

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

EDWARD G. MURPHY, INC. PROFIT : CIVIL ACTION  
SHARING PLAN - EDWARD G.  
MURPHY, 111, TRUSTEE et al,  
Appellants  
:  
:  
v. :  
:  
SELHEIMER & CO. et al, NO. 02-6847  
Appellees

MEMORANDUM AND ORDER

McLaughlin, J.

February 23, 2003

Edward G. Murphy, Inc. Profit Sharing Plan ("Profit Sharing Plan"), Edward G. Murphy, Inc. Money Purchase Pension Plan ("Money Purchase Pension Plan"), and Edward G. Murphy, 111, appealed the Bankruptcy Court Orders of April 4, 2002, and June 13, 2002, which denied their customer claims in bankruptcy proceedings involving the debtor, Selheimer & Co. ("Selheimer"). The Court will affirm the Bankruptcy Court Orders.

Many of the basic facts are not in dispute. Selheimer was a securities broker-dealer company from 1967 to 1994. Selheimer was a member of the Securities Investor Protection Corporation ("SIPC"). Selheimer closed its business on December 7, 1994, because the Securities and Exchange Commission was

investigating the company's practices. Prior to December 7, 1994, Selheimer held all of the securities claimed by the appellants.' After December 7, 1994, Selheimer held none of the securities claimed by the appellants.

On September 8, 1997, the SIPC provided notice that a direct payment procedure had started with respect to Selheimer. In February 1998, the appellants filed statements of customer claims with the SIPC for various securities that had been held by Selheimer.

The appellants argue that the SIPC should pay their claims because they were "customers" of Selheimer. Under the Securities Investor Protection Act, "customers" of a debtor include "any person . . . who has a claim on account of securities received, acquired, or held by the debtor in the ordinary course of its business as a broker or dealer." 15 U.S.C. § 78111(2). A person is not a customer "to the extent that such person has a claim for cash or securities which by contract, agreement, or understanding, or by operation of law, is part of the capital of the debtor." 15 U.S.C. § 78111(2)(B).

Even if a person is a "customer," his claims are not to be paid by the SIPC if the customer is: (1) a general partner,

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<sup>1</sup> Mr. Murphy is the sole beneficiary for the Profit Sharing Plan and the Money Purchase Pension Plan.

officer, or director of the debtor; (2) a beneficial owner of 5% or more of any class of equity security of the debtor; (3) a limited partner with a participation of 5% or more in the net assets or net profits of the debtor; or (4) a person who exercised or had the power to exercise a controlling influence over the management or policies of the debtor. 15 U.S.C. § 78fff-3(a)(4).

On April 4, 2000, the SIPC denied the appellants' customer claims, and an appeal was taken to the Bankruptcy Court of the Eastern District of Pennsylvania.

The Bankruptcy Court denied the appellants' claims in its order dated April 4, 2002. The Bankruptcy Court held that Murphy was not a customer because his securities were part of Selheimer's capital. Even if Mr. Murphy were a customer, the Bankruptcy Court determined that his claims were not payable because Mr. Murphy was a general partner of Selheimer, a limited partner of Selheimer whose capital account comprised a significant portion of Selheimer's aggregate capital, and a controlling person of Selheimer. The Bankruptcy Court also held that the claims of the Profit Sharing Plan and the Money Purchase Pension Plan could not be paid because Mr. Murphy was the plans' sole beneficiary, and he was an ineligible customer.

On June 13, 2002, the Bankruptcy Court denied the appellants' motion for reconsideration, to amend and/or make additional findings, and to alter and/or amend its judgment. On August 21, 2002, an appeal was taken to this Court.

Challenged in this appeal are the Bankruptcy Court's findings that: (1) Mr. Murphy was not a customer because his securities were part of Selheimer's capital; (2) Selheimer was a general partnership; (3) Mr. Murphy was a partner of Selheimer; (4) Mr. Murphy received IRS Schedule K-1s from Selheimer; (5) Mr. Murphy was a controlling person of Selheimer; and (6) the claims of the Profit Sharing Plan and the Money Purchase Pension Plan could not be paid because Mr. Murphy was the sole beneficiary of the plans. The appellants also ask to have the Bankruptcy Court's judgments set aside arguing that the judgments are without substantial evidentiary support, are against the clear weight of the evidence, and are otherwise based on an erroneous view of the law.

A district court reviews a bankruptcy court's factual findings under a clearly erroneous standard. A bankruptcy court's factual findings are not clearly erroneous unless the findings are completely devoid of minimum evidentiary support displaying some hue of credibility or bear no rational relationship to the supportive evidentiary data. A district

court's review of a bankruptcy court's legal determinations is plenary. Kool, Mann, Coffee & Co. v. Coffey, 300 F.3d 340, 353; see Bankruptcy Rule 8013.

