

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

WORLD FUEL SERVICES
CORPORATION,

Plaintiff,

v.

DONALD F. MOOREHEAD, JR.,

Defendant.

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Miscellaneous No. 3:01-MC-082-L



ORDER

Before the court are Findings and Recommendation of the United States Magistrate Judge (“Report”), filed February 27, 2002; Plaintiff’s Objections to Magistrate’s Report, filed March 12, 2002; and Defendant’s Objections to Magistrate Judge Kaplan’s Findings and Recommendation as to Turnover Relief, filed March 13, 2002. After making an independent review of Plaintiff’s amended application for turnover order, application for charging order, briefs in support thereof, Defendant’s response, the record evidence and applicable law, the court concludes that the findings and conclusions of the magistrate judge are correct.

Defendant Donald F. Moorehead, Jr. (“Defendant”) makes a number of objections to the magistrate judge’s Report. His first four objections are interrelated and question Plaintiff’s entitlement to turnover relief. Defendant’s fifth and sixth objections question the propriety of appointing a receiver in this case. Plaintiff’s sole objection is that the Report does not include a finding or recommendation with respect to the receiver’s authority to vote shares in Defendant’s nonexempt assets and property interests. The court addresses these objections in turn.

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Defendant contends that the magistrate judge erred in finding that Plaintiff is entitled to relief under the Texas Turnover Statute because Plaintiff has not satisfied the requirements necessary for relief. In particular, Defendant contends that Plaintiff has failed to show (1) that the pledged assets identified in the magistrate judge's Report are in his (Defendant's) possession or control, and (2) that the assets cannot be readily attached or levied on by ordinary legal process. The court disagrees.

The Texas Turnover Statute is a procedural device by which judgment creditors may reach assets of a debtor that are otherwise difficult to attach or levy on by ordinary legal process. Tex. Civ. Prac & Rem. Code Ann. § 31.002(a) (Vernon 1997 & Supp. 2002); *Beaumont Bank N.A. v. Buller*, 806 S.W.2d 223, 224 (Tex. 1991). To be entitled to relief under the statute, a judgment creditor need only show that the judgment debtor owns nonexempt property that is not readily subject to ordinary execution. *See Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738, 740 (Tex. 1991); *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex. App.—Dallas 1992, no writ); *Bergman v. Bergman*, 828 S.W.2d 555, 557 (Tex. App.—El Paso 1992, no writ); *Finotti v. Old Harbor Co.*, 1999 WL 1034607, at *1 (Tex. App. Dallas Nov. 16, 1999, no pet.)(unpublished opinion). Plaintiff has satisfied these requirements.

The items of property that are the subject of Defendant's objections include assets in which Defendant has pledged or assigned to third parties.¹ That Defendant owns or has ownership interest in these assets is not in dispute. It is also undisputed that none of the assets identified in the Report

¹These assets, which are specifically enumerated on pages 4 and 5 of the Report, include corporate stock, debentures, a brokerage account, partnership and membership interest in various entities, bonds, and accounts receivables.

is exempt from attachment, execution, or seizure for satisfaction of liabilities. Therefore, the only question is whether these assets can be readily attached or levied on by ordinary legal process.

The turnover statute does not provide guidance for determining whether property may be readily attached or levied on by regular ordinary legal process; however, the legislative history and case law indicates that the statute was created to reach the type of property at issue in this case. According to Texas House and Senate Committee Reports, the statute was enacted to provide judgment creditors with a remedy to reach a judgment debtor's nonexempt property in cases where traditional methods had proved to be inadequate, including: where the debtor has property outside the state of Texas; where the debtor owns interests in intangible property, such as contract rights receivable, accounts receivable, commissions receivable, and future rights to payments; and where the debtor owns interests in other property that could be easily hidden from a levying officer, such as negotiable instruments, corporate stocks, and corporate securities. *See Davis v. Raborn*, 754 S.W.2d 481, 483 (Tex. App. —Houston [1st Dist.], no writ)(citing Hittner, *Texas Post-Judgment Turnover and Receivership Statutes*, 45 Tex. B.J. 417 (1982)). Texas courts, moreover, have applied the turnover statute to reach a wide variety of property, including, corporate stock in the hands of third parties and held out of state, *D.A. Childre v. Great Southwest Life Ins. Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ); shares of stock and accounts receivable, *Arndt v. National Supply Co.*, 650 S.W.2d 547, 549 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.); and promissory notes, *Matrix, Inc. v. Provident Am. Ins. Co.*, 658 S.W.2d 665, 668 (Tex. App.—Dallas 1983, no writ).

Defendant, however, contends that it is not the nature of the particular asset that necessarily renders it “not readily capable of attachment or levy,” but, rather, it is the judgment debtor's efforts

to conceal his ownership of the assets that ultimately justifies a court-ordered turnover. Defendant contends that he has fully cooperated with Plaintiff's postjudgment discovery efforts, including producing all of the pertinent documents in his possession and control. Defendant further asserts that he has not tried to conceal the existence or location of his assets, and has paid \$700,000 toward the judgment. That Defendant has willingly revealed the location of his encumbered assets, many of which are out of state, does not make those assets readily attachable or leviable. As previously noted, the assets at issue in this case, namely, corporate stock, debentures, a brokerage account, partnership and membership interest in various entities, bonds, and accounts receivables, are the types of property and property interests the Texas legislature contemplated the statute would reach. The ability of Plaintiff to reach this property through traditional methods is even more difficult since Defendant's interest in these assets has been pledged to various third parties.

That these assets cannot be readily attached is also established by the evidence. The record demonstrates that after postjudgment discovery, Plaintiff attempted to collect the judgment through a writ of execution; however, the writ was returned *nulla bona*. Defendant's argument that Plaintiff must show that other procedures would be "inadequate" is unavailing, as he cites no authority for the proposition. The evidence further establishes that in the six-month period after the entry of judgment, Defendant liquidated, transferred, and encumbered assets, and that, although he reported a net worth of more than \$34 million at the time of judgment, his financial condition has since dramatically deteriorated. The court therefore agrees with the magistrate judge that, notwithstanding Defendant's gestures of cooperation and full disclosure, the evidence establishes that Plaintiff cannot collect the judgment by traditional legal process. Plaintiff is therefore entitled to relief under the Texas Turnover Statute.

Defendant argues that even if Plaintiff establishes that it is entitled to relief, the pledged assets are not subject to turnover. Defendant explains that he relinquished physical possession of the original certificates, promissory notes and debentures to third party creditors, and that the pertinent pledge and security agreements expressly prohibit him from selling, assigning, transferring, encumbering or otherwise disposing of any of the pledged assets without the secured party's consent. Defendant therefore concludes that because the pledged assets are not in his possession or control, they cannot be subject to turnover relief. Defendant's argument is unfounded.

Once a judgment creditor has shown that it is entitled to turnover relief, the court may order the judgment debtor to turn over nonexempt property for execution, apply the property to the satisfaction of the judgment, or appoint a receiver. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(1)-(3). When nonexempt assets are in the possession of a third party, as in this case, the court may reach those assets if they are *owned* by and *subject to* the judgment debtor's possession or control. *See Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 239 (5th Cir. 1997)(citing *Norsul Oil & Mining Ltd. v. Commercial Equip. Leasing, Co.*, 703 S.W.2d 345, 349 (Tex. App.—San Antonio 1985, no writ)). The turnover statute does not require, as Defendant suggests, that nonexempt property be “in” control of the judgment debtor — only “subject to” the debtor's control. *See* § 31.002(b). That Defendant's ability to dispose of the pledged assets is limited by a third party's security interest in it does not necessarily mean that the assets are no longer subject to Defendant's control. The record establishes that, although his interest is encumbered by pledge and security agreements, Defendant continues to own or have an ownership interest in the pledged assets. *See* Tr. at 7-9; Report at 7. Defendant also admits that he retains voting rights attributable to the corporate stock, Tr. at 77; Report at 7, and that the pledge and security agreements only prohibit him

from disposing of the pledged assets without permission from the respective banks. *Id.* In *Resolution Trust Corp. v. Smith*, the Fifth Circuit found no error in the district court's reliance on the same type of evidence in concluding that the judgment debtors retained control of corporate stock in the hands of a third party.² 53 F.3d at 78. Based on the evidence before it, the court concludes that Defendant's interest in the pledged stock remains subject to his control.

Insofar as Defendant's interest in the remaining pledged assets, specifically, the brokerage account with Founders Equity Group; the 12 % EarthCare Debenture (\$7.5 million loan to EarthCare); the 8% Subordinated Note No. 4 from Founders Equity Group, Inc.; the 8% Subordinated Note No. 6 from Founders Equity Group, Inc.; and a limited partnership interest in Sagemark Capital, L.P.; 35% limited partnership interest in V.I. Disposal Corporation; 49% limited partnership interest in Moorehead Property Company, Ltd.; membership interest in Founders Cash Management V, LLC.; and receivables from Eagle Point Golf Club, Inc. in the amount of \$600,000, from Felipe Gonzales in the amount of \$176,000, and from SWV, the court concludes turnover relief is proper to the extent of Defendant's interest in these assets. The record establishes that

²Defendant contends that *Resolution Trust Corp.*, however, is distinguishable because of the "apparently fraudulent nature of the stock transfer described in that case." The court disagrees. In *Resolution Trust Corp.*, the Fifth Circuit determined that the Texas Turnover Statute was the proper vehicle to reach the judgment debtors' interest in stock that had been pledged to their attorney under a pledge agreement that permitted them to retain ownership of the stock. In reaching this conclusion, the Fifth Circuit relied on evidence showing that (1) there was no dispute that the judgment debtors continued to own the stock; (2) the judgment debtors retained full voting rights attributable to the stock; and (3) the only limitation on the judgment debtors' ability to dispose of the stock was the requirement of the secured third party's written consent to a sale. 53 F.3d at 74. The court did not, as Defendant suggests, consider the fraudulent nature of the stock transfer. Since the turnover statute "does not allow for a determination of the substantive rights of involved parties," *Resolution Trust Corp.*, 53 F.3d at 80 (quoting *Republic Ins. Co. v. Millard*, 825 S.W.2d 780, 783 (Tex. App. 1992, no writ); see also *United Bank Metro v. Plains Overseas Group*, 670 S.W.2d 281, 284 (Tex. App. 1983, writ ref'd n.r.e.)), the court is unpersuaded by Defendant's argument.

although Defendant pledged a continuing security interest in the assets to various third party creditors, he continues to own the assets. To the extent that some of these assets are encumbered by pledge and security agreements, the only limitation on Defendant's ability to dispose of the property is permission from the secured party. The magistrate judge found, and the court agrees, that Defendant therefore retains at least some interest in the assets. *See* Report at 8; *Bullock v. Foster Cathead Co.*, 631 S.W.2d 208, 210 (Tex. App. –Corpus Christi 1982, no writ)(noting that general title in pledged property remains with the pledgor, “notwithstanding an apparent transfer of legal title to the [pledgee].”). This determination is further supported by the general proposition that a pledgee “acquires no interest in the [pledged] property except as security for his debt or obligation, and his actual interest is purely contingent in that it depends for effect on something that may or may not occur.” *Bullock*, 631 S.W.2d at 211(quoting 72 C.J.S. Pledges, s 23, p. 31-2.)). Defendant's first four objections are **overruled**.

Defendant's remaining two objections challenge the magistrate judge's recommendation that a receiver be appointed in this case. Defendant first contends that since most of his assets have been pledged to banks and other financial institutions, there is no imminent risk that the assets will be concealed, lost or diminished in value, and that in view of the superior rights of these creditors, the appointment of a receiver to sell pledged assets will do more harm than good. He disagrees with the magistrate judge's finding that the timing of Defendant's postjudgment transactions suggests the possibility of a fraudulent transfer, and contends that the remedy of receivership cannot be justified on the basis of “sheer speculation” that fraudulent conveyances have occurred. Even if the court were inclined to do so, there is no need to engage in “sheer speculation,” as the evidence clearly supports an inference that Defendant *may have* engaged in fraudulent conduct. Defendant relies on

Kelly v. Armstrong, 206 F.3d 794, 799 (8th Cir. 2000) and *In re Owen J. Rogal, D.D.S., Ltd.*, 38 B.R. 677, 679 (Bankr. E.D. Pa. 1984), for the proposition that a postjudgment transaction is not necessarily indicative of fraudulent conduct since debtors are permitted to engage in postjudgment transactions that have a lawful or legitimate purpose. Defendant's reliance on these cases, however, is misplaced, as neither involves the appointment of a receiver or addresses the criteria the court considers in making such a determination.

The probability that fraudulent conduct has occurred or will occur to frustrate a judgment creditor's claim is one factor that the court considers in determining whether to appoint a receiver, *see Santibanez*, 105 F.3d at 242 (citing *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-17 (8th Cir. 1993)); however, *proof of fraud* is not required. *See Aviation Supply Corp.*, 999 F.2d 314 at 317. As previously noted, Defendant's financial condition since entry of judgment has dramatically deteriorated, and he has engaged in several postjudgment transactions, including debt swaps and asset pledges. Three of these transactions involved Defendant's close friends or business associates, including Norma Stachura, to whom Defendant sold 190 shares of common stock in Highland Holdings, Inc. for a total sum of \$1.00. Notwithstanding Defendant's attestation to the contrary, the evidence suggests, at a minimum, the possibility of fraudulent conduct. The court therefore agrees with the magistrate judge that this factor militates in favor of appointing a receiver.

The court also rejects Defendant's argument that the appointment of a receiver in this case for any purpose other than the preservation or conservation of property is inconsistent with the purpose of Fed. R. Civ. P. 66. According to Defendant, "receivers may [only] be appointed to 'preserve property pending final determination of its distribution in supplementary proceedings in aid of execution.'" *Santibanez*, 105 F.3d at 241. Defendant's argument, however, is undermined

by the procedural posture of this case, and he cites no authority for the proposition that a receiver's powers are limited to the preservation and conservation of the judgment debtor's property in an ancillary postjudgment proceeding brought in aid of execution. As previously stated, under the turnover statute, the court may "appoint a receiver with the authority to take possession of . . . [a judgment debtor's] nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment." Tex. Civ. Prac. & Rem. Code § 31.002(b)(3). Defendant's objection is **overruled**.

Insofar as Defendant's objection that the appointment of a receiver would violate the due process rights of secured third parties, the court agrees with the magistrate judge that, "to the extent Defendant even has standing to assert the due process rights of third parties, the [proposed] turnover order adequately addresses those concerns." Report at 8 n.2. Pursuant to the turnover order, the receiver would be authorized to "to take possession of *Defendant's interest* in [the nonexempt] property and 'to collect, sell, or otherwise liquidate those . . . interests *after giving proper notice to third parties who also may have an interest in the property.*" *Id.* and 12. This provision adequately protects the due process rights of secured third parties since the receiver must provide them with proper notice prior to collecting, selling, or otherwise liquidating Defendant's interest in the assets. Defendant's objection is therefore **overruled**.

Plaintiff objects to the magistrate judge's Report to the extent it does not include a provision authorizing the receiver to vote the shares of stock over which it would exercise control. According to Plaintiff, "shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into his name if authority so to do be contained in an appropriate order of the court by which such receiver was appointed." Pl.'s Objections at 1 (quoting Tex. Bus. Corp. Act.

art 2.29 (Vernon 1980). Here, the receiver's authority to vote shares is implicit in the recommendation. Specifically, the magistrate judge recommends that Defendant be ordered to turn over to the receiver *all* of his right, title, and interest in nonexempt property. Report at 13. This necessarily includes Defendant's voting rights in corporate stock. In any event, to avoid potential confusion, the court will make clear in its ruling that the receiver is authorized to vote the shares of stock over which it exercises control. Accordingly, Plaintiff's objection is **sustained**.

The findings and conclusions of the magistrate judge are hereby accepted as the findings and conclusions of the court. For the reasons stated herein, Defendant's objections are **overruled**, and Plaintiff's objection is **sustained**. Accordingly, Plaintiff's Amended Application for Turnover Order, filed February 8, 2002 is **granted**; and Plaintiff's application for a charging order is **denied** as unnecessary.

The court appoints the following person to serve as Receiver in this matter:

Charles B. Hendricks, Esq.
Cavazos, Hendricks, Poirot & Dewey, P.C.
900 Jackson Street, Suite 570
Dallas, Texas 75202
Phone: (214) 748-8171
Facsimile: (214) 748-6750

The Receiver is authorized to: (1) take possession and control of all nonexempt assets and property interest of Defendant Donald F. Moorehead, Jr. (including those listed in Exhibit A to Plaintiff's Amended Application for Turnover Order); (2) collect, sell, or otherwise liquidate those assets and property interests after giving proper notice to third parties who also may have an interest in the property; (3) exercise all powers and rights exercisable by Defendant in reference to his interest in the stock, bonds, warranties, debentures, and options in the corporations in which he has any legal or beneficial interests, including but not limited to the exercise of voting rights tied to those interests,

on terms approved by the court; (4) pay the proceeds to Plaintiff World Fuel Services Corporation to the extent required to satisfy the judgment in this case; and (5) perform any and all acts necessary and appropriate in order to take possession and control of Defendant's nonexempt assets and property interests, and to collect, sell, or otherwise liquidate those assets and property interests.

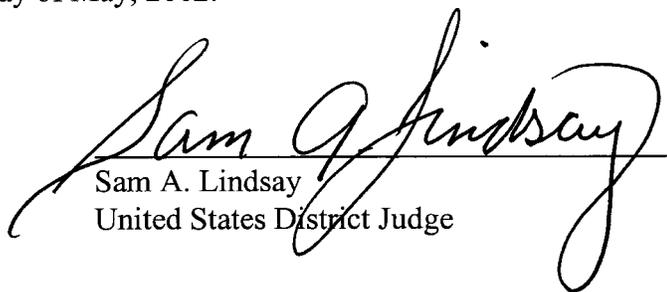
The appointment of the Receiver shall take effect upon the posting of a cash bond in the amount of \$1,000, which the court finds to be an adequate and reasonable bond under the circumstances. Plaintiff shall advance the costs of receivership, and such costs shall be taxed against Defendant. As a further requirement of the court, the Receiver shall file an oath that he will faithfully execute the duties of a Receiver as set forth in this order.

Once the appointment of Receiver becomes effective (that is, upon the filing of the Receiver's Oath and posting of a cash bond), Defendant shall turn over to the Receiver all of his right, title, and interest in nonexempt property, together with any documents or records related to such property, including without limitation all original stock certificates, pledge agreements, security agreements, and promissory notes. Until such time as this property is turned over to the receiver, Defendant and all persons acting in concert with him, together with all persons having actual knowledge of this order, are restrained and enjoined from transferring, concealing, or otherwise disposing of Defendant's interest in any property.

Plaintiff is awarded its reasonable costs and attorney's fees for services rendered in this proceeding, subject to approval of the court. The parties are directed to confer in an attempt to agree on a reasonable fee. If this issue cannot be resolved by agreement, Plaintiff may file an application for fees and costs within 14 days from the date of this order.

The clerk of the court is authorized to issue all writs and process necessary to enforce this order, including writs of execution and attachment, to the extent authorized by law.

It is so ordered this 14th day of May, 2002.


Sam A. Lindsay
United States District Judge