IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

205

UNPUBLISHED OPINION

In re	)	Bankruptcy Case No. 82C-01031
	)	
JON C. VASILACOPULOS,	)	
	)	
Debtor.	)	
	)	
MAIN HURDMAN, Trustee,	)	Civil Proceeding No. 84PC-1094
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
GREG BALDWIN, et. al.,	)	MEMORANDUM DECISION
	)	
Defendants.	)	

Appearances: Carolyn Montgomery, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Main Hurdman, trustee; Gary L. Paxton, Clyde & Pratt, Salt Lake City, Utah, for defendant R.C. Tolman.

FACTS AND PROCEDURAL BACKGROUND

This matter came before the Court for trial on April 1 and 2, 1986 on the trustee's complaint to set aside and recover certain commission payments made by the debtor to the defendant on the theory that such payments were fraudulent conveyances. At trial, the trustee established that the debtor, Jon Vasilacopulos, doing business as Vasilacopulos and Associates, operated a "Ponzi" scheme, which operated essentially as follows:

Vasilacopulos or his agents represented to potential customers that Vasilacopulos was engaged in the business of buying and selling investment grade diamonds, which he would purchase initially at below wholesale cost from site cutters in Johannesburg, South Africa. Customers who purchased diamonds from Vasilacopulos generally left their diamonds with him for resale to undisclosed third parties upon the representation that they could receive up to 50 percent profit from resale and the diamonds could be resold every 28 days. Vasilacopulos never actually engaged in the purported purchase and resale of diamonds and instead paid his customers with monies received from other customers. Vasilacopulos purchased a number of diamonds which were kept on hand to display to potential customers, and acquired some real and personal property with funds deposited by customers. The value of these items was not disclosed at trial.

The defendant received funds from the debtor, both as payments from the fictitious "resale" of diamonds that he personally "purchased," and as commissions for sales to other customers.

DISCUSSION

In order to avoid a transfer under Section 548(a)(2), the burden of proof lies on the trustee to prove by a preponderance of the evidence the following elements: (1) there was a transfer

of an interest of the debtor in property; (2) which occurred within a year of the filing of the bankruptcy petition; (3) in exchange for which the debtor received less than a reasonably equivalent value; and (4) that the debtor was either insolvent on the date of the transfer, became insolvent as a result, or was left with an unreasonably small capital. See In re Ear, Nose and Throat Surgeons of Worcester, Inc., 49 B.R. 316, 319 (Bkrtcy. D. Mass. 1985). In this proceeding the trustee's evidence founders on the "reasonably equivalent value" and "insolvency" elements. It is to those matters that the Court now turns.

A. The "Reasonably Equivalent Value" of Defendant's Services

Neither the trustee nor the defendant presented any evidence on the value of the services rendered by the defendant; the parties seemed to regard as controlling the decision of Judge Allen in Merrill v. Chad Allen, slip op., no. 82PA-0253 (Bkrtcy. D. Utah May 3, 1985). In that case, the Court held that the services of commissioned salesmen, which deepened the debtor's insolvency and furthered a "Ponzi" scheme, were without legally cognizable value as a matter of law. After the parties to this proceeding rested, Judge Allen's decision was reversed by the District Court. See Merrill v. Chad Allen, 60 B.R. 985 (D. Utah 1986). Judge Winder concluded that "a determination of whether value was given under section 548 should focus on the value of the goods and services provided rather than on the impact that

the goods and services had on the bankrupt enterprise" and remanded the case for factual findings on the issue of whether the value of the services provided by the salesmen was reasonably equivalent to the value of the transfers received.

Under these circumstances, this Court would be compelled to reopen this proceeding on its own motion or on the motion of the plaintiff and receive evidence on the value of the defendant's services. See Rule 59(a) and (d), Fed.R.Civ.P.; 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2813, at 87-88 (1973); 6A J. Moore, J. Lucas & G. Grotheer, MOORE'S FEDERAL PRACTICE ¶ 59.04[13], at 59-30, 59-37 (2d ed. 1985). But in this case the trustee's proof fails for another reason.

B. Judicial Notice of Insolvency

The evidence presented by the trustee was not sufficient to support a finding that the debtor was insolvent at the time of each transfer to the defendant, or became insolvent as a result, or was left with an unreasonably small capital. At the conclusion of the proceeding, after both sides had rested, the Court asked the parties if it had the discretion to repair the defect in the trustee's proof by taking judicial notice sua sponte of the debtor's schedules of assets and liabilities and of a stipulation between the debtor and the trustee in another

adversary proceeding in the Vasilacopulos bankruptcy case.[1] After hearing argument, the Court invited the parties to submit memoranda on this issue.[2]

The Court has read and considered the parties' memoranda, and from its own review of the applicable authorities concludes that it cannot take judicial notice of those matters as a substitute for proof of insolvency.

