

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

In re

DOUGLAS L. HEINSOHN )  
a/k/a DOUGLAS LYLEBURN HEINSOHN )  
d/b/a TIMBERWINDS RESTAURANT )

Case No. 90-31655

Debtor. )

WILLIAM T. HENDON, TRUSTEE )

Plaintiff, )

v. )

Adv. Proc. No. 92-3095

DOUGLAS L. HEINSOHN FAMILY )  
TRUST AND UNKNOWN HOLDERS OF )  
BEARER SHARE CERTIFICATES OF )  
BIO MAR CAYMAN LTD. )

Defendants. )

WILLIAM T. HENDON, TRUSTEE )

Plaintiff, )

v. )

Adv. Proc. No. 92-3172

REBECCA HEINSOHN )

Defendant. )

In re

GLOBAL GOLF CORPORATION OF )  
GATLINBURG, INC. )

Case No. 90-33524

Debtor. )

WILLIAM T. HENDON, TRUSTEE )

Plaintiff, )

v. )

Adv. Proc. No. 92-3173

REBECCA HEINSOHN, )

Defendant. )

M E M O R A N D U M

This adversary proceeding is before the court on a motion for summary judgment against the Douglas L. Heinsohn Family Trust filed by plaintiff, William T. Hendon, Trustee, on August 8, 1994. In support of the motion, plaintiff also filed the affidavit of attorney Brenda G. Brooks and a memorandum of law on the same date. No response to the motion has been filed by the defendant, Douglas L. Heinsohn Family Trust (the "Trust"). Because the time for a response provided by Local Rule 7 has expired, the court will rule on the motion without a hearing.

I.

Plaintiff initiated this declaratory judgment action on April 20, 1992, naming as defendants the Trust and all Unknown Holder(s) of Bearer Share Certificates of Bio Mar Cayman Ltd. The complaint requests a declaration concerning the ownership of Bio Mar Cayman, Ltd., a Grand Cayman, British West Indies corporation ("Bio Mar"). Plaintiff asserts that the debtor, Douglas L. Heinsohn, a/k/a Douglas Lyleburn Heinsohn, d/b/a Timberwinds Restaurant ("Heinsohn"), is the beneficial owner of the original six bearer share certificates issued by Bio Mar upon its incorporation in 1981. The plaintiff seeks this declaration so that the assets of Bio Mar may be included within the bankruptcy estate of Heinsohn.

The Trust filed an answer to the complaint on October 23,

1992,<sup>1</sup> asserting that it is a valid legal entity created in 1976 and that Lowell B. Poling serves as the trustee. The Trust requests that the court determine that the bearer share certificates of Bio Mar are owned and have always been owned by the Trust, and that, accordingly, the bankruptcy estate of Heinsohn does not have any interest in the bearer share certificates.

## II.

Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056, provides that a "party seeking to ... obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action ... , move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof." FED. R. CIV. P. 56(a). When a summary judgment motion is made and supported by affidavit, made upon personal knowledge and setting forth such facts as would be admissible in evidence, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not

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<sup>1</sup>The Trustee of the Trust previously filed an answer on behalf of the Trust on May 20, 1992, which answer was stricken by order entered August 19, 1992, upon the plaintiff's motion to require the Trustee to withdraw from further participation and representation of the Trust since the Trustee is not a licensed attorney.

so respond, summary judgment, if appropriate, shall be entered against the adverse party." FED. R. CIV. P. 56(e).

Plaintiff contends that summary judgment against the Trust is appropriate because (1) the Trustee of the Trust, Mr. Poling, testified in his discovery deposition that he had never seen the bearer share certificates and the only reason he knew they existed was because the debtor, Douglas Heinsohn, told him; (2) Douglas Heinsohn testified during a Rule 2004 examination that he had no knowledge of the whereabouts of the bearer share certificates, did not know who owned them, and did not even know that there were bearer share certificates for Bio Mar; (3) Mr. Clive Harris, a representative of International Management Service, the Cayman Island, British West Indies company which formed the corporation of Bio Mar and provided it with corporate services, testified during his deposition that although he did not recall to whom the bearer share certificates were delivered, he did not deal with anyone other than Douglas Heinsohn regarding the affairs of Bio Mar and did not think that he would have given the shares to anyone other than Douglas Heinsohn; and (4) when the Trust filed for chapter 11 bankruptcy in March 1988 (which case was subsequently dismissed), the Trust did not list on its schedule of personal property its interest in Bio Mar or the bearer share certificates of Bio Mar (the Trust did list the ownership of AT&T and First Tennessee Bank shares of stock).

The Trust has not come forward with an affidavit or other admissible evidence to contradict the testimonies of Messrs.

Poling, Heinsohn, and Harris, or to challenge the personal property schedule which the Trust filed in its bankruptcy proceeding in 1988. In fact, the Trust has not even filed a response opposing the summary judgment sought by plaintiff. As discussed above, the Trust may not simply rest upon the allegation and denial contained in its answer that it owns the bearer share certificates and that the bankruptcy estate of Heinsohn does not. Faced with a motion for summary judgment supported by affidavit, the Trust must come forward with some admissible evidence in support of its position. See Fed. R. Civ. P. 56(c). In the absence of any such evidence, the court agrees with Plaintiff that summary judgment against the Trust is both appropriate and required by Fed. R. Bankr. P. 7056.

### III.

Bearer share certificates, as the name suggests, are presumed to be owned by whoever holds them. See *Goldsmith v. C.I.R.*, T.C. Memo. 1986-227 (1986), citing 11 FLETCHER, *Cyclopedia of Law of Private Corporations*, § 5091 (perm. ed. 1978) and 1 CHRISTY, *Transfer of Stock*, §§ 22 and 56 (5th ed. 1975) (bearer shares are simply transferable by delivery and the holder is presumed to be the owner). It is undisputed that the Trust does not physically hold the certificates or otherwise have them in its possession. Nor has the Trust presented any other evidence that would support its contention that it owns Bio Mar. Instead, as stated by Mr. Poling, the Trust's assertions that the Trust owns the corporation and that the bearer share certificates even exist are based solely

on representations to Mr. Poling by Douglas Heinsohn. However, because Mr. Heinsohn has testified under oath at both his § 341 meeting and Rule 2004 examination that he has no knowledge of the ownership of the bearer share certificates or of Bio Mar, the court must conclude that the Trust cannot present any admissible evidence that would establish a genuine issue as to the true ownership of the certificates. "There is no genuine issue of material fact when 'the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.'" *Dollar Corporation v. Zebedee (In re Dollar)*, 25 F.3d 1320, 1322 (6th Cir. 1994), citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Not only is there no such genuine issue of material fact, the Trust has failed to establish even a *prima facie* case that it is the owner of the bearer share certificates. As a result, the plaintiff is entitled as a matter of law to summary judgment declaring that the Trust is not the owner of the bearer share certificates.

An order will be entered in accordance with this memorandum.

ENTER: September 7, 1994

BY THE COURT

  
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MARCIA PHILLIPS PARSONS  
United States Bankruptcy Judge