

No. 10-11202
In the
United States Court of Appeals
for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs

v.

JEFFREY BARON,
Defendant-Appellant

v.

ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

Cons. w/ No. 11-10113

NETSPHERE INC., Et Al, Plaintiffs

v.

JEFFREY BARON, Et Al, Defendants

v.

QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants

v.

PETER S. VOGEL,
Appellee

Appeal of Order Adding Non-Parties Novo Point, LLC
and Quantec, LLC as Receivership Parties

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

**PRELIMINARY RESPONSE TO MOTION FOR
FEES FOR MARTIN THOMAS**

TO THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW Appellant Jeff Baron, and subject to the Fifth Amendment objection and motion previously filed in this cause¹ and incorporated herein by reference, makes this preliminary response with respect to the 10-03-11 MOTION filed by Appellee Mr. Peter S. Vogel to supplement the record on appeal with The Receiver's Eighth Application for Reimbursement of Fees Incurred by Martin Thomas [6917688].

I. ARGUMENT AND AUTHORITY

Background

Thomas failed to present a single itemized billing or explanation of how his fee is reasonable or ethical. Once the receivership was imposed Thomas refused to represent Baron, refused to provide him with information about the bankruptcy proceeding, refused to file any fee objections, refused to appeal any orders, refused to keep Baron informed about the bankruptcy proceedings, refused to provide copies of the activity in the bankruptcy proceedings, and feely disclosed Baron's communications without authority. Thomas has refused to provide Baron any itemized billing, has failed to provide copies of any court proceedings, has refused repeated requests for information about the case, and has taken no action before the bankruptcy court for Baron's benefit.

¹ Document 00511592562 filed in Case 10-11202 on 09/04/2011.

Prior to the imposition of the receivership Thomas was acting, and legally responsible for acting, as Baron's bankruptcy counsel for \$5,000.00 per month. Thomas has admitted in writing that he was paid and had no 'claim' against Baron. However, **Thomas was complacent in falsely representing to the District Court that Baron had fired Thomas and had filed ethical complaints against him.**

The Thomas allegations are fraudulent and the matter is material. Sherman filed his motion for receivership **Falsely representing that the Bankruptcy Judge ordered that if Baron fired his counsel and proceeded *pro se* that a receivership was to be placed over him.**² That representation, itself, as well as the grounds asserted for the receivership sought by Sherman were false. Notably, Sherman did not act on his own and filed his false motion seeking to appoint Vogel as receiver over Baron after secret consultations with Vogel.³

Crucially, to show that the falsely represented conditions were met, Sherman and Vogel had to show that Thomas (who was counsel in the bankruptcy court) was fired. So an entirely false story was fabricated—a false story in which Thomas has been complicit—that Baron filed an ethics complaint against Thomas, didn't pay him, and thereby caused Thomas to withdraw.⁴ The story is false and fabricated. If an ethics complaint were filed against Thomas it can be produced. This is a fact that can be objectively verified by the Court with the State Bar. However, no such

² R. 1576.

³ SR. v5 p238.

⁴ R. 1576.

event occurred, and the entire allegation is fabricated.⁵ Moreover, Thomas' complicity in the false representations made about his client violates his fundamental ethical duties as an attorney. Thomas apparently violated his ethical and fiduciary duties in other ways, as well. For example, Sherman's motion to impose the receivership states that "Mr. Baron was advised by Mr. Thomas that he needed to attend in order to raise objections to the Trustee's Motion for Authority

⁵ The solicitation and fabrication of manufactured allegations against Baron appears to be a *modus operandi* of the Sherman-Vogel enterprise. See, e.g., pdf page 14, et.seq., of the "GENERAL RESPONSE TO MOTIONS FOR FEES FOR VOGEL, HIS PARTNERS, AND OTHER "RECEIVER PROFESSIONALS" (Document 00511600278 in case 10-11202 filed on 9/12/2011) (describing the fabricated claims solicited and Vogel's orchestrated attempt to falsely make it appear that Baron was harassing, intimidating, and 'obstructing'), and SR. v4 pp102-110 (the smoking gun emails with Vogel's office's digital IDs proving the affair was a completely and 100% a fabricated set-up by Vogel).

The background context is significant, as follows: In September 2010 the Ondova bankruptcy estate had some \$2,000,000.00 in cash and only around \$900,000.00 in claims— ie., a million dollar cash surplus. Sherman as Chapter 11 trustee should have immediately closed the bankruptcy at that point. Instead, Sherman ran up over \$300,000.00 in additional attorney fees. Then, Baron objected and within three business days Sherman and Vogel had Baron placed into receivership (with Vogel as receiver) *ex parte* in the district court case where Vogel was employed as special master. Vogel's first act was to withdraw Baron's objection to Sherman's attorney's fees in the bankruptcy court. Since then, Sherman and Vogel have run up their fees to a combined total of FOUR MILLION DOLLARS, and have shown no signs of stopping. Sherman and Vogel have emptied the cash reserves of Ondova, and have emptied Baron's savings accounts and are seeking now to sell off assets in the bankruptcy and the receivership to pay their own outstanding claims of around two million dollars in fees. Without the complicity of Thomas (and Stan Broome), Baron's bankruptcy counsel, the entire enterprise could not have gotten off the ground. That is because the fabricated Thomas claim (falsely alleging that Baron filed an ethics complaint against Thomas), combined with Broome's fabricated claims for fees, were the underlying grounds set up by Sherman-Vogel in Sherman's receivership motion. Broome clearly coordinated with Sherman, and filed his motion to withdraw in the Bankruptcy Court immediately before Sherman filed the motion for receivership in the district court. Sherman cited as the basis for his motion the fabricated facts of Broome's non-payment and withdrawal, and the fabricated ethics complaint against Thomas and his withdrawal. R. 4390, 4488. Notably, Broome's claim of non-payment has similarly been shown to be fabricated—the basis of the claim was Broome's representations that his fee contract contained no provision capping his monthly fees at \$10,000.00 per month (the rate at which he was paid), and thus he is owed tens of thousands of dollars. Broome finally produced his contract and his sworn statements about his contract were shown to be completely false. See SR. v8 p1212 (the written contract terms); SR. v5 pp426-430 (Broome's sworn statements about the terms).

to Reject Executory Contracts.”⁶ As Baron did not share that information, Thomas clearly violated Baron’s right to confidentiality with respect to alleged communications made within the attorney-client relationship. *See e.g., Gleason v. Coman*, 693 S.W. 2d 564(Tex.App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).

Since the receivership was imposed, Thomas has taken the position that Baron has no rights in the Bankruptcy and therefore there is nothing—nothing—for Thomas to do with respect to actually representing Baron before the bankruptcy court. In such a circumstance to attempt to charge a \$5,000.00 monthly fee—for doing nothing with respect to representation of the purported client before the court, exceeds all bounds of reasonableness and the fee request is unethical, unwarranted, and should not be allowed.

Legal Analysis of the Fee Request

Compensation paid from a receivership estate must be for actual services provided by to that estate. *E.g., Commodity Credit Corporation v. Bell*, 107 F.2d 1001, 1001 (5th Cir. 1939). Thomas’ total fee demands against the receivership estate have now reached in total some Fifty Thousand Dollars, with \$25,000.00 in fee demands for Thomas currently pending before this Honorable Court.⁷ Thomas

⁶ R. 1576.

⁷ 6-30-11 MOTION filed by Appellee Mr. Peter S. Vogel to supplement the record on appeal with Receiver's Fourth Application for Reimbursement of Fees Incurred by Martin Thomas (Pending Before the District Court and Filed with the Fifth Circuit; 07/06/2011 MOTION filed by Appellee Mr. Peter S. Vogel of Receiver's Fifth Application for Reimbursement of Fees Incurred by Martin Thomas (Pending Before the District Court and Filed with the Fifth Circuit Pursuant to District Court Order) [6851310-2]; 8-02-11 MOTION filed by Appellee Mr. Peter S.

has clearly not provided legal services to the estate and is not entitled to disbursement as ‘fees’ of any estate assets. Further, no allegation has been made and no evidence has been offered to sustain a showing that the fee request is reasonable or necessary. The limitation upon attorneys to charge only a reasonable legal fee and to charge only for legal services that are actually provided is a legal and ethical duty imposed by law in Texas. *Lee v. Daniels & Daniels*, 264 S.W. 3d 273, 280-281 (Tex.App.-San Antonio 2008, pet. denied)(noting “[A]ttorneys are members of an ancient profession with unique privileges and corresponding responsibilities” and rejecting the right of attorney to seek fees where “None of that time was spent engaged in ‘legal services’ performed or rendered on behalf of Cummings, his client.”). Moreover, when a fee arrangement is implemented during the course of an attorney’s representation of a client, pursuant to established Texas law, “There is a presumption of unfairness or invalidity attaching to the contract, and the burden of showing its fairness and reasonableness is on the attorney”. *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). The fee application for Thomas wholly fails to meet this standard.

Vogel to supplement the record on appeal with Receiver's Sixth Application for Reimbursement of Fees Incurred by Martin Thomas (Pending Before the District Court) [6872512-2]; 8-31-11 MOTION filed by Appellee Mr. Peter S. Vogel to supplement the record on appeal with Receiver's Seventh Application for Reimbursement of Fees Incurred by Martin Thomas (Pending before District Court [6894012-2]; 10-03-11 MOTION filed by Appellee Mr. Peter S. Vogel to supplement the record on appeal with The Receiver's Eighth Application for Reimbursement of Fees Incurred by Martin Thomas (pending and filed [6917688-2]

Further, pursuant to Texas law, an attorney is paid (when they actually do work on behalf of a client providing legal services) not solely based on their work, but also based on their loyalty to the client. *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (“[N]ot entitled to be paid when he has not provided the loyalty bargained for”). Thomas clearly violated his fiduciary duties in his complicity in the presentation of entirely false and fabricated claims made against Baron on the part of Thomas, and in disclosing confidential attorney-client communications with respect to Baron. *E.g. Deutsch v. Hoover, Box & Slovacek, L.L.R.*, 97 S.W.3d 179, 190 (Tex.App.-Houston [14th Dist.] 2002, no pet.); *Upjohn Co. v. United States*, 449 US 383, 389 (1981).

The Fifth Amendment Question

Baron repeatedly moved in the District Court to be allowed access to his own money in order to hire attorneys to represent him. E.g., R. 2720; SR. v2 p384-390 (Doc 264); SR. v5 p139 (Doc 445). However, the District Court did not allow Baron to hire counsel. E.g., Doc 316 (SR. v4 p119). Baron has made a similar motion before this Honorable Court. That motion is pending ruling, and, to this point, Baron has not been permitted to (1) Earn wages and engage in business transactions to earn money to pay an attorney; (2) Be allowed access to his own money held by the receiver to pay an attorney to represent him; nor (3) Hire paid legal counsel. However, this Honorable Court has held that a civil litigant has a constitutional right to retain hired counsel. *Potashnick v. Port City Const. Co.*, 609

F.2d 1101, 1104 (5th Cir. 1980). Moreover, this Honorable Court has held that “the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement.” Id. at 1118; *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981). An individual's relationship with his or her attorney “acts as a critical buffer between the individual and the power of the State.” *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002). Further, the Supreme Court has held that a party must be afforded a fair opportunity to secure counsel “of his own choice” and that applies “in any case, civil or criminal” as a due process right “in the constitutional sense”. *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932). That basic right was denied Baron by the District Court below, and is pending ruling by this Honorable Court.

As a fundamental cornerstone of Due Process, the Constitution guarantees every citizen the right to a meaningful opportunity to be heard in a meaningful manner. *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). As a matter of established law, this means **the right to be represented by paid legal counsel**. *E.g.*, *Mosley*, 634 F. 2d at 946; *Powell*, 287 U.S. at 53; *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). In the instant proceedings, Jeffrey Baron is being denied this fundamental right. Accordingly the substantive motions pending against Baron and his property while he is being deprived of his basic constitutional right to pay an attorney to represent him should be denied. Because the undersigned is a solo

practitioner with no funding for discovery or manpower to perform itemized review of fee applications, or manpower to attend all of the various bankruptcy court proceedings, etc., the representation provided Baron is limited in scope to appellate legal issues. Baron is entitled as a matter of constitutional right to more. A citizen is entitled to use their own money to hire paid legal counsel to fully represent them, including conducting discovery, attending hearings, reviewing line by line items on fee applications, hiring expert witnesses to provide evidence that fee requests are not reasonable, to investigate the claims against them, etc.

WHEREFORE, Vogel's motion should be denied and overruled.

Respectfully submitted,

/s/ Gary N. Schepps

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CERTIFICATE OF SERVICE

This is to certify that this motion was served this day on all parties who receive notification through the Court's electronic filing system.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANT