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Re: Cordoba Corporation
Case No. 96-62330
Adv. Pro. No. 96-70132A
Cordoba Corporation, Bennett Funding Group, Inc. and Bennett Management and Development Corporation v. Edmund T. Bennett and Kathleen M. Bennett

LETTER DECISION

This Court held a trial in the above referenced adversary proceeding on June 22, 1998, at 9:00 A.M. at the U.S. Courthouse, 10 Broad Street, Utica, New York and the Defendants, Edmund T. Bennett and Kathleen M. Bennett, failed to appear or proceed to trial.

At the trial, Plaintiffs' counsel, Simpson, Thacher & Bartlett by William T. Russell Jr., of counsel, offered, and the Court received, proof of actual expenditures by Plaintiffs Bennett Funding Group, Inc. ("BFG") and Bennett Management and Development Corporation Inc. ("BMDC") of at least $456,500 in connection with the purchase, operation and maintenance of a yacht known as the "Lady Kathleen".

At trial, Plaintiffs asked the Court to find that the total expenditures in connection with the Lady Kathleen were actually $1,300,000 based upon an adverse inference to be drawn from the refusal of Defendant Edmund T. Bennett to answer certain questions at a pre-trial deposition conducted on March 24, 1998, in Syracuse, New York. Defendant Edmund T. Bennett refused to answer the relevant questions having invoked his right against self incrimination guaranteed by the Fifth Amendment of the U.S. Constitution.

Plaintiffs contend that the difference between the $456,500 in documented expenditures and the $1.3 million sought can be adversely inferred by the Court from Defendant Edmund Bennett's assertion of his Fifth Amendment rights as indicated. Plaintiffs maintain that the invocation of the self-incrimination privilege by Edmund Bennett leads to the drawing of the adverse inference that the entire purchase price of the yacht was funded through improper transfers of funds from the Plaintiffs, BFG and BMDC.

The question of whether adverse inferences can be drawn from a party's assertion of its rights against self-incrimination in civil actions traces its roots to the United States Supreme Court's decision in *Baxter v. Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). In *Baxter*, Palmigiano, a prison inmate, was called before the prison's disciplinary board for a hearing on charges that he had attempted to start a riot. *Id*. at 312. At the time of his hearing, Palmigiano was advised that he had a right to remain silent during the hearing, but that if he did so his silence would be held against him. *Id.* On the basis of the hearing and his refusal to testify, Palmigiano was subsequently disciplined by the board. *Id.* at 313. In his unsuccessful appeal to the district court, Palmigiano maintained that the disciplinary hearing violated the Due Process Clause of the Fourteenth Amendment, as well as his Fifth Amendment rights against self-incrimination. *Id.* at 314. The case eventually reached the Supreme Court, which concluded that while a party's assertion of the Self-Incrimination Clause of the Fifth Amendment cannot be construed adversely against the party in a criminal action, the use of this clause "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 320.

A year later the Supreme Court clarified its holding in *Baxter* by noting,

> *Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted.

Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5, 97 S.Ct. 2132, 2137 n.5, 53 L.Ed2d 1 (1977). It is clear that "an adverse inference may not be the sole basis for imposing liability upon a defendant in a civil proceeding." *United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 44 F.3d 1082, 1090 (2d Cir. 1994); *see also In re Lollipop, Inc.*, 205 B.R. 682, 689 (Bankr. E.D.N.Y. 1997) (citing *In re Einhorn*, 29 B.R. 966, 970 (Bankr. E.D.N.Y. 1983) (requiring "substantial evidence in addition to the party's unsupported refusal to testify.")); *In re Curtis*, 177 B.R. 717, 720 (Bankr. S.D. Ala. 1995) (finding that the "invocation of the Fifth Amendment privilege standing alone is not sufficient evidence to constitute probative proof of plaintiff's case."); *In re Caucus Distributors, Inc.*, 106 B.R. 890, 891 (Bankr. E.D. Va. 1989) (indicating that it had no authority "to infer beyond what the independent evidence establishes."). Furthermore, this Court previously noted that the drawing of an adverse inference against a party in a civil proceeding should be "tempered" by the balancing test of Rule 403 of the Federal Rules of Evidence ("Fed.R.Evid."). *See In re Endres*, 103 B.R. 49, 53 (Bankr. N.D.N.Y. 1989).[1]

The Court concludes that while the Plaintiffs have established their right to a judgment in

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[1] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403.

the amount of $456,500, based on evidence of the advancement of funds by the Plaintiffs to acquire the Lady Kathleen and to operate and maintain it, there has been no additional proof presented to support a judgment of $1,300,000. The inferences to be drawn from Edmund T. Bennett's invocation of his Fifth Amendment privilege when questioned at a pre-trial deposition concerning the value of the Lady Kathleen as listed in his personal financial statement, in and of itself is insufficient to support a finding in favor of the Plaintiffs in the amount of $1,300,000.

Plaintiffs may have an order and judgment accordingly.

Dated at Utica, New York

this 3rd day of August 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

cc: Carl Guy, Esq.