

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

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CLERK

JAMES HOPSON, as RECEIVER)
for NEWS-JOURNAL CORPORATION,)
a Florida corporation, and COX)
ENTERPRISES, INC.,)
a Delaware corporation,)

Plaintiffs,)

v.)

COBB & COLE, P.A., a Florida)
corporation,)

Defendant.)
/

CIVIL ACTION
FILE NO. 6:10-cv-284-22 DAB

ANCILLARY &
SUPPLEMENTARY
TO CIVIL
ACTION FILE NO.
6:04-cv-698-Orl-28DAB

ANCILLARY AND SUPPLEMENTARY COMPLAINT

Plaintiffs James Hopson, the Court-appointed Receiver of News-Journal Corporation, by and through his undersigned counsel and pursuant to the Court's February 4, 2010 Order (Doc. No. 597) in Cox Enterprises, Inc. v. News-Journal Corp., et al., Civ. Action No. 6:04-cv-698-Orl-28DAB, hereby files this ancillary and supplementary complaint against Defendant Cobb & Cole, P.A., and Cox Enterprises,

Inc., judgment creditor of News-Journal Corporation, provisionally joins in the Complaint¹, and allege as follows:

PARTIES

1. Plaintiff James Hopson is the Court-appointed Receiver of News-Journal Corporation (“NJC”), a Florida corporation with its principal place of business at 901 Sixth Street, Daytona Beach, Florida, 32117. NJC is a closely-held corporation that owns and operates a daily newspaper, called the Daytona Beach News-Journal, which primarily serves the Daytona, Florida area.

2. Plaintiff Cox Enterprises, Inc. (“Cox”) is a Delaware corporation with its principal place of business in Atlanta, Fulton County, Georgia. Cox is a former 47.5% minority shareholder of NJC. Cox currently is a judgment creditor of NJC holding a judgment against NJC in the amount of \$129.2 million, plus interest.

3. Defendant Cobb & Cole, P.A. (“Cobb Cole”), is a Florida corporation with its principal place of business at 150 Palmetto Avenue, Daytona Beach, Florida, 32114. Cobb Cole is a law firm which served as counsel for NJC generally, including in the related case of Cox Enterprises, Inc. v. News-Journal Corp., et al., Civ. Action No. 6:04-CV-698-ORL-28-DAB (M.D. Fla.) (the “Underlying Case”).

¹ This Court’s Order (Doc. No. 597) limits the parties to this ancillary and supplemental claim to “the Receiver and Cobb Cole.” (Id. at 4.) In order that it may pursue a claim for fraudulent transfer as a judgment creditor of NJC, Cox on February 10, 2010 filed an Unopposed Motion to Clarify Order so as to add Cox as a party (Doc. No. 608), which is currently pending before the Court.

JURISDICTION

4. Jurisdiction is proper under 28 U.S.C. § 754, § 1367 as well as the doctrines of ancillary, supplementary and pendant jurisdiction.

VENUE

5. Venue is proper under 28 U.S.C. § 1391 because the Defendant resides in Volusia County, Florida, and a substantial part of the events or omissions giving rise to this action took place in Volusia County, Florida.

SERVICE

6. Pursuant to the Court's Order of February 4, 2010 in the Underlying Case (Doc. No. 597), Cobb Cole may be served by service upon its counsel, David King of King, Blackwell, Downs, & Zehnder P.A., 25 East Pine Street, Orlando, Florida, 32801.

FACTS AND ALLEGATIONS

7. On May 11, 2004, Cox initiated a shareholder action against NJC, its officers, directors and majority shareholder for alleged waste and misuse of corporate assets in the Underlying Case. (Doc. No. 1.)

8. From the outset Cobb Cole represented NJC, as well as its Officers and Directors, Tippen Davidson, Marc Davidson, Julia Davidson Truilo, Robert Truilo,

David Kendall, Jonathan Kaney and Georgia Kaney, and its majority shareholder PMV, Inc. (Doc. No. 21.) Separate counsel for David Kendall and Georgia Kaney did not appear in the case until August 2008. (Doc. No. 395.) Separate counsel for PMV, Marc Davidson, Julia Davidson Truilo and Robert Truilo did not appear in the case until September 2008. (Doc. Nos. 422 & 427.)

9. On July 29, 2004, NJC filed an irrevocable notice of election to purchase Cox's shares for their fair value as of May 10, 2004 pursuant to Fla. Stat. § 607.1436. (Doc. No. 51.) Pursuant to the statute, the notice of election otherwise stayed Cox's pursuit of its claims.

10. On June 30, 2006, following a two-week trial, which took place in December 2005, the Court determined the fair value of Cox's stock as of May 10, 2004 to be \$129.2 million. (Doc. No. 251.)

11. On July 20, 2006, and thereafter, Cobb Cole represented to the Court on behalf of NJC that due to a number of factors, including a two-year downward trend in newspaper valuations, it would not be possible for NJC to pay this amount fully and promptly and that requiring NJC to do so would result in "the ultimate hardship, the cessation of its business." (Doc. No. 252 at 11.)

12. On September 27, 2006, the Court entered an Order deferring payment pending appeal, permitting payment in installments pursuant to Fla. Stat. § 607.1436, and imposing certain affirmative and negative payments on NJC. (Doc. No. 262.)

13. On October 10, 2006, and thereafter, Cobb Cole represented to the Court on behalf of NJC that “NJC cannot remain in business and make the required installment payments.” (Doc. No. 266 at 15.)

14. After entry of the judgment, and throughout the course of an appeal, Cobb Cole continued to represent NJC and its directors, officers and majority shareholder in the Underlying Case in numerous post judgment matters before the Court, including multiple proceedings relating to failures to abide by the terms and conditions of the Court’s orders and judgment.

15. On December 21, 2007, a unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed the judgment in all respects. Cox Enterprises, Inc. v. News-Journal Corp., 510 F.3d 1350 (11th Cir. 2007). A petition for rehearing and for rehearing en banc filed by NJC was denied on April 1, 2008 and on April 9, 2008 the mandate was issued and received by this Court. (Doc. No. 319.)

16. On April 25, 2008, James Hopson was appointed Chief Executive Manager of NJC pursuant to a Joint Sale Agreement between Cox and PMV. (Doc. No. 495, Exhibit B.)

17. Shortly thereafter, Hopson “discovered” that on November 2 and 4, 2004 (less than a week prior to the mediation in the Underlying Case), NJC had purportedly entered into grossly excessive compensation agreements with two of its Officer/Directors (Georgia Kaney and David Kendall - so called “Executive Severance Agreements”) and at least twenty-seven of its employees (so-called “Key-Manager Agreements”) (three of the managerial agreements were entered into two years later). (Doc. No. 474.)

18. At the behest of Tippen Davidson, both the Executive Severance Agreements and the Key-Manager Agreements were drafted by Cobb Cole which represented NJC, Kendall and Kaney and whose senior partner, Jonathan Kaney, was NJC’s general counsel and husband of Georgia Kaney. (Doc. No. 474 at 7.)

19. On November 4, 2004, Tippen Davidson had NJC execute with its Publisher/CEO, Director and Officer, Defendant Georgia Kaney, and its CFO, Director and Officer, Defendant David Kendall, so-called Executive Severance Agreements. Had they been valid, the agreements would have obligated NJC, upon the occurrence of certain contingencies, to guarantee Kaney and Kendall severance payments at six times their annual base pay. The payments were also “grossed up” for tax purposes, allowing for a net result of payments to Kaney and Kendall of approximately thirteen times their annual base pay. (Doc. No. 474.) The agreements also guaranteed Kaney and Kendall, regardless of who controlled the majority of NJC

stock, lifetime employment at the highest level of the company at levels of compensation exceeding \$200,000 per year. Indeed the agreements provided that Kaney would automatically become CEO and Kendall would become the second ranking executive upon Tippen Davidson's resignation or death. Payouts under the Executive Severance Agreements would have cost NJC in excess of \$5 million.

20. On November 3, 2004, Kaney and Kendall and an attorney from Cobb Cole conducted a group meeting of over thirty NJC employees at a local yacht club. These so-called "key managers" included, e.g., an assistant packaging manager and another employee who had been with the company barely over a year. At the meeting, each employee, only after signing a strict confidentiality agreement, was directed to sign – but not given a copy of – one of the Key-Manager Agreements.

21. By their terms, the Key-Manager Agreements, if valid, would provide a benefit to the employee – a windfall "severance" payment in the amount of 2.99 times the employee's annual base salary – if, and only if, there was a "change in the ownership of a majority of the voting securities of the Company, such that Herbert M. Davidson, Jr., the Davidson family, or any trust or similar entity created by the family's estate plan, directly or indirectly, no longer has voting control of the Company." (Doc. No. 333-2 at 2.) Payouts under these agreements would have cost NJC in excess of \$8 million.

22. Tippen Davidson did not have the authority under the corporation's by-laws to enter into the agreements, nor were they approved by the NJC board of directors or shareholders.

23. Moreover, the agreements were "closely held secrets" and neither Tippen Davidson nor Kendall or Kaney or anyone at Cobb Cole disclosed the existence of these agreements to Cox, NJC's then 47.5% minority shareholder, or to three members of the seven member NJC Board of Directors – Marc Davidson, Julia Davidson Truilo, and Robert Truilo. (Doc. No. 474.)

24. These agreements were entered into without any element of good faith or business judgment and were fraudulent and done solely to benefit Tippen Davidson, Georgia Kaney and David Kendall.

25. In addition to being fraudulent, these agreements constituted a waste of corporate assets and were contrary to public policy as they were entered into for no consideration and provided an excessive amount of compensation, compensating the employees beyond what their services would normally command.

26. On May 23, 2008, Cox filed a motion to set aside the Executive Severance Agreements to Kaney and Kendall and the Key-Manager Agreements. (Doc. No. 333.) Cox was later granted leave to withdraw without prejudice that portion of the motion seeking to set aside the Key-Manager Agreements (Doc. No. 438),

which leave was sought by Cox because Cobb Cole acknowledged in its response to the motion to set aside that the Key-Manager Agreements would not become effective (despite the language contained in the Agreements) if the employee voluntarily terminated (Doc. No. 352 at 12), and because the “key manager” Intervenors acknowledged that the agreements would not be effective in the event of an asset sale (Doc. Nos. 378 at 11; 393 at 11). (Doc. No. 412.)

27. After Cox filed its motion to set aside the agreements, Cobb Cole, purporting to act on behalf of NJC, filed an opposition, supported by an affidavit of Kendall, “argued that the decision of the NJC Board of Directors to enter into the [] agreements was protected by the business judgment rule.” (Doc. No. 474 at 7-8.)

28. Thereafter, in response to a request for the “minutes of each Board of Directors meeting . . . at which the subject of severance or golden parachute agreements was discussed or voted on,” Cobb Cole, on behalf of NJC, produced a one page handwritten document authored by Kendall titled “BOG Mtg,” dated October 22, 2004, containing the names of the other members of the NJC Board of Directors which stated:

NJC BOD discussed Tin and Golden Parachute plans.

BOD approved both types of parachute.

This Court found that these notes corroborated Cobb Cole's response in opposition to the motion to set aside the agreements (Doc. No. 352), "giving the district impression that there was a meeting of the NJC Board of Directors and that the board had approved the golden parachute agreements in question." (Doc. No. 474 at 8-9.)

29. However, during the deposition of Director Robert Truilo, who was represented by Cobb Cole at the time, it became apparent that these notes were "inaccurate and misleading" because the NJC Board did not even consider, much less approve, these agreements. (Doc. No. 474.) Only after Robert Truilo's testimony did Kendall first acknowledge that the Board did not, in fact, approve the agreements.

30. Even after it was apparent that there was no director or shareholder approval, that Tippen Davidson had no authority under the by-laws of the corporation to enter into these agreements, and that the amounts of the parachutes were wildly out of proportion to severance packages granted by other comparable companies, Cobb Cole still caused NJC to refute the invalidity of the agreements and required the Court, Cox, and NJC to participate in a two-day evidentiary hearing to void the Executive Severance Agreements. Following that hearing, this Court held the argument made by counsel for Kaney and Kendall, which had previously first been asserted by Cobb Cole (Doc. No. 352), was "misleading because there never was an NJC Board of Directors meeting during which the golden parachute agreements were discussed." (Doc. No. 474 at 9.)

31. Cobb Cole knew from the outset that the agreements had not received board or shareholder approval, as required by the basic principles of corporate law and by the NJC by-laws, and that accordingly, they were invalid from their inception.

32. Likewise, Cobb Cole knew that the actions of Kendall and Kaney, if successful, would cause substantial injury to NJC (either directly or in the sale of the company), but nevertheless proceeded to promote their interest, rather than the interest of NJC and its stockholders.

33. Once Cox learned of the agreements and filed its motion to set aside on May 23, 2008, Cobb Cole had an irreconcilable conflict between its representation of NJC and its representation of Kendall and Kaney in support of their agreements. While Kendall and Kaney eventually employed their own individual counsel, Cobb Cole continued to work on their behalf - employing expert witnesses, preparing memoranda of law, attending depositions, appearing at hearings and arguing in support of the validity of the agreements. Indeed this Court found the conclusions offered by the expert witness employed by Cobb Cole to support Kendall and Kaney's position to be "unreliable," and that his testimony supported Cox's position that "the compensation provided for in the golden parachute agreements awarded to Kendall and Kaney does not bear a reasonable relationship to the services rendered by these two executives." (Doc. No. 474 at 24.)

34. Following the hearing on Cox's motion, the Court entered an Order holding the Executive Severance Agreements void on the grounds that Tippen Davidson lacked actual or apparent authority to enter into them, the shareholders or disinterested members of the NJC Board did not approve them, the business judgment rule had no application, and because there "was no reasonable relationship between the services rendered by Kendall and Kaney and the benefits received by NJC," the agreements constitute "corporate waste" which could only have been ratified "through a unanimous stockholder vote." (Doc. No. 474 at 25.)

35. During this same time period, Cobb Cole was representing NJC in two state-court actions brought by certain former employees who executed "Key Manager" agreements.

36. Cobb Cole also caused NJC to support the validity of the severance agreements in those actions and was eventually replaced as counsel by the Receiver.

37. On March 18, 2009, Cox asked the Court to appoint Hopson as Receiver of NJC (Doc. No. 495), a motion granted by the Court on April 17, 2009. (Doc. No. 507.) Hopson was directed to oversee the general business and operations of NJC, and was granted express power to "marshal, preserve, and safeguard any and all of the assets and properties of NJC." (Doc. No. 507 at 2.)

38. Thereafter, Hopson requested that Cobb Cole withdraw as counsel for NJC in the Underlying Case. The Court thereafter granted Cobb Cole's motion to withdraw. (Doc. No. 543.) The Receiver also removed Cobb Cole from representation of NJC in other matters.

COUNT I

Breach of Fiduciary Duty (Receiver Claim)

39. The allegations of paragraphs 1 through 38 above are repeated and incorporated herein as if set out in full.

40. As the law firm representing NJC generally and in the Underlying Case, Cobb Cole assumed and is charged with fiduciary duties towards NJC, its client. As NJC's fiduciary, Cobb Cole is required, among other things, to act in the best interests of its client, not utilize its control to its own personal advantage or the advantage of others, and to perform its duties in good faith and with such care as an ordinarily prudent person in a like position would exercise under similar circumstances.

41. Cobb Cole deliberately, willfully, intentionally and maliciously, without justification, privilege, or authority, improperly and wrongfully breached and conspired to breach these fiduciary duties by, among other things, the following:

- a. Preparing and facilitating the execution of severance agreements which had no benefit to NJC, but benefit to individual members of NJC's Board of Directors, Kendall and Kaney.
- b. Hiding the severance agreements from NJC's 47.5% minority shareholder and members of the Board of Directors.
- c. Effectively representing Kendall and Kaney instead of NJC and advocating on their behalf in favor of agreements which, if upheld, would have cost NJC in excess of \$13 million.
- d. Failing to allege the invalidity of the severance agreements in the state court actions brought by certain former employees.
- e. Acting directly contrary to and in conflict with the interest of their client NJC and its shareholders.
- f. Failing to act in the best interest of the corporate client.

42. As a result of Cobb Cole's actions, NJC has suffered damages.

WHEREFORE, judgment should be entered for Hopson, as Receiver for NJC against Cobb Cole on its breach of fiduciary duty claim and Hopson, as Receiver for NJC, should be awarded damages in an amount to be proven for all loss caused by Cobb

Cole's breach. Hopson, as Receiver for NJC, should also be awarded interest, costs, expenses and such further and additional relief as the Court deems just and proper.

COUNT II

Fraudulent Transfer (Cox Claim)

43. The allegations of paragraphs 1 through 38 above are repeated and incorporated herein as if set out in full.

44. Cobb Cole received numerous payments from NJC for purported legal services on behalf of NJC after judgment in the Underlying Case became final when such services were in fact for the benefit of Officer/Director Kaney and Kendall and adverse to the best interests of NJC.

45. The payments were fraudulent within the purview of the Florida Uniform Fraudulent Transfer Act, Chapter 726, Florida Statutes.

46. Specifically, Cobb Cole charged NJC legal fees and expenses for work for which NJC did not receive reasonably equivalent value, in connection the defense of the Executive Severance Agreements and Key-Manager Agreements in both the Underlying Case, the state court actions and briefly pursuing an appeal of the Court's Order of December 5, 2008. (Doc. No. 474.)

47. In the Underlying Case this Court specifically held:

NJC should not have paid any attorneys' fees or expenses, including expert witness fees, to assist intervenors Kendall and Kaney in their defense of the motion to set aside the severance agreements.

August 11, 2009 Order (Doc. No. 535 at 2).

48. These expenditures were made with the intent to hinder, delay, or defraud NJC's creditors, including Cox.

49. At the time of the expenditures, NJC was insolvent as that term is defined in the Florida Uniform Fraudulent Transfer Act, Chapter 726, Florida Statutes.

50. Cobb Cole knew or had reasonable cause to believe that NJC was insolvent because Cox's judgment exceeded the assets of NJC.

51. Cobb Cole should be ordered to disgorge to NJC all fees and expenses received in connection with the defense of the severance agreements.

WHEREFORE, judgment should be entered against Cobb Cole on the fraudulent transfer claim and Cobb Cole directed to disgorge to NJC all fees and expenses charged NJC in connection with the defense of the severance agreements, and for which NJC did not receive reasonably equivalent value, in an amount to be proven to the Court, plus interest. Cox should also be awarded its costs, expenses and such other and further relief the Court deems just and proper.

Respectfully submitted,

BEDELL, DITTMAR, DeVAULT,
PILLANS & COXE, P.A.

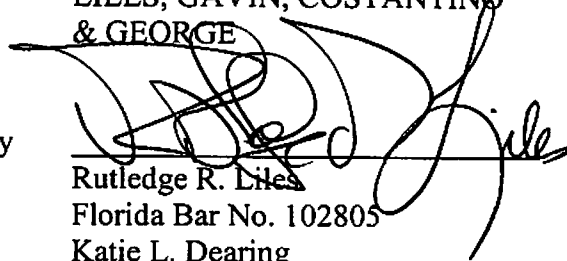
By



John A. DeVault, III
Florida Bar No. 103979
Courtney K. Grimm
Florida Bar No. 953740
The Bedell Building
101 E. Adams Street
Jacksonville, FL 32202
Telephone: 904-353-0211
Facsimile: 904-353-9307

LILES, GAVIN, COSTANTINO
& GEORGE

By



Rutledge R. Liles
Florida Bar No. 102805
Katie L. Dearing
Florida Bar No. 184632
225 Water Street
Suite 1500
Jacksonville, FL 32202
Telephone: 904-634-1100
Facsimile: 904-634-1234

-and-

Counsel for Receiver
James W. Hopson and the
News-Journal Corporation

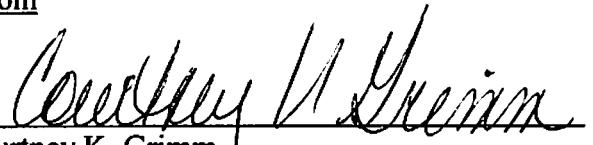
DOW LOHNES PPLC
Peter C. Canfield
Lesli N. Gaither
6 Concourse Parkway
Suite 1800
Atlanta, Georgia 30328-6117
Telephone: 770-901-8800
Facsimile: 770-901-8874

Counsel for Cox Enterprises, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of February, 2010, I filed the foregoing with the Clerk of the Court and I served a copy of the foregoing via U.S. Mail to:

David B. King
King, Blackwell & Downs, P.A.
Post Office Box 1631
Orlando, Florida 32802
dking@kdbzlaw.com



Courtney K. Grimm
Bedell, Dittmar, DeVault, Pillans & Coxe
Professional Association
The Bedell Building
101 East Adams Street
Jacksonville, FL 32202