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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In re ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, Debtor.	Civil Action No. 3:95CV114 (AVC)
RANDALL L. GIBBS, Appellant, vs. MARTIN W. HOFFMAN, TRUSTEE, Appellee.	March 10, 1995

BRIEF OF APPELLEE,
MARTIN W. HOFFMAN, TRUSTEE

Federal Communications Commission
Docket No. ______ Exhibit No. 29
Presented Shurberg Broadcasting
Disposition { Identified X
Received X
Rejected ______
Reporter George Holmes
Date 9-23-99

John B. Nolan, ct05583
Steven M. Greenspan, ct00380
Day, Berry & Howard
CityPlace I
Hartford, CT 06103-3499
(203) 275-0100

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INTRODUCTION

Martin W. Hoffman, Chapter 7 Trustee (the "Trustee") of the estate of Astroline Communications Company Limited Partnership ("ACCLP" or the "Debtor"), respectfully submits this brief in opposition to the interlocutory appeal by defendant Randall L. Gibbs ("Gibbs") from the United States Bankruptcy Court's denial his motion for summary judgment as to Count I of the Trustee's Complaint. Because the overwhelming evidence in the record demonstrates that Astroline Company, a putative limited partner of the Debtor, held complete control over the Debtor's business and finances, a genuine issue of material fact exists as to whether Astroline Company and its general partners, including Gibbs, acted in the same way as a general partner and, therefore, are liable to the Trustee under Section 723 of the Bankruptcy Code, 11 U.S.C. §§ 1001 et seq. Accordingly, the Bankruptcy Court's decision denying summary judgment must be affirmed, and the Trustee must be allowed to proceed to trial in order to permit the finder of fact to determine whether Gibbs and the other defendants are liable as general partners for the substantial deficiency of assets in the estate available to pay creditors.

BASIS OF APPELLATE JURISDICTION

This is an interlocutory appeal from the United States Bankruptcy Court's denial of Gibbs' motion for summary judgment as to Count I of the Trustee's Complaint. It is brought pursuant to this Court's January 11, 1995 Order granting Gibbs' motion for leave to file an interlocutory appeal. Pursuant to Local Rule 9(e), the Trustee moved for reconsideration of the Court's January 11, 1995 Order. To date, no ruling has been made by this Court on the Trustee's motion for reconsideration. Subject to the Trustee's pending motion for reconsideration, this Court has jurisdiction pursuant to 28 U.S.C. § 158(a), which grants district courts jurisdiction over appeals from interlocutory orders and decrees of bankruptcy judges.

STANDARD OF APPELLATE REVIEW

Rule 8013 of the Federal Rules of Bankruptcy Procedure establishes that the Bankruptcy Court's findings of fact must be reviewed under the "clearly erroneous" standard. In re Ionosphere Clubs, Inc., 922 F.2d 984, 988-89 (2d Cir. 1990) (citing In re Manville Forest Prods. Corp., 896 F.2d 1384, 1388 (2d Cir. 1988)). The Bankruptcy Court's conclusions of law, however, are subject to de novo review. Ionosphere Clubs, 922 F.2d at 988; Manville, 896 F.2d at 1388; In re Pickus, 26 B.R. 171, 173 (D. Conn. 1982).

COUNTERSTATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the Bankruptcy Court correctly conclude that the Trustee has standing, pursuant to Sections 723 and 544 of the Bankruptcy Code, to assert generalized claims of creditors against Astroline Company, a putative limited partner of the Debtor, and its general partners, who held complete control over the Debtor's business and finances and acted as general partners of the Debtor?

2. Did the Bankruptcy Court correctly conclude that a genuine issue of material fact exists as to the degree of control exercised by Astroline Company, through Gibbs and its other general partners, thus precluding summary judgment on Gibbs' liability under Count I of the Trustee's Complaint?

STATEMENT OF THE CASE

The Trustee commenced this adversary proceeding against various parties, including Gibbs, seeking to recover the substantial deficiency in the assets of the Debtor necessary to pay the claims of its creditors. The Amended Complaint dated February 15, 1994, is cast in four counts, each asserting a separate basis for the liability of certain of the defendants to satisfy the deficiency. In Count I, the Trustee claims that Astroline Company, its partners and its successor Astroline Company, Inc., are liable under Massachusetts law because of the degree of control exercised, through its general partners, over the Debtor and its business. Based on the overwhelming evidence of control exercised by the defendants in the record and the factual nature of such claims, the Trustee should be allowed to pursue these claims at trial.

STATEMENT OF FACTS

I. Formation of Astroline Communications Company Limited Partnership

Astroline Communications Company Limited Partnership ("ACCLP" or the "Debtor"), was created on May 29, 1984, in order to "acquire, own and operate" a television station known as WHCT-TV, Channel 18 in Hartford, Connecticut. (Defendants' Exhibit A at 6, filed with Defendants' Motion for Summary Judgment). At the time, WHCT-TV was owned by Faith Center, Inc. ("FCI"), but FCI's license to operate the station had been scheduled for review at a license revocation hearing before the Federal Communications Commission ("FCC"). (Exhibit 1 at 100; Exhibit 2 at ¶ 8, filed with the Trustee's Memorandum of Law in Opposition to Motion for

Summary Judgment). In September, 1983, FCI had agreed to sell the station to Interstate Media Corporation ("IMC") pursuant to the minority distress sale policy of the FCC which allowed an owner of a television station whose license was subject to revocation to sell the license at a discount from the fair market value to a qualified minority applicant. Metro Broadcasting, Inc. v. F.C.C., 479 U.S. 547 (1990). (Exhibit 2 at ¶ 8). The sale to IMC had been approved by the FCC, provided the transaction was consummated on or before May 16, 1984. (Exhibit 3). In April, 1994, IMC became concerned that it would be unable timely to complete the transaction because it lacked the necessary financing. (Exhibit 2 at ¶ 8).

IMC then contacted Thomas A. Hart, Jr. ("Hart"), a Washington, D.C. attorney, (and also a defendant in this action) to seek assistance in raising financing. (Exhibit 1 at 94; Exhibit 2 at ¶ 8). At the time, Hart represented Astroline Company, a Massachusetts general partnership whose partners were Gibbs, Sostek, Boling, Richard H. Gibbs and Joel A. Gibbs. (Exhibit 2 at ¶ 9). On April 27, 1984, Hart provided material regarding WHCT-TV to Sostek and reminded Sostek that time was of the essence "because the license revocation hearing was due to resume on May 16, 1984. (Exhibit 3). From April 27, 1984 through mid-May, Astroline Company, through Sostek and Boling, negotiated with IMC regarding the possible financing of IMC's acquisition of WHCT-TV. (Exhibit 2). Astroline Company and IMC were unable to reach an agreement for financing. (Exhibit 6 at 100-103). On or about May 14, 1984, Hart, for the first time, advised FCI that Astroline Company was interested in negotiating directly with FCI to purchase WHCT-TV. (Exhibit 5).

To demonstrate its interest, Astroline Company requested that First National Bank of Boston, to send a letter to FCI's counsel stating that Astroline Company had assets sufficient for a $500,000 down payment. (Exhibit 7). FCI and