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District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
SANTA FE PRIVATE EQUITY FUND,
Debtor. No. 7-87-01188 SS

MEMORANDUM OPINION ON COURT'S ABILITY TO RECONSIDER ORAL RULING MADE BY PREVIOUSLY ASSIGNED JUDGE

This matter came before the Court for a status conference on January 13, 1999. The Trustee Robert Hilgendorf appeared. Alice Nystel Page appeared for creditor Lincoln Life Insurance Company ("Lincoln"). Walter Reardon appeared for creditor Arinco Computer Systems, Inc. ("Arinco"). Kenneth Harrigan and Wade Woodard appeared for interested party Eastham, Johnson, Monnheimer & Jontz, P.C. ("Eastham")[1]. Robert A. Johnson appeared.

This case was originally assigned to the Hon. Judge Rose. Upon his retirement from recall status on December 16, 1998 the case was assigned to this judge. At issue in this case is this Court's power to reconsider prior oral rulings of the previous judge. In other words, can this Court hear a pending motion for reconsideration of an oral ruling made by the prior judge? This

[1]For purposes of this decision, the Court does not find it necessary to rule on the issue of Eastham's standing in this case, or the effect of what appears to be an oral ruling by Judge Rose during the December 7, 1998 hearing (Tr. at page 7) that the Eastham firm has standing. As is apparent from this memorandum opinion, the Court has read and considered all the materials filed by Eastham.

memorandum does not address the merits of that motion for reconsideration, and the Court expressly states that it has made no decision on that motion; the only issue addressed in this memorandum is the Court's power to hear it.

PROCEDURAL HISTORY

On April 20, 1994 the Court entered a default order denying the amended claim of Santa Fe Private Equity Fund II ("SFPEF2") in the amount of $1,359,051. The Trustee obtained an order for an interim distribution to creditors on May 3, 1995 and distributed a large majority of the estate's funds pursuant to the order. Because the SFPEF2 claim had been denied, no dividend was paid on this claim.

On November 19, 1996 Lincoln filed a Statement of Transferee's Claim, stating that on April 21, 1988 the SFPEF2 claim was assigned to Lincoln as part of a settlement agreement in a state court case. Lincoln sent notice of the transfer on November 25, 1996, and the Court entered an Order substituting Lincoln for SFPEF2 on February 5, 1997.

On November 22, 1996 Lincoln, who was then represented by Eastham, filed a motion for reconsideration of order disallowing claim. Notice of the motion was given to all parties, and the trustee, Arinco, and Silicon Valley Bank objected. The Court conducted a hearing on February 5, 1997 and orally ruled that the order disallowing the claim would be set aside for inadvertence

and excusable neglect. The Court entered a written order to this effect on August 25, 1997.

On September 15, 1997 Lincoln then filed a Motion for 1) a final hearing on the objection to the proof of claim, 2) a motion to amend order for interim distribution, and 3) to compel the trustee to act to recover overpayments or, in the alternative, to distribute causes of action to Lincoln ("Lincoln's motion"). On December 1, 1997 Lincoln filed a Second Amended Proof of Claim in the amount of $3,391,169.87. Lincoln sent notice of its filing of the second amended proof of claim to all creditors on December 2, 1997, and the United States Trustee, Arinco and the Trustee objected to the claim. The Court heard the objections to the second amended proof of claim on January 22, 1998, and the parties agreed to a stipulation. On April 28, 1998 Alice Nystel Page substituted in as counsel for Lincoln. The January 22 stipulation was documented in an order entered June 2, 1998:

> The Court FINDS:
> 1. Lincoln claims that if its claim is allowed the trustee will be required to pursue recovery of amounts previously distributed to unsecured claimants in the 1995 interim distribution. The trustee and Arinco disagree with that contention, arguing that the previous distribution was proper and approved by the Court and that Lincoln is subject to equitable estoppel and other legal defenses.
> 2. Lincoln, the trustee, and Arinco have agreed to present to the Court for resolution the issue set forth in paragraph one on the assumption that Lincoln's claim is valid, and prior to Lincoln's claim being tried and determined by the Court, without prejudice to the trustee's and creditors' rights to later dispute the claim.

The Court then ordered that the issue of paragraph 1 would be tried without prejudice to the trustee's and creditors' rights to dispute the claim, and that notice of the relief requested (i.e. recovery of payments) be given to all creditors with an opportunity to object. This notice was sent to the matrix on June 5, 1998. Creditors Richard and Kathleen Abeles and Arinco filed objections. The Court heard Lincoln's motion and objections on July 9, 1998 and orally denied the motion, directing Arinco's attorney to prepare the order. A presentment hearing was set for September 15, 1998 at which Lincoln requested findings and conclusions. The Court directed the parties to submit proposed findings and conclusions. The parties submitted these in August. On September 10, 1998 Eastham, as "party in interest" filed a motion for reconsideration of the July 9 oral ruling (the "reconsideration motion").[2] The Court entered the written order on September 18, 1998 denying Lincoln's motion (to amend distribution order and to compel trustee to act); the Court withdrew this order on September 22, 1998 as "improperly entered." On October 14, 1998, the Court set the reconsideration motion for hearing for December 7, 1998. On December 3, 1998 the Court entered Findings of Fact and Conclusions of Law on

[2]The filing of this motion was premature; ordinarily a motion for reconsideration is not filed until after the written order has been entered. However, after Judge Rose entered his written order on September 18, he sua sponte set it aside on September 22.

Lincoln's Motion. No Order based on either these findings and conclusions or the July 9 oral ruling has been or remains entered. On December 7 the reconsideration motion came on for hearing, and the minutes of that hearing indicate that Judge Rose stated that he believed the appropriate thing to do would be to set the motion for a final hearing before the successor judge, who would take over the matter and do what needed to be done.

On January 13, 1999, this Judge held a status conference, and requested briefs on the authority of a successor judge to reconsider either findings already entered on the record or a prior oral ruling by a predecessor judge. Having reviewed the briefs and the file in this case and being otherwise sufficiently informed and advised, the Court finds and concludes that it has the authority to review the previous activities in this case and to reconsider them to the same extent as if there were no change in judges.

DISCUSSION

Bankruptcy Rule 9028 adopts Rule 63 of the Federal Rules of Civil Procedure, which states in full:

> If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

The Court finds that this rule authorizes, or even perhaps requires, that a successor judge reexamine prior rulings upon timely motion. A recent Court of Appeals for the District of Columbia case supports this view:

> By refusing to consider the post-trial motions, the successor judge failed to comply with Rule 63. After all, the original judge could not have refused to consider them. Although district courts enjoy wide discretion to grant or deny post-trial motions, they cannot refuse to exercise that discretion. Since Rule 63 requires a successor judge to stand in the shoes of the original judge, the successor judge in this case assumed the original judge's obligation to exercise his discretion with respect to the contractors' post-trial motions. It would be unfair to deny a litigant's right to try to persuade the court that it has erred simply because the judge who rendered the original decision is unavailable and cannot be called on to reconsider the matter. (Citations and quotation marks omitted.)

Mergentime Corporation v. Washington Metropolitan Area Transit Authority, 166 F.3d 1257, 1263-64 (D.C. Cir. 1999). See also Canseco v. United States, 97 F.3d 1224, 1226 (9th Cir. 1996)("Rule 63 always permitted a successor judge to decide post-

trial motions in a case in which findings of fact and conclusions of law had been filed."); Langevine v. District of Columbia, 106 F.3d 1018, 1022-23 (D.C. Cir. 1997)(Interlocutory orders and rulings are subject to modification any time prior to final judgment and may be modified to the same extent if the case is reassigned to another judge.) The Court agrees with the reasoning set forth in these cases.

Arinco's brief contains two basic arguments: 1) there is a rule that strictly restricts a successor judge from "overruling" a prior judge, and 2) the law of the case doctrine should prohibit reexamination of earlier rulings. Each of these arguments will be discussed in turn. First, Arinco asks the Court to apply a "rule" set out in the Fifth Circuit case of Gallimore v. Missouri Pacific Railroad, 635 F.2d 1165, 1171 (5th Cir. 1981), which states that a successor judge should "respect and not overrule" a prior judge's decision. The Court noted, however, that "carried to its extreme, this rule could dictate absurd results" such as precluding a court from reaching a correct decision merely because the case had been transferred from another judge. Id. The Court noted that the rule should give way in the interests of justice and economy. Id. at 1172. In this case, the Court finds that it should hear the motion to reconsider in the interests of justice; refusing to hear it would deny a litigant's right to a review before appealing, which is granted by the federal rules. Mergentime, 166 F.3d at 1264.

Arinco cites another Fifth Circuit case in support of this rule, which states "a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." United States v. O'Keefe, 128 F.3d 885, 891 (5th Cir. 1997). However, this case also points out an exception to that "rule": "a second court should follow a ruling made by an earlier court unless the prior decision was erroneous, is no longer sound, or would create injustice." Id. There is obviously no way a successor court could determine if the prior decision were erroneous, no longer sound, or would create injustice unless the successor court actually heard and considered a motion to reconsider. Arinco's argument, then, is that this Court should not even consider whether the prior ruling is erroneous or unjust. That position is untenable and not supported by the cases. In summary, it appears that this Fifth Circuit rule is not inflexible, and specifically recognizes the power of a successor court to entertain motions to reconsider. The Court points out that to the extent these cases give guidelines for ruling on the merits of motions they are outside the scope of this memorandum opinion, which addresses only the Court's power to hear a motion to reconsider.[3]

[3]The Trustee also filed a memorandum of law. This memorandum contains two arguments: 1) that Eastham does not have

Arinco next argues that under the "law of the case" doctrine Judge Rose's prior rulings should be followed. In support, Arinco cites Erie Conduit Corporation v. Metropolitan Asphalt Paving Association, 560 F.Supp. 305 (E.D. N.Y. 1983), Gillig v. Advanced Cardiovascular Systems, Inc., 67 F.3d 586 (6th Cir. 1995), Tanner Motor Livery Ltd. v. Avis Inc., 316 F.2d 805 (9th Cir. 1963) and Wilson v. Merrell Dow Pharmaceuticals, Inc., 160 F.3d 804 (10th Cir. 1998). Eastham points out in its response brief that the law of the case doctrine should not apply under the facts of this case because there was no final order, only an interlocutory oral ruling and entry of written findings and conclusions.

The Court agrees that the oral ruling and findings and conclusions in this case are interlocutory and do not implicate the law of the case doctrine. See American Precision Vibrator Company v. National Air Vibrator Co., 863 F.2d 428, 429 (5th Cir. 1989):

> Orders do not become final until they are docketed. The reasons for respecting finality of judgments do not apply to undocketed orders. They cannot be enforced. Hence, judges may change their decisions until they are docketed. (Footnote citations omitted.)

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standing to file the motion for reconsideration, and 2) the Court should decline to consider new arguments or new evidence on reconsideration when those arguments or evidence were available earlier. Both of these arguments go to the merits of the motion for reconsideration, not the Court's power to entertain such a motion. Therefore, these arguments will be considered in conjunction with the motion for reconsideration.

See also Langevine, 106 F.3d at 1023-24 (Order granting new trial is interlocutory and not subject to law of the case doctrine.) and Wilson v. Merrell Dow, 160 F.3d at 627 (Denial of motion for summary judgment is interlocutory and not subject to law of case doctrine.) However, even if the law of the case doctrine were to apply in this case, that doctrine is flexible. See Gillig, 67 F.3d at 589-90:

> At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time... [T]here is no jurisdictional inhibition to reconsideration... and a trial judge should not court reversal because of the erroneous ruling of another judge any more than because of an erroneous ruling of his own.

and Erie Conduit, 560 F.Supp. at 307 (The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power" but generally should be followed unless the "decision was clearly erroneous and would work a manifest injustice.") Compare Tanner Motor Livery, 316 F.2d at 809-10 (Statute permits appeal of interlocutory order granting or denying preliminary injunction; this obviates need to resort to trial court to obtain review, and it was abuse of discretion for second judge to do so. Court "emphasise[s] the appealability of the order" in reaching its conclusion.) The Court finds that the law of the case doctrine is inapplicable to the status of this case.

CONCLUSION

The Court has the authority to hear and consider the motion for reconsideration filed in this case. The only remaining issues are the requirements of Bankruptcy Rule 9028 and Federal Rule of Civil Procedure 63. This rule requires that this Court certify familiarity with the record, and because the issue involved is a non-jury trial, rehear evidence at the request of a party. By separate Order this Court will enter its certification, and set deadlines by which parties may request a trial setting.

Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to:

Robert Hilgendorf, Trustee
Robert St. John/ Alice Nystel Page, counsel for Lincoln
Kenneth Harrigan/ Wade Woodard, counsel for Eastham
Walter Reardon, counsel for Arinco
Robert A. Johnson
Richard and Kathleen Abeles
Ron Andazola, Office of the US Trustee