

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE
COMMISSION

Plaintiff,

v.

ARTHUR NADEL,
SCOOP CAPITAL, LLC,
SCOOP MANAGEMENT, INC.,

Defendants,

CASE NO.: 8:09-0087-T-26TBM

SCOOP REAL ESTATE, L.P.,
VALHALLA INVESTMENT PARTNERS, L.P.,
VALHALLA MANAGEMENT, INC.,
VICTORY IRA FUND, LTD.,
VICTORY FUND, LTD.,
VIKING IRA FUND, LLC.,
VIKING FUND, LLC., and
VIKING MANAGEMENT, LLC.

Relief Defendants.

**OBJECTION TO RECEIVER'S MOTION
TO ESTABLISH OBJECTION PROCEDURE (Dkt. 675)**

The Receiver's "Proposed Objection Procedure" (Dkt. 675) provides no opportunity for discovery, imposes unrealistic time schedules to submit evidence, and violates due process of claimants. American Momentum Bank, as successor in interest to the claims of LandMark Bank of Florida in this case (**LandMark Bank**), requests the Court reject the Proposed Objection Procedure and to implement procedures which provide due process by, among other things,

allowing discovery and the opportunity to rebut the Receiver's allegations.¹ The Court should also require the Receiver to prove his prima facie case for rejection of claims that assert avoidance theories, such as fraudulent transfers.

A. The Proposed Objection Procedure Violates Claimants' Due Process Rights.

The Receiver has set forth nine broad categories of reasons why some claims should be rejected. Some are relatively simple, such as the failure to cure deficiencies in the proof of claim forms. Many of the claims rejection categories are much more complex and are based on unproven assertions by the Receiver, such as whether claimants knew or should have known of the fraud – i.e., fraudulent transfer theories. (Dkt. 675, pp. 27, 48-69). Despite this broad spectrum of factual issues involved in the different claim rejection categories, the Receiver's Proposed Objection Procedure does not differentiate between the complexity of the issues involved in the claims. (Dkt. 675 p. 81). While the Proposed Objection Procedure may work for the simplest of claims rejection reasons (such as failing to cure deficiencies in the proof of claim form), it is woefully insufficient to afford claimants due process in more complex matters such as fraudulent transfer claims.²

The Proposed Objection Procedure imposes a draconian deadline of 20 days for claimants to file all evidence rebutting the Receiver's reasons for rejection of the claims. The Receiver proposes to send notice to the claimants of his rejection of the claims, requiring claimants who

¹ On July 22, 2011, LandMark Bank of Florida was closed by the Florida Office of Financial Regulation and the Federal Deposit Insurance Corporation was appointed as receiver of LandMark Bank of Florida. American Momentum Bank purchased the assets of LandMark Bank of Florida and is the successor interest to LandMark Bank of Florida's two claims filed with the Receiver in this case. The Receiver has rejected LandMark Bank's claims on the grounds, among others, of fraudulent transfers. (Dkt. 675 pp. 27-28, pp 48 et seq.)

² Although discretionary with the Court, the Court should strongly consider requiring the Receiver to file separate lawsuits against the alleged fraudulent transferees, which has been routinely done in other Ponzi scheme cases. *See e.g. Wing v. Horn*, 2009 WL 2843342 (D. Utah 2009); *Quilling v. Schonsky*, 247 Fed.Appx. 583 (5th Cir. 2007); *Warfield v. Byron*, 436 F.3d 551 (5th Cir. 2006).

object to the Receiver's decision to provide written objections and "provide all supporting statements and documentation the claimant wishes the Receiver to consider" **within 20 days** from the date of the Receiver's notice. (Dkt. 675 p. 81 para. (c))(emphasis added). There can be no valid reason for such an abbreviated time schedule. Twenty days is simply too short a time research the legal issues, collect all evidence, and submit it to the Receiver. A minimum of ninety days should be provided, especially when the Receiver proposes no deadlines for him to bring the matter to the Court's attention.

The Proposed Objection Procedure provides no opportunity for discovery, and no opportunity for claimants to supplement their disclosure after conducting discovery. Instead, the Receiver proposes that once he receives the 20 day disclosures, he will file with the Court, at his leisure, "any supporting documents or statements he considers as appropriate." (Dkt. 675 p. 82 para. (g)). The Receiver envisions the Court to make a final determination based on these submissions or with a hearing. (Dkt. 675 p. 82 para. (h)). The objection procedure should include the opportunity to conduct discovery, test the Receiver's evidence supporting his claims, and allow for the orderly submission of evidentiary facts and legal arguments after the discovery has been completed.

B. Justice Requires The Receiver to Prove His Allegations of Fraudulent Transfer

The Receiver wants the alleged fraudulent transferees to prove their affirmative defense of good faith, while absolving himself of his burden to prove the elements of his fraudulent transfer claim under the Florida Uniform Fraudulent Transfer Act, Fla. Stats. §§ 726.101 et seq. (FUFTA). (Dkt. 675 p. 49). Procedures must be put in place to require the Receiver to prove that the specific transfers were made in furtherance of a Ponzi scheme.

For instance, in LandMark Bank's case, the alleged fraudulent transfer (the granting of a security interest) did not come from Arthur Nadel, the Relief Defendants, or any of the receivership entities. Rather, the security interest was provided by a non-receivership entity on assets owned by that entity.³ While the Receiver tries to invoke the presumption of fraud theory because a Ponzi scheme existed, he must first prove that the transfers were in furtherance of the Ponzi scheme.⁴ His procedures do not require him to do so, but instead seek to shift the entire burden of proof on the claimants to disprove what he should prove in the first instance, in addition to bearing the burden of proof on its affirmative defenses. (Dkt. 675, p. 87 para. (g)). This impermissibly shifts the entire burden of disproving the Receiver's allegations on the claimants.

Memorandum of Law

A. Due Process Requires A Reasonable Time to Conduct Discovery, Rebut Issues, and Present Disputed Facts to the Court at an Evidentiary Hearing.

"A district court has broad powers and wide discretion to determine the appropriate relief in equity receivership." *Securities and Exchange Commission v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992), *rev'd in part on other grounds* 998 F.2d 922 (11th Cir. 1993). As a result, a district court may use summary, or abbreviated, procedures in receivership cases. However, such does not mean an absence of procedure at all, nor does it allow due process to be eliminated. *Id.* at 1567. "Due process essentially requires that the procedures be fair." *Id.* at

³ Christopher D. Moody Revocable Trust (**Moody Trust**) granted a security interest in collateral it owned to LandMark Bank, to secure a loan from LandMark Bank to Christopher Moody. The Receiver is attempting to avoid this security interest as a fraudulent transfer.

⁴ As part of this proof, the Receiver must show that Moody Trust acquired its interests in the collateral from proceeds of the Ponzi scheme. While the Receiver alleges this occurred (Dkt. pp. 62-63), his Proposed Objection Procedures provide no requirement that he actually prove these allegations. Instead, he says "The Claimant shall have the burden of proof," without exception. (Dkt. p. 82 paragraph (h)).

1566. "The process that is due varies according to the nature of the right and to the type of proceedings." *Id.* "Summary proceedings are inappropriate when parties would be deprived of a full and fair opportunity to present their claims and defenses." *Id.* at 1567. However, a district court does not generally abuse its discretion if its summary procedures permit parties to present evidence when the facts are in dispute and to make arguments regarding those facts." *Id.* at 1567.

Due process requires that claimants be given the opportunity to conduct discovery, and to present evidence and arguments rebutting the Receiver's arguments. *See Elliot*, 953 F.2d at 1568 (voiding as fraudulent a transfer, without providing the opportunity to conduct discovery and be given an opportunity to dispute facts asserted by the Receiver violates due process).

Discovery is essential in LandMark Bank's case because much of the information needed to rebut the Receiver's allegation of actual fraud lies with third parties such as the Receiver, ex-LandMark Bank officers, executives and employees, the accountants for Christopher Moody and his trust, and Chris Moody.⁵ Without the opportunity to conduct discovery, LandMark Bank will not have any realistic ability to have a full and fair opportunity to test the allegations and prove its defenses.

B. The Receiver Must Prove His Prima Facie Case.

To avoid a transfer as being fraudulent under Florida's Uniform Fraudulent Transfer Act, the Receiver must show that the debtor made a transfer to a creditor with the actual intent to hinder, delay or defraud any creditor of the debtor. Specifically,

⁵ For instance, how has the Receiver traced the multiple transfers in this matter to conclude that LandMark Bank's collateral, owned by the Moody Trust, was acquired from the proceeds of the Ponzi scheme? What knowledge, if any, did ex-LandMark Bank executives have about the Nadel Ponzi scheme, Chris Moody's involvement in the scheme, Chris Moody's source of income, and how the assets pledged as collateral to LandMark Bank were acquired and the source of the funds used to acquire the assets? These are but a few examples of the discovery needed to defend the fraudulent transfer allegations and support a good faith affirmative defense.

a transfer made or obligation incurred by a debtor is fraudulent as to a creditor ... if the debtor made the transfer or obligation ... with the actual intent to hinder, delay, or defraud any creditor of the debtor.

§726.105(1)(a), Fla. Stat. Transfers made by Ponzi scheme operators during or in furtherance of the Ponzi scheme are presumptively fraudulent. See e.g. *Cuthill. v. Greenmark, LLC* 275 B.R. 641, 656 (M.D. Fla. 2002) (a Ponzi scheme is by definition fraudulent, so any acts taken in furtherance of the Ponzi scheme, such as payments made by the debtor to keep the scheme ongoing, is fraudulent).

Proving a Ponzi scheme, however, is not enough. "In order to apply the Ponzi scheme presumption, the plaintiff must show that the transfers in question were in furtherance of the Ponzi scheme." *In re Phoenix Diversified Inv. Corp*, 2011 WL 2182881 (Bankr. S.D. Fla. 2011).

As succinctly stated by that court:

The existence of a Ponzi scheme supports a finding that the debtor had a generalized intent to defraud. But this is not sufficient, by itself, to show that the transfers in question were made with fraudulent intent. Transfers subject to the Ponzi scheme presumption are those that perpetuate the scheme, or that are necessary to the continuance of the fraudulent scheme. This is the reason that case law applying the Ponzi scheme presumption typically involves claims against investors, brokers, and others who assisted in perpetrating the scheme.

Id. For the presumption to apply, "courts must be sure that the transfers sought to be avoided are related to the scheme." *Bear, Sterns Securities Corp. v. Gredd*, 397 B.R. 1, 11 (S.D.N.Y. 2007)

Not only must the Receiver prove the existence of a Ponzi scheme, but that the specific transfers at issue (here, the Moody Trust's granting of a security interest in its assets to LandMark Bank) were made in furtherance of the fraud. *Id.* at 13.

The Receiver should not be able to skirt his burdens of proof by making mere allegations and seeking to place the entire burden of proof on the claimants to disprove his case in chief. He

should provide evidence to support his allegations, and discovery should be conducted to be able to test his allegations and obtain facts to support the good faith affirmative defense.

CONCLUSION

LandMark Bank respectfully requests the Court reject the Receiver's Proposed Objection Procedure and, at a minimum, adopt an objection procedure for complex claims which would do the following:

(1) Require the Receiver to provide notice to the claimants of his rejection of the claim, setting for the elements and facts supporting his avoidance theories, and providing the documents, sworn statements and other evidence supporting his claims to the respective claimant;

(2) Requiring the claimants who object to the Receiver's claim objection to file a notice with the Receiver, within 90 days, of its objection and providing initial disclosures to the Receiver as to the information in its possession which it relies upon in support of its position;

(3) Provide the parties with the opportunity for discovery over a minimum six month timeframe;

(4) If disputed issues of material fact exist such that the matter cannot be determined by the court as a matter of law, set the matter for trial with attendant pre-trial disclosures.

(5) Include such further procedural safeguards to comport with due process.

Respectfully submitted,

/s/ Kathryn B. Hoeck

Kathryn B. Hoeck, Esq.

Florida Bar Number: 813060

AKERMAN SENTERFITT

420 South Orange Avenue, Suite 1200

Orlando, FL 32802-0231

Phone: (407) 423-4000

Fax: (407) 843-6610
Email: kathy.hoeck@akerman.com

Counsel for American Momentum Bank, successor
in interest to the claims filed by LandMark Bank of
Florida

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Arthur G. Nadel
Register No. 50690-018
MCC New York
Metropolitan Correctional Center
150 Park Row
New York, NY 10007

/s/ Kathryn B. Hoeck
Kathryn B. Hoeck, Esq.