Frishberg instructed Defendant Kaleta to open a separate bank account so that client money would be separated from non-client money, and verified that Kaleta had done so by seeing the balances of the two accounts, which showed that over two-million dollars was in the non-client account. (D. Frishberg Declaration).

During the period in which Frishberg, Jordan and Kaleta had become self-funding, there was no need for the corporation to borrow money from Defendant Kaleta. Kaleta devised the scheme to lend KCM money to the corporation, while hiding the fact that he was doing so from Frishberg. Frishberg checked on Jordan's accusations against Kaleta but found no evidence to support them.. Frishberg did re-train Kaleta when he found that Kaleta's way of explaining investment decisions

to clients of the corporation was not sufficiently accurate. (D. Frishberg Declaration).

Bizradio had a separate bookkeeping system from Frishberg, Jordan and Kaleta, and the bookkeepers for the two companies would meet to reconcile the shared expenses, so that each benefitted from economies of scale in sharing payroll, space, and other expenses, but keeping their assets and liabilities separate. (D. Frishberg Declaration).

Bizradio convinced Wallace-Bejali to invest in it, which was accomplished by Daniel Frishberg making a presentation to Wallace-Bejali which convinced the partnership that the investment had growth potential. (D. Frishberg Declaration).

Daniel Frishberg allowed David Wallace to present Wallace-Bejali as an investment opportunity to investors who had money under management with Frishberg, Jordan and Kaleta. but made a point of not being present for these presentations to avoid any appearance to the people who trusted his advice that he was endorsing this as a good investment opportunity for them. He was shown a term sheet by David Wallace, and approved allowing the presentations on the basis of that term sheet, under the terms of which the invested money would be secured by a proportion of the aggregate of Wallace-Bejali's diversified investments. When a client of Frishberg, Jordan and Kaleta complained to Daniel Frishberg that a Wallace-Bejali note was not paying on time, Frishberg learned that the term sheet which had been given to the investors did not secure the note with a share of the entire portfolio of Wallace-Bejali partners' investments but with a single asset, in that instance, BizRadio. He also learned of other irregularities in Wallace's handling of invesment agreements. (D. Frishberg Declaration, Exh. 8).

Daniel Frishberg confronted David Wallace and told him that this was not acceptable and encouraged him to substitute notes which were secured by all of Wallace-Bejali's assets. He also notified the clients who had invested in the notes of the switch. (D. Frishberg declaration).

When Richard Reilly contacted Daniel Frishberg to complain of Kaleta's forcing his mother to invest in KCM, Daniel Frishberg investigated Kaleta's activities, and learned that Kaleta had acted improperly. He immediately severed all ties between the corporation of which he was the CEO and Albert Kaleta and KCM. (Frishberg Declaration, Exh. 15).

In 2009, the Securities and Exchange Commission informed Daniel Frishberg that it was investigating Albert Kaleta and KCM, and later that year, that it had found that hundreds of thousands and possibly millions of dollars were missing from KCM, and that FJK owed KCM over one-million dollars.

This was the first time Daniel Frishberg was aware of the loans which Albert Kaleta made in the name of the firm, using a forged stamp of Daniel Frishberg's signature. (D. Frishberg Declaration, Exh. 1). A comparison of the signatures, which are visible to the lay person's eye as precise copies of one another demonstrates that they were in fact, made from a stamp. Daniel Frishberg never authorized the making of such a stamp, and there was no reason for one to be used since he was in the office weekly, so that his signature could be obtained. (D. Frishberg Declaration).

Kaleta engaged in numerous exorbitant expenditures, and paid excessive salaries, apparently in an attempt to justify the loans he was covertly making to Frishberg, Jordan and Kaleta, while carefully obfuscating the truth about the expenditures by telling Frishberg outright lies. He also stamped Frishberg's signature on seventy pages of documents. (D. Frishberg Declaration, Exh. 13).

Daniel Frishberg had developed a plan to operate both Frishberg, Jordan and Kaleta and BizRadio under a single holding company, allowing synergies which would permit BizRadio to be profitable as part of the combined operation. Frishberg entered into negotiations with Salem to sell

Bizradio hardware. The documents included projections of financial performance. (Exhs. 9, 14). However, while Frishberg was too ill to oversee the daily operation of BizRadio, Richard Wallace agreed to serve as its chief operating officer. Taking advantage of his position, he placed liens on BizRadio, filing them in Maryland, where they would not be discovered. Taylor, who was not then receiver of BizRadio, gave assurances that since he was pursuing Wallace, he would be able to secure a release of lien. (Frishberg Declaration.)

To conserve its resources, Daniel Frishberg agreed to make BizRadio part of the receivership estate. However, as soon as he had secured the BizRadio receivership, Taylor changed his position, and refused to agree to the sale of the station to Salem. Eventually, the Receiver made a cash deal to sell BizRadio which, at one-million dollars, was much less valuable than the agreed price of eight-hundred thousand dollars cash and almost two-million dollars in national programming. (Frishberg Declaration). A document was generated prior to the Receiver's about-face which described the possible future revenues of the combined companies. (D. Frishberg Declaration, Exh. 18).

The Receiver blocked the plan which Daniel Frishberg had devised, and which several of the larger investors who had purchased KCM notes, to exchange these notes, now highly likely to be unredeemable, since KCM was in receivership and money was missing from it, for shares in Frishberg, Jordan and Stewart, which continued to be viable.

It was only because it was not able to repay the money which Kaleta had surreptitiously loaned his own company that Frishberg, Jordan and Stewart was placed in receivership.

(D. Frishberg Declaration).

Because Frishberg, Jordan and Stewart/Kaleta, lost the custodian of its funds, it could no longer offer management of funds as a service. At that time, Daniel Frishberg, having an obligation to his clients, met with Bill Heath, the principal of Barrington Financial Services. He arranged for

Heath to offer Barrington's services to Frishberg, Jordan and Stewart investors, and to serve as a consultant to Barrington on investments, on an at-will employment basis, so that these clients would still benefit from his investment strategies.

.(D. Frishberg Declaration)

Daniel Frishberg continued to provide services to Barrington Financial Services after agreeing to surrender his RIA license in a settlement with the SEC, but not services which had to do with investments. He provided services including the production of a newsletter, advertising and the like, along with Elisea Frishberg. (D. Frishberg Declaration, Exh. 17.)

Elisea Frishberg also provided services for which she was hired by Barrington, which are detailed in her declaration. (E. Frishberg Declaration).

B. Contentions mischarecterized by the Receiver as "uncontested."

The following is a summary of some of the key points in the narrative, supported by documentary evidence, which are mischaracterized by the Receiver as uncontested, either based on bald assertions without documentation (e.g., DFFS was insolvent), or based on distortions of Daniel Frishberg's deposition testimony.

1. Daniel Frishberg Financial Services, Inc., a/k/a Frishberg, Jordan and Stewart, or later, Frishberg, Jordan and Kaleta, was insolvent and needed to borrow money from Defendant Kaleta.

2. Daniel Frishberg was negligent in not detecting Defendant Kaleta's carefully hidden scheme.

3. Daniel Frishberg was aware of Defendant Kaleta's lavish expenditures.

4. Daniel Frishberg knew or should have known that his signature was being forged via a stamp on documents which authorized payments to Kaleta and others.

5. Daniel Frishberg should have known earlier of the misrepresentations by Defendant Kaleta when he was encouraging investors to withdraw money from Frishberg, Jordan and Kaleta and invest it in Kaleta Capital Management.

6. Daniel Frishberg received payment to induce him to transfer customers who had money under management with Frishberg, Jordan and Kaleta when it lost its custodian to Barrington Financial Services.

7, Elisea Frishberg received payment for Daniel Frishberg encouraging customers of Frishberg, Jordan and Kaleta to transfer their funds to be invested by Barrington.

These and other material contested issues of fact are elaborated in Daniel Frishberg's Declaration, and the Exhibits references in it, and insofar as Elisea Frishberg is alleged to have been a conduit for Barrington to pay Daniel Frishberg for inducing clients to move their funds, the Declaration of Elisea Frishberg.

LEGAL ARGUMENT

Point I THE PRESENCE OF MATERIAL ISSUES OF FACT PREVENT THIS COURT FROM GRANTING PARTIAL SUMMARY JUDGMENT TO THE RECEIVER

As noted above, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *United States* v. *Diebold,* 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L.Ed.2d 176 (1962). *Cassy Enterprises, Inc*. v. *American Hardware Mutual Ins. Co.,* 655 F.2d 598 (5th Cir. 1981). Once a court determines that a triable issue exists the inquiry is at an end Weinstein, Korn & Miller, *Federal Practice and Procedure, supra, §* 2727,

Negligence cases, in particular, do not lend themselves to summary judgment. Weinstein, Korn & Miller, *Federal Practice and Procedure, supra,* § 2729. *Barron v. Honeywell, Inc. Micro Switch Div.,supra*, 69 F.R. D. 390, 392 (E.D. Pa. 1975).

