IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:

JOSE M. RIVERA, SR.,

Debtor.

MARVIN A. SICHERMAN, TRUSTEE,

Plaintiff,

v.

WILLIAM M. CROSBY ET. AL.,

Defendants.

IN PROCEEDINGS UNDER CHAPTER 7

CASE NO. 03-10798

ADV. PROC. NO. 05-1140

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court the Motion of Marvin A. Sicherman, Trustee, for Summary Judgment Against Defendants, William M. Crosby and Jose M. Rivera, Sr. ("Motion"). William M. Crosby filed a certificate of no opposition to the Motion. Jose M. Rivera opposes the Motion. The Trustee moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, made applicable to bankruptcy matters under Rule 7056. Summary judgment is sought in disposition of the Trustee's adversary complaint seeking to avoid and recover certain post-petition transfers made to William M. Crosby and the Debtor. The Court acquires core matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(A), (E) and (O), 28 U.S.C. § 1334, and General Order Number 84 of this District. The following constitutes the findings and conclusions of law in support of granting the Trustee's Motion:

Debtor filed for voluntary relief under Chapter 7 proceedings on January 22, 2003. At the time of the commencement of the case, Debtor had a personal injury claim against the Catholic Diocese of Cleveland [Trustee's Affidavit at ¶ 4]. The Debtor entered into a settlement agreement of the personal injury claim on June 19, 2003, without prior approval of this Court. [Complaint at ¶ 5]. Debtor agreed to settle his claim for $175,000.00. *Id.* Of the settlement amount, Debtor received $95,000.00 [Trustee's Affidavit at ¶ 6]. The remainder of the funds were distributed to various attorneys for fees and expenses, including $17,500 to William M. Crosby [Trustee's Affidavit at ¶ 6 and Ex. B]. The Debtor failed to turnover $80,000 of these funds to the Trustee and this failure resulted in revocation of the Debtor's discharge. [*See* Adv. Proc. No. 05-1231]. The revocation of the Debtor's discharge was affirmed on appeal. *Sicherman v. Rivera*, 356 B.R. 756 (BAP 6th Cir. 2007).

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The dispositive issue is whether there exists a genuine issue of material fact in dispute to warrant imposition of summary judgment as a matter of law.

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The Trustee moves for summary judgment pursuant to Rule 56, made applicable to this proceeding under Bankruptcy Rule 7056, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c), Fed. R. Bankr. P. 7056 (c). Rule 56(e) describes the burden of the nonmoving

party. That subsection provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e), Fed R. Bankr.P. 7056(e).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *White v. Turfway Park Racing Ass'n, Inc.,* 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether the [trier of fact] could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252, 106 S.Ct. 2505.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby,* 863 F.2d 1029, 1034 (D.C.Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which

create a genuine issue of material fact. *Pavlovich v. National City Bank*, 342 F.Supp.2d 718, 722 - 723 (N.D. Ohio 2004) *citing Fulson v. City of Columbus,* 801 F.Supp. 1, 4 (S.D. Ohio 1992).

The Trustee alleges that Crosby and the Debtor received an unauthorized post-petition transfer of estate funds. Section 549 states in pertinent part:

> §549. Postpetition transactions
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> (a) Except as provided in subsection (b) or (c) of this section the trustee may avoid a transfer of property of the estate -
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> (1) that occurs after the commencement of the case; and
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> (2) (A) that is authorized only under section 303(f) or 542(c) of this title, or
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> (B) that is not authorized under this title by the court.

11 U.S.C. § 549. Accordingly, in order to successfully avoid the transfer by Crosby to the Debtor alleged here, the Trustee must show: 1) the transfer involved property of the estate; 2) the transfer occurred after the commencement of the case; and 3) the transfer was not authorized by any provision of the Code or by the court. *In re Chattanooga Wholesale Antiques, Inc.* 930 F.2d 458 (6th Cir. 1991). A party asserting the validity of a transfer under § 549 of the Code shall have the burden of proof. Bankruptcy Rule 6001. Further, 11 U.S.C. § 550 allows the Trustee to recover a transfer avoided pursuant to § 549. Section 550 states that:

> §550. Liability of transferee of avoided transfer.
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> (a) . . . to the extent that a transfer is avoided under section . . . 549 . . ., the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from ----
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> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made.

Herein, it is undisputed that the settlement proceeds were property of the Debtor's estate. [See this Court's February 13, 2006 order in Adv. Proc. No. 05-1231]. It is also undisputed that the transfer occurred post-petition. *Id.* Finally, it is undisputed that the Debtor transferred the settlement proceeds without prior approval of this Court. *Id.* Accordingly, the Trustee has made a prima facie showing that the transfer of the settlement proceeds to the Crosby and the Debtor can be avoided under § 549.

The burden now shifts to the Debtor to show that the post-petition transfer was valid. Bankruptcy Rule 6001.[1] In opposition, the Debtor raises the same arguments that he made in opposition to the Trustee's complaint seeking revocation of his discharge. The evidence he offers in support of his arguments was also considered during the revocation proceeding. The Debtor claims that he relied upon the advice of his counsel and believed that Crosby had reached an understanding with the Trustee. These arguments were rejected by this Court in the revocation proceeding and affirmed on appeal. The Bankruptcy Appellate Panel found that:

> His reliance upon the advice of Crosby was also unreasonable given the bankruptcy court's order on September 15, 2004 for turnover of the $15,000. This court order, together with Kerner's advice to turnover the full settlement and the Debtor's acknowledgment at the meeting of creditors of his obligtation to turnover the money, permits only one *reasonable* inference: the Debtor knew he was obligated to turn over the *full* settlement. . . . Because of the Debtor's own testimony that his bankruptcy attorney advised him to turnover the full settlement to the Trustee, his denial of knowledge (based on Crosby's advice) that he needed to turn over the $80,000 is utterly implausible.

Rivera also again raises the argument that the Trustee is barred by the doctrine of laches because he allegedly waited 14 months to pursue recovery of the remaining settlement proceeds after the Debtor turned over the initial $15,000.00. In the revocation proceeding, this Court

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[1]Defendant William Crosby filed a Certificate of No Opposition.

stated that "[t]he doctrine of laches is not applicable, as the Trustee clearly made numerous, vigorous attempts to determine the total amount that the Debtor received, and to contact Kerner and the Debtor, as noted in the Debtor's email. The Trustee could not have taken actions to recover funds from the Debtor until he was informed of the amounts that had actually been dispersed to the Debtor." [See this Court's February 13, 2006 order in Adv. Proc. No. 05-1231 at 14]. Furthermore, the Bankruptcy Appellate Panel found that the Debtor was paid an additional $80,000 settlement distribution from Crosby on June 8, 2004 and that "[w]hen this payment was made, both the Debtor and Crosby knew the Personal Injury Suit Proceeds were property of the bankruptcy estate. *The Trustee was not advised of this second distribution.*" *Sicherman*, 356 B.R. at *2.

The matters raised by the Debtor in his responsive pleading have previously been argued to this Court and rejected. The relief sought by the Debtor herein violates the law of the case doctrine. That doctrine mandates that "[i]ssues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case." *EEOC v. United States Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Indus. of the United States and Canada, Local No. 120*, 235 F.3d 244, 249 (6th Cir. 2000). To diverge from a previous statement, "[courts] must find some cogent reason to show the prior ruling is no longer applicable, such as if our prior opinion was a clearly erroneous decision which would work a manifest injustice." *In re Kenneth Allen Knight Trust*, 303 F.3d 671, 677-78 (6th Cir. 2002) (quotations omitted). There are three extraordinary exceptions to the law of the case doctrine: 1) subsequent to the issuance of the prior decision, substantially different evidence is presented; 2) a contrary view of the law is issued by a controlling authority; or 3) the prior decision is clearly erroneous and would create a manifest injustice if allowed to stand. *Craft v. United States*, 233 F.3d

358. 363-64 (6th Cir. 2000). Herein, no exception to the law of the case doctrine has been sufficiently demonstrated to justify denying the Trustee's Motion.

The Debtor has therefore failed to meet his burden and summary judgment in favor of the Trustee is appropriate. *Celotex,* 477 U.S. at 322, 106 S.Ct. 2548 (Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.) Accordingly, summary judgment is hereby granted in favor of the Trustee against Defendants William M. Crosby and Jose M. Rivera. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 29th day of January, 2009.

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT