UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff,	§	
v.	§	**Case No. 4:05-CV-472**
TRAVIS E. CORRELL, GREGORY THOMPSON DWIGHT JOHNSON, HARRY ROBINSON "ROBBY" GOWDEY, et al., Defendants,	§	
And	§	
BANNER SHEILED, LLC, HOSPITALITY MANAGEMENT GROUP, INC., CREATIVE WEALTH VENTRUES and JTA ENTERPRISES, Relief Defendants	§	

RECEIVER'S RESPONSE TO POTENTIAL BIDDER REMNANT OIL & GAS, LLC'S MOTION TO RECONSIDER ORDER APPROVING PUBLIC SALE OF INTEREST IN REAL PROPERTY BY RECEIVER (DOCKET NUMBER 514) AND MOTION TO STRIKE SAME

TO THE HONORABLE RICHARD SCHELL, UNITED STATES DISTRICT JUDGE:

COMES NOW, S. Gregory Hays, the duly appointed and qualified receiver in the above captioned action (the "Receiver") and files this the Receiver's Response to Potential Bidder Remnant Oil & Gas, LLC's Motion to Reconsider Order Approving Public Sale of Interest in Real Property by Receiver (Docket Number 514) ("Remnant's Motion") and Motion to Strike ("Receiver's Motion to Strike") and would should unto the Court as follows:

I.

BACKGROUND

1. This action was originally filed by the Securities Exchange Commission on December 7, 2005 (Doc #1). On the same day, the Receiver was appointed by order of this Court (Doc #7). This particular matter involves assets of Defendant Gregory S. Thompson. Judgment was initially entered against Defendant Thompson on October 31, 2006 (Doc #180). This initial judgment, however, did not finally dispose of all issues, and so the receivership continued. Ultimately, a final judgment was entered against Defendant Thompson on July 17, 2010 (the "Final Judgment") (Doc #483) which did dispose of all remaining issues, including a disgorgement order of $195,330.00. Thereafter, by order dated March 28, 2011 this matter was administratively closed (Doc # 495). Although the matter was administratively closed, the Receiver was not released or discharged as there still existed Receivership Estate Assets to be located, collected and liquidated, and the Receiver was given authority to enforce the Final Judgment, as well.

2. One of the assets remaining to be liquidated was Thompson's 8% working interest ("Thompson's Interest") in a mineral lease in Frio and Zavala Counties (the "Browne Lease"). Although the Browne Lease was not obtained by Thompson with funds traceable to the underlying Ponzi scheme, the Receiver had been collecting the revenue from the Browne Lease to reduce the amount still due and owing on the Final Judgment.

3. The Browne Lease remains the subject of litigation in the case known as *Shephard, et. al. v. Covington, et. al.*, in the 81st Judicial District Court of Frio County, Texas (the "Frio County Litigation"). The Frio County Litigation was previously removed to this Court; however, it was remanded to the state court after motion filed by the Defendants therein.

4. By January of 2012, very few assets or matters remained to be administered, liquidated or resolved in this case. The Receiver had sought to negotiate a private sale of Thompson's Interest, but such was difficult, if not impossible, given the requisites of 28 U.S.C. § 2001, *et. seq.* As the court is aware, a working interest in a mineral lease is considered to be real property (the conveyance of a determinable fee) under Texas jurisprudence. Accordingly, to negotiate a private sale required that the Receiver obtain three opinions of value of the property. Given that the lease was originally granted in the early 1970's, consisted of over 6,000 acres being held by one producing gas well, the validity of which was being challenged in the Frio County Lawsuit, it was not possible to obtain credible opinions of value. A methodology of selling the interest with the cooperation of Thompson was arranged, however, Mr. Thompson is presently serving an eight year sentence in the federal penitentiary for a related criminal conviction to this case. Unless the sales price was sufficient to cover his total liability on the Final Judgment, there was no real way to secure his cooperation. The Receiver was unable to get an offer in excess of $200,000.00 for the property.

5. Accordingly, in order to liquidate one of the last known assets of Thompson, and reduce the outstanding and unpaid portion of the Final Judgment, the Receiver determined to sell Thompson's Interest at public auction, pursuant to 28 U.S.C. § 2001, *et. seq.* Such an auction does not require opinions of value. Notice of the intent to proceed with the private sale was filed with the Court on August 8, 2012 (Doc #504).

6. Attached to Remnant's Motion is the transcript of the proceedings (Doc #518-2) from the Receiver's Motion for Order of Sale, filed on August 14, 2012 (Doc #505). The transcript correctly sets forth the proceedings on September 12, 2012. Attached hereto as **Exhibit 1** and incorporated by reference herein for all purposes is the Declaration of Derek

Bragg, who observed the sale on September 12. Exhibit 1 accurately recounts the proceedings at the auction on September 12, 2012 by a witness to the auction.

7. After the auction was complete, the Receiver's counsel returned to his office where he was informed about Mr. Burris' attempts to reach him. Attached hereto as **Exhibit 2** is a true and correct copy of the Declaration of Clark B. Will regarding his conversations with Mr. Burris. Also attached hereto as **Exhibit 3** is the Declaration of Carl Pipoly authenticating an affidavit he gave to Messrs. Morales and Person regarding allegations that Mr. Burris made to Mr. Pipoly regarding their law firm prior to the hearing on September 12.

8. As was set forth, *supra*, this matter went to judgment and was administratively closed over eighteen months ago. Remnant Oil & Gas, LLC ("Remnant") is ***not*** a party to this action. Additionally, leave of court was not requested nor granted prior to filing Remnant's Motion. Greg Thompson, not Remnant, is the defendant whose property was being sold by the Receiver to satisfy the Final Judgment. Finally, no Motion to Intervene, either permissively or as of right has been filed by Remnant. Mr. Yocham, the successful bidder at the auction, is not a party to this action, and the Receiver has already closed the transaction and assigned the interest to Mr. Yocham.

II.

REMNANT IS NOT A PARTY AND IS NOT PROPERLY BEFORE THE COURT

9. This case is at its end. Indeed, it was the Receiver's intention to get everything finalized so that a final order finally closing this case could have been entered during fiscal year 2012. The present motion has made this impossible.

10. When someone not a party, claims an interest in the subject matter of a pending suit and disposition of the suit may impair said interest the proper way to protect that interest is

to file a motion to intervene in the suit. *Davis v. Butts*, 290 F.3d 1297, 1300 (11th Cir. 2002); Fed. R. Civ. P. 24. In order to intervene as of right, the applicant must show (1) timeliness of the motion to intervene; (2) an interest relating to the action, (3) that the interest would be impaired or impeded by the case, and (4) that the interest is not adequately represented by existing parties.[1]

11. Procedurally, an applicant files a motion to intervene and files the pleading it desires to file in intervention, along with it.[2] The motion must be in writing and should state the grounds for intervention sufficient for the Court to determine if it is sought as of right or permissively.[3] Additionally, the Local Rules for the Eastern District of Texas contain specific "meet and confer" requirement, as well as a requirement for a certificate regarding said conference. LR-CV 7(h) & (i). While the requirement is not there for motions for reconsideration, it is there for motions to intervene. *See*, LR-CV 7(i)(12).

12. In the present case, it is difficult to determine Remnant Oil's interest in this action. Remnant Oil is *not* an unsuccessful bidder at an auction, since it did not appear at the auction. Remnant Oil does not claim to have been a victim of the underlying Ponzi scheme in this action, nor does it claim any kind of independent action against the Receiver, the estate, or even the property that was the subject of the auction. Remnant is also not the defendant for whose benefit 28 U.S.C. § 2002 (as briefed below) exists. Remnant has made no showing that it "would have been" the successful bidder had its counsel left himself more than thirty minutes to get from the airport to the Courthouse nor is there even an allegation that the Receiver has not adequately represented Remnant's interests.

[1]. *In re Lease Oil Antitrust Litig.*, 570 f3d 244, 247 (5th Cir. 2009).
[2]. Fed. R. Civ. P. 24(c); *U.S. v. Metropolitan St. Louis Sewer Dist.*, 569 F3d 829, 834 (8th Cir. 2009).
[3]. *In re Beef Indus. Antitrust Litig.*, 589 F2d 786, 788-89 (5th Cir. 1979); Fed. R. Civ. P. 24(c).

13. Since Remnant has failed to comply with the clear pleading requirements of Fed. R. Civ. P. 24, the court can only conjecture or assume Remnant's bases for bringing this motion. Since Remnant's counsel failed to comply with the conference requirements of LR-CV 7, the Receiver has no additional data or information to provide from such conference to assist the Court.

14. The foregoing having been said, and prior to addressing the merits of Remnant's Motion, the striking of said motion for failure to meet the pleading requirements of Rule 24 and/or the conference requirements of LR-CV 7 is certainly appropriate, and under these circumstances warranted. By way of illustration only, had Remnant's counsel contacted the Receiver's counsel, the Receiver's counsel would have pointed out that the sale has already been consummated. Attached to the Declaration of Clark B. Will is a true and correct copy of the assignment of the Receiver's interest in the Browne Lease, showing its acceptance by Mr. Yocham. Presumably, the interest has been recorded in Frio and/or Zavala Counties. Essentially, the issue is moot. A threshold requirement on Remnant would have been to request that the final closing of the auction be stayed until a record could be produced and an appeal prosecuted. This was also not done.

15. Additionally, had Remnant's counsel conferred with the Receiver's counsel, the Receiver's counsel would have suggested that in addition to intervening in the case, Remnant would need to add Mr. Yocham as a third party under Fed. R. Civ. P. 20. As the case presently stands, assuming the Court addresses the merits of Remnant Oil's motion and finds the motion meritorious and reverses itself, full relief cannot be afforded since the court no longer has jurisdiction over the interest itself and the present owner of the interest is not before the Court.

16. Accordingly, for the reasons set forth in this section, the Receiver's Motion should be granted and Remnant Oil's motion should be stricken or alternatively denied *in toto*.

III.

RECEIVER'S RESPONSE TO THE MERITS OF THE MOTION

17. While there is certainly procedural justification for striking or denying Remnant's Motion, the record makes it abundantly clear that it utterly lacks merit. Without waiving the arguments in Section II, and assuming that the Court considers Remnant's Motion on its merits, the Receiver contends it should still be denied.

18. Mr. Burris appeared at the hearing on September 12. As an accommodation the Court allowed him to address the Court, and raise the issue regarding the allegedly "defective notice." Presumably, Mr. Burris' point, on behalf of Remnant Oil, was that his tardiness to the auction itself should be excused because the notice of sale contained a defective address for the Eastern District of Texas, Sherman Division's courthouse in Plano, Texas. The address was mistakenly printed as 7904 Preston Road instead of the accurate address of 7940 Preston Road.

19. In its motion, Remnant now adds that the location is actually in Frisco, and the zip code is different. Without seeking to cast dispersions on the logic of this argument, the Court conducted an appropriate and thorough inquiry to determine whether or not the transposition of the numbers in 7940 to 7904 could credibly have caused Mr. Burris to be late. The record from the hearing makes it abundantly clear that such is not the case. The issue was accurately delineated by the Court early in the proceedings:

"The Court: And so if the notice is sufficient, then Mr. Yoakum [sic] is the successful bidder here. If it's insufficient, then, if the law requires that it be redone, I'll certainly require that it be redone. . .

Mr. Burris: Well, if it wasn't for the incorrect address that was in the notice, I would be in complete agreement with you that I should have no standing to be able to come into this courtroom and stand before this court."[4]

20. Indeed, as the Court inquired of Mr. Burris, the Court learned that Mr. Burris never actually had the notice of sale prior to the auction,[5] had actually *been to the same Courthouse* just 3 days earlier,[6] and that the Courthouse is in the 7900 block of Preston Road, which contains only a bank, an office condominium and the Courthouse, and that nothing else on the block remotely looks like a courthouse.[7] Indeed, these matters were not contested but freely admitted by Remnant's counsel and representative at the hearing, Mr. Burris. Further, at the hearing, Mr. Burris was *not* advocating that the sale be nullified. As he stated on the record:

"Mr. Burris: And just for the record, Judge, I don't think anybody that's sitting around this table would want the court to cancel the sale. In other words, to just uproot the sale and say generally the notice was insufficient. . ."[8]

21. Given the admissions made by Remnant's self-described representative at the hearing,[9] why are we even engaging in this exercise? Mr. Burris admitted at the hearing that he was late for a 10:00 auction, having only landed at Addison Airport ***thirty minutes prior to the***

[4]. Exhibit B to Remnant's Motion (Doc #518-2) Page 68 Line 14 thru Page 69 Line 1. (Hereinafter referred to as "Trans. P xx L xx).
[5]. Trans. P 75 L15.
[6]. Trans. P 76 L 9-10.
[7]. Trans. P76 L11-18.
[8]. Trans. P77 L8-11.
[9]. Trans. P6 L2-15.

time of the auction, and then without the notice in hand.[10] As was pointed out above, he did *not* want the auction cancelled, he just wanted it "re-opened" so he could bid on behalf of his client.