In one instance which, with due respect to Defendant Albert Fase Kaleta, bears an unfortunate factual parallel, it was held that substantial fact issues existed as to whether the dog owners knew or should have known of the dangerous propensities on the part of the dog prior to the day the dog attacked a minor, precluding summary judgment on the part of the owners [or the plaintiff] in an action to recover for personal injuries sustained by the minor. *Stofer* v. *Ramsey*, 558 F. Supp. 1 (D. Tenn. 1982).

In the area of allegations of negligent or reckless supervision of a corporate officer, the facts of the case at bar closely parallel those of *Perrenod* v. *United States of America,* 2013 WL 3357927 (N. D. CA). Defendant in Perrenod was the CEO of a corporation which was found by the Internal Revenue Service to have failed to compply with its tax obligations for a number of years. Defendant Perrenod conceded that he was the responsible person for

a single year of the winding down of the company's existence, and was thus liable for the payment to other creditors before satisfying that year's obligations to the IRS.

The language of the opinion is instructive for its reasoning in denying summary judgment as to the remaining years:

> The government contends that the available facts demonstrate that Perrenod was a responsible person at Parallax prior to April 2005. Pointing primarily to Perrenod's own deposition transcript, te government highlights Perrenod's status as president, CEO, and highest-paid shareholder of Parallax; his shared responsibility for hiring and firing employees, and his authority to co-sign checks. Perrenod diagrees. Pointing to the same deposition, Perrenod counters that Thompson (the CFO) made decisions regarding which and in what order outstanding debts were to be paid, that Thompson exercised control over daily bank accounts and disbursement records, and that Romo (the vice-president of operations) managed Parallax's day-to-day operations. *This dispute turns on a qualitative weighing of the facts and the credibility of Perrenod's testimony. It is thererfore unsuitable for summary judgment.*

WL at 3. (Emphasis supplied).

> In the same matter, the court further expounded that
>
> [a]fter Perrenod discovered the embezzling, Thompson refused to turn over the enterprise's financial records, making it difficult for Perrenod to reconstruct the wrongdoing. Perrenod contends that his subsequent investigation and efforts to pay creditors were swift and reasonable, or at most, negligent. *Wether Perenod's actions amount to reckless disregard, negligence, or non-culpable conduct is a question of fact that again turns heavily on a qualitative weighing of the facts and the credibility of Perrenod's own testimony. Summary judgment on this issue is accordingly* ***Denied.***

WL at 4. (Emphasis supplied).

As Daniel Frishberg's affidavit makes clear, Defendant Kaleta's conduct was done as the principal of KCM, and surreptitiously, in his role as an employee of Frishberg, Jordan and

Kaleta. As in *Perrenod*, the weighing of the credibility of Daniel Frishberg's testimony, and the meaning to be ascribed to the exhibits Defendants Daniel Frishberg and Elisea Frishberg have produced, is a matter of fact for a jury, not one which can be ruled on by this Court on summary judgment.

Simply stated, it cannot be stated that no reasonable jury could conclude from the testimony of Daniel Frishberg, and of Elisea Frishberg, together with the documents produced by Daniel Frishberg, weighed against the testimony of Albert Fase Kaleta, and the spin attempted on Daniel Frishberg's deposition testimony, that Daniel Frishberg has no liability for negligence or breach of a fiduciary duty.

It should be noted that Albert Fase Kaleta was required by the Securities and Exchange Commission to agree to disgorge 3.25 million dollars in settlement. Daniel Frishberg, agreed to pay sixty-five thousand dollars, considerably less than it would have cost him to litigate against the Securities and Exchange Commission. At or nearing the age of eligibility for Social Security old age benefits at the time the deal was struck, he agreed to give up his Registered Investment Advisor license, without making any admission of wrongdoing.

The Receiver may choose to parade Albert Kaleta and David Wallace to testify in front of a jury. But he can hardly contend that the testimony of these two men, both of whom have entered into seven figure settlements themselves for their role in the loss of income to investors in Frishberg, Jordan and Kaleta and to BizRadio noteholders must be given credence by the finder of fact.

With respect to the allegations of breach of fiduciary duty, it should also be noted that the Receiver has made a hash of the regulations governing Registered Investment Advisors by the SEC, importing into the mix NASD guidelines and other regulations which have no

bearing on the conduct of a Registered Investment Advisor, and to suggest without proof that Daniel Frishberg "probably" violated his agreement with the SEC when he did work for Barrington having nothing to do with investment advice after surrendering his license.

A motion for summary judgment is not the place for exploring what is alleged to be probable, and it does no credit to the Receiver that he attempts to tar Daniel Frishberg with allegations he concedes by his language that he is unable to prove.

Point II UNDER F,R, CIV. P. RULE 56 (D), THE FAILURE OF THE RECEIVER TO BE PRODUCED FOR DEPOSITION SHOULD DICTATE THAT THE RULING ON THIS MOTION BE HELD IN ABEYANCE UNTIL THIS COURT HAS RULED ON AN APPLICATION FOR HIS PRODUCTION AT A DEPOSITION

As more fully developed in the Declaration of the undersigned counsel, the Receiver, through his counsel, engaged in a series of stalls to avoid a head-on impasse on the right of Defendants Daniel Frishberg and Elisea Frishberg to depose the Receiver. He now invokes the delay he has caused, and the adherence by the undersigned counsel to the belief that this Court's Individual Practices mean what they say in directing counsel to resolve differences concerning discovery without resort to the Court, unless this has proven impossible.

On the merits, the Receiver has maintained that his personal knowledge is limited to the period after he became Receiver and therefore has no relevance to the allegations of the complaint. The difficulty with that formulation, insofar as it relates to the Receiver's personal involvement, is twofold.

First, it makes the unwarranted assumption that nothing that was done by the Receiver after taking control of Albert Fase Kaleta's wholly owned Kaleta Capital Management would assist in disclosing discoverable evidence concerning the period before he took control of that, and later, of BizRadio and Daniel Frishberg Financial Services.

Secondly, it does not take into account the crucial period when Daniel Frishberg was struggling to avoid having the company that bore his name become a Relief Defendant, and was admittedly prevented by the Receiver from carrying out deals which would have had the potential to redeem the company. The alternative to the Receiver's theory that liability stemmed from Daniel Frishberg's negligence is the one he wishes to avoid being deposed about, that his own actions were responsible for preventing the salvation of companies which

had been sabotaged by an employee, but could be turned profitable again. It is not necessary for the Receiver to concede the truth of that theory for Daniel Frishberg and Elisea Frishberg to have the right to take his testimony under oath.

In addition, since federal practice does not include a bill of particulars, and interrogatories are limited to thirty, all of which will ordinarily be carefully vetted by counsel before being responded to, a deposition is an irreplacable tool for having a plaintiff flesh out his contentions. Where, as here, the Complaint runs to forty-six pages, learning what the plaintiff has to offer beyond the conclusions which are all that is required of Notice pleading, is an additional important function of the deposition.

The Receiver has not cited any authority for refusing to take seven hours or less in his own office to answer questions, in a case in which he has billed many hundreds of thousands of dollars for his time and his counsel's, while claiming that this process would be unduly burdensome on the estate. The savings in trial time alone would be enormous, while the contention that only a seven figure settlement will satisfy the estate insures that if such a judgment were ever achieved, the expense of defending an appeal on the issue created by the Receiver would burden the estate more than compensation for a day of his time.

In point of fact, Daniel Frishberg should have been afforded the right to take the Receiver's deposition before being required to address a motion for summary judgment. This Court should allow the process which is set forth in its Individual Practices to resolve this discovery issue before making a ruling before an opportunity has been afforded for a ruling on the merits of that discovery controversy.

CONCLUSION

This Court should delay ruling on the motion for summary judgment pursuant to F.R. Civ. P. Rule 56 (d) until Defendant has been afforded an opportunity to place before the Court the dispute with the Receiver which has now reached impasse, and to supplement his brief if he is allowed to depose the Receiver..

Whether or not this Court orders the Receiver deposed, rt should deny the Receiver's motion for partial summary judgment, because there are material issues of fact on which Defendant Daniel Frishberg has produced testimony and voluminous evidence from which a finder of fact could find that he was not negligent and did not breach a fiduciary duty.

Respectfully submitted,

/s/

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