

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)
) NO. 3-83-00372
SOUTHERN INDUSTRIAL BANKING)
CORPORATION)
) Chapter 11
Debtor)

THOMAS E. DuVOISIN, LIQUIDATING)
TRUSTEE)
)
Plaintiff)
)
v.) ADV. NO. 3-85-0862
)
WILLIAM TODD DANIEL and)
WILLIAM ZANE DANIEL)
)
Defendants)

M E M O R A N D U M

This adversary proceeding is before the court upon the defendants' renewed motion for dismissal and/or for summary judgment and/or for reconsideration of the order allowing amendment. This motion relates only to Count Two of the amended complaint. The plaintiff has filed a response in opposition to the motion.

I.

The record reveals the plaintiff originally filed a complaint to recover a single preferential transfer allegedly occurring on February 10, 1983. This proceeding is one of many similar preference actions brought by the plaintiff to recover funds withdrawn

from Southern Industrial Banking Corporation ("SIBC") within ninety days of its bankruptcy filing.

Subsequently, the defendants moved for summary judgment contending the alleged preferential transfer was not subject to avoidance because it fell within the ordinary course of business defense provided by § 547(c)(3) of the Bankruptcy Code. Finding that genuine issues of material fact precluded summary judgment, the court denied the motion.

The plaintiff then filed a motion to amend its complaint seeking to avoid a prior transfer of funds from SIBC to the defendants and the court granted that motion.

Thereafter, the defendants filed a motion for summary judgment which sought an order dismissing the added preference claim on the ground it was barred by the limitations' period set forth in § 546(a) of the Bankruptcy Code. Although the added preference claim was alleged following expiration of the § 546(a) limitations' period, the court denied the defendants' motion reasoning that the added preference claim related back to the date of the original complaint pursuant to the provisions of Rule 15(c) of the Federal Rules of Civil Procedure.

Eventually, this adversary proceeding, together with the other pending SIBC preference cases, were reassigned to the undersigned judge. In a group of other SIBC preference cases, the plaintiff moved to amend his complaint to allege additional preferential

transfers after expiration of the § 546(a) limitations' period just as he did in the instant proceeding. After considering the briefs of the parties, and the authorities addressing the issue, this court denied the motions to amend based upon its decision that the amendments would not relate back to the date of the original complaint under Rule 15(c).

Based on that ruling in the other SIBC preference proceedings, the defendants have now asked the court to reconsider the earlier ruling in this proceeding denying their motion for summary judgment on limitations grounds. As the defendants correctly note, this proceeding is no different from the other SIBC proceedings in which this court held the added preferential transfers would not relate back to the date of the original complaint under Rule 15(c). The plaintiff opposes the defendants' motion citing the doctrine of law of the case.

II.

The Supreme Court has described the doctrine of law of the case as an "amorphous concept." *Arizona v. California*, 460 U.S. 605, 618 (1983). Generally, the doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The doctrine, however, only directs a court's discretion, it does not limit the court's power. *Id.* A "court has the power to revisit prior decisions of its own or a coordinate court in any circum-

stance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." *Christianson v. Colt Ind. Operating Corp.*, 486 U.S. 800, 817 (1988).

A review of circuit cases discussing the law of the case doctrine reveals different attitudes regarding its applicability. Some courts believe the doctrine should be stringently adhered to except when particular, well-defined exceptions are present. See *In re Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985) (law of the case must govern except when there is new evidence, new controlling law, or clear error); *Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981) (adherence to the law of the case is within the discretion of the court when the law has changed or new evidence has been discovered); *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981) (although law of the case generally requires a court to follow a rule throughout proceedings, a lower court can correct a prior interlocutory ruling if substantially erroneous); *Tanner Motor Livery v. Avis, Inc.*, 316 F.2d 804, 809-10 (9th Cir.), cert. denied, 375 U.S. 821 (1963) (district judge may overrule an interlocutory decision of another district judge for "the most cogent reasons").

Other courts are more lax in applying the doctrine. See *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984) (when a case is transferred to a second judge, law of the case does

not bind the second judge to an erroneous ruling); *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 290 n.3 (4th Cir. 1982) (whether rulings by first judge become binding upon the second judge under law of the case is not a matter or rigid legal rule but more a matter of proper judicial administration which can vary with the circumstances); *Champaign-Urbana News Agency v. J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980) (law of the case is not so rigid that it cannot be ignored when a court wishes to correct an error); *Burns v. Massachusetts Inst. of Technology*, 394 F.2d 416, 418 (1st Cir. 1968) (a court may change its decision because of error); *Castner v. First Nat'l Bank*, 278 F.2d 376, 379-80 (9th Cir. 1960) (no abuse of discretion when a second judge, to whom the case was assigned, overruled a prior order because of an error in law).

One commentator has noted the Second Circuit Court of Appeals has the most relaxed attitude toward the law of the case doctrine ever since Judge Learned Hand's decision in *Dictograph Products Co. v. Sonotone*, 230 F.2d 131 (2d Cir.), cert. dismissed, 352 U.S. 883 (1956). Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595 (1987). Commenting on the law of the case doctrine in *Dictograph*, Judge Hand stated:

No one will suggest that the first judge himself may not change his mind and overrule his own order, so that the basis of the doctrine can only be that there are reasons why the second judge may not do so that do not exist when the first does. We can think of only two such reasons: (1) the second judge should de-

fer to the rule of the first as a matter of mutual respect between members of the same court; (2) if he does not so defer, the defeated party may shop about in the hope of finding a judge more favorably disposed. The first reason is clearly untenable; judicial sensibilities should play no part in the disposition of suitors' rights. The second reason has indeed much to recommend it, and, as a matter of practice, has been universally regarded a sufficient reason for treating the first ruling as conclusive. It is, however, quite another question whether under all circumstances it makes the first ruling immune from reconsideration.

Id. at 134-35.

In *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), the Sixth Circuit Court of Appeals quoted with approval Judge Hand's comment in *Dictograph* set out above. Furthermore, in discussing law of the case the court in *Cale* stated:

A wide degree of freedom is often appropriate when the same question is presented to different judges of a single district court. To be sure, unfettered reexamination would unduly encourage efforts to shop rulings from one judge to another, and might seem an undesirable denial of comity between colleagues[.] Substantial freedom is desirable nonetheless, particularly since continued proceedings may often provide a much improved foundation for deciding the same issue. Thus, it has often been ruled that denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge, and other preliminary matters are often reopened.

Id. at 947 (quoting 18 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478 (1981)).

The Sixth Circuit's discussion of the law of the case doctrine in *Cale* suggests it falls into the category of courts that refuse to apply the law of the case doctrine stringently. Indeed, even before the *Cale* decision was rendered, one commentator, citing an unpublished decision of the court, believed the Sixth Circuit had adopted the more relaxed approach toward the law of the case doctrine. See Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. at 617 n.58.

In deciding whether to adhere to or depart from the doctrine in this proceeding, the court first notes there has been no forum shopping by the parties in these preference actions. Hence, a reconsideration of the earlier ruling would not have resulted because the defendants "shopped about" hoping to find a judge more favorably disposed to their arguments. The defendants merely request that this judge reconsider the earlier ruling in this proceeding based upon this judge's ruling on the identical issue in other similar SIBC preference actions.

In its memorandum opinion denying the trustee's motions to amend in the other SIBC preference actions, this court explained its rationale for concluding that the added preference claims would not relate back to the date of the trustee's original complaint. The court believes its ruling is in conformity with the clear majority of cases that have treated preferential transfers as separate and distinct for purposes of Rule 15(c). See *Dworsky v. Alan-*

Jay Bias Binding Corp., 182 F.2d 803 (2d Cir. 1950); *In re Ostrer*, 216 F. Supp. 133 (E.D.N.Y. 1963); *Pereira v. Hong Kong & Shanghai Banking Corp.*, 67 B.R. 304 (Bankr. S.D.N.Y. 1986); *Metzeler v. Bouchard Transp. Co. (In re Metzeler)*, 66 B.R. 977 (Bankr. S.D.N.Y. 1986); *In re Robitaille Farms*, 2 B.R. 598 (Bankr. D. Mass. 1980). Notably, the earlier contrary ruling in this proceeding did not discuss or cite any case authorities that have addressed the issue of whether added preferential transfers relate back to the date of the original complaint under Rule 15(c).

The earlier ruling was not inconsequential; rather, it dealt with whether the plaintiff could prosecute its cause of action on the merits. If the judge who made the earlier ruling in this proceeding later changed his mind and decided the same issue differently in another pending SIBC preference action, there is no doubt that judge would be willing to change his earlier ruling. After all, Rule 54(b) of the Federal Rules of Civil Procedure provides that such pretrial rulings are subject to revision at any time before entry of judgment. The judge may change his mind as a result of new and more persuasive arguments presented in the other case, or as a result of considering case authorities not cited or considered before. Whatever the reason that prompts a judge to reconsider an earlier ruling, Rule 54(b) provides the tool for making a change. The benefit of that rule should not be simply cast aside because the proceeding has been assigned to a different

judge who has rendered a contrary ruling on the identical issue in a similar case.

Neither the Supreme Court nor the Sixth Circuit Court of Appeals has mandated a strict and inflexible rule that would require this court to adhere to the law of the case doctrine under the circumstances presented in this proceeding. Having had to rule on the identical Rule 15(c) issue in the other SIBC preference actions, and firmly believing the issue was decided correctly in those other proceedings, the court will apply that same ruling in this proceeding. In doing so, the court hastens to add this is not an instance in which the court is being asked to revisit an issue de novo. If that were the case, the court would be extremely reluctant to reconsider the earlier ruling absent extraordinary circumstances. The court agrees with the observation that law of the case principles "are a matter of practice that rests on good sense and the desire to protect both court and parties against the burdens of repeated reargument by indefatigable diehards." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478 (1981). There is, however, no burden of repeated reargument here. In this proceeding, the court is faced with the fact it has already decided the issue in question. The defendants merely request this court to apply the same ruling here that it applied under similar facts in the other SIBC preference actions. It would be unjust to force the defendants to defend the merits of the added preference allegations when this court believes, and has ruled in virtually identical cir-

cumstances, that the defendants have a valid limitations' defense.

Accordingly, an order will enter granting the defendants' motion for summary judgment based upon the reasons set forth in the court's previous memorandum entered in several of the other SIBC preference actions. A copy of that memorandum will be filed herewith.

JOHN C. COOK
United States Bankruptcy Judge