In determining that the securities that Mr. Murphy provided to Selheimer were part of Selheimer's capital, the Bankruptcy Court relied on the following evidence: (1) Selheimer was established as a partnership; (2) in 1975, Mr. Murphy signed a document entitled "Amendment to Partnership Agreement" that stated he would become a limited partner; (3) in 1981, Mr. Murphy wanted to perform trades himself and he was told that he needed to give securities to Selheimer to protect it in the event Mr. Murphy failed to honor his trades; (4) the letters written by Mr. Murphy giving Selheimer the securities instructed the company to place the securities in Mr. Murphy's "capital account;" (5) ledger sheets prepared by Selheimer listed Mr. Murphy's securities as part of a capital account; (6) Perry Selheimer, a partner at Selheimer, testified that Selheimer sent Mr. Murphy IRS Schedule K-1s from 1981 to 1990; (7) the IRS Schedule K-1s reflected a balance in Mr. Murphy's capital account and the percentage of the partnership's capitalization that this balance represented; and (8) Mr. Murphy never received a customer account number or periodic customer statements and never questioned Selheimer about this.

There was some evidence to support a finding that the securities were not part of Selheimer's capital. Mr. Murphy testified that he gave the securities to Selheimer for safekeeping and for his capital account. Mr. Murphy also testified that he never received the IRS Schedule K-1s. Mr. Murphy met with Perry Selheimer periodically to review his account. Additionally, handwritten lists entitled "E.G. Murphy Capital Bonds or Capital Securities" prepared by Selheimer included over a million dollars of the securities of Mr. Murphy's mother, and those securities were not treated by Selheimer as part of its capital. Finally, Mr. Murphy did not receive profits from the securities held by Selheimer.

The Bankruptcy Court thoroughly considered the evidence relevant to the determination of whether Murphy's securities were part of Selheimer's capital, weighed the credibility of the witnesses, and examined the documents relating to Selheimer's possession of the securities. See Bankruptcy Court Opinion dated April 4, 2002, at 15-17. Although there was evidence that the securities were not part of Selheimer's capital, the Bankruptcy Court properly determined what weight to give this evidence. The Bankruptcy Court also acted appropriately when it decided what weight to give to documents created by Selheimer and the testimony of Perry Selheimer. The Court finds no clear error in

the fact-finding of the Bankruptcy Court on whether Mr. Murphy's securities were part of Selheimer's capital. The Bankruptcy Court, therefore, properly held, as a legal matter, that Mr. Murphy was not a customer of Selheimer because his securities were part of Selheimer's capital.

The claims of the Profit Sharing Plan and the Money Purchase Plan were denied because Mr. Murphy, an ineligible customer, was the sole beneficiary of the plans. To support the proposition that the plans' claims could not be paid, the Bankruptcy Court and the appellees cite In re Weis Securities, Inc., No. 73-2332, 1975 U.S. Dist. LEXIS 13146, at \*9-\*10 (Bankr. S.D.N.Y. 1975). In that case, the beneficiary of a trust was ineligible to be paid as a customer because he was an officer of the debtor. The Weis Securities Court denied the trust's claims because the law's purpose of protecting the innocent and unsophisticated investor was frustrated if a trust's claims were paid when the trust's beneficiary was an ineligible customer.

The appellants do not cite, and the Court is unaware of, any authority that would allow the claims of the plans to be paid when the plans' sole beneficiary is an ineligible customer. The appellants have not provided the Court with any reasons why the analysis in Weis Securities is incorrect or inapplicable in this case. The Court concludes that the analysis of Weis

Securities is persuasive. Applying Weis Securities in the present case, the claims of the Profit Sharing Plan and the Money Purchase Pension Plan cannot be paid when the sole beneficiary of the plans, Mr. Murphy, is an ineligible customer. The Bankruptcy Court properly decided this legal issue.

Given that Mr. Murphy's claims cannot be paid because he is not a customer, and the plans' claims cannot be paid because Mr. Murphy, an ineligible customer, is the sole beneficiary of the plans, the Court does not reach the other issues raised by the appellants.

An appropriate order follows.

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

EDWARD G. MURPHY, INC. PROFIT : CIVIL ACTION  
SHARING PLAN - EDWARD G.  
MURPHY, III, TRUSTEE et al,  
Appellants

v.

SELHEIMER & CO. et al,  
Appellees

NO. 02-6847

ORDER

AND NOW, this 23<sup>rd</sup> day of February, 2003, upon consideration of the appeal by Edward G. Murphy, Inc. Profit Sharing Plan , Edward G. Murphy, Inc. Money Purchase Pension Plan, and Edward G. Murphy, III, of the Bankruptcy Court's Orders of April 4, 2002, and June 13, 2002 (Docket No. 1), the briefs of the appellants and appellees, and following oral argument, IT IS HEREBY ORDERED that the Bankruptcy Court's Orders are AFFIRMED for the reasons set forth in a memorandum of today's date.

BY THE COURT:

  
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MARY A. MCLAUGHLIN J.