

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN A GLASSER, AS TRUSTEE
OF THE YELLOWSTONE CLUB
LIQUIDATING TRUST,

CASE NO. C14-1576 RAJ

ORDER

Plaintiff,

v.

JESSICA T. BLIXSETH et al. ,

Defendants.

I. INTRODUCTION

This matter comes before the court on defendants’ motion to dismiss (Dkt. # 168), plaintiff’s motion for partial summary judgment (Dkt. # 169) and plaintiff’s motion to sever Count I from Counts II and III (Dkt. # 206). As a preliminary matter, the court notes that non-party Desert Ranch LLLP has filed for bankruptcy protection and both parties agree that Counts II and III in this action belong to that bankruptcy estate. *See* Dkt. ## 204, 207, 227. Accordingly, to the extent either party seeks relief related to those Counts, their motions are DENIED.

1 For the reasons stated below, the court GRANTS plaintiff's motion to sever (Dkt.
2 # 206) and sets this matter for trial on October 3, 2016. At the most recent telephonic
3 hearing in this matter, the Desert Ranch LLLP Bankruptcy Trustee, Ms. Helen Frazer,
4 advised the court that she "does not foresee intervening into this particular lawsuit," but
5 that she would need a few months to determine exactly what course of action she intends
6 to take with respect to the assets at issue in this case. Accordingly, the court has set a
7 tentative date for trial in October in an effort to conserve judicial resources and to allow
8 the parties and Ms. Frazer an opportunity to provide the court with any relevant updates
9 in the bankruptcy proceedings that would impact the trial of Count I.

10 The court has also addressed the remaining portions of defendants' "motion to
11 dismiss" (Dkt. # 168) and plaintiff's motion for partial summary judgment (Dkt. # 169).
12 As explained below, both motions are DENIED.

13 **II. BACKGROUND**

14 Beginning in the late 1990s, Timothy L. Blixseth began developing an exclusive
15 and unique ski and golf resort for the ultra-rich in Montana under the name Yellowstone
16 Mountain Club, LLC (the "Yellowstone Club").¹ (Compl.) Dkt. # 147, ¶ 14; Dkt. # 170,
17 Ex. A at 2-3. As the sales of building lots and memberships began piling up, Mr.
18 Blixseth, in 2005, caused the Yellowstone Club and its affiliated entities (collectively, the
19 "Debtors") to borrow \$375 million from Credit Suisse and a group of institutional lenders
20 and to pledge all or substantially all of their assets to secure the loan. (Compl.) Dkt. #
21 147, ¶ 15; Dkt. # 170, Ex. A at 15-16. On the same day Credit Suisse disbursed the loan
22 proceeds to the Debtors, Mr. Blixseth diverted \$209 million of those proceeds into his
23 personal accounts. (Compl.) Dkt. # 147, ¶ 16; Dkt. # 170, Ex. A at 19. In addition, Mr.
24 Blixseth converted tens of millions of additional proceeds, assets, and properties for
25

26 ¹ The facts of this case have been summarized in several previous orders as well. *See*
27 Dkt. ## 13, 48, 99.

1 himself or his related entities during his tenure as the Yellowstone Club's sole manager.
2 (Compl.) Dkt. # 147, ¶ 17; Dkt. # 170, Ex. A at 119-121. All told, Mr. Blixseth is subject
3 to claims against him totaling at least \$286.4 million. Dkt. # 170, Ex. A at 116 & 119.

4 An exhibit to Mr. Blixseth's 2008 Marital Settlement Agreement identified
5 seventeen different litigation claims filed against Mr. Blixseth or his related entities. Dkt.
6 # 170, Ex. B. The actions included at least two suits by Mr. Blixseth's co-investors in the
7 Yellowstone Club, one by the former Tour de France champion, Greg LeMond, and
8 others, and another by Michael Snow, both directly related to Mr. Blixseth's alleged
9 misappropriation of the Credit Suisse loan proceeds. Dkt. # 170, Exs. C and D. The
10 Montana Department of Revenue also asserted claims relating to the Credit Suisse
11 proceeds. Dkt. # 170, Ex. B.

12 In 2007, Mr. Blixseth secretly created Desert Ranch LLLP ("Desert Ranch"), a
13 Nevada limited liability limited partnership to which he planned to transfer all of his
14 personal assets. (Compl.) Dkt. # 147, ¶ 18; Dkt. # 170, Ex. A at 52, 108-09; Ex. E. Mr.
15 Blixseth then transferred substantially all of his assets to Desert Ranch to place them
16 beyond the reach of his existing creditors and beyond the reach of creditors in the
17 Debtors' bankruptcy cases. (Compl.) Dkt. # 147, ¶ 18-19; Dkt. # 170, Ex. A at 52, 108-
18 109.

19 The assets Blixseth transferred into the Desert Ranch structure included the
20 subjects of the present litigation, namely all his membership interests in (a) Western Air
21 & Water, LLC ("Western Air"), an Oregon limited liability corporation, which owned
22 Blixseth's Citation private jet, 156-foot private yacht known as "The Piano Bar," and 58-
23 foot "fishing" boat and (b) Kawish, LLC, a Washington LLC, which owned Mr.
24 Blixseth's waterfront home in Medina, Washington. (Compl.) Dkt. # 147, ¶¶ 12, 45; Dkt.
25 # 170, Ex. I.

26 After the Debtors filed bankruptcy in November 2008, the creditors investigated
27 and asserted, among other claims, fraudulent transfer claims against Mr. Blixseth in an

1 adversary proceeding seeking to set aside Mr. Blixseth's transfers of the Debtors' assets
2 to himself and his related entities. (Compl.) Dkt. # 147, ¶ 21; Dkt. # 170, Ex. A at 56-58,
3 67-69. Eventually, the bankruptcy plan confirmed in the Debtors' Chapter 11 bankruptcy
4 cases conveyed those claims to the plaintiff Trust for the purpose of pursuing those and
5 other claims to recover the Debtors' properties and assets and distribute their proceeds to
6 the Debtors' defrauded creditors. (Compl.) Dkt. # 147, ¶ 22; Dkt. # 170, Ex. A at 55-56.

7 When the Trust learned of Blixseth's wholesale asset transfers to Desert Ranch, it
8 commenced a separate adversary proceeding against Desert Ranch and others seeking to
9 set aside and recover those transfers as well. (Compl.) Dkt. # 147, ¶ 23; Dkt. # 170, Ex.

10 J. After a trial, the USBC, District of Montana (the "Montana Bankruptcy Court"), in an
11 August 16, 2010 memorandum of decision, rendered a decision against Blixseth in the
12 first adversary proceeding. (Compl.) Dkt. # 147, ¶ 56; Dkt. # 170, Ex. A at 134-135.

13 The Montana Bankruptcy Court concluded that Blixseth had caused the Yellowstone
14 Club to transfer its assets to him with actual intent to hinder, delay, and defraud.

15 (Compl.) Dkt. # 147, ¶ 56; Dkt. # 170, Ex. A at 102-109. It also concluded that he had
16 breached his fiduciary duties to the Debtors. (Compl.) Dkt. # 147, ¶ 56; Dkt. # 170, Ex.
17 A at 117-121.

18 After additional litigation, the Montana Bankruptcy Court entered final judgment
19 in December 2012 against Blixseth in the approximate amount of \$41 million. (Compl.)
20 Dkt. # 147, ¶ 124; Dkt. # 170, Ex. K. Blixseth then appealed and the USDC, District of
21 Montana (the "Montana District Court") affirmed the judgment on April 7, 2014. Dkt. #
22 170, Ex. L. Mr. Blixseth's further appeal to the 9th Circuit has been fully briefed and
23 submitted as of February 25, 2016. *Blixseth v. Glasser (In re Yellowstone Mountain*
24 *Club)*, Case No. 14-35438 (9th Cir.).

25 In addition to the \$41 million judgment of the Montana Bankruptcy Court, the
26 USDC, Central District of California (the "California District Court") entered judgment
27 in favor of the Trust against Mr. Blixseth on June 24, 2014 in the amount of \$219 million.

1 Dkt. # 170, Exs. M and N. Blixseth appealed the California District Court’s judgment to
2 the Ninth Circuit. That appeal, too, has been fully briefed and submitted as of February
3 25, 2016. *See Blixseth v. Glasser (In re Yellowstone Mountain Club, LLC)*, Case No. 14-
4 56184 (9th Cir.). The Desert Ranch fraudulent transfer action remains pending before the
5 Montana Bankruptcy Court. (Compl.) Dkt. # 147, ¶ 60.

6 In the summer of 2013, the Trust discovered that Blixseth had sold a \$40 million
7 resort, one of the properties he had taken out of the Yellowstone Club, in April 2011 in
8 violation of an injunction order he had stipulated to in connection with yet another action
9 the Trust had commenced against him to recover that fraudulently transferred asset.
10 (Compl.) Dkt. # 147, ¶ 62, 63; Dkt. # 170, Ex. O-1. The Montana District Court then
11 entered an order of contempt against Mr. Blixseth on February 3, 2014. Dkt. # 170, Ex.
12 O-2. In connection with that ongoing contempt proceeding, Mr. Blixseth has been jailed
13 for his refusal or inability to account for the proceeds of the sale. Dkt. # 170, Ex. P. Mr.
14 Blixseth remains incarcerated in the Cascade County Regional Jail in Great Falls,
15 Montana pursuant to the April 20, 2015 order of incarceration. Dkt. # 170, Ex. Q.

16 In addition to the contempt proceedings against Blixseth, the Trust also moved for
17 an injunction in the Desert Ranch adversary proceeding on November 22, 2013 barring
18 Blixseth and Desert Ranch from transferring any of their remaining assets. Dkt. # 170,
19 Ex. R. In connection with that proceeding, Blixseth testified under oath in a deposition
20 that he had caused Desert Ranch to convey Western Air and Kawish to his wife Jessica
21 Blixseth in April 2013. (Compl.) Dkt. # 147, ¶ 67; Dkt. # 170, Ex. S, 39 & 79.

22 The Blixseths have produced a single document, dated “effective” April 3, 2013,
23 purporting to evidence the transfer of Kawish to Defendant JTB, LLC, a Washington
24 limited liability company of which Jessica Blixseth appears to be the sole member and
25 manager. Dkt. # 170, Ex. T. However filings with the Oregon Secretary of State and the
26 Washington Secretary of State indicate that both Western Air and Kawish were
27 transferred on or after December 13, 2013. (Compl.) Dkt. # 147, ¶¶ 68-70. Mr. Blixseth

1 continued to serve as the manager of both Western Air and Kawish until at least February
2 27, 2014, despite their supposed transfer to Defendant JTB. (Compl.) Dkt. # 147, ¶ 75;
3 Dkt. # 170, Ex. S at 40 & 74.

4 Since December 13, 2013, the Blixseths have sold all of the known assets of
5 Western Air and Water. They sold their 58-foot fishing boat, the *Piano Bar Too*, on
6 December 19, 2013, their Citation VI private jet on February 28, 2014, and their 156-foot
7 yacht, the *Piano Bar*, on September 15, 2014. (Compl.) Dkt. # 147, ¶¶ 76-79; Dkt. # 170,
8 Exs. U, V & W. The net proceeds of the sale of both the private jet and the yacht were
9 transferred directly from the purchaser to Defendant Jessica Blixseth's personal bank
10 account. Dkt. # 170, Exs. X (deposit of \$47,035.98 on 2/28/14) and Y (deposit of
11 \$1,620,000 on 9/15/14.) Another Blixseth creditor foreclosed on and sold at an
12 execution sale the Blixseths' Medina mansion on or after June 13, 2014. *See Order, 395*
13 *Lampe, LLC v. Kawish, LLC*, No. 2:12-cv-01503-RAJ (W.D. Wash., April 8, 2015) [Doc
14 195], at 3.

15 On October 14, 2014, the date the Trust commenced this action, Jessica Blixseth
16 still had approximately \$1.065 million of the proceeds of sale of the *Piano Bar* in her
17 personal bank account. Dkt. # 170, Ex. Z. Thereafter, Mrs. Blixseth transferred all of
18 those assets out of that account, including \$600,000 that she transferred to her mother,
19 Defendant Cherrill Ferguson, on October 14, 2014. (Compl.) Dkt. # 147, ¶¶ 79, 83-85;
20 Dkt. # 170 Exs. Z and AA. A week later, Cherrill Ferguson transferred \$600,000 to an
21 account in Jessica Blixseth's name at American Bank in Bozeman, Montana. Dkt. # 170,
22 Ex. BB. Mrs. Blixseth then pledged the \$600,000 in the account to American Bank to
23 secure a loan in the amount of \$600,000 to herself. Dkt. # 170, Ex. CC.

24 III. ANALYSIS

25 A. Legal Standard

26 Summary judgment is appropriate if there is no genuine dispute as to any material
27 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.

1 56(a). The moving party bears the initial burden of demonstrating the absence of a
2 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
3 Where the moving party will have the burden of proof at trial, it must affirmatively
4 demonstrate that no reasonable trier of fact could find other than for the moving party.
5 *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). On an issue where the
6 nonmoving party will bear the burden of proof at trial, the moving party can prevail
7 merely by pointing out to the district court that there is an absence of evidence to support
8 the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets
9 the initial burden, the opposing party must set forth specific facts showing that there is a
10 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*
11 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most
12 favorable to the nonmoving party and draw all reasonable inferences in that party's favor.
13 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

14 **B. Cross-Motions for Summary Judgment**

15 First, the court notes that defendants' counsel has incorrectly titled his motion as a
16 "motion to dismiss," when in fact he seeks summary judgment on behalf of his clients.
17 This type of error is surprising in light of counsel's many years of experience as a
18 litigator. This type of error also results in a waste of the court's time, confusion among
19 the parties, and an inaccurate docket. Because the motion is based upon Rule 56, the
20 court will construe defendants' motion as one for summary judgment and address both
21 motions together.

22 Here, the only claim at issue is Count I. (Compl.) Dkt. # 147, ¶¶ 86-93. In Count
23 I, plaintiff seeks to hold defendants liable as subsequent transferees. *Id.* To do so,
24 plaintiff must show: (1) that the initial transfer of Western Air and Kawish from Mr.
25 Blixseth to Desert Ranch was fraudulent, and (2) that the subsequent transfer of those
26 same assets from Desert Ranch to defendants was also fraudulent. *See Woods &*
27 *Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 735 (9th Cir. BAP 2008)

1 (applying analogous bankruptcy provision); *Creditors Committee v. JP Morgan Chase*
2 *Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 742 (Bankr. S.D.N.Y. (2008))
3 (finding that the party seeking to recover fraudulently transferred property “can sue the
4 subsequent transferee in the first instance, and need prove only that the initial transfer
5 was avoidable.”).

6 There are two ways to show that a transfer was fraudulent. A transfer is fraudulent
7 if the debtor made the transfer or incurred the obligation:

8 (1) With actual intent to hinder, delay, or defraud any creditor
9 of the debtor; *or*

10 (2) Without receiving a reasonably equivalent value in
11 exchange for the transfer or obligation, and the debtor:

12 (i) Was engaged or was about to engage in a business
13 or a transaction for which the remaining assets of the
14 debtor were unreasonably small in relation to the
business or transaction; *or*

15 (ii) Intended to incur, or believed or reasonably should
16 have believed that he or she would incur, debts beyond
17 his or her ability to pay as they became due.

18 If plaintiff seeks to show fraud under option (1) above (i.e., “actual intent” to
19 defraud), consideration may be given, among other factors, to whether:

20 (1) The transfer or obligation was to an insider;

21 (2) The debtor retained possession or control of the property
22 transferred after the transfer;

23 (3) The transfer or obligation was disclosed or concealed;

24 (4) Before the transfer was made or obligation was incurred,
25 the debtor had been sued or threatened with suit;

26 (5) The transfer was of substantially all the debtor’s assets;
27

1 (6) The debtor absconded;

2 (7) The debtor removed or concealed assets;

3
4 (8) The value of the consideration received by the debtor was
5 reasonably equivalent to the value of the asset transferred or
6 the amount of the obligation incurred;

7 (9) The debtor was insolvent or became insolvent shortly after
8 the transfer was made or the obligation was incurred;

9 (10) The transfer occurred shortly before or shortly after a
10 substantial debt was incurred; and

11 (11) The debtor transferred the essential assets of the business
12 to a lienor who transferred the assets to an insider of the
13 debtor.

14 R.C.W. § 19.14.041.²

15 The plaintiff must make this showing as to each transfer at issue in this case (*e.g.*,
16 the transfer from Mr. Blixseth to Desert Ranch, the subsequent transfer to JTB LLC, the
17 subsequent transfer to Mrs. Blixseth, the subsequent transfer to Mrs. Ferguson, and the
18 subsequent transfer from Mrs. Ferguson to American Bank/Mrs. Blixseth).

19 If the plaintiff successfully shows that each of these transfers was
20 fraudulent, then defendants can only avoid liability by showing that they were
21 good faith transferees. Each defendant will have the burden of proving this

22 ² To this day neither party has addressed the choice-of-law in this case. Because
23 this court's jurisdiction is based on diversity of citizenship, the court will apply
24 Washington law. The court has reviewed Nevada's fraudulent transfer law and
25 Montana's fraudulent transfer law and sees no conflict with RCW § 19.40.041. *See*
26 *Patton v. Cox*, 276 F. 3d 493, 495 (9th Cir. 2002) ("A federal court sitting in diversity
27 applies the forum state's choice of law rules."); *see also Erwin v. Cotter Health Ctrs.*,
161 Wash. 2d 676, 692 (2007) ("When parties dispute choice of law, there must be an
actual conflict between the laws or interests of Washington and the laws or interests of
another state before the court will engage in a conflict-of-laws analysis.")

1 affirmative defense. R.C.W. § 19.40.081. This is an objective standard. *See*
2 *Hayes v. Palm Seedlings*, 916 F.2d 528 (9th Cir. 1990) (“[C]ourts look to what the
3 transferee objectively knew or should have known in questions of good faith,
4 rather than examining what the transferee actually knew from a subjective
5 standpoint.”) (internal quotations omitted).

6 In the instant case, the court has reviewed the briefs, declarations, and
7 supporting evidence and finds that plaintiff has presented significant and
8 persuasive evidence in support of his claims of fraudulent transfer. However,
9 credibility determinations and the weighing of the evidence are jury functions, not
10 those of a judge. *Anderson*, 477 U.S. at 255. Based upon the record, and
11 especially with respect to the good faith defense, the court finds that issues of fact
12 remain and those issues should be decided by a jury. *See, e.g.*, Fed. R. Civ. P. 56,
13 Committee Notes on Rules-2010 Amendment, Subdivision (g) (“[The court] may
14 properly decide that the cost of determining whether some potential fact disputes
15 may be eliminated by summary disposition is greater than the cost of resolving
16 those disputes by other means, including trial.”); *see also Powell v. Radkins*, 506
17 F.2d 763, 765 (5th Cir. 1975) (“A court, in its discretion in shaping the case for
18 trial, may deny summary judgment as to portions of the case that are ripe therfor,
19 for the purpose of achieving a more orderly or expeditious handling of the entire
20 litigation.”). Accordingly, the cross-motions for summary judgment are DENIED.

22 **C. Motion to Sever Count I**

23 As the court has already stated, this matter will proceed to trial as to Count I. The
24 Federal Rules of Civil Procedure authorize the Court either upon a motion or on its own
25 at any time and on just terms to “sever any claim against a party.” Fed. R. Civ. P. 21.
26 Deciding whether to sever a party or claim lies wholly within the trial court’s sound
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1 discretion and is subject to appellate review only for clear abuse. *See Coughlin v.*
2 *Rogers*, 130 F.2d 1348, 1350 (9th Cir. 1997); *Garber v. Randell*, 477 F.2d 711, 714 (2d
3 Cir. 1973). In exercising their broad discretionary “power to sever claims and order
4 separate trials . . . , [the courts must] balance the factors of benefit and prejudice that will
5 result from the alternative courses.” *Garber*, 477 F.2d at 714.

6 Here, the parties agree that Counts II and III belong to the Desert Ranch
7 bankruptcy estate. Thus, the only option is proceed as to Count I. Defendants, however,
8 argue that Desert Ranch is an indispensable party and allowing this matter to proceed at
9 all would violate the automatic stay. Defendants further argue that this litigation should
10 be stayed because it is duplicative of litigation pending in Montana against Desert Ranch.
11 The court disagrees.

12 A creditor asserting claims to recover fraudulently transferred property has a
13 choice and may seek judgment “against *either* (1) the *first transferee* of the fraudulently
14 transferred asset (in this case Desert Ranch) or (2) ‘any *subsequent transferee* other than
15 a good-faith transferee . . . who took value from any subsequent transferee.” Dkt. # 197,
16 citing RCW § 19.40.081 (emphasis added). The Ninth Circuit Bankruptcy Appellate
17 Panel has held under the analogous Bankruptcy Code fraudulent transfer provision that
18 the party seeking a judgment against a subsequent transferee “is not required to avoid the
19 initial transfer from the initial transferee before seeking recovery from subsequent
20 transferees.” *Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 735 (9th
21 Cir. BAP 2008). Indeed, at least one court has expressly held that in any action against a
22 subsequent transferee, the initial transferee is neither a necessary party nor required to be
23 joined under Federal Rule of Civil Procedure 19. *See In re M. Fabrikan*, 394 B.R. 721 at
24 744 (“the plaintiff can obtain complete relief by recovering a money judgment against the
25 [subsequent transferees] without regard to the [initial transferees]”). Accordingly, the
26 court can grant complete relief to plaintiff without joining Desert Ranch.