22. Having judiciously and correctly delineated the issue, that being: did the typographical error in the notice so taint the sale that it prevented Remnant from being able to bid and so should be set aside and re-noticed and re-convened, the Court took a recess to review case authorities regarding the same.[11] The court found three case authorities and determined from his factual interrogation of Remnants' representative that the error in the notice was nominal and accordingly approved the sale. In addition to the case authorities cited be the Court (see footnote 11), there are additional authorities dispositive of the matter.

23. Initially, it is relatively well settled, that all that is required for a sale pursuant to 28 U.S.C. **§** 2002 is *substantial compliance* with the statute. This is because the statute is directory in nature.[12] This is likewise the law in the Fifth Circuit.[13]

24. In *Godchaux,* the Court of Appeals for the Fifth Circuit reviewed a sale of real property made pursuant to the statute in question as it existed at that time. The opposing party had objected to the sale in many particulars, including the failure to offer the sale "at the courthouse in the parish where the principal part of the property is situated" as required by the statute. In upholding the confirmation of the sale, the Court found

> ". . .that the statute is directory merely. This is the opinion of Judge Hawley, as expressed in his decision of the case of Nevada Nickel Syndicate v. National Nickel Company (C.C.) 103 Fed. 391. Commenting on the act, this learned judge says the provisions of the act of Congress in question are intended for the benefit and protection for the judgment debtor, which he may insist upon or waive as he sees fit."[14]

[10] . Trans. P52 L2; Trans. P75 L15.
[11] . Trans. P70 L 24 thru P71 L7. The cases discovered by the Court were: *Feldman Inv. Co. v. Connecticut General Life,* 78 F2d 838 (10th Cir. 1935); *Federal Land Bank of Jackson v. Kennedy,* 662 F. Supp. 787 (N.D. MS 1987); and *Breeding Motor Freight Lines v. Reconstruction Finance Corp.*, 172 F.2d 416 (10th Cir. 1949).
[12] . *Bermudez v. Industrial Siderurgica, Inc.,* 672 F. Supp. 57, 60 (D. Puerto Rico, 1987) (discussing the law in the various circuits).
[13] . *Godchaux v. Morris,* 121 F 482, 486 (5th Cir. 1903)(*per curiam*).
[14] . *Id* at 486.

25. Accordingly, by substantially complying with the requirements of 28 U.S.C. § 2002, the Receiver discharged his duties. Additionally, as implied by the *Godchaux* decision, since the notice provisions are for the benefit of the *judgment debtor* (i.e. Greg Thompson), Remnant Oil would seem to be without standing to complain. Finally, the transaction has closed. In local rhetoric, "the horse is out of the barn . . . the train has left the station . . . the ship has sailed . . . etc." Essentially, the matter is moot.

IV.

CONCLUSION

26. The reasons for denying Remnant's Motion appear to be legion. The logic in granting it, nonexistent. At the hearing on September 12, Mr. Burris effectively waived Remnant's present complaint. At the hearing, Mr. Burris did not state that the notice was so defective as to void the sale. He simply advocated that the estate could get more money if the Court would allow him to bid on behalf of his client. Indeed, it is a bit of a stretch to believe that Mr. Burris could have arrived at the sale on time, given he landed less than half an hour prior to it, even if he had utilized a police escort.

27. Having not complied with the clear procedural requirements to raise the issue (*e.g.*, motion to intervene, conference requirement, adding Mr. Yocham, etc. . .) Remnant seeks to champion that the reason it was late for the auction was because the address on the notice, which also included the verbiage "United States District Court for the Eastern District of Texas, Sherman Division" missed by a numerical transposition. Having been given the courtesy of full consideration at the hearing on September 12, Remnant now seeks to re-urge the same arguments that were not persuasive then.

28. Notwithstanding the weak argument regarding the typographical error, the statute is for the benefit of the judgment debtor, not for Mr. Burris or his client, Remnant Oil. Even so, the Receiver clearly *substantially complied* with the requirements of 28 U.S.C. § 2002. Accordingly, for all of the reasons set forth above, the Receiver requests that Remnant's Motion be stricken for failure to seek permission to intervene, or in the alternative, that it be denied on its merits in its entirety.

Respectfully submitted,

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ATTORNEYS FOR RECEIVER

CERTIFICATE OF SERVICE

On this 12th day of November, 2012, a copy of this pleading was served on all counsel of record and other interested parties through the Court's electronic filing system.

/s/ Clark B. Will
Clark B. Will

4844-2361-8577, v. 1