Rule 201, Fed.R.Evid., which applies to adversary proceedings by virtue of Bankruptcy Rule 9017, provides:

> (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

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1 In that stipulation, Vasilacopulos admitted that he had been insolvent at all times during the operation of his business. Main Hurdman v. Jon C. Vasilacopulos, Civil Proceeding No. 83PC-3188, Motion and Stipulation for Entry of Judgment ¶ J, at 18.

2 Procedural fairness demands that the parties have an opportunity to object to the taking of judicial notice. J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE ¶ 201[07], at 201-50 (1985). Subdivision (e) of Rule 201, Fed.R.Evid., provides that upon timely request a party will be given the opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter to be noticed. In this case, the Court advised the parties that the debtor's schedules and stipulation with the trustee in another adversary proceeding may establish his insolvency at the time the transfers to the defendant occurred. The Court then invited the parties to brief the issue. The parties have not requested additional oral argument. Therefore, they have been given "an opportunity to be heard," within the meaning of Rule 201(e), Fed.R.Evid. Cf. Matter of King Resources, 651 F.2d 1326, 1337 & n. 11 (10th Cir. 1980).

> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
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> (c) When discretionary. A court may take judicial notice, whether requested or not.
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> (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
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> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
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> (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
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> (g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

The doctrine of judicial notice permits a judge to consider a generally accepted or readily verified fact as proved without requiring evidence to establish it. United States v. Berrojo, 628 F.2d 368, 369 (5th Cir. 1980). Under Rule 201(b) judicial notice of adjudicative facts is limited to facts that are "not

subject to reasonable dispute." The general rule is that a court will not take judicial notice in one proceeding of the records in another proceeding, even though the contents of those records may be known to the court, unless the facts are admitted or the records placed in evidence. See Wilson v. Volkswagen of America, Inc., 561 F.2d 494, 510 & n. 38 (4th Cir. 1977). A bankruptcy court may take judicial notice of, and give effect to, its own records in another but interrelated proceeding if they have a direct bearing on the matters at issue. Freshman v. Atkins, 269 U.S. 121, 124 (1925); St. Louis Baptist Temple, Inc. v. Federal Deposit Insurance Corp., 605 F.2d 1169, 1172 (10th Cir. 1979). However, the Court's discretion in an adversary proceeding to take judicial notice sua sponte of information contained in its files on other matters within the bankruptcy case is limited. See Matter of Clayton, 32 B.R. 219, 223 (Bkrtcy. E.D. Va. 1983). "For a court to take judicial notice of facts which might have a substantive outcome of proceedings before it is a difficult exercise." In re Leach, 35 B.R. 100, 101 (Bkrtcy. W.D. Ky. 1983).

In exercising its discretion to take judicial notice sua sponte of information contained in the files of other proceedings involving the debtor, the Court must weigh the degree of doubt or certainty about the facts, and the degree to which the facts are central or peripheral to the controversy. See J. Weinstein &

M. Berger, WEINSTEIN'S EVIDENCE ¶ 201[02], at 201-20 (1985). The propriety of notice in a particular case, as well as the conclusiveness of proof by judicial notice, depends upon the nature of the adjudicative fact of which the Court intends to take notice. See Colonial Leasing Co. v. Logistics Control Group, 762 F.2d 454, 459 (5th Cir. 1985).

The stipulation signed by the trustee's counsel and the debtor's counsel and approved by the Court was the product of a settlement reached in an unrelated adversary proceeding. The defendant in this proceeding was not a party or in privity with a party to the stipulation. Generally, a stipulation as a substitute for proof is binding only upon the parties. See First of Denver Mortgage Investors v. C.N. Zundel, 600 P.2d 521, 528 (Utah 1979). An admission in a stipulation, although perhaps admissible in a subsequent proceeding as an admission against interest, does not operate in favor of or against persons who were not parties to the stipulation. Gall v. South Branch National Bank of South Dakota, 783 F.2d 125, 128 (8th Cir. 1986).

This Court could properly take notice of the schedules and stipulation for the limited purposes of establishing that the debtor prepared the schedules, or that judgment was entered by the Court against the debtor based upon the stipulation. The existence of these facts is not "subject to reasonable dispute." It follows that this Court should not accord res judicata effect

to the stipulation between the debtor and the trustee so as to preclude relitigation of the insolvency issue in this adversary proceeding. For the purpose of this proceeding, then, the debtor's prior stipulation is ineffective and nonbinding.

CONCLUSION

Under the doctrine of judicial notice, the bankruptcy court has the discretion to sua sponte examine its own records and take notice of facts not subject to reasonable dispute. However, the doctrine is not a talisman by which the court should supply the missing link in a litigant's presentation of evidence. In the present case, the trustee has failed to establish the debtor's insolvency, and the defendant is entitled to have this proceeding dismissed.

Counsel for the defendant shall prepare and submit an appropriate form of order in accordance with Local Rule 13.

DATED this 14 day of September, 1986.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE