UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
CONTIFINANCIAL CORPORATION, et al.,	:	Case No. 00-12184 (AJG)
Reorganized Debtors.	:	

OPINION AND ORDER DENYING OMEGA CONSULTING'S MOTION TO RELEASE FUNDS HELD BY CLERK OF THE COURT

On July 10, 2008, the Liquidating Trustee of the ContiFinancial Liquidating Trust in the above-captioned matter forwarded to the United States Bankruptcy Court two checks, one in the amount of $307,768.62, and the other in the amount of $503,295.07. The former amount represented unclaimed distributions and dividends owed to known beneficiaries. The latter amount represented funds belonging to unknown parties held by ContiFinancial in connection with mortgage servicing operations. Movant, Eric Dangerfield d/b/a Omega Consulting ("Omega"), seeks access to the $503,295.07 that belongs to unknown parties and is currently being held by the Clerk of the Court. Omega requests the release of these funds in order to satisfy two default judgments (the "Judgments") it obtained in Bexar County, Texas totaling $520,696.01.

The first judgment was rendered on June 8, 2009 in the amount of $302,960.00. That suit was brought by Omega as assignee of Juan Intriago and Luciana Santana. Both Intriago and Santana were creditors of ContiFinancial Corporation ("ContiFinancial") who filed proofs of claim in the Chapter 11 proceedings. The second judgment was

rendered on July 17, 2009 in the amount of $217,736.01 and was the result of Omega suing ContiFinancial as assignee of Mitch Cash.[1]

Movant filed its motion seeking release of the funds held by the Clerk of the Court on March 4, 2010.[2] The Liquidating Trustee filed an objection to the release of the funds on March 30, 2010. Movant filed its response to the Liquidating Trustee's objection on April 28, 2010. No hearing was requested on this issue.

The Liquidating Trust

On May 17, 2000, ContiFinancial and 18 of its affiliates[3] filed voluntary petitions for bankruptcy protection under Chapter 11. On May 18, 2000, an order was signed allowing for the joint administration of these Chapter 11 cases. Two additional affiliates of ContiFinancial commenced Chapter 11 cases on August 14, 2000, and an order was signed allowing for these two cases to be jointly administered with the previously filed petitions of the other affiliates.[4] The Debtors' Third Amended Joint Plan of Reorganization of ContiFinancial Corporation and Affiliates under Chapter 11 of the Bankruptcy Code (the "Plan") was confirmed in the Order Confirming Third Amended Joint Plan of Reorganization of ContiFinancial Corporation and Affiliates Under Chapter 11 of the Bankrupcy Code ("Plan Confirmation Order") entered on December 20, 2000. The effective date of the Plan was April 10, 2001. The Plan Confirmation Order provides

[1] Mitch Cash is listed on the proof of claim as counsel to the creditor, not as the creditor.
[2] Movant also sought the release of the unclaimed distributions in its motion. In its response to the Liquidating Trustee's objection, movant asked the Court to only consider releasing the abandoned funds.
[3] The affiliates include ContiTrade Services, L.L.C., ContiWest Corp., ContiMortgage Corp., ContiFinancial Services Corp., Resource One Consumer Discount Company, Inc., Warminister National Abstract, Inc., Keystone Capital Group, Inc., Keystone Mortgage Investment, Inc., ZTS Corp., Resource One Mortgage of Oxford Valley, Inc., Resource One Consumer Discount Company of Minnesota, Inc., Resource One Mortgage of Delaware Valley, Inc., ResourceCorp Fianncial, Inc., ContiInsurance Agency, Inc., Crystal Mortgage Company Inc., Lenders, M.D., Inc., California Lending Group, Inc. d/b/a United Lending Group, and ContiAsset Receivables Management, LLC.
[4] The two additional affiliates are Royal Mortgage Partners, L.P. and Fidelity Mortgage Decisions Corporation. The Court will refer to ContiFinancial and all of the named affiliates collectively as the "Debtors."

for the consolidation of the assets and liabilities of the Debtors for all purposes, including distributions on claims.[5]

Plan section 6.01 directs that the Debtors execute the Liquidating Trust Agreement (the "LTA") on the effective date, and take all steps necessary to establish the Liquidating Trust. The following Plan section, 6.02, provides for appointment of a Liquidating Trustee. According to the LTA, Debtors would "transfer, assign, and deliver to the Liquidating Trustee all of their right, title, and interest in the Trust Assets free and clear of any Lien, Claim or Interest in such Property of any other Person or entity except as provided in the Plan."[6] The Plan defines Trust Assets as "any and all of the Debtors' right, title and interest in all property and Assets of the Debtors transferred on the Effective Date to the Liquidating Trust . . . ."[7] The Liquidating Trust was established in order to liquidate the Trust Assets and make timely distributions.[8] In other words, the Debtors' assets were to go from the estate to the Liquidating Trust to be administered by the Liquidating Trustee in an efficient manner.

The Judgments Are Void *Ab Initio*

The Plan Confirmation Order enjoins any party asserting a pre-petition debt from filing suit against the Debtors. Paragraph 17 of the Plan Confirmation Order discharges all claims and interests against the Debtors that arose at any time before the entry of the Plan Confirmation Order. That paragraph states:

> As set forth in Section 7.05(a) of the Plan, except as otherwise provided in the Plan or this Confirmation Order, and subject to Section 1141(d)(1) of the Bankruptcy Code, when the Confirmation Order becomes a Final Order, the Plan and the Confirmation Order shall discharge, effective as of

[5] Plan Confirmation Order at 14.
[6] Liquidating Trust Agreement, § 1.1.
[7] Plan, § 1.134.
[8] Liquidating Trust Agreement, § 3.1.

> the Effective Date, all debts of, Claims against, Liens on, and Interests in each of the Debtors, their assets, or properties, which debts, Claims, Liens, and Interests arose at any time before the entry of the Confirmation Order. The discharge of the Debtors shall be effective as to each Claim or Interest, regardless of whether a proof of Claim or Interest therefore was filed, whether the Claim is an Allowed Claim, or whether the holder thereof votes to accept the Plan. On the Effective Date, as to every discharged Claim and Interest, any holder of such Claim or Interest shall be precluded from asserting against any Debtor formerly obligated with respect to such Claim or Interest, or against such Debtor's assets or properties, any other or further Claim or Interest based upon any document, instrument, act, omission, transaction, or other activity of any kind or nature that occurred before the Confirmation Date.

Paragraph 18 of the Plan Confirmation Order bars creditors from bringing any action against the Debtors. That paragraph states that creditors are barred from:

> (1) commencing or continuing in any manner any action or other proceeding against the Debtors, the Liquidating Trust or the Disputed Claims Reserve Trust or their respective Trust Assets or other property; (2) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Debtors, the Liquidating Trust or the Disputed Claims Reserve Trust or their respective Trust Assets or other property; (3) creating, perfecting or enforcing any Lien or encumbrance against the Debtors, the Liquidating Trust or the Disputed Claims Reserve Trust or their respective Trust Assets or other property; (4) asserting a setoff, right of subrogation or recoupment of any kind against any obligation due to the Debtors, the Liquidating Trust, or the Disputed Claims Reserve Trust or their respective Trust Assets or other property; and (5) commencing or continuing any action that does not comply with or is inconsistent with the Plan.

Omega, as assignee of the proofs of claim, was barred from bringing the Bexar County suits in the first place. Thus, the Judgments are void *ab initio*. *See* 11 U.S.C. § 1141(d)(1)(A) ("Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation . . . ."); 11 U.S.C. § 524(a) ("A discharge in a case under this title (1) voids any judgment at any time obtained, to the

extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived . . . ."). Therefore, there is no basis for relief since the Judgments, as void *ab initio*, are unenforceable. The relief is denied in all respects. However, for the sake of completeness and clarification, the Court will address the request for relief, assuming the Judgments were valid and enforceable against the Debtors.

Omega Does Not Have Rightful Claim to Funds

The funds that Omega requests the Court to release were not abandoned to the Debtors, nor were they assets of the Debtors' estate transferred to the Liquidation Trust that were available for distribution to creditors. ContiFinancial held title to the funds of third parties pursuant to escrow agreements. As funds that have always belonged to these unknown third parties, they were never property of the estate. The funds were properly separated from the Trust Assets by the Liquidating Trustee and turned over to the Clerk of the Court so that they would remain available to the parties who can rightfully claim them as their own. Further, as to Omega's argument that the funds ultimately will be paid over to the Debtors' shareholders, this is not the case. Debtors' shareholders have no rightful claim to the funds, since, as stated above, the funds at issue were not abandoned to the Debtors and hence not to the shareholders of a "defunct" company. The

funds will remain in possession of the Clerk of the Court until any party with a valid interest in them comes forward. The Debtors are not such parties.

This is not a situation where a trustee abandons property of the estate back to the debtor. The Liquidating Trustee abandoned these funds under § 554 of the Bankruptcy Code which allows the trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). Abandonment under § 554 is to the party who has a possessory interest in the property. *In re Jandous Elec. Const. Corp.*, 96 B.R. 462, 466 (Bankr. S.D.N.Y. 1989); s*ee Ohio v. Kovacs*, 469 U.S. 274, 284 n. 12 (1985) *citing* S.Rep. No. 95-989, 95th Cong. 2d Sess. At 92 (1978); *see also In re Interpictures Inc.*, 217 F.3d 74 (2d Cir. 2000) (holding that district court did not abuse its discretion by denying appellant's § 554(b) motion to have a RICO claim abandoned to him because appellant's status as a creditor did not give him a possessory interest in the claim). A "possessory interest" is defined as a "right to exert control over" or a "right to possess" property "to the exclusion of others." *In re Cruseturner*, 8 B.R. 581, 591 (Bankr. D. Utah 1981) (citing BLACK'S LAW DICTIONARY 1049 (5th ed. 1979)).

In this case, the funds were not abandoned to the Debtors and, under relevant case law, could not have been so abandoned because the debtor entities did not have a "possessory interest" in them. As an alleged judgment creditor of the Debtors, Omega would only be entitled to assert a claim against the Debtors' property. Omega cannot make such assertion. Since the funds are not property of the Debtors, in order to reach any part of the funds, Omega would have to establish that it is in fact one of these unknown third parties or that it has some other valid claim of right to the funds. Omega

does not establish that it was a party to any escrow agreement (or other agreement) with the Debtors that required the Debtors to hold any sum of money on its behalf, nor does it establish any other claim of right to this non-debtor property.

As stated above, the Judgments were obtained against the Debtors based upon a pre-petition right to payment. As such, the right to payment would be against the Debtors and would not establish a right to payment against non-debtor property. Even if the Judgments were considered to create some post-confirmation right against the Debtors, such claim would not be a claim that could be satisfied by non-debtor property being held for the benefit of those who are able to establish a valid claim of right to the property.

Conclusion

The Court finds that the Judgments have no effect as they are void *ab initio*. Even if they were not void, any recovery in satisfaction of those Judgments would have to be limited to property of the estate or of the Debtors. The $503,295.07 at issue here is not property of the estate nor was it abandoned to the Debtors. The funds abandoned by the Liquidating Trustee were not abandoned to the Debtors, therefore a claim against the Debtors would not establish any claim of right to such funds.[9] For the reasons set forth above, it is hereby

[9] Omega also requests that the Court make the abandoned funds available as an equitable remedy. However, there is no basis to grant the request on equitable grounds. Releasing the funds to satisfy the Judgments would result in a substantial injustice to parties with valid interests in them if and when they make the proper showing to claim the funds.

ORDERED that Omega's motion to release funds held by the Clerk of the Court is denied in its entirety.

Dated: New York, New York
June 17, 2010

s/Arthur J. Gonzalez
CHIEF UNITED STATES BANKRUPTCY JUDGE