

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	
C.F. FOODS, L.P.,	:	
	:	
Debtor.	:	
	:	
	:	
	:	
ARTHUR P. LIEBERSOHN, TRUSTEE,	:	CIVIL ACTION
	:	
Appellant,	:	
	:	
v.	:	NO. 03-6361
	:	
EDWARD STILLMAN,	:	
DAVID BURRY, AND	:	
C.F. FOODS PENSION PLAN,	:	
	:	
Appellees.	:	
	:	

MEMORANDUM

Diamond, J.

September ___ 2004

The Bankruptcy Court has ordered the Trustee in this liquidation proceeding to terminate the Debtor’s Pension Plan and file its final tax returns. In this appeal, the Trustee argues that the Order is impermissible, that these fiduciary duties should be assumed by the Debtor’s former partners - - one of whom is in prison for looting the Debtor, and the other of whom the Trustee considers dishonest. More remarkable, the Trustee does not challenge the Bankruptcy Court’s factual determination that neither of the former partners was ever responsible for such administrative duties.

I affirm. The Bankruptcy Court’s Order is not only permissible, it is the only

practicable way to wind up the Plan's affairs.

I. Background and History

The Debtor, C.F. Foods, L.P., was a limited partnership in which David Burry was the General Partner, and Edward Stillman was the Limited Partner. In September 1999, Burry pleaded guilty to money laundering and mail and bank fraud charges in connection with his management of C.F. Foods. Burry is now incarcerated in federal prison.

On May 6, 1999, C.F. Foods's creditors filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code. On August 9, 1999, the Court appointed Arthur P. Liebersohn (Appellant here) to serve as Trustee. Just before the Chapter 7 filing, Stillman and Burry transferred some \$299,196.63 of partnership funds into the C.F. Foods Money Purchase and Profit Sharing Plans (the "C.F. Foods Pension Plan"). The Plan is qualified under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1301 - 1461, ("ERISA"). Included in the Plan's assets are retirement monies of approximately fifteen former C.F. Foods employees. (August 6, 2004 N.T. at 15-16.)

On June 29, 2001, Liebersohn filed a Complaint against Stillman, Burry, and the C.F. Foods Pension Plan, seeking to have the transfer declared fraudulent and recoverable under Bankruptcy Code §§ 544(b) and 548. On July 2, 2001, the Bankruptcy Court issued a Summons requiring Stillman, Burry, and the Plan to answer the Complaint by August 1, 2001. On July 25, 2001, Stillman indicated that he was not going to oppose the Complaint.

On October 29, 2001, Liebersohn filed a Motion for Default Judgment. Burry

(still incarcerated) filed a *pro se* Answer to the Complaint on November 5, 2001. On November 29, 2001, Stillman reiterated that he would consent to the entry of a Default Judgment against him. On November 30, 2001, Liebersohn filed a Certificate of No Objection as to Stillman and the C.F. Foods Pension Plan.

On December 3, 2001, the Bankruptcy Court held a hearing on the Default Motion, which only Liebersohn and his counsel attended. Pursuant to the Bankruptcy Court's direction, Liebersohn circulated a Proposed Order providing that the Court would enter judgment against Stillman "individually and as Plan Administrator." This is the first mention in the record of anyone serving as Administrator of the C.F. Foods Pension Plan. The record further reveals that neither Stillman nor Burry had ever served as "Plan Administrator." Rather, Stillman had served as "Plan Trustee." The parties' confusing of these two very different titles would subsequently complicate this litigation.

On January 14, 2002, the Court entered an Order granting relief in favor of Liebersohn and against Stillman, "individually as plan administrator," and against C.F. Foods Pension Plan "in the amount of the partnership monies transferred." (Certificate of Appeal at Ex. 16.) On December 31, 2001, Burry filed a belated Motion to Dismiss the Complaint. The Bankruptcy Court denied the Motion and scheduled a trial against Burry (the only remaining defendant). On September 26, 2002, after Burry failed to appeal at trial, the Court signed Liebersohn's Proposed Order, providing that "judgment is entered in favor of the Trustee and against Defendants, Edward Stillman and David Burry, individually and as Plan Administrators, and C.F. Foods Pension Plan in the amount of \$299,196.63" (Certificate of Appeal at Ex. 20.)

Approximately one month later, Burry submitted a letter request to the Court for

additional time to file a Notice of Appeal, or, in the alternative, for Reconsideration of the September 26th Order under Rule 60 of the Federal Rules Civil Procedure. The Court ordered the parties to attend a hearing to determine whether the adversary proceeding should be reopened to consider Burry's motion.

On December 20, 2002, Liebersohn took the opportunity to correct his own mistake in the Proposed Order, and filed a Correction Motion, also pursuant to Rule 60, asking the Bankruptcy Court to amend its September 26th Order to name the funds holding Pension Plan investments. The Bankruptcy Court set a February 3, 2003 hearing to consider both motions.

Up through this point, the record reveals that Stillman agreed that Liebersohn should recover the fraudulent transfers. Apparently, Stillman's sole concern was whether the Bankruptcy Court's judgment might expose his personal assets to attachment. Accordingly, Stillman urged that judgment be entered against him not in his individual capacity, but - - as initially suggested by Liebersohn in his Proposed Order - - in Stillman's capacity as Plan Administrator. Shortly after the Court entered its September 26th Order - - against Stillman and Burry as Plan Administrators - - Stillman's counsel sought to learn who would wrap up the Plan's affairs. (February 10 and 24, 2003 Trial Exhibits at Ex. F.) Liebersohn concedes that this is the first mention of these duties in the record. (August 6, 2004 N.T. at 4-6.) Liebersohn responded that as "Plan Administrator," Stillman had this responsibility. It was only then that Stillman checked the Debtor's records and determined that he had served as Plan Trustee; neither he nor Burry had ever served as Plan Administrator. The records further confirmed to Stillman that C.F. Foods itself had administered the Plan.

On January 31, 2003, when Stillman filed his Response to Liebersohn's Correction Motion, he also attempted to correct the September 26, 2002 Order. Stillman averred that he was not the Plan Administrator, and asked the Bankruptcy Court to amend the Order to provide that: (1) the Debtor, C. F. Foods, L.P., was the Plan Administrator; (2) Liebersohn was required to prepare tax returns for 1999 through 2001 for the Pension Plan; and (3) Liebersohn was required to terminate the Pension Plan and "collect all monies attributable to contribution to the [Pension Plan] on behalf of Edward Stillman or David Burry and distribute all other funds from the [Pension Plan] to the respective participants with the required notification by ERISA concerning their rights and responsibilities with regard to the [Pension Plan] distributions." (Certificate of Appeal at Ex. 22.)

At the February 3, 2003 hearing, the Bankruptcy Court denied Burry's motion, and on February 10, 2003, the Bankruptcy Court granted the changes proposed by Liebersohn in his Correction Motion. In keeping with the Motions filed by Burry and Liebersohn, the Bankruptcy Court treated Stillman's Response to Liebersohn Correction Motion as a Rule 60(b) request for reconsideration, and scheduled a hearing for February 24, 2003.

Stillman testified at the hearing, denying that he had ever served as Plan Administrator. (Certificate of Appeal at Ex. 27.) Stillman introduced into evidence C.F. Foods's December 31, 1999 Annual Report, and resolutions by the C.F. Foods Board of Directors. In all these documents, C.F. Foods is named as the Plan Administrator; Edward Stillman is named as Plan Trustee. See In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 6 (unpublished memorandum opinion filed October 17, 2003).

Liebersohn offered no testimony, but introduced an unsigned 1998 tax form listing Stillman and Burry as Plan Administrators. See id.

On March 12, 2003, Liebersohn filed a Memorandum of Law asking the Bankruptcy Court to: (1) confirm that Stillman was Plan Administrator, and (2) order Stillman to wrap up the Plan's affairs. On March 18, 2003, Stillman submitted a Supplemental Brief in which he asked for relief from the September 26th Order pursuant to Rule 60(b). Although Liebersohn now argues that this invocation of Rule 60(b) came too late, (Appellant's Brief at 20-21), he conceded at oral argument that he raised no such objection before the Bankruptcy Court. (August 6, 2004 N.T. at 5-6.)

In its October 17th decision, the Bankruptcy Court ruled that Stillman was entitled to relief from the September 26th Order under Rule 60(b)(1). The Bankruptcy Court, finding Stillman's evidence "more convincing" than that submitted by Liebersohn, found as a fact that C.F. Foods, and not Stillman or Burry, was the Plan Administrator. In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 7. Ruling that Liebersohn stood in the shoes of C.F. Foods, the Court ordered Liebersohn to undertake the duties of Plan Administrator and to file tax returns to terminate the Plan.

