

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

MICHAEL J. QUILLING, Receiver	§	
for Megafund Corporation and	§	
Lancorp Financial Group, LLC,	§	
	§	
Plaintiff,	§	Civil Action No. 3:06-CV-0959-L (BD)
	§	
v.	§	ECF
	§	
GARY McDUFF, Individually and d/b/a	§	Referred to the U.S. Magistrate Judge
SOUTHERN TRUST COMPANY and	§	
FIRST GLOBAL FOUNDATION,	§	
ROBERT REESE, Individually and d/b/a	§	
EXCEL FINANCIAL, INC., and	§	
SHANNON McDUFF, Individually and	§	
d/b/a SECURED CLEARING CORP.,	§	
	§	
Defendants.	§	

**SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF’S MOTION
FOR TURNOVER ORDER ENFORCING CONSTRUCTIVE TRUST**

TO THE HONORABLE JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE:

COMES NOW, Michael J. Quilling, as the Receiver for Megafund Corporation and Lancorp Financial Group, LLC (“Plaintiff” or “Receiver”) and files this Supplemental Brief in Support of his *Motion for Turnover Order Enforcing Constructive Trust* [Dkt. No. 53]. As explained more fully below, the Receiver would respectfully show (1) that Defendant Gary McDuff has fled the country, thereby frustrating the Receiver’s efforts to personally serve him with the Show Cause Order and (2) that, even if Defendant successfully evades personal service, this Court should still issue the turnover order *ex parte* and without notice to the Defendant.

**I.
BACKGROUND FACTS**

1. This Motion is supported by the Declaration of Michael J. Quilling, Receiver (the “Receiver’s Declaration”), which is attached and fully incorporated for all purposes as Exhibit “A”.

2. On January 23, 2007, this Court entered its Judgment [Dkt. No. 41] against Defendant Gary McDuff (“Defendant”) in the principal amount of \$304,272.58. That judgment also provided that “[a] constructive trust is imposed on the property at 1318 Minchen Drive in Deer Park, Texas and any improvements thereon.” *Id.*

3. On April 6, 2007, the Receiver filed his Motion for Turnover Order [Dkt. No. 53] to enforce the constructive trust on 1318 Minchen Drive in Deer Park, Texas (the “Deer Park Property”). Through that motion, the Receiver sought (1) immediate possession of the Deer Park Property, (2) imposition of an equitable lien, (3) foreclosure of that lien, (4) a writ or order for sale of that property by the appropriate local authorities, and (5) a ruling that the Receiver may use his outstanding judgment amount as a credit towards the purchase of the Deer Park Property at the court-ordered sale. *Id.*

4. On April 9, 2007, this Court entered a Show Cause Order [Dkt. No. 55], which set the Receiver’s motion for hearing on May 4, 2007. That Order also directed the Receiver to “attempt personal service of this Show Cause Order on Gary McDuff.” *Id.*

5. The Receiver attempted to personally serve Defendant with a copy of the Show Cause Order, as directed. *Receiver’s Declaration*, Exhibit “A” at ¶ 5. The Defendant, however, has apparently abandoned both the Deer Park Property and his address of record at 1314 Minchen Drive in Deer Park, Texas. *Id.*; *Affidavits of Non-Service*, Exhibits “B” and “C”. The Receiver has also obtained confirmation from multiple sources that Defendant fled the country and has been residing in Mexico for nearly five months. *Receiver’s Declaration*, Exhibit “A” at ¶ 5. In fact, Defendant

is currently attempting to sell the house at 1314 Minchen Drive to his son, Shilo McDuff. *Id.*; *Shannon McDuff's Letter and Affidavit*, Exhibit "D" (noting also that she signed her affidavit "near Morelos, Mexico").

6. The Receiver submits that, from the beginning of these receivership proceedings, Defendant has defied this Court's authority and evaded both the Receiver and the Securities and Exchange Commission ("SEC"). *Receiver's Declaration*, Exhibit "A" at ¶ 6. First, Defendant failed to appear at the court-ordered status conference on August 18, 2006. *Id.* Defendant then ignored two separate subpoenas to appear and testify at depositions scheduled by the Receiver and the SEC. *Id.* Finally, Defendant underscored his contempt for these proceedings by filing claims in a fictional court against the District Judge, the Magistrate Judge, and all attorneys for the SEC and Receiver involved in these proceedings. *Id.*

7. The Receiver submits that this Court has given Defendant enough opportunities to appear and properly defend this action. As explained more fully below, even though Defendant has successfully evaded service of the Show Cause Order, the Receiver is still entitled to turnover relief under Texas law without any further notice to the Defendant or a hearing.

II. ARGUMENTS AND ANALYSIS

Although Defendant has successfully evaded personal service of the Show Cause Order [Dkt. No. 55], this Court should still grant the Receiver's Motion for Turnover Order [Dkt. No. 53]. It is well settled that Tex. Civ. Prac. & Rem. C. §31.002 entitles the Receiver to such post-judgment turnover relief *ex parte* and without any additional notice to the Defendant.

In this case, the Receiver is entitled to post-judgment relief under Fed. R. Civ. P. 69(a). *See Plaintiff's Motion for Turnover Order* [Dkt. No. 53]. Rule 69(a) implicitly incorporates Tex. Civ. Prac. & Rem. C. § 31.002 in setting the standards and procedures for post-judgment relief. *See Fed.*

R. Civ. P. 69(a) (“proceedings supplementary to and in aid of a judgment . . . shall be in accordance with the practice and procedure of the state in which the district court is held”); *see also In re Davis*, 170 F.3d 475, 483 (5th Cir. 1999) (noting that Tex. Civ. Prac. & Rem. C. § 31.002 governs when there is no applicable federal statute regarding execution of judgments); *Quilling v. Pursehouse*, 2001 WL 257947 (N.D. Tex. Mar. 9, 2001). That provision is generally referred to as the Texas Turnover Statute and, in relevant part, it provides as follows:

(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:

- (1) cannot readily be attached or levied on by ordinary legal process; and
- (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.

Tex. Civ. Prac. & Rem. C. § 31.002(a).

This Court frequently uses the Texas Turnover Statute as a “procedural devise by which judgment creditors may reach assets of a debtor that are otherwise difficult to attach or levy.” *World Fuel Servs. Corp. v. Moorehead*, 229 F.Supp.2d 584, 586 (N.D. Tex. 2002). It allows the Court to broadly reach assets “owned by and subject to the judgment debtor’s possession or control.” *Id.* at 588 (citing *Santibanez v. Wier McMahan & Co.*, 105 F.3d 234, 239 (5th Cir. 1997)). To obtain turnover relief, the judgment creditor must show that the debtor owns non-exempt property that cannot be readily attached or levied by ordinary legal process. *Pursehouse*, 2001 WL 257947 at *1. Once assets are traced to the Defendant, a presumption arises that those assets are in his possession. *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 627 (Tex. App.—Fort Worth 2006). In effect, the Texas Turnover Statute gives Defendant the burden to produce property subject to

execution in this case. *Bear, Stearns & Co., Inc. v. Amad*, 919 F.2d 920, 921 (5th Cir. 1990); *Ex Parte Johnson*, 654 S.W.2d 415, 418 (Tex. 1983).

The Receiver submits that this Court should grant turnover relief without scheduling a hearing or providing notice to Defendant. Under Texas law, it is well established that judgment creditors and third parties subject to the Texas Turnover Statute are not entitled to notice or a hearing before the Court issues a turnover order. *See Ex Parte Johnson*, 654 S.W.2d at 418 (“the statute allows *ex parte* entry of the order without notice and hearing”); *Honaker*, 192 S.W.3d at 628; *Sivley v. Sivley*, 972 S.W.2d 850, 860-61 (Tex.App.—Tyler 1998); *Thomas v. Thomas*, 917 S.W.2d 425, 433 (Tex. App.—Waco 1996) (“failure to provide prior notice and hearing before the issuance of a turnover order under section 31.002 does not compromise constitutional principles”); *Plaza Court, Ltd. v. West*, 879 S.W.2d 271, 276 (Tex. App.—Houston [14th Dist.] 1994) (“Section 31.002 does not provide for notice to be afforded a judgment debtor in a turnover proceeding”).¹

The United States Supreme Court has also addressed the issue and determined that such post-judgment collection proceedings do not compromise constitutional due process. In *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285, 288-290, 45 S.Ct. 61, 69 L.Ed. 288 (1924), the judgment debtor challenged a state garnishment statute that did not require prior notice and a hearing. The Supreme Court ruled that the statute was constitutional and that no further notice was required:

. . . the established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and

¹ While the Texas Supreme Court has noted that there exists a potential for abusing the Texas Turnover Statute, it limited its concern to situations where “turnover is ordered directly to judgment creditors.” *Ex Parte Johnson*, 654 S.W.2d at 418. In this case, however, the Receiver ultimately asks that the property be entrusted to “a designated sheriff or constable for execution,” as anticipated by Tex. Civ. Prac. & Rem. C. § 31.002(b)(1).

has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take notice of what will follow, no further notice being necessary to advance justice.

Endicott-Johnson Corporation, 266 U.S. at 288 (emphasis added) (internal quotations omitted); *see also Ex Parte Johnson*, 654 S.W.2d at 418 n.1 (Tex. 1983) (noting that “[t]he judgment rendered against [defendant] put him on notice that post-judgment collection proceedings would follow”). Without question, Defendant has notice of the judgment entered against him and, therefore, the Receiver is entitled to turnover relief even if Defendant successfully evades personal service of the Show Cause Order.

The Receiver has already established all elements necessary to obtain relief under the Texas Turnover Statute. It is evident from this Court’s Judgment [Dkt. No. 41] and the pleadings on file that the Defendant purchased the Deer Park Property and continues to own or control it. *See, e.g., Brief in Support of Plaintiff’s Motion for Partial Summary Judgment* [Dkt. No. 30] at 11-12. In fact, the process server located Defendant at that address and served the summons upon him there in June 2006. *Affidavit of Service* [Dkt. No. 6]. Defendant has not alleged that the Deer Park Property is exempt from execution in this case. *Receiver’s Declaration*, Exhibit “A” at ¶ 7. To the contrary, state exemption laws were “never intended to be, and cannot be, the haven of wrongfully obtained money or properties.” *Kostelnik v. Roberts*, 680 S.W.2d 532, 536 n.1 (Tex. App.—Corpus Christi 1984). Furthermore, the Receiver cannot readily attach or levy the Deer Park Property without a Turnover Order from this Court imposing and foreclosing an equitable lien and directing its sale.

Receiver's Declaration, Exhibit "A" at ¶ 7. The Receiver, therefore, submits that he has established all elements for relief under the Texas Turnover Statute and that notice to Defendant and a hearing are not required.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

On the 2nd day of May, 2007 a true and correct copy of the above and foregoing was sent via first class mail, with full and proper postage prepaid thereon, to:

Gary McDuff
1314 Minchen Drive
Deer Park, Texas 77536

/s/ Michael J. Quilling