

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

- - - - - x
IN RE: :
: :
FAITH ELYZABETH ANTONIO : Case No. 8:20-bk-07637-CPM
: Chapter 7
Debtor :
- - - - - x
DGP PRODUCTS, INC., :
d/b/a NUMERIC RACING :
: :
Plaintiff : **Adversary 20-ap-0537**
vs. :
: :
FAITH ELYZABETH ANTONIO :
: :
Defendant : U.S. Courthouse
- - - - - x 801 N. Florida Avenue
Tampa, Florida
December 7, 2020
10:10 A.M.

TRANSCRIPT EXCERPT OF HEARING

- (1) Pretrial Conference;
- (2) Plaintiff's Motion to Strike Affirmative Defenses (Doc. #7);
- (3) Plaintiff's Motion for Ruling on Objections to Third Party Discovery (Doc. #8).

**BEFORE THE HONORABLE CATHERINE PEEK McEWEN
UNITED STATES BANKRUPTCY JUDGE**

PROCEEDINGS RECORDED BY COURT PERSONNEL.
TRANSCRIPT PRODUCED BY TRANSCRIPTION SERVICE
APPROVED BY ADMINISTRATIVE OFFICE OF U.S. COURTS.

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Also Present: Faith Antonio

EXCERPT OF PROCEEDINGS

(Time Noted: 10:10 a.m.)

1
2
3 THE COURT: Hello? CourtCall operator, is
4 John --

5 MR. MEGNA: Sorry, Your Honor. I'm here. Yes,
6 Your Honor. (Indiscernible) Gino Megna on behalf of Faith
7 Antonio.

8 THE COURT: Okay. Mr. Megna. And, yes, he
9 sounds like he's underwater so it's definitely our system.
10 We may have to shift you all over to Zoom.

11 All right. And then on the Plaintiff's side,
12 ladies first?

13 MR. SOLOMON: This is Sandy Solomon. Allison
14 Thompson is with me.

15 THE COURT: Okay. And, yes, you sound like
16 you're underwater too.

17 MR. MEGNA: Your Honor, I also have my client on
18 the line as well.

19 THE COURT: Okay. That was Mr. Megna?

20 MR. MEGNA: Yes, Your Honor.

21 THE COURT: Okay. Let's see if we can switch to
22 Zoom. Do you all mind doing Zoom?

23 MR. SOLOMON: We are not in a place that we can
24 do that, but we could -- can I have a couple minutes? We're
25 not really situated to do that at the moment.

1 THE COURT: Oh, okay then. Wait a minute. Wait
2 just a minute. Let's see what we can do. I've got to get
3 Laurie or somebody here to come down and troubleshoot. I
4 hate to cause counsel to incur extra money to -- by
5 rescheduling another CourtCall hearing.

6 We actually have time, up until really about
7 11 o'clock because the two 10:30's are going to go very
8 fast. We're just going to be continuing those. And the
9 reason we didn't do it out of the box is we have two pro se
10 defendants and we needed to tell them about it in open
11 court. So the 10:30's aren't going to take that long. So
12 just sit tight. We'll --

13 MR. SOLOMON: We hear you just fine and we could
14 hear the other parties on the other -- everybody in the
15 first hearing as well, Your Honor.

16 THE COURT: Yeah, I understand that, but I can't
17 hear you very well. And you all are going to make real
18 arguments. I'll tell you what. Let me talk. I'll talk
19 for a while.

20 All right. What I see here on the motion to
21 strike the affirmative defenses, Mr. Megna, I think most of
22 that is well-taken. I think with regard to the one on
23 damages and the one on ordinary course, those are really
24 just denials. You know, to be accused of embezzlement, you
25 deny it. Why do you deny it? Because it wasn't

1 embezzlement. It means that you didn't come into
2 possession of funds legally and then convert them to your
3 own use without permission. That's a denial.

4 The Section 548(c), I don't know -- I don't know
5 when you're looking at a 523 -- and then there's a 727, but
6 if you're looking at 523's, you're looking at defenses
7 under the 523's. And so you wouldn't -- you wouldn't
8 mismatch the defenses; okay? And maybe you all have
9 already talked about this and I'm wasting my breath. On
10 the other hand --

11 MR. MEGNA: No, Your Honor, that one --

12 THE COURT: Huh, Mr. Megna?

13 MR. MEGNA: Yes. I agree with you, Judge. That
14 one (indiscernible) 548(c).

15 THE COURT: Okay. So I went through some of
16 those. I also know that there is a motion for a ruling on
17 third-party discovery in a case that's not my case, my
18 adversary proceeding, and I can't rule on those. I don't
19 have any jurisdiction. The alternative is for me -- and
20 I'll let you all vet this. I can abstain for a while, in
21 other words abate this adversary proceeding, let you go
22 over to state court, finish out your business over there,
23 bring me back the result, which will drive my decision
24 under principles of collateral estoppel. That's one
25 choice.

1 Another choice -- and frankly it might be my
2 preferred choice depending on what you tell me about how
3 long the state court has had it. Another choice might be
4 that you issue identical discovery in this adversary
5 proceeding over which I would have jurisdiction to call
6 balls and strikes on objections to motions to compel or
7 call balls and strikes on a motion for a protective order.

8 I can tell you that based on the allegations, I
9 would be very reluctant to block that kind of discovery. I
10 think it is relevant based on the claim that is pleaded in
11 the complaint. And in terms of privacy issues, there's a
12 balancing test under the State Constitution for that and,
13 you know, frankly I'm not sure that credit cards, you know,
14 maybe there is some sensitive information that the
15 Defendant was purchasing things that might be embarrassing
16 to her and so forth, but we can -- we can fashion a
17 confidentiality order as has been suggested.

18 So that's kind of the way I was going to go on
19 this motion for a ruling on objections to third-party
20 discovery.

21 Let me track back to the motion to strike
22 affirmative defenses. There are a couple of theories of
23 estoppel. And it looks like the Plaintiff is honing in
24 mostly on collateral estoppel, but there is regular
25 estoppel too. But there are elements to those under the

1 state law. Let me see if I've got my *White's* -- W-H-I-T-E-
2 S -- *Florida Causes of Action and Defenses* book up here.
3 Oh, I've got the little one. Hold on. This isn't as good
4 as what I would -- as robust as the big one, but, you know,
5 it's -- the Supreme Court case on equitable estoppel is --
6 it looks like -- this is an old book -- 2002 *Westlaw*
7 31662590 at asterisk 3. There's a Second DCA case cited at
8 816 So.2d 832. I should give you the names. In the
9 Supreme Court case it's *Florida Department of Health and*
10 *Rehabilitative Services*, so FDHRS. The Second DCA is
11 *Watson Clinic*.

12 There's an Eleventh Circuit case, *Tefel*, T-E-F,
13 as in *Frank*, E-L, 180 F.3d 1286. And there's also -- I see
14 a Middle District in this book. At any rate -- and then
15 there are defenses to a claim for equitable estoppel, as
16 well, that you can pick up. Promissory estoppel has got
17 different elements.

18 And so, you know, Mr. Megna, you're going to have
19 to plead which theory of estoppel you're going under there.
20 Is it collateral; is it promissory; is it equitable?

21 And the way that we plead our affirmative
22 defenses is as stated in the motion to strike. You plead
23 it as if it's a pleading. You can't just use a name or a
24 title of a certain kind of defense, you've got to lay out
25 the elements rather precisely.

1 Now I don't mind a Rule 12(b)(6) defense pleaded
2 as a defense. Let me get this.

3 I saw the case law, Mr. Solomon, that you cited
4 but, you know, it is true that 12 says that you can lodge
5 these as a defense instead and you don't need to do it in
6 the form of a motion.

7 But if you're going to do it as a defense, you're
8 going to have to lay out which elements, Mr. Megna, you
9 believe are missing. So you can't just say, fails to state
10 a claim. You have to say What did they leave out? That's
11 how you plead an affirmative defense on a motion -- excuse
12 me, on a 12(b) motion to state a claim.

13 One last point. Judge Moody always says this:
14 Unless you know that there is no way they could plead a
15 certain kind of claim, you should sit on your hands and not
16 raise a motion to dismiss because it gives them a chance to
17 fix their pleadings. That's the message he gives young
18 lawyers and that's a message I give you because you're a
19 young lawyer.

20 And so I have given you a lot of stuff and I have
21 talked a lot. We still don't have a technician here.

22 COURTROOM DEPUTY: He's on his way.

23 THE COURT: On her way -- on his way? Hey, Bill.
24 Bill Miguenes is here.

25 So what if I were to send you back, Mr. Megna,

1 and give you an opportunity to replead the affirmative
2 defenses? I would grant the motion to strike except for
3 the -- well, I would grant it, but I would permit you to
4 include the failure to state a claim if you choose to re-
5 include it with precision. And how much time would you
6 need to replead the affirmative defenses, Mr. Megna?

7 MR. MEGNA: Judge, if you can give me
8 (indiscernible) -- can I have seven days?

9 THE COURT: You can take 14; okay? Same with
10 waiver.

11 MR. MEGNA: That works, (indiscernible)

12 THE COURT: Same with waiver, too. I'm getting
13 that the theme here is these people, the principle behind
14 the --

15 MR. MEGNA: Your Honor, (indiscernible) -- it's
16 based on laches as well, Your Honor.

17 THE COURT: Yeah. And laches, you know, that
18 usually is the statute of limi -- it usually is guided by
19 what the statute of limitations is. They usually run hand
20 and glove, but you can replead laches but then we'll
21 probably have a dispositive motion on that one. And
22 there's case law out there that talks about when laches is
23 good and when it's not good. And it's maybe that there is
24 now insufficient documentary evidence because of the lapse
25 of time and that you shouldn't be bound by just the statute

1 of limitations. But do some research on laches and when
2 it's appropriate So I'm going to allow you to replead.
3 You can have 14 days.

4 And we'll do a jiffy order for you, Mr. Solomon.
5 Mr. Solomon, a jiffy order is something we just do a
6 checkbox. We grant your motion to strike based on the
7 colloquy on the record and then there's a line that says,
8 Defendant shall have 14 days to replead the affirmative
9 defenses. Is that okay with you?

10 MR. SOLOMON: Yes, ma'am. (indiscernible). We
11 had discussed this at the conference of counsel and I had
12 thought that Mr. Megna was going to replead because if he
13 repleads with the specificity that we believe is required
14 for each and every one of the defenses, then we can go from
15 there. We will just reply to close the pleadings knowing
16 what he's talking about. But merely raising an affirmative
17 defense by (indiscernible) is insufficient. And Mr. Megna
18 and I have discussed that. We had thought he was going to
19 do that before today.

20 THE COURT: Okay. Well, he didn't but you've got
21 the motion, I've ruled on it, and he'll do that.

22 Now with regard to the objections on the third-
23 party discovery, how long has the state court had the case?

24 MR. SOLOMON: The case has been outstanding since
25 August or September. And with respect to these discovery

1 requests, we served third-party subpoenas and discovery
2 requests directly to Ms. Antonio. They haven't produced
3 anything. They filed a series of objections and we have
4 been at this with prior counsel before Mr. Megna got
5 involved in the state court case. And we floated the idea
6 of the confidentiality agreement and have now sent that
7 four or five different times without response.

8 I think it's a very simple question because we
9 don't have any objection to limiting the exposure that
10 Ms. Antonio may feel by having a confidentiality agreement.
11 And now that it's been out there for two-and-a-half months,
12 three months, I think that we could probably resolve this
13 if they would just respond to the confidentiality. The
14 state law is very clear as you had indicated was your
15 understanding of the law anyway, that if the discovery is
16 relevant to claims that are pled, and our complaint is pled
17 with great specificity, that we're entitled to that
18 discovery.

19 Much of what they raised initially in the state
20 court was that these were not documents that belonged to
21 Ms. Antonio, but that they belonged to DGP and that was the
22 reason why we shouldn't be able to seek the discovery. But
23 that's a non-sequitur. And then we said there are a series
24 of documents that were created or accounts that were
25 created in the name of DGP by Ms. Antonio that we did not

1 know of and that's part of the problem where we go to these
2 third-party providers, whether they be credit cards, banks,
3 or, if you will, software apps that are used in the
4 business. And this has been going on for four months
5 without an ability to actually have a hearing in state
6 court.

7 And what we were trying to do by filing the
8 motion with you was to avoid all of the expense of
9 reserving all of the subpoenas and then waiting for
10 objections again and going through the process both
11 time-wise and expense-wise because they're the same
12 objections that they raised before. In fact, what I would
13 propose is that if they have any objections to the state
14 court discovery that was already served on the third
15 parties, that they merely refile those objections now
16 before you and allow that decision to be made by you in
17 this court so that we don't have to go re-serve.

18 Because we re-serve and then we get telephone
19 conversations with Citibank and Chase and we have
20 (indiscernible) all over the country. So we had to get
21 subpoenas issued by the state courts in other states. That
22 was an expense. And then in some states, as you probably
23 are aware, we have to actually open a new case which costs
24 somewhere between 250 and \$500 just to open those state
25 court cases to have a subpoena issued on those parties who

1 don't have a direct presence in Florida and have to be
2 served out of state, for example, on the West Coast.

3 So this was merely an attempt to get a shorthand
4 resolution and we would like to avoid having to redo all of
5 the discovery. And then deferring to the state court is
6 just going to engender another delay. I don't even know
7 whether the judge that was originally assigned to the case
8 is going to remain in the same division because as you know
9 they'll all switch in January. And with the new judges
10 taking their seats on January 19th or 20th, that's just
11 going to engender another delay and --

12 THE COURT: Okay. I've heard --

13 MR. SOLOMON: -- (Indiscernible) --

14 THE COURT: -- enough. I've heard enough. Hold
15 on. I've heard enough. It hasn't been in the state court
16 that long, so abatement is not an appropriate thing here.
17 Now I don't -- the stay is in effect with respect to
18 litigation in the state court. Unless Mr. Megna will agree
19 and consent to treating that discovery as if it was made in
20 this adversary proceeding and is subject to my
21 jurisdiction, I can't really touch it.

22 It's so much easier to issue discovery in
23 bankruptcy court because you may simply mail subpoenas to
24 these third parties with documents and you would need not
25 -- I don't think you need to go to any other bankruptcy

1 court to have subpoenas issued. So it's very customary
2 where we have people subpoenaing, you know, Fifth Third
3 Bank, Bank of America, wherever and they get the documents
4 in.

5 I would urge you all to talk some more and look
6 at Bankruptcy Rule 1001 and live by the spirit of it. And,
7 Mr. Megna, you are familiar with the case, I think, I
8 probably have mentioned it to you, of *Sahlyers v. Prugh*,
9 S-A-H-L-Y-E-R-S v. Prugh, P-R-U-G-H, the decision by Judge
10 Edmondson -- Judge Edmondson was Chief Judge of the
11 Eleventh Circuit then -- and he talks about the need for
12 counsel to remember that you are -- your maybe primary duty
13 is the duty to the court and the system in ensuring the
14 just, speedy, and inexpensive determination of every claim.
15 And he says that the lawyers are officers of the court in
16 that regard.

17 I think that what Mr. Solomon has suggested could
18 be done by consent in the spirit of Bankruptcy Rule 1001,
19 but I'm going to let you all talk about that and I'll
20 continue this hearing until after we have the affirmative
21 defenses already in hand, and so if it's going to be a
22 14-day turnaround on that, something that's about a month
23 away, and see if you can come up with a consensual
24 resolution on this discovery.

25 Mr. Megna, it's going to come in. It's going to

1 come in.

2 MR. MEGNA: Your Honor --

3 THE COURT: Frankly, the way I see this is
4 there's a bunch of expenses. There may or may not be some
5 irregularities in the creation of some documents. The
6 defense apparently is that these people had a relationship
7 with each other and that there was a free hand given to the
8 Defendant to do certain things. If she didn't report these
9 things as income, that's going to be an issue unless, you
10 know, she can make a credible case that the company gifted
11 her company treasury money.

12 I'll tell you that I have an issue with the
13 fid -- I think that there might be an issue with the
14 fiduciary allegation, Mr. Solomon. That could come up on a
15 dispositive motion. I also looked at the 727. That one
16 I'm not convinced yet that that's the proper stuff of 727,
17 but I haven't done any research, you'll have to find some
18 cases, but that may be a dispositive issue or ripe for a
19 dispositive motion at some time.

20 I do think you all should mediate. **AUDIO
21 ENDED**

22 (End of requested excerpt. Time Noted: 10:30 a.m.)

23

24

25

CERTIFICATE

I, Gretchen L. Schultz, Certified Electronic Reporter, hereby certify that the foregoing is the official transcript, prepared to the best degree possible from the digital audio recording and logs provided by the court.

I further certify that I am neither counsel for, nor related to, nor an employee of any of the parties to the action in which this hearing was taken.

I further certify that I have no personal interest in the outcome of the action.

SIGNED this 5th day of April, 2024.

A handwritten signature in cursive script, reading "Gretchen L. Schultz", is written over a horizontal line.

GRETCHEN L. SCHULTZ, CER
Transcriber