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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 IN RE:

10 SK FOODS, L.P., a California
11 limited partnership, et al.,

12 Debtor.

13 BANK OF MONTREAL, as Administrative
14 Agent, Successor by Assignment to
15 Debtors SK Foods, L.P. and RHM
16 Industry Specialty Foods, Inc.,
17 a California Corporation, d/b/a
18 Colusa County Canning Co.,

CIV. S-13-0237 LKK

19 Plaintiff,

20 v.

21 CARY SCOTT COLLINS, an individual
22 doing business as Collins and
23 Associates; FREDERICK SCOTT SALYER,
24 an individual, SAS 1999 TRUST;
25 CGS 1999 TRUST; CGS 2007 TRUST;
26 STEFANIE A. SALYER, an individual
CAROLINE G. SALYER, an individual,

O R D E R

Cross-defendants.
_____/

24 **I. BACKGROUND**

25 This is an Adversary Proceeding within the SK Foods
26 bankruptcy. It is brought by the Bank of Montreal ("BMO") against

1 Frederick Scott Salyer and Salyer's accountant, Cary Scott Collins
2 (dba Collins and Associates). The complaint also names Salyer's
3 daughters, their trust funds and Monterey Peninsula Farming, LLC,
4 as defendants.

5 The complaint seeks to recover \$3.2 million in "apparently
6 improper" tax refunds, which Collins allegedly obtained by filing
7 unauthorized tax returns on behalf of the bankruptcy debtors. The
8 complaint also seeks to recover ownership in non-party "Cedenco
9 Foods." The complaint alleges that Salyer and Collins spirited the
10 \$3.2 million out of the country, and "transferred ownership" of
11 Cedenco to a "secret trust located in the Cook Islands," in the
12 South Pacific. Collins answered the complaint on July 30, 2012,
13 and included a demand for a jury trial.

14 Collins has now moved to withdraw the automatic reference to
15 the Bankruptcy Court, citing his asserted right to a jury trial on
16 Counts One, Two, Four and Nine. Count One of the complaint seeks
17 the avoidance of the post-petition transfer of the tax refunds,
18 under 11 U.S.C. § 549 (avoidance of post-petition transfers) and
19 Cal. Civ. Code 3439.05 (fraudulent transfer). Count Two seeks the
20 recovery of the tax refunds from Collins, the transferee, under 11
21 U.S.C. § 550(a), based upon the avoidance alleged under
22 Section 549. Count Four seeks a constructive trust to recover
23 Collins' "unjust enrichment" in the amount of the tax refunds.
24 Count Nine seeks to avoid the fraudulent transfer of the ownership
25 of Cedenco, under Cal. Civ. Code § 3439.05.

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1 II. STANDARDS FOR WITHDRAWAL OF THE REFERENCE

2 Except as otherwise provided by Congress, the district court
3 has original and exclusive jurisdiction over all cases arising
4 under Title 11. 28 U.S.C. § 1334(a); Stern v. Marshall, 564 U.S.
5 ___, 131 S. Ct. 2594, 2603 (2011). Congress has empowered the
6 district court to refer to bankruptcy judges any cases arising
7 under that title as well as related proceedings. See 28 U.S.C. §
8 157(a). Under this authority, the Eastern District of California
9 through a General Order adopted by the District Court, has referred
10 all cases under Title 11 as well as related proceedings to the
11 Bankruptcy Judges of the district. See General Order Nos. 182 (May
12 14, 1985) & 223 (October 22, 1987).

13 The Ninth Circuit has recently determined however, that two
14 Supreme Court decisions, Granfinanciera, S.A. v. Nordberg, 492 U.S.
15 33 (1989), and Stern v. Marshall, 564 U.S. ___, 131 S. Ct. 2594
16 (2011) make clear that bankruptcy courts do not "have the general
17 authority to enter final judgments on fraudulent conveyance claims
18 asserted against noncreditors to the bankruptcy estate." Executive
19 Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency,
20 Inc.), 702 F.3d 553, 565 (9th Cir. 2012). Accordingly, those
21 claims must normally be determined by the district court. There
22 are two caveats to this rule, however.

23 First, defendant can waive its right to have the matter heard
24 and finally determined by the district court, if he fails to
25 "timely" object to the Bankruptcy Court's authority. Id., at 568
26 ("Because EBIA waited so long to object, and in light of its

1 litigation tactics, we have little difficulty concluding that EBIA
2 impliedly consented to the bankruptcy court's jurisdiction").
3 Second, even with a timely objection, the Bankruptcy Court is still
4 authorized to hear the matter, and to submit Findings and
5 Recommendations for the district court's de novo review. Id., at
6 566 ("bankruptcy courts have statutory authority to hear and enter
7 proposed findings of fact and conclusions of law in a fraudulent
8 conveyance proceeding asserted by a bankruptcy trustee against a
9 noncreditor, subject to de novo review by a federal district
10 court").

11 **III. ANALYSIS**

12 Counts One and Nine are fraudulent transfer claims under state
13 law, and thus are governed by the rule of Bellingham. They may
14 be finally decided only by the district court, absent waiver or
15 consent (including implied consent), by both parties defendant.

16 BMO argues that Collins waived his right to have this matter
17 finally determined by the district court by waiting too long - over
18 six months from his Answer - to file the withdrawal motion, after
19 the Bankruptcy Court had "already invested significant time and
20 effort on this case," and after it had already "entered final
21 judgment" against Collins' co-defendants. Opposition (ECF No. 6)
22 at 5 (ECF at 8).

23 This court's review of the Bankruptcy Court record shows that
24 Collins answered the adversary complaint on July 30, 2012. Bankr.
25 Dkt. No. 149. On August 16, 2013, Collins filed a Status
26 Conference Statement in which he proposed a schedule to proceed in

1 the Bankruptcy Court. The proposed dates range from May 24, 2013
2 (close of discovery) to August 27, 2013 (final pretrial
3 conference), with a trial date "to be set." Bankr. Dkt. No. 160.
4 The Statement does not indicate any desire to proceed in the
5 district court, but rather contemplates that all proceedings will
6 take place in the Bankruptcy Court.

7 The Bankruptcy Court thereupon issued a Pretrial Scheduling
8 Order with dates ranging from September 28, 2013 (initial
9 disclosures) to June 6, 2013 (final pretrial conference). The
10 close of discovery was scheduled for March 29, 2013. Collins did
11 not file any objection, nor advise the Bankruptcy Court or opposing
12 counsel that the Scheduling Order would be meaningless because he
13 intended to move the proceedings to the District Court. Instead,
14 it appears that he complied with the Scheduling Order by, for
15 example, making his expert disclosures in the Bankruptcy Court, on
16 the date specified in the Scheduling Order. See Bankr. Dkt. No.
17 210.

18 On February 7, 2013, about two months before the close of
19 discovery in the Bankruptcy Court, and a little over six months
20 after filing his Answer, Collins moved to withdraw the reference.
21 The court finds that Collins' conduct in the Bankruptcy Court
22 waived his right to try the case in the district court, and
23 instead, impliedly consented to trial before the Bankruptcy Court.

24 **IV. CONCLUSION**

25 For the reasons stated above, defendants' Motion To Withdraw
26 the Reference is **DENIED**.

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IT IS SO ORDERED.

DATED: April 2, 2013.



LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT