

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 16-cv-62603-Dimitrouleas
Proceeding Ancillary to
CASE NO. 15-cv-60082-Dimitrouleas/Snow

GRISEL ALONSO, as Receiver for Elm Tree Investment Advisors, LLC, Elm Tree Investment Fund, LP, Elm Tree 'e'conomy Fund, LP, and Elm Tree Motion Opportunity, LP,

Plaintiff,

v.

JAMES BENVENUTO, an individual, NGU INVESTORS, LLC, a Florida limited liability company; JEAN BENVENUTO, an individual, SURJIT WALIA, an individual, S.W. EQUITIES CORP., a New York corporation, TIMOTHY HARTMANN, an individual, ALEXANDER BUKHSHTABER, an individual, MVS MEDIA GROUP, LLC, a Florida limited liability company, HARRY TAWIL, an individual, EDUARDO DOS SANTOS, an individual, FILOMENA CALABRIA, an individual, JOSE ROFFE, an individual, MIREILLE ROFFE, an individual, SOMESWARI NUKALA, an individual, YAEL TAPIERO, an individual, LAAS W. TURNBULL, an individual, OMRI TINTPULVER, an individual, CONSTANTINO DOS SANTOS, an individual, ARMAND DELMAR, an individual, AHMAD NAQVI, an individual, MERCEDES ELMALEH, an individual, ELIA BLUMIN, an individual, TED GREENWALD, an individual, ALINA TALSKY, an individual, ELVIS PERVAN, an individual, ANGELO ISMIRNIOGLOU, an individual, and JONATHAN VERK, an individual.

Defendants.

_____/

**DEFENDANT, TIMOTHY HARTMANN'S, REPLY TO RECEIVER'S RESPONSE AND
OPPOSITION TO DEFENDANT'S MOTION FOR RULE 11 SANCTIONS**

Defendant, Timothy Hartmann (“Mr. Hartmann”) files its Reply to Plaintiff’s, Grisel Alonso, and Plaintiff’s counsel, Daniel Newman and Christopher Cavallo of the law firm of Broad and Cassel (hereinafter “Plaintiff’s Counsel”), Response and Opposition [D.E. 193] to Hartmann’s Motion for Rule 11 Sanctions [D.E. 189].

I. The Cyber Promissory Note proves that the payments to Hartmann were not fraudulent.

The Promissory Note that was provided to Plaintiff’s Counsel evidences an all-cash loan made by Mr. Hartmann to Cyber Investments International, Inc. (“Cyber”), signed by Fred Elm (“Elm”) as CEO – who at the time borrowed Forty Thousand Dollars (\$40,000.00) from Mr. Hartmann and was making payments to repay that debt which is the subject of this lawsuit. Elm, who was in control of Cyber and the Receivership Entities, was paying back the loan by and through the Receivership Entities.

Pursuant to Florida law, loan repayments are traditionally not considered fraudulent transfers because they extinguish an antecedent debt. *In re Pearlman*, 440 B.R. 900, 905 (Bankr. M.D. Fla. 2010) (*citing HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2d Cir.1995) (“The preferential repayment of preexisting debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors, because the basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy some of his creditors; it normally does not try to choose among them.”)).

Accordingly, the loan repayment transfers to Hartmann were not fraudulent and the Receiver is not entitled to those funds.

II. Defendant is not subject to sanctions.

Plaintiff argues that Defendant knew its Rule 11 motion for sanctions was frivolous at the time of filing because all claims against Hartmann have a reasonable basis, because Plaintiff has filed a motion for summary judgment, because Hartmann's case law is purportedly inapplicable, and because additional case law disproves Hartmann's argument. However, these arguments are without merit, and therefore, the Court should not impose sanctions upon Hartmann or his counsel.

In this circuit, three types of conduct warrant Rule 11 sanctions: "(1) when a party files a pleading that has no reasonable factual basis; (2) when the party files a pleading that is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law; and (3) when the party files a pleading in bad faith for an improper purpose." *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993). The Defendant did not take part in any conduct that would warrant sanctions. In fact, the test for imposition of Rule 11 sanctions is whether attorney's conduct was "reasonable under the circumstances." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997). Based on the circumstances at hand, Defendant Hartmann's decision to pursue Rule 11 sanctions against the Receiver was reasonable and justified.

In the instant case, Hartmann was sued for the return of funds, for which he believed in good faith, were owed and due to him in connection with the Promissory Note with Cyber. Hartmann has testified in this case, under oath, that the transfers he received were in connection with the Promissory Note with Cyber – a company that Elm controlled and signed on behalf of Hartmann, had no reason to believe that the transfers he was receiving were for any other purpose other than for repayment for the Promissory Note with Cyber.

Hartmann's counsel performed legal research and made the argument in good faith that the loan repayments from the Receivership Entities to Hartmann are outside of the scope of the Receiver's clawback. This argument was made in good faith by Hartmann's counsel with his participation. Therefore, Hartmann's arguments are based in fact and far from a legal theory, that has no reasonable chance of success.

Finally, sanctions are warranted when the claimant exhibits a "deliberate indifference to obvious facts," they are not warranted when the claimant's evidence is merely weak. *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing document was served upon all Counsel of Record via the CM/ECF electronic filing method, on this 2nd day of May, 2018.

DANIELS RODRIGUEZ BERKELEY
DANIELS & CRUZ, P.A.
Attorneys for Timothy Hartmann
4000 Ponce De Leon Boulevard, Suite 800
Coral Gables, Florida 33146
Telephone: 305.448.7988
Facsimile: 305.448.7978

By: /s/ Adam H. Levit, Esq.
LORNE E. BERKELEY, ESQ.
Florida Bar No. 146099
lberkeley@drbdc-law.com
vmunoz@drbdc-law.com
ADAM H. LEVIT, ESQ.
Florida Bar No. 114428
alevit@drbdc-law.com
pcastro@drbdc-law.com