UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ESTATE OF JOHNNY FISHER, Dec'd,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 3:09-CV-00748-B**
	§	
J.P. MORGAN CHASE BANK, N.A., GLENN MILTON, JAY SANDLIN, LUCY NORRIS, RN and NANCY ARGO, RN,	§	
	§	
Defendants.	§	

REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT JP MORGAN CHASE BANK, N.A.'S MOTION FOR RECONSIDERATION OF MEMORANDUM ORDER

TO THE HONORABLE UNITED STATES DISTRICT JUDGE JANE J. BOYLE:

Defendant JP Morgan Chase Bank, N.A. ("Defendant") files this its reply to Plaintiff's Response to Defendant JP Morgan Chase Bank, N.A.'s Motion for Reconsideration of Memorandum Order [Docket No. 27] ("Response")[1], and in support would respectfully show the Court as follows:

I. THE NOTICE OF REMOVAL WAS FILED AND SERVED

Plaintiff alleges in its Response that Defendant did not file its Notice of Removal with the State District Court and that Defendant further, intentionally concealed that fact from this Court.[2] Plaintiff also argues that the removal was improper because the Notice of Removal was filed directly with the clerk of the bankruptcy court and in the incorrect division, and that Defendant has acted with an intent to delay the proceedings. All of these allegations are false.

[1] Plaintiff's Response also requests payment of costs, expenses and attorneys' fees. Defendant will be addressing those arguments in a separate, timely filed response to the Plaintiff's motion for payment of costs, expenses and attorney's fees and does not waive any arguments in connection with same.

[2] *See* Response at 23-27.

A. Defendant Properly Filed the Notice to State Court of Notice of Removal.

Defendant filed a Notice to State Court of Notice of Removal with the clerk of court for the 413th Judicial District Court of Johnson County, Texas ("State District Court").[3] It appears there was confusion in the clerk of court's office based upon the transfer of the Lawsuit from the Probate Court No. 2 of Johnson County, Texas ("Probate Court") to the State District Court. On or about October 2, 2008, Plaintiff moved to transfer the Lawsuit[4] from the Probate Court to the State District Court.[5] On October 3, 2008, an Order of Transfer was signed by the Presiding Judge of the Probate Court effectively transferring the Lawsuit to the State District Court.[6] Because the Lawsuit had been transferred from the Probate Court to the State District Court, counsel for Defendant believed that the appropriate place for filing the Notice to State Court of Notice of Removal was in the State District Court.

On October 9, 2008, in preparation for filing the Notice to State Court of Notice of Removal, counsel for Defendant contacted the clerk of the State District Court to obtain a case number for filing the notice and the clerk provided case number C200800560.[7] At 11:39 a.m. on October 9, 2008, counsel for Defendant electronically filed the Notice to State Court of Notice of Removal, via "CaseFile Xpress",[8] in the State District Court under the case number provided by the clerk of court and received a notification that the submission of the Notice to State Court of Notice of Removal was successful.[9] At 11:40 a.m. on October 9, 2008, counsel for Defendant received an email notification that the Notice to State Court of Notice of Removal had been

[3] *See* Affidavit of Jeffrey G. Hamilton, attached hereto as **Exhibit A.**

[4] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion for Reconsideration.

[5] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 1.

[6] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 2.

[7] *See* Affidavit of Jeffrey G. Hamilton.

[8] "CaseFile Xpress" is an approved electronic filing service provider authorized to conduct electronic filing for the 413th Judicial District Court of Johnson County, Texas. *See* Affidavit of Jeffrey G. Hamilton, Exhibit 4.

[9] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 3.

"transmitted successfully to eFiling for Courts."[10]

Counsel for Defendant has no record of having received a notification (via email or otherwise) that the Notice to State Court of Notice of Removal had not been accepted by the clerk of the State District Court, and was only made aware of such fact upon the filing of Plaintiff's Response.[11] The clerk of the State District Court has been unable to explain why they apparently rejected the filing on the grounds that they did not have a case number despite having provided a case number to counsel for Defendant.[12] If Defendant's counsel had received notification of a problem with the filing, steps would have been taken immediately to correct the problem. Moreover, no purpose could be served by concealing the removal from the State District Court. The removal is effective upon filing in federal court and requires no action from the state court and Defendant clearly served Plaintiff by facsimile with all of the removal documents. Plaintiff has made no allegation that it was not so served or that it did not know about the removal.[13] At no time did Defendant attempt, or intend, to deceive this Court or any other court as to the fling of the Notice to State Court of Notice of Removal.[14]

Additionally, the filing of a copy of the Notice to State Court of Notice of Removal with the State District Court is procedural and any failure to file the notice with the State District Court does not deprive a federal court of jurisdiction over the matter.[15] Accordingly, the alleged failure of the clerk of court for the State District Court to accept the filing of the Notice to State Court of Notice of Removal did not deprive this Court of jurisdiction over the Lawsuit.

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[10] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 5.
[11] *See* Affidavit of Jeffrey G. Hamilton.
[12] *See* Affidavit of Jeffrey G. Hamilton.
[13] Plaintiff has attached the facsimile coversheet and the cover letter evidencing service as Exhibits to its Response.
[14] *See* Affidavit of Jeffrey G. Hamilton.
[15] *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 547 (5th Cir. 1985).

B. Defendant's Filing of the Notice of Removal With the Bankruptcy Court for the Fort Worth Division Did Not Deprive This Court of Jurisdiction.

Plaintiff argues that Defendant did not properly remove the Lawsuit to federal court because Defendant filed the Notice of Removal directly with the bankruptcy clerk in the Fort Worth Division of the United States Bankruptcy Court for the Northern District of Texas. As this Court has previously ruled, a party may properly file a notice of removal directly with the bankruptcy clerk where that party relies on the bankruptcy-related removal statute for jurisdiction.[16] In so ruling, this Court recognized that under sections 151 and 157 of title 28 of the United States Code and under Rules 9027 and 9001 of the Federal Rules of Bankruptcy Procedure, removal of a proceeding directly to the bankruptcy court is the functional equivalent of filing the notice of removal with the district court. A party's filing of the removal directly with the bankruptcy clerk complies with the requirements of 28 U.S.C. § 1452(a).[17]

Plaintiff's argument that the filing of the notice of removal in the wrong division deprives this Court of jurisdiction is also without merit. Although Defendant was aware that Johnson County, Texas is located in the Dallas Division of the United States District Court of the Northern District of Texas, Defendant filed the Notice of Removal in the Fort Worth Division because it was asserting jurisdiction based, in part, upon "related to" jurisdiction in connection with a bankruptcy case pending in the Fort Worth Division.[18] The Fifth Circuit Court of Appeals has ruled that the filing of a Notice of Removal in the wrong division of the correct district court is a procedural matter and does not deprive the federal courts of jurisdiction.[19] Instead, such an action is more akin to an improper venue situation that is to be corrected by transferring the

[16] *Industrial Clearinghouse, Inc. v. Mims, (In re Coastal Plains, Inc.)*, 338 B.R. 703, 711-12 (N.D. Tex. 2006).
[17] *Id.*
[18] *See* Notice of Removal at 3, n. 2.
[19] *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 645 (5th Cir. 1994).

matter to the correct division, which is exactly what occurred in this case.

Defendant had a good faith basis for filing the removal with the bankruptcy clerk for the Fort Worth division because jurisdiction was based, in part, upon "related to" jurisdiction for a bankruptcy case that was currently pending in that division. Accordingly, any argument that this Court lacks jurisdiction because Defendant filed the Notice of Removal directly with the clerk of the bankruptcy court for the Fort Worth Division is not supported by the law.

C. Defendant Has Not Sought to Delay the Proceedings.

Plaintiff also argues that Defendant seeks to delay the proceedings by removing the Lawsuit to federal court. Plaintiff erroneously states that the bankruptcy court found that joinder was not fraudulent. This assertion is false. The bankruptcy court made no such findings. The bankruptcy court merely ruled that it should permissively abstain from hearing the Lawsuit, that it could not exercise jurisdiction over the Lawsuit based solely upon diversity of citizenship, and that it was not competent to determine whether removal of the Lawsuit under section 1441 and 1332 of title 28 of the United States Code was proper.[20] Defendant believes in good faith that removal is appropriate and simply exercised its right to remove the Lawsuit to federal court.

Plaintiff was previously engaged in litigation against Defendant in a lawsuit filed in the related bankruptcy case asserting the same claims relating to Defendant's management of the Trust. Plaintiff voluntarily dismissed that lawsuit and filed this Lawsuit in state court nearly five months later alleging the same claims against Defendant as were asserted in the first lawsuit.[21] Given these actions, it seems hypocritical for the Plaintiff to allege that Defendant has delayed a resolution of this dispute.

[20] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 6 at 6 and 11.

[21] *See* Affidavit of Jeffrey G. Hamilton, Exhibit 7.

II. DEFENDANT MET ITS BURDEN OF PROOF IN THE MOTION FOR RECONSIDERATION

Plaintiff has also argued that Defendant failed to meet its burden of proof in the Motion for Reconsideration because Defendant did not present new evidence, the statute of limitations for civil conspiracy is four years and defendant failed to negate the applicability of the discovery rule. Each of these arguments is also without merit.

A. Defendant Was Not Required to Present New Evidence.

Plaintiff argues at length in the Response that Defendant has failed to bring forth any new evidence that the claims against the Individual Defendants are barred by the statute of limitations. However, Plaintiff has completely misconstrued the standard upon which orders may be reconsidered. As was articulated in Defendant's Motion for Reconsideration, Defendant is not required to bring forth new evidence but need only show that there was "**either** a manifest error of law or fact **or** must present newly discovered evidence."[22] In the Motion for Reconsideration, Defendant argued that there was a manifest error of law or fact and the Court should reconsider and vacate the Order. A finding that there was a manifest error of law or fact is sufficient for reconsideration of the Order and Defendant is not required to present any new evidence in support of its Motion for Reconsideration.

B. The Statute of Limitations for Civil Conspiracy is Two Years.

Plaintiff also argues that the Motion for Reconsideration should be denied because the applicable statute of limitations in Texas for its civil conspiracy claims is four years. Plaintiff's argument is not supported by the law. The statute of limitations for civil conspiracy in Texas is two years.[23] Plaintiff's reliance on *Legal Econometrics* for the argument that the statute of

[22] *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (emphasis added).

[23] *Mayes v. Stewart*, 11 S.W.3d 440, 453 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1999)).

limitations for its civil conspiracy claim is four years is erroneous. The *Legal Econometrics* court did not rule that the statute of limitations for a civil conspiracy claim to defraud is four years.[24] Moreover, Texas federal courts applying Texas law after the *Legal Econometrics* decision have continued to hold that the applicable limitations period for civil conspiracy is two years.[25]

In *Doe v. St. Stephen's Episcopal School*,[26] the United States District Court for the Southern District of Texas held that although Plaintiffs' breach of fiduciary duty and fraud claims were subject to a four year statute of limitations, their civil conspiracy claim based in part upon those underlying torts was subject to a two year statute of limitations.[27] This decision was rendered after the statute of limitations for fraud had changed to four years and despite that, the court held:

> The statute of limitations for Plaintiffs' civil conspiracy, negligence and negligent misrepresentation causes of action is two years from the date of accrual of the claim …. The statute of limitations for a breach of fiduciary duty cause of action is four years from the date of accrual of the claim, and the statutes of limitations for fraud (and fraudulent concealment) is four years from the date that the plaintiff discovered or could have discovered the fraudulent act.[28]

The United States Bankruptcy Court for the Northern District of Texas similarly held that a civil conspiracy claim based, in part, upon an underlying fraud claim was subject to a two year statute

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[24] *Legal Econometrics, Inc. v. Chama Land & Cattle Co., Inc. (In re Legal Econometrics, Inc.)*, 169 B.R. 876, 883 (Bankr. N.D. Tex. 1994).

[25] *See Jackson v. W. Telemarketing Corp. Outbound*, 245 F.3d 518, 523 (5th Cir. 2001); *Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 645 (5th Cir. 1999); *Doe v. St. Stephen's Episcopal School*, No. C-08-299, 2008 WL 4861566 at *3 (S.D. Tex. Nov. 4, 2008); *Doe v. Linam*, 225 F.Supp.2d 731, 734 (S.D. Tex. 2002); *Texas Workers Compensation Insurance Fund v. A.C. Painting, Inc. (In re A.C. Painting, Inc.)*, 283 B.R. 404, 416 (Bankr. N.D. Tex. 2002), *rev'd in part on other grounds*, 2003 WL 222572 (N.D. Tex. Jan. 28, 2003); *Prostok v. Browning*, 112 S.W.3d 876, 898-99 (Tex. App. – Dallas 2003), *aff'd in part and rev'd in part on other grounds*, 165 S.W.3d 336 (Tex. 2005).

[26] *Doe v. St. Stephens Episcopal School*, 2008 WL 4861566 at *3.

[27] *Id.*

[28] *Id.* (internal citations omitted).

of limitations.[29] In *In re A.C. Painting, Inc.,* the court held that "[t]he limitations period is four years for fraud, two years of negligent misrepresentation and two years for civil conspiracy."[30] Again, the court clearly applied the four year statute of limitations to the underlying fraud claim but continued to apply the two year statute of limitations to the civil conspiracy claim. Accordingly, extending the statute of limitations to four years for breach of fiduciary duty has not changed the statute of limitations to four years for a civil conspiracy claim. Plaintiff's claims for civil conspiracy against the Individual Defendants are barred by the two year statute of limitations applicable to such claims under Texas law.

C. Plaintiff's Claims are Not Saved by the Discovery Rule.

Finally, Plaintiff's argument that the discovery rule applies to toll the statute of limitations is without merit. Plaintiff argues that Defendant has "ignored" the applicability of the discovery rule.[31] Defendant has not "ignored" the application of the discovery rule because Plaintiff has never filed a pleading asserting that it applies. Defendant asserted a statute of limitations defense in its answer. The burden then fell upon Plaintiff to plead the discovery rule which Plaintiff did not do despite adequate time to do so.[32]

Even if Plaintiff had asserted that the discovery rule applies, Defendant has negated that fact and shown that limitations has run on the civil conspiracy claims against the Individual Defendants. The discovery rule applies only when an injury is inherently undiscoverable and a

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[29] *In re A.C. Painting, Inc.*, 283 B.R. at 416.

[30] *Id*.

[31] *See* Response at 20.

[32] *Woods v. William M. Mercer, Inc.*, 769 S.W2d 515, 517-18 (Tex. 1988) (holding that "[a] party seeking to avail itself of the discovery rule must therefore plead the rule, either in its original petition or in an amended or supplemented petition in response to defendant's assertion of the defense as a matter in avoidance …. A defendant who has established that the suit is barred cannot be expected to anticipate the plaintiff's defenses to that bar. A matter in avoidance of the statute of limitations that is not raised affirmatively by the pleadings will, therefore, be deemed waived.").

claimant is unable to know of the injury at the time of accrual of a cause of action.[33] The discovery rule will then toll the statute of limitations until the plaintiff either: (1) discovers the injury; or (2) in the exercise of reasonable care and diligence, acquires knowledge of facts that would lead to the discovery of the wrongful act or injury.[34] The plaintiff need not know of the specific nature of each wrongful act that may have caused the injury, as the cause of action will accrue when the plaintiff knew or should have known of the injury.[35]

The exercise of reasonable diligence is generally a question of fact, however, if the evidence is such that reasonable minds could not disagree as to its effect, it becomes a question of law.[36] The discovery rule is a very limited exception to the statute of limitations and courts generally construe it strictly.[37] Further, the discovery rule will not excuse a party from exercising reasonable diligence to protect its own interests.[38] "The discovery rule expressly mandates the party to exercise reasonable diligence to discover facts of negligence or omission."[39] The tolling of the limitations period will end when the party relying on its benefit "acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action."[40]

As explained by the Texas Supreme Court, due diligence requires parties to protect their own interests.[41] Plaintiff was aware of the Hospital's bankruptcy filing[42] and in the exercise of

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[33] *Seibert v. General Motors Corp.*, 853 S.W.2d 773, 776 (Tex. App. – Houston[14th Dist.] 1993, no. pet.).
[34] 50 TEX. JUR. 3d, *Limitation of Actions* § 52 (1995).
[35] *Id.*
[36] *Conoco, Inc. v. Amarillo Nat. Bank*, 14 S.W.3d 325, 328 (Tex. App. – Amarillo 2000, no pet.).
[37] *Id.*, 50 TEX. JUR. 3d, *Limitation of Actions* § 52 (1995) (citing *Bates v. Texas State Technical College*, 983 S.W.2d 821 (Tex. App. – Waco 1998, pet. denied).
[38] *Conoco, Inc.*, 14 S.W.3d at 328.
[39] *Stewart Title Guaranty Co. v. Becker*, 930 S.W.2d 748, 756 (Tex. App. – Corpus Christi 1996, writ denied).
[40] *Id.*
[41] *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).

reasonable diligence knew or should have known, as of March 7, 2005, when the Hospital's Schedules were filed with the bankruptcy court as a matter of public record, that the actual value of the Trust assets were only $18,018.27. Any argument that the Plaintiff was not aware of the bankruptcy filing and the assets in the Hospital's bankruptcy estate at by that time is specious. The discovery rule will not excuse Plaintiff from failing to exercise reasonable diligence and does not operate in this case to prevent the running of limitations as a matter of law.

IV. Conclusion

For the foregoing reasons, Defendant requests that its Motion for Reconsideration be granted and that the Court vacate its Memorandum Order remanding the Lawsuit to State District Court and reinstate this District Court case. Defendant further requests that the Court vacate the Memorandum Order denying Defendant's Motion for Summary Judgment as moot.

Respectfully submitted,

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[42] Plaintiff successfully sought stay relief from the bankruptcy court to pursue its pending state court litigation against the Hospital and other parties related to the death of Mr. Fisher. *See* Affidavit of Jeffrey G. Hamilton, Exhibits 8 and 9.

CERTIFICATE OF SERVICE

This is to certify that on October 30, 2009, the foregoing pleading was served electronically via the Court's Electronic Filing System, and/or via Certified United States Mail, postage prepaid upon the following:

Mr. E.L. Atkins
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Arlington, Texas 76010

/s/ Jeffrey G. Hamilton
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