

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:09-cv-00087-T-26TBM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

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

Defendants,

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.

**WELLS FARGO BANK AND TRSTE'S MEMORANDUM ON JURISDICTION
IN RESPONSE TO THE COURT'S FEBRUARY 3, 2012 ORDER [D.E. 733]**

Wells Fargo Bank, N.A. ("Wells Fargo"),¹ a secured creditor of Laurel Mountain Preserve, LLC, and TRSTE, Inc. ("TRSTE"), the Trustee holding the fee simple title to North Carolina real property known as Laurel Mountain ("Laurel Mountain property")² for the benefit of Wells Fargo to secure payment of a loan made to Laurel Preserve, LLC,

¹ Wells Fargo is successor by merger to Wachovia Bank, N.A. ("Wachovia").

² The real property at issue here is described as, "approximately 420 acres near Asheville, North Carolina in Buncombe and McDowell counties, intended for development of home-sites, and more particularly described in the Deed of Trust previously filed as an exhibit to various pleadings, [most recently, D.E.740, Exh. D].

respectfully submit the following memorandum addressing the jurisdictional issues pertaining to the Laurel Mountain property in accordance with the Court's February 3, 2012 Order [D.E. 733].

SUMMARY OF THE ISSUE

The United States District Court for the Southern District of New York acquired jurisdiction over Arthur Nadel ("Nadel") and all the Nadel related property, all of which is identified in its Indictment, before the Receiver filed the Order of Appointment and the Complaint in the Western District of North Carolina, where the Laurel Mountain property is located. The Southern District of New York's exercise of its jurisdiction in advance of the Receiver's filing deprived the Receiver, and this Court, of jurisdiction and control over that property.³

In cases, such as this one, that involve specific property, real or personal (including intangible property), a District Court's jurisdiction is qualified by the well-established "prior exclusive jurisdiction rule" — that once a court of competent jurisdiction has obtained power over a particular property, that authority and power may not be disturbed by any other court. *See e.g., U.S. v. Bank of New York & Trust Co.*, 296

³The record shows that the Order expanding the Receivership to the Laurel Mountain property was entered **February 11, 2009** [D.E. 44], the Indictment of Nadel identifying the Laurel Mountain property (among others) was filed **April 28, 2009**, but the Receiver did not seek re-appointment after the inclusion of the Laurel Mountain property until **June 3, 2009** [D.E. 139]. It was not until **June 10, 2009** that he filed his re-appointment Order and Complaint in the Western District of North Carolina. As such, the Southern District of New York gained jurisdiction over the Laurel Mountain property prior to the Receiver complying with the mandatory procedure as set forth in 18 U.S.C. § 754, which provides that a receiver "shall, within ten days after the entry of his order of appointment, file copies of the complaint and such order . . . in the district court . . . in which the property is located." *See* 18 U.S.C. § 754.

U.S. 463, 477 (1936). This principle is applied *even when there has been no actual seizure of property*, as is the case here.⁴

Thus, as of April 28, 2009, the Receiver's purported assertion of control over the Laurel Mountain property was at best a nullity and at worst, a slander of title.

RELEVANT TIMELINE OF EVENTS

January 21, 2009, a Sealed Verified Criminal Complaint charging Nadel with securities and wire fraud, referencing the Laurel Mountain property is filed in the SDNY and an arrest warrant is issued. [D.E. 1, SD NY]. Exhibit A.

January 21, 2009, this Court Appoints the Receiver and enters an asset freeze as to the Defendants and the Relief Defendants identified in the filings, but *neither Laurel Mountain Preserve, LLC nor the Laurel Mountain property is identified as either a Defendant or a Relief Defendant*. [D.E. 8]

January 27, 2009, Nadel is arrested and presented to a U.S. Magistrate Judge in the Southern District of New York where bail is denied.

February 10, 2009, the Receiver applies to the Court to include Laurel Mountain Preserve, LLC as a Relief Defendant and the Laurel Mountain property in the Receivership estate. [D.E. 36]

⁴The Court in *Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900) explained this principle, as follows:

The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. *Nor is this rule restricted in its application to cases where property has been actually seized* under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts.

Id. at 61 (emphasis added).

February 11, 2009, Laurel Mountain Preserve, LLC and the Laurel Mountain property is included in the Receivership [D.E. 44]

April 28, 2009, a Grand Jury sitting in the Southern District of New York, returns a multi-count Indictment charging Nadel with multiple counts of securities, mail and wire fraud, as well as seeking the forfeiture of the Laurel Mountain property, among other specifically identified property. [D.E. 18, SD NY] Exhibit B.

June 3, 2009, the Receiver files a motion seeking to be re-appointed on grounds that re-appointment was necessary to “satisfy the 10-day requirement of 28 U.S.C. § 754” to invoke the Court’s jurisdiction over actions he intends to pursue. [D.E. 139, p. 3-4].⁵

June 10, 2009, the Court enters an Order Re-Appointing the Receiver [D.E. 140] and the Receiver files the Order of Re-Appointment and Complaint in the Western District of North Carolina.

October 14, 2009, Nadel is sentenced and ordered to forfeit all his interests in the properties identified in the Indictment and to a money judgment in the amount of \$162 million.

December 2, 2010, Judgment of Forfeiture entered by the court in the Southern District of New York.

MEMORANDUM OF LAW

A. The Prior Exclusive Jurisdiction Rule Vested Jurisdiction Over the Laurel Mountain Property in the Southern District of New York.

The prior exclusive jurisdiction rule is simple and sensible. When two (or more) courts have concurrent jurisdiction over property, it is the first court to acquire jurisdiction over the property that will maintain jurisdiction to the exclusion of the other.

See e.g., U.S. v. Bank of New York, 296 U.S. 463, 477; *Merrill Lynch v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982) (providing that the court that initially has jurisdiction of a

⁵ The Receiver explained that 28 U.S.C. § 754 extends “the territorial jurisdiction of the appointing court . . . to any district of the United States where property believed to be that of the receivership estate is found, provided that the proper documents have been filed in each such district as required by § 754.” *S.E.C. v. Bilzerian*, 378 F.3d 1100, 1104 (citing *Haile v. Henderson Nat’l Bank*, 657 F.2d 816, 823 (6th Cir. 1981)). See Receiver’s Motion for Reappointment, [D.E. 139]

controversy should be the one to decide the case); *U.S. v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989) (same).

1. *The New York Court Exercised its Jurisdiction at the Latest on April 28, 2009.*

In the current case, the above timeline, which is corroborated in the record, demonstrates that the Southern District of New York acquired jurisdiction over the Laurel Mountain property before the Receiver and this Court. Indeed, jurisdiction by the New York court could have arguably vested as early as January 27, 2009, when Nadel was arrested, presented to that court, and the Verified Sealed Complaint was unsealed. At the very latest, jurisdiction vested in New York on April 28, 2009 upon the indictment of Nadel. In either case, that court obtained jurisdiction well before the Receiver acquired jurisdiction.⁶

It is the return of the Indictment on April 28, 2009 that conclusively brought the Laurel Mountain property within the dominion and control of the Southern District of New York. Upon the filing of the Indictment, 21 U.S.C. § 853(e)(1)(A) empowered that court to enter restraining or seizing orders to preserve the availability of the property identified in the Indictment. The key point is not whether the Court ordered a protective order or seizure of property by the U.S. Marshal as the Receiver argues, but rather the fact that it could, and it could do so from the very outset. It has long been accepted that having possession is not required for jurisdiction over property. *See e.g., U.S. v. Bank of New York*, 296 U.S. 463, 477 (1936); *First Nat'l Bank of Columbus v. Charles Broadway Rouss, Inc.*, 61 F.2d 489 (5th Cir. 1932) *cert den.* 287 U.S. 670 (1933). The power of a

⁶ 18 U.S.C. §3231 gives District Courts original exclusive jurisdiction over all offenses against the laws of the United States. 18 U.S.C. § 982 incorporates 21 U.S.C. § 853. Together these statutes give the court where an indictment is returned broad, actual, or constructive power over any property designated as proceeds of the crimes charged. *See* 21 U.S.C. § 853(e) and (g).

court over the property identified in an indictment is very broad and not limited to property owned by the defendant. *See Almeida v. U.S.*, 459 F.3d 377, 381 (2d Cir. 2006) (holding that criminal forfeiture reaches “any property that is involved in the offense”). Moreover the relation-back doctrine codified in 21 U.S.C. § 853(c) vested all right title and interest (subject only to the rights of third parties such as Wells Fargo) in the United States at the time of the underlying crime. *See e.g., U.S. v. Gilbert*, 244 F.3d 888, 902 n.38 (11th Cir. 2001).

As such, it is undisputed that the Southern District of New York exercised its jurisdiction over the Laurel Mountain property.

2. *The Southern District of New York Acquired Jurisdiction Over the Laurel Mountain Property Prior to the Receiver Complying with Statutory Prerequisites Necessary for Him to Obtain Jurisdiction.*

28 U.S.C. § 754 forecloses any argument that the Receiver, or this Court, had jurisdiction prior to the New York Court’s exercise of its jurisdiction, as explained above. Indeed, this statute creates a jurisdictional bright line – a court can only exercise jurisdiction over property that a receiver brings into the court’s reach by the timely filing of the order of appointment and complaint in the district where the property is located. *See Inland Empire Ins. Co. v. Freed*, 239 F.2d 289, 292 (10th Cir. 1953) (providing that section 754 goes to the jurisdiction and control of the property once the receiver has been appointed).

Here the Receiver waited more than one hundred twelve (**112**) days (Feb. 10, 2009 to June 10, 2009) after the Laurel Mountain property was first included in the Receivership to seek an order of appointment that could meet the section 754 ten day filing deadline. The delay was fatal to the Receiver’s jurisdiction over the Laurel

Mountain property. By the time the Receiver finally filed in North Carolina, on June 10, 2009, the New York court, had already acquired power and dominion over the property.

The above time-line provides the inescapable conclusion: the Southern District of New York acquired jurisdiction over the Laurel Mountain property at the very latest on April 28, 2009. On the other hand, the Receiver only acquired any cognizable right to jurisdiction over this property on June 10, 2009, when he finally complied with 28 U.S.C. § 754. Therefore, the New York Court acquired jurisdiction, as a matter of law, more than thirty (30) days before the Receiver took the steps necessary to acquire jurisdiction. As such, the prior exclusive jurisdiction rule mandates that the Southern District of New York was vested with exclusive jurisdiction over the Laurel Mountain Property as of at least April 28, 2009.

B. The Actions Taken By the Receiver Are a Nullity.

The Receiver's failure to obtain jurisdiction over the Laurel Mountain property renders every action taken by the Receiver in connection with the Laurel Mountain property a nullity. Specifically, the Receiver lacked authority to demand the filing of a claim on property over which neither he nor the Court had jurisdiction, much less the authority to seek to dispose of the property. Accordingly, the listing of the Laurel Mountain property for sale even before attempting to acquire jurisdiction under 28 U.S.C. § 754 was improper.

C. Jurisdiction Cannot Be Created By Secret Agreements

It needs no citation of authorities to show that a mere agreement, much less a secret understanding as described by the Receiver in the Reply [D.E. 712, p. 4], cannot confer jurisdiction on a United States District Court to hear and decide a matter. *See,*

e.g., *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880). Assuming that there was in fact a secret understanding⁷ between the Receiver and the United States Attorney's Office in New York regarding disposition of the Laurel Mountain property, it is of no moment. The secret understanding cannot override the statutory due process provisions of 21 U.S.C. § 853(n).⁸

The clear purpose of 21 U.S.C. §853(n) is to provide third parties claiming an interest in forfeited property due process. It requires that the government provide actual and constructive notice of the claims process, and in conjunction with Fed. R. Crim. P. 32.2 it provides for a meaningful opportunity to establish superior title. *See e.g. United States v. Gilbert*, 244 F. 3d 888 (11th Cir. 2001); *United States v. McCorkle*, 143 F. Supp. 2d 1311 -19(M.D. Fla. 2001).

