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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION, Plaintiff v. UNIVERSAL EXPRESS, INC., RICHARD A. ALTOMARE, CHRIS G. GUNDERSON, MARK S. NEUHAUS, GEORGE J. SANDHU, SPIGA, LTD., TARUN MENDIRATTA Defendants.	04 Civ. 2322 (GEL)

SEC'S RESPONSE TO INTERVENOR'S SUPPLEMENTAL ANSWER TO MOTION TO SELL JEWELRY

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Plaintiff Securities and Exchange Commission ("SEC") responds to The Estate Department, Inc.'s ("TED") supplemental answer to the SEC's motion to sell judgment debtor Richard Altomare's jewelry seized on October 10, 2007 when the U.S. Marshall levied upon a writ of execution. TED's motion to intervene was granted on February 14, 2008. [Docket 295] For the reasons stated below, TED's motion for return of the jewelry and other relief should be denied, and the US Marshall should be ordered to sell the jewelry.

I. SEC Followed Proper Procedures When It Seized Jewelry Under A Writ Of Execution.

TED argues that the SEC did not follow the requisite legal procedures to enforce its judgment and so it could not levy under the writ of execution issued by this court on Richard Altomare's jewelry in the possession of TED. TED claims that the SEC must register its judgment with the district court in Florida under the provisions of 28 U.S.C. § 1963 before it could levy on the jewelry. However, TED cites no legal authority supporting its argument that 28 U.S.C. § 1963 is the sole means by which the SEC could enforce its writ. To the contrary, *United States v. Palmer*, 609 F. Supp. 544, 547-48 (E.D. Tenn. 1985), is directly on point in recognizing that a judgment entered for the United States may be enforced under either the provisions of 28 U.S.C. § 1963 or § 2413. Section 2413 provides that a writ of execution on a judgment obtained for the use of the United States in any court thereof shall be issued from and made returnable to the court which rendered the judgment, but may be executed in any other State. Furthermore, Section 2413 does not require registration of the judgment prior to execution. *Palmer*, 609 F. Supp. at 548. Under 28 U.S.C. § 2413 and Fed. R. Civ. P. 69(a), the process for collection is governed by the laws of New York where this district court sits, rather than Florida where Altomare's property was located. *Id.*

The procedures for levying upon personal property by seizure are contained in New York Civil Practice Law and Rules (CPLR) § 5232(b), which provides that the sheriff shall levy upon any interest

of the judgment debtor in personal property capable of delivery by taking the property into custody without interfering with the lawful possession of pledgees. CPLR § 5225 provides that a judgment creditor may bring a special proceeding against a person who is a transferee of personal property from a judgment debtor to determine whether the judgment creditor rights are superior to those of the transferee. CPLR § 5202(a) provides that where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights in the judgment debtor's personal property are superior to the extent of the amount of execution to the rights of any transferee except a transferee who acquired the property for fair consideration before it was levied upon. Under New York law, a judgment creditor acquires a lien on personalty of the judgment debtor when an execution is delivered to the Sheriff, or in this case the US Marshal. See *In re Sid Bernstein, Ltd*., 1996 Bankr. LEXIS 393 * 24 (E. D. Penn. 1996), citing *Balaber-Strauss v. Marine Midland Bank (In re Maceca),* 129 Bankr. 369, 370 (Bankr. S.D.N.Y. 1991) (discussing lien under CPLR § 5202(a)) and other cases. The SEC acquired a lien on Altomare's personal property when it delivered the writ of execution to the US Marshal on October 4, 2007.

In this proceeding commenced by the SEC as a judgment creditor, it is appropriate for the court to determine whether the SEC's rights to the jewelry are superior to TED's rights as a transferee from Altomare. CPLR § 5225. The key issue for the court to determine is whether TED acquired title to the Altomare jewelry on September 24 and 25, 2007, the dates of the transactions recorded by TED on the Secondhand Dealer Property Forms filed with the Palm Beach County Sherriff's Office [see New Exhibit 6 previously filed with SEC's Response, Docket 281-6] or as to part of the jewelry on October 5, 2007, the date when Barbara Altomare received final payment for the September 24, 2007 transaction, or whether title passed to TED on October 10 and 20, 2007, fifteen days later after the holding period for TED, as a secondhand dealer, had expired. See Fla. Stat. § 538.06(1) which

imposes 15 day holding period on second hand dealers. In order to prevail, TED must convince the court that title passed on September 24, and 25, 2007, prior to TED making full payment or the expiration of the 15 day holding period. TED's argument that title passed upon delivery eviscerates the 15 day holding period of the Florida second hand dealer statute.

The SEC's rights as a judgment creditor attached to jewelry prior to TED receiving good title under the Florida second hand dealer statute. Under CPLR § 5202(a), the SEC's judgment lien attached to the jewelry upon delivery of the writ of execution to the US Marshal on October 4, 2007. The lien comes into existence upon issuance of the execution to the Sheriff or in this case US Marshal. See e.g. *Art-Camera-Pix, Inc. v. Cinecom Corp.*, 64 Misc. 2d 764, 765, 315 N.Y.S. 2d 991, 992 (N.Y. Sup. Ct. 1970). Delivery of a writ of execution to the sheriff creates an interest superior to that of any transferee who thereafter acquires his interests except as enumerated in CPLR § 5202(a). *International Ribbon Mills, Ltd. v. Sturtz*, 42 A.D. 2d 354, 352 N.Y.S. 2d 1 (N.Y. App. Div. 1973*), rev'd on other grounds*, 36 N.Y. 2d 121, 365 N.Y.S. 2d 808, 325 N.E. 2d 137 (N.Y. 1975). To enforce a judgment as a lien against the debtor's personalty, the judgment creditor must deliver a writ of execution to the sheriff for a levy. *Knapp v. McFarland*, 462 F. 2d 935, 938 (2d Cr. 1972) (private suit to enforce judgment lien attached under 28 U.S.C. § 1962). The SEC delivered the writ of execution to the US Marshall on October 4, 2007. See Exhibit B previously filed with SEC's Motion to Sell Jewelry [Docket 222-3] previously filed with the court.

If the court finds that title passed to TED on September 24 and 25, prior to expiration of the second hand dealer holding period, then court must consider whether TED paid fair consideration for the jewelry.[1] However, if the court finds that title passed to TED on October 5, the date of the final payment to Barbara Altomare, or at the end of the fifteen day holding periods on October 10 and 20,

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[1] As discussed in the SEC's Reply at pp. 6-7 and below, TED did not pay fair consideration for the jewelry, which makes Altomare's conveyance fraudulent under New York law.

which events occurred after the judgment lien had attached on October 4, then the SEC's rights are superior to TED and the court should deny TED's request for relief and order the jewelry sold to satisfy the SEC's judgment against Altomare.

II. TED Is Not A Good Faith Purchaser For Value.

For TED to prevail the court must find that title passed on September 24, and 25, 2007, which abrogates the 15 day holding period, and that TED in good faith paid fair consideration. Altomare's conveyance to TED was fraudulent under New York Debtor and Creditor Law § 273-a, which provides every conveyance made without fair consideration when the person making it is a defendant … [against whom] a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment." As this court has clearly stated, "The purpose of § 273-a is to provide a remedy for a creditor who has brought an action for money damages against a party who, after being named a defendant in that action, conveys assets to a third party for less than fair consideration leaving the ultimate judgment unpaid." *Sklaroff v. Rosenberg*, 125 F. Supp. 2d 67, 74 (S.D.N.Y. 2000), *aff'd*, 18 Fed. App'x. 28 (2d Cir. 2001). Altomare conveyed the jewelry to TED without receiving fair consideration at a time when the SEC's judgment had been entered and he had failed to satisfy it. New York Debtor and Creditor Law § 272 defines fair consideration to include an exchange of a fair equivalent and good faith conveyance of the property. TED's purchase of the jewelry with knowledge of the SEC's civil lawsuit demonstrates it did not act in good faith. In such a situation, the SEC as a judgment creditor may disregard the conveyance and levy execution on the property. See New York Debtor and Creditor Law § 278 (1). Whether TED was a purchaser in good faith is a question of fact to be determined under the particular circumstances of each case. *Atlantic Bank of New York v. Toscanini*, 145 A. D. 2d 590, 591, 536 N.Y.S. 2d 132, 133 (N.Y. App. Div.

1988). The SEC sought through the writ of execution to collect disgorgement that Altomare was ordered to pay. Disgorgement is an equitable injunction issued in the public interest. *SEC v. AMX International Inc*., 7 F.3d 71, 74 (5th Cir. 1993). The court should view TED's alleged good faith in this transaction under the equitable maxim that "he who comes into equity must come with clean hands." Equity demands that parties shall have acted fairly and without fraud or deceit as to the controversy in issue. "One's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co*., 324 U.S. 806, 997-98 (1945).

TED's agent, Marc Kravit, knew of the SEC's injunctive action against Altomare, and showed Mr. Osipov information on the Internet about the lawsuit to induce him to release the GIA certificate on the 7.00 carat yellow diamond ring; Kravit's knowledge is attributable to his principal, TED. This knowledge demonstrates that TED had unclean hands when it acquired Altomare's jewelry and that it did not purchase it in good faith. The SEC has also presented evidence that TED did not pay fair consideration for the jewelry. Under these circumstances, the court should find that TED was not a purchaser in good faith. TED's remedy is to seek return of the funds it paid to Altomare while his property was subject to the SEC's judgment lien.

A. Universal Express Owns the Jewelry Purchased from Les Bijoux.

TED does not dispute the fact that Universal Express paid Les Bijoux at least $613,900 toward the purchase of ten pieces of jewelry which Richard Altomare later conveyed to TED. To support its contention that Altomare had good title to the jewelry, TED relies on the declaration of Richard Altomare, a person that this court has found to have committed fraud. Summary Judgment Opinion

and Order at p. 28 [Docket 172]. Altomare stated in his declaration that "All monies disbursed to me by USXP were through either a loan chargeable against my loan account, a bonus, or salary. Every disbursement of monies to me, or on my behalf, or my wife, or in her behalf were timely recorded in the books and records of the corporation and reported to the SEC and Internal Revenue Service in required filings with each." Declaration of Richard A. Altomare dated January 15, 2008, [Docket 290-2 at p.3, ¶ 5.] Altomare's declaration is false for several reasons and fails to support TED's contention that Altomare did not embezzle funds from Universal Express to purchase jewelry from Les Bijoux.

First, the payments to Les Bijoux were not included in Altomare's "loan account." In the annual report of Universal Express for the year ending June 30, 2005, which report was signed by Altomare as the CEO and Chief Accounting Officer, Altomare represented that the outstanding balance in his loan account was $753,496 and the outstanding balance for Barbara Altomare's loan account was $906,000. See relevant portions of financial statements in 2005 Form 10-KSB listing as Other Assets: loan to officer and related party receivable; Notes 3 and 4 to consolidated financial statements describing loan amounts, and Item 12 describing the loans. Exhibit 1 at pp. 5, 7, 11. During the fiscal year from July 1, 2005 through June 30, 2006, Universal Express transferred $453,900 to Les Bijoux in a series of wire transfers starting April 13, 2006 and continuing through June 5, 2006. These transfers are not recorded in Altomare's and Barbara Altomare's loan accounts. Altomare represented in the annual report for the year ending June 30, 2006 that his loan account balance decreased to $722,709 and Barbara Altomare's loan account balance remained constant at $906,000. See Exhibit H at p. 44 of 49 previously filed with SEC Motion to Sell Jewelry [Docket 222-9]. Therefore, the $453,900 that Universal Express paid to Les Bijoux[2] between June 30, 2005 and June 30, 2006 was not part of the

[2] See Plaintiff's Exhibit D and Exhibit 3 previously filed which document five wire transfers from Universal Express to Les Bijoux between April 13 and June 5, 2006 that total $453,900.

Altomares' loan account balances. Universal Express wire transferred an additional $160,000 to Les Bijoux between July 27, 2006 and May, 16, 2007. These amounts are not recorded in the company's trial balance for the period from July 1, 2006 through March 31, 2007. See Exhibit 2, account 110202 Employee Loan – B Halpern (this is Barbara Altomare's previous name), and account 110208 Loan to Officer. The trial balance shows Altomare's loan account decreased to $700,447 and Barbara Altomare's loan account remained at $906,000. Altomare testified at deposition that the amounts wired to Les Bijoux were his "bona fide salary properly documented and properly recorded by our controller." Altomare Deposition dated November 12, 2007 at p. 92 [Docket 268-2]. He did not testify that is was part of his loan account.

Second, the payments to Les Bijoux were not recorded as a bonus during 2006 or 2007. Altomare represented in the annual report for Universal Express for the fiscal year ending June 30, 2006 that he did not receive any annual bonus. See Exhibit H at p. 41 of 49. The corporate records of Universal Express contain no written consent authorizing the company to pay Altomare a bonus during the fiscal year ending June 30, 2006. Altomare did authorize Universal Express to pay him a bonus of $550,000 to be drawn upon at his discretion after October 1, 2006. See Exhibit 3. However, this bonus does not cover any moneys paid to Les Bijoux after October 1, 2006, because Altomare had already expended his $550,000 bonus by directing Universal Express to transfer $330,000 on October 26, 2006 to Rose and Rose PA as down payment on a condominium, to paying $20,000 on December 29, 2006 to his line of credit at Wachovia, and to pay him a $200,000 bonus check on January 12, 2007. See Exhibit 4, composite of Universal Express bank records. All of these payments occurred prior to Universal Express transferring a total of $80,000 to Les Bijoux on January 26 and May 16, 2007.

Third, the payments to Les Bijoux were not recorded as part of the salaries paid to Altomare or Barbara Altomare. Altomare represented in the annual report for Universal Express for the fiscal year ending June 30, 2006 that he received an annual salary consisting solely of cash compensation of $650,000. He affirmatively represented that he received no other annual compensation, which amount should have included payments to third parties for his benefit. See Exhibit H at p. 41 of 49. Altomare's salary consisted of a series of twenty-six bi-weekly paychecks issued between January 13, 2006 and December 29, 2006, which represented $650,000 in gross salary reduced to $427,332.31 in net salary after withholding taxes. Barbara Altomare's salary consisted of twenty-six bi-weekly checks, which represented $58,046.20 in gross salary reduced to $44,008.38 in net salary. See Summary of Altomares' payroll payments in Exhibit 5. The company's payroll agent, CompuPay, did not record any of the payments to Les Bijoux as part of Altomare's or Barbara Altomare's salaries in either 2006 or 2007. See CompuPay Employee Payroll History, Exhibit 6. For example, there are no entries in Altomare's or Barbara Altomare's payroll history summaries to record the $325,000 transfer to Les Bijoux on April 13, 2006, the two transfers totaling $60,000 on April 26, 2006, the $25,000 transfer on May 16, 2006, or the $33,900 transfer on June 5, 2006. Similarly, the payroll history records for 2007 do not record the $60,000 in two transfers on January 26, 2007, or $20,000 on May 16, 2007. See Exhibit 6, containing CompuPay records. The corporate records of Universal Express contain no written consents that authorize payments to Les Bijoux to be expensed as part of the salaries or bonuses of Richard or Barbara Altomare.

TED argues that under the "voluntary payment doctrine" Universal Express *voluntarily* wired the funds to Les Bijoux and therefore Universal Express' claim to the jewelry is barred citing *Newman v. RCN Telecom Services, Inc.*, 238 F.R.D. 57, 78 (S.D.N.Y. 2006); and *City of Miami v. Kenton*, 115 So. 2d 547, 551 (Fla. 1959). TED Supp. Brief at 7. The common law defense of "voluntary payment

doctrine" bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law. *Dillon v. U-A Columbia Cablevision of Westchester, Inc.,* 100 N.Y. 2d 525, 526 (N.Y. 2003). This defense is not applicable to the facts in this case. The company did not have full knowledge of the facts where Altomare embezzled funds by directing the corporation to make payments to Les Bijoux so that he could convert the funds to his own benefit when no corporate authorization existed. Altomare's actions were ultra vires. Universal Express as a corporate entity did not know the full facts and for that reason the voluntary payment doctrine does not apply.

Without appropriate corporate authorization, Altomare converted funds from Universal Express into jewelry that he purchased from Les Bijoux. Under these circumstances, Altomare did not have good title to the jewelry purchased from Les Bijoux and therefore he could not convey good title to TED. These circumstances of theft are exactly what the 15 day holding period for second hand dealers was created to address. The holding period allows the rightful owner to make a claim for the property. The jewelry purchased with unauthorized Universal Express funds remains the property of the company and should be returned to the Receiver.

B. TED Lacked Good Faith in its Purchase of the Yellow Diamond Ring Where It Knew The Altomares Owed Les Bijoux $65,000 for Fabrication of the Ring.

It is clear from Mr. Osipov's testimony that the Altomares owed Les Bijoux $65,000 on the 7.00 ct fancy yellow diamond which was delivered to Mr. Altomare in late September 2007 just prior to his conveyance to TED. See Osipov Deposition, New Exhibit 7 at p. 30:23-34:9; and New Exhibit 4, September 11, 2007 Les Bijoux demand letter previously filed [Docket 282, and 281-4]. Regardless of what the Altomares told Marc Kravit about their ownership of the jewelry, they made also made him aware that they owed money to Les Bijoux for the fabrication of the ring and that Les Bijoux continued to hold the GIA certificate on the diamond's authenticity. The Altomares also gave Mr. Kravit a clock

to return to Les Bijoux in hopes of receiving a credit against the amount owed. Mr. Kravit returned the clock to Les Bijoux and had discussions with its owners about the outstanding balance. In these circumstances, TED was not a good faith purchaser of the 7.00 ct fancy yellow diamond ring where it knew the Altomares had not fully paid for the ring.

C. TED Did Not Give Fair Value For The Seized Property.

The court need only reach the issue of fair consideration if it concludes that TED acquired title to the jewelry on September 24 and 25, 2007, on the dates of the Second Hand Dealer Forms were completed. If under Florida statutes, title did not pass to TED until 15 days later, then the lien created by the writ of execution gives the SEC as judgment creditor superior rights and the consideration paid by TED is not at issue.

Although TED paid $571,000 for twenty-four items of jewelry, this amount was not fair value when compared to the purchase price of just ten of the items the Altomares had purchased from Les Bijoux during 2006 and 2007 for a total of $925,774.88. Osipov at 12:15-13:9, 23:20- 25:5; Osipov Exhibit 2 previously filed[Docket 282 and 283]. Assuming no value for the additional fourteen items, TED's payment of $571,000 represents 61% of the purchase price of ten of the items. Neither Richard nor Barbara testified to the purchase price of the fourteen additional items transferred to TED. See Richard Altomare Deposition dated November 12, 2007 at pp. 89-93, 100-103 [Docket 268-2]; Barbara Altomare Deposition dated November 30, 2007 at pp. 33-45 [Docket 270-2]. TED's analysis of fair value focuses on its alleged payment of $375,000 for the single most valuable item, an 11.02 carat diamond ring. However, there is no contemporaneous evidence to support Andrew Kravit's statement in his affidavit that TED paid $375,000 for this 11.02 ct diamond ring. See Affidavit of Andrew Kravit, Docket 264-4 at ¶ 23. The Second Hand Dealer's Property Form dated September 24, 2007, which TED was required to complete and file with the Palm Beach County Sherriff, contains no

dollar amount next to the entry for the "diamond emerald cut 11.02 cts" listed as the last property item on the fifth page of the report above the signature.

Although Mr. Osipov testified that he is not a gemologist, he is a jeweler who as part of his business at Les Bijoux purchases diamonds in the market for inclusion in his jewelry. His years of business experience allow him to have an opinion on the value of the 11.02 ct diamond and what its resale value would have been in September 2007. His testimony demonstrates that the amount TED paid was not fair consideration.

D. The SEC Was Not Required To File Its Judgment In The State Of Florida In Order To Obtain A Judgment Lien.

As discussed above, the SEC obtained its writ of execution under 28 U.S.C. § 2413 which does not require the government to register its judgment. *Palmer*, 609 F. Supp. at 548. See discussion above in Section I. New York rather than Florida law controls the procedures for levying on the writ of execution. At the time the writ was delivered to the US Marshal on October 4, 2007, the judgment lien attached. If the court finds that title transferred to TED as a second hand dealer on the date the Altomares delivered custody of the jewelry to TED, then TED has the superior rights in the jewelry. If the court finds that title transferred when full payment was made or only after expiration of the 15 day holding period, then the SEC has superior rights.

TED contends the SEC should be estopped from asserting its rights as a judgment creditor. TED has failed to meet the heavy burden to prove estoppel against the government. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984). As discussed above and in the SEC's Reply to TED's motion to intervene, the SEC does not agree that TED was a good faith purchaser for value because it had knowledge of the SEC's lawsuit and failed to pay fair market value for the jewelry. Moreover, the SEC's rights as a judgment creditor attached upon delivery of the writ of execution to

the US Marshal on October 4, 2007 prior to TED receiving title as a second hand dealer. Under these circumstances, TED did not acquire title to the jewelry prior to the judgment lien attaching.

III. Conclusion

The SEC complied with proper procedures by having the US Marshal levy on the writ of execution and seized the jewelry that Altomares transferred to TED. The SEC was not required to register its judgment in Florida prior to obtaining the writ of execution, and under New York law, which is applicable in this case, the judgment lien attached to the personal property upon delivery of the writ of execution to the US Marshal on October 4, 2007. The SEC's rights as a judgment creditor attached prior to title passing to TED. TED's remedy is to request that the court order Altomare to pay restitution of the $571,000. For the forgoing reasons and those discussed in its memorandum of law submitted with its original motion and in its reply, the SEC requests that TED's motion be denied in its entirety.

Dated February 22, 2008.

Respectfully submitted,

s/ Leslie J. Hughes
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U.S. Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the **SEC'S RESPONSE TO INTERVENOR'S SUPPLEMENTAL ANSWER TO MOTION TO SELL JEWELRY** to be served on February 22, 2007 as follows:

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