IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4237

IN THE MATTER OF: CHRIS J. ROY,
A Law Corporation,

DEBTOR.

* *

WADE N KELLY,

Appellee,

versus

CENTRAL LOUISIANA BANK & TRUST CO.,

Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CV-2649)

(December 23, 1993)

Before REYNALDO G. GARZA, KING and DeMOSS, Circuit Judges.

PER CURIAM:*

Wade N. Kelly, trustee of the estate of Chris J. Roy, a law corporation (the law firm), brought an adversary proceeding seeking to avoid transfers made to Central Louisiana Bank & Trust

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Company (CENLA) and to recover property of the estate. The bankruptcy court dismissed the adversary proceeding. The district court reversed the decision of the bankruptcy court. CENLA appeals. We affirm in part, vacate the judgment of the district court, and remand the case to the district court with instructions to remand the case to the bankruptcy court.

I. FACTS AND PROCEDURAL HISTORY

In October of 1982, Barry Juneau was injured while operating a Honda motor vehicle. Chris J. Roy (Roy) agreed to represent the Juneaus in their personal injury case against American Honda Motor Company (Honda). Roy was the president and controlling shareholder of the law firm.

On May 27, 1986, Roy, individually and as president of the law firm, executed an "Act of Assignment." The "Act of Assignment" purported to "pledge and assign" to CENLA an undivided twenty-five per cent interest "in the attorney's fees to be earned" in several cases, including the Juneau case. The "Act of Assignment" was in consideration for an earlier loan given to the law firm and Roy, individually.

On December 18, 1987, the Juneaus and Honda entered into a structured settlement agreement. Under the structured settlement agreement, the law firm was to receive deferred attorney's fees of $500,000 from Honda in five equal annual installments. As a part of the settlement agreement, Reliance Insurance Co. (Reliance) was to assume the obligation to make the annual payments. The structured settlement agreement further provided

that Reliance would pay the annual payments by purchasing an annuity from United Pacific Life Insurance Company (United Pacific).

In accordance with the settlement agreement, Reliance purchased an annuity from United Pacific. The annuity designated Reliance as the owner, the law firm as the payee, and Roy as the annuitant. The annuity provided for five annual payments of $100,000 each with the first payment due on December 15, 1988.

On March 22, 1988, Roy as president of the law firm and individually executed another "Act of Assignment." This time the law firm and Roy "pledge[d] and assign[ed]" a fifty per cent interest "in the attorney's fees earned and to be earned" in, inter alia, the Juneau case. The "Act of Assignment," however, made no reference to the settlement agreement or the annuity. The "Act of Assignment" was again made in consideration of the loan made by CENLA to the law firm and Roy individually.

On October 31, 1988, Roy wrote a letter to Reliance which provided that:

> I understand that neither I nor my corporation are permitted to assign my interest in this matter to anyone that would be binding on you; nevertheless, I have assigned my interest in my attorney's fees to [CENLA] and would appreciate your having the $100,000.00 check due me on December 15, 1988, made payable to [the law firm] and [CENLA].

Thereafter, on December 7, 1988, Roy received the first $100,000 check from Reliance. As Roy had instructed, the check from United Pacific was made payable to the law firm and CENLA as joint payees. The check was then endorsed by both CENLA and the law firm, and six days later it was deposited in the law firm's

account at CENLA. Two days later, a $25,000 check was drawn on the law firm's account and made payable to CENLA. CENLA used the $25,000 to satisfy two loans CENLA had previously made to the law firm.

On December 16, 1988, Roy wrote another letter to CENLA in which he stated:

> Enclosed is a copy of the Act of Assignment and pledge that was executed in the captioned matter on March 22, 1988.
>
> After going over the information you wrote down with respect to additional loans made to me predicated on the assignment and pledge of this case, I agree with you that the instrument should have reflected a one hundred percent [sic] of the settlement proceeds of Barry and Cynthia Juneau v. American Honda. Therefore, I have written in longhand "100%" next to that entry and initialed it. The next time I am in Marksville, I will sign the original document and make the changes noted on this copy; however, pending that time, you be [sic] more comfortable with this instrument as corrected.

Roy enclosed a copy of the March 22, 1988, "Act of Assignment" on which he wrote "100% assigned & pledge [sic] on Juneau settlement - Chris J. Roy 12/16/88."

On February 6 and 8, 1989, Roy and the law firm, respectively, filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The law firm's schedules of assets and liabilities listed the annuity as an asset valued at $325,000. The fees from the Juneau case were listed as security for a loan from CENLA to the law firm. In total, the obligations owed by the law firm to CENLA were listed as $329,191.02. Both cases were ultimately converted to proceedings under Chapter 7 of the Bankruptcy Code on October 10, 1990.

Later that year, on November 27, 1989, the second annuity payment was sent directly to the law firm; the law firm was the sole payee. Approximately one month later, the check was endorsed by the law firm over to CENLA. CENLA then applied the proceeds to the amount that the law firm and Roy, individually, owed CENLA.

On November 16, 1990, Roy sent a letter to Ward & Associates, Reliance's agent, directing them to "Please send my check this year to Chris J. Roy, c/o A. J. Roy, Jr., Post Office 363, Marksville, La. 71351." A. J. Roy is Chris Roy's brother and president of CENLA. On November 26, 1990, the third annuity payment was issued according to Roy's instructions and the proceeds were applied against the law firm and Roy's debt.[1]

Before the third payment was made, Wade N. Kelly (trustee), the Chapter 7 trustee of the law firm, filed a complaint in the bankruptcy court to avoid certain transfers and to recover property of the estate. The trustee alleged that the attempted "assignments" by Roy to CENLA were unperfected and therefore unenforceable against the trustee. The trustee later filed an amended complaint seeking to also avoid the payment of the third annuity payment to CENLA. CENLA responded to the trustee's first amended complaint by arguing that it had a perfected security interest in the law firm's accounts receivable.

[1] During the course of this litigation, the 1991 and 1992 payments from the annuity were paid into the registry of the bankruptcy court.

The bankruptcy court determined that the law firm had intended to assign its right to receive attorney's fees from the Juneau case to CENLA. The bankruptcy court referred to the "Act[s] of Assignment" and concluded that the law firm intended to transfer an undivided interest in its right to receive attorney's fees from the Juneau case to CENLA. The bankruptcy court also examined the various letters written by Roy concerning the payments from the annuity and concluded that the letters manifested the law firm's belief that it had transferred all of its rights to receive payments under the annuity contract to CENLA. Because the bankruptcy court determined that the law firm had assigned its rights to receive money from the annuity to CENLA, it did not address CENLA's alternative argument that it had a perfected pledge of the law firm's right to receive attorney's fees from the Juneau case.

On appeal to the district court, the district court reversed the decision of the bankruptcy court. The district court determined that the assignment of incorporeal rights is governed by La. Civ. Code arts. 2642 and 2643. Under those provisions, a valid assignment is created if the assignor (1) transfers title to the right and (2) notifies the debtor of the transfer of title. The district court concluded that the law firm never transferred title to CENLA and that it did not see any evidence that the parties intended to transfer title to the annuity. The district court further concluded that the law firm retained its right to receive the annuity payments and never attempted to

legally divest itself of that right. The district court also determined that there was no evidence that United Pacific was notified of a permanent transfer of the law firm's rights under the annuity contract.

The district court refused to decide whether CENLA had a perfected pledge of the law firm's right to receive payments from the annuity contract because the bankruptcy court had not ruled on the issue. The district court did, however, "observe in passing" that because the annuity contract was written evidence of the law firm's right to receive annual payments under the contract, that delivery of the contract to CENLA was necessary to perfect a pledge. The district court then entered a judgment against CENLA for $200,000 and ordered the clerk of the bankruptcy court to pay over to the trustee the funds on deposit in the court's registry.

II. STANDARD OF REVIEW

This court reviews findings of fact by the bankruptcy court under the clearly erroneous standard, Killebrew v. Brewer (In re Killebrew), 888 F.2d 1516, 1519 (5th Cir. 1989), and decides issues of law de novo. Id. "A finding of fact is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with a firm and definite conviction that a mistake has been committed.'" In re Missionary Baptist Found. of Am., 712 F.2d 206, 209 (5th Cir. 1983) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

III. DISCUSSION

This appeal involves the trustee's "strong arm" powers pursuant to 11 U.S.C. § 544. Section 544 clothes the trustee with the status of a lien creditor with a judicial lien on all of the debtor's property that a contract creditor could subject to such a lien under state law and a bona fide purchaser of real property from the debtor to whom the transfer is made and perfected as of the time of the bankruptcy. 11 U.S.C. § 544(a). Section 544 allows the trustee to avoid previous transfers of the debtor's property to creditors who would be subordinate, under state law, to the type of interests that the trustee has as a hypothetical creditor as of the time that the bankruptcy petition is filed. The question to be answered in this appeal is whether CENLA properly perfected its interest in the attorney's fees from the Juneau case so that the trustee, even with his status as a hypothetical lien creditor, would be subordinate to CENLA's interest in that property.

A. Assignment

Initially, CENLA argues that the district court erred in determining that the law firm had not assigned to CENLA its right to receive attorney's fees from the Juneau case. Before discussing whether CENLA holds a perfected assignment, we note that the law firm's right to receive attorney's fees from the Juneau case is an account receivable. In In re Young, this court determined, in a situation identical to the present case, that when an attorney agreed, under a structured settlement agreement,

that his attorney's fees would be paid from an annuity that would be purchased by the defendants in the case, the monthly payments made to the attorney were nothing more than payments on an account receivable. Young v. Adler (In re Young), 806 F.2d 1303, 1306-07 (5th Cir. 1987) (noting that an account receivable is a claim "against a debtor usually arising from sales or services rendered").

Under Louisiana law, an assignment of an account receivable is perfected in one of two ways. A party may perfect an assignment in an account receivable by utilizing the procedures set forth in the Louisiana Assignment of Accounts Receivable Act. LA. REV. STAT. ANN. § 9:3101, et seq. (West 1991). The Louisiana Assignment of Accounts Receivable Act was passed to facilitate the assignment of accounts receivable as a security device. Bossier Bank & Trust Co. v. Natchitoches Dev. Co., 272 So. 2d 731, 735 (La. Ct. App. 1973). However, we need not address whether CENLA has a perfected security interest under those provisions because CENLA has acknowledged that it failed to comply with them.

Louisiana law further provides for the assignment of an account receivable, an incorporeal right, pursuant to LA. CIV. CODE ANN. arts. 2642-43 (West 1952 & Supp. 1993) (assignment or transfer of credits and other incorporeal rights). Citizens Bank & Trust Co. v. Consolidated Terminal Warehouse, Inc., 460 So. 2d 663, 671 (La. Ct. App. 1984) (stating that an account receivable is an incorporeal movable). Article 2642 provides that "[i]n the

transfer of credits, rights or claims to a third person, the delivery takes place between the transferrer and the transferee by the giving of the title." See Scott v. Corkern, 91 So. 2d 569, 571 (La. 1956) (stating that the "[a]ssignment or transfer of credits and other incorporeal rights is a species of sale and is treated as such in our Civil Code . . . delivery of an assignment takes place as between transferrer and transferee by the giving of title. Accordingly, a vesting of title in the transferee is essential to an assignment"). Thus, to assign an incorporeal right under article 2642 is to transfer title, which is "the equivalent of complete ownership of the right, and under Louisiana law a party with perfect ownership of a thing is one with the right to use, enjoy and dispose of the thing as he sees fit." Nicolls Pointing Coulson, Ltd. v. Transportation Underwriters, Inc., 777 F. Supp. 493, 496 (E.D. La. 1991); see LA. CIV. CODE ANN. art. 477 (West 1980) ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."). Article 2643 provides that:

> A. The transferee is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place.
>
> B. The transferee may nevertheless become possessed by the acceptance of the transfer by the debtor in an authentic act. A partial transfer and assignment is effective as to the debtor without the necessity of giving notice thereof.

Therefore, under articles 2642 and 2643 an "assignment" will be effective as against third parties if the assignor transfers

title to the assignee and notifies the debtor of the transfer of title. LA. CIV. CODE ANN. arts. 2642-43 (West 1952 & Supp. 1993).

The district court determined that the law firm did not assign its interest to receive payments from the annuity contract because CENLA never obtained an exclusive right to receive the annuity payments from United Pacific. The district court further concluded that there was not an effective assignment of the law firm's interest in the annuity payments because the law firm never provided notice to the debtor as required by article 2643. CENLA argues that the district court erred in determining that the law firm never assigned an interest to it because the district court incorrectly focused on the annuity payments and not the right to receive attorney's fees from the Juneau case. According to CENLA, (1) the intent of the parties to assign an interest in the attorney's fees from the Juneau case is sufficiently demonstrated by the "Act[s] of Assignment," and (2) proper notice was given because the law firm gave notice to Reliance of the assignment and Reliance was the actual debtor, not United Pacific.

We agree with the district court that the bankruptcy court's determination that the law firm assigned its interest in the Juneau fees to CENLA was erroneous. The two documents entitled "Act of Assignment" purported to "pledge and assign to the Central Louisiana Bank & Trust Company an undivided . . . interest in the attorney's fees to be earned in the following cases." The fact that both instruments are entitled an "Act of

Assignment" does not mandate a finding that the transaction between CENLA and the law firm is in fact an "assignment." Cadle Co. v. Dumesnil, 610 So. 2d 1063, 1069 (La. Ct. App. 1992) (noting that the court should look to the intent of the parties to determine the nature of the transaction), writ denied, 613 So. 2d 992 (La. 1993); Great Am. Ins. Co. v. Hibernia Nat'l Bank, 506 So. 2d 186, 188 n.1 (La. Ct. App. 1987); First Nat'l Bank of Commerce v. Hibernia Nat'l Bank, 427 So. 2d 569, 573 (La. Ct. App. 1983). Although no special words are necessary to create an effective assignment between the assignor and the assignee, Producing Manager's Co. v. Broadway Theater League, Inc., 288 So. 2d 676, 679 (La. Ct. App. 1974), the assignment must "reveal a positive intention on the part of the assignor to transfer title to the assignee." In re Pan Am. Life Ins. Co., 88 So. 2d 410, 414 (La. Ct. App. 1956).

In this case, both of the documents entitled "Act of Assignment," which CENLA argues transfers title to CENLA of the law firms right to receive payments from the Juneau case, are ambiguous as to whether the parties intended an assignment or a pledge. The documents do not purport to divest the law firm of title to the Juneau fees. In fact, both of the "Act[s] of Assignment" state that the law firm "pledge[s] and assign[s]" its interest in the Juneau fees. In Louisiana, it is impossible to have an assignment, which is a transfer of title, and a pledge, which is merely security for a debt, of the same thing at the same time. Scott v. Corkern, 91 So. 2d 569, 571 (La. 1956).

While we acknowledge that no magic words are necessary to create an effective assignment between CENLA and the law firm, we do not believe that the acts of assignment "reveal a positive intention on the part of the assignor to transfer title to the assignee."

Furthermore, the actions of the parties in regard to the payments from the annuity illustrates that the law firm did not intend to totally divest itself of title to the Juneau fees. For example, when the law firm received the first payment from the annuity, the law firm had already executed the second "Act of Assignment," which purported to "pledge and assign" a fifty percent interest "in the attorney's fees earned and to be earned" in the Juneau case. The check listed CENLA and the law firm as payees. However, approximately one week after receiving the first check from the annuity, the law firm wrote a check for only $25,000 to CENLA. If CENLA "owned" fifty percent of the $100,000 payment from the annuity, its failure to take possession of its $50,000 at the time it endorsed the check is at least inconsistent with its ownership interest. It is clear from this transaction that the law firm retained control over the funds disbursed from the annuity. Additionally, the law firm, on its schedules of assets and liabilities, lists the annuity as an asset of the law firm and lists CENLA as a secured creditor with a security interest in the Juneau fees. Because we have determined that the law firm did not intend to transfer title to the Juneau fees to CENLA, we need not address the district

court's conclusion that the law firm did not give proper notice to the debtor.

In summary, we conclude that the bankruptcy court erred in determining that the law firm had assigned its interest to receive attorney's fees from the Juneau case to CENLA. First, the "Act[s] of Assignment" did not "reveal a positive intention on the part of [the law firm] to transfer title to [CENLA]." Second, the actions of the parties subsequent to the execution of the "Act[s] of Assignment" do not demonstrate an intention that the assignment was a transfer of title to CENLA.

B. Pledge

CENLA next argues that even if it did not have a perfected assignment of the attorney's fees in the Juneau case it did have a perfected pledge. Because the bankruptcy court had not ruled on the issue of whether CENLA had a perfected pledge in the Juneau fees, the district court declined to rule on that issue; however, the district court then entered a judgment against CENLA for $200,000 and ordered the clerk of the bankruptcy court to pay over to the trustee the funds on deposit in the court's registry. The trustee, pursuant to his "strong arm powers," could have recovered the pre-petition funds paid to CENLA only if CENLA did not have a perfected assignment or pledge in the attorney's fees from the Juneau case.[2] We agree with the parties' contention

[2] The only issue argued in this case is whether the trustee could recover the pre-petition fees paid to CENLA pursuant to his "strong arm powers." The trustee did not raise the issue of whether any of the transfers to CENLA may have been preferential transfers pursuant to 11 U.S.C. § 547. Therefore, we need not

that even though the district court stated that it was not going to rule on the issue of whether CENLA had a perfected pledge, the judgment that it entered against CENLA represents a finding that CENLA did not have a perfected pledge in the attorney's fees from the Juneau case. We believe, however, that because neither the bankruptcy court nor the district court made a definitive ruling on the pledge issue, it would be premature for us to decide this difficult issue of Louisiana law without the benefit of careful consideration by the district and bankruptcy courts. We, therefore, vacate the district court's judgment which (1) required the clerk of the bankruptcy court to pay the funds on deposit in the bankruptcy court's registry to the trustee, and (2) entered a $200,000 judgment, plus accrued interest and costs of court, against CENLA.

The district court did note in passing that the "[p]ledge of a payee's payments under a written agreement must satisfy the requirements of a pledge evidenced by a written instrument. The annuity contract between United Pacific and Reliance and the [law firm] is written evidence of the [law firm's] right to receive annual payments under the contract." While we express no opinion on the district court's statement that delivery of the annuity contract was necessary in order for CENLA to hold a perfected pledge in this case, we question whether delivery of the annuity contract to CENLA would be required for CENLA to hold a perfected pledge. On remand, we believe that the parties should address

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consider that issue.

the question of whether the annuity contract is actually a written instrument which evidences the obligation that the law firm purported to pledge to CENLA. Additionally, we believe that the bankruptcy court should address the question of whether an account receivable is a "written obligation" or an interest that is "not evidenced by written instrument or muniment of title." Some pertinent questions appear to be: (1) when there is any written evidence of an interest that a party wishes to pledge as security for a debt must the party deliver that written evidence, and (2) is an account receivable the type of interest for which delivery is required to perfect a pledgee's rights against third parties, in light of the fact that it appears that an account receivable may be pledged under the Assignment of Accounts Receivable Act without the delivery of a written instrument. However, the bankruptcy court should not interpret this as an exhaustive list of the pertinent issues that it should review on remand, or assume that it need address all of these issues if it finds one or more of them dispositive.

IV.

For the foregoing reasons, we AFFIRM the district court's determination that CENLA did not have a perfected assignment of the law firm's right to receive attorney's fees from the Juneau case, VACATE the district court's judgment, and REMAND the case to the district court with instructions to remand the case to the bankruptcy court for a determination of whether CENLA held a perfected pledge.