In his appeal to this Court, Liebersohn initially raised three issues, including a challenge to the Bankruptcy Court's factual finding that C.F. Foods (and not Stillman or Bury) was Plan Administrator. (Appellant's Brief at 2.) At oral argument, however, Liebersohn withdrew that challenge, conceding that this finding was supported by substantial evidence. (August 6, 2004 N.T. at 8-9.) As he explained at oral argument, Liebersohn contends here primarily that the Bankruptcy Court erred in ruling that Stillman was entitled to Rule 60(b) relief for "excusable neglect." (August 6, 2004 N.T.

at 2, 10.) Secondly, Liebersohn argues that the Bankruptcy Court erred in ruling that the Trustee was legally authorized to wrap up the Plan. (August 6, 2004 N.T. at 11-13.)

Accordingly, I address only those two contentions.

II. Discussion

A. Whether Rule 60(b)(1) Relief under the Excusable Neglect Standard Was Proper.

I am obligated to review the Bankruptcy Court's Rule 60(b) determination under an abuse of discretion standard. See Pelullo v. Edwards & Angell, No. 99-2053, U.S. Dist. LEXIS 16711 at * 7 (E.D.Pa. October 29, 1999); see also North River Insurance Co. v. Cygnet Reinsurance Co., 52 F.3d 1194, 1203 (3d Cir. 1995); Lorenzo v. Griffith, 12 F.3d 23, 26 (3d Cir. 1993); Marta Group, Inc. v. County Appliance Co., Inc., 79 B.R. 200, 205 (E.D.Pa. 1987).

The Bankruptcy Court found that Stillman agreed to allow a default judgment to be taken against him so that Liebersohn could recover the fraudulent transfers. The Court found that Stillman - - who apparently had confused his role as "Plan Trustee" with that of "Plan Administrator" - - "mistakenly assumed that allowing judgment against him as the plan administrator" would limit Liebersohn's recovery to the Pension Plan funds. In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 7. The Bankruptcy Court correctly observed that until this point, no party even suggested that this description of Stillman as Plan Administrator might require him to perform any additional duties. In his Complaint, Liebersohn sought only to recover the fraudulent transfers; no mention was made of terminating of the Plan. See In re C.F. Foods, L.P., Bankruptcy No. 99-15996

KJC at 4.

The Bankruptcy Court considered Stillman's claim for Rule 60(b)(1) relief under the standard set out in Pioneer Investment Services, Inc. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 113 S.Ct 1489, 123 L.Ed. 2d 74 (1993), and Scott v. United States Environmental Protection Agency, 185 F.R.D. 202, 206 (E.D. Pa. 1999) (applying the Pioneer analysis to Rule 60(b)):

The *Pioneer* Court held that the determination of what constitutes excusable neglect is "at bottom an equitable one," and thus the Court must "tak[e] account of all relevant circumstances surrounding the party's [act or] omission....In the context of a motion under Rule 60(b)(1), these circumstances include (1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay, including whether it was in reasonable control of the movant, and (4) whether the movant acted in good faith.

In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 4-5 (citing Scott, 185 F.R.D. at 206).

Applying these criteria, the Bankruptcy Court concluded that Stillman was entitled to relief from the September 26th Order:

The Trustee has not alleged any specific prejudice arising from the timing of Stillman's request. In fact, it comes as a response to the Trustee's own motion to amend the same order. Further, it does not impact the finality of this adversary proceeding because it does not affect the Trustee's ability to obtain the transferred funds. Although Stillman should have determined the legal ramifications of allowing judgment against him as the "plan administrator" sooner, he proceeded in good faith to raise these issues, including his position that the Trustee is responsible for administering the Pension Plans, with the Trustee over the course of this proceeding . . . Based on the *Pioneer* guidelines for excusable neglect, I find that Stillman is entitled to seek relief from the Trial Order under Rule 60(b).

In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 5.

I cannot conclude that the Bankruptcy Court abused its discretion in making these determinations. See Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp. Prides Litig.), 234 F.3d 166, 170 (3d Cir., 2000)(citing Oddi v. Ford Motor Co., 234 F.3d 136 (3d Cir. 2000)).

Liebersohn argues that Stillman acted in “bad faith”; that his decision to allow a default judgment to be taken against him was a “strategy.” (Appellant’s Brief at 25.) The Bankruptcy Court found that Stillman, acting in good faith, made a mistake. Stillman agreed to entry of judgment against him in his capacity as “Plan Administrator” because he sought to avoid a judgment against himself personally. As soon as questions concerning the Plan’s termination arose, however, Stillman checked the Debtor’s records, and realized that he had made a mistake - - apparently confusing “Plan Administrator” and “Plan Trustee” - - and promptly sought relief from the Court. Because these findings of fact are supported by substantial evidence, I may not disturb them.

More troubling is the result Liebersohn appears to seek in this appeal. Again, Liebersohn’s primary challenge here is to the Bankruptcy Court’s Rule 60(b) determination. At oral argument, Liebersohn underscored his belief that “Mr. Stillman’s [Rule 60(b)] request should not have been considered by the [Bankruptcy Court] in the first place.” (August 6, 2004 N.T. 10.) Thus, were Liebersohn successful here, it would leave in place that Bankruptcy Court’s September 26, 2002 Order that Stillman and Burry were the Plan Administrators. Yet, Liebersohn does not challenge the Bankruptcy Court’s determination that C.F. Foods, itself - - and *not* Stillman or Burry - - was the Administrator. Thus, Liebersohn effectively concedes that the original September 26th Order was factually incorrect. Liebersohn nonetheless asks me, on procedural grounds,

to nullify an Order he knows to be correct, and let stand an Order he knows is factually incorrect.

More remarkable, Liebersohn emphasized at oral argument his belief that Stillman is a wrongdoer in these liquidations proceedings.

The Court: You want [Stillman] to be the Plan Administrator and you view him as a wrongdoer? I'm just trying to get it clear here, that's what you just said, right?

Counsel: That's correct, your Honor.

(August 6, 2004 N.T. at 11.) Thus, the Trustee asks me to reinstate an Order he knows is factually wrong, and let stand an Order that would entrust fiduciary obligations to a convicted felon and a wrongdoer. I believe that such a result would contravene the aims of the Bankruptcy Code itself. See In re Sturm, 121 B.R. 443, 448 (Bankr. E.D. Pa. 1990) (stating that a trustee has a duty of reasonable diligence towards the discharge of his or her statutory duties and fair dealings in winding up the debtor's affairs); see also LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 196 F.3d 1, 6 (1st Cir. 1999) (stating that a "Chapter 7 trustee [has a duty] to . . . close [the bankruptcy] estate as expeditiously as is compatible with the best interests of parties in interest."); Burtch v. Ganz (In re Mushroom Transp. Co.), 282 B.R. 805, 818 (E.D. Pa. 2002).

In these circumstances, I cannot overrule the Bankruptcy Court's factual determinations, nor can I say the Bankruptcy Court abused its discretion in allowing Stillman relief under Rule 60(b).

B. Whether Liebersohn is the Legal Successor to the Duties for the C.F. Foods Pension Plan.

Having found as fact that the Debtor itself, C.F. Foods, (and not Burry or Stillman) was the Plan Administrator, the Bankruptcy Court next considered who would assume those fiduciary duties and terminate the Plan. The Bankruptcy Court concluded that Liebersohn was “legal successor to the position of plan administrator in a Chapter 7 bankruptcy.” In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 9. I must review this interpretation of law *de novo*. See In re Trans World Airlines, Inc., 145 F.3d 124, 131 (3d Cir. 1998).

Liebersohn argues that his authority extends only to property that is part of the bankruptcy estate, and that this does not include ERISA-qualified pension plans. See 11 U.S.C. § 541(c)(2). Thus, Liebersohn concludes that he may not terminate the Plan. Instead, Liebersohn argues that these duties should be entrusted to the Pension Benefit Guarantee Corporation (“PBGC”). (Appellant’s Brief at 23.)

The Fifth Circuit has addressed this question, which arises from the intersection of ERISA and the Bankruptcy Code. See Pension Benefit Guar. Corp. v. Pritchard (In re Esco Mfg.) (“Esco I”), 33 F.3d 509, 511 (5th Cir. 1995), opinion withdrawn and superceded on rehearing by Pension Benefit Guar. Corp. v. Pritchard (In re Esco Mfg.) (“Esco II”), 50 F.3d 315 (5th Cir. 1995). The Esco I Court ruled that in adopting ERISA and related statutes, Congress intended to create retirement vehicles that would survive an employer’s liquidation or reorganization. Accordingly, the Fifth Circuit held that ERISA authorizes a Chapter 7 trustee to terminate a debtor’s pension plan, and that this does not exceed the authority conferred on the trustee by the Bankruptcy Code:

ERISA speaks to the specific subject of pension plans and tells trustees and employers that termination of a plan at the onset of bankruptcy is essential to the PBGC’s accomplishment of its obligations.

Esco I, 33 F.3d at 512; see also Center Hospital, 200 B.R. at 595 (same holding for a Chapter 11 trustee).

The Fifth Circuit also found persuasive the enactment of the Single Employer Pension Plan Amendment Act of 1986, P.L. 99-272, 100 Stat 237 (1986) (“SEPPAA”):

In passing [SEPPAA], Congress sought to ensure that the commencement of Chapter 7 proceedings would not wipe out the debtor’s pension obligations....Congress made clear its intention that a pension plan may not be deserted by an employer except through certain defined procedures, even if that employer has filed for the protection of federal bankruptcy law.

In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 10 (citing Esco I, 33 F.3d at 512-13). The Fifth Circuit held that in thus ensuring that a debtor’s pension plan survives a Chapter 7 filing, ERISA and SEPPAA necessarily confer on the Chapter 7 trustee the authority to terminate the plan. Id. at 513.

The Esco I Court noted that its ruling was consistent with decisions that statutory obligations binding the debtor will subsequently bind the bankruptcy trustee. Esco I, 33 F.3d at 513 (citing Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154-62 (3d Cir. 1989) (the bankruptcy trustee must comply with an obligation under the Federal Arbitration Act to arbitrate because the trustee “stands in the shoes of the debtor for purposes of the arbitration clause.”)); see also New Center, 200 B.R. at 593 (“statutory obligations that bind the debtor will subsequently bind the bankruptcy trustee”); In re C.F. Foods, L.P., Bankruptcy No. 99-15996 KJC at 10.

The Bankruptcy Court correctly determined that these decisions strongly support the conclusion that although pension plan assets are not normally considered a part of the

bankruptcy estate under the Bankruptcy Code, a Chapter 7 trustee may properly be required to terminate a debtor's ERISA-qualified Plan. See Esco I, 33 F.3d at 511; see also In re Center Hospital, 200 B.R. 592 (E.D. Mich. 1996) (the trustee was the legal successor to the employer's pre-bankruptcy position of plan administrator in a Chapter 11 bankruptcy); In re Carolina Premier Medical Group, P.A., No. 00-82322C-7D, 2003 WL 1751257 at *2 (Bankr.M.D.N.C. March 31, 2003) (a Chapter 7 trustee assumes the responsibilities and obligations of plan administration).

In both his brief and at oral argument, Liebersohn contends that because the Esco I decision was withdrawn, it has no precedential value. (Appellant's Brief at 29; August 6, 2004 N.T at 12.) Like the Bankruptcy Court, however, I believe that the Fifth Circuit's reasoning remains persuasive. See In re Okura & Co. (America), Inc., 249 B.R. 596, 611 n.10 (Bankr. S.D.N.Y. 2000). First, the Esco Court's reconciliation of the various statutory imperatives is consistent with the Third Circuit's approach in analogous cases. See Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (reconciling the Bankruptcy Code with the Federal Arbitration Act). Moreover, the Fifth Circuit withdrew Esco I for reasons having nothing to do with the Court's holding that a Chapter 7 trustee stands in the shoes of the plan administrator.

As significant, in Esco I, the PBGC repudiated the argument - - identical to that made here by Liebersohn - - that the law required the Court to appoint the PBGC as plan administrator to terminate the debtor's pension plan. Esco I, 33 F.3d at 511-12. Indeed, the PBGC argued that only the Chapter 7 trustee knew the debtor's affairs sufficiently to perform the termination duties and advise the PBGC so that it could, in turn, carry out its "insurance responsibilities." Id. at 512.

In these circumstances, it is apparent that the Bankruptcy Court correctly

determined that Liebersohn has the authority to terminate the C.F. Foods Pension Plan. Such authority neither “exceed(s) his job description as trustee [n]or infringe[s] on his primary obligation to the bankruptcy estate and its creditors.” See Esco I, 33 F.3d at 511.

Accordingly, I conclude that the Bankruptcy Court properly ordered Liebersohn to wrap up the C.F. Foods Pension Plan.

An order consistent with this Memorandum follows.

BY THE COURT:

Date

Paul S. Diamond, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	
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Appellant	:	
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v.	:	NO. 03-6361
	:	
EDWARD STILLMAN,	:	
DAVID BURRY,	:	
AND C.F. FOODS PENSION PLAN,	:	
	:	
Appellees	:	
	:	

ORDER

AND NOW, this _____ day of September 2004, for the reasons given in the accompanying Memorandum Opinion, it is ORDERED that the decision of the Bankruptcy Court is AFFIRMED and the appeal DENIED.

BY THE COURT

Date

Paul S. Diamond, J.