UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/
RANDALL L. FRANK, TRUSTEE,
Plaintiff/Counter-Defendant,

Adversary Case Number
17-02002-dob
Honorable Daniel Opperman

V

PAUL B. MALETICH
VIRTUAPIN CABINETS, INC.,
Defendants/Counter-Plaintiffs.
_____/

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
Keith M. Nathanson, PLLC
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833
kn@nathanson-law.com

Shanna M. Kaminski (P74013)
SCHAFER AND WEINER, PLLC
40950 Woodward Ave., Ste. 100
Bloomfield Hills, MI 48304
248-540-3340
skaminski@schaferandweiner.com

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF COUNTER-DEFENDANTS MOTION TO DISMISS

FACTS:

Defendants' Counter-Claim makes the argument that there are three statements which were contained in Trustee's Application for Entry of Default Judgment [Docket 15]. Those statements are[1]:

a. Defendant was involved in the Debtor's "business" (SkitB Pinball) and involved in the fraud of obtaining money from approximately 250 prospective purchasers of a "Predator" pinball machine.

b. That Defendant and Debtor, along with other non-parties marketed the pinball machine for sale and collected 'deposits' for the purchase, ranging from $250 to $4,750.00 per person, with most of the 250 purchasers paying $4,750.00.

c. Defendants received checks totaling $113,705.00, mostly in the form of numerous checks, most of which just shy of $10,000 in value (but with numerous checks written on the same day, apparently in an attempt to 'structure' and avid what Defendants and Debtor believed to be IRS reporting requirements for transfers of money in excess of $10,000), when Defendants did not earn same, nor did they have any contract for same.

Defendants' make no other claims, and have stated in their reply, that the publication of the legal pleadings is not part and parcel of their Claims against Counter-Defendant.

LAW AND ARGUMENT:

A. The statements are not defamatory.

i. The statements are not defamation per se

Defendants correctly identify the statements in their Counter-Claim as "allegations". Addressing the statements individually:

a. "That Defendant and Debtor, along with other non-parties marketed the pinball machines for sale and collected deposits…"

This statement does not accuse anyone of any crime or any other action which could be construed as defamation *per se*. Defendants first do not cite any authority to show how this statement could be construed as defamation *per se*. There is no recognized "crime" of "marketing a pinball

[1] Defendants continuously edit the statements of Plaintiff and his Counsel to take creative liberty with what was actually written.

machine for sale and collecting deposits." Additionally, this statement does not identify which Defendant marketed the pinball machine for sale and collected deposits. Defendants have not provided the Court with any authority to show how this statement accuses Defendants of a violation of MCL §767.39, MCL §750.218(1)(c), and certainly are wholly inapplicable to any violation of 31 USC §5324. The statement is simply not actionable.

b. Defendant was involved in the Debtor's "business" (SkitB Pinball) and involved in the fraud of obtaining money from approximately 250 prospective purchasers of a "Predator" pinball machine.

Again, this statement does not lay any accusation of commission of any crime. "Involved in the fraud of obtaining money" does not accuse Defendants of violating MCL §750.218(1)(c)[2]. There is no accusation that Defendants had any intent to defraud, or made or used any false pretense. It merely states that "Defendant" (in the singular) was "involved". Additionally, "fraud of obtaining money" does not specify any crime. Further, Defendants misquote MCL §767.39 which is merely an abolition of distinction between accessory and principal, it is **not** the crime of "assisting a person with the act of obtaining money from a person with the intent to defraud or cheat".

c. Defendants received checks totaling $113,705.00, mostly in the form of numerous checks, most of which just shy of $10,000 in value (but with numerous checks written on the same day, apparently in an attempt to 'structure' and avid what Defendants and Debtor believed to be IRS reporting requirements for transfers of money in excess of $10,000), when Defendants did not earn same, nor did they have any contract for same

The statement reads "… apparently in an attempt to structure and avid what Defendants and Debtor…". The word **avid** is defined as:

"showing great enthusiasm for or interest in, or extremely desirous".

[2] MCL §750.218(1)(c) specifically proscribes that a person, who with intent to defraud or cheat makes or uses a false pretense to … (c) obtain from a person any money …"

Defendants own interpretation of the sentence cannot change the words that are written on the page. The statement does not accuse anyone of anything, other than being enthusiastic.

Defendants creatively attempt to rewrite the statement and associate the statement with the federal crime of structuring transactions to evade reporting requirements, 31 USC §5324. However, the Court must carefully look at the actual statement, which reads "apparently in an attempt to 'structure' and avid what Defendants and Debtor believed to be IRS reporting requirements for transfers of money in excess of $10,000". In addition to the absolute lack of any accusation of the crime of **structuring**, the transactions cited involved checks, not cash transactions. The reporting requirements of 31 USC §5324 in both sections (a) and (b) relate to "domestic coin and currency transactions". Checks are negotiable instruments are not "domestic coin and currency transactions".

There can be no structuring with negotiable instruments. Thus, it is impossible that Counter-Defendant could have been "accusing" Counter-Plaintiffs of any crime, let alone a violation of 31 USC §5324, even if you allow Defendants to re-write the words on the page. Further, the allegation does not specify any specific 'reporting requirement' and it merely states that the Counter-Defendants showed great enthusiasm in what they believed to be IRS reporting requirements.

ii. **The statements are not defamatory.**

The first statement, "a", discussed above, is simply not defamatory at all. Defendants have stated no support for any basis that marketing a pinball machine and collecting deposits is defamatory. Additionally, the statement only refers to "Defendant" in the singular. There are two Defendants here. Counter-Plaintiff has failed to even allege to who that statement applies.

Statement "b" is actually a true statement. Defendant Maletich has admitted in sworn testimony that he moved the Debtor and his business into his facility, and was assisting the Debtor in trying to get the Predator pinball machine built and sold. Defendants built the cabinets and printed Predator cabinet art (without any IP license).

More problematic are Defendant Maletich's posts on the internet. Maletich on at least two occasions posted under his moniker, "NoahFentz" that:

a. He would not be producing the cabinets for SkitB unless there was a valid license; and

b. He, in no uncertain terms, assured people, inclusive of the Predator depositors that they "would be receiving their Predator pinball machines".

Likewise, there can be no dispute that Debtor's SkitB Predator enterprise was nothing but a fraud. Debtor, even prior to collecting anything more than a $250.00 deposit, received a cease and desist letter from 20th Century Fox, and shortly thereafter started collecting the balance of the $4,750.00 for a pinball machine that he had no license to build or sell (and had no manufacturing ability to actually build).

Statement "c" is simply not defamatory. Showing great enthusiasm for what Defendants believed to be IRS reporting requirements is not a crime, is not derogatory and does not impugn anyone's character. While Defendants cherry-pick language out of the paragraph, which describes the conduct of Defendants in their dealings with Debtor. Defendants have yet to offer an explanation of why it was necessary to have sequential checks written to them on the same day, all of which, save one, were just shy of $10,000.00 ($9,880.00).

B. **The Legal/Judicial Privilege absolutely applies**

Defendants rely upon *Osterle v Wallace*, 272 Mich. App. 260 (2006)[3]. Specifically, to the quote the *Osterle* Court used from *Timmis v Bennett*, 352 Mich. 355 (1958). *Timmis* found that the privilege would be limited if the expressions had "**no relation to or bearing upon** the **issue or subject matter** before the Court**"**. *Timmis at 365.*

Within the narrow scope of absolute privilege for statements made during judicial proceedings, public policy favors liberally construing the privilege to allow the maximum flexibility and freedom of

[3] Remarkably, while Defendants wax about Plaintiff's use of unpublished cases, Defendants cite 3 unpublished cases

disclosure without fear of subsequent liability. *Sanders v Lesson Air Conditioning Corp*, 362 Mich 692, 108 NW2d 761 (1961), *Couch v Schultz*, 193 Mich App 292, 483 NW2d 684 (1992).

Sanders, supra at 695 found that judicial proceedings should be liberally construed so participants are free to express themselves without fear of retaliation. See also *Meyer v Hubbell,* 117 Mich App 699,710; 324 NW2d 139 (1982).

a. **The allegations are relevant to a 544/548 claim.**

Defendants have the defenses of reasonably equivalent value and good faith available to them in defense of a claim under 544 and/or 548. The allegations all relate to both reasonably equivalent value and good faith, in the conduct between Debtor and Defendants.

Fraud can certainly be a defense to any good faith argument, as there can be no good faith if fraud exists. The Court in *In re Agricultural Research and Technology Group, Inc.*, 916 F.2d 528 (9th Cir. 1990) looked at what the **transferee** knew or should have known with respect to the debtor and the transaction. PSA in that case was involved in a Ponzi scheme in which Agretech participated. The Trustee sought to avoid the transfers of money made to PSA, and ultimately the Court determined that objectively PSA should have known about the Ponzi scheme and therefore did not act in good faith.

In the instant matter, Defendants had Debtor operating in their very own facility and were assisting Debtor in trying to sell an unlicensed game to people. Additionally, Defendants participation in reassuring the public that the game was licensed and that the depositors **would** be receiving their Predator machines shows much more than an arms-length business relationship between Debtor and Defendants. Defendant Maletich was quick to post that he wouldn't be building cabinets without their being a valid IP license to do so, yet no license was ever verified[4] other than the alleged statements of Debtor that he had a license.

[4] Additionally, the Court should note that Defendants produce cabinets with licensed artwork for other projects and are intimately familiar with IP licensing requirements.

Including these facts in Plaintiff's application for entry of default judgment assisted the Court in determining that Plaintiff was entitled to the Default Judgment and that Defendants had no defenses of reasonably equivalent value or good faith, and that in fact, Defendants were far more than just a business contact or business vendor of Debtor, but intimately involved in his operations; and further, that Plaintiff was entitled to the default judgment for the balances sought.

The allegations are related to, relevant and material to the conduct between Debtor and Defendants.

As stated in *Hartung v Shaw*, 130 Mich 177, 179; 89 NW701 (1902):

"If statements made in the course of judicial proceedings, in pleadings or in argument are relevant, material, or pertinent to the issue … they are absolutely privileged"[5].

Defendants' argument that the allegations do not relate to a 544 or 548 claim simply are without merit.

Notably, Defendants refer this Court to *In Re Davis*, 312 B.R. 681 (Bankr.D.Nev. 2004) but only in the limited context of holding that the Trustee is not immune from suits for libel and slander. In *Davis*, the Debtors counterclaimed against the Trustee and his Counsel including a count for liber and slander based upon statements made **repeatedly** and written pleadings. The *Davis* Court used cases involving misrepresentations, malfeasance, failure to preserve redemption rights, failure to distribute assets to determine that quasi-judicial immunity did not apply.

What Defendants fail to advise this Court is that the *Davis* Court also discussed and made a ruling based upon the litigation privilege. *Davis* correctly states that:

"[T]he federal common law litigation privilege applies. However, federal law generally borrows from state law in this context." (Citing *Steffes v Stepan Co*, 144 F3d 1070, 1075 (7th Cir. 1998)[6]). *Davis* also relied upon the finding in *Rodriguez v Panayiotou*, 314 F3d 979,988 (9th Cir. 2002) which found

[5] *Hartung, supra*, also held that falsity or malice were irrelevant to the finding of absolute privilege.

[6] *Davis*, *supra*, was a Nevada case and the Court applied Nevada law, which following the majority (and parallels Michigan's judicial/litigation privilege).

that the litigation/judicial privilege applies to any communication with **some logical relation to a judicial ... proceeding made by a litigant or other participant in the proceeding**.

Relying upon a Nevada Supreme Court case (*Fink v Oshins*, 118 Nev 428, 49P3d 640 (2002)), the *Davis* court stated that: "the scope of the absolute privilege is quite broad", and that to be protected, the defamatory communication need **not** be relevant to the proposed or pending litigation; it need only be related in **some way** to the subject of the controversy.

Ultimately, the *Davis* court concluded that the litigation/judicial privilege applied and dismissed those claims against Trustee and his Counsel.

This Court, by a simple reading of the allegations, must conclude that there is a logical relation between the statements and the proceeding, and that they are in fact, related to the claims of the Estate against Defendants.

RELIEF REQUESTED

Counter-Defendant moves this Honorable Court to:

a. Dismiss the instant matter pursuant to F.R.Civ.P. 12(b) with prejudice;

b. Grant Counter-Defendant costs and attorney fees pursuant to 28 U.S.C. §1927;

c. Enjoin Defendants from filing suit pursuant to 11 U.S.C. §105(a);

d. Grant such other relief as may be equitable in the circumstances.

/s Keith M. Nathanson

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
Keith M. Nathanson, PLLC
2745 Pontiac Lake Road
Waterford, MI 48328
(248) 436-4833
kn@nathanson-law.com
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