UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOOTH OIL SITE ADMINISTRATIVE GROUP,

Case No. 98-CV-0696A(Sr)

Plaintiff,

-vs-

GEORGE T. BOOTH, JR.
GEORGE T. BOOTH III
LONSDALE SLATER SCHOFIELD
JOSEPH CHALHOUB
AHSEN YELKIN
BOOTH OIL COMPANY, INC.
SCHOFIELD OIL LIMITED
118958 CANADA LIMITED
SPEEDY OIL SERVICES, INC.
BRESLUBE INDUSTRIES LIMITED
EC HOLDINGS CORP.
KATHERINE STREET PROPERTIES, INC. now known as Eventures Ltd.
SAFETY-KLEEN CORP.

Defendants.

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST AHSEN YELKIN AND EC HOLDINGS

Preliminary Statement

The Yelkin defendants, Ahsen Yelkin and EC Holdings Corp., urge this Court to deny plaintiff's motion: (1) on the grounds described in the pending motions to dismiss; (2) because they require discovery; and (3) because there are genuine issues of fact. As we demonstrate below, there is no dispute as to the material facts and the Court should grant Plaintiff's Motion for Summary Judgment. Plaintiff incorporates by reference the Reply Memoranda in Further Support of Plaintiff's Motions Against Joseph Chalhoub, Lonsdale Schofield, and George T. Booth III (filed herewith).

I. Ahsen Yelkin and EC Holdings Corp. are Liable for $450,000 plus Accrued

Interest on Promissory Notes Provided to Booth Oil

Nowhere in its motion papers do the Yelkin defendants dispute that $450,000 was paid to EC Holdings Corp. in exchange for non-negotiable promissory notes. Documents received recently from the Yelkin defendants show that EC Holdings Corp. has filed tax returns for the tax years 1992-2003 (EC Holdings Corp. dissolved on or about November 30, 2003) which show a debt of $450,000 to Booth Oil and accrued interest on that debt which is currently more than $250,000. While Ahsen Yelkin claims that the $450,000 loan was "compensation for services which I rendered for Booth Oil over the years", he does not dispute that it was a loan. It would be difficult for him to dispute that in light of twelve years of Federal tax returns stating the opposite. Under the circumstances, even though the amended complaint does not contain specifically this cause of action, the Court should order that EC Holdings Corp. and Ahsen Yelkin repay the $450,000 loan plus accrued interest to Booth Oil. The Evans case states the general proposition that:

> As a general rule a plaintiff should not be prevented from pursuing a valid claim just because she did not set forth in the complaint a theory on which she could recover, "provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits." (Citations omitted.) The purpose of "fact pleading," as provided by Fed. R. Civ. P. 8(a)(2), is to give the defendant fair notice of the claim against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery. (Citation omitted.)

Evans v. McDonald's Corp., 936 F.2d 1087, 1090-91 (10th Cir. 1991).

In the Schwartz case, one issue before the court was whether a request for relief on certain statutory grounds was properly before the court in a motion for summary judgment where

those grounds were omitted from the complaint. The court held that it would consider the motion on the omitted statutory grounds:

> In Nat'l Agric. Chems. Ass'n v. Rominger, 500 F. Supp. 465, 473 (E.D. Cal. 1980), the court stated "when deciding a motion for summary judgment the court may evaluate not just the issues presently tendered by the pleadings but those which can reasonably be raised in an amended pleading." The case of In re Zweibon, 565 F.2d 742, 747 n. 20 (D.C. Cir. 1977), articulates the proposition that "it is now settled that the process of amendment may be initiated by presentation of an issue for the first time in a motion for summary judgment." Accord C. Wright & A. Miller, Federal Practice and Procedure Section 2722 at 46 (1983); see also Seaboard Terminals Corp. v. Standard Oil Co., 104 F.2d 659 (2d Cir. 1939).

In re Schwartz, 36 B.R. 355, 357 (E.D.N.Y. 1984).

II. Ahsen Yelkin and EC Holdings Corp. Fail to Articulate the Type of Evidence They Hope to Uncover with Further Discovery which would Preclude the Granting of Plaintiff's Motion for Summary Judgment

The Yelkin defendants provide no description of the type of information they seek in discovery as is required by Rule 56(f). While this motion may appear premature to the Yelkin defendants, this case has been pending for quite some time and the facts surrounding the transfers at issue are relatively simple. How can a bankrupt corporation in liquidation loan $450,000 to a holding company formed by one of its key management employees? None of the defendants dispute that Booth Oil had approximately $2.8 million in profits between 1990 and 1992 leading up to the loans or dispute that the shareholders of Booth Oil agreed on December 18, 1992, that a "special fund" would be established for "future claims or potential liabilities of Booth". The remaining issues are legal issues related to the interpretation of the Liquidating Plan. Plaintiffs have no interest in preventing the defendants from conducting discovery and have made every effort to make the documents that have been produced in this case available to Defendants. The issue here is not whether the Yelkin defendants have had a fair opportunity to

conduct discovery. The issue is whether Defendants can discover evidence that would prevent this motion from being granted. Plaintiff has provided the new defendants with the papers filed on the motion to amend and the pending cross-motion for summary judgment. The evidence establishes the material facts and the Yelkin defendants cannot dispute those facts. The Yelkin defendants do not dispute the material facts but refuse to admit or dispute certain facts and fail to articulate the type of evidence they hope to discover.

III. Loan of $80,000 to Ahsen Yelkin

While plaintiff has not moved for summary judgment in connection with the loan to Ahsen Yelkin of $80,000, the impropriety of that loan which was used to pay off a mortgage on George T. Booth III's residence is clear as a matter of law. The evidence related to the $80,000 loan was actually produced by the Yelkin defendants subsequent to the filing of plaintiff's motion.

A bank might make a loan of $80,000 to one of its employees for the purpose of buying a house, just as an oil company might provide oil at a discount to its employees. This Court is not prevented from finding that a loan of $450,000 by a bankrupt oil re-refining corporation in liquidation to a holding company set up by one of the oil company's key management employees is simply so far out of bounds in the context of the Liquidating Plan that summary judgment is appropriate. Defendants make no effort to articulate a potential circumstance which would make this conduct consistent with the terms of the Liquidating Plan. The Yelkin defendants state:

> all of the transfers at issue were financial arrangement compensating him for services he rendered to Booth over the years
>
> Yelkin defendants' Memorandum of Law at 4-5 (November 19, 2004).

Defendants make no attempt to articulate circumstances under which such a loan of $300,000 by a liquidating corporation with income of more than $1.2 million in the year of the loan could be described as anything other than surplus. See Booth Oil tax return for 1992 (filed under seal). Neither is any information offered relative to the loan of $150,000 in 1993, a year in which Booth Oil claims it had a loss of $110,694. See Booth Oil tax return for 1993 (filed under seal).

IV. The Liquidating Plan Requires the Establishment of a Contingency Fund with Any Surplus and The Contingency Fund Constitutes a Trust

Defendants claim that plaintiff has not properly alleged the existence of a trust. Since the Liquidating Plan is attached to the complaint, the question of whether it creates a trust is a question of law based on the Court's examination of the language of the Plan itself. No additional allegations are necessary.

V. This Court's Decision of November 26, 2003 Does Not Limit Plaintiff to a Cause of Action for Simple Breach of Contract in Connection with the Liquidating Plan

The suggestion that the Liquidating Plan can only support a cause of action for breach of contract ignores the fact that the Court specifically permitted an amendment of the complaint to allege a cause of action for enforcement of the Liquidating Plan. While whether or not the provisions of the Liquidating Plan have been followed or violated is a question of corporate and contract law, procedural issues and issues of who can be held liable for violations of the Plan are issues addressed by federal law including the Bankruptcy Code. Specifically, section 1142 of the Bankruptcy Code allows the Court to "direct . . . any other necessary party . . . to perform any other act . . . that is necessary for the consummation of the plan." 11 U.S.C. §1142(b). For

example, this Court could order EC Holdings Corp. and/or Ahsen Yelkin to pay $450,000 plus accrued interest into the Contingency Fund required by the Liquidating Plan.

VI. Ahsen Yelkin can be held Personally Liable for his Conduct in Connection with Loans from Booth Oil

Defendants allege that their personal, individual liability can only be established by piercing the corporate veil. Plaintiff does not seek to pierce the Booth Oil corporate veil. Individual liability can be established in connection with a cause of action for breach of fiduciary duty and a cause of action for violation of the terms of a Liquidating Plan. Aiding and abetting a breach of fiduciary duty can also form the legal basis for a finding of personal, individual liability.

VII. Payments to Ahsen Yelkin and EC Holdings Corp. were Payments of Surplus

Whether or not "the monies paid to Yelkin or EC Holdings Corp. were part of a severance payment to Yelkin," the transfers violated the Liquidating Plan. If the payments were made out of surplus (none of the parties seriously disputes that Booth Oil had profits of $2.8 million between 1990 and 1992), those amounts were to be placed in the Contingency Fund pursuant to the Liquidating Plan. Neither is Joseph Chalhoub's approval of the payments material. These "loans" represent payments of surplus to EC Holdings Corp. and simply cannot be defended in the context of the Liquidating Plan.

