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NOT FOR PUBLICATION



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re:)	Case No. LA02-42222SB
ABDOULAYE BAH,)	
)	CHAPTER 11
Debtor,)	
_____)	
JACK NAIMAN,)	Adv. No. 03-01298SB
)	Adv. No. 03-01438SB
Plaintiff,)	
vs.)	RULING ON RULE 52(c) MOTION
ABDOULAYE BAH,)	
)	
Defendant.)	
_____)	DATE: January 12 and 13, 2006
AND RELATED CROSS-ACTIONS)	TIME: 10:00 a.m.
_____)	CTRM: 1575

This adversary proceeding came on for trial on January 12 and 13, 2006. Plaintiff Abdoulaye Bah appeared through his counsel John Fuchs. Defendant Martin Goldberg appeared through his counsel Helen Ryan Frazer.

The court has severed for later trial the issue of the quantification of damages, except as to the claim arising from Goldberg's failure to obtain insurance, failing to safeguard the property as to which he took possession, and the failure to pay storage fees for the property.

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After the conclusion of plaintiff's case (except on the severed issue of damages), defendant made a motion under Rule 52(c), as applicable in adversary proceedings in bankruptcy under Rule 7052, for judgment on partial findings. After hearing the testimony of the witnesses and examining the exhibits admitted into evidence, and considering the pleadings and files in this adversary proceeding and the underlying bankruptcy case, the court makes the following findings of fact and conclusions of law in support of its judgment on partial findings.

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SAN DIEGO CASE

Philip C. and Georgette Restaino brought a case in San Diego Superior Court against Bah and Jack Naiman in 2001. The San Diego litigation was based on a claim of a partnership between the Restainos and Bah. This court has previously ruled that there was no such partnership.

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Defendant Martin Goldberg was appointed by the San Diego Superior Court in that case to take possession of partnership property by order of October 18, 2001. Because there was no partnership, there was no partnership property, and no property that Goldberg, as receiver, had an obligation to take possession of or to administer. Goldberg did, nonetheless, take possession of two storage lockers for some eight months that contained more than a hundred artworks belonging to Bah. The San Diego litigation ended with the filing of this bankruptcy case and the imposition of the automatic stay.

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THIS ADVERSARY PROCEEDING

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In due course Bah brought this Adversary Proceeding no. 03-01438 against the Restainos, Naiman and Goldberg, which was consolidated with Adversary Proceeding no. 03-01298. All of the parties except Goldberg have settled. On a summary judgment motion, the court found that the only triable claim against Goldberg is for breach of fiduciary duty,

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which is claimed in four respects:

1. He failed to take possession of alleged partnership property in possession of the Restainos and Naiman;
2. He failed to obtain insurance as required by the San Diego Superior Court order of October 18, 2001;
3. He failed to safeguard the property as to which he took possession; and
4. He failed to pay the storage fees for the property.

PROPERTY IN POSSESSION OF RESTAINOS AND NAIMAN

Plaintiff alleges that Goldberg had a duty, pursuant to the San Diego court order appointing him as receiver, to take possession of certain artworks in the possession of the Restainos and Jack Naiman. The court finds that, because there was no partnership property, Goldberg had no such duty under that order.

Debtor also alleges that Goldberg had a duty to take possession of these artworks under a settlement stipulation signed by the parties on March 28, 2002 and approved by the San Diego court on May 15, 2002. The court finds that this document, in substance, is a stipulation negotiated and signed by the parties, which was submitted to the San Diego court for its approval. The court gave its approval by stating at the bottom of the stipulation, "It is so ordered." This was nothing more than an approval of the stipulation. In consequence, the parties had the power to modify the stipulation among themselves.

In fact, the parties did modify the stipulation on the same day that they signed it. After signing the stipulation, they met with Goldberg, and discussed the fact that Goldberg had no funds to pay for storage costs, insurance or other costs of administering his receivership. The Restainos declined and refused to advance any funds for these purposes. In consequence, the parties orally decided and agreed that Goldberg would not take possession of the artworks in the possession of the Restainos and Naiman. Although not

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2 included in the submission to the San Diego court, this agreement relieved Goldberg of any
3 obligation to take possession of these artworks under the stipulation approved by the court.
4 While the court approval of the stipulation came after this supplemental agreement, the
5 subsequent court approval did not negate the oral agreement.
6

7 **SAFEGUARDING PROPERTY**

8 Goldberg had an obligation to store properly and to safeguard the property belonging
9 to Bah as to which he did take possession, so long as he remained in possession, in the
10 same manner as the owner would. *See, e.g., Vitug v. Griffin*, 214 Cal. App. 3d. 488, 496,
11 262 Cal. Rptr. 588 (1989). Bah testified at trial that one artwork was so damaged by rats
12 when he retook possession of the property in the storage lockers that it was and is now
13 essentially worthless. He further testified that the artwork was worth \$25,000.

14 This particular piece of art (along with the others) had been stored in one of the
15 lockers for several years prior to Goldberg's appointment as receiver. The evidence is very
16 tenuous that this damage occurred while Goldberg was in possession of the artworks.
17 Nobody testified as to the condition of this piece on the date that Goldberg took possession
18 of the storage bins. Bah was not a good housekeeper: on that date the storage bins were
19 dirty, there were spider cobwebs and a certain amount of insect infestation of the art objects.
20 The lockers were not airtight: insects, birds and rodents had access to them.

21 Much or all of the damage caused by the rats could have occurred prior to Goldberg's
22 watch over the property. The court finds the evidence insufficient to hold Goldberg
23 responsible for this damage.
24

25 **INSURANCE**

26 The order of October 18, 2001 appointing Goldberg as receiver imposed on him an
27 obligation to purchase insurance for the property of which he took possession. Goldberg
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2 failed to do so. The order further required Goldberg to go back to the court if he had
3 insufficient funds or had other difficulties in obtaining insurance. Again, Goldberg failed to
4 do so.

5 However, the only item of damage alleged to result from the lack of insurance is the
6 damage caused by the rats to one artwork. Because the court cannot conclude that this
7 happened during Goldberg’s possession of this artwork, the court cannot conclude that the
8 lack of insurance caused damage to Bah.

9 In addition, it is far from certain that, if the damage caused by the rats had occurred
10 while the artwork was in Goldberg’s possession, and he had purchased insurance, the
11 insurance would have covered this damage. Any such conclusion is mere conjecture and
12 speculation. In consequence, the court finds no damage resulting from Goldberg’s failure
13 to obtain insurance over the artwork as to which he took possession.

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15 **STORAGE FEES**

16 On the storage fee issue, the court finds that Goldberg has been fully heard.
17 Goldberg had an obligation to pay the storage expenses of the property in his possession.
18 According to the evidence at trial, these storage fees totaled \$5,456. Goldberg testified that
19 he intended to pay these fees, but did not receive a bill from the storage company to pay.
20 Instead, the bill went to Bah, who paid the storage charges. It is now time for Goldberg to
21 reimburse Bah for these expenses. Bah is entitled to recover \$5,456 from Goldberg for these
22 charges.

23 Goldberg did not receive funds to cover these storage charges in the receivership.
24 Lacking such funds, he had a duty to bring to the attention of the San Diego court this issue,
25 and to seek instructions. He did not do so. In consequence, these charges are a personal
26 expense of Goldberg to the extent that receivership assets are insufficient to cover these
27 expenses. The court takes no position on whether Goldberg may recover these expenses
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2 **CERTIFICATE OF MAILING**

3 I certify that a true copy of this **RULING ON RULE 52(c) MOTION** was mailed on

4 _____ to the parties listed below:

5 **FEB 07 2006**

6 Office of the U.S. Trustee
7 725 So. Figueroa St., Suite 2600
8 Los Angeles, CA 90017

9 Steven L. Hogan
10 Lurie, Zepeda, Schmalz & Hogan
11 9107 Wilshire Blvd., Suite 800
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13 Attorneys for Creditor/Plaintiff/Defendant
14 Jack Naiman and Creditor/Defendant Matthew Naiman

15 Illyssa I. Fogel, Esq.
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20 John R. Fuchs, Esq.
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25 Attorneys for Debtor/Plaintiff/Defendant
26 Abdoulaye Bah

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17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-8597
Attorneys for Defendant
Martin Goldberg

26 **FEB 07 2006**

27 DATED: _____



DEPUTY CLERK