UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re
KAYAK MANUFACTURING CORP. Case: 90-12981K
Debtor

R. DOUGLAS KROTZER
Plaintiff
-vs- AP 92-1154 K

MARK S. WALLACH, as Trustee of
Kayak Manufacturing Corp., Debtor

KAYAK LIMITED PARTNERSHIP, a New
York Limited Partnership
Defendants

MARK S. WALLACH, Trustee
Plaintiff
-vs- AP 92-1156 K

ROBERT DOUGLAS KROTZER, a/k/a
R. DOUGLAS KROTZER

KAYAK LIMITED PARTNERSHIP
c/o Kayak Development, Inc.
General Partner, and further
c/o Robert Douglas Krotzer
Defendants

MARK S. WALLACH, Trustee
Plaintiff

-vs- AP 92-1183 K
ROBERT DOUGLAS KROTZER a/k/a
R. DOUGLAS KROTZER
BERKELEY ENTERPRISES LIMITED
KAYAK LIMITED PARTNERSHIP
Defendants

MARK S. WALLACH, TRUSTEE
Plaintiff
-vs- AP 92-1102 K

MAJESTIC POOLS & EQUIPMENT CO., INC.
BEAUTY POOLS, INC.
GERALD B. COHEN, Individually and
d/b/a PARAMOUNT ENTERPRISES
CORTZ INCORPORATED
ROBERT DOUGLAS KROTZER a/k/a
R. DOUGLAS KROTZER
Defendants

Determination of the proper date to release any excess property to R. Douglas Krotzer requires interpretation of the Settlement Agreement of March 14, 1994. Firstly, the Court must correct an error in its Orders: The date on which the Trustee "received" the coins and currency must be deemed to be later than the actual receipt, by a number of days equal to the number of added days Krotzer sought and obtained in order to complete a sale of the coins.

This conclusion flows from a number of considerations regarding ¶ 7 of the Settlement Agreement. That paragraph was agreed to by the parties for the very purpose of providing Krotzer an opportunity to enjoy the rewards of carefully timing the sale of the precious metals. Had he elected not to avail himself of that opportunity, the Krotzer interpretation of the literal language of ¶ 3 of the Settlement Agreement might have applied, the Trustee could have sold the coins immediately, and Krotzer would have the excess property by now. Instead, Krotzer twice sought modification of ¶ 7 to extend his opportunity to exercise discretion over the sale. Twice the Court granted that relief. The Trustee and the Court cooperated with Krotzer's efforts (because the value of the property in the Trustee's possession was substantially in excess of the settlement amount), even to the point of the Court authorizing the Trustee to send a letter to Smith Barney, Inc. for Krotzer's

benefit. *See* Order of September 21, 1994.

The Order of August 31, 1994 was not, however, a stipulated order; it was drafted and signed by the Court in the presence of counsel, and was the Court's effort to balance the parties' conflicting concerns regarding the additional time. The September 21, 1994 Order was provided by the Trustee but was patterned after the August 31 order. The Court's haste on August 31 precluded a more careful analysis of the need for conforming amendments to other provisions of the Agreement, such as ¶¶ 2, 3 or 12 thereof. By no means did the Court intend to prejudice the estate of Kayak, nor would either order have been granted in the form that the Court adopted had the Court known that Krotzer would seek to prejudice the estate on the basis of the Court's failure to amend other paragraphs of the Settlement Agreement at the same time that it amended ¶ 7 thereof.[1]

This is not an instance in which an innocent third party has relied in good faith upon an imprecise order of the Court. (Compare this Court's earlier decision in AP 92-1102 granting partial summary judgment to Majestic Pools and Beauty Pools.) This

[1]The term "prejudice" here refers to any effect the Court's Order might have on the parties' "bargained-for exchange," and does not refer to any issue of preference. Whether or not the Trustee's concerns about the law of preferences are valid concerns, he bargained for protections in those regards. Eventually, some other Court might have to determine the merits of those concerns and protections.

is an instance in which a party who has pleaded guilty to a felony in connection with this very case seeks unfair advantage from the imprecision of an order granting relief he sought from the Court and which was entered solely for his benefit.

The circumstances set forth by the Trustee in his "Declaration," together with the Court's knowledge of its own intentions in entering the orders of August 31 and September 21, 1994 warrant correction of those orders under Bankruptcy Rule 9024, which incorporates Fed. R. Civ. P. 60. Such correction may be of use to any other judge considering the transactions at issue.

Thus, it is ORDERED, nunc pro tunc to August 31, 1994, that this Court's Order of August 31, 1994 is amended to add the following sentence: "Because Krotzer has sought and obtained herein an extension of time within which to exercise discretion regarding the time of sale of the seized property, said Order of May 9, 1994 is further amended to adjust all relevant dates and periods of time in the said 'Settlement Agreement' accordingly, and it is specifically Ordered, that the Trustee's 'receipt' of the seized property shall not be deemed to have occurred until a number of days after actual receipt that is equal to the number of days of extension now or thereafter obtained by Krotzer."

The actual date of receipt of the coins and currency by the Trustee was on or about August 4, 1994. If that date is correct, then by the Settlement Agreement, Krotzer had until

approximately September 3, 1994 to exercise discretion regarding the sale of the coins. The Court's Orders extended that time until October 7, 1994. Thus, Krotzer was given approximately thirty-four additional days. The Court's decision today, therefore, directs that for purposes of determining when the excess property should be released to Krotzer, the Trustee is deemed to have received the coins a corresponding thirty-four days later than he actually did. Constructively, then, the Trustee is deemed to have received the property on approximately September 7, 1994. The issue remaining, therefore, is whether the remaining property must be released to Krotzer on December 7, 1994 (91 days after the Trustee received the property), or January 16, 1995 (91 days after the proceeds of the sale were received by the estate).

It is unclear why the Trustee did not actually receive the proceeds of the sale until October 17, 1994, ten days after Krotzer's extension expired. However, any issue existing regarding that ten day period would have existed even if the Court had not granted Krotzer any extension at all. That issue is part of what the Court will now explore.

Addressing, now, the disposition of Krotzer's Motion, the Court finds that the language of the Settlement Agreement is clear and unambiguous, and is totally consistent with the Trustee's Declaration and inconsistent with Krotzer's argument.

The dispositive provisions of the Settlement Agreement

are firstly, ¶ 2's dependence upon "receipt by the Trustee as specified herein of the sum of One Million Three Hundred Thousand ($1,300,000) Dollars (the "Settlement Payment") paid to the Trustee by the Payors" (whereupon the lawsuits are to be discontinued), and secondly, ¶ 12's direction that "the Trustee shall remit immediately to R. Douglas Krotzer all funds or other assets other than the Settlement Payment then held by the Trustee on account of any of the Payors."

Paragraph 3 of the Settlement Agreement merely afforded Krotzer (and the Trustee, if Krotzer were to have absented himself[2]) the opportunity to decide which of the various funds and objects the Trustee possessed could be designated to constitute the Settlement Payment. It simply states that the Settlement Payment "may be derived from" any of the various sources. Contrary to Krotzer's assertions, it by no means defines what constitutes "the receipt" (in ¶ 2 terms) of the settlement amount or even "payment of the Settlement Payment" as that term is used in ¶ 12.

If ¶ 3 means what Krotzer says it means, then ¶ 12 becomes meaningless when it directs the Trustee to remit "all funds or other assets other than the Settlement Payment." In logic, ¶ 3 cannot define what is meant by the term "Settlement Payment" as

[2]Krotzer previously absented himself from further cross examination after the first day thereof in a hearing in connection with the Trustee's Motion for pre-judgment attachment of assets.

that term is used in ¶ 2, but mean only $1.3 million of value in ¶ 12 wherein some portion of the funds and items enumerated in ¶ 3 are contemplated to be in excess of the "Settlement Payment," and are to be remitted to Krotzer.

This interpretation is confirmed in ¶ 13. In discussing the crediting of interest, it states that interest shall be for the credit of Krotzer to the extent it accrues on funds remaining "after full payment of the Settlement Payment but before the remaining funds are released to R. Douglas Krotzer by the Trustee as provided in Section 12."

Paragraph 2, therefore, is not referring to ¶ 3 when it states "after receipt by the Trustee of the sum of [$1,300,000] (the "Settlement Payment") paid by the Payors by the date set forth below." Rather, that is a reference to the dates, dispositions and remittances or forebearances addressed in ¶'s 6 and 7.

Paragraph 3 does not describe "receipt," "payment" or any other operative terms. It simply defined a term used in other provisions of the "Settlement Agreement' that are "operative" terms, such as ¶'s 7 and 12.

The Trustee need not deliver the "excess" property until January 16, 1995, and then only if Krotzer makes the sworn

statement sought by the Trustee in his cross-motion.

IT IS SO ORDERED.

Dated: Buffalo, New York
December , 1994

/s/ Michael J. Kaplan

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U.S.B.J.