

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
NICHOLAS PETER CHOCHOS) CASE NO. 03-12787
)
)
Debtor)

DECISION AND ORDER
DENYING MOTION TO RECONSIDER

At Fort Wayne, Indiana, on May 23, 2007.

On April 19, 2007, the court denied a motion, filed by John Marshall, seeking payment of unclaimed funds that had been deposited with the clerk because the motion did not comply with the court's local rules. Mr. Marshall, who is proceeding pro se, responded to the order with a letter in which he states that he believes he fully complied with the court's local rule, explains why this is so, and asks the court to reconsider its decision. It is that request which is presently before the court.

Although the request does not identify the procedural rule upon which it is based, it appears to have been filed pursuant to Rule 59 of the Federal Rules of Civil Procedure, which is made applicable to these proceeding by Bankruptcy Rule 9023. Such a motion is addressed to the court's discretion. Figgie Int'l, Inc. v. Miller, 966 F.2d 1178, 1179 (7th Cir. 1992). It "may only be granted if the movant shows there was a mistake of law or fact or presents newly-discovered evidence that could not have been discovered previously." Deutsch v. Burlington Northern R. Co., 983 F.2d 741, 744 (7th Cir. 1992) (citing Figgie, 966 F.2d at 1180).

For one reason or another, creditors often fail to cash the checks representing their distribution from bankruptcy estates. When that happens in cases under Chapter 7, 12, or 13, the funds are paid to the clerk of the court, for the benefit of the creditor, to be disposed of pursuant to

the provisions of 28 U.S.C. § 2041, et seq. See, 11 U.S.C. § 347(a). In Chapter 11 cases unclaimed funds are dealt with somewhat differently: five years after confirmation, unclaimed property generally becomes property of either the Chapter 11 debtor or the entity acquiring the debtor's assets under the plan. See, 11 U.S.C. §§ 347(b), 1143. Because of the possibility that the right to the money might revert to someone else, unclaimed funds are not usually deposited with the clerk in Chapter 11 cases. See, In re George Rodman, Inc., 50 B.R. 313 (Bankr. W.D. Okla. 1985). Nonetheless, that does not mean it cannot be done, see, In re TLI, Inc., 213 B.R. 946 (D. N.D. Tex. 1997), and in a liquidating case such as this one, where the court had directed the appointment of a trustee and the debtor is an individual, doing so might be preferable to leaving the case open for five years waiting to see if the creditors who did not cash their distribution checks come out of the proverbial woodwork, all the while accruing additional quarterly fees to the United States Trustee. That is the route the trustee chose to take in this case and among the funds she paid to the clerk is the money sought by Mr. Marshall: \$6,000.00 deposited for the use and benefit of NCO Financial.

Mr. Marshall is not a creditor of the debtor, he is not the entity for whose benefit the funds were deposited, and he does not purport to be acting that entity's behalf, either directly or, as so many "unclaimed fund locators" do, through a power of attorney. He contends the right to receive the money has been assigned to him by the original creditor. Whether or not it has been or, more precisely, whether or not the record sufficiently indicates that fact is the reason for this decision.

Depositing unclaimed funds with the clerk of the court is a relatively simple and straight forward process. Getting the money back out again can be a bit more cumbersome, especially where the one seeking the funds is not the one for whom they were deposited. The statute governing withdrawal does not contemplate that the two might be different. Compare, 28 U.S.C. §§ 2041-2044

with, Fed R. Bankr. P. Rule 3001(e) (concerning transferred claims). It says only:

Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him. 28 U.S.C. § 2042.

The issue usually turns upon what type of showing is required in order for the applicant to make “full proof of the right thereto.” See e.g., In re Applications for Unclaimed Funds, 341 B.R. 65, (Bankr. N.D. Ga. 2005); In re Scott, 346 B.R. 557 (Bankr. N.D. Ga. 2006); In re Miniscribe Corp., 331 B.R. D. Col. 2005); In re Acker, 275 B.R. 143 (Bankr. D. Col. 2002). This court’s local bankruptcy rule B-3011-1 helps, by giving some of the guidance that § 2042 lacks. See, N.D. Ind. L.B.R. B-3011-1.

In essence it provides:

- a. the request must be made through an attorney who is a member of the bar of this court, unless the entity entitled to receive payment is a natural person making the request on its own behalf and not as an agent or other representative of the claimant;
- b. the motion must be accompanied by an affidavit, together with appropriate supporting documentation, which demonstrates the claimant’s present entitlement to the funds;
- c. if the claimant is not a natural person the accompanying affidavit must be executed by an officer, director, general partner or other individual authorized to do so and shall be accompanied by proof that the individual executing the affidavit has been authorized to do so and of the capacity in which the individual acts;
- d. the motion and a notice of the motion are to be served upon the United States Attorney in accordance with Fed. R. Bankr. P. Rule 7004; and
- e. absent an objection within thirty days the court may determine the motion, without further notice or hearing.

The failure to comply with the rule’s requirements may result in the motion being denied. Id. at B-3011-1(f). In this instance, they were not.

Looking at Mr. Marshall’s motion on the simplest level, while the local rule requires the

motion to be “accompanied by an affidavit, together with any appropriate supporting documentation, . . . demonstrating the claimant’s present entitlement to the funds,” N.D. Ind. L.B.R. B-3011-1(b), his motion had no affidavits or documentation of any kind attached to it. The entire motion consists of but a single page. Admittedly, there are a number of things accompanying the notice of the motion, but that is not sufficient. Nothing was attached to the motion itself.¹

A motion and a notice of a motion are two entirely separate things and one cannot substitute for the other. Like a complaint in traditional civil litigation, a motion lays out the basis for the movant’s right to the relief sought. See, Fed. R. Bankr. P. Rule 9013 (“The motion shall state with particularity the grounds therefor . . .”). The associated notice of a motion serves much the same function as a summons, advising the recipient of the fact the motion was filed and the deadline for responding. One cannot enlarge upon the relief sought by a complaint, or the basis for that relief, by serving extraneous documentation along with the summons. The same is true for the bankruptcy court’s motion practice. The relief the movant seeks and its right to that relief must be contained in the motion itself. Mr. Marshall’s motion was not accompanied by the required documentation – documentation which is necessary in order to demonstrate “full proof of [his] right” to the funds – and, based upon that deficiency alone, the court did not err in denying it.

Beyond the issue of attaching documentation to the motion, there are additional, more fundamental, problems with Mr. Marshall’s request. Even if all the documentation accompanying

¹What the court actually received from Mr. Marshall was an envelope containing number of separate pages, none of which were attached to anything. In determining how to docket this collection and what was supposed to go what, the court began with the first document bearing a caption and moved through the stack to the next captioned document. Everything between the two captioned documents was treated and docketed as being part of what belonged with the first captioned document, with the second and anything following it as a separate filing, and so on.

the notice of his motion was attached to the motion itself, that documentation is not sufficient to “prove the claimant’s present entitlement to the funds.” N.D. Ind. L.B.R. B-3011-1(b). So, once again, Mr. Marshall failed to offer “full proof of [his] right thereto.” 28 U.S.C. § 2042.

To begin with, Mr. Marshall is not the entity for whose benefit the funds were deposited, neither is he acting on its behalf. The funds in question were deposited for the benefit of NCO Financial. Mr. Marshall seeks them in his own right and for himself. He contends he is NCO’s assignee – that he acquired the rights to the money deposited from the one for whom they were deposited – and, as a result, is entitled to claim them in his name as a successor-in-interest to the original beneficiary of the deposit. The first problem with this argument is that, based upon the court’s records, NCO is the only one entitled to the funds and it appears to know nothing of Mr. Marshall’s actions in this court.

While it is certainly possible for claims to be traded or transferred from one entity to another, the bankruptcy rules are quite specific as to how this done and how such transfers are to be documented. If a claim is transferred before a proof of claim has been filed, the transferee is to file the proof of claim. Fed. R. Bankr P. Rule 3001(e)(1). This claim would be accompanied by the appropriate documentation, including the written assignment. *Id.* at Rule 3001(c). All creditors and parties in interest, including the trustee and the original claimant, would then have the opportunity to object to the assignee’s claim for a variety of reasons, including questions concerning the validity of the assignment. *See*, 11 U.S.C. § 502(a), (b). If the transfer occurs after a proof of claim has been filed, the transferee is to file evidence of the transfer with the court and the clerk then gives the transferor notice of the transfer and of the opportunity to object thereto. Absent a timely objection, the transferee is substituted for original claimant, but if an objection is filed the court is to determine

the validity of purported transfer. Fed R. Bankr. P. Rule 3003(e)(2). Thus, whether a claim is transferred before or after a proof of claim has been filed, there is always the opportunity for all concerned to be made aware of the transfer and, if appropriate, object to it. This opportunity provides vital protection against the possibility of fraudulent or otherwise improper attempts to obtain a distribution that rightfully belongs to someone else.

There is no similar mechanism where unclaimed funds are concerned and the creditor's distribution has been deposited with the clerk. The court has no idea why this is so. Perhaps Congress never imagined that someone who had money deposited to their credit with a federal court, and needed only to stop by and claim it, would transfer that right to someone else. Or, perhaps it thought that notice to the United States attorney and the court's enforcement of the requirement that the claimant make "full proof" of the right to the funds would provide the needed vigilance against improper withdrawals. We do not know. The court is satisfied, however, that if unclaimed funds are going to be withdrawn for the benefit of someone other than the entity for whom they were deposited, the beneficiary of the deposit should receive the same type of protections offered by Rule 3001(e) and, absent compliance with the requirements of that rule, some other proceeding that provides the same type of procedural protections will have to be initiated in order to change ownership of the fund.² Application for Unclaimed Funds, 341 B.R. at 72. Nothing like that has not

²If meaningful compliance with Rule 3001(e) is not possible, either because the original claimant did not and was not required to file a proof of claim, see, 11 U.S.C. § 1111; Fed. R. Bankr. P. Rule 3003(b)(1), but see, In re Oxford Royal Mushroom Products, Inc., 93 B.R. 390, 394-96 (Bankr. E.D. Penn. 1988); In re Heritage Village Church & Missionary Fellowship, 87 B.R. 17 (Bankr. D. S.C. 1988) (notice procedure of Rule 3001(e)(2) may be used where a claim is deemed filed), the case has been closed and claims administration issues no longer matter, or the address on file with the court has become outdated, a civil action, in which the custodian of the funds and the potential rival claimants would be named as defendants and service would be made at the address required by the applicable rules of procedure rather than an address on file with the court, may be

been done in this case and until it has been done only NCO Financial has the right to withdraw the funds deposited for its benefit. Cf., Bucher v Vance, 36 F.2d 774 (7th Cir. 1929) (funds deposited with court could not be seized on behalf of creditor's of the fund's owner).

Aside from procedural issues, Mr. Marshall's motion does adequately demonstrate that either he or his assignor have a present entitlement to the funds. Those funds were deposited for the use and benefit of NCO Financial, P.O. Box 41593, Philadelphia, Pennsylvania 19101-1593. That is the name and address of the creditor as listed on the debtor's schedule F which, since the claim was not scheduled as disputed, contingent or unliquidated, served as a substitute for a formal proof of claim. 11 U.S.C. § 1111; Fed. R. Bankr. P. Rule 3003(b)(1). Mr. Marshall's assignment comes from NCO Financial Systems, Inc. of 507 Prudential Road, Horsham, Pennsylvania 19044. Beyond the similarity of names, the court has been given nothing that would tend to suggest that the assignor is the same entity as the creditor scheduled by the debtor, and a similarity of names is not enough. The court cannot just assume that NCO Financial of P.O. Box 41593, Philadelphia, Pennsylvania is the same entity as NCO Financial Systems, Inc. of 507 Prudential Road, Horsham, Pennsylvania. Application for Unclaimed Funds, 341 B.R. at 70 ("it is not appropriate for the Court to release funds based upon supposition"). Something must be done to affirmatively demonstrate that they are one and the same, and unless Mr. Marshall's assignment comes from precisely the same entity as the one for whom the funds were deposited it is ineffective.³ Id., at 69-74.

required. The court expresses no opinion as to whether, given the limitations on the scope of bankruptcy jurisdiction, see, 28 U.S.C. § 1334, such a proceeding could be filed in the bankruptcy court or if it should be maintained in the district court.

³Not only is there nothing to tie NCO Financial to NCO Financial Systems, Inc., the affidavit accompanying the assignment seems to disclaim the ability to do so. It states:

Even if the two NCOs are one and the same, that is not enough to demonstrate a present entitlement to the funds. The debtor's discharge was denied and it is at least theoretically possible that all or some part of the debt has since been paid. If so, the right to recover the funds may have passed to someone else. Consequently, an application for unclaimed funds must demonstrate that the debt remains unpaid. Application for Unclaimed Funds, 341 B.R. at 74; Scott, 346 B.R. 357; Acker, 275 B.R. 143. The affidavit Mr. Marshall received does not make this representation. While it does state that the account has not previously been sold or assigned, Affidavit of Seller ¶ 4, which counts for something, see, N.D. Ind. L.B.R. B-3011-1(b), it says nothing about whether it or any part of it has been paid.

Not only does the application fail to demonstrate that the two NCOs are the same entity, it

NCO Group is a very large financial services entity with many locations, assets and operations, throughout the USA and beyond Mailing addresses for payments are constantly changed by all such firms, including our own, and thus providing proof of past mailing addresses would be unduly burdensome, and may be impossible. Affidavit of Seller, ¶ 3.

Furthermore, while the assignment itself (which was not executed under oath) recites that the "seller was/is a creditor in this" case and that it was entitled to a distribution which was not received, it also specifically disclaims any representations, warranties, and the like concerning or with respect to the funds or the buyer's right to collect them. Taken as a whole, these documents seem to portray a very equivocal assignor who has not made, and seems unwilling or unable to make, any assertion as to its right to the funds held by the clerk. "Full proof of the right thereto" requires greater conviction.

There is an additional reason to question whether the two NCO entities are the same. The debt as scheduled by the debtor was in the sum of \$6,000 and its consideration was identified as "Superior Lighting." Accompanying the seller's assignment are two "fact sheets" whose content and import are not explained. Nonetheless they seem to refer to two debts, one assigned by Amoco Oil with an "amt refered [sic]" of \$699.69 and another assigned by "Amer E" with an "amt refered [sic]" of \$1,703.53. While the court harbors no illusions that a bankruptcy debtor's schedules are absolutely accurate even when the debt is not scheduled as disputed, contingent or unliquidated, in view of the apparent discrepancy in amounts, it needs some reason to believe that these two assigned debts relate to the claim as listed on schedule F. There may well be an explanation for the discrepancy, but it has not yet been offered.

also fails to demonstrate that the individual executing the affidavit Mr. Marshall received was authorized to do so on the claimant's behalf and of the capacity in which they acted. See, N.D. Ind. L.B.R. B-3011-1(c). To some extent, this deficiency arises out of the failure to try to show that the two NCOs are one and the same, but it also goes deeper than that. The seller's affidavit (and the assignment) have been executed by a Joshua Gindin who states that he is the Executive Vice President and General Counsel of NCO Group, Inc. Yet there is nothing beyond the content of this affidavit (and a photocopy of a business card) that substantiates the representation. The necessary proof of Mr. Gindin's capacity, his authority to act and the source of that authority requires more than a recitation in his own affidavit. Application for Unclaimed Funds, 341 B.R. at 71, 73.

The motion to reconsider the order of April 19, 2007 denying Mr. Marshall's request for unclaimed funds is, therefore, DENIED.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court