

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
In re: :  
 : Chapter 11  
PAYROLL EXPRESS CORPORATION, : Case no. 92-43150 (JMP)  
 :  
Debtor. :  
-----X

**MEMORANDUM DECISION AND ORDER  
DENYING APPLICATION FOR UNCLAIMED FUNDS**

**STUART M. BERNSTEIN**  
**Chief United States Bankruptcy Judge:**

Omega Consulting, as assignee of Kruger, Kruger, Albenberg / Architects, Engineers Planners and R&S Enterprises Corporation (collectively, “Omega”), obtained a money judgment against Robert and Barbara Felzenberg (the “Felzenbergs”). Omega seeks to enforce its judgment against the unclaimed funds derived from the estates of Payroll Express Corporation and/or Payroll Express Corporation of New York (collectively, “Payroll”), corporations that the Felzenbergs owned. The application is denied for the reasons that follow.

**BACKGROUND**

The background leading up to this bankruptcy has been described in the numerous published opinions of the District Court and Circuit Court of Appeals. E.g., Pereira v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.), 186 F.3d 196, 199 (2d Cir. 1999). The Court assumes familiarity with those decisions, and limits the background discussion to that necessary to dispose of the pending application.

Payroll filed chapter 11 petitions in this Court on June 5, 1992. On June 8, 1992, the Bankruptcy Court signed an order of joint administration, and on June 26, 1992, John S. Pereira, Esq. was appointed chapter 11 trustee.

The Felzenbergs were the sole shareholders of Payroll. On August 7, 1992, they filed a joint voluntary chapter 11 petition in the United States Bankruptcy Court for the District of New Jersey. The case was subsequently transferred to this Court on September 18, 1992, and Pereira was also appointed the Chapter 11 trustee of the Felzenbergs' estate.

It appears that the Felzenbergs' case and the Payroll cases were jointly administered along with the cases filed by several other affiliated debtors, but the cases ended differently. On November 28, 1995, the Court confirmed the Second Revised Liquidating Plan of Reorganization Submitted by Chapter 11 Trustee of the Estate of Robert M. Felzenberg and Barbara M. Felzenberg, Case No. 92-B-45415 (CB) (the "Plan"). (See Creditor's Motion for the Release of Unclaimed Funds, dated Oct. 2, 2008 (the "Motion"), Ex. N.)(ECF Doc. # 1267.)<sup>1</sup> Pereira was appointed Post-Confirmation Operating Trustee.

In contrast, the Payroll case was never confirmed, and was eventually dismissed. During the case, however, Pereira had made a 10% distribution to the Payroll creditors. The source of the distribution was a \$7.6 million settlement with United Jersey Bank, (see Application In Support Of Rule 9019 Motion By Trustee, dated Aug. 12, 2002, ¶¶

---

<sup>1</sup> Unless otherwise specified, ECF document numbers refer to documents electronically filed in Case No. 92-43150.

10-11, 18-19)(ECF Doc. # 1005), which Pereira received on December 30, 2002. (See Statement of Completion of Administration of the Bankruptcy Estate of [Payroll], dated Sept. 17, 2008, Ex. B, at 5)(ECF Doc. # 1261.) He made the 10% distribution between August 29, 2003 and July 13, 2004, (see id., Ex. B, at 22-55), but as often happens, many of the dividend checks were never cashed.<sup>2</sup> Pereira continued to hold the funds corresponding to the uncashed distributions in his trustee bank accounts.

Four years later, in December 2007, he took steps to complete his administration of the Payroll case. He deposited the unclaimed funds in the amount of \$244,392.00 with the Court on December 11, 2007, (see id., Ex. B, at 63), and filed a Statement of Unclaimed Dividends, dated December 17, 2007. (Motion, Ex. A.) On December 20, 2007, Bankruptcy Judge Peck signed an order authorizing Pereira to abandon the remaining property of the estate, including Payroll's books and records, and to submit an order dismissing the case after it had been fully administered. (See Order Pursuant to Sections 105, 305, 554 and 1112(b) of the Bankruptcy Code Authorizing the Trustee to Abandon Property of the Estate and Dismissing the Debtor's Chapter 11 Case, dated Dec. 20, 2007)(ECF Doc. # 1243.)

The only remaining case administration involved the payment of the balance in the estate to the professionals on account of their fees and disbursements. Pereira made these payments at the end of 2007, leaving a balance of only \$7,500.00 in the estate. (See Statement of Completion of Administration of the Bankruptcy Estate of [Payroll], Ex. B,

---

<sup>2</sup> The trustee's cash disbursement records indicate that many checks had to be stopped and reissued. This probably explains why the distribution spanned approximately 11 months.

at 64-66). On October 10, 2008, Judge Peck dismissed the Payroll chapter 11 case. (Order Dismissing Case, dated Oct. 10, 2008)(ECF Doc. # 1263.)

In the meantime, Omega sued the Felzenbergs in the United States District Court for the Southern District of New York, and obtained a default judgment (the “Judgment”) in the amount of \$150,000 on September 30, 2008. Omega thereafter submitted the current application to enforce its Judgment against the unclaimed dividends. Omega does not contend that it was a creditor of Payroll, and its name does not appear on the Statement of Unclaimed Dividends. Nor does it argue that the Felzenbergs were creditors entitled to an unclaimed dividend. Instead, Omega argues that (1) Payroll owns the unclaimed dividends, (2) Payroll and the Felzenbergs are alter egos, and, therefore, (3) Omega is entitled to enforce the Judgment against the unclaimed dividends. (Motion, ¶ 4.)

## **DISCUSSION**

Omega bears the burden of proving its right to the unclaimed funds. Omega Consulting v. Edwards (In re Future Trust, Inc.), 387 B.R. 574, 578 (8th Cir. B.A.P. 2008). Thus, it must show, in the first instance, that Payroll owns the unclaimed dividends. Ownership depends on the nature of the bankruptcy proceeding. In a chapter 7 case, the trustee must stop payment on uncashed checks 90 days after distribution, and pay the remaining property of the estate into the court for disposition under 28 U.S.C. §§ 2041, et seq. See 11 U.S.C. § 347(a). The clerk of the court must deposit the funds with the United States Treasury. 28 U.S.C. § 2041. The clerk holds the deposited funds for the benefit of the owners for five years, and after five years, the funds escheat to the United States. See 28 U.S.C. § 2042; see generally 3 ALAN N. RESNICK & HENRY J.

SOMMER, COLLIER ON BANKRUPTCY ¶ 347.01, at 347-2 to -3 (15th ed. rev. 2008)(“COLLIER”).

The creditors whose distributions were returned remain the rightful owners of the unclaimed dividends. In re Bradford Prod., Inc., 375 B.R. 356, 361 (Bankr. E.D. Mich. 2007); In re Transport Group, Inc., No. 93-30015, 2007 WL 734817, at \*2 (Bankr. W.D. Ky. Mar. 7, 2007); In re Applications for Unclaimed Funds Submitted In Cases listed on Exhibit “A”, 341 B.R. 65, 69 (Bankr. N.D. Ga. 2005). They may apply for their unclaimed dividends indefinitely into the future. Bradford Prod., Inc., 375 B.R. 361-62. Accordingly, the corporate debtor has no right to the funds. Transport Group, Inc., 2007 WL 734817, at \*2.

In chapter 11 cases, the plan ordinarily provides for the disposition of unclaimed funds. Under § 347(b),

Any security, money, or other property remaining unclaimed at the expiration of the time allowed in a case under chapter 9, 11, or 12 of this title for the presentation of a security or the performance of any other act as a condition to participation in the distribution under any plan confirmed under section 943(b), 1129, 1173, or 1225 of this title, as the case may be, becomes the property of the debtor or of the entity acquiring the assets of the debtor under the plan, as the case may be.

Section 1143 adds an additional condition. If the plan requires the creditor to present or surrender a security or render some performance as a condition to participating in a distribution, it must do so within five years of the confirmation order or forego its right to participate in any distribution under the plan. Unless the plan requires otherwise, the plan administrator is not required to deposit the unpaid funds with the clerk. Rather, the two provisions provide an outside limit of five years from the entry of the plan confirmation order within which a creditor must take the required action to participate in

the plan distribution; if he fails, the unclaimed funds automatically revert to the debtor or the entity acquiring the assets of the debtor under the plan. See TLI, Inc. v. Lynn (In re TLI, Inc.), 213 B.R. 946, 950 (N.D. Tex. 1997), aff'd, 159 F.3d 1355 (5th Cir. 1998); 3 COLLIER ¶ 347.03[2], at 347-8.

Sections 347(b) and 1143 do not apply in this case because Payroll never confirmed a plan. Instead, the Court dismissed the case. Section 349(b)(3) of the Bankruptcy Code states, in this regard, that unless the Court orders otherwise, the dismissal of a case reverts the property of the estate in the debtor. Neither the abandonment order nor the dismissal order mentioned the unclaimed funds deposited with the Court. Nevertheless, it does not seem likely that the Court ever intended to turn the funds over to the defunct Payroll.

Instead, the circumstances strongly suggest that the trustee and the Court intended to complete the administration as if Payroll were a chapter 7 case. The deposit of the unclaimed funds followed in lockstep with the motion to abandon the remaining property and dismiss the case once it was fully administered. Pereira would not have paid the unclaimed dividends into court, some four years after he made the distribution, if the funds were to revert in Payroll following the contemplated dismissal; he would paid the unclaimed funds directly to Payroll. Furthermore, the abandonment order would not have referred to the completion of the administration of the Payroll case if the Court intended to dismiss the case and return the parties to the status quo. Rather, it appears that the parties and the Court intended to administer this case like a chapter 7: the money would

be held indefinitely, first in the name of the clerk, and after five years, in the name of the United States, for the benefit of the rightful owners of the dividends.<sup>3</sup>

Accordingly, the Court concludes that Omega has failed to show, as a matter of fact or law, that the unclaimed funds are the property of Payroll. It is unnecessary, therefore, to address Omega's argument that Payroll was the alter ego of the Felzenbergs.

So Ordered.

Dated: New York, New York  
November 24, 2008

/s/ Stuart M. Bernstein  
STUART M. BERNSTEIN  
Chief United States Bankruptcy Judge

---

<sup>3</sup> The clerk has held the unclaimed funds for approximately one year. During this period, the Court has granted several applications by the unpaid creditors to collect their unclaimed dividends. (See ECF Doc. # 1252-58, 1262, 1268.)