# Not for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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| IN RE: CASE NO. 05-12177 | ) | |
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| FORT WAYNE TELSAT, INC. | ) | |
| | ) | |
| Debtor | ) | |
| | ) | |
| | ) | |
| R. DAVID BOYER, TRUSTEE | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| vs. | ) | PROC. NO. 07-1286 |
| | ) | |
| JAMES A. SIMON, et. al. | ) | |
| | ) | |
| Defendants | ) | |
| | ) | |
| | ) | |
| JAS PARTNERS, LTD and JAMES A. SIMON | ) | |
| | ) | |
| Cross-Claimants | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| WILLIAM MILLETT, THOMAS SHOAFF, WILLIAM CAST, FOUAD HALABY, WILLIS JESIEK ESTATE, AND WAYNE SHIVE | ) | |
| | ) | |
| Cross-Defendants | ) | |

**AMENDED DECISION**[1]

At Fort Wayne, Indiana, on May 6, 2010.

Although this litigation was originally initiated by the bankruptcy trustee in order to

[1] This amended decision is being issued in order to correct grammatical and typographical errors found on page 3.

determine competing claims to property in which the estate asserted an interest, by the time it came to trial the only claims remaining were those asserted by James Simon and JAS Partners against William Millett, Thomas Shoaff, Fouad Halaby, the Willis Jesiek Estate and Wayne Shive. At various times throughout this proceeding those individuals have been referred to as the "the gang of five," "the noteholders," and/or "the secured creditors." Each of the five held an interest in a promissory note originally given by the debtor to NBD Bank, N.A. and personally guaranteed by Simon and JAS, in the amount of $380,000 plus interest. The note, which was originally for only six months, had been renewed or extended numerous times. It was secured by a lien upon all of the debtor's assets, including its FCC licenses. The note was in default, the debtor was in financial distress and contemplating the sale of its assets. It was in connection with this state of affairs that the "Scheumann Agreement" was executed. The essence of that agreement is that Mr. Scheumann would loan the debtor an additional $100,000, which was guaranteed by Simon and JAS. The noteholders agreed to subordinate the payment of their claim, which was otherwise secured by the assets the debtor contemplated selling, to, among other things, all amounts due Mr. Scheumann, which included not only the new $100,000 advance but also an additional $400,000 he had previously loaned to the debtor. They also agreed that they would accept $600,000 in full satisfaction of both their note and the Simon/JAS guarantees of that note. This was a substantial discount from the more than $1,000,000 that was owed them at the time.

The debtor's asserts were not sold as quickly as the parties anticipated, a bankruptcy ensued and the assets were eventually sold by the chapter 7 trustee. In the meantime, Simon and/or JAS have become the holders of Mr. Scheumann's otherwise unsecured claim. By their claims in this proceeding, they seek to enforce the secured creditors' agreement to subordinate payment of their secured claims to the payment of Scheumann's otherwise unsecured claim. The effort is opposed by the remaining noteholders,[2] Shoaff, Shive, Cast and Millett, who raise two primary challenges to the enforceability of the agreement. They contend that it never went into effect, and that it is unenforceable, because all of the noteholders never agreed to it. If the agreement is otherwise effective, they claim that Simon and JAS cannot enforce it because it was obtained through Simon's fraud. The matter is before the court following a trial of those issues and this decision represents the court's findings of fact and conclusions of law.

Many of the issues before the court depend upon its assessment of the credibility of the various witnesses that testified. In this regard, the court should note that James Simon is not a credible witness. To the contrary, he is a liar and consummate manipulator. Several angels would have to corroborate his testimony before the court would be inclined to accept it, and even then we would do so only reluctantly.

Subordination agreements among a debtor's creditors are enforceable in bankruptcy proceedings to the same extent they would be enforceable under applicable non-bankruptcy law. 11 U.S.C. § 510(a). As a result, the issue before the court is a matter of Indiana Law.

There is no dispute that all of the noteholders did not agree to the Scheumann agreement. William Cast, Fouad Halaby, and a representative of the Willis Jesiek estate never did so. Furthermore, although Wayne Shive signed the agreement, his acceptance was revoked before it was ever communicated or delivered to Mr. Simon or the debtor. Mr. Shive conditionally delivered his

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[2]Simon and JAS have subsequently acquired the interest of two of the original five noteholders, Fouad Halaby and Willis Jesiek Estate. Similarly, Mr. Shoaff has subsequently acquired Mr. Shive's interest in the note. Those events, however, are not material to the outcome of this litigation.

signed copy of the agreement to Mr. Shoaff, with instructions not to deliver it to Simon until he had made a definite decision whether or not he wanted to accept it. Very soon thereafter, he advised Mr. Shoaff that he did not want to be a party to the deal and so the copy of the document bearing his signature was never delivered and was instead either destroyed or returned to Mr. Shive. As a result, the only noteholders to accept the Scheumann agreement are Mr. Shoaff and Mr. Millett.

Under Indiana Law,

> in situations where fewer than all the proposed parties executed document, we look to the intent of the parties as determined by the language of the contract to determine who may be liable under the agreement. It should be assumed that all parties who sign the agreement are bound by it unless it affirmatively appears that they did not intend to be bound unless the others signed. Anderson v. Indianapolis Indiana AAMCO Dealers Advertising Pool, 678 N.E.2d 832, 837 (Ind. Ct. App. 1997) (citing Kruse Classic Auction Co., Inc. v. Aetna Cas. & Sur. Co., 511 N.E.2d 326, 328 (Ind. Ct. App. 1987)). See also, International Creative Management, Inc. v. D & R Entertainment, Co. Inc., 670 N.E.2d 1305, 1310-11 (Ind. Ct. App. 1996).

Although this intent is determined by the language of the contract (and to the extent that language is ambiguous parol evidence),[3] this does not, as Simon seems to argue, require the agreement to contain a provision stating something like: "this agreement is not effective unless signed by all parties hereto or set forth below."

Although the credible testimony concerning the parties' intent, their conduct and the conversations surrounding the agreement clearly indicate that its effectiveness required all of the secured creditors to join, the court does not need to look to that testimony in order to reach the

[3]The Scheumann agreement was drafted and prepared by Mr. Simon. Although he testified that Mr. Shoaff assisted him in doing so, the court finds that Simon was the sole author of the document. The court finds, among other things, that Mr. Shoaff would not participate in the preparation of a document the final version of which misspells his own name. As a result, any ambiguities in the document may be resolved or construed against the one who prepared it. See e.g., Wabash Life Ins. Co. v. Hacker, 164 N.E.2d 666, 669 (Ind. Ct. App. 1960).

conclusion that its enforceability required their unanimous joinder. The language and the structure of the agreement speaks to and deals with them collectively, not individually. More importantly, we must remember the purpose of the agreement. Under it, the holders of a single promissory note, secured by a lien on all of the assets of the debtor, were agreeing to subordinate their secured claim to some miscellaneous unsecured trade debt, more than $500,000 worth of unsecured debt owed to Mr. Scheumann, and then accept the total sum of $600,000 in full satisfaction of both the debtor's liability under the note and the liability of the debtor's guarantors, Simon and JAS. On the very simplest level, that could not be accomplished unless all of the noteholders would agree to it. A single holdout would frustrate the entire arrangement. Furthermore, unless the agreement is interpreted as requiring the assent of all of the secured creditors, it presents the classic problem of a "free rider" who, by not joining in a particular endeavor, can obtain all of the benefits that come from it and, yet, bear none of the burdens. None of the noteholders would sacrifice their interests under the note, and in the liens securing it, unless all others would do so as well. As a result, this is not a situation, as in Anderson, 678 N.E. 2d at 837, or Skinner v. Haugseth, 426 So.2d 1127 (Fla. Dist. Ct. App. 1983), in which each of the signatories to an agreement can receive the benefits they contracted for even though someone else did not join as expected.

Even if the Scheumann agreement is enforceable against the noteholders who accepted it, the court finds that their acceptance was procured through James Simon's fraud. It is a classic maxim of equity that no one should be allowed to profit from their own fraud, see e.g., Pena v. Mattox, 84 F.3d 894, 900 (7th Cir. 1996) ("The maxim that a wrongdoer shall not profit from his wrong is deeply inscribed in the Anglo-American legal tradition."), and enforcing the Scheumann agreement in any way would allow Mr. Simon to do just that.

Mr. Simon made false representations of material facts to both Mr. Shoaff and Mr. Millett and did so with the intent to deceive, knowing that those representations were false. Furthermore, he not only intended that they would rely upon those misrepresentations in making their decision to sign on to the Scheumann agreement, but also that Mr. Shoaff would communicate them to the other noteholders in an effort to induce them to sign on as well. In addition to the affirmative misrepresentations, Mr. Simon also consciously withheld material facts from Mr. Shoaff and Mr. Millett, facts that, under the circumstances, he had a duty to disclose, and which, if known by any of the noteholders, would have immediately led them not to join the Scheumann agreement. The court will not make an exhaustive list of Mr. Simon's fraudulent actions; a selected sample of the most significant ones should suffice.

Among other things, Mr. Simon falsely represented the status of negotiations for the sale of the debtor's FCC licenses. Those negotiations where far more advanced and far more concrete than he led Mr. Shoaff and Mr. Millett to believe. Furthermore, when asked by Mr. Millett to provide some information concerning those negotiations he refused to do so, based upon the proposition that the buyer required absolute secrecy and that if its interest in the acquisition were known, the entire deal would be jeopardized. Mr. Simon also took the unusual step of having other parties to the negotiation specifically agree that they would not disclose information concerning them to anyone at the debtor, including other officers or directors. Mr. Simon misrepresented the buyer's interest in an operating station, and therefore the need for the Scheumann loan to prevent the station from going dark by ceasing broadcast operations. Contrary to Mr. Simon's representations, the buyer was not interested in an operating station or licenses which were in active use, it simply wanted the licenses so that it could put them to its own uses, uses which were completely different from those of the debtor and which would require the cessation of debtor's operations. It did not care whether the licenses were actively being used or not. The entire transaction could have been accomplished without continuing the debtor's operations, without the loan from Mr. Scheumann which was supposedly needed to facilitate those operations, and without the elaborate subordination agreement that was supposedly needed to obtain that loan. Mr. Simon also fraudulently represented his own participation in the sale by leading Shoaff and Millett to believe that licenses in which he and/or JAS had an interest would be sold and their proceeds would be available to satisfy the station's debts and the obligation to the noteholders. Mr. Simon never had such an intent. As he subsequently stated to Mr. Shoaff, "I said my licenses were in the deal, I never said my money was." Finally, in January, 2005, when the Scheumann agreement still had not been signed by any of the noteholders, Simon concocted a financial crisis in order to induce their acceptance. He represented that Mr. Scheumann would not advance any funds, and would apparently pull out of the deal, unless the noteholders signed immediately. It was this final report that induced Mr. Shoaff and Mr. Millett to sign on to the deal and Mr. Shive's subsequently revoked acceptance. In reality, not only had Mr. Scheumann made no such threat, but he had already advanced at least $90,000 and perhaps the entire $100,000 (probably because Simon falsely told him the noteholders had all signed the agreement).

The noteholders who signed the Scheumann agreement relied upon Mr. Simon's misrepresentations in making the decision to do so and, as a result of that reliance, agreed to diminish their rights to the proceeds of the sale of debtor's assets. Furthermore, not only was there detrimental reliance on the part of the noteholders, but Simon also gained by persuading them to give up their rights. He and/or JAS had guaranteed at least some of the debtor's obligations to Scheumann, as well as the debt to the noteholders, and through the subordination agreement he would be able to have Scheumann's otherwise unsecured debt (and therefore his guarantee of that obligation) fully satisfied before any distribution was made to the secured creditors, and then to satisfy his obligation to them for pennies on the dollar. In other words, he was working a deal by which his debts would be paid using someone else's money. Nice work, if you can get it.

For all of these reasons, the court concludes that the Scheumann agreement is unenforceable and judgment will be entered accordingly.

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