

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 00-27836-C-7
D.W. RAINS and O.L. RAINS,) Adversary No.00-2608
Debtor(s).) DC No. GJH-10
_____))
KENNY FLINN, Chapter 7) OPINION
Trustee,)
Plaintiff(s),)
v.)
OMER L. RAINS and DIANA W.)
RAINS,)
Defendant(s).)
_____)

Gregory J. Hughes, Hughes & Pritchard, Roseville, California,
for plaintiff

Omer L. Rains, Carmichael, California, appearing In Propria
Persona

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

This motion requests authority to appoint the plaintiff
bankruptcy trustee to act on behalf of the judgment debtor to
withdraw \$250,000 from an ERISA-qualified pension plan as an

1 exercise of the court's authority to appoint a person to
2 perform an act on behalf of a disobedient party pursuant to
3 Federal Rule of Civil Procedure 70 and Federal Rule of
4 Bankruptcy Procedure 7070. The motion will be GRANTED.

5
6 Facts

7 The Ninth Circuit stated the underlying facts in its
8 decision in Rains v. Flinn (In re Rains), 428 F.3d 893 (9th
9 Cir. 2005), in which it affirmed an order approving a
10 settlement agreement and a subsequent judgment enforcing the
11 settlement agreement:

12 Omer L. Rains is an attorney and a debtor in
13 bankruptcy. Kenny W. Flinn is the bankruptcy trustee.
14 In September 2002, the bankruptcy court appointed a
15 mediator in connection with adversary proceedings
16 involving Rains, Flinn, and a creditor. A settlement
17 conference was held on September 23, 2002, and after a
18 full day of negotiations, the parties reached a
19 settlement (settlement or agreement). The agreement was
20 reduced to writing and the parties (including Rains) and
21 their attorneys signed it.

22 Pursuant to the terms of the settlement, Rains and
23 his wife, also a debtor, agreed to pay the trustee
24 \$250,000 by March 31, 2003. Upon timely payment, the
25 trustee and the creditor agreed to dismiss the adversary
26 proceedings and withdraw their objections from the
27 bankruptcy estate. Among the exemptions claimed by Rains
28 was his interest in a retirement plan sponsored by the
American Bar Association (retirement plan). The
agreement alternatively provided that:

[i]n the event that payment is not timely made by
the defendants, judgment shall be entered denying
the debtors' discharge and an order shall be entered
denying the debtors' exemption claim to the ABA
pension plan up to the amount of \$250,000 unless
before the due date for payment the debtors have
posts an irrevocable standby letter of credit ...
(or other instrument of collateral acceptable to the
trust and to [the creditor]) to support the \$250,000
payment.

[Facts relating to approval of settlement, and
appeal therefrom, omitted.]

While the first appeal was pending before the
district court, Flinn filed an ex parte application for

1 entry of judgment pursuant to the terms of the settlement
2 agreement. This request was prompted by Rains's failure
3 to pay \$250,000 by the March 31, 2003 due date. The
4 bankruptcy court entered judgment in favor of Flinn,
5 ruling that Rains's "claim of exemption against the ABA
6 Retirement Plan is hereby denied up to the sum of
7 \$250,000.00, and \$250,000.00 of the funds in that
8 Retirement Plan is hereby held to be property of the
9 chapter 7 estate." The judgment further required Rains
10 to "forthwith withdraw the sum of \$250,000.00 from the
11 ABA Retirement Plan, and ... pay said amount to the
12 Trustee immediately upon receipt."

13 Rains, 428 F.3d at 897-99.

14 As relevant to the instant motion, the Ninth Circuit
15 ruled that:

16 The bankruptcy court had jurisdiction to enter the
17 judgment enforcing the settlement agreement; Rains's
18 appeal from that judgment was timely; the bankruptcy
19 court properly ordered Rains to remit \$250,000 in
20 retirement plan funds to Flinn; and Rains's due process
21 rights were not violated. AFFIRMED.

22 Id. at 907.

23 When Rains still did not pay, the trustee requested that
24 this court order that Rains be incarcerated on a theory of
25 civil contempt until he obtained \$250,000 from the ABA
26 retirement plan. Action on the contempt question was deferred
27 until the trustee demonstrated that measures less drastic than
28 the "heavy hand" of contempt would not suffice.

The trustee's response to the court's requirement that
other alternatives be explored was the instant motion to
appoint Flinn pursuant to Federal Rule of Civil Procedure 70,
as incorporated and supplemented by Federal Rule of Bankruptcy
Procedure 7070, to make the request on Rains's behalf to have
the ABA pension plan disburse \$250,000.

It is conceded that Rains is over the age of 59½ and that
there is no legal impediment to his withdrawal of \$250,000

1 from the ABA pension plan.

3 Jurisdiction

4 The underlying adversary proceeding seeking to deny
5 discharge and recover property of the estate was within
6 federal subject-matter jurisdiction. 28 U.S.C. § 1334(b). It
7 was a core proceeding that a bankruptcy judge is empowered to
8 hear and determine. 28 U.S.C. § 157(b)(2). The enforcement
9 under Federal Rule of Bankruptcy Procedure 70 of the judgment
10 rendered in the adversary proceeding is merely an exercise of
11 the continuing jurisdiction over the adversary proceeding.
12 Fed. R. Civ. P. 82; Fed. R. Bankr. P. 9030.

14 Discussion

15 This is the unusual case in which \$250,000 in an ERISA-
16 qualified plan has been definitively determined to constitute
17 property of the bankruptcy estate and in which the judgment
18 debtor has been directly ordered to "withdraw \$250,000 from
19 the ABA Retirement Plan" and "pay said amount to the
20 [bankruptcy] Trustee immediately upon receipt."

21 Since the judgment debtor has not complied with the order
22 after being called upon to do so, the plaintiff bankruptcy
23 trustee asks that he be appointed to make the withdrawal on
24 the judgment debtor's behalf and, in compliance with the terms
25 of the judgment, to pay himself the sum withdrawn.

26 The procedural tool being invoked is the first sentence
27 of Rule 70, which provides in relevant part:

28 If a judgment directs a party to execute ...

1 documents or to perform any other specific act and the
2 party fails to comply within the time specified, the
3 court may direct the act to be done at the cost of the
4 disobedient party by some other person appointed by the
5 court and the act when so done has like effect as if done
6 by the party. ...

7 Fed. R. Civ. P. 70.¹

8 All of the requirements of Rule 70 have been satisfied.
9 The judgment is not a simple money judgment that could be
10 enforced by regular execution. Rains has been directed to
11 withdraw \$250,000 from the ABA Retirement Plan and to pay that

12 ¹The full text of Rule 70 is:

13 If a judgment directs a party to execute a conveyance of land or deliver deeds or other
14 documents or to perform any other specific act and the party fails to comply within the time
15 specified, the court may direct the act to be done at the cost of the disobedient party by some
16 other person appointed by the court and the act when so done has like effect as if done by the
17 party. On application of the party entitled to performance, the clerk shall issue a writ of
18 attachment or sequestration against the property of the disobedient party to compel obedience
19 to the judgment. The court may also in proper cases adjudge the party in contempt. If real or
20 personal property is within the district, the court in lieu of directing a conveyance thereof may
21 enter a judgment divesting the title of any party and vesting it in others and such judgment has
22 the effect of a conveyance executed in due form of law. When any order or judgment is for the
23 delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or
24 assistance upon application to the clerk.

25 Fed. R. Civ. P. 70.

26 Federal Rule of Bankruptcy Procedure 7070 expands upon the fourth sentence of Rule
27 70 by permitting a judgment divesting title of any party and vesting title in another whenever the
28 subject real or personal property is "within the jurisdiction of the court," instead of (as in Rule
70) "within the district":

Rule 70 F.R. Civ. P. applies in adversary proceedings and the court may enter a
judgment divesting the title of any party and vesting title in others whenever the real or personal
property involved is within the jurisdiction of the court.

Fed. R. Bankr. P. 7070.

1 amount to Flinn, the bankruptcy trustee. Moreover, Rains's
2 right to receive \$250,000 from the ABA Retirement Plan has
3 been definitively determined to be property of the bankruptcy
4 estate. He has been asked to perform his obligation to
5 request the withdrawal, and he has not done so. He is now a
6 "disobedient" party. 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER &
7 RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE §§ 3021-22 (2d ed.
8 1998); 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 70.02[1]
9 (3d ed. 2005); 10 COLLIER ON BANKRUPTCY ¶ 7070.01 (Alan N. Resnick
10 & Henry J. Sommer, eds., 15th ed. rev., 2005).

11 Nor does the phrase "fails to comply within the time
12 specified" in Rule 70 constitute an obstacle to appointment of
13 a person to act at this stage of the litigation. Although the
14 judgment did not specify a specific time in which Rains was
15 required to perform his obligation to withdraw the \$250,000,
16 the phrase "fails to comply within the time specified" in Rule
17 70 logically means a "reasonable" time under the circumstances
18 in the instance of a judgment that does not designate a time
19 certain.

20 Under any view of what constitutes a "reasonable" time,
21 the time in which Rains was required to withdraw the funds has
22 already come and gone. The judgment was appealed to the Ninth
23 Circuit. The time in which to file a petition for writ of
24 certiorari to obtain review by the U.S. Supreme Court of the
25 Ninth Circuit's decision has expired without a petition having
26 been filed. The judgment has now become both final and
27 unappealable. The trustee has demanded performance. Rains
28 has not performed.

Thus, it has been held that what is required in order to comply with the "within the time specified" is that the disobedient party have had an opportunity to have done the required act and not have done so. Texas Extrusion Corp. v. Lockheed Corp. (In re Texas Extrusion Corp.), 844 F.2d 1142, 1153 (5th Cir. 1988).

Moreover, to the extent that the lack of a date certain in the judgment could form the basis for opposing the motion to appoint a person to effect the withdrawal on Rains's behalf, Rains has waived the issue by not asserting it in his opposition to the motion.

The bankruptcy trustee is entitled to an award of costs and attorney's fees pursuant to the provision of Rule 70 that the act may be done "at the cost of the disobedient party." Fed. R. Civ. P. 70. Such costs and fees may be established by separate motion made after the act is completed.

* * *

The motion by the plaintiff bankruptcy trustee for an order appointing him to act on behalf of the defendant judgment debtor to withdraw \$250,000 from the ABA Retirement Plan and to direct the delivery of the aforesaid \$250,000 to himself is GRANTED.

Dated: March 3, 2006

/s/
UNITED STATES BANKRUPTCY JUDGE