UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PREMIERE HOLDINGS OF TEXAS, LP LIQUIDATING TRUST,	§	
PLAINTIFF.	§	
V.	§	**CASE NO. 04-CV-02398**
JACK LAPIN, ET AL.,	§	**(Jury Trial Demanded)**
DEFENDANTS.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW Defendants, Jack Lapin, Susan and Jack Lapin Family Foundation, Carrigan Lapin & Landa, LLP, Robert and Eve Lapin, Herman Lapin, Individually and as owner of the Herman Lapin IRA, Maxine Lapin, Debra Lapin, Stephen Lapin, Jeremy and Lauren Blachman, Ann and Stephen Kaufman Family Foundation, Ann and Stephen Kaufman Foundation, Stephen Kaufman Family Trust, Ann Kaufman, Individually and as owner of the Ann Kaufman IRA; Jean F. Kaufman Family Limited Partnership and the Estate of Jean F. Kaufman ("Defendants"), and file their Response and Opposition to Plaintiff's Motion to Strike Defendants' Motion for Summary Judgment (the "Plaintiff's Motion to Strike") and respectfully show the Court the following:

RELIEF REQUESTED

1. Defendants request that the Court deny the Plaintiff's Motion to Strike.

SUMMARY OF OPPOSITION

2. The Plaintiff has admitted and it is undisputed that the loans actually belonged to the Defendants. Consequently, the Plaintiff cannot prove his case. The Defendants' Motion for Summary Judgment was not filed in violation of Judge Hoyt's previous orders. The Motion for Summary judgment was filed because it is undisputed that Plaintiff cannot sustain key elements of his case: ownership of the loans in issue. In his deposition, the Plaintiff admitted that Premiere did not own the loans. That deposition was taken during the discovery period but after the case was transferred from Judge Hoyt. This recent development was unknown to Judge Hoyt when he issued his prior orders, and makes this case especially easy to resolve.

BACKGROUND

3. This action began in the Bankruptcy Court on September 30, 2003, as Adversary Proceeding Number 03-04028. The Defendants filed a jury demand in that action. Defendants filed their Motion to Dismiss on December 31, 2003 ("Motion to Dismiss) and asked the Court to consider the Motion to Dismiss as a motion under Federal Rule of Civil Procedure 56. That request was never granted.

4. On December 31, 2003, the Defendants also filed a motion to withdraw reference. The Bankruptcy Court signed an Agreed Order recommending the withdrawal of the reference on May 28, 2004 and the reference was thereafter withdrawn on June 17, 2004. Upon withdrawal of the reference, this matter was given Civil Action Number 04-2398 and was assigned to Judge Hoyt.

5. On October 28, 2004, Defendants filed their Supplemental Motion to Dismiss ("Supplemental Motion to Dismiss") and again asked that the Supplemental Motion to Dismiss

be considered as a motion under Federal Rule of Civil Procedure 56. Again, that request was never granted.

6. On November 17, 2004, twenty days after Defendants filed their Supplemental Motion to Dismiss and prior to the completion of discovery, the Court entered the two orders at issue in the Plaintiff's Motion to Strike, both dated November 17, 2004. Since that date, the issues in this case have changed based on further discovery and the Plaintiff's admission, in his deposition, that the loans in issue were NOT the property of the Debtors. The Plaintiff has admitted that the loans actually belonged to the Defendants. Consequently, the Plaintiff can no longer prove his case.

ARGUMENT AND AUTHORITY

7. Plaintiff's Motion to Strike confuses two separate orders issued by Judge Hoyt, both dated November 17, 2004. Specifically, the Plaintiff's Motion states:

> This case was previously in front of Judge Hoyt. Judge Hoyt denied these motions on November 17, 2004, and found that there were genuine issues of material fact, as well as mixed questions of law and fact, that necessitate a trial on the merits of this case. See Exhibit C. Indeed Judge Hoyt felt so strongly regarding the genuine issues of material fact that he ordered no more dispositive motion to be filed. See Exhibit D.

Plaintiff's Motion to Strike, p. 2., para. 3.

7. In fact, the Motion to Dismiss and Supplemental Motion to Dismiss (the "Dismissal Motions") were denied by the first order dated November 17, 2004. Exhibit C to Plaintiff's Motion to Strike. The Court did not rule on Defendants' request that the dismissal motions be considered under Rule 56 and, in particular, the first order addressed only the "stockbroker" defense of 11 U.S.C. § 546(e). The first order said nothing about whether a motion for summary judgment could be filed at a later date.

8. The second order signed by Judge Hoyt on November 17, 2004, was the Scheduling Order. Exhibit D to Plaintiff's Motion to Strike. The Scheduling Order states:

> The Court is not of a mind to accept dispositive motions that may delay the trial of the case. In the event the parties agree that a motion will be dispositive of one or more issues, the Court should be notified on or before April 1, and any such motion/cross motions must be filed on or before April 30. No responses to motions or cross motions will be permitted; attorneys should determine issues and brief them separately.

Scheduling Order dated November 17, 2004, Exhibit D to Plaintiff's Motion to Strike. The Scheduling Order does NOT state that Defendants may not file a motion for summary judgment. The Scheduling Order does make clear that dispositive motions must not interfere with the trial set for June 6, 2005. The Scheduling Order sets a deadline for filing such motions of April 30. Defendants have fully complied with the Scheduling Order in the following respects: (1) the motion for summary judgment was filed on March 1, 2005, so as not to interfere with a June 6, 2005 trial date (which has now been cancelled by reason of the case being reassigned to this Court), and (2) the motion for summary judgment was filed well in advance of the April 30, 2005 deadline.

9. Since the date of Judge Hoyt's orders, the Plaintiff has admitted, in the recent deposition of Mr. Robert Ogle, that the loans in issue (and necessarily the proceeds of those loans) belonged to Defendants.

> Q. Do you acknowledge that Premiere was not the owner of the loans for which it received principal and interest payments?
>
> Mr. Higgins: Objection, calls for legal conclusion.
>
> A. That's my general understanding. I didn't believe that they did own those loans.[1]

[1] Deposition of Robert Ogle, Trustee, taken on February 4, 2005 (hereinafter "Ogle Depo.") p. 107, lines 19 - 25. A copy of the transcript is filed with the court in the papers accompanying Defendants' motion for summary judgment.

Q. [T]he reason you returned the loans to the investors who had funded them was because you recognized that those loans belonged to them, correct?

. . . .

A. Yes, I reached a – my conclusion was that those loans belonged to the investors.[2]

Q. Do you agree that my clients are the owners of the loans that Premiere's records show them to be the owners of?

. . . .

A. I don't think – I haven't made any distinctions between your clients and other investors. So I believe they had – they're owners of those loans to the same extent other investors own the loans that Premiere's books and records showed as their – in their portfolio.[3]

* * * *

Q. [T]he reason that you returned the [single family] loans to the investors who had funded them was because you recognized that those loans belonged to them, correct?

. . . .

A. Yes, I reached a - - my conclusion was that those loans belonged to the investors.

. . . .

Q. And if the loans had belonged to Premiere and you had received payments attributable to those loans, you know that that money would have been available for distribution to creditors, right?

A. I agree, that's correct.

Q. So you had an incentive as trustee to keep that money if you could have, correct?

A. I agree.

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[2] Ogle Depo., p. 116, lines 8 - 14.
[3] Ogle Depo., p. 117, line 20 - p. 118, line 6.

Q. And it is the fact that you did not keep it, correct?

A. That's correct, I distributed or released all of the loans of that nature.

Q. And you did that after careful thought, right?

A. Yes.

Q. And after consulting with your counsel, correct?

A. Yes.[4]

10. This recent development was unknown to Judge Hoyt. The admission makes this case exceedingly simple to resolve. Both the statute[5] and controlling case law[6] recognize that Plaintiff cannot recover unless the payments belonged to the Debtor. Mr. Ogle's testimony (and the documents upon which he bases his testimony) make clear that the loan payments belonged to Defendants. This development occurred during the discovery period, but after the case was transferred away from Judge Hoyt. The fact that the loans belonged to Defendants and not the Debtor is a "controlling issue" and will assist the Court in achieving an efficient and expeditious resolution to this case.

WHEREFORE PREMISES CONSIDERED, the Defendants respectfully request that the Court deny the Plaintiff's Motion to Strike.

[4] Ogle Depo., p. 116, line 8 – p. 117, line 19.
[5] 11 U.S.C. §§ 544, 547, 548 and 549.
[6] *Begier v. United States*, 496 U.S. 53, 66 (1990).

DATED: March 29, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon all parties listed below by fax and/or first class mail, this 29th day of March, 2005.

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