

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA

In Re

JAMES E. PARKER, SR.

Case No. 94-04020

Debtor

DAN LIVINGSTON, MELVIN BURKLOW,
ROBERT L. BURKLOW, EDDIE R. BURKLOW
and JAMES WILSON

Plaintiffs

v.

Adv. No. 00-80019

JAMES E. PARKER, SR., as Personal
Representative of the Estate of Beverly Ann Ward Parker,
deceased, JAMES E. PARKER, SR., individually,
and PEN AIR FEDERAL CREDIT UNION

Defendants

**ORDER GRANTING DEFENDANT JAMES E. PARKER'S MOTION FOR
JUDGMENT ON THE PLEADINGS AS TO BEVERLY PARKER AND HER ESTATE
AND AWARDING JUDGMENT TO THE PLAINTIFFS AS TO THE REMAINDER
OF THE DEFENDANTS**

Yancey Langston, Attorney for the Plaintiffs, Pensacola, Florida
Kenneth R. Ridlehoover, Attorney for James E. Parker, Pensacola, Florida
Michael Schofield, Attorney for Pen Air Federal Credit Union, Pensacola, Florida

This case is before the Court on the motion for judgment on the pleadings of defendant James E. Parker, Sr., as to Beverly Parker and her estate, and due to a trial on the merits as to the other issues. The trial was held on January 28, 2005. This Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to

I HEREBY CERTIFY that this is a true and correct copy of the original on file in the office of the Clerk, United States Bankruptcy Court for the Northern District of Florida.

WILLIAM W. BLEVINS, Clerk, Bankruptcy Court

By Maude M. Mura
Deputy Clerk

enter a final order. For the reasons indicated below, the Court is entering an order granting James Parker—~~m~~otion for judgment on the pleadings and is awarding judgment to Dan Livingston, et al., on the remaining issues.

FACTS

This case was commenced on April 7, 2000 by the plaintiffs. Due to several circumstances beyond the Court and counsel—~~s~~ontrol, the case took five years to get to trial. One issue was the necessity of a final order from the Mississippi court system in a fraudulent transfer action that formed the basis for this action. That action was not final until June 2002. Ms. Beverly Parker became very ill after the entry of the Mississippi judgment and died on April 10, 2003. After her death there was a will contest among her family members. The suit could not proceed until a legal representative was named for her. This was resolved in or about April 2004 when James Parker, Sr. was named the personal representative of Ms. Parker—s estate. At that time, James Parker, individually, and, as representative of Beverly Parker—s estate, was added to the action.

On June 13, 2003, Pen Air Federal Credit Union was dismissed from the action upon payment of all money held by Pen Air in account # 40211695 being paid into the Registry of the Court. That sum was \$16,018.98.

Dan Livingston, Melvin Burklow, Robert L. Burklow, Eddie R. Burklow, and James Wilson obtained judgments against James A. Parker, Sr. on June 6 or 15, 1990, in Santa Rosa County, Florida, in the aggregate sum of \$191,978.73. In early 1992, the same parties sued James E. Parker, Sr., Beverly Parker and others in the Chancery Court of Jefferson Davis County, Mississippi, based upon James E. Parker, Sr.—s alleged fraudulent~~t~~ransfer of oil and gas interests to Beverly Parker, and

other entities. On December 15, 1998, the Chancery Court ruled in plaintiffs' favor holding that the deeds and other transfers of interests made by Mr. Parker to Beverly Parker were set aside.

In this suit, Dan Livingston and the other plaintiffs allege that royalties paid to Beverly Parker on some of the transferred properties were deposited in Pen Air Federal Credit Union Account #40211695 and should be paid to them in partial satisfaction of their Florida judgments.¹ Livingston, et al., assert that they should be able to have the funds paid over to them pursuant to "542(a)" under the doctrine of tracing.TM Amended Complaint, paragraph 14, p.4.

At trial, four depositions of Beverly Parker were offered as evidence.² The depositions portray the facts through Ms. Parker's slowly deteriorating memory of the fraudulent transactions and the finances of Mr. and Mrs. Parker, perhaps mirroring Ms. Parker's deteriorating health. On June 10, 1994, Ms. Parker testified that she handled payment of all of the Parkers' bills. Mr. Parker received a retirement check that was deposited into a checking account (unspecified bank) in Ms. Parker's sole name. Deposition, June 10, 1994, p. 43, lines 7-20; p. 75-76, lines 19-22 and line 15. She had a checking account in her name alone and a checking account in the name of the Beverly Parker Revocable Trust. The banks in which these accounts were opened were not specified. She used both to pay expenses of the parties.

¹ Dan Livingston, et al., purchased the chapter 7 trustee's right to pursue the fraudulent transfer claims on January 18, 2000. They paid the estate \$5,000 for this right.

² The Court received these depositions into evidence over the objection of James Parker on hearsay and relevance grounds.

The Court conditionally received Exhibits 11 and 15 which are copies of checks deposited to two bank accounts not at issue in this trial. After review of the relevance of the documents, the Court is receiving them as relevant to the issue of Ms. Parker's pattern of receiving funds. Whether Exhibits 11 and 15 are received or not has no impact on the Court's ruling. The result would be the same with or without them.

On September 21, 1994, Beverly Parker was again deposed and stated the Beverly A. Parker Revocable Trust had a checking account from 1989 to that date at AmSouth Bank. Deposition, September 21, 1994, p. 11, lines 5-16. Ms. Parker used that account to pay for the Parkers— personal needs. Deposition, p. 14, lines 1-6. Ms. Parker deposited all of the money she received into that account. Deposition, p.15, lines 13-20. The money Ms. Parker received included the royalties from the oil and gas interests she received from Mr. Parker and her Social Security disability payments. Deposition, p. 31, lines 8-10.

On May 30, 2000, Ms. Parker gave further deposition testimony. This testimony was the most crucial evidence in the case. She testified that the Pen Air checking account was in the name of Beverly Parker. Deposition, p. 27, lines 22-25. She stated that the funds in that account are comprised of money her husband puts . . . over into the checking from the savings. He transfers his VA, whatever he gets.TM Deposition, p. 28, lines 3-4. Ms. Parker stated that “all the money that—s in . . . [her] personal checking account [at Pen Air] comes from transfers made from . . . [her] husband—account.”TM(account unspecified)Deposition, p. 28, lines 6-9. Ms. Parker, at that time, paid personal bills from both an AmSouth checking account and the Pen Air checking account. Deposition, p. 28, lines 15-22. Ms. Parker deposited dividend and royalty checks to her Pen Air account (which account is unspecified). Deposition, p. 43, lines 8-12; p.45, lines 2-8, lines 13-17. The Parkers had a Pen Air savings account that is a joint account. Deposition 44, lines 3-4. The 1999 federal income tax return of the Parkers showed that they received \$23,615 from a working interest in an oil and gas lease. Deposition, p. 47, lines 19-25; p.48, lines 1-12. Mr. Parker received a federal government pension. Deposition, p. 50, lines 5-8.

The evidence showed that from February 25, 1998, through April 26, 1999, \$19,789.56 in royalty checks from Spooner Petroleum were deposited in the Pen Air Account # 40211695. The Spooner Petroleum interest was one of the transfers to Ms. Parker voided in the Mississippi suit.

James Parker testified at the trial that the Pen Air account (which account is unspecified) was used by he and his wife to take care of the household and normal personal expenses. He testified that, besides the Spooner Petroleum royalties deposited to the account, he deposited his Civil Service Retirement, his Social Security retirement check and his Veterans— Administration check in the account at some point in time. Again, whether Mr. Parker was speaking of checking or savings was not specified. He stated that he changed the direct deposit to that account when this suit tied up the money in the account. His Civil Service retirement payment each month was about \$1600-1700; his Social Security check was \$310-315 each month.

LAW

There are two matters that need to be addressed--Parker's motion for judgment on the pleadings and the trial of the case. The court will address each matter in turn.

A.

Mr. Parker moved for judgment on the pleadings as to Livingston's case against Ms. Parker and her estate. The parties agree that the Pen Air account at issue, Account # 40211695, was a joint account held by Beverly Ann Parker and James E. Parker, Sr. Upon Ms. Parker's death, the account became the sole property of James E. Parker, Sr. Therefore, the case against Ms. Parker and/or her estate was no longer sustainable. Livingston, through his counsel, had no defense to this argument. Even if Livingston had raised a defense, the law supports this result. *Cooper v. Bekle*, 334 Md. 608,

623-24, 640 A.2d 1120, 1127-28 (Md. 1994) (holding estate of deceased joint tenant was not a necessary party to a fraudulent transfer action since deceased's interest was extinguished at death).

The court agrees that the case against Ms. Parker is now moot. Judgment on the pleadings is due to be granted and James E. Parker, as personal representative of the estate of Beverly Ann Ward Parker, deceased, is dismissed from the action.

B.

1.

Livingston claims that the funds in the Pen Air bank account rightfully belong to him and he seeks turnover of the property, as if he were the trustee, pursuant to 11 U.S.C. § 542(a). The funds, per his complaint, are fruits of the oil and gas interests fraudulently transferred to Beverly Parker in 1986-87 by James Parker. To obtain the funds he must prove the account contains property that was fraudulently transferred to Ms. Parker. Parker asserts that Livingston cannot trace the funds in the account to the oil and gas interests.

This court must look to state trust law to determine whether Livingston has right to the funds. *Chicago Title Insurance Co. v. Mart (In re Mart)*, 75 B.R. 808, 811 (Bankr. S.D. Fla. 1987). A constructive trust is a remedy which equity applies in order to do justice.TM *Wadlington v. Edwards*, 92 So. 2d 629, 631 (Fla. 1957). It is a trust—constructed—by equity to prevent an unjust enrichment of one person at the expense of another as the result of fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem.TM *Id.* In *ITT Community Development Corp., Inc. v. Barton*, 457 F. Supp. 224, 230 (M.D. Fla. 1978), the Court stated:

[t]he Florida Supreme Court has also stated that equity will raise a constructive trust and compel restoration where one, through actual fraud, abuse of confidence, reposed

or accepted, or through other questionable means, gains something for himself which in equity and good conscience he should not be permitted to hold.

In this case, Livingston has proved that Ms. Parker was the transferee of the fruits of the fraudulently transferred mineral interests. Livingston has also proved that royalties from one of those oil and gas properties, Spooner Petroleum, was deposited in the Pen Air account # 40211695.

However, there is another step that Florida law requires. A party seeking to obtain funds from a transferee of a fraudulent transferee must have a court impose a constructive trust on the fraudulently transferred property. Tracing is necessary to allow imposition of a constructive trust. ~[I]ndeed, it is well settled that Florida courts will impress property with a constructive trust only if the trust res is specific, identifiable property or if it can be clearly traced in assets of the defendant which are claimed by the party seeking such relief.TM*Finkelstein v. Southeast Bank, N.A.*, 490 So. 2d 976 (Fla. 4th Cir. DCA 1986)(citing *Landers v. Sherwin*, 261 So. 2d 542 (Fla. 4th DCA 1972).

In this case, it is clear that Ms. Parker put the Spooner Petroleum royalties shown in Plaintiffs—Exhibit 16 in Pen Air account # 40211695. However, it is also established from Ms. Parker—deposition testimony and Mr. Parker—s trlætestimony³ that at least some of Mr. Parker—s

³ Livingston objected to Mr. Parker—s testimony about deposit of his checks into the account # 40211695 based on Fed. R. Evid. 1002, the best evidence rule. The Court overruled the objection and allowed Mr. Parker to testify that he had his retirement checks directly deposited to the account at issue. The best evidence rule requires that a person who wishes ~to prove the content of a writing must introduce the thing itself—the ~original.—TMMULLER & KIRKPATRICK, FEDERAL EVIDENCE, Chapter 10, ~ 568, Best Evidence Doctrine in Operation--(A) Original Required (2004). The rule is ~not a general rule of evidential preference, demanding production of the thing itself in all cases in which it would shed a brighter light upon the issues in litigation than would some other form of proof.TM*Id.* The rule ~leaves to the substantive law and to the strategy of the parties the question whether a writing. . . is of primary importance in the

civil service retirement, Veterans— Administration and Social Security checks were deposited to the account too. Ms. Parker—s own testimony was that Mr. Parker transferred money from the savings account that included his VA checks and ~whatever he gets.TM Mr. Parker testified that he had to change his direct deposit after this suit tied up the Pen Air account and he could not get his pension payments. Therefore, his checks were going into the account at issue, Account # 40211695, or they would not have been held. Therefore, the evidence shows that the royalties were comingled with Mr. Parker—s pension monies.

When funds are intermingled, courts generally apply the ~lowest intermediate balance testTM to determine whether the fraudulently received funds can be obtained by the creditor. RESTATEMENT (FIRST) OF RESTITUTION, Mingling Money of Several Persons ~ 213, Cmt. e, Effect of Subsequent Additions (1937).

The situation frequently occurs where trust funds have been traced into a general bank account of the debtor. The following general principles have been applied. The bankruptcy court will follow the trust fund and decree restitution where the amount of the deposit has at all times since the intermingling of funds equaled or exceeded the amount of the trust fund. But where, after the appropriation and mingling, all of the moneys are withdrawn, the equity of the cestui is lost, although moneys from

litigation, and only requires production when either such law or such strategy answers this question in the affirmative.TM*d.*

The primary issue in this case is what funds were in Pen Air Account # 40211695. Therefore, evidence about what was in the account does require adherence to the best evidence rule. This means that Mr. Parker—s statements about direct deposit of his checks into the Pen Air account should have been excluded without production of the Pen Air records. Although the improper evidence strengthened the defendant—s case, it is not determinative of the outcome.

Ms. Parker also testified that Mr. Parker—s checks went into the account. That evidence was offered by the plaintiffs. Deposition of May 30, 2000, p. 28. Therefore, it is properly considered. Mr. Parker also testified that he changed his direct deposit after he had funds tied up in the account when Pen Air froze the account. His testimony about actions he took is not so related to the documents that the testimony should be excluded. Only testimony about the actual account deposits and withdrawals would require a document. Therefore, that testimony is properly considered.

other sources are subsequently deposited in the same account. In the intermediate case where the account is reduced to a smaller sum than the trust fund, the latter must be regarded as dissipated, except as to the balance, and funds subsequently added from other sources cannot be subject to the equitable claim of the cestui que trust. If new money is deposited before the balance is reduced, the reduction should be considered to be from the new money and not from the monies held in trust. This analysis may be referred to as the lowest intermediate balance test.

First Federal of Michigan v. Barrow, 878 F.2d 912, 916 (6th Cir. 1989)(citing 4 L. KING, COLLIER ON BANKRUPTCY, $\frac{3}{4}$ 541.13, at 541-79--541-80 (15th ed. 1988)).

There was no proof of the amounts of money in Account # 40211695 at particular points in time.

The court knows that on or about June 15, 2003, when Pen Air deposited funds in the Court, there was \$16,018.98 in the account. Over \$19,000 was deposited from the Spooner royalties over the period from 1998-1999. Therefore, the account balance could meet the intermediate balance test.

The problem is that the proof does not include a history of the account to show whether the account was ever fully dissipated or not during the 1998-99 period. If it was, then the funds may not be all Spooner Petroleum funds. The evidence did show, through Ms. Parker—s testimony, that money was transferred from that account to the Beverly Parker checking account to pay bills.

Once the trust relationship has been established, one claiming as a cestui que trust thereunder must identify the trust fund or property in the estate, and, if such fund or property has been mingled with the general property of the debtor, sufficiently trace the trust property. If the trust fund or property cannot be identified in its original or substituted form, the cestui becomes merely a general creditor of the estate. *Id.* at 915 (citing 4 L. KING, COLLIER ON BANKRUPTCY, $\frac{3}{4}$ 541.13, 541-78--541-79 (15th ed. 1988)).

Livingston has failed to adequately trace the funds. The court cannot find that Livingston established that the Spooner funds remained in the account at the point in time that the funds were frozen by Pen Air. The plaintiffs would lose this case if a strict tracing were required.

