Advance Magazine Publishers, Inc. v. Anichini, Inc., No. 150-6-08 Oecv (DiMauro, J., Apr. 15, 2009)

STATE OF VERMONT
ORANGE COUNTY

ADVANCE MAGAZINE PUBLISHERS, INC.	)	
	)	**Orange Superior Court**
v.	)	**Docket No. 150-6-08 Oecv**
ANICHINI, INC.	)	

DECISION
Plaintiff's Motion to Adjudge Trustee

The present matter before the court is plaintiff Advance Magazine Publisher, Inc.'s motion to adjudge Chittenden Bank as trustee. Advance Magazine contends that Chittenden Bank filed an incomplete disclosure under oath in response to a trustee summons, and that a correct answer would have disclosed the existence of a line of credit and an accompanying operating account. Accordingly, Advance Magazine seeks an order holding Chittenden Bank liable for the amount of the order of approval, which was $75,000.

An evidentiary hearing was held on March 23, 2009. Advance Magazine was represented by Alan Bjerke, Esq. Chittenden Bank was represented by Gail Westgate, Esq. and Gary Karnedy, Esq. Defendant Anichini, Inc. waived appearance at the hearing.

Findings of Fact

The underlying action is an attempt to collect the balance due on an advertising account. Anichini ordered four magazine advertisements from Advance Magazine, but did not pay for them in full. The outstanding principal balance was $123,792.94 as of the date of the hearing.

After filing the complaint in June 2008, Advance Magazine sought trustee process against Anichini's "bank account" at Chittenden Bank. On September 8,

2008, Judge Teachout granted the motion for trustee process after notice and hearing, and issued an order of approval in the amount of $75,000. Advance Magazine served the trustee summons on Chittenden Bank the following day.

At the time of service, Chittenden Bank and Anichini were parties to a promissory note and an asset-based business loan agreement (in other words, an asset-backed line of credit). In addition, Chittenden had a deposit account with Anichini that served as an operating account for the line of credit. The promissory note, line of credit, and operating account are all related.

As amended, the promissory note authorizes a "maximum aggregate loan amount" of $1,300,000 at variable interest rates, to be disbursed through the line of credit. The actual amount of money available to be borrowed by Anichini at any given time is determined by a weekly "borrowing base" calculation, which takes into consideration the loan balance and certain assets belonging to Anichini (such as inventory and accounts receivable). As of August 31, 2008, the total available borrowing base was approximately $639,000, from which Anichini had already borrowed approximately $428,000. After deducting an additional $18,000 reserved for a letter of credit, the remaining amount available to borrow at the time of service of the trustee summons was roughly $193,000.

The operating account is used for daily transactions. Anichini writes checks, authorizes debits, and initiates wire transfers on the operating account in a manner similar to how one would use an ordinary checking account. These transfers are treated as "debits" on the account.

Unlike an ordinary checking account, however, use of the operating account does not require maintenance of a positive account balance. Instead, under the terms of the line of credit agreement, Anichini may continue to draw on the account even when there is a negative balance. When that happens, the bank compares the requested debit to the available borrowing base and the terms of the loan agreement. If there is a sufficient amount available under the borrowing base, and Anichini is not in default, Chittenden Bank will advance money from the line of credit to honor the request. The advance is treated as a "credit" on the operating account.

Thus, each requested draw or "debit" on the operating account is usually paired with a corresponding advance or "credit." The operating account therefore normally maintains a balance of approximately zero. The real accounting as between Chittenden Bank and Anichini is done under the line of credit: each advance is treated as a loan under the line of credit, which increases the loan balance and reduces the amount available to be borrowed.

Anichini makes loan payments by depositing money into the operating account. These deposits take the form of lockbox deposits and wire transfers, and are treated as "credits" on the operating account. At the end of the day, any positive balance in the operating account is "swept" into the line of credit in order to reduce the outstanding loan balance.

In short, advances made by Chittenden Bank under the line of credit agreement are loans that must be repaid, with interest. Anichini makes loan payments by depositing money into the operating account.

The trustee summons was served on Chittenden Bank at approximately 9:00 o'clock on the morning of September 9th. The bank completed the disclosure form approximately one hour later. It is undisputed that during this interval, the operating account had a negative balance of ($19,000), and that no credits or debits were posted to the account between the time of service and completion of the disclosure under oath.

Chittenden Bank completed its disclosure under oath as follows, with the questions asked by Advance Magazine in plain text, and the bank's answers in bold:

> 1. At the time of service on the Trustee Summons, Chittenden Bank had in its possession the following goods, effects, credits or other property belonging to the Defendant: **No funds.**
>
> 2. Today, Chittenden Bank has in its possession the following additional goods, effects, credit or other property belonging to the Defendant: **No funds.**
>
> 3. I do not know whether certain of the goods, effects, credits or other property should be subject to trustee process in this case because of the following facts: **None.**

After completing the disclosure under oath, Chittenden Bank continued to do business with Anichini. In particular, the bank advanced more than $75,000 to the operating account within the next several business days in order to honor demands made upon the account. The end result is that the trustee summons did not capture any funds to secure the judgment in this lawsuit, even though other Anichini creditors were subsequently paid with money advanced from the line of credit.

Conclusions of Law

Advance Magazine contends that Chittenden Bank's disclosure under oath is incomplete, and that a correct answer would have disclosed the existence of the line of credit along with the corresponding operating account. Although Advance Magazine acknowledges that the line of credit itself is not attachable, it asserts that disclosure of the *existence* of the line of credit and accompanying operating account is required by *In re Southwestern Glass Co., Inc.*, 332 F.3d 513 (8th Cir. 2003), and that the bank's continuing failure to complete the disclosure under oath accurately has made it liable for subsequent advances made to the operating account.

It is important at the outset to clarify the role of the trustee summons. It is not a discovery tool. Instead, it is a "device by which a judgment debtor may reach certain obligations due the judgment debtor." *First Wisconsin Mortgage Trust v. Wyman's Inc.*, 139 Vt. 350, 353 (1981). Service of the trustee summons effectively casts a net which captures all of the "goods, effects or credits of the defendant which are in the hands of such trustee at the time of the service of the writ upon the trustee, or which come into the trustee's hands or possession before disclosure." 12 V.S.A. § 3013; V.R.C.P. 4.2(a). Any goods, effects or credits captured by the net of trustee process must be "attached and held to respond to final judgment in the cause." 12 V.S.A. § 3013.

There are three possible kinds of disclosure in response to a trustee summons. "The first simply reports under oath that the trustee in fact has in its possession no goods, effects or credits of the defendant." *First Wisconsin Mortgage Trust*, 139 Vt. at 356; 12 V.S.A. § 3064. The second admits possession of assets belonging to the defendant, and lists them so that the court may determine whether the assets should be attached. *Marble Bank v. Heaton*, 160 Vt. 188, 191 (1993); 12 V.S.A. § 3065. The final option also admits possession of assets and lists them, but indicates that the assets may not be appropriate for surrender because of "some intervening right or claim" belonging to the trustee or a third party. *First Wisconsin Mortgage Trust*, 139 Vt. at 356.

Although the disclosure under oath provides a limited amount of information, the trustee has a fiduciary duty of utmost good faith "to adequately present the exact nature of any obligations" that it believes constitutes goods, effects or credits belonging to the defendant. *Id.*; *Baldwin v. Percival*, 88 Vt. 211, 215 (1914). If the plaintiff believes that the answers do not provide adequate information, it may seek more information by propounding written interrogatories upon the trustee, V.R.C.P. 4.2(d), and by contesting the trustee's answers in court. V.R.C.P. 4.2(g). If the court determines that the trustee failed to disclose goods, effects or credits belonging to the defendant, or that the trustee's answers were

incomplete or negligently inadequate, the trustee "must accept the outcome of the battle it has chosen," *Southwestern Glass*, 332 F.3d at 516 n.2, and may be held liable for the amount of the judgment recovered by the plaintiff, up to the amount of the order of approval. *First Wisconsin Mortgage Trust*, 139 Vt. at 356; 12 V.S.A. § 3063.

The central question presented here is whether Chittenden Bank's answer was incomplete because it did not disclose the existence of the line of credit or the accompanying operating account.

A line of credit is the "maximum amount of borrowing power extended to a borrower by a given lender, to be drawn upon by the borrower as needed." Black's Law Dictionary 949 (8th ed. 2004). It is "usually intended to cover a series of transactions, in which case, when the customer's line of credit is nearly or quite exhausted, he is expected to reduce his indebtedness by payments before drawing upon it further." *Oceanfocus Shipping Ltd. v. Naviera Humboldt, S.A.*, 962 F. Supp. 1481, 1483–84 (S.D. Fla. 1996) (quotation omitted). In other words, the amount of money that has already been borrowed under a line of credit represents a loan that must be repaid—a liability of the defendant, rather than an asset. And the amount remaining available to borrow under a line of credit agreement represents the remaining borrowing limit of the defendant (the maximum amount of potential future liability), rather than an asset. For these reasons, the line of credit is not an attachable asset belonging to Anichini, and its existence did not need to be disclosed in response to the trustee summons. *Southwestern Glass*, 332 F.3d at 518; *Oceanfocus Shipping*, 962 F. Supp. at 1485; *Sears, Roebuck & Co. v. Romano*, 482 A.2d 50, 53–54 (N.J. Super. 1984).

It makes sense that a line of credit is not attachable, for two reasons. First, it would not be fair to permit a creditor to affirmatively draw down a debtor's line of credit in order to satisfy its own judgment, because doing so would effectively force the bank to pay the debts of its customer. *Southwestern Glass*, 332 F.3d at 518. Second, service of the trustee summons freezes only assets or money that is "actually owed to the defendant at the time of service of trustee process." *First Wisconsin Mortgage Trust*, 139 Vt. at 353–54. Thus, although the trustee summons freezes assets belonging to the defendant, it does not freeze the defendant's ability to take out additional loans or to incur new liabilities.

The next question is whether the operating account constitutes an attachable asset belonging to Anichini. Although money held in a deposit account is normally an asset belonging to the defendant, the operating account in this case had a negative balance of ($19,000) at the time of service of the trustee summons. The negative balance represented money that was owed by Anichini to Chittenden Bank, rather than money owed by the trustee to the defendant. *First Wisconsin*

Mortgage Trust, 139 Vt. at 353–54. For this reason, there were no assets belonging to Anichini in the account at the time of service, and it was appropriate for the bank to respond to the trustee summons by saying that it held "no funds" belonging to Anichini at the time of service.

Southwestern Glass does not require banks to disclose the mere existence of lines of credit or operating accounts. Although the facts of the case are not precisely clear from the recitation, it appears that the bank in that case became liable because it did not disclose the fact that credits were posted to the operating account *between the time of service of the trustee summons and completion of the disclosure under oath*. This is implied strongly by the court's reasoning, which focused primarily on the fact that the advances from the line of credit flowed through the operating account before being disbursed to the payee, and were therefore briefly credits belonging to the account holder. 332 F.3d at 518. In other words, the *Southwestern Glass* court characterized the advances as loan proceeds that were attachable for the period of time after they were posted to the operating account, and before they were disbursed to the payee. *Id*. This reasoning only makes sense if the credits were posted to the account at a time when they were subject to capture by the net of trustee process.

This distinction is also supported by the *Southwestern Glass* court's reliance on *First National Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192, 196 (Tex. Ct. App. 1962), in which it was explicitly stated that the trustee's liability was caused by the fact that it loaned money to the debtor after service of the trustee summons, and before completion of the disclosure under oath.

These precedents do not apply to this case for the factual reason that no advances were made by Chittenden Bank during the time between service of the trustee summons and completion of the disclosure under oath. In short, there was "nothing to attach" between the time of service and the time of disclosure. *Baldwin*, 88 Vt. at 213–14. Furthermore, the act of filing a complete disclosure discharges the trustee from responsibility, and the trustee cannot be held liable for subsequent transactions. *Island Pond Nat. Bank v. Chase*, 101 Vt. 60, 62–63 (1928). Thus, since Chittenden Bank's disclosure in this case accurately represented that it held "no funds" belonging to the defendant at the time of service, its liability did not extend beyond completion of the disclosure under oath.

Advance Magazine expresses legitimate frustration that Chittenden Bank resumed doing business with Anichini after completion of the disclosure under oath, and that other creditors were paid with proceeds from the line of credit even after it attempted to attach those proceeds. But the limitation of trustee process is that it requires disclosure and attachment only of goods, effects or credits belonging to the defendant that are held by the trustee at the time of service, or

that come into the trustee's hands before filing of the disclosure. 12 V.S.A. § 3013. It does not require the trustee to disclose other relationships with the defendant that do not meet the statutory definitions, or to cease its relationship with the defendant altogether.

Finally, Advance Magazine has neither pursued nor proven its claim that the promissory note was attachable as negotiable paper under 12 V.S.A. § 3014. For these reasons, the motion to adjudge Chittenden Bank as trustee is *denied*.

The only remaining matter in this case is the motion for attorneys' fees and costs filed by Chittenden Bank on November 13, 2008. V.R.C.P. 4.2(g); 12 V.S.A. § 3083. Chittenden Bank shall file an updated affidavit of requested costs and fees, along with any memoranda supporting the request, within fifteen days from the file-stamped date of issuance of this order. Advance Magazine shall file any response or objection within fifteen days thereafter. The court will decide the motion on the papers unless an evidentiary hearing appears absolutely necessary.

ORDER

Plaintiff's Motion to Adjudge Chittenden Bank as Trustee (MPR #3), filed October 9, 2008, is *denied*. Chittenden Bank shall file an updated affidavit of requested and costs and fees within fifteen days. Advance Magazine shall file any response or objection within fifteen days thereafter.

Dated at White River Junction, Vermont this ____ day of _____, 2009.

_____
Hon. Theresa S. DiMauro
Superior Court Judge

_____
Hon. Maurice Brown
Assistant Judge (as to facts)

_____
Hon. Prudence Pease
Assistant Judge (as to facts)