IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MICHAEL J. QUILLING, as Receiver for Megafund Corporation and Lancorp Financial Group, LLC	§	
Plaintiff,	§	
VS.	§	NO. 3-06-CV-0959-L
GARY McDUFF, ET AL.	§	
Defendants.	§	

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Plaintiff Michael J. Quilling, as Receiver for Megafund Corporation and Lancorp Financial Group, LLC, has filed a motion for partial summary judgment with respect to his fraudulent transfer and constructive trust claims against Defendant Gary McDuff and his various companies. For the reasons stated herein, the motion should be granted.

I.

This case arises out of a lawsuit brought by the Securities and Exchange Commission ("SEC") against various defendants and relief-defendants involving the sale of unregistered securities. *SEC v. Megafund Corp.*, No. 3-05-CV-1328-L ("the *Megafund* Litigation"). In that case, the SEC alleges that the defendants, including Megafund Corporation ("Megafund") and Lancorp Financial Group, LLC ("Lancorp"), raised more than $13 million from unwitting investors by making false representations about the expected rate of return on their investments and by promising that a portion of the profits generated from the sale of securities would be used to benefit charitable causes. On July 5, 2005, the court appointed Michael J. Quilling as the Receiver for all defendants in the

Megafund Litigation. In that capacity, Quilling was authorized to:

> take[ ] exclusive jurisdiction and possession of the assets, monies, securities, claims in action, and properties, real and personal, tangible and intangible, of whatever kind and description, wherever situated, of [the named defendants and relief defendant] and any entities they control ("Receivership Assets"), and the books and records of the Defendants and Relief Defendant ("Receivership Records").

See Order, 7/5/05 at 1-2, ¶ I(1)). The order further provides:

> The Receiver is hereby authorized to institute, defend, compromise or adjust such actions or proceedings in state or federal courts now pending and hereafter instituted, as may in his discretion be advisable or proper for the protection of Receivership Assets or proceeds therefrom, and to institute, prosecute, compromise or adjust such actions or proceedings in state or federal court as may in his judgment be necessary or proper for the collection, preservation and maintenance of Receivership Assets.
>
> The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to person or entities who received assets or funds traceable to investor monies. All such actions shall be filed in this Court.

Id. at 5-6, ¶ I(12) & (13)).

On May 30, 2006, the Receiver filed this action to recover more than $300,000 of investor funds allegedly transferred to Gary McDuff by Megafund and Lancorp. According to the Receiver, McDuff laundered the money through various accounts at MexBank SA de C.V. ("MexBank") and Cash Cards International, Inc. ("CCI") before distributing the funds to himself, Shannon McDuff, and Robert Reese. (*See* Plf. Compl. at 4, ¶ 12).[1] The Receiver also seeks an order requiring Gary McDuff to surrender his property at 1318 Minchen Drive in Deer Park, Texas, which allegedly was purchased with investor funds. (*See id.* at 4-5, ¶¶ 13, 15). The case is before the court on the

[1] Shannon McDuff and Robert Reese are also named as defendants in this action. On November 15, 2006, the court entered a $15,000 default judgment against Shannon McDuff. The Receiver recently settled his claim against Reese.

Receiver's motion for partial summary judgment. The issues have been briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A movant who has the burden of proof at trial must establish "beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Once the movant meets its initial burden, the non-movant must show that summary judgment is not proper. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *See Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 113 S.Ct. 82 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993).

A.

The Receiver alleges that $304,272.58 paid to Gary McDuff by Megafund constitutes a voidable transfer under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), Tex. Bus. & Comm. Code Ann. § 24.001, *et seq*. This statute provides, in pertinent part:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.

TEX. BUS. & COMM. CODE ANN. § 24.005(a) (Vernon 2002). Ordinarily, the creditor must prove that the challenged transfer was made with the intent to defraud. *See Quilling v. Gilliland*, 3-01-CV-1617-BD, 2002 WL 373560 at *2 (N.D. Tex. Mar. 6, 2002) (Kaplan, J.), *appeal dism'd*, No. 02-10415 (5th Cir. Jun. 3, 2002). However, in the case of a *Ponzi* scheme,[2] courts have found that the debtor's intent to hinder, delay, or defraud is established by the mere existence of the *Ponzi* scheme. *Id.*; *see also Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) (burden of proving that transfers were made with actual intent to defraud is satisfied by establishing the existence of a *Ponzi* scheme "which is, as a matter of law, insolvent from its inception"); *SEC v. Cook*, No. 3-00-CV-0272-R, 2001 WL 256172 at *3 (N.D. Tex. Mar. 8, 2001), *citing In re Independent Clearing House Co.*, 77 B.R. 843, 860 (Bankr. D. Utah 1987) (finding requisite intent to defraud from fact that debtor must have known that *Ponzi* scheme would inevitably collapse and that later investors would lose their investment).

B.

The summary judgment evidence conclusively establishes that Megafund was an unlicensed securities broker created and operated by Stanley Leitner. (Plf. MSJ App. at 3, ¶ 7). Investors, who were promised high-yield returns on their contributions, were recruited by Leitner and others to send funds to accounts at Wells Fargo Bank and SouthTrust Bank. (*Id.*). As Megafund received those funds, Leitner diverted large amounts of money to pay earlier investors. (*Id.* at 3-4, ¶ 7). Account records confirm that Megafund operated as a classic *Ponzi* scheme without generating any investment revenue. (*Id.* at 4, ¶ 8 & Exhs. A1-A2).

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[2] A *Ponzi* scheme is a fraudulent investment scheme where money from new investors is used to pay "profits" on the money contributed by earlier investors, without the operation of an actual revenue-producing business other than the raising of new funds by finding more investors. *See Quilling v. Humphries*, No. 3-06-CV-0299-L, 2006 WL 2934276 at *5 n.2 (N.D. Tex. Oct. 13, 2006), *citing* BLACK'S LAW DICTIONARY 1180 (7th ed. 1999).

Gary McDuff, Individually and d/b/a Secured Clearing Corporation, First Global Foundation, and Southern Trust Company, helped solicit new investors into the Megafund investment scheme. (*Id.* at 4, ¶¶ 9-10). McDuff was also instrumental in creating Lancorp, a separate entity that contributed more than $9.3 million of investor funds to Megafund. (*Id.* at 4-5, ¶ 11). For his efforts, McDuff received two wire transfers from Megafund totaling $304,272.58. One transfer of $128,437.58 was wired to MexBank through an account at Union Bank of California on March 29, 2005--six days after Megafund made a $500,000 *Ponzi* payment to Lancorp. (*See id.* at 12, 27, 76, 78). Another payment of $175,835.00 was made to MexBank's account at CCI on April 26, 2005. (*Id.* at 20, 45, 83). The next day, McDuff paid $152,401.55 to Tipton Living Trust to purchase his home at 1318 Minchen Drive in Deer Park, Texas. (*Id.* at 49).

McDuff does not controvert any of these facts with competent summary judgment evidence. Instead, his rambling 19-page response challenges the court's jurisdiction, accuses the Receiver of "criminal conversion" and other acts of wrongdoing, and insists that the Receiver is in default for not responding to the demand contained in his "Challenge of Jurisdiction and Commercial Affidavit of Truth." The court previously determined that McDuff's jurisdictional challenge was patently frivolous. *See Quilling v. McDuff*, No. 3-06-CV-0959-L, 2006 WL 3026104 (N.D. Tex. Oct. 23, 2006). His other arguments are similarly unavailing. Because there is no genuine issue of material fact for trial, the Receiver is entitled to judgment as a matter of law on his fraudulent transfer and constructive trust claims.

RECOMMENDATION

Plaintiff's motion for partial summary judgment [Doc. #21] should be granted. The court should enter judgment: (1) against Gary McDuff in the amount of $304,272.58, together with prejudgment and post-judgment interest as allowed by law; (2) declaring that McDuff purchased his

property at 1318 Minchen Drive in Deer Park, Texas with investor funds obtained through an illegal *Ponzi* scheme; and (3) imposing a constructive trust on the property and any improvements thereon. As the prevailing party in this case, the Receiver is entitled to recover "costs and reasonable attorney's fees as are equitable and just." *See* TEX. BUS. & COMM. CODE ANN. § 24.013. An application for attorney's fees shall be filed within 14 days after entry of a final judgment in accordance with Fed. R. Civ. P. 54(d)(2).

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party may file written objections to the recommendation within 10 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The failure to file written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: December 13, 2006.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE