UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

RAMA GROUP OF COMPANIES, INC. — Case No. 00-12654 K

Debtor

Official Committee of Unsecured Creditors of Rama Group of Companies, Inc.

Plaintiff

-vs- — AP No. 02-1097 K

Richard A. Maussner

Defendant

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This is a motion under Rule 64 of the Federal Rules of Civil Procedure seeking pre-judgment attachment pursuant to New York CPLR 6201 et seq. The moving party is the plaintiff in this Adversary Proceeding - the Official Unsecured Creditor's Committee of this Chapter 11 Debtor, RAMA Group of Companies, Inc. The respondent is the defendant, Richard A. Maussner. By Order of this Court entered on May 23, 2000, Mr. Maussner was designated under Bankruptcy Rule 9001(5) to perform the duties of the corporate debtor.

Mr. Maussner sought and obtained the Order of this Court dated March 19, 2002, by which he said that RAMA would not pursue certain causes of action against himself personally, and against others of his family; and so at RAMA's request, the Committee was granted authority to bring this lawsuit against Richard Maussner on behalf of the corporate debtor.

There has yet been no trial on the merits of the complaint in this Adversary Proceeding. Rather, it is the nature of a Rule 64 Motion and proceedings under CPLR 6201 et seq. that there be only one issue before the Court. That is whether Mr. Maussner shall have the right to spend his own income and to transfer or encumber his own assets as he pleases, pending an adjudication on the merits of the underlying complaint.

From the beginning of the proceedings on this particular motion, through several days of evidentiary hearing thereon, and in the subsequent submissions, Mr. Maussner and his counsel have stubbornly and unjustifiably refused to recognize that this is not a mere civil suit in a Federal Court. Rather, Mr. Maussner, by his own choice, remains the fiduciary for the benefit of the creditors represented here by his opponent - the Official Committee of Unsecured

Creditors. Mr. Maussner asked this Court, for RAMA, that the Committee be empowered to sue him and so he has failed to address the underlying allegations in the form of a sworn disclosure statement and plan. Mr. Maussner admits that during the pendency of this Chapter 11 case he turned personal assets with significant present value into more remote, ephemeral, or future, or supposedly-exempt (or otherwise "sheltered"), assets, for the benefit of his children, his fiancé, and other insiders. Mr. Maussner has never made a full, sworn accounting for the post-petition affairs of this Debtor-in-Possession, whether in the form of a Disclosure Statement and Plan, or by conversion and the filing of a Final Report and Account of the affairs of the Debtor-in-Possession. And he now agrees that some of what he swore as to the pre-petition affairs of the Debtor are not quite correct.

The Committee counsel and the Court have repeatedly, consistently, and pointedly admonished Mr. Maussner and his counsel to consider, reflect upon, and research (if necessary), these critical points which so greatly distinguish this particular proceeding from the generality of civil litigation in state or federal courts.

Mr. Maussner and his counsel have stubbornly refused to acknowledge these matters, and consequently assert arguments in defense against this motion that would be perfectly understandable in the generality of litigation, but are absurd in the context recited above. To begin, the Court will note that Mr. Maussner's counsel has sought to preclude the plaintiff's written closing arguments because they were submitted two days late. That request is granted, but that is of no consequence, because the plaintiff's case on this motion speaks for itself and the Court needs no summary of the evidence and the law from plaintiff's counsel.

The arguments now offered on Mr. Maussner's behalf by his counsel are generally incorrect on the law; misguided and misdirected as to the nature of the matters currently before the Court; incorrect as to the evidence and as to the value and weight of that evidence; and universally wrong as to the application of the law to the facts of this case.

I.

To begin, counsel is simply wrong in asserting that proof must consist only of "direct" evidence and testimony. One illustration of this assertion is in reference to the 1999 tax return for the Debtor and certain internal accounting records of the Debtor. A CPA testified that if the information in those records were correct and if one were to assume that the book values reference therein were the same as market values, the records would indicate solvency at the relevant times. Counsel states, at page 2 of his submission that. "Evidence must be presented through testimony and documents, not speculation, conjecture or hypothetical. No proof was presented which directly challenged the figures offered on the tax return. Nor was any witness offered who contradicted [the CPA's] conclusion that RAMA was solvent at all times through April 2000. As such, the testimony that RAMA was solvent through April 2000 remains uncontested, and this Court shall so find."