Livingston asserts that even if he cannot trace the funds in the account with precision, he is entitled to the funds anyway. Parker, as the original fraudulent transferee, should not now be able to benefit from the account when it is clear that at least some of the money in the account is the fruit of the fraudulent transfers.

The court could find no case directly on point. The RESTATEMENT (FIRST) OF RESTITUTION (1937) is, however, instructive. First, at § 3, entitled "No Profit From Conscious Wrongdoing,"TM it states:

A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.

Mr. Parker, as the fraudulent transferor to Ms. Parker of the mineral interests, was a conscious wrongdoer. The Mississippi Chancery Court complaint, Plaintiffs—Exhibit 2, had two counts. Although the state court judgment, Plaintiffs—Exhibit 4, did not contain specific findings that this Court can use to determine Mr. Parker's intent or knowledge, the complaint's ~~two~~ counts are both based upon intentional wrong acts. Count I alleged "malice, fraud, covin, collusion, and guileTM on Mr. Parker's part in the divestiture of his ownership interests. Count II alleged that Mr. Parker "willfully and wantonly [attempted to] injure and harm property interests of . . . Plaintiffs."TM Thus, whether the Chancery Court found Parker liable under either Count I or II, or both, the Court found Parker acted wrongfully and intentionally. He is, therefore, a conscious wrongdoer.

RESTATEMENT (FIRST) OF RESTITUTION, Effect of Withdrawals from Mingled Funds § 211, states:

(1) Where a person wrongfully mingles money of another with money of his own and subsequently makes withdrawals from the mingled fund, the other is entitled to an equitable lien upon the part which remains and the part which is withdrawn or upon their product, except as stated in Subsection (3).

* * * *

(3) Where the wrongdoer has effectively separated the money of the other from his own money, the other is entitled to, and only to, his own money or its product.

In this case, subsection (3) does not apply. Livingston is entitled to all of the funds remaining in the account. Since Parker was an intentional wrongdoer, even if the plaintiffs cannot exactly trace the funds in the account, the plaintiffs have a right to any balance remaining. *Varon v. Salomon (In re Martin Fein & Co., Inc.)*, 43 B.R. 623 (Bankr. S.D.N.Y. 1984). In the *Martin Fein* case, a debtor-auctioneer failed to pay to another debtor funds collected for it at an auction. The debtor-auctioneer commingled the auction proceeds with the auction company's other funds. The Bankruptcy Court held that the funds of the defrauded debtor were to be turned over to it once it was shown that the money went into the account. The Court stated:

The reason for preserving a trust fund claimant's rights in spite of the commingling of the trust res with general funds is explained in Scott on Trusts as follows: There is no reason why any person whose money has been wrongfully taken by another and mingled with his own should not be entitled to a charge upon the mingled fund . . . The fact that money has no earmark is a good reason why the claimant cannot insist that any particular part of the mingled fund is his; but it is no reason why he should be denied an interest in the fund, no reason why he should be relegated to a mere personal claim against the wrongdoer . . . It is the wrongdoer's own fault that he cannot identify his own contribution. Therefore, to make reparation he should use, and a court of equity will compel him to use, so far as necessary, the fund which is made up in part of the money of the claimant. In other words, the claimant has an equitable lien or charge on the whole fund . . .
5 SCOTT ON TRUSTS 515, at 3610-11 (3d ed. 1967).


Id. at 628.

If Mr. Parker were not a wrongdoer, the plaintiffs would have to trace the funds in the accounts more closely and would only be entitled to the remaining money if they could do so.

IT IS ORDERED and ADJUDGED that:

1. Judgment on the pleadings is granted to the defendant James E. Parker, Sr., as personal representative of the Estate of Beverly Ann Ward Parker, deceased;
2. Judgment be awarded to Dan Livingston, Melvin Burklow, Robert L. Burklow, Eddie R. Burklow and James Wilson against James E. Parker, Sr.;
3. The Clerk shall pay to the plaintiffs the \$16,018.98 plus interest held in the Registry of the Court.

Dated: February 23, 2005


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE