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Superpumper v. Leonard, 137 Nev. Adv. Op. 43 (Sept. 30, 2001)

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Superpumper v. Leonard, 137 Nev. Adv. Op. 43 (Sept. 30, 2001)¹

Bankruptcy Law: State District Court has Subject Matter Jurisdiction Over Fraudulent Conveyance Actions

Summary:

The Nevada Supreme Court considered whether state district court has proper subject matter jurisdiction over fraudulent conveyance actions, or if bankruptcy courts have exclusive jurisdiction over these matters. The court concluded that pursuant to *In re Gruntz* and *In re McCarthy*, state and federal bankruptcy courts share concurrent jurisdiction over fraudulent conveyance actions, therefore the district court had proper subject matter jurisdiction over this case.²

Facts and Procedural History:

In 2007, Morabito filed a lawsuit against the Herbsts, who filed a counterclaim. The court found for the Herbsts and awarded \$149.4 million in damages, but the parties later settled for \$85 million. Morabito, however, had already transferred most of his assets out of his name, and then defaulted on the settlement agreement. The transferees include: Superpumper, Inc.; Morabito's brother, Sam; Edward Bayuk, Trustee of the Bayuk Trust; and Snowshoe Petroleum, Inc. The Herbsts filed an involuntary Chapter 7 bankruptcy petition to initiate proceedings and the bankruptcy court adjudicated Morabito as a Chapter 7 debtor. The Herbsts filed a fraudulent transfer action, in state district court, against Morabito and the transferees of his assets under NRS Chapter 112.³ The transferees, collectively known as Superpumper, and the Herbsts stipulated to substitute Morabito's court appointed trustee, Leonard, for the Herbsts and to remove Morabito as a defendant.

During discovery, Superpumper received notice of the Trustee's intent to depose Morabito's and Superpumper's attorney, Dennis Vacco. In response, Superpumper filed a motion to challenge that deposition and protect its attorney-client communication under the common-interest privilege. The district court admitted the communications into trial, holding that the common-interest privilege did not apply. The state district court ultimately avoided all of Morabito's transfers to Superpumper and awarded the subject property or value thereof to Leonard (the Trustee). Superpumper appealed.

Discussion:

The district court had subject matter jurisdiction over the fraudulent conveyance action

Regarding the first argument (i.e., that the district court did not have subject matter jurisdiction), Superpumper cited *In re Gruntz* to support its assertion that the bankruptcy court has exclusive jurisdiction over "core proceedings" and fraudulent transfer proceedings are "core proceedings," thus the bankruptcy court has exclusive jurisdiction over the fraudulent

¹ By Tali Frey.

² *In re Gruntz*, 202 F.3d 1074; *In re McCarthy*, 230 B.R. 414.

³ NEV. REV. STAT. § 112 (2021).

conveyance action in this case.⁴ The court does not determine whether, as a proceeding that could only arise in the context of a bankruptcy proceeding, a fraudulent conveyance action constitutes a “core proceeding,”⁵ because, the court rejects Superpumper’s argument that “core proceedings” are within the exclusive jurisdiction of the bankruptcy court. The court notes that while Federal district courts “have original and exclusive jurisdiction of all cases under title 11,”⁶ the district courts also, “shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11”⁷ Additionally, the court highlights the permissive, not mandatory, nature of the bankruptcy court’s responsibility in determining core proceedings, by emphasizing that bankruptcy judges “may hear and determine . . . core proceedings arising under title 11.”⁸

The court then looks to *Gruntz* and the Supreme Court decision in *Executive Benefits Insurance Agency v. Arkison* to demonstrate that whether a proceeding is “core” is unrelated to whether a state court has jurisdiction over the issue.⁹ A matter that is “core” only determines whether a bankruptcy court may enter a final judgement and the appropriate standard of review for that judgement. The court expressly states that *Gruntz* did not overrule *In re McCarthy* which held that there is not exclusive federal jurisdiction over a “core proceeding.”¹⁰ The Superpumper court follows *McCarthy* and rules that state and federal courts share concurrent jurisdiction over fraudulent transfer actions.

Regarding the second argument, (i.e., the Trustee did not have standing), the court determines that under NRS 112.210(1)(a) and 11 U.S.C. §544, the Trustee has both an obligation and the authority to recover fraudulent conveyances for the bankruptcy estate. Therefore, the Trustee had standing to maintain the action.

Superpumper waived its in rem jurisdiction argument

Regarding the third argument, (i.e., the district court did not have in rem jurisdiction over the Bayuk Trust), Superpumper argued that the court lacked in rem jurisdiction over the Bayuk Trust because only Edward Bayuk was named in the transfer, and not the trust itself. The court found that in rem jurisdiction is analogous to personal jurisdiction. Pursuant to NRCP 12(h)(1)(B), a defense of lack of personal jurisdiction is waived unless is it asserted in a responsive pleading.¹¹ The court notes that this is distinguishable from a defense of lack of subject matter jurisdiction which may be raised at any time. Therefore, the court finds that Superpumper waived its argument of lack on in rem jurisdiction because it was not mentioned in the responsive pleading.

The district court did not abuse its discretion when it allowed attorney-client communications to be disclosed during discovery and admitted into evidence at trial

Regarding the fourth argument, (i.e., the district court erred in allowing attorney-client communications to be disclosed during discovery and admitted into evidence at trial),

⁴ *In re Gruntz*, 202 F.3d 1074, 1080-81 (9th Cir. 2000).

⁵ *Id.* at 1081.

⁶ 28 U.S.C. § 1334(a) (2005).

⁷ *Id.* at § 1334(b).

⁸ *Id.* at § 157(b)(1).

⁹ *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 33-34 (2014); *see Gruntz*, 202 F.3d at 1081.

¹⁰ *In re McCarthy*, 230 B.R. 414, 418 (B.A.P. 9th Cir. 1999).

¹¹ NEV. R. CIV. PROC. 12(h)(1)(B).

Superpumper argued that the district court erred in determining that the common-interest privilege did not apply to its communications. The court, however, found that because Superpumper did not specify which communications were privileged, Superpumper did not meet its burden of proving that the privilege was applicable. Additionally, on appeal, Superpumper did not indicate that there would have been a different result had the communications been prohibited. Therefore, the court rejects Superpumper's final argument that the district court erred in allowing the communications to be admitted into evidence at trial.

Conclusion:

First, the court concluded that state and federal bankruptcy courts share concurrent jurisdiction over fraudulent conveyance actions, therefore the district court had proper subject matter jurisdiction over this case. Second, the court found that the Trustee had standing to maintain the fraudulent conveyance action because Trustee's have the authority and obligation to recover fraudulent transfers for the bankruptcy estate. Third, the court held that in rem jurisdiction is analogous to personal jurisdiction and the defense to lack of either must be raised in a preanswer motion or responsive pleading. Superpumper failed to assert this defense at the proper time and thus waived its in rem jurisdiction argument. Finally, the court maintained that Superpumper failed to meet its burden of proving that the privilege was applicable to its attorney-client communications, or that it was prejudiced by their admission, so the district court did not err in admitting the communications into evidence. Judgement affirmed.