It is Hornbook law that proof also lies in the inferences reasonably to be drawn from the facts in evidence.[1] Such inferences are not "speculation and conjecture." Rather, they

[1]See, for example, *In re Segrist*, 163 B.R. 940 (Bankr. W.D.N.Y. 1994), and the learned authorities relied on therein.

are what we mean when we speak of "indirect" or "circumstantial" evidence. Even if it were true (and it is not true) that the CPA testified that RAMA was solvent, it is not necessary that the Committee directly discredit or disprove his testimony. Rather, the Committee may offer a different line of evidence of insolvency or of "insufficient capital," such as the undisputed need for Mr. Maussner to keep RAMA "afloat" by making repeated loans from his credit cards. Then, the Court, as finder of fact, decides the relative value and weight of the competing evidence. This is "Evidence 101" material, but seems to be lost on Mr. Maussner's counsel.

Indeed, a fundamental failure to recognize what the terms "undisputed" or "uncontradicted" really means with regard to the concept of evidence runs throughout Mr. Maussner's arguments. He makes the following other misrepresentations, as a consequence:

- "The Committee . . . failed to present at proof whatsoever that RAMA was insolvent at any time . . . ." (Page 1 of his Closing Argument)

- "The Committee failed to challenge the finding of solvency in any manner." (Page 2)

- "No proof was presented disputing or calling into question the validity of [the $8.4 million] offer or the fact that sale would have been consummated at that price had the [IRS] raid not occurred." (Page 4)

- ". . . there was no showing as to the financial condition of the company at the time these reported payments were made, nor was there any evidence submitted as to how it is claimed these payments amount to an attempt to defraud creditors." (Page 4)

- " . . . plaintiff has failed to establish that RAMA was insolvent at any time, and

its presumption of insolvency was effectively rebutted." (Page 5)

- "Plaintiff failed to rebut the testimony that [the horse trailers] were purchased by RAMA Farms and placed under the name of RAMA Group of Companies for insurance purposes only." (Page 5)

- "Plaintiff . . . failed to establish any supporting documentation or evidence at to [the $101,813] debt" which Mr. Maussner himself swore he owed to RAMA when he signed the RAMA schedules. (Page 6)

- "The only proof presented [as to the RAMA equipment transferred to Beat Publications] was that the property was transferred with encumbrances and for fair consideration . . . . There was no proof presented which refuted the conclusive proof that, on February 29, 2000, RAMA had been valued at over $8.4 million and was fully solvent, and the shareholders enjoyed significant value." (Page 8)

In isolation, such remarks might be viewed simply as "advocacy," but in context it appears that Mr. Maussner and his counsel truly believe their own myopic view of the evidence before the Court. The Court will begin its Rule 52 findings with the matter of solvency or insolvency of RAMA. The Court finds it "probable" for purposes of the CPLR provision that the Committee will, at full plenary trial on the merits of the Complaint, prove that RAMA was insolvent from some point in December of 1999 until the filing of the Petition. Although the Committee has presented evidence to establish insolvency months before that time, such proof does not rise to "probable success" for today's purposes. This finding is reached on the following basis. Mr. Maussner testified on August 6 and 24, 2004, that RAMA had lost

$500,000 from the fall of 1998 to March of 1999, and that as to October, 1999, he was trying to "revive" RAMA. To do so he was using his "float" with his personal credit cards in order to meet the cash needs of RAMA. Mr. Grupka testified that as of December, 1999 and on into April of 2000, RAMA was "very short of cash" and so Pam Zygaj (Mr. Maussner's daughter) was borrowing on her father's cards and RAMA was making payments to those lenders. Indeed, Mr. Maussner testified to having borrowed money from other family members to sustain RAMA in 1999 and 2000.

The evidence offered by Mr. Maussner to contradict the Committee's claim of insolvency or of insufficient capitalization as a consequence of fraudulent transfers, consists only his own stated opinion, the 1999 RAMA tax return based on untested, unaudited information, and some internal RAMA documents for the year 2000 that similarly are untested and unaudited. The current assertion in Mr. Maussner's closing arguments that the CPA had testified that RAMA was solvent is ridiculous and well beyond the bounds of zealous advocacy. Counsel for Mr. Maussner saw and heard the Court engage the CPA in colloquy by which the CPA was decisive and insistent that his finding of "solvency" from those documents would require ignoring the question of whether the information contained therein (which was prepared by or under the direction of Mr. Maussner) was accurate, and would require ignoring the fact that the tax return dealt with book values and that book values are not, standing alone, fair market values. The demeanor of the CPA during the colloquy was such that he was clearly grateful for the opportunity so to qualify the testimony that Mr. Maussner's counsel elicited from him. Consequently, the Court gives the testimony of "solvency" from the CPA no weight at all,

because it is obvious that the CPA himself believed, as an expert, that a finding of solvency without inquiry into the accuracy of the information in the returns and without ascertaining fair values independently of book values, was impossible.

The assertion in Mr. Maussner's closing arguments that the February 10, 2000 letter of intent from Strategic proves that RAMA was worth $8.4 million and was therefore solvent at all relevant time, would be an interesting argument in a philosophy seminar focusing on the meaning of "worth." But accounting and bankruptcy are not philosophies. The fact is that there never was a purchase agreement at $8.4 million. The letters of intent here expressly did not bind Strategic to buy the assets of RAMA. Rather, it bound RAMA to deal exclusively with Strategic and to sell to Strategic if Strategic decided to go ahead with the purchase. It was RAMA that was to pay a $500,000 penalty for breach of the letter of intent, not Strategic. Again, there never was an enforceable agreement at $8.4 million. The letter of February 10, 2000 would be probative as to the market value of RAMA's assets only if it were demonstrated that RAMA could have satisfied all of Strategic's concerns and qualifications. The letter (which is Committee Exhibit 52 in evidence) contained eleven non-exclusive conditions to closing, including "the satisfactory completion by [Strategic] of financial, business, environmental and legal due diligence," and the "absence of any pending or threatened claim, suit, action or proceeding that may negatively affect [RAMA or its business]", and "the absence of any pending or threatened material adverse change to the purchased assets, the prospects, financial condition or operations of business", among other things.

Certainly RAMA could not satisfy these conditions. Mr. Maussner had somehow

gotten himself involved in serious trouble with the IRS, and the IRS launched an investigation in the offices of RAMA on April 5, 2000. So Mr. Maussner then agreed that RAMA should have only $6.1 million for the assets to be sold. And he came to his Court as a fiduciary asking this Court to approve that sale. And he took the witness stand and asked this Court to find that that $6.1 million purchase was a "good faith" purchase on Strategic's part. Consequently, not only is $6.1 million the best and only true evidence of the actual value of the assets sold, but Mr. Maussner is estopped from claiming otherwise. His claim that it was the IRS's "raid" that "drove" the actual "value" of RAMA down is meritless. This is not a securities law case or a blue sky law case in which the value of investments were burst because confidence was shaken when the IRS raided. This is not a case involving the value of RAMA. Rather, we are talking about the value of RAMA assets. With the exception of the collectability of accounts receivable, it is hard to understand how the value of those assets could have been reduced the by the IRS action. A web press is not worth less because its owner is under investigation by the IRS. Rather, the fact that the owner is under investigation by the IRS provides an opportunity for the buyer to make a lower offer to the buyer who may be in trouble. Mr. Maussner did not have to accept that lower offer if he though the value was higher. He did and then he voluntarily filed RAMA in Chapter 11. He caused RAMA to be a "willing seller" at $6.1 million and caused the Court to find that to be a good faith purchase by Strategic. These facts vastly outweigh whatever otherwise-probative value there might have been to the earlier $8.4 million letter of intent. Mr. Maussner cannot ask this Court to approve the sale at $6.1 million as a "good faith purchase," and prevail, then claim (when it suits his purpose) that the assets were really worth $8.4 million.

That is the law of "judicial estoppel."[2]

II.

The Court now moves on from the matter of solvency to the matter of whether there is evidence from which the Court concludes it to be "probable" that the Committee will be able to establish, at plenary trial on the merits of the Complaint, that Mr. Maussner did in fact act to hinder, delay or defraud RAMA's creditors. Mr. Maussner tosses off as essentially "not his problem" the fact that he either signed a false 1999 tax return for RAMA or false bankruptcy schedules for RAMA, or both, as pertains to what has been referred to as the "reorganization" description. One or the other was false (or both) even if the Court agreed (which is does not) with the asserted timing of the alleged spin-off of the sheet-fed assets. Mr. Maussner claims that he doesn't know who gave his accountant or lawyers the information contained in the two inconsistent statements of the "reorganization." That description is critical to a number of things. It is key to the question of whether RAMA (as opposed to RAMA's owners) ever got any consideration at all for the assets that were spun off, which the tax return said were worth over $300,000. The timing of the events set forth in the inconsistent statements of "reorganization" seems to be terribly important to Mr. Maussner, but the Court cannot figure out why. The documentary evidence is that the spin-off had not yet occurred as of October 1, 1999, [3] January

[2]See *In re Albion,* 203 B.R. 884 (Bankr. W.D.N.Y. 1996), affirmed on other grounds 1997 U.S. Dist. Lexis 11834.

[3]See Committee Exhibit # 61.

11, 2000,[4] February 10, 2000,[5] and February 29, 2000.[6] In bankruptcy terms, the insistence that the spin-off occurred in 1999, not 2000, makes no sense where, as here, the defense is that the Debtor was at all times solvent and/or that there was fair consideration for the transfers. This is because the state "look back" period for fraudulent transfers is six years, not the one year "look back" period of 11 U.S.C. § 548(a)(1). So, unless a defendant can date the transfer to be more than six years before the filing, it would not seem to make any difference whether it occurred in one year or the next. Moreover, the 90-day "presumption of insolvency" (of which Mr. Maussner makes a great deal in his closing argument) has no relationship at all to the fraudulent transfer causes of action and breach of pre-petition fiduciary duty causes of action. That presumption is only for purpose of 11 U.S.C. § 547 - the preference provision.

So the current insistence that the spin-off occurred as a matter of law in 1999 not 2000 cannot be explained in bankruptcy terms. It appears that whether or not the spin-off occurred in 1999 in the minds of Mr. Maussner and his son, the decision to accomplish it as a matter of law did not occur until the sudden good fortune of finding a buyer for the web operations only. The spin-off was accomplished as a matter of law only after counsel sent the forms to accomplish it in February of 2000. For some reason, the decision was made to back date the paperwork in a way that would permit RAMA to claim that the transaction occurred in 1999. But that decision occurred at a time when, by Mr. Maussner's own testimony, there was

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[4]See Committee Exhibit # 47.

[5]See Committee Exhibit # 52, at paragraph 10 c.

[6]See Committee Exhibit # 48.

no contemplation of any possible bankruptcy filing. The Court has no indication one way or the other as to whether Mr. Maussner was already aware that the IRS was looking into his and RAMA's taxes. But by the time Mr. Maussner signed the 1999 tax return for RAMA in October or November of 2000, he clearly knew that there was tax trouble. (The IRS raid was months before.) The current insistence that the spin-off did indeed occur as a matter of law in 1999 despite the overwhelming weight of evidence to the contrary can be explained by the desire not to confess an error as to RAMA's tax returns, in light of Mr. Maussner's intervening felony conviction as to one of his personal tax returns. But that is not this Court's concern. What is of importance here is that it is completely clear that (and the Court makes the Rule 52 finding of fact that) the spin-off occurred in 2000, not 1999, and it therefore fell within the one year provision of 11 U.S.C. § 548(a). It is therefore "probable" that in a plenary trial on the merits of whether the spin-off was a fraudulent transfer that gave rise to liability of Mr. Maussner as the fiduciary under state law, the Committee will prevail.

III.

The Court moves on to Mr. Maussner's utter lack of concern over his responsibility for assuring that all trade names of the Debtor used within six years before the filing were disclosed in the Petition and Schedules. The four names omitted are precisely the names he claims were spun off to his son in early 1999. For purposes of the present point, it makes no difference when they were actually spun off. There is no dispute about the fact that the four names were names "used by the debtor" within six years previous to the filing and were

required to have been disclosed in the Petition and Schedules. Again Mr. Maussner claims that he doesn't know who gave his lawyer the information by which all of the other trade names of the Debtor were duly scheduled, but not the trade names that were spun off to his son. The Court makes the Rule 52 finding that the inference is inescapable that Mr. Maussner intended to make sure that those names were not brought up in connection with the RAMA filing, even in the minor sense of having been trade names that RAMA had used in previous years. Though his primary intent may have been to protect his son's business, his conduct constituted a false oath and caused the estate of RAMA to have to pay for the Committee to uncover the true facts. The true facts are that physical assets that once were assets of RAMA at some point in time became assets of corporations owned by Mr. Maussner's son and we still don't have a consistent, straightforward statement, under oath, as to what, if any, consideration RAMA (as opposed to Mr. Maussner or his son, other family members or insiders) received for that transfer. And those assets were valued at over $300,000 in the 1999 tax return that Mr. Maussner signed for RAMA. The further inference, consequently, is that Mr. Maussner continues to cover-up the pre-petition malfeasances alleged in the Complaint. (Again, this is a finding of "probability" of success in a trial on the merits, not a final adjudication of the merits of the pertinent causes of action in the complaint.)

IV.

Now, the Court moves to the fact that Mr. Maussner's advocate ignores the fact that Mr. Maussner himself signed, under penalty of perjury, the official schedules by which he

acknowledged a debt of $101,813 owed by him to RAMA. He says that it was "disputed." In fact, that is not true. It was listed as an asset that is "contingent or unliquidated." But Mr. Maussner's closing arguments assert that the Committee failed to introduce evidence that that debt ever existed or had not been repaid. Again, Mr. Maussner's counsel stubbornly, consistently, and repeatedly ignored admonitions about the fact that Mr. Maussner is the fiduciary that is RAMA[7] and so counsel also tosses off as meaningless the transfer of RAMA-owned horse trailers to non-debtor, RAMA Farms, on a post-petition basis, without leave of Court. In defending that transfer, Mr. Maussner's counsel disregards not one, not two, but three well-settled principles of law or statutes. The first is that Mr. Maussner is a trustee for the benefit of RAMA and cannot self deal.[8] The second is that he is a Debtor-in-Possession and cannot violate the Bankruptcy Code.[9] The third is Mr. Maussner himself caused RAMA to have record title to the trailers and he cannot now be heard to claim that the public record of title is wrong.[10]

And Mr. Maussner's counsel continues to claim that Mr. Maussner's son took over the debts on the assets he received, even though (1) there is documentary evidence that it

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[7]See, for example, *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, at 355-356; and see *Slater v. Smith (In re Albion Disposal, Inc)*, 152 B.R. 794 (Bankr. W.D.N.Y. 1993) and learned authorities relied upon therein.

[8]*Id*.

[9]18 U.S.C. §§ 152, 153 and 157.

[10]See, for example, *In re Wittmeyer*, 311 B.R. 137 (Bankr. W.D.N.Y. 2004).

was intended that he receive them free and clear,[11] and (2) there is no evidence to show that anyone other than RAMA paid off those liens, and (3) the reason that we have no evidence as to whether RAMA did or did not pay off those liens is because Mr. Maussner has never made a full accounting of the post-petition activities of this estate in the form of a sworn Disclosure Statement and Plan or Debtor-in-Possession Final Report and Account from which it could be ascertained what debts were or were not satisfied from the proceeds of the sale of RAMA assets. The inference, again, is one of post-petition cover-up of the alleged pre-petition malfeasances.

V.

Mr. Maussner's counsel also ignores the simple truth that the veracity of witnesses is for the Court to judge. He argues as if Mr. Maussner's testimony is dispositive, and that the Court may not conclude that Mr. Maussner is not to be believed in some or all critical respects. Again, and to return to the key elements recited at the beginning of this Decision, Mr. Maussner and his counsel ignore the precarious position that Mr. Maussner is in, a position of which the Court has cautioned them time and time and time again. Mr. Maussner is the designated principal of a closely held Chapter 11 corporate debtor and he has been sued by the Committee because he was not himself going to address questions about his own possible liability to the Chapter 11 estate. Any such person has only two choices, in the Court's view: convert the case to Chapter 7 and defend vigorously (as the principals in the Corson Manufacturing case have done) or sit down and settle up with the estate, cooperating with the Committee's effort to be

[11]Committee Exhibit # 47.

certain that the estate is made justly whole.[12]

Mr. Maussner has instead chosen to blaze a third path. That is to lead the Committee a long and costly chase, while still remaining in control of the RAMA Chapter 11 estate. There can be only one reason for that. It is to avoid making the full and honest accounting that is required in a Disclosure Statement and Plan, or in a Final Report and Account, until after he has managed to get a settlement with the Committee that would include a general release. This trail has imposed enormous economic burdens on this estate, as the Committee has had to uncover all of the information that Mr. Maussner should have open disclosed as the fiduciary of this estate. This situation worsens with each passing day.

VI.

In conclusion, the Court rules that it is "probable" for purposes of CPLR 6201 *et seq.* that the Committee will succeed upon various of the instant causes of action that assert preferential or fraudulent transfers, and breaches of fiduciary duty, during the period from December 1999 to the date of the filing of the petition.
(For this purpose, the spin-off of assets to the son's corporations occurred in February, March or April of 2000, not in the year 1999.)

The Court finds that Mr. Maussner has, since the filing of the RAMA Chapter 11 Petition, been engaged in a program of placing significant assets that had immediate value beyond the reach of the Committee, were the Committee ultimately to prevail on the merits of its

[12]See *In re Present Co., Inc.*, 141 B.R. 18 (Bankr. W.D.N.Y. 1992).

claims.

To this day, Mr. Maussner denies his post-petition duties of trust. He makes the estate to which he owes that duty of trust, fight to obtain a secure position as to his liabilities (if any) to the bankrupt Debtor, which he still insists on controlling.

The Committee has persuaded the Court that Mr. Maussner's failure to file a Plan and Disclosure Statement or (in the alternative) convert this case to Chapter 7, is an effort to avoid his duty to fully account for the true pre and post-petition financial affairs of the Debtor. In a Disclosure Statement he would have to do so under oath. He would also have to do so in the updated schedules and the Final Report and Account required by Rule 1019(5) in the event of conversion. Mr. Maussner has failed even to perform his obvious, continuing duty to amend the schedules to the extent that he now asserts that they are incorrect, incomplete, or otherwise inconsistent with his current testimony under oath. Although not necessary to today's decision, the Court draws the inference from this inexcusable conduct by this fiduciary that he is conducting himself with actual intent to hinder, delay and defraud the creditors of this estate. The Court has admonished Mr. Maussner and his counsel in open court repeatedly and unequivocally that he must perform his fiduciary duty. The Court has no choice but to conclude that the failure to do so even in the least significant ways (such as amending the schedules appropriately) is a conscious effort to hide the truth from the Court, from the Committee and from the RAMA estate.

The Court has considered all other arguments raised by Mr. Maussner and rejects them.

There is no need for the Court to quantify the dollar amounts of the causes of action for which the Court finds the ultimate success of the Committee to be "probable," because Mr. Maussner has few assets left to restrain or attach. For the Court to provide any more detail about its present findings than is actually required simply provides an unfair roadmap to just one side of the case as to how to do a better job at plenary trial.

Committee counsel shall submit, on notice to Mr. Maussner's counsel, an Order in sufficient and adequate form to accomplish the following: To freeze Mr. Maussner's interest in 25 Boxwood, the grazing land in Springville, and his mortgage interest in the Del Gato land; to insure the deposit into an escrow of half of the rents on 25 Boxwood, of all payments from Del Gato, of all payments on the Promissory Note received for the Cayuga Road land, and of 10% of the remaining income stream to Mr. Maussner, excluding Social Security. Mr. Maussner may make application to this Court from time to time for releases from escrow, for good cause.

SO ORDERED

Dated: Buffalo, New York
September 29, 2004

/s/Michael J. Kaplan

U.S.B.J.