UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

January 26, 2017 at 9:30 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

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1. 14-25820-D-11 INTERNATIONAL MANUFACTURING GROUP, INC.
16-2090 MCFARLAND V. CALIFORNIA BANK & TRUST ET AL
OMM-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING
9-21-16 [81]

Tentative ruling:

This is the motion of defendant Bank of America, N.A. (the "Bank") to dismiss the first amended complaint ("Amended Complaint") of the plaintiff, Beverly McFarland, who is also the trustee in the chapter 11 case in which this adversary proceeding is pending (the "trustee"), pursuant to Fed. R. Bankr. P. 12(b)(6), incorporated herein by Fed. R. Bankr. P. 7012(b). The trustee has filed opposition, the Bank filed a reply, the parties have submitted supplemental briefs on a discrete issue, and the court has heard oral argument. For the following reasons, as well as those set forth in the court's original tentative ruling (in the civil minutes for November 8, 2016), the motion will be granted in part and denied in part.

The court's original tentative ruling left open a single question concerning

the effect of Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106 (9th Cir. 2009), and applicable Washington law: whether Washington law governing collateral attacks on Washington state court orders, as set down in Bresolin v. Morris, 86 Wn.2d 241, 245 (1975), applies to fraudulent transfer actions brought under Washington's version of the Uniform Fraudulent Transfer Act. Although neither party has cited a case directly on point, and the court has found none, the court now concludes that the Washington courts would rule that the collateral attack doctrine does apply to fraudulent transfer actions. Thus, because the trustee has not alleged the King County Superior Court lacked personal or subject matter jurisdiction when it entered the orders under which the court registry transfers were made and has not alleged the Superior Court lacked the inherent power to enter the orders, the orders are not void under Washington law and the trustee cannot avoid those transfers.

Against this conclusion, the trustee argues that because the debtor's unsecured creditors, in whose shoes the trustee stands, were not parties to the Superior Court orders, they (and she) are not bound by those orders and may therefore challenge the court registry transfers despite the general rule against collateral attacks on Washington state court orders. The cases the trustee relies on are inapposite. In Farrow v. Ostrom, 16 Wn.2d 547 (1943), the Washington Supreme Court permitted the plaintiff, who held a judgment against a man and the marital community comprised of the man and his wife – to reach the community property the man had transferred to his wife pursuant to a consensual divorce decree. The court held that in awarding the husband's community interest to his wife, the divorce decree had done nothing more than award to the wife "such interest as [the husband had]." 16 Wn.2d at 552. "In entering the interlocutory decree, the court did not attempt to extinguish the plaintiff's equitable claim against the property." Id.[1]

The court did not construe the creditor's action as a fraudulent transfer action and its ruling did not discuss fraudulent transfer law. Thus, the case does not stand for the proposition for which the trustee cites it: "that a creditor not party to a court proceeding is not bound by it and thus may pursue a fraudulent transfer claim." Trustee's Supp. Brief, DN 160, at 2:7-8.

The trustee relies on Morley v. Morley, 131 Wash. 540 (1924), for what she calls the "long standing principle of Washington law that a stranger to litigation is not bound by it and, in turn, the doctrine of collateral attack is inapplicable to such parties." Trustee's Supp. Brief at 2:9-11. Again, the trustee overstates the case. In Morley, a wife died before her husband, leaving him a life estate in her interest in certain real property and the remainder to their children. After her death, the husband, then a widower, obtained a court order determining the property to be his sole and separate property. He then executed a will leaving the property to his new wife. The children challenged the will and the court found that the earlier order determining the property to be the widower's sole and separate property had been entered with no notice to or appearance by the children, who, the court held, had earlier been vested with an undivided one-half interest in the property immediately upon their mother's death. 131 Wash. at 543-44. In the language quoted by the trustee and later, the court emphasized that the earlier order had purported to affect the children's interests in the property, without notice to them. See id. at 544, 545. As with Farrow, the case did not concern fraudulent transfers.

Finally, the trustee cites Bus. Fin. Corp. v. Knoll, 2016 Wash. App. LEXIS 1173 (May 23, 2016). In that case, after the death of an individual and the appointment of her two sons as copersonal representatives of her probate estate, an entity loaned money to the family business, taking as additional collateral a security

interest in real property owned by the probate estate. Only one of the decedent's two sons signed the deed of trust as personal representative of the probate estate. The other son later challenged the lender's foreclosure action on the ground that it was an impermissible collateral attack on the probate court's order appointing him as a co-personal representative. The court concluded that the collateral attack doctrine did not apply because the lender's dealings with the company began a year after the probate court entered its order, and thus, the lender was "not a party to the [probate court's order] and not in privity with any of the parties to the order." 2016 Wash. App. LEXIS 1173 at *17.

The Bus. Fin. Corp. v. Knoll decision is unpublished; therefore, it is not precedential and not binding on any court, although it "may be accorded such persuasive value as the court deems appropriate." Washington State Court Rules, Rule GR 14.1. Second, it was not a fraudulent transfer action. Third, the court's statement about the collateral attack rule was not necessary to its decision;[2] thus, even if the decision had been published, that statement would not have binding effect. Thus, the court finds the decision has little, if any, persuasive value.

More persuasive is the decision cited by the Bank, where the collateral attack doctrine was applied against persons who were not parties to the order they were challenging or in privy with parties to that order. In Freise v. Walker, 27 Wn. App. 549 (1980), a widow, Mrs. Jones, sold her real property to Mr. and Mrs. Walker. When Mrs. Jones' daughters learned of the sale, they obtained a court order appointing Mr. Freise as guardian of the person and the estate of Mrs. Jones and Mr. Freise then sued the Walkers to rescind the sale of the real property. The Walkers challenged Mr. Freise's appointment as guardian, asserting they were harmed by it, but the court applied the doctrine of collateral attack. "Here, the court had subject matter jurisdiction, personal jurisdiction, and the inherent power and duty to appoint a guardian to protect Mrs. Jones' estate. Thus, the order appointing Freise as guardian was not void. The Walkers, therefore, may not collaterally attack the appointment." 27 Wn. App. at 553.

The Bank also cites Mueller v. Miller, 82 Wn. App. 236 (1996), which involved a dispute between an individual who acquired property under an order confirming a sheriff's sale and one who later purchased the same property from a probate estate. The purchaser from the probate estate sued the sheriff's sale purchaser to quiet title. The court held that the sheriff's sale was "void at the outset" because it was held more than ten years after the underlying judgment was entered (id. at 248) and the order confirming it could not make it valid. Id. at 248-49. The court construed the quiet title action as a collateral attack on the sheriff's sale and the order confirming it. Id. at 250. The court stated the general rule: "A collateral attack may be maintained only against a final order or judgment which is absolutely void, not merely erroneous or voidable." Id. at 250-51. Thus, the court held the quiet title action was proper because the sheriff's sale and the order confirming it were void. Id. at 251.

Hypothetically, the court might have ruled instead that the probate sale purchaser could challenge the order confirming the sheriff's sale because she was not a party to the action that generated it or in privy with a party. Had the court done that, the decision might support the trustee's position here. But the court did not do that. It ruled instead that the purchaser could challenge the sheriff's sale and order because they were void, thereby strongly suggesting her challenge would have failed as an impermissible collateral attack if she had not proven the sheriff's sale was void.

Finally, the trustee contends application of the collateral attack rule to fraudulent transfer actions by persons who were not parties to the judgment or order would violate the right to due process. The Bledsoe court, however, evinced no such concern when it held that under Oregon law, the rule applies to fraudulent transfer actions. "We begin by observing that nothing in Johnson suggests that its rule is not one of general applicability; that is, nothing suggests that the rule would not apply to all collateral attacks on judgments. Additionally, Trustee has failed to explain persuasively why UFTA fraudulent transfer claims would be subject to a different rule." Bledsoe, 569 F.3d at 1109-10.

In light of the cases cited by the Bank and the trustee's failure to cite contrary Washington authority concerning the effect of the collateral attack rule in fraudulent transfer cases, the court concludes that the the Washington courts would hold that the rule applies to collateral attacks in the form of fraudulent transfer actions. Accordingly, as the trustee has not shown the King County Superior Court orders to be void, the motion will be granted as to the court registry transfers. As to the balance of the transfers, for the reasons discussed in the original tentative ruling, the motion will be denied.

The court will hear the matter.

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1 The Farrow holding has subsequently been characterized as follows: "When the community incurs an obligation and is subsequently dissolved, the former community remains liable regardless of the spouses' agreement between themselves as to who should pay the debt. Consequently, the creditor may continue to pursue the former community property in the hands of either spouse." Mansfield v. Stevens, 1998 Wn. App. LEXIS 1605, *6-7 (1998).

2 When it made the statement, the court had already held that the son who did not sign the deed of trust had by statute become disqualified to act as a co-personal representative even though the probate court had not removed him and that the son who signed the deed of trust had authority by statute to act without his brother's participation. Bus. Fin. Corp. v. Knoll, 2016 Wash. App LEXIS 1173, at *15-16. In other words, the court did not need to invalidate the earlier probate court order before it could rule on the lender's foreclosure action.

2. 14-25820-D-11 INTERNATIONAL MANUFACTURING GROUP, INC.
16-2090 MCFARLAND V. CALIFORNIA BANK & TRUST ET AL
WT-2

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING AND/OR MOTION TO TRANSFER CASE TO ANOTHER VENUE
10-5-16 [104]

Tentative ruling:

This is the motion of defendant Jamestown S'Klallam Tribe (the "Tribe") to dismiss the first amended complaint ("Amended Complaint") of the plaintiff, Beverly McFarland, who is also the trustee in the chapter 11 case in which this adversary proceeding is pending (the "trustee"), for a variety of reasons. The trustee has filed opposition, the Tribe filed a reply, the parties have submitted supplemental briefs on two discrete issues, and the court has heard oral argument. For the following reasons, as well as those set forth in the court's original tentative ruling (in the civil minutes for November 8, 2016), the motion will be granted in part and denied in part.

I. The Rule 4(m) Issue

The trustee attempted to serve her original complaint on the Tribe within the 90-day period prescribed by Fed. R. Civ. P. 4(m), incorporated herein by Fed. R. Bankr. P. 7004(a)(1) ("Rule 4(m)"). She served the Amended Complaint on the Tribe 126 days after the filing of the original complaint. The Tribe argues (1) the trustee has still not properly served the Tribe; and (2) she has not shown and cannot show good cause for her failure to serve the Tribe within the 90 days from the commencement of the case. The court rejected the Tribe's first argument in its original tentative ruling; the court now rejects the second.

If service is not made within the 90-day period but the plaintiff shows good cause for the delay, "the court shall extend the time for service for an appropriate period." Rule 4(m). The court is to consider these factors in determining whether the plaintiff has shown good cause: "(a) the party to be served . . . received actual notice of the lawsuit; (b) the defendant would suffer no prejudice; and (c) plaintiff would be severely prejudiced if his complaint were dismissed." Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512 (9th Cir. 2001) (citation omitted).

Here, there is no question the Tribe had actual notice of the action and of the fact it was a named defendant within the 90-day period. Within that period, in fact on the 52nd day after the original complaint was filed, the Tribe's attorney, who also signed the present motion, signed a stipulation by which she agreed to a deadline for the Tribe to respond to the complaint, a date for a discovery conference and the exchange of initial disclosures, a deadline for filing a joint discovery plan, and a continuance of the initial status conference. The stipulation strongly suggests the trustee believed the Tribe acknowledged it had been properly served and no further attempt to effect service was necessary. Further, in light of the stipulation, there can be no contention (and the Tribe makes none) that the Tribe would suffer any prejudice if the court extends the Rule 4(m) deadline to a date after the date on which the Tribe was served through its Tribal Council Chairman and Chief Executive Officer.[1]

The trustee, on the other hand, could suffer the ultimate prejudice in the

litigation if the Amended Complaint is dismissed. The Tribe argues the trustee would be barred by the statute of limitations from filing a new complaint against the Tribe. If so, that would constitute severe prejudice of the sort the court is specifically entitled to consider. The rule itself provides that if good cause is not shown and the court does not exercise its discretion to extend the service deadline, the dismissal of the case must be without prejudice. Rule 4(m). "Such a dismissal ordinarily enables the plaintiff to refile the complaint and effect timely service. It is conceivable, however, that prejudice might result from a dismissal without prejudice if, for example, the statute of limitations had expired. The existence of prejudice of this kind could affect what action a court might choose to take in response to untimely service of process." United States v. 2,164 Watches, 366 F.3d 767, 773 (9th Cir. 2004). Thus, "relief under Rule 4(m) 'may be justified, for example, if the applicable statute of limitations would bar the re-filed action.'" Lemoge v. United States, 587 F.3d 1188, 1195 (9th Cir. 2009), citing Fed. R. Civ. P. 4, Advisory Committee Note to 1993 Amendments, Subdivision (m).

The court concludes the trustee has shown all three of the factors necessary to a finding of good cause for her failure to properly serve the Tribe within the 90-day period. Accordingly, the court will extend the time for service under Rule 4(m) to September 30, 2016.

II. The Effect of the Bledsoe Decision and Applicable Washington Law

The court's original tentative ruling left open a single question concerning the effect of Batlan v. Bledsoe (In re Bledsoe), 569 F.3d 1106 (9th Cir. 2009), and applicable Washington law: whether Washington law governing collateral attacks on Washington state court orders, as set down in Bresolin v. Morris, 86 Wn.2d 241, 245 (1975), applies to fraudulent transfer actions brought under Washington's version of the Uniform Fraudulent Transfer Act. Although neither party has cited a case directly on point, and the court has found none, the court now concludes that the Washington courts would rule that the collateral attack doctrine does apply to fraudulent transfer actions. Thus, because the trustee has not alleged the King County Superior Court lacked personal or subject matter jurisdiction when it entered the orders under which the court registry transfers were made and has not alleged the Superior Court lacked the inherent power to enter the orders, the orders are not void under Washington law and the trustee cannot avoid those transfers.

Against this conclusion, the trustee argues that because the debtor's unsecured creditors, in whose shoes the trustee stands, were not parties to the Superior Court orders, they (and she) are not bound by those orders and may therefore challenge the court registry transfers despite the general rule against collateral attacks on Washington state court orders. The cases the trustee relies on are inapposite. In Farrow v. Ostrom, 16 Wn.2d 547 (1943), the Washington Supreme Court permitted the plaintiff, who held a judgment against a man and the marital community comprised of the man and his wife – to reach the community property the man had transferred to his wife pursuant to a consensual divorce decree. The court held that in awarding the husband's community interest to his wife, the divorce decree had done nothing more than award to the wife "such interest as [the husband had]." 16 Wn.2d at 552. "In entering the interlocutory decree, the court did not attempt to extinguish the plaintiff's equitable claim against the property." Id.[2]

The court did not construe the creditor's action as a fraudulent transfer action and its ruling did not discuss fraudulent transfer law. Thus, the case does not stand for the proposition for which the trustee cites it: "that a creditor not party to a court proceeding is not bound by it and thus may pursue a fraudulent

transfer claim." Trustee's Supp. Brief, DN 160, at 2:7-8.

The trustee relies on Morley v. Morley, 131 Wash. 540 (1924), for what she calls the "long standing principle of Washington law that a stranger to litigation is not bound by it and, in turn, the doctrine of collateral attack is inapplicable to such parties." Trustee's Supp. Brief at 2:9-11. Again, the trustee overstates the case. In Morley, a wife died before her husband, leaving him a life estate in her interest in certain real property and the remainder to their children. After her death, the husband, then a widower, obtained a court order determining the property to be his sole and separate property. He then executed a will leaving the property to his new wife. The children challenged the will and the court found that the earlier order determining the property to be the widower's sole and separate property had been entered with no notice to or appearance by the children, who, the court held, had earlier been vested with an undivided one-half interest in the property immediately upon their mother's death. 131 Wash. at 543-44. In the language quoted by the trustee and later, the court emphasized that the earlier order had purported to affect the children's interests in the property, without notice to them. See id. at 544, 545. As with Farrow, the case did not concern fraudulent transfers.

Finally, the trustee cites Bus. Fin. Corp. v. Knoll, 2016 Wash. App. LEXIS 1173 (May 23, 2016). In that case, after the death of an individual and the appointment of her two sons as copersonal representatives of her probate estate, an entity loaned money to the family business, taking as additional collateral a security interest in real property owned by the probate estate. Only one of the decedent's two sons signed the deed of trust as personal representative of the probate estate. The other son later challenged the lender's foreclosure action on the ground that it was an impermissible collateral attack on the probate court's order appointing him as a co-personal representative. The court concluded that the collateral attack doctrine did not apply because the lender's dealings with the company began a year after the probate court entered its order, and thus, the lender was "not a party to the [probate court's order] and not in privity with any of the parties to the order." 2016 Wash. App. LEXIS 1173 at *17.

The Bus. Fin. Corp. v. Knoll decision is unpublished; therefore, it is not precedential and not binding on any court, although it "may be accorded such persuasive value as the court deems appropriate." Washington State Court Rules, Rule GR 14.1. Second, it was not a fraudulent transfer action. Third, the court's statement about the collateral attack rule was not necessary to its decision;[3] thus, even if the decision had been published, that statement would not have binding effect. Thus, the court finds the decision has little, if any, persuasive value.

More persuasive is the decision cited by the Tribe, where the collateral attack doctrine was applied against persons who were not parties to the order they were challenging or in privy with parties to that order. In Freise v. Walker, 27 Wn. App. 549 (1980), a widow, Mrs. Jones, sold her real property to Mr. and Mrs. Walker. When Mrs. Jones' daughters learned of the sale, they obtained a court order appointing Mr. Freise as guardian of the person and the estate of Mrs. Jones and Mr. Freise then sued the Walkers to rescind the sale of the real property. The Walkers challenged Mr. Freise's appointment as guardian, asserting they were harmed by it, but the court applied the doctrine of collateral attack. "Here, the court had subject matter jurisdiction, personal jurisdiction, and the inherent power and duty to appoint a guardian to protect Mrs. Jones' estate. Thus, the order appointing Freise as guardian was not void. The Walkers, therefore, may not collaterally attack the appointment." 27 Wn. App. at 553.

The Tribe also cites Mueller v. Miller, 82 Wn. App. 236 (1996), which involved a dispute between an individual who acquired property under an order confirming a sheriff's sale and one who later purchased the same property from a probate estate. The purchaser from the probate estate sued the sheriff's sale purchaser to quiet title. The court held that the sheriff's sale was "void at the outset" because it was held more than ten years after the underlying judgment was entered (id. at 248) and the order confirming it could not make it valid. Id. at 248-49. The court construed the quiet title action as a collateral attack on the sheriff's sale and the order confirming it. Id. at 250. The court stated the general rule: "A collateral attack may be maintained only against a final order or judgment which is absolutely void, not merely erroneous or voidable." Id. at 250-51. Thus, the court held the quiet title action was proper because the sheriff's sale and the order confirming it were void. Id. at 251.

Hypothetically, the court might have ruled instead that the probate sale purchaser could challenge the order confirming the sheriff's sale because she was not a party to the action that generated it or in privy with a party. Had the court done that, the decision might support the trustee's position here. But the court did not do that. It ruled instead that the purchaser could challenge the sheriff's sale and order because they were void, thereby strongly suggesting her challenge would have failed as an impermissible collateral attack if she had not proven the sheriff's sale was void.

Finally, the trustee contends application of the collateral attack rule to fraudulent transfer actions by persons who were not parties to the judgment or order would violate the right to due process. The Bledsoe court, however, evinced no such concern when it held that under Oregon law, the rule applies to fraudulent transfer actions. "We begin by observing that nothing in Johnson suggests that its rule is not one of general applicability; that is, nothing suggests that the rule would not apply to all collateral attacks on judgments. Additionally, Trustee has failed to explain persuasively why UFTA fraudulent transfer claims would be subject to a different rule." Bledsoe, 569 F.3d at 1109-10.

In light of the cases cited by the Tribe and the trustee's failure to cite contrary Washington authority concerning the effect of the collateral attack rule in fraudulent transfer cases, the court concludes that the the Washington courts would hold that the rule applies to collateral attacks in the form of fraudulent transfer actions. Accordingly, as the trustee has not shown the King County Superior Court orders to be void, the motion will be granted as to the court registry transfers. As to the balance of the transfers, for the reasons discussed in the original tentative ruling, the motion will be denied.

The court will hear the matter.

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1 That individual was served by mail on September 6, 2016. For the sake of avoiding any argument about whether service is effective upon mailing, the court will extend the service deadline to September 30, 2016. There can be no dispute that the court may extend the deadline retroactively, after the original deadline has run. Mann v. Am. Airlines, 324 F.3d 1088, 1090 (9th Cir. 2003).

2 The Farrow holding has subsequently been characterized as follows: "When the community incurs an obligation and is subsequently dissolved, the former community remains liable regardless of the spouses' agreement between

themselves as to who should pay the debt. Consequently, the creditor may continue to pursue the former community property in the hands of either spouse." Mansfield v. Stevens, 1998 Wn. App. LEXIS 1605, *6-7 (1998).

3 When it made the statement, the court had already held that the son who did not sign the deed of trust had by statute become disqualified to act as a co-personal representative even though the probate court had not removed him and that the son who signed the deed of trust had authority by statute to act without his brother's participation. Bus. Fin. Corp. v. Knoll, 2016 Wash. App LEXIS 1173, at *15-16. In other words, the court did not need to invalidate the earlier probate court order before it could rule on the lender's foreclosure action.