UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

Comparato

Plaintiff(s)

v. 6:98-cv-06364

Bentley

Defendant(s)

---

PLEASE take notice of the entry of an ORDER filed on 4/5/99, of which the within is a copy, and entered 4/5/99 upon the official docket in this case. (Document No. 7 .)

Dated: Rochester, New York
April 5, 1999

RECEIVED
APR - 9 1999
BANKRUPTCY COURT
ROCHESTER, NY

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Heidi Schult Gregory, Esq.
Theodore N. Pucher, Esq.
Kenneth W. Gordon, Esq.

FILED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

ANTHONY COMPARATO,

Appellant,

v.

JASON BENTLEY and KENNETH W. GORDON,
as Chapter 7 Trustee,

Appellees.

---

98-CV-6364T

**DECISION and ORDER**

INTRODUCTION

Appellant, Anthony Comparato ("Comparato"), a creditor of the Chapter 7 debtor, Jason M. Bentley ("Bentley" or "debtor"), brings this bankruptcy appeal pursuant to Title 28 of the United States Code §158(a)(1), seeking reversal of the May 15, 1998 Order of Hon. John C. Ninfo, United States Bankruptcy Court Judge, which denied Comparato's motion pursuant to Fed. R. Civ. P. 57 for a declaration that the proceeds of a certain annuity contract issued by ITT Hartford to the debtor pre-petition were not property of the bankruptcy estate, but rather had been validly assigned to Comparato by the debtor. Judge Ninfo's May 15, 1998 Order also granted the Chapter 7 Trustee's cross-motion for a declaration that



#7

the annuity proceeds are property of the bankruptcy estate and that future annuity payments should be directed to the Trustee.

For the reasons that follow, Judge Ninfo's May 15, 1998 Order is affirmed in its entirety.

BACKGROUND

On March 19, 1996, Bentley executed a Promissory Note and Assignment of Proceeds (the "Agreement") in exchange for a loan of capital from Comparato. The Agreement was drafted and executed without the assistance of legal counsel. The terms of the Agreement provided that Comparato would give Bentley a line of credit up to $30,000 to be used for the opening of Sir Richard's Pizza and Pasta. Bentley agreed to pay the principal and 12% interest in annual installments. The parties agreed that the installment due dates would coincide with the dates on which Bentley was scheduled to receive payments from the ITT Hartford Insurance Group ("Hartford") as part of a personal injury settlement between Bentley and the Greece Central School District.

The Agreement provided, in relevant part, that

> I hereby assign the $40,000 settlement from the Greece Central School District and ITT Hartford Insurance Group of which $10,000 has already been paid in legal fees leaving a balance of $30,000 due to me on the respective dates stated above. In the event of default in payment as described herein, Anthony Comparato, his heirs or assigns, may immediately claim any unpaid balance of the

> settlement to satisfy this note and the undersigned does hereby assign any proceeds of the settlement (in the event of default) to Anthony Comparato and this assignment may be recorded anytime before the expiration in the County Clerks [sic] office.

On October 9, 1996, (the first installment due date), Bentley defaulted by failing to make the first payment. Comparato demanded payment from Bentley and from Hartford. On December 23, 1996, Comparato sent a letter to Lawrence Felt of ITT Hartford in Watertown, New York, directing them to pay the remaining annuity payments to Comparato and enclosing a copy of the Agreement between Bentley and Comparato. ITT Hartford responded in writing, advising Comparato that they would "not volunteer any assignments of benefits."

The annuity contract between ITT Hartford and Bentley specifically provided that

> You may assign this contract. Until you notify us in writing, no assignment will be effective against us. We are not responsible for the validity of any assignment.

The contract further defines "in writing" as meaning "a written form satisfactory to us and filed at our office in Hartford, Connecticut. All correspondence concerning this contract should be sent to our mailing address at P.O. Box 2999, Hartford, CT 06104-2999."

There is no factual dispute that Bentley never notified Hartford in writing of his purported assignment to Comparato, nor did Comparato provide written notice of the assignment to Hartford's Connecticut address. Comparato never requested a copy of the Hartford annuity contract from Bentley at the time they entered into their Agreement and, therefore, was not aware of the requirements for an assignment to be recognized by Hartford.

Comparato commenced an action against Bentley in New York Supreme Court, County of Monroe, for default under the Agreement. A Stipulation resolving the action was signed by counsel for both Comparato and Bentley on May 30, 1997, but never signed by a judge or entered in the case. Bentley filed a Chapter 7 bankruptcy petition on June 20, 1997.

ITT Hartford paid the October, 1996 annuity payment ($10,000) directly to Bentley and tendered the October, 1997 annuity payment ($10,000) to Bentley. The Trustee has recovered the 1997 payment and currently holds it in the Trustee's account. Although the record does not directly reflect it, the Trustee also presumably holds the October, 1998 annuity payment as property of the bankruptcy estate.

Appellant Comparato appeals Bankruptcy Judge Ninfo's May 15, 1998 Order which held (without discussion) that the October, 1997

and October, 1998 ITT Hartford annuity payments are property of the bankruptcy estate and that any security interest in said annuity contract granted by the debtor to Comparato is void pursuant to 11 U.S.C. § 544.

During the April 15, 1998 oral argument in Bankruptcy Court, Judge Ninfo stated on the record that Bentley's purported assignment to Comparato of the annuity contract was not an outright assignment, but rather was an assignment for security purposes. Judge Ninfo stated that the assignment could have become an outright assignment in December of 1996 because Bentley was, at that time, in default on the Agreement, but Comparato failed to take the actions necessary to make it an outright assignment. Thus, Judge Ninfo held that the assignment was not effective because the annuity contract specifically provided for "things to be done" which were not done, including the specific notice provisions. Judge Ninfo went on to say that Hartford could have waived its notice requirements, but chose not to and, instead, paid the 1997 annuity payment to Bentley even after receiving Comparato's December, 1996 letter to Lawrence Felt in Hartford's Watertown office. Judge Ninfo explained to Comparato, "[Y]ou have a right. That's between the Debtor and yourself, the contract, but

it's unperfected for third parties because ITT didn't honor your notification."

DISCUSSION

The Bankruptcy Court's factual findings must not be disturbed on appeal unless clearly erroneous. Bankruptcy Rule 8013. Conclusions of law are reviewed *de novo*. In re Taft, 184 B.R. 189 (E.D.N.Y. 1995). I find that Bankruptcy Judge Ninfo's findings of fact and conclusions of law were accurate and, therefore, I affirm his May 15, 1998 Order in its entirety.

The terms of the annuity contract between Bentley and ITT Hartford specifically provided that the contract was assignable only upon certain conditions, i.e. written notice by Bentley to a specific address, and that, absent those conditions, no assignment would be binding as against Hartford. Contractual restrictions concerning assignability are enforceable under New York law. See Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 856 (2nd Cir. 1997) [Under New York law, express limitations on assignability are enforceable.] It is undisputed that Hartford's conditions for assignment were not met. Comparato failed to obtain a copy of the Hartford annuity contract and, thus, failed to comply with its notice provisions. Therefore, while the March 19, 1996 Agreement may have been enforceable as between Bentley and

Comparato, it was not enforceable against Hartford as an assignment.

Furthermore, although a specific prohibition against assignments may be waived in favor of an assignee, see Citibank, N.A. v. Tele/Resources, Inc., 724 F.2d 266 (2nd Cir. 1983), there is no evidence that Hartford waived the contractual pre-requisites to assignment of the Bentley annuity contract. In fact, after receiving notice from Comparato of the purported assignment, Hartford responded that they "would not volunteer any assignments of benefits" and tendered the 1997 annuity payment directly to Bentley.

Comparato commenced an action in state court to enforce the Agreement between he and Bentley, but was not successful in obtaining a judgment or order to enforce the Agreement prior to Bentley's bankruptcy filing. On June 20, 1997, the date that Bentley filed a Chapter 7 bankruptcy petition, the Chapter 7 Trustee obtained only the rights and powers of a judgment lien creditor as to all property of the debtor "on which a creditor on a simple contract could have obtained such a judicial lien." 11 U.S.C. § 544. Because no valid assignment of the annuity proceeds binding on ITT Hartford had occurred prior to the debtor's Chapter 7 filing, the Trustee thus obtained the rights of a judicial lien

creditor as to the annuity proceeds on June 20, 1997. Accordingly, Judge Ninfo correctly held that the October, 1997 and October, 1998 annuity proceeds are property of the debtor's bankruptcy estate.

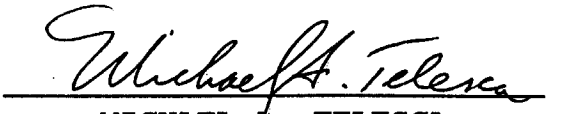
On this appeal, Comparato adopts the view that the March 13, 1996 Agreement between he and Bentley was not an outright assignment of the annuity but rather was a security agreement giving Comparato a security interest in the annuity proceeds in the event of Bentley's default. Comparato argues that he was not required to take any action to perfect the security interest since insurance annuity contracts are specifically exempted from Article 9 of New York's version of the Uniform Commercial Code, see N.Y.U.C.C. § 9-104(g). Thus, Comparato argues that he should have priority as a secured creditor in the annuity proceeds over the bankruptcy Trustee's § 544 judicial lien rights.

Comparato's current position was not raised by Comparato's counsel before the Bankruptcy Court. During the March 18, 1998 oral argument, Comparato's counsel specifically stated that, "[i]t's the position of Mr. Comparato that the assignment was an outright assignment," and "since it was an outright assignment, your Honor, no security interest was created and there was no need to perfect such interest." (Transcript, pp. 3-4.)

Because Comparato's current argument was not presented to the court below, I decline to address it on appeal. See United States v. Int'l Brotherhood of Teamsters, 12 F.3d 360, 365 (2nd Cir. 1993) [Court of appeals should not ordinarily decide issues not presented below.]

Judge Ninfo's May 15, 1998 Order is affirmed in its entirety.

ALL OF THE ABOVE IS SO ORDERED.



MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
March 31, 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

---

Comparato

Plaintiff(s)

v. 6:98-cv-06364

Bentley

Defendant(s)

---

PLEASE take notice of the entry of a JUDGMENT filed on 4/5/99, of which the within is a copy, and entered 4/5/99 upon the official docket in this case. (Document No. 8 .)

Dated: Rochester, New York
April 5, 1999

RECEIVED
APR - 9 1999
BANKRUPTCY COURT
ROCHESTER, NY

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

Heidi Schult Gregory, Esq.
Theodore N. Pucher, Esq.
Kenneth W. Gordon, Esq.

AO 450 (Rev. 5/85) Judgment in a Civil Case

# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

ANTHONY COMPARATO,
Plaintiff(s),

v. JUDGMENT IN A CIVIL CASE

JASON BENTLEY and
KENNETH W. GORDON,
Defendant(s).

CASE NUMBER: 98-CV-6364T

☐ JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND THE JURY HAS RENDERED ITS VERDICT.

X DECISION BY COURT. THIS ACTION CAME TO HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN HEARD AND A DECISION HAS BEEN RENDERED.

**IT IS ORDERED AND ADJUDGED** that Judge Ninfo's May 15, 1999 Order is affirmed in its entirety.

FILED
99 APR -5 PM 2:40
U.S. DISTRICT COURT
WDNY

APRIL 5, 1999
DATE

RODNEY C. EARLY
CLERK

Jacqueline Lawrence

JACQUELINE LAWRENCE
(BY) DEPUTY CLERK

#8