UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10597
Summary Calendar

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

versus

MAXWELL C. HUFFMAN, JR.,
ET AL.,

Defendants,

JAMES F. STEWART,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:90-CV-2036-H)

(April 17, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant James F. Stewart (Stewart) appeals the district court's judgment ordering him to disgorge $513,784, an

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

amount equal to funds allegedly acquired in violation of the securities laws. On appeal, Stewart argues that the district court erred in disallowing an offset for state law exemptions and in finding that he had failed to prove an inability to pay. We affirm.

Facts and Proceedings Below

In September 1990, the Securities and Exchange Commission (the SEC) filed a civil suit against Stewart, Maxwell C. Huffman, Jr., James T. Henry, John J. Forsberg, and twenty-seven corporate defendants they controlled, alleging violations of several provisions of the securities laws. Without conceding liability, Stewart and the other individual defendants consented to permanent injunctions and orders to disgorge an amount equal to the profits received from the illegal activities alleged in the SEC's complaint. In the consent agreement, the defendants preserved as an affirmative defense their inability to pay some or all of the ordered disgorgement. The district court then entered the settlement as a consent order, which, among other things, directed Stewart to pay $513,784.

The defendants all claimed they were unable to pay the disgorgement. Following an evidentiary hearing on August 26, 1991, a magistrate judge appointed by the district court determined that the Debt Act, 28 U.S.C. § 3001 *et seq.*, applied to disgorgement orders. The Debt Act permits an individual debtor to exempt from collection under the Act any property that is exempt from debt collection under the state law of the debtor's domicile. *Id.* § 3014(a)(2)(A). On this basis, the magistrate judge reduced the

amount each defendant was ordered to disgorge in accordance with Texas homestead, personal property, and retirement plan exemptions. The magistrate judge found that Stewart had $385,925 in non-exempt assets and, in a report filed on November 29, 1991, recommended that he be ordered to disgorge that amount. After increasing Stewart's personal property exemption, the district court, on January 15, 1992, adopted over Stewart's objection the report and recommendations of the magistrate judge, and ordered Stewart to disgorge $354,925.59.[1] On January 27, 1992, Stewart filed a motion for reconsideration, arguing that the magistrate judge had miscalculated the amount of non-exempt assets available for disgorgement. The district court denied his motion, observing that Stewart had not "plainly and unmistakably" shown an inability to pay the amount ordered.

Stewart and the other defendants appealed the district court's calculation of assets available for disgorgement, and the SEC cross-appealed the district court's determination that the Debt Act applied to disgorgement orders. We reversed and held that disgorgement is not a debt under the Debt Act and that, consequently, the defendants were not entitled to any state law exemptions as a matter of right. *S.E.C. v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) (*Huffman I*).[2] We noted, however, that

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[1] All the defendants had some exempt property and were therefore ordered to pay amounts smaller than those specified in the consent order.

[2] In a footnote, we observed that the parties had assumed that the amounts ordered to be repaid "are a form of 'disgorgement,' rather than the simple settlement of a law suit" and, in so doing, had further assumed that the amounts they were ordered to

principles of equity nevertheless give the district court broad discretion to allow state law exemptions when fashioning a disgorgement order. *Id.* Finally, we determined that the district court had incorrectly required Stewart to establish his inability

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pay should be analyzed under disgorgement as opposed to standard contract principles. *Huffman I*, 996 F.2d at 801 n.1. Although recognizing that such distinctions may relate to whether the Debt Act applies and thus whether state law exemptions must be allowed, we determined not to consider the question because neither party had raised it. In this appeal, Stewart now attempts to raise this point for the first time, engaging in a dispute with the SEC over the applicability of a recent, intervening case, *Securities & Exchange Commission v. AMX Internat'l*, 7 F.3d 71, 76 (5th Cir. 1993). In *AMX*, this Court held that an amount ordered as disgorgement is not a debt under the Debt Act whether it results from a settlement agreement or from full litigation. Stewart argues that *AMX* is distinguishable because the amount of disgorgement in that case was determined by litigation and not by consent. *Id.* at 72. Whatever the merits of Stewart's argument, it comes too late. Our justified refusal to consider this question in the first appeal is now law of the case and therefore binding. *Chevron USA v. Traillour Oil Co.*, 987 F.2d 1138, 1150 (5th Cir. 1993). Our task in this second appeal is merely "to follow the findings, holdings, and instructions contained in the appellate court's initial mandate . . . ." *Reid v. Rolling Fork Public Utility*, 979 F.2d 1084, 1086 (5th Cir. 1992) (internal quotation marks omitted). We did not remand this case for a determination whether the Debt Act should apply to the disgorgement; that determination was made once and for all in the last appeal.

Also barred by the law of the case doctrine is Stewart's argument that the consent agreement is voidable for mutual mistake of law. This argument again relates to whether disgorgement should be analyzed under standard contract principles, an issue we explicitly decided not to consider in the prior appeal because it had not been raised. *Huffman I*, 996 F.2d at 801 n.1. We further observe that the argument is unpersuasive in any event. Stewart has completely failed to show how, at the time of the consent agreement, the SEC was under the mistaken impression that the Debt Act applied to disgorgements; to the contrary, the SEC has consistently argued that the Debt Act does not apply. Indeed, Stewart has never alleged, either here or below, that the SEC made any mistake of law; he merely notes that all the *defendants* assumed that the Debt Act applied. By definition, however, *mutual* mistake of law requires that both contracting parties be mistaken. *In re Topco, Inc.*, 894 F.2d 727, 738 (5th Cir. 1990) (applying Texas law).

to pay by plain and unmistakable proof. We held that the correct standard of proof is a preponderance of the evidence, but noted that the district court was not bound under either standard to accept any "unsubstantiated, self-serving testimony as true." *Id.* Leaving "to the trial court the decision whether on remand to re-open the evidence or to re-evaluate it . . . in light of the thorough record already compiled," we reversed and remanded. *Id.*

On remand, the magistrate judge reviewed, but did not re-open, the evidence and concluded that the defendants had failed to establish their inability to pay by a preponderance of the evidence.[3] Finding for a second time that the proof offered by the defendants was "characterized by a lack of documentation and corroboration," the magistrate judge rejected point by point Stewart's contention that his available assets had been miscalculated and determined that his alleged liabilities were unsubstantiated. The magistrate judge also determined that state law exemptions should not offset the full amount of disgorgement ($513,784). Over Stewart's detailed objections, the district court adopted the magistrate judge's report and recommendations and, on June 1, 1994, entered a final judgment directing Stewart to disgorge the full $513,784 according to the following schedule: one payment of $354,925.59 on August 17, 1994 (an amount equal to the district court's prior calculation of non-exempt assets); $25,000 a year from August 17, 1995 through August 17, 2000; and,

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[3] On remand, the magistrate judge allowed the parties to brief the issue whether the defendants should benefit from state law exemptions. On no other issues was additional briefing allowed.

finally, one payment of $8,858.41 on August 17, 2001. This appeal followed.[4]

Discussion

On appeal, Stewart makes the following three arguments: that the district court erred in finding that he was able to pay the ordered disgorgement, that the district court failed to apply the correct evidentiary standard, and that the district court abused its discretion in not applying state law property exemptions to offset the total disgorgement.

At the outset, we must reject Stewart's contention that the district court employed an erroneous evidentiary standard in evaluating the quality of Stewart's proof on his inability-to-pay defense. In the report adopted by the district court, the magistrate judge clearly and unequivocally followed this Court's instructions in the first appeal to apply the preponderance of the evidence standard. The magistrate judge quoted our holding in *Huffman I* as well as this Circuit's Pattern Jury Instructions, which correctly define a preponderance of the evidence as "evidence that persuades you that the plaintiff's claim is more likely true than not." *Pattern Jury Instructions (Civil Cases)* 2.20 (West 1994).

We find unpersuasive Stewart's assertion that the magistrate

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[4] On June 27, 1994, Stewart filed both his notice of appeal and a motion to reconsider the judgment pursuant to Federal Rule of Civil Procedure 60(b). The district court denied the motion to reconsider on July 1, 1994. No further notice of appeal has been filed. This appeal is therefore only from the district court's June 1 judgment and not from the district court's denial of Stewart's Rule 60(b) motion.

judge merely nodded to the appropriate evidentiary standard. The basis for this assertion is the magistrate judge's reliance on caselaw requiring plain and unmistakable proof. However, the magistrate judge made it clear that these cases were referred to only for "guidance" and carefully noted that the plain and unmistakable burden "does not apply to this determination." Further, the magistrate judge cited these cases largely in reference to the proposition that a party claiming an inability to pay does not establish it simply by bald, conclusory assertions. This proposition is equally true under the preponderance of the evidence standard. As we stated in the first appeal, the magistrate judge and district court are not "bound . . . to accept [Stewart's] unsubstantiated, self-serving testimony as true." *Huffman I*, 996 F.2d at 803.

We must also reject Stewart's contention that the district court abused its discretion in disallowing state law exemptions. As we held in *Huffman I*, the decision whether to apply state law exemptions is committed to the broad discretion of the district court under its power to fashion equitable remedies. *Id.* In the report adopted by the district court, the magistrate judge examined the reason for disgorgement and concluded that its primary goal was deterrence, a goal that the magistrate judge concluded would be frustrated here by the sizeable reduction Stewart and the other defendants sought from state law property exemptions. This determination, based as it is on equitable principles of public policy, provides in the present factual context an adequate basis for refusing to allow Stewart to benefit from generous exemptions,

particularly as the district court factored equitable considerations into its decision to spread the payment of a large portion of the disgorgement over a period of seven years. The district court therefore did not abuse its broad discretion.[5]

Finally, we must determine whether the district court clearly erred in finding that Stewart had the ability to pay a disgorgement of $513,789. We review the district court's factual findings for clear error. *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990); *see also CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir.), *cert. denied*, 113 S.Ct. 66 (1992). In her report filed after remand, the magistrate judge reevaluated the evidence concerning Stewart's ability to pay the disgorgement. This confusing and sometimes conflicting evidence consisted of Stewart's oral testimony at a hearing before the same magistrate judge on August 26, 1991; three financial statements, one dated

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[5] In arguing that the district court abused its discretion in disallowing state law exemptions, Stewart has repeatedly insisted that the magistrate judge incorrectly determined that he has approximately $95,000 in non-exempt annuities. Stewart claims that these assets are in fact part of, and not in addition to, an exempt IRA account worth approximately $175,000. The magistrate judge rejected this argument on remand, concluding that Stewart had failed to establish that these annuities were part of his retirement accounts. Even if the magistrate judge clearly erred in this determination, and we believe she did not, Stewart has completely failed to explain how these alleged errors relate to his contention that the district court erred in disallowing state law exemptions. That decision was based entirely on public policy concerns, and on that basis we support it. The bare allegation that Stewart has somewhat fewer non-exempt assets than the magistrate found he had is beside that point. As we note below, the magistrate judge took Stewart's contentions into account in determining his ability to pay and on that basis recommended a graduated payment plan. The plan devised by the magistrate judge explicitly relied on Stewart's own estimates of his assets. *See infra* note 8.

1990, the other two dated 1991; his individual and corporate tax returns for 1989 and 1990; and his oral deposition, given on April 10, 1991 and filed on May 24, 1991. After reviewing this evidence on remand, the magistrate judge concluded that Stewart had failed to prove an inability to pay by a preponderance of the evidence.

According to the evidence before the district court, including an updated 1993 financial statement included in his brief on remand, Stewart has, by his own admission, assets sufficient to pay the disgorgement in full.[6] On appeal, Stewart contends that the district court erred, however, in not offsetting these assets by more than $300,000 in alleged liabilities, which, he claims, reduce his net worth to approximately $214,000SQan amount considerably below the $354,925 the district court directed him to pay by August 17, 1994. The bulk of these liabilities stem from Stewart's sworn assertion that his $300,000 homestead is subject to a $290,000 mortgage. At no time, however, has Stewart offered any evidence, besides his own self-serving statements, that he in fact has this or any other liability.[7] Our explicit instructions in the prior

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[6] The magistrate judge reported,

> "[E]ven accepting as true [Stewart's] representations regarding his present financial condition, as set out in his November 23, 1993 Brief . . ., Stewart has sufficient assets to disgorge this amount. His brief sets out that he has assets totalling $557,279 as of October 29, 1993. In addition, his brief shows retirement accounts worth $227,566. And accepting his valuation as to the worth of his personalty as of October, 1993, he has another $32,000 available to pay his disgorgement." (citations omitted).

[7] For instance, there is no writing (or testimony) from the alleged mortgagee indicating that these liabilities in fact exist. The same lack of corroboration characterizes Stewart's

appeal provided that "[t]he district court was not bound . . . to accept [Stewart's] unsubstantiated, self-serving testimony as true." *Huffman I*, 996 F.2d at 803. Because all the evidence in the record concerning Stewart's liabilities is unsubstantiated and self-serving, we can not say that the district court erred in disregarding it. Accordingly, we hold that the district court did not clearly err in finding that Stewart had failed to prove an inability to pay the disgorgement by a preponderance of the evidence.[8]

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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claim at the 1991 hearing that a $67,000 mortgage receivable Stewart obtained as inheritance is pledged to a bank.

[8] Stewart's insistence that his own testimony is uncontroverted by the SEC in no way makes his evidence less self-serving or unsubstantiated. The burden is on Stewart to prove his inability to pay by a preponderance of credible evidence, and we have held that the district court may disregard evidence such as that presented here.