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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO 06-2593 BLS1

BAIN CAPITAL PARTNERS IV, L.P., as Trustee
for and on behalf of BCP IV Grantor Trust, & others¹

Notice sent: 04/02/07

D.H.M.

vs.

L.W.

MADDOX FOUNDATION, INC.

R.&G.

R.C.M.

S.G.K.

D.J.S.

vs.

MADDOX FOUNDATION TRUST & others²

R.W.

BM.LLP

N.J.S.JR.

R.M.G.

F.S.&R.

M.P.G.

P.G.B.

K.G.K.

DH.LLP

P.G.

J.A.W.

W.L.D.&D.LLP

R.M.

C.D.S.

C.C.T.&B

A.B.H.Jr.

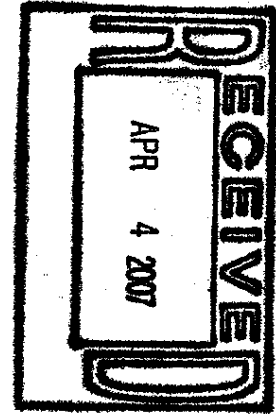
G.D.N.

J.G.T.

N.&H.

vs.

BROOKSIDE INVESTORS, LLC & others³



MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on two cross-motions⁴ for summary judgment: Defendant

Maddox Foundation's Cross-Motion for Summary Judgment, Paper #23; and Cross-Motion by

Brookside Investors and DMAR Limited Partnership for Summary Judgment, Paper #24. Both

motions were served on October 24, 2006, and filed with the Court on November 15, 2006

(md)

¹ Brookside Capital Partners Fund, L.P.; Prospect Harbor Credit Partners (Offshore), L.P.; and Sankaty Credit Opportunities (Offshore) I, L.P.

² Robin G. Costa, as Trustee for and on behalf of the Maddox Foundation Trust; Tommye Maddox Working, as Trustee for and on behalf of the Maddox Foundation Trust; and Diversified Trust Company, as Trustee for and on behalf of the Maddox Foundation Trust.

³ CE Partnership and DMAR Limited Partnership.

⁴ The Court is uncertain as to what these motions are "cross" to, as they do not seem in opposition to each other.

BACKGROUND

The underlying complaint seeks to interplead the Maddox Foundation, Inc (the "Maddox Corporation") and the Maddox Foundation Trust (the "Maddox Trust") in order to determine which of these two entities is entitled to receive distributions of monies by the various plaintiffs, herein called "the Bain entities "

The Maddox Corporation is a non-profit corporation organized under the laws of Mississippi, located in Hernando, Mississippi. It purports to have rights to distributions as a limited partner in each of Bain Capital Partners IV, L.P., Brookside Capital Partners Fund, L.P., Prospect Harbor Credit Partners (Offshore), L.P. and Sankaty Credit Opportunities (Offshore), I, L.P., the Bain entities

The Maddox Trust is a charitable foundation created pursuant to a trust agreement under the laws of Tennessee. Instead of the Maddox Corporation, the Maddox Trust purports to be the entity that has the rights to distributions as a limited partner in each of Bain Capital Partners IV, L.P., Brookside Capital Partners Fund, L.P., Prospect Harbor Credit (Offshore), L.P. and Sankaty Credit Opportunities (Offshore), I, L.P., the same Bain entities.

The Maddox Trust was created in Tennessee pursuant to a Trust Agreement executed on October 10, 1968. Dan W. Maddox and his wife, Margaret H. Maddox, both then of Nashville, Tennessee, donated the corpus of the trust. The Maddox Trust was established for a variety of charitable, religious, scientific, literary and educational purposes.

On January 14, 1998, Dan and Margaret Maddox were killed in a boating accident in Louisiana. The Maddoxes had over \$100 million in assets at the time of their deaths. Their estates are still under probate in the Seventh Circuit for Davidson County, Tennessee, Probate

Division (the "Tennessee Probate Court")

Robin G. Costa ("Costa") is a trustee of the Maddox Trust. She resides in Hernando, Mississippi, but apparently practices law in Tennessee.

Tommye Maddox Working ("Working"), a step-granddaughter of Dan W. Maddox and Margaret H. Maddox, is, or was, also a trustee of the Maddox Trust. She resides in Nashville, Tennessee.

Under the Maddox wills, Costa was named as a co-executrix of the two Maddox estates.

On June 14, 1999, Costa and Working, as trustees of the Maddox Trust, executed an Action on Written Consent of Trustees that purported to transfer the situs of the Maddox Trust for administration and all other purposes from Tennessee to Mississippi. The Maddox Trust challenges the effectiveness of this transfer.

On September 13, 1999, the Maddox Corporation was incorporated in Mississippi. Costa and Working were its only incorporators. Then, on July 27, 2001, Costa, as "managing trustee" of the Maddox Trust and as a director of the Maddox Corporation, and Working, as a director of the Maddox Corporation, executed an Agreement as to Reorganization of the Maddox Trust. The Agreement purported to authorize the Maddox Trust to transfer to the Maddox Corporation all of its assets. On August 1, 2001, the Maddox Corporation purportedly accepted receipt of all of the assets transferred to it by the Maddox Trust. Included would be the rights to distributions from the Bain entities.

On August 31, 2004, pursuant to Tenn. Code Ann. sec. 29-35-101 *et seq.*, the District Attorney General of the Twentieth Judicial District of Tennessee authorized the filing of *quo warranto* litigation in the Probate Division of the Seventh Circuit Court for Davidson County,

Tennessee, in the name of the State of Tennessee, ex rel Working, against the Maddox Trust and Costa (the "Tennessee Litigation")

On November 18, 2004, litigation was filed in the Chancery Court for DeSoto County, Mississippi (the "Mississippi Litigation") The Mississippi Litigation was an action by the State of Mississippi against the Maddox Corporation, Costa and Working It sought a declaration and injunctive relief diametrically opposite to the relief sought in the Tennessee Litigation.

On August 30, 2005, in the Tennessee Litigation, the Probate Court granted partial summary judgment in favor of the State of Tennessee, finding that the purported transfer of the situs of the Maddox Trust from Tennessee to Mississippi was ineffective because neither Costa nor Working complied with Tenn. Code Ann. sec. 35-1-122(b). On September 9, 2005, the Maddox Corporation and Costa filed a Notice of Appeal from the August 30, 2005 summary judgment order.

On November 21, 2005, in the Mississippi Litigation, the Mississippi Chancery Court granted a judgment in favor of the State of Mississippi, finding that the purported transfer of the situs of the Maddox Trust from Tennessee to Mississippi was effective. Also on November 21, 2005, the State of Mississippi sought and obtained (with the agreement of the Maddox Corporation and Costa) temporary injunctive relief which blossomed into a preliminary injunction on November 29, 2005. This preliminary injunction purported to bar Working, and others, from seeking to place the Maddox Trust into receivership in the courts of Tennessee, or otherwise from taking any steps in the courts of Tennessee to relocate the Maddox Trust to Tennessee.

Working appealed the Mississippi judgment. Thereafter, on August 10, 2006, upon

Working's motion for voluntary dismissal, the Mississippi Supreme Court issued a Dismissal Notice. Thus, the Mississippi Litigation appears over, with a final judgment.

On August 8, 2006, the Tennessee Court of Appeals affirmed, in part, the Tennessee Probate Court's judgment with regard to the change of situs issue.⁵ Thereafter, the matter was remanded to the Probate Court "for such further proceedings as may be necessary." Thus, there is not yet a final judgment out of Tennessee.

On August 24, 2006, on the motion of the Maddox Corporation, the Mississippi Chancery Court entered, *ex parte*, an order enforcing the Mississippi judgment, wherein Working, and others, were purportedly restrained from taking contrary action in the Tennessee courts. Then, on September 1, 2006, the Mississippi Chancery Court entered a permanent injunction.

At this time, this Massachusetts Court is faced with competing decisions from the courts of Tennessee and Mississippi regarding aspects of the status of the Maddox Trust.⁶ In Mississippi there is a final judgment; in Tennessee there is not.

DISCUSSION

Summary judgment is granted where, viewing the evidence in the light most favorable to the non-moving party, there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law. Cabot Corporation v AVX Corporation, SJC-09857, Slip Op, pp. 11-12 (March 28, 2007); Hakim v Massachusetts Insurers' Insolvency Fund,

⁵ The judgment was reversed insofar as it purported to void all actions of the trustees of the Maddox Trust following the transfer of the situs of the trust to Mississippi.

⁶ This Court recognizes that it may not have captured all of the nuances and determinations that have occurred thus far in the Mississippi and Tennessee lawsuits. It has been presented with a mass of material, not all of which is readily understandable, nor does it present a consistent and seamless web for any reader.

424 Mass. 275, 281 (1997); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991);

Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Mass. R. Civ. P. 56(c).

“[T]he moving party must establish that there are no genuine issues of material fact, and that the non-moving party has no reasonable expectation of proving an essential element of its case.”

Miller v. Mooney, 431 Mass. 57, 60 (2000). See also Pederson v. Time, Inc., 404 Mass. 14, 17 (1989).

Here the Maddox Corporation, Brookside Investors and DMAR Limited Partnership are the moving parties and, as such, bear the laboring oars.

The Maddox Trust has raised a number of issues challenging the actions in the Mississippi Litigation, including a charge that the judgment therein is not entitled to full faith and credit by this Court. Further, the Maddox Trust asserts that it should be permitted the opportunity to engage in discovery under Mass. R. Civ. P. Rule 56(f), “so as to fully develop the factual record of extrinsic fraud surrounding the Mississippi Litigation and the Mississippi judgment.”

The Maddox Corporation counters that the only issue to be resolved in this matter is which of the Maddox Trust or the Maddox Corporation has rightful title to the Bain investments held in the name of the Maddox Foundation and the right to receive any escrowed and future distributions from those assets. The Maddox Corporation argues that there is only one final judgment, which is unappealable and worthy of full faith and credit – the judgment in the Mississippi Litigation.

It all sounds very simple, but it is not. Courts in two states, far from Massachusetts, and the parties themselves, are locked in a bitter and sometimes very personal battle over very large

amounts of money. This Massachusetts litigation, being as it is a matter of interpleader, really seeks to have the litigating parties' respective claims resolved by a Massachusetts trial judge and have that determination reviewed by Massachusetts appellate courts. But are these Massachusetts courts the most appropriate fora? And if so, are the matters ready for the initial determination by this Court? This Court has serious doubts.

There may be factual discovery to be completed on the issues that raise a challenge to the Mississippi judgment. Further, the Tennessee courts have not yet reached the end of the line in the litigation in that State. It seems quite imprudent for this distant Court to burst onto the scene and attempt to resolve the significant issues outstanding.

Tennessee law should be determined in Tennessee trial courts and reviewed on appeal in Tennessee appellate courts. Just as has already been done, at least to some extent, in Mississippi

While clearly not on all fours with this case, the situation in Wright Machine Corp. v. Seaman-Andwall Corp., 364 Mass. 683 (1974), sheds some light on the complexity faced here

It is the general rule that when two different actions involving the same parties and the same claim are pending at the same time, the final judgment first rendered is entitled to res judicata effect in the second action, regardless of which was commenced first. However, when two consecutive judgments have been rendered in actions involving the same claim and parties once again, its outcome is controlled by the later of the prior judgments, regardless of whether that judgment was based on a mistake of law, including erroneous interpretation of the first judgment.

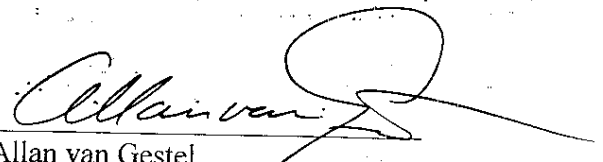
Id. at 690-691

In the present situation, it is not entirely clear whether the Mississippi Litigation and the Tennessee Litigation involved the same parties and the same claim. Further, there is a final judgment in Mississippi, but there is none yet in Tennessee. Much needs sorting out before this

Court should attempt to make the definitive ruling

ORDER

For the foregoing reasons, this Court at this time and on this record, is unable to rule that the movants have carried their burden of showing that there are no material facts in dispute or that, even if so, they are entitled to judgment as a matter of law. Consequently, Defendant Maddox Foundation's Cross-Motion for Summary Judgment, Paper #23; and Cross-Motion by Brookside Investors and DMAR Limited Partnership for Summary Judgment, Paper #24, are each DENIED, without prejudice.


Allan van Gestel
Justice of the Superior Court

DATED: March 30, 2007