

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE:	§	
	§	
CHARLES WILLIAM GREENER, DEBTOR.	§	CASE NO. 99-36767-RCM-7
	§	
<hr/>	§	
THE CADLE COMPANY, PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 00-3132
	§	
CHARLES WILLIAM GREENER, DEFENDANT.	§	
	§	

**MEMORANDUM OPINION AND ORDER**

Charles William Greener, the debtor, moves for summary judgment, seeking dismissal of the Cadle Company's adversary proceeding objecting to the debtor's discharge pursuant to 11 U.S.C. §727(a)(2)(A), (a)(5), and (a)(4)(A). Cadle opposes the motion. The court held a hearing on the motion on March 13, 2001.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson

v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

An objection to the granting of a discharge constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(J) and 1334.

Greener asserts that Cadle lacks standing to pursue the denial of his discharge under §727 because it does not hold a claim in his bankruptcy case. In the alternative, Greener argues that, even if Cadle can show it holds a claim, Cadle may not prosecute a complaint under §727(a)(2)(A) and (a)(4)(A).

Cadle's adversary proceeding seeks the denial of Greener's discharge under §727(a)(2)(A), (a)(5), and (a)(4)(A). Section 727(c)(1) provides: "The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section." 11 U.S.C. §727(c)(1). Section 101(10)(A) defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. §101(10). Accordingly, in order for a party (other than the trustee or United States trustee) to have standing to object to a debtor's discharge under §727(a), it must be the holder of a pre-petition claim against the debtor. See In re Andrews, 239 F.3d 708, 710 (5th Cir. 2001); In re Vahlsing, 829 F.2d 565, 567 (5th Cir. 1987).

### **Evidentiary Objections**

As a threshold matter, the court will address evidentiary objections raised by Greener during the hearing on the summary judgment motion. The objections concern the admissibility of a document which purports to be a link in establishing the ownership of Cadle's claim.

During the hearing, Greener objected to the admission into evidence of a document dated May 19, 1994, marked "Assignment and Bill of Sale." Greener objected to this document on the basis that (1) it is incomplete, in contravention of Federal Rule of

Evidence 106, because it refers to a "Contribution Agreement" which Cadle did not produce; (2) it is not authenticated because while a notary public notarized the document on May 19, 1994, the attached exhibit to the assignment is dated June 6, 1994; and (3) it is hearsay, not subject to the exception provided by Federal Rule of Evidence 803(15), because dealings with the property subsequent to the statement in the document purporting to affect an interest in the property have been inconsistent with the purport of the document.

Federal Rule of Evidence 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. The rule is designed "to permit the contemporaneous introduction of recorded statements that place in context other writings admitted into evidence which, viewed alone, may be misleading." United States v. Branch, 91 F.3d 699, 727 (5th Cir. 1996) (citation omitted). In order to be admitted into evidence, the other recorded statement must be relevant and "necessary to qualify, explain, or place into context the portion already introduced." Id. at 728.

The "Assignment and Bill of Sale" purports to transfer, from the Resolution Trust Corporation to Premier Financial Services -

Texas, "all of the Seller's right, title and interest, if any, in and to the "JDCs" and "Small-Balance Assets" (as such terms are defined in the Contribution Agreement) listed on Exhibit A attached hereto (the 'Assets')." The "Assignment and Bill of Sale" does not describe the nature of the RTC's interest in the assets it purported to transfer. Production of the "Contribution Agreement" is therefore necessary to explain which assets, if any, were transferred to Premier Financial Services - Texas.

Greener also questions the authenticity of the "Assignment and Bill of Sale." Federal Rule of Evidence 1003 provides:

A duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Fed. R. Evid. 1003. Here, Greener has raised genuine issues as to the authenticity of the original because the exhibit attached to the "Assignment and Bill of Sale" bears a date later than the execution and notarization date of the "Assignment and Bill of Sale." Presumably, the document as notarized referenced and had a different exhibit attached or no exhibit attached. Therefore, the copy provided by Cadle is inadmissible.

Lastly, Greener objects to the admission of the assignment as hearsay not within Rule 803(15). Federal Rule of Evidence 803(15) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

The assignment purports to transfer a judgment from the RTC to Premier Financial Services - Texas. The assignment is dated May 19, 1994. Dealings with the judgment after May 19, 1994, appear to be inconsistent with the document. The parties have produced a document executed August 4, 1999, which on its face appears to be a transfer by the FDIC to Premier Financial Services of the judgment which was transferred to Premier Financial Services - Texas by the May 19, 1994, "Assignment and Bill of Sale." Cadle has also produced a document executed February 21, 2001, which corrects the August 4, 1999, assignment.<sup>1</sup> On the one hand, the RTC appears to transfer the judgment on May 19, 1994. On the other hand, the FDIC appears to transfer the judgment on August 4, 1999, or by document executed February 21, 2001. Therefore, the exhibit may not be admitted

---

<sup>1</sup>The February 21, 2001, assignment changed the August 4, 1999, assignment by including an effective date of December 30, 1993, and listing the two debt obligations obtained by the RTC in its 1991 judgment. The August 14, 1999, assignment did not reflect an effective date prior to execution and included only part of the RTC judgment.

under Rule 803(15).

Accordingly, the court sustains the objection to the exhibit for purposes of this summary judgment motion.

#### **Holder of Claim**

Greener contends that there are no genuine issues of material fact that Cadle did not hold a claim against Greener on the date of his bankruptcy petition. Cadle concedes that it cannot obtain a summary judgement that it held a claim, but argues that there is a genuine issue of material fact requiring a trial.

The summary judgment evidence establishes that in 1991 the Resolution Trust Corporation as conservator for Commonwealth Federal Savings Association obtained a judgment against Greener on two guarantees, one for \$1,277,651.12 plus interest, and the other for \$276,015.59 plus interest. On October 5, 1998, Premier Financial Services - Texas, L.P., and Cadle executed a bill of sale, in which Cadle purchased several assets, including the RTC judgment against Greener. On March 12, 1999, Premier Financial Services - Texas, L.P., assigned the judgment to Cadle, with the assignment providing an effective date as of October 5, 1998. However, later, on August 4, 1999, the Federal Deposit Insurance Corporation, in its corporate capacity, assigned the judgment to Premier Financial Services. The August 4, 1999, FDIC assignment reports that FDIC-corporate purchased the assets of FDIC-receiver

for Commonwealth, which succeeded RTC as receiver of Commonwealth. The assignment references only the \$1,277,651 portion of the 1991 judgment. The amount was later addressed by a corrected assignment from the FDIC to Premier Financial Services dated February 21, 2001. The 2001 document contains a statement "effective date December 30, 1993."

Greener filed his bankruptcy petition on September 24, 1999. Cadle filed its proof of claim on October 18, 1999, purporting to own the 1991 judgment.

This summary judgment evidence does not connect Cadle to the ownership of the 1991 RTC judgment by an unambiguous chain of ownership. On October 5, 1998, Premier Financial Services - Texas, L.P., and Cadle executed a bill of sale for the purchase by Cadle of several judgments, including the 1991 Greener judgment obtained by the RTC. Premier Financial Services - Texas, L.P., purportedly assigned the judgment to Cadle effective as of October 5, 1998. But there is no summary judgment documentary evidence assigning the judgment from the RTC to Premier Financial Services - Texas, L.P., prior to that time. The FDIC purports to transfer the judgment to Premier Financial Services on August 4, 1999, although there is the corrected February 21, 2001, assignment purporting to be effective in 1993. If the court infers that the FDIC obtained the judgment from the RTC, then the summary judgment evidence suggests that Premier

Financial Services - Texas, L.P., did not have the judgment to assign to Cadle in 1998. Cadle claims that Premier Financial Service - Texas, L.P., obtained the judgment from the RTC prior to 1998. But the summary judgment suggests that the FDIC owned the judgment and did the transfers. The FDIC executed an amended assignment after the filing of the instant adversary proceeding purporting to be effective in 1993. Assuming standing could be altered after the suit had been filed, there is no summary judgment evidence establishing that the RTC had transferred the judgment to the FDIC in or prior to 1993. While the court may infer that the FDIC obtained the judgment from the RTC by 1999, the court has no basis to infer a transfer in the early years of the decade. Lastly, there is no summary judgment documentary evidence connecting Premier Financial Services - Texas, L.P., to Premier Financial Services.

Cadle submitted the affidavit of Tim Dugic, its account officer responsible for handling Cadle's claims against Greener. Dugic avers that he understands that Cadle obtained the judgment from Premier Financial Services - Texas, L.P., which had obtained the judgment from the RTC. Cadle then went to the FDIC, as successor in interest to the RTC, to obtain a specific assignment of the RTC judgment to Premier for purposes of filing the assignment of a specific judgment. Cadle takes that step to

pursue a judgment lien to advance collection of judgments it obtains.

Viewing the summary judgment evidence in the light most favorable to Cadle, the party opposing the motion, Cadle has acted as the owner of the judgment, pursuing a specific judgment lien for purposes of collection and pursuing a claim in the Greener bankruptcy case for purposes of collection. These actions coupled with the ambiguity in the documents compared with the gap in the chain of ownership of the judgment revealed by the summary judgment evidence reflect a genuine issue of material fact requiring trial. Summary judgment on this ground must be denied.

#### **Release**

If Cadle establishes at trial that it obtained ownership of the 1991 RTC judgment from the FDIC assignment of August 4, 1999, Greener contends that Cadle is estopped from objecting to his discharge under 11 U.S.C. §727(a)(2)(A) and part of the claim under §727(a)(4)(A). On August 18, 1994, the FDIC filed a fraudulent transfer complaint against Greener. On November 3, 1995, the FDIC and Greener settled the suit. The settlement contains a release which provides, in pertinent part:

WHEREAS, in order to avoid the expense of litigation, the FDIC, in exchange for valuable consideration identified below, has agreed to release specified claims against the Defendants that are identified in the Complaint and/or the transfers that

specifically have been identified by Defendants through the course of settlement negotiations, more particularly described in Exhibit "B" attached hereto and incorporated herein by reference. The claims relating to the property, transactions or transfers identified in the Complaint and/or Exhibit "B" shall be collectively referred to as the "Alleged Transfers[.]"

\*\*\*\*

In return for consideration, warranties and representations given by Defendants as specified in this Agreement, the FDIC hereby releases, settles, discharges, cancels and acknowledges to be fully satisfied with regard to any and all of the FDIC's claims arising from, pertaining to or otherwise related in any manner to the Alleged Transfers. The release contained in this paragraph shall not limit, modify, avoid, cancel, waive or impair any rights which the FDIC may now or hereafter have or assert against the Defendants, their successor or assigns, whether said claims be known or unknown, knowable or unknowable, for any matters totally and completely unrelated to the Alleged Transfers or any liability of the Defendants as referenced in paragraph 1 above or 5 below, including without limitation, the breach of this Agreement. The undersigned FDIC representative and such other representatives and agents directly involved in the Lawsuit represent that they presently have no knowledge of the existence of any cause of action against the Defendants or the Trustees of the Defendant Trusts except those set forth in the Lawsuit.

Greener Exhibit 10 (emphasis added). The agreement indicates that the FDIC reserved the right to assert claims for "any matters totally and completely unrelated to the Alleged Transfers." In turn, "Alleged Transfers" refers to claims asserted in the FDIC's lawsuit and items listed on exhibit B to

the settlement agreement. The release appears to carve out for the FDIC the right to assert claims but only to the extent that the claims are "totally and completely unrelated to the Alleged Transfers."

In count one of its complaint objecting to discharge, Cadle alleges a continuing concealment of several transfers. The transfers mirror the transfers of the FDIC's fraudulent transfer complaint. This complaint is not "totally and completely unrelated to the Alleged Transfers" of the FDIC complaint, and consequently, is covered by the release. If Cadle obtained the 1991 judgment from the FDIC via Premier, then Cadle is bound by the release. Cadle took only that which the FDIC had to transfer and subject to the agreements reached between the FDIC and Greener.

Cadle contends that a complaint objecting to discharge raises issues different from those covered in the FDIC's fraudulent transfer complaint. But Cadle misses the point. Cadle must be estopped from complaining about concealed transfers when its predecessor in title to the 1991 judgment released claims pertaining to the transfers. Cadle cannot complain that Greener seeks a discharge of his 1991 judgment even if he made or concealed transfers for which he obtained a release from the FDIC. With the prior release of fraudulent transfers, Cadle did not have to purchase the judgment. The court takes judicial

notice that Cadle is a major player in bankruptcy cases.

Therefore, Cadle would understand the significance of releases of fraudulent transfers. Greener's Chapter 7 trustee and his other creditors, of course, are not similarly bound.

In count two, Cadle alleges that Greener failed to satisfactorily explain his loss of assets. Greener does not seek to estop Cadle from litigating that count.

In count three, Cadle objects to Greener's discharge for knowingly and fraudulently making a false statement. Two items in this count pertain to the transfers, items (a) and (d). As reasoned above, if Cadle obtained its ownership of the 1991 judgment from the FDIC via Premier, Cadle would be bound by the release and estopped from litigating those points.

The court notes that the FDIC apparently attempted to circumvent the release by stating in the February 21, 2001, corrected assignment, that the assignment dates back to 1993. In other words, the document attempts to be made effective prior to the FDIC fraudulent transfer suit and the FDIC-Greener settlement and release. Cadle filed the instant adversary proceeding on March 16, 2000. The FDIC and Cadle cannot thereafter change Greener's rights by executing a document in 2001.

A creditor may waive or release fraudulent transfer claims and all matters related to the transfers. If the beneficiary of the waiver or release later seeks bankruptcy relief, the debtor

should enjoy the benefit of that bargain. If the debtor meanwhile conceals transfers from his other creditors, as stated above, the release has no effect on his other creditors or his trustee.

Accordingly, if at trial Cadle establishes that it obtained ownership of the judgment from the FDIC via Premier rather than from the RTC via Premier, the court would grant Greener a partial summary judgment dismissing count one and count three items (a) and (d).

Based on the foregoing,

**IT IS ORDERED** that the motion for summary judgment is **DENIED**.

Dated this \_\_\_\_\_ day of April, 2001.

---

Steven A. Felsenthal  
United States Bankruptcy Judge