Allocation of payment
to judgment

Robbins Group, LLC v. Felix Capó 96-6291-fra
In re Felix Capó 696-65489-fra7

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Plaintiff obtained a jury verdict against the Defendant in Oregon state court for $170,000, $100,000 of which was determined to be allocable to conversion. Soon after the judgment, a co-defendant paid $60,000 which was applied toward the Defendant's obligation, leaving a judgment of $110,000 plus interest. Plaintiff alleged that it applied the $60,000 payment to the non-conversion part of the judgment, leaving the $100,000 conversion judgment intact. Plaintiff filed a motion for summary judgment in this adversary proceeding seeking a determination that the $100,000 conversion debt is nondischargeable under § 523(a)(6). The court granted the Plaintiff partial summary judgment, holding that the judgment is nondischargeable to the extent it relates to the conversion element. Whether an allocation of the payment had been made prior to the petition date, however, was a question which could not be answered from the record then before the court.

The Plaintiff submitted a second motion for summary judgment on the question of allocation. It was undisputed by the parties that the Plaintiff had submitted a form of judgment in the state court action which allocated the $60,000 payment to the non-conversion part of the judgment and that the payor had made no allocation. The state court chose to make no allocation in the final form of judgment. The bankruptcy court found this situation analogous to that of a creditor who is owed money under two separate accounts with a payor. Under Oregon law, the creditor may make an allocation when the payor makes no allocation. Submission by the Plaintiff of its proposed form of judgment provided objective proof that an allocation had been made by the Plaintiff in the absence of allocation by the payor. Consequently, the entire amount of the conversion judgment remained unpaid at the petition date and nondischargeable.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

IN RE FELIX R. CAPO' Debtor.	)	Case No. 696-65489-fra7
ROBBINS GROUP, LLC, Plaintiff, v. FELIX R. CAPO', Defendant.	)	Adv. Pro. No. 96-6291-fra MEMORANDUM OPINION

This is Plaintiff's second motion for summary judgment in this adversary proceeding. The first was resolved in Plaintiff's favor, with one issue left unresolved: whether a payment to the creditor by a co-obligor should be deemed to have been credited against the conversion judgment awarded in state court against Defendant Capó. The second motion is directed to that issue. On the record now before me, I find that this second motion for summary judgment should be granted as well.

I. FACTS

Events surrounding the entry of the judgment, and the collateral effect of the judgment, are described in the Court's Memorandum Opinion entered on April 2, 1997. I held that the rights of the parties are fixed as of the date the petition for relief is filed, and that, if the payment was *actually* allocated prior to the date this bankruptcy case was commenced, Oregon law controls the allocation of the payment. It appears from the parties' affidavits that the following additional facts are not disputed:

Prior to trial in the state court, Plaintiff entered into a confidential settlement agreement with ProWest, a co-defendant with Mr. Capó in the state court case. ProWest made no attempt to direct how the payment would be allocated between the causes of action awaiting trial.

At trial a verdict was entered finding Defendants liable for both conversion and under the common law count of money had and received. After the verdict was entered, counsel for Mr. Capó[1] argued that the amount paid by ProWest should be allocated against the conversion portion of the judgment. Plaintiffs disagreed and on August 1, 1996 forwarded to Mr. Capó's attorney a proposed judgment which allocated the amount paid by ProWest exclusively to the money had and received judgment.

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[1]Who is not the attorney representing him in this case.

The matter was ultimately left to the Circuit Judge, who entered a judgment which recognized that $60,000 was paid, but did not allocate the payment between the conversion and money had and received claims.

II. DISCUSSION

The issues now before me are: was Plaintiff entitled to determine how the ProWest payment was to be applied? If so, did Plaintiff take sufficient steps to accomplish the allocation before Defendant's bankruptcy was commenced?

In the state court case the jury found that "The value of money or property that defendant Felix Capó converted from Robins Group L.L.C. through the ProWest, Inc., and ProWest Oak Tree L.L.C. ("ProWest") transaction was $100,000." The Court, in a separate determination[2] found that "The value of money or property that defendant Felix Capó received for his own use and benefit under the money had and received claim from Robins Group through the ProWest transaction was $170,000." It appears from the complaint that the claims were separate counts of a single claim for relief, and arose from the same events. (The judgment and the complaint were made part of the record with the first motion for summary judgment.) I previously held that the conversion claim is not subject to discharge in this bankruptcy case.

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[2]The parties stipulated prior to trial that the jury would consider the conversion claims, and the Court the money had and received claim.

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The two awards are concurrent, rather than cumulative: that is, Defendant was found to owe $170,000, plus interest, as opposed to $270,000. $60,000 was received from ProWest. This payment could be applied to the common count claim first, leaving all of the remaining balance attributable to the conversion claim, or the other way around, leaving only $40,000 of non-dischargeable debt remaining.

The situation is analogous to payment to a creditor who is owed money under two separate accounts with the payor (or the person on whose behalf payment is made). Under Oregon law a creditor, in the absence of any instruction from the payor, is entitled to determine which account is to be reduced by the payment. Fatland v. Wentworth & Irwin, 149 Or. 277, 280-281, 40 P.2d 68 (1935), Fowler v. Courtemanche, 202 Or. 413, 274 P.2d 258 (1954); Kincaid v. Fitzwater, 257 Or. 170, 474 P.2d 742 (1970).

Kincaid involved an action to foreclose a land sale contract. The contract contained a provision requiring payment of property taxes before they became past due. While they generally made contract payments when due, defendants were consistently delinquent in their obligation to pay taxes. After giving due notice, plaintiffs sued to foreclose the contract, citing the failure to pay current taxes as grounds of default. Defendants asserted that a payment made shortly before the action was commenced should have been credited against the tax

obligation. The court held otherwise, noting that Defendants had not tendered the payment with any instruction, and that Plaintiffs' attorney had advised them after the payment was received that Plaintiffs intended to apply it to a lump sum principal and interest payment coming due later that year. Citing to Fatland, the Court stated that "In the absence of any direction by the defendants as to how the $3,000 was to be applied, the plaintiffs could apply it as they saw fit." 257 Or. at 173, 474 P.2d at 744.

Here, it is undisputed that ProWest made no attempt to allocate the payment between claims.[3] It is equally clear that Plaintiff did make an allocation, as evidenced by its tender of a proposed judgment to that effect.[4] It follows that Plaintiff's allocation must be given effect.

Between the time the verdict was rendered and the judgment entered Defendant also requested a particular allocation. However, under Oregon law the right to allocate belongs to the payor: "It is a rule of general application upon which this as

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[3]Defendant argues that ProWest was not given an opportunity to make the allocation. It is hard to see how this could be, since all that was required was an indication of ProWest's intention at the time the money was paid. A simple notation on the check might have sufficed. In any case, there is no requirement that a payor be given an explicit invitation to allocate as a prerequisite to the payee's doing so where no instruction is given at the time of payment.

[4]Defendant asserts in its statement of facts that Plaintiff made no allocation; however, the claim is not backed by any affidavit or other evidence. It appears to me to be a legal conclusion, rather than a claimed fact.

well as all other courts are agreed: 'That the party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent, the law must decide." Fatland v. Wentworth & Irwin, 149 Or. 277, 280, 40 P.2d 68 (1935)(internal citation omitted). Defendant here had no right in any event to direct how ProWest's payment was to be treated. Absent any instruction from ProWest, the right to determine the allocation fell to Plaintiff, and not Defendant.

Defendant urges the court to allocate the remaining debt pro rata between dischargeable and non-dischargeable claims. Oregon law permits such an approach, if otherwise justified, if no allocation was made by either party before the controversy arose. Fowler v. Courtemanche, 202 Or. 413, 274 P.2d 258 (1954). However, an allocation was in fact made in this case. Likewise, there are bankruptcy cases which employ the proration approach, *See, e.g.,* In re The Securities Groups, 116 B.R. 839 (Bankr. M.D. Florida 1990), In re Hunter, 771 F.2d 1126 (8th Cir. 1985), In re Bozzano, 183 B.R. 735 (M.D. N.C. 1995). However, these federal cases are not applicable here. As noted in Securities Groups, federal common law rules regarding application of payments apply to payments made in settlement of federal litigation. 116 B.R. at 845. Federal common law rules are not applicable where, as here, the parties' rights were established as a matter of state law before the bankruptcy petition was filed.

III. CONCLUSION

As a matter of law, Plaintiff was entitled to determine how the ProWest payment was to be allocated between judgment debts arising from the conversion and contract counts in the absence of any instruction from ProWest. The fact that Defendant sought an allocation in its favor is immaterial. The evidence is undisputed that ProWest made no attempt to allocate, and that Plaintiff clearly and overtly sought to allocate the payment against the contract claim only. It follows that Plaintiff is, as a matter of law, entitled to judgment in its favor in this case.

This memorandum opinion constitutes the Court's findings of fact and conclusions of law in this case, which shall not be separately stated. Counsel for Plaintiff shall submit an order allowing summary judgment, and a form of judgment, consistent with this memorandum opinion and the memorandum opinion previously entered.

FRANK R. ALLEY, III
Bankruptcy Judge