

the Hospital had a trust pursuant to a Self-Insurance Plan Trust Agreement executed on or about September 15, 1987 (“Trust”), with a balance of \$18,018.27.¹

On October 2, 2008, more than 3 years after the Bankruptcy Case and Schedules were filed, the Estate of Johnny Fisher, Dec’d (“Plaintiff”) filed its Original Petition and Claim of Estate (“Petition”), which was pending under Cause No. C200800560 in the 413th Judicial District Court of Johnson County, Texas (“Lawsuit”) at the time of removal.² On October 9, 2008, JPMC timely removed the Lawsuit to the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division (“Bankruptcy Court”), initiating adversary no. 08-4168 in the Bankruptcy Case (“Adversary”). On October 23, 2008, JPMC filed its answer in the Adversary. On January 20, 2009, more than three months after JPMC removed the Lawsuit, Plaintiff filed its Motion to Remand, which motion was untimely.

In the Motion to Remand the Plaintiff requested that the Bankruptcy Court either abstain from hearing the Adversary or remand the Lawsuit to State Court. On February 12, 2009, Defendant filed its Motion for Summary Judgment and its Response to Motion to Remand. On April 15, 2009, the Bankruptcy Judge entered a Memorandum Opinion permissively abstaining from hearing the matter and directed the clerk of court to transmit the Adversary to this Court.

On August 12, 2009, almost ten months after Plaintiff filed the Petition, summons were issued for service on Glenn Milton, Jay Sandlin, Lucy Norris, RN and Nancy Argo,

¹ Defendant respectfully requests that this Court take judicial notice of the Hospital’s Schedule B filed in the Bankruptcy Case and which appears as docket number 39, a copy of which is attached hereto as Exhibit A.

² The Lawsuit was originally filed under cause number P200017096 in Probate Court No. 2 of Johnson County, Texas and was transferred to the 413th Judicial District Court on October 3, 2008. The 413th Judicial District Court accepted the transfer on October 9, 2008.

RN (“Individual Defendants”). There is no record that the Individual Defendants have ever been served, or that Plaintiff has made any attempt to serve them. On September 23, 2009, this Court entered the Order, which granted the Plaintiff’s untimely Motion to Remand and denied Defendant’s Motion for Summary Judgment as moot.

II. Relief Requested

Defendant respectfully requests that the Court reconsider the Order remanding the Lawsuit to State Court because the Individual Defendants were improperly joined. It is undisputed that the Individual Defendants are the only non-diverse parties. Therefore, if they were improperly joined diversity jurisdiction exists in this Court and the Lawsuit should not be remanded to State Court.

In the Order, the Court concluded that the Lawsuit must be remanded to State Court because JPMC had not met its burden of proof on the issue of whether the individual defendants were improperly joined. JPMC respectfully submits that this ruling was in error. The claims against the Individual Defendants are for conspiracy to breach fiduciary duty when they allegedly aided and abetted JPMC’s purported improper management of the Trust. However, as was argued in the Response to the Motion to Remand, the conspiracy claims against the Individual Defendants are barred by the statute of limitations and, the Plaintiff has no cause of action against the non-diverse defendants as a matter of law. Therefore, the Court should vacate the Order remanding the Lawsuit to State Court.

III. Legal Argument and Authorities

In the Fifth Circuit, a motion to reconsider an order filed and served within 10 days of entry of the order is analyzed under Federal Rule of Civil Procedure 59(e), as a

motion “to alter or amend judgment.”³ This Motion for Reconsideration of Memorandum Order has been filed and served within 10 days of entry of the Order. To succeed on a motion for reconsideration under Rule 59(e), a party must “clearly establish either a manifest error of law or fact or must present newly discovered evidence.”⁴ In this case JPMC submits that there was a manifest error of law or fact and the Court should reconsider and vacate the Order.

Plaintiff’s Motion to Remand presents unique issues in the context of a bankruptcy case. With the filing of the Hospital’s chapter 7 petition, a bankruptcy estate was created. That estate was comprised of all of the Hospital’s assets, including all legal or equitable interests the Hospital had in property, wherever located and by whomever held, as of the commencement of the case.⁵ This included the legal and equitable interests the Hospital had in the Trust assets. Once the Hospital’s legal and equitable interest in the Trust assets became property of the bankruptcy estate, all rights that the Hospital had in the Trust were extinguished.⁶ Moreover, pursuant to section 362 of the Bankruptcy Code, an automatic stay took effect on the Petition Date. The automatic stay prevents, with certain exceptions that are not applicable here, all actions against a debtor or a debtor’s estate.⁷

In addition to the creation of a bankruptcy estate and imposition of the automatic stay to halt all actions against the debtor or the debtor’s estate, in a chapter 7 liquidation

³ See *Lavespere v. Niagara Mach. & Tool Works*, 910 F.2d 167, 173 (5th Cir.1990); and *Marine Geotechnics, LLC v. Williams*, No. 4:07-CV-03499, 2009 WL 2144161 (S.D. Tex. July 13, 2009).

⁴ *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005).

⁵ 11 U.S.C. § 541(a)(1); *Kane v. National Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) (noting that pursuant to Section 541 of the Bankruptcy Code, virtually all of the debtor’s assets vest in the bankruptcy estate upon the filing of a petition).

⁶ See *Kane*, 535 F.3d at 385.

⁷ 11 U.S.C. § 362(a).

case, a chapter 7 trustee is appointed. That trustee has a duty to “collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of the parties in interest”⁸ Further, the chapter 7 trustee is the only party authorized to operate the debtor’s business once a chapter 7 proceeding is initiated.⁹ Therefore, neither the Hospital, nor any of its officers, directors or employees (including the Individual Defendants) was or could have been authorized to exercise any control over the Trust assets, because those assets were under the control of the Chapter 7 trustee. Upon the commencement of the Bankruptcy Case, the Individual Defendants could no longer conspire to hide or transfer Trust assets because the Hospital’s assets were effectively frozen by virtue of the creation of the bankruptcy estate and the imposition of the automatic stay, and the operation of the Hospital’s business, including control over the Trust assets, was vested in the chapter 7 trustee.

When the Hospital filed its Schedules on March 7, 2005, the Plaintiff was put on notice as to the actual value of the Trust assets and the fact that they were insufficient to cover any potential judgment Plaintiff might receive. The Schedules were public record at that point and the Individual Defendants could take no additional action to conceal the value of the assets in the Trust.

In Texas, the statute of limitations for civil conspiracy is two years.¹⁰ Plaintiff’s Lawsuit was filed on October 2, 2008. Therefore, any cause of action against the

⁸ 11 U.S.C. § 704(a)(1).

⁹ 11 U.S.C. § 721. See also *In re Gracey*, 80 B.R. 675, 678 (E.D. Pa. 1987), affirmed 849 F.2d 601 (3rd Cir. 1988), cert. denied 488 U.S. 880 (1988).

¹⁰ *Mayes v. Stewart*, 11 S.W.3d 440, 453 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 1999)); and *Legal Econometrics, Inc. v. Chama Land & Cattle Co., Inc. (In re Legal Econometrics, Inc.)*, 169 B.R. 876, 883 (Bankr. N.D. Tex. 1994).

Individual Defendants which accrued prior to October 2, 2006, would be barred by the applicable statute of limitations. As set forth above, any actions the Individual Defendants might have taken to conspire to either conceal the value of the Trust assets or to transfer the Trust assets had to have taken place prior to the Petition Date, February 11, 2005, because the Individual Defendants' no longer had any ability to deplete the Trust or to conceal the amount of funds remaining in the Trust after that date. Accordingly, they could not have engaged in any conspiracy with regard to the Trust at any time after February 11, 2005.

Plaintiff's conspiracy claims against the Individual Defendants are barred by the statute of limitations and the Plaintiff has no possibility of establishing a cause of action against the Individual Defendants. The fact that the Plaintiff has never even served the Individual Defendants at any time during the one year after the Lawsuit was filed supports an inference that it does not believe it has viable claims against them and they have been improperly joined to defeat diversity jurisdiction.¹¹ Because there is no possibility of establishing a cause of action against the Individual Defendants, they have been improperly joined and the Motion for Remand should have been denied.

IV. Conclusion

For the foregoing reasons, Defendant requests that this Motion be granted and that the Court vacate its Memorandum Order remanding the Lawsuit to State Court and reinstate this District Court case. Defendant further requests that the Court vacate the Memorandum Order denying Defendant's Motion for Summary Judgment as moot.

¹¹ *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (noting that failure to properly serve an individual defendant when that defendant's location is known to the plaintiff supports an inference that the plaintiff does not intend to actively pursue the claims against that non-diverse party).

DATED: October 1, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October 1, 2009, the foregoing Motion for Reconsideration of Memorandum Order was served electronically via the Court's Electronic Filing System, and/or via United States mail, postage prepaid upon the following:

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