VIII. Plaintiff's Claims are not Barred by the Statute of Limitations

The Yelkin defendants persist in their attempt to overstate the implication of the Court's November 26, 2004, decision. The Court did not hold that "all claims arising before December 20, 1995, are time-barred." The Court certainly did not hold that plaintiff's claims for enforcement of the Liquidating Plan are barred. Decision at 24. Plaintiff has moved for

summary judgment on the promissory notes given to Booth Oil by EC Holdings. While this cause of action is not specifically addressed by the amended complaint, the facts as disclosed by recently produced tax returns of Ahsen Yelkin make it clear that Ahsen Yelkin has treated these loans as valid corporate obligations in tax returns filed for the years 1992-2003, and there is no issue of disputed fact in this regard.

It is also clear that Ahsen Yelkin has aided and abetted Booth Oil's violation of the Liquidating Plan. This Court could find Ahsen Yelkin and EC Holdings Corp. in contempt for their roles in the violation of the Liquidating Plan, a binding order of this Court.

IX. Statute of Limitations

It is not clear that a statute of limitations would prevent relief under the circumstances of this case.

The Yelkin defendants claim that plaintiff should have known of the transactions at issue based on "the public and ongoing Chapter 11 proceedings." Yelkin defendants' Responding Memorandum at 6. Nothing in that which was disclosed to the Bankruptcy Court provides the slightest hint related to the amount of profits Booth Oil was bringing in or that Booth Oil was making large loans. The status report submitted just prior to the Final Decree showed only payments to the U.S. Trustee ($9,880), accountant's fees ($5,490), attorneys fees for debtor ($3,352.61), and taxes ($70,394.66), for a total of $79,237.27. The status report explains:

> The Amended Disclosure Statement and Plan of Reorganization contemplated the establishment of a Contingency Fund for class 4 (environmental) claimants. The fund is in the process of being set up. The amount of such a fund is dependent upon pension and other liabilities being fully identified and resolved. The Amended Disclosure Statements and Plan of Reorganization estimated that Booth would have approximately $271,000 available for administrative and priority claims. To date, of that $271,000, the following has been spent:

$ 3,352.61 - attorneys fees
5,490.00 - accounting fees
70,394.66 - taxes
$79,237.27

Status Report attached to Final Decrees (exhibit 26 to the July 30, 2004 Affirmation of R. William Stephens).

The clear implication is that there will be $271,000.00
- 79,237.27
or $191,762.73

less $50,000 to $90,000 to the Pension Benefit Guarantee Corporation ("P.B.G.C.") for a total amount available to the environmental creditors of between $141,762.73 and $101,762.73. What Booth Oil failed to tell the Court is that it had earned more than $2.8 million between 1990 and 1992 and had loaned $450,000 to EC Holdings Corp. Under "Other Distributions" Booth Oil listed "N/A". Neither did it mention that its shareholders had agreed in principle to place $500,000 in a special fund for future claims and potential liabilities.

Plaintiff is permitted to rely on Booth Oil and its officers and directors to carry out fiduciary duties to the Contingency Fund beneficiaries. Plaintiff is not require to sue the defendant(s) in order to determine whether its representations to the Bankruptcy Court have been misleading. The non-negotiable promissory notes were not made public in any way but were confidential business records of Booth Oil. Plaintiff had no right to obtain any of those documents. Similarly, the settlement agreement with George T. Booth III was not a public document but kept confidential. These documents only came to light in discovery. Even after Plaintiff received the promissory notes and settlement agreement, it only became clear to Plaintiff that Booth Oil was potentially not living up to its obligations under the Liquidating Plan when Ahsen Yelkin stopped a deposition to confer with his attorney when confronted with one

of the promissory notes. The violations of the Liquidating Plan became clear earlier this year when Booth Oil produced its tax returns showing profits of at least $2.8 million between 1990 and 1992.

Plaintiff does claim that it relied upon the skill of Booth Oil and its officers and directors to run the business in such a way as to comply with the terms of the Liquidating Plan. Just as a beneficiary of a decedent's estate relies on an executor or administrator to carry out its function with skill and in conformance with its fiduciary duty, every creditor in a Chapter 11 bankruptcy relies on the debtor in possession to run its business with skill for the benefit of its creditors. The whole purpose behind the debtor-in-possession principle is that a trustee would not know enough about, in this case, the oil re-refining business to run it efficiently.

While this motion comes early from the point of view of the new defendants, Defendants must articulate some basis for a finding that discovery is necessary in order to defeat a motion for summary judgment.

Conclusion

The Court should grant summary judgment on Plaintiff's motion against Ahsen Yelkin and EC Holdings for payment on the Promissory Notes and for violation of the Liquidating Plan.

Dated: December 3, 2004
Buffalo, New York

s/ R. William Stephens
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