UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for
OASIS INTERNATIONAL GROUP, LTD.;
OASIS MANAGEMENT, LLC; AND
SATELLITE HOLDINGS COMPANY,

Plaintiff,

v. Case No: 8:20-cv-00862-VMC-TGW

CHRIS AND SHELLEY ARDUINI, et al.,

Defendants.
_____/

RECEIVER'S RESPONSE IN OPPOSITION TO DEFENDANT ALAN JOHNSTON'S MOTION TO DISMISS [DOC. 416] AND MOTION FOR ENTRY OF CLERK'S DEFAULT

Plaintiff, BURTON W. WIAND, as Receiver for OASIS INTERNATIONAL GROUP, LTD.; OASIS MANAGEMENT, LLC; AND SATELLITE HOLDINGS COMPANY ("***Receiver***"), through undersigned counsel responds to Defendant's, ALAN JOHNSTON ("***Johnston***"), Motion to Dismiss (Doc. 416) and moves for entry of a clerk's default due to Johnston's failure to timely file an Answer pursuant this Court's August 17, 2020 Order (Doc. 344), and in support thereof states:

Executive Summary

Johnston's Motion to Dismiss must be denied and the clerk should enter a default against Johnston because it is procedurally barred by Rule 12, Johnston's arguments are contrary to settled law, and Johnston failed to comply with this Court's August 17, 2020 Order directing him to file an Answer on or before September 16, 2020. The Motion to Dismiss constitutes a second,

successive 12(b) motion—which is expressly prohibited by Rule 12(g)—and two of the four arguments raised are identical to previously rejected arguments that Johnston raised in his Motion to Quash. Even if the Court considers the merits of Johnston's arguments, the arguments fail as a matter of law and should be rejected. Accordingly, the Motion to Dismiss must be denied as both procedurally and substantively insufficient, and the clerk should enter a default against Johnston due to his failure to timely answer the Complaint.

Procedural Background

On April 14, 2020, the Receiver filed his Complaint against Johnston (Doc. 1) and on June 27, 2020, he served Johnston with the summons and complaint. See Affidavit of Service filed on July 1, 2020 (Doc. 174). On July 21, 2020, Johnston filed his "Motion by Special Appearance to Quash Summons and Object to Jurisdiction (***"Motion to Quash"***)," wherein he challenged personal jurisdiction and the Receiver's compliance with the requirements of 28 U.S.C. §754 and 28 U.S.C. § 1692. (Doc. 241). The Court denied Johnston's Motion to Quash and rejected the arguments asserted therein, holding that the Court has personal jurisdiction over Johnston and that the Receiver properly effected service of process on Johnston. See August 17, 2020 Oral Order Denying Motion to Quash at Doc. 344. The August 17, 2020 Order directed Johnston to file an **Answer** to the Complaint by September 16, 2020.[1]

On September 14, 2020, in spite of the Court's Order directing Johnston and other defendants to file an **Answer** by September 16, 2020, Johnston filed, "By Special Appearance Motion to Dismiss" (***"Motion"***) (Doc. 416). The Motion moves for dismissal based on previously rejected arguments of insufficiency of process and lack of personal jurisdiction, and raises new

[1] On August 25, 2020, Johnston also filed a Notice of Filing Supplemental Evidence in Support of Motion by Special Appearance to Quash Summons and Object to Jurisdiction where he asserted that he "is not raising new issues nor arguments," that he represents himself "pro per" and not *pro se*, and that he is not represented by Brent Winters (Doc. 388).

claims that Plaintiff failed to join an indispensable party and failed to state a cause of action. As of the date of this filing, Johnston has not filed an Answer to the Complaint as ordered by this Court to do on or before September 16, 2020.

Memorandum of Law

I. Johnston is Prohibited by Rule 12(g) from Filing Successive Rule 12 Motions.

Johnston's first 12(b) motion, the Motion to Quash, was filed on July 21, 2020. (Doc. 241). In the Motion to Quash, Johnston raised the 12(b)(2) defense of lack of personal jurisdiction and the 12(b)(4) defense of insufficient process. (Doc. 241). In his Motion filed on September 16, 2020, Johnston now raises the 12(b)(6) defense of failure to state a claim and the 12(b)(7) defense of failure to join a party under Rule 19, in addition to reasserting the same Rule 12 defenses that he raised in his Motion to Quash. (Doc. 416). By failing to raise the defenses of failure to state a claim and failure to join a party under Rule 19 in Johnston's first Rule 12(b) motion—his Motion to Quash—Johnston is barred from asserting them in a successive Rule 12 motion. Fed. R. Civ. P. 12(g); *see also Florio v. Success Agency LLC*, 2017 U.S. Dist. LEXIS 227261, at *19 (S.D. Fla. Oct. 27, 2017) ("Rule 12(g) requires all of the permitted Rule 12(b) defenses to be raised in a single, consolidated motion rather than in multiple or successive motions."). Moreover, the entire Motion itself is a procedural nullity. *See Chen v. Cayman Arts, Inc.*, 2011 U.S. Dist. LEXIS 28835, at *6-*7 (S.D. Fla. Mar. 21, 2011) (striking second, successive motion to dismiss as improper under Rule 12(g)).

While there is an exception to Rule 12(g) under Rule 12(h)(2), it does not apply here because the Motion is not a pleading allowed or ordered under Rule 7(a), a motion under Rule 12(c), and it is not being raised at trial. *See Silver Creek Farms, LLC v. Fullington*, 2017 U.S. Dist. LEXIS 223394, at *6 n.1 (S.D. Fla. May 7, 2017) ("Rule 12(h)(2) does not identify successive Rule 12(b)(6) motions as an exception to Rule 12(g)(2)); *Manns v. City of Atlanta*,

2006 U.S. Dist. LEXIS 63210, at *11-*12 (N.D. Ga. July 14, 2006) ("Rule 12(h)(2) only allows a failure to state a claim defense to be made in one of three (3) categories: a Rule 7(a) 'pleading'; a motion for judgment on the pleadings provided by Rule 12(c); or a trial on the merits. Defendants' second 12(b)(6) motion simply does not fall into any of these categories."). Accordingly, because the filing of a successive pre-answer 12(b) motion is improper, the Court should not consider the merits of the Motion. *See id.* (agreeing with the plaintiff that defendants' second pre-answer motion to dismiss was improper and barred consideration of the substance of the issues raised in the motion).

II. The Defenses of Lack of Personal Jurisdiction and Insufficient Process are Insufficient as a Matter of Law and Have Already Been Rejected by this Court.

Johnston erroneously argues that the Complaint should be dismissed for insufficient process and lack of personal jurisdiction because the Receiver purportedly did not comply with section 754's jurisdictional requirement to file copies of the complaint and order of appointment in the district court for each district in which the property is located within ten days after the entry of his order of appointment. 28 U.S.C. § 754. Specifically, Johnston argues that the Receiver was required to file a copy of the Complaint in the Eastern District of Texas by May 10, 2019 (ten days after Plaintiff's appointment as receiver on April 30, 2019) and instead filed the Complaint in the Eastern District of Texas on July 18, 2019 (within ten days of a July 11, 2020 Consolidated Receivership Order). See Doc. 416 ¶¶ 4-5 and Doc. 241, ¶ 7. According to Johnston, this Consolidated Receivership Order is a nullity with respect to § 754 because it fails to expand the Receiver's powers or convert the Receiver's appointment from temporary to permanent. (Doc. 416, ¶¶ 26-29). Finally, Johnston reargues that the Court lacks personal jurisdiction over him due to the Receiver's insufficiency of process. (Doc. 416, ¶ 39).

Initially, Johnston's arguments regarding lack of personal jurisdiction and insufficient

process are identical to the arguments raised he raised in his Motion to Quash, which was previously denied by this Court. (Doc. 241, 344). Accordingly, Johnston's arguments should be rejected for the same reasons that the Court rejected Johnston's Motion to Quash. See August 17, 2020 Oral Order Denying Motion to Quash at Doc. 344; *see also United States v. Fleming*, 2014 U.S. Dist. LEXIS 100329, at *15 (M.D. Fla. July 23, 2014) (denying defendants' renewed motion to dismiss because it was filed without leave of court and it merely reasserted the same arguments that had already been rejected by the Court).

