UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

JASON M. BENTLEY,

Debtor.

ORDER

Chapter 7
Case No: 97-22384-N

By Notice of Motion dated January 13, 1998, Anthony Comparato, by his attorneys, Harris Beach and Wilcox, LLP, moved this Court for an Order pursuant to Rule 57 of the Federal Rules of Civil Procedure for declaration of the rights and liabilities of parties with respect to a certain annuity issued by ITT Hartford to the debtor pre-petition, and the Court having received and reviewed said Notice of Motion together with Mr. Comparato's Amended Notice of Motion dated January 13, 1998; the Statement in Support of the Motion for Declaratory Relief signed by David L. Rasmussen, Esq. and received by the Court on January 14, 1998 and the exhibits annexed thereto; the Statement on Behalf of the Debtor by debtor's attorney, Charles W. Rogers, Esq. received by the Court on January 27, 1998; the Affidavit of Charles W. Rogers, Esq. sworn to January 27, 1998 and the exhibits annexed thereto; a Notice of Cross-Motion of the Chapter 7 Trustee, Kenneth W. Gordon, dated February 27, 1998 seeking alternative relief pursuant to FRCP 57, 11 USC section 522(g) and 11 USC section 544; the Affirmation of the Trustee in Support of said motion dated February 27, 1998 with the exhibits annexed thereto; the Affirmation in Further Support of Mr. Comparato's motion signed by Heidi Schult-Gregory, Esq. dated March 13, 1998; the Affirmation in Further Support of Mr. Comparato's motion signed by Heidi Schult-Gregory, Esq. dated April 8, 1998 and the ITT Hartford Annuity Agreement attached thereto which is the subject of these motions; and the various memoranda of law and

letter memoranda received by the Court from counsel regarding the pending motions; and upon hearing argument by Heidi Schult-Gregory, Esq. on behalf of Mr. Comparato, Kenneth W. Gordon, Esq. on behalf of the Trustee and Theodore Pucher, Esq. on behalf of the debtor and upon due deliberation, it is hereby

ORDERED AND DECLARED that the Hartford Annuity payments under annuity contract #CCX 3173 made in October 1997 and to be made in October 1998 each in the amount of $10,000.00 are property of the debtor's bankruptcy estate; and it is hereby further

ORDERED that any security interest in said annuity contract granted by debtor to Anthony Comparato is hereby void pursuant to 11 USC section 544; and it is hereby further

ORDERED AND DECLARED that pursuant to 11 USC section 522(g) debtor waived his interest and may not claim as exempt said annuity payments; and it is hereby further

ORDERED that the annuity payment to be paid in October, 1998 under Hartford Annuity Contract #CCX 3173 shall be paid and tendered to Kenneth W. Gordon, Chapter 7 Trustee at his office address located at 2541 Monroe Avenue, Suite B4, Rochester, New York 14618. *

So Ordered this ___ day ~~of April 1998~~ 5/15/98

/S/

Honorable John C. Ninfo, II
Bankruptcy Court Judge

Approved as to form and content:

FILED
MAY 15 1998
BANKRUPTCY COURT
ROCHESTER, N.Y.

Heidi Schult-Gregory, Esq.
Attorney for Anthony Comparato

Theodore Pucher, Esq.
Attorney for Debtor

* And it is further ordered that Mr. Comparato's claim can be amended within [illegible] of this order. Trustee has 30 days from filing to

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF NEW YORK

----------x

In Re:

JASON BENTLEY,

Debtor.

----------x

BK No. 97-22384

Transcript of Proceedings

Before The Honorable John C. Ninfo, II

United States Bankruptcy Court Judge

Wednesday

April 15, 1998

Rochester, New York

Reported by:
Mary Dianetti
Bankruptcy Court Reporter
612 South Lincoln Road
East Rochester, New York 14445 (716) 586-6392

APPEARANCES:

HARRIS, BEACH & WILCOX, LLP
Of Counsel: HEIDI S. GREGORY, ESQ.
130 East Main Street
Rochester, New York 14608

KENNETH W. GORDON, ESQ.
2541 Monroe Avenue
Suite B 4
Rochester, New York 14618

BK No. 97-22384

CLERK: Jason Bentley.

MR. GORDON: Good morning your Honor.

THE COURT: Good morning.

MS. GREGORY: Good morning.

MR. GORDON: I assume the Court has received our additional submissions. Both Mr. Comparato's counsel and I have submitted some additional material to the Court on the issue of the annuity and what the annuity provided with respect to assignments.

I think what we learned is this, Judge: That the annuity contract did allow assignments, that it provided a specific mechanism for providing those assignments.

It's my belief that Mr. Comparato failed to comply with those requirements. Namely, there was not a written letter signed by the owner of that annuity, which was sent to the correct address and, therefore, according to the terms of the annuity contract, any attempted assignment would have been ineffective, and to supplement that, I did go back in my file and dig out some correspondence I received from the Debtor's counsel back on December 12, 1997, indicating that, in fact, the October '97 annuity

payment was in fact paid by Hartford to the Debtor in this case. For example, after obviously receiving the correspondence upon which Mr. Comparato is seeking to rely, which was dated I believe on December of '96, clearly from my perspective was it not only information and practice for procedure, but in practice Hartford did not honor an agreement, annuity due in -- and in fact sent that money to Mr. Bentley, and Mr. Rogers cooperated with me in getting that money back from Mr. Bentley and giving to the Trustee, and Trustee's account.

THE COURT: Is that true?

MS. GREGORY: Your Honor, with respect to the notification issue on ITT Hartford, we did what the consented Debtor's attorney -- notified ITT Hartford. We notified an individual by the name of Lawrence Felt in Watertown, New York. The reason for doing that is because that was the information provided us through Debtor's attorney. At that time we did not have the annuity contract in hand. We notified them. They obviously received notification because they did respond in writing, but at no time did notification or sufficiency of that notification ---

THE COURT: Who responded in writing?

MS. GREGORY: Mr. Lawrence Felt did respond.

THE COURT: Who is Mr. Lawrence Felt?

MS. GREGORY: I believe he was the contact person that the Debtor's attorney was dealing with.

THE COURT: Is he just a local agent?

MS. GREGORY: Yes, I believe a local agent, and that is why our notification, our written notice that the annuity payments had been signed was sent directly to Mr. Felt. He was the contact person.

It's our contention, your Honor, that that notification was sufficient. Although there was no writing, and I do agree with that there was no written notice sent directly to the Hartford office. We did not do that. We did not contact anyone in the Connecticut office.

Again, the reason for doing that, we didn't realize that was what was supposed to be done under the annuity contract terms, and it's our position that under the UCC for perfection purposes, it would be notification.

THE COURT: You're either under the UCC, or you're not under the UCC. If you're under the UCC, you didn't have what is -- you didn't have a

copy of it -- you didn't notify him under the document, you didn't file UCC filing statements. You can't have it both ways.

MS. GREGORY: Your Honor, to the extent I am both ways, I apologize.

Yes, we feel we do not fall under Article 9 of the UCC, but to the extent under the terms of the annuity, we feel we have satisfactorily met those terms. The notification was sent to the agent, that it was disclosed to us from the Debtor's attorney.

THE COURT: This is what we're going to do. I'm going to reserve for myself the right to supplement any order that you give me, because I'm not going to write my decision, but I'm going to make sure that -- the Court's belief is that this is outside the UCC, because it is an insurance product, so that the terms, we need to perfect, by filing a financing statement. That is I think from the perspective there is a right to payment outside the UCC, which is, we know now from the contract, assigned, and in order to effectively assign it, it provides things to be done. The things that need to be done in the Court's view under that contract,

specifically notice to ITT Hartford, that at the address that is shown, is a provision which is at least in part for the benefit of ITT Hartford, in the Court's view would be waivable by them, so that if your noticed to the Watertown office, for example, and deem effective by them, they could accept it. They would have the ability to do that because that provision really is in large part for their benefit. But, in fact, we know from the facts here they did not. They did not waive their right to have the assignment noticed, given directly to them, because in fact, unless the facts Mr. Gordon has given me are not correct they paid on the '97 payment, which was after the notice was sent directly to the Debtor, and they did not feel there was compliance because of a contracting question and/or that they had not waived the specific provisions of the contract. From the Court's perspective, you as a secured creditor, you've been there, I think that is not an outright assignment. I think it was an assignment for security purposes. In the Court's view, in December of 1996, it could have, for example, gone into an outright assignment because the Debtor was by then already in default. However, in commercial

transactions your client has the obligation to ensure that it does what he needs to do under the document, to take control of those documents, and being given the proper notice, such debt that the insurance company paid over the monies the next time to the Debtor.

So I believe, therefore, that you had not done by this notice and had never done prior to the filing of the petition such access were necessary to cause the effect, your assignment, and to establish your right to have those payments paid directly by ITT Hartford.

And then the Court has to look, as I've said before previously too, if you pool all of those hearings together, look at 544 and what the Trustee's rights are, the Trustee has to step into the shoes of the other creditors, it would appear that other creditors would have gotten that money, ITT, because it hadn't red-flagged it or done anything to honor your assignment, and I'm not aware of any other law that would give you the right to that as between ITT, third party, you and the Debtor. You 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.

If ITT had honored your notification, I would say you had trumped the Trustee. But they obviously did not, and they did choose to waive it.

So, therefore, I'm going to find that the Trustee has the right.

Now, what I'm not going to do to you, or I am going to direct ITT, because I'm not really finding for purposes of this decision, I'm not really, because Hartford hadn't been a party to this. I'm not going to find the right between you. As I said to you before, if you want to go back to State court, at some point, and bringing an action against ITT Hartford for failure to pay over, an honor your notification to its agent, it's a different situation, but I'm not going to let them hold up the payment because of that, as to you, Mr. Gordon, do you understand?

MR. GORDON: Yes, I do.

THE COURT: They're on the hook for it or they're not on the hook for it. They either wrongfully failed to honor your notification. I don't know, that is between you and your client. I'm not going to bar you from that. I'm not making that finding as between the two of you. I'm making it

for purposes of the Debtor and the estate, but I'm not going to make it, you know, and to recover collateral estoppel on that issue, because it wasn't actually litigated for our purpose because it's too different. It's not consistent, and not secured.

And the second element that is between the Debtor, I think the Debtor, with 522 (g) has given up the right from an exemption of those monies. I think it's very clear under the statute and under the Court's view with respect to that.

I'm going to ask you to put together an order, and you may mark up the order a little bit in terms of findings, because this has been sort of -- I don't want to take the time to write it, but I think we all understand what was, because we had sort of a logical progression of all this.

MR. GORDON: What I understand, I just want to have this brief conversation with the Judge in order to -- declaring that the October '97 payment, which is already in the Trustee's possession ---

THE COURT: And/or property to the estate direct the Hartford to pay the October '98 payment to the Trustee, and putting in some language about

in State court to ---

MR. GORDON: You would not want to have that in the order at all?

THE COURT: We have to think about that, because my concern is then Hartford will pay the money and pay to the Court and look for an actual determination. As long as in this court, I -- even you may have to go in the District Court in Connecticut on diversity basis to sue, unless you can bring in New York, for example, and you may have to go to a different Federal court.

I find under 544, avoid is whatever security.

MR. GORDON: And 522 (g). I think we're on the same page. I'll take a crack at it.

THE COURT: I'm sure you want to circulate It.

MR. GORDON: I'll circulate it.

THE COURT: And feel free to mark it up.

MR. GORDON: We'll do our best job.

REPORTER CERTIFICATE

I, Mary Dianetti, do hereby certify that I did report in stenotype machine shorthand the proceedings held in the above-entitled matter;

Further, that the foregoing transcript is a true and accurate transcription of my said stenographic notes taken at the time and place hereinbefore set forth.

Dated July 20, 1998

At Rochester, New Y

/S/

/ Mary Dianetti

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

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
98 APR -5 PM 2:40
U.S. DISTRICT COURT
WIDNEY - DISTRICT

APRIL 5, 1999
DATE

JACQUELINE LAWRENCE
(BY) DEPUTY CLERK

#8