

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:

No. 03-15419

Chapter 7

JACKSON & JONES OILS, INC.
Debtor

JOHN KEITH JACKSON and
CHARLES DAVID JONES,

Plaintiffs

v

Adversary Proceeding

No. 04-1093

FRED MARSHALL and DOUGLAS R. JOHNSON,
solely as trustee for Jackson & Jones Oils, Inc., and
Mid-State Oils, Inc.,

Defendants

MEMORANDUM AND ORDER

This adversary proceeding is before the court on a motion by Fred Marshall to set aside or to alter or amend an agreed order. This proceeding and the case are in a quagmire because of shifting representation by one of the attorneys and changing legal positions. The motion of Mr. Marshall shall be granted, and the "Agreed Order" referred to in the motion shall be vacated.

The chapter 7 case was commenced by a voluntary petition by Jackson & Jones Oils, Inc., filed August 12, 2003. On November 24, 2003, Mr. Marshall filed an unsecured claim based on a State Court judgment. His address was listed as c/o Frank Fly, Esq., P.O. Box 398, Murfreesboro, TN 37133. The only other claims have been filed by the State of Tennessee.

On or about March 11, 2004, Mr. Marshall commenced an action in state court against the individual shareholders of the debtor. The state court proceeding seeks to “pierce the corporate veil” of the debtor so that Mr. Marshall can recover from the individual shareholders. Mr. Marshall was represented in the state court by attorney Fly. On July 12, 2004, the shareholders filed this proceeding against Mr. Marshall for a declaratory judgment holding that all the causes of actions raised by Mr. Marshall in the state court proceeding belong to the bankruptcy estate and not to Mr. Marshall. 11 U.S.C. § 541(a). The summons was apparently served on attorney Fly, who represented Mr. Marshall in the state court action, but not on Mr. Marshall.

On September 8, 2004, the trustee filed an application in the case to employ two attorneys, one of whom was Mr. Fly. The purpose for which the trustee anticipated legal services was:

Investigation of pre petition transfers by the debtor corporations [including Mid-State Oils, Inc., a related company for which Mr. Johnson is also the trustee] to officers and directors that are the subject of a pending state court action in Rutherford County.

In support of his employment Mr. Fly filed with the court an affidavit of disinterestedness in which he acknowledged under oath “. . . that our firm did represent an unsecured creditor whose interest is subordinate to that of the Trustee” This statement is unclear as to whether it was intended as a statement that the shareholders should prevail in the declaratory judgment action because Mr. Marshall did not have a personal cause of action. It certainly suggests that result because it is difficult to see why a cause of action belonging to Mr. Marshall personally would be subordinate to the trustee’s rights as representative of the debtor corporation. The evidence

does not clearly show that Mr. Fly was still representing Mr. Marshall when he signed the affidavit of disinterestedness. Indeed, the wording of the statement supports the opposite view. The firm “did represent” Mr. Marshall in the past. Of course, the termination of Mr. Fly’s representation of Mr. Marshall suggests that Mr. Marshall had in fact conceded to the shareholders’ position in the declaratory judgment action. Even if Mr. Fly was still representing Mr. Marshall, the affidavit of disinterestedness might not be treated as an action taken on behalf of Mr. Marshall.

The “Agreed Order” which is the subject of the pending motion was tendered to the court on December 21, 2004, and entered on December 23, 2004. Its operative language is as follows:

3. The parties, after reviewing the facts and circumstances relative to the pending State Court cause of action and the bankruptcy petition of the debtor corporation, agree that the pending State court cause of action is an asset of the bankruptcy estate consistent with 11 U.S.C. Section 541 and subject to being administered by the Chapter 7 Trustee.

4. The parties agree that the debtor corporation’s request for declaratory judgment, relative to the issues herein, should be granted pursuant to Rule 57 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Bankruptcy Rule 9029.

5. Further, the parties agree that the adversary proceeding initiated by the debtor corporation, subsequent to the entry of this Order shall be deemed fully resolved and shall be closed.

IT IS THEREFORE SO ORDERED. . . .