Regardless, as previously explained in the Receiver's Omnibus Response in Opposition to Motion to Quash Summons and Object to Jurisdiction (***"Omnibus Response"***) (Doc. 326), the Commodity Futures Trading Commission (***"CFTC"***) filed an enforcement action against various defendants alleged to have violated the Commodity Exchange Act on April 15, 2019. *See C.F.T.C. v. Oasis International Group, Ltd.*, Case No. 8:19-cv-886-T-33SPF (M.D. Fla.) (***"CFTC Action"***). Also on April 15, 2019, the Court entered a temporary order appointing the Receiver and directed him to take possession of the Receivership Estate. (CFTC Action, Doc. 7). In response to the CTFC's Motion for Entry of Consent Orders of Preliminary Injunction (CFTC Action, Doc. 172), the court entered the July 11, 2019 Consolidated Receivership Order, (CFTC Action, Doc. 177). The Consolidated Receivership Order superseded prior orders and provided that "[t]his Order shall also constitute the appointment or re-appointment of the Receiver for purposes of 28 U.S.C. § 754." (CFTC Action, Doc. 177 at ¶3). The Consolidated Receivership Order also converted the Receiver's appointment from temporary to permanent for several of the defendants. (CFTC Action, Doc. 172, 177).

Thus, the Consolidated Receivership Order reappointed the Receiver and restarted the clock for purposes of section 754. *See SEC v. Vision Communs.*, 74 F.3d 287, 291 (D.C. Cir.

1996) (explaining that the district court may reappoint a receiver and start the ten-day clock of § 754 anew); *Terry v. June* 2003 U.S. Dist. LEXIS 12873, at *7 (W.D. Va. July 21, 2003) ("Courts having addressed this issue unanimously suggest that an order of reappointment will renew the ten-day filing deadline mandated by section 754."). Moreover, the clock restarts regardless of whether the order reappointing the receiver is a temporary or permanent appointment order. *Cf. Terry*, 2003 U.S. Dist. LEXIS 16080, at *7 ("Section 754 does not, by its terms, distinguish between initial orders of appointment and later reappointment of the receiver."). Accordingly, the July 11, 2019 Consolidated Receivership Order restarted the clock for purposes of § 754 and the Receiver complied with § 754's ten-day deadline by filing the Complaint in the Eastern District of Texas on July 18, 2019. (Doc. 241, ¶ 7). Because Johnston's argument for insufficiency of process fails, his argument that the Court lacks personal jurisdiction premised solely on the insufficiency of process also fails, and the Motion must be denied.

III. The Defenses of Failure to State a Claim and Failure to Join an Indispensable Party are Legally Insufficient.

Despite not raising the arguments in his initial Motion to Quash, Johnston now argues that the Complaint must be dismissed for failure to state a claim and failure to join an indispensable party pursuant to Rule 19. Apart from being procedurally barred from being raised in a successive pre-answer motion as discussed above, Johnston's arguments are contrary to settled law and insufficient to entitle him to relief.

a. Failure to State a Claim

Johnston's argument that the Complaint should be dismissed for failure to state a claim upon which relief can be granted is not entirely clear; he raises general concerns about federal question jurisdiction and the insufficiency of the allegations in the Complaint without fully developing a coherent argument. To the extent that Johnston is challenging this Court's federal

question jurisdiction, "[i]t is established law that a federal court which appoints a receiver has ancillary jurisdiction over all suits brought by the receiver in furtherance of the receivership." *Quilling v. Cristell*, 2006 U.S. Dist. LEXIS 8480, at *11 (W.D.N.C. Feb. 9, 2006) (quoting *City of Detroit v. Michigan*, 538 F. Supp. 1169, 1172 (E.D. Mich. 1982)); *see also Pope v. Louisville, N.A. v. C.R. Co.*, 173 U.S. 573, 577 (1899) ("When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a court of the United States is concerned.").

Because such jurisdiction is ancillary, it is not dependent upon a showing of federal question or diversity factors which would normally determine jurisdiction. *See id.* (citing *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 825 (6th Cir. 1981). In short, this Court has jurisdiction because this proceeding is ancillary to the CFTC Action, the proceeding in which the Receiver was appointed. *See Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008) ("Although the Receiver only filed suit under a California statute, we have subject matter jurisdiction because the proceeding is ancillary to the SEC enforcement action."). Accordingly, the Court has subject matter jurisdiction over this proceeding.

Next, for the remainder of his argument, Johnston merely recites the language of Document 383, which is an order denying the Receiver's motions for default judgment against several defendants not including Johnston (the ***"Order"***). (Doc. 383). In the Order, the Court found that the Receiver's motions for default judgment lacked sufficient detail to entitle him to relief, and it thus denied the motions without prejudice. (Doc. 383).[2] The Order does *not* make

[2] For purposes of efficiency and judicial economy, the Receiver is finalizing a detailed Omnibus Motion for Default Judgment to include all defaulted defendants.

any finding about the sufficiency of the allegations in the Complaint. Indeed, the Order's citation to Local Rule 3.01—a Rule which applies only to "a motion or other application for an order," and not pleadings—shows that the Court was concerned only with the sufficiency of the substance of the motions for default judgment, and not the allegations in the Complaint. Accordingly, Johnston's reliance on the Order in support of his argument that the Complaint fails to state a claim upon which relief can be granted is misplaced, and Johnston is not entitled to relief on that basis.

b. Indispensable Party

Finally, Johnston argues that the Complaint must be dismissed because the Receiver failed to join indispensable parties—Michael J. DaCorta, Joseph S. Anile, II, Raymond Montie, III, Francisco "Frank" L. Duran, and John J. Haas (collectively, the ***"Insiders"***)—pursuant to Rule 19. In other words, Johnston argues that the debtors (or transferors) are necessary parties to this fraudulent transfer action. However, as explained below, "the [d]ebtor is not an indispensable party to a fraudulent transfer suit." *Jensen v. Captiva Limousine Serv. (In re Rajkovic)*, 289 B.R. 197, 199 (Bankr. M.D. Fla. 2002).

A party is necessary if its joinder is required in order to (1) "render complete relief among those already parties to the litigation," (2) "prevent impairment of the absent party's ability to protect its interest in the subject matter of the litigation," or (3) "protect any of the existing parties to the litigation from a substantial risk of incurring multiple or inconsistent obligations." *WMH Tool Group H.K. Ltd. v. Ill. Indust. Tool, Inc.*, 2006 U.S. Dist. LEXIS 38542, at *9 (N.D. Ill. May 24, 2006). "A fraudulent transfer claim is an action to set aside, or void, a transfer of assets." *Id.* Because the challenged transfer will be voided if the claim is successful, the outcome necessarily impacts the transferee, and the transferee is a necessary party. *Id.* at *9-*10. However, "where

a transferor has retained no interest in the property at issue, the transferor is not an indispensable party." *Still v. Hopkins (In re Hopkins)*, 494 B.R. 306, 314 (E.D. Tenn. Bankr. 2013).

Here, the Insiders do not retain any interest in the property that the Receiver seeks to recover, and thus they are not implicated by Rule 19. *See id.* at 315; *see also In re Silverman*, 603 B.R. 498, 502 (Bankr. D.N.M. 2019) ("Case law makes clear that the transferor is not a necessary party to an avoidance action brought against the transferee if the transferor did not retain any interest in the transferred property."). Indeed, Florida's Uniform Fraudulent Transfer Act (***"FUFTA"***) allows a claim to be brought by the creditor directly against the transferee, even though the transferee was not the party that made the fraudulent transfer. *See* § 726.109(2)(a) ("[J]udgment may be entered against . . . [t]he first transferee of the asset or the person for whose benefit the transfer was made."). Accordingly, because the Insiders—the transferors—retain no interest in the property the Receiver seeks to recover from the Defendants in this action, the transferors will not be prejudiced by failing to be joined in this action and the action is not subject to dismissal pursuant to Rule 19.

IV. Motion for Entry of Clerk's Default.

Johnston's Motion to Quash was denied by this Court on August 17, 2020. See August 17, 2020 Oral Order Denying Motion to Quash at Doc. 344. The August 17, 2020 Order directed Johnson to file an Answer to the Complaint by September 16, 2020. Instead, Johnston filed this Motion. However, as previously explained in Section I above, this Motion is procedurally barred by Rule 12(g). *See, e.g.*, *Chen*, 2011 U.S. Dist. LEXIS 28835, at *2 (striking successive motion to dismiss as improper under Rule 12(g)). Accordingly, because this Motion is not permitted under Rule 12, it cannot serve to toll the time for Johnston to file his Answer. As of the date of this Response, Johnston has not filed an Answer, and the Court's September 16, 2020, deadline

has long passed.

WHEREFORE, Plaintiff respectfully requests that this Court deny the Motion, direct the Clerk to enter a Clerk's Default against Johnston, and grant such other relief as this Court deems just and proper.

Dated: September 25, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system and will send copies by U.S mail and email as indicated to the following:

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