In response to the 21 U.S.C. §853(n) notice⁹ sent by the United States Attorney's Office for the Southern District of New York, Wells Fargo filed a timely verified claim in a court with jurisdiction over the Laurel Mountain property¹⁰. Its failure to file a claim with a Receiver that lacked jurisdiction over the property cannot possibly form the bases on which to deprive Wells Fargo of its secured interest in property.

⁷ The existence of an undisclosed secret understanding between the Receiver and the United States Attorney in New York was revealed in the Receiver's Reply [D.E. 712, p. 4].

⁸ Moreover, the existence of such an understanding is doubtful in light of the fact that it would be the height of impropriety for the United States Attorney's Office to have done so and also send a 21 U.S.C. §853(n)(1) notice that did not mention that filing a verified claim was futile because of an undisclosed agreement. When the United States does in fact enter into such agreements it is done transparently and with Court approval as was done by order in *U.S. v. Drier*, (S.D.N.Y. Feb 5, 2010) (No. 0:09-cr-60331-JIC) and *U.S. v. Brandau, et al* (S.D. Fla. Aug. 9, 2000) (No. 99-8125-Cr). Copies of the orders in the *Drier* and *Brandau* cases are attached hereto as composite Exhibit C.

⁹ Exhibit D.

¹⁰ Exhibit D.

If in fact it comes to light that the secret understanding described in the Receiver's Reply to Wells Fargo's jurisdictional objections prove to be true, the Court should do as other courts have done and sanction the parties¹¹.

D. Recent Developments That The Court Needs to Take Into Consideration.

On February 9, 2012, Wells Fargo reached an agreement with the United States whereby the Laurel Mountain property would, subject to Court approval, be released from the Order of Forfeiture. The agreement was submitted to the Court on February 10, 2012. Wells Fargo has learned today that the New York court has approved the agreement. Exhibit E. However, the agreement has no effect on the jurisdictional issues in this case because at the heart of the jurisdictional question is: 1) whether at the time the Receiver imposed a claims deadline on Laurel Mountain property, he had any authority to do so, and 2) whether the Receiver had any authority to seek to dispose of the Laurel Mountain property while he lacked the jurisdiction to do so.

Unlike the third party claims process under 21 U.S.C. § 853(n) where a secured creditor such as Wells Fargo must file a claim, a claim by a secured creditor is ordinarily

¹¹ Courts expect government representatives to have a minimum substantive obligation of good faith when acting on behalf of the government. The Supreme Court recognized that citizens have an interest in "some minimum standard of decency, honor, and reliability in their dealings with their Government", see *Heckler v. Comty. Health Servs., Inc.*, 467 U.S. 51, 61, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); that "when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception", *id.* n. 12 (citing *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670-675, 93 S.Ct. 1804, 36 L.Ed.2d 567 (1973), and *Moser v. United States*, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951)); and that " 'Men naturally trust in their government, and ought to do so, and they ought not to suffer for it' ", *id.* n. 13 (quoting *Menges v. Dentler*, 33 Pa. 495, 500 (1859)).

When the government has used dual proceedings to attempt to gain an unfair tactical advantage over a defendant, it has been sanctioned and admonished. See e.g. *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977) (reversing a conviction because IRS misrepresented the nature of the investigation); *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005) (government manipulation of the dual proceedings resulted in the suppression of evidence.)

unnecessary.¹² However, should the Court determine that secured creditors must file a claim, it would only be equitable for this Court to accept the Verified Claim Wells Fargo timely filed in the New York court as a timely claim here once the requirements of 28 U.S.C. § 754 are deemed to have been met.

CONCLUSION

For the foregoing reasons the Court should find that the Receiver's delay in complying with the jurisdictional requirements of 28 U.S.C. § 754 deprived the Court of jurisdiction over the Laurel Mountain property, whereupon the Southern District of New York already exercised its jurisdiction, and that all acts of the Receiver pertaining to the Laurel Mountain property, including but not limited to the demand that a claim be filed, the listing of the property for sale, and /or the seeking of leave to dispose of the property were *ultra vires* impermissible actions.

Respectfully submitted,

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¹² See, Wells Fargo's Motion For Determination That Filing Proofs of Claims Herein is not Necessary. [D.E. 740]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 13, 2012, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Ana T. Barnett _____

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