This order was signed by attorney James Lane on behalf of the trustee and attorney Paul Jennings on behalf of the debtor. Attorney Jennings actually represented the plaintiffs, the shareholders in the debtor. The order was not signed by Mr. Marshall or any one acting on his

behalf. Mr. Marshall was the only party with an interest adverse to the agreed order. Of course, Mr. Fly was an attorney of record for the trustee at the time. The only address available for Mr. Marshall was that of Mr. Fly from the filed proof of claim. A copy was sent to Mr. Fly. The order has the effect of granting judgment for the shareholders and against Mr. Marshall in the declaratory judgment action even though, as explained below, the record is unclear as to whether Mr. Marshall or an attorney representing him agreed to the order or expressly conceded by other actions.

On January 18, 2005, Mr. Fly filed a document entitled “Notice of Resignation as Attorney for Trustee.” In the Notice, Mr. Fly indicates Mr. Marshall may have an interest adverse to the interest of the trustee and that he wishes to *continue* to represent Mr. Marshall. At the same time Mr. Fly filed another document entitled “Fred Marshall’s Offer to Purchase State Court Action”, wherein he referred to the “Agreed Order” now under attack without making any complaint about its terms. The offer of Mr. Marshall was \$1,500. The plaintiffs in this proceeding have now offered \$15,000. If their offer is accepted and Mr. Marshall does nothing else, then the agreed order should prevent him from asserting any personal cause of action against the shareholders. Mr. Marshall filed the pending motion on March 15, 2005. The motion was filed by attorney Thomas Knight of Chattanooga and lists Mr. Fly as one of the attorneys for Mr. Marshall. For the first time, Mr. Marshall asserted that he has rights against the shareholders separate and distinct from those of the trustee as representative of the debtor.

Whether Mr. Fly was representing the trustee or Mr. Marshall when the court entered the agreed order seems to be a question that demands an answer. If Mr. Fly was still representing Mr. Marshall, this proceeding may be over. That depends on whether the court should treat Mr. Fly’s and Mr. Marshall’s prior actions in this court as Mr. Marshall’s adoption of a position contrary to

his current argument. The facts at this point are unclear as to whether Mr. Marshall effectively conceded the conclusion set out in the agreed order.

The agreed order also deals only with Mr. Marshall's claims in the state court action. The parties apparently have assumed that all of Mr. Marshall's possible causes of action, including personal causes of action, are set out in the state court complaint. Limitations statutes may have made this assumption correct, but the parties have not argued the point. That leaves open the question of whether, despite the agreed order, Mr. Marshall has personal causes of action against the shareholders that he can still pursue.

The court should also note that attorney Lane is withdrawing as attorney for the trustee because he had discussions with attorney Fly regarding the issues in this proceeding when they were both working for the trustee and now attorney Fly is apparently representing Mr. Marshall as an adverse party.

The effect of agreed order is far from clear. The court, the parties, and their lawyers could spend a long time answering the question of whether Mr. Marshall is bound by the order. *See Conway v. Brooklyn Union Gas Co.*, 236 F.Supp.2d 241 (E. D. N. Y. 2002); *Tiernan v. Devoe*, 924 F.2d 1024 (3d Cir. 1991); *Skelton v. General Motors Corp.*, 860 F.2d 250 (6th Cir. 1988). The better course of action is to set aside the order so that Mr. Marshall can litigate the issue of whether he has a cause of action that does not belong to the bankruptcy trustee as the corporation's representative. Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b)(6); *L. M. Leathers' Sons v. Goldman*, 252 F.2d 188 (6th Cir. 1958) (confusion as to meaning of order); *In re Abrams*, 305 B.R. 920 (Bankr. S. D. Ala. 2002) (due process concerns). That seems to be the only way to straighten out the tangle that this proceeding has become.

Accordingly,

It is ORDERED that the order entered December 23, 2005, is hereby VACATED;
and,

It is FURTHER ORDERED that Fred Marshall shall have ten (10) days from entry
of this order within which to file an answer or other pleading in response to the complaint.

ENTER: May 5, 2005

BY THE COURT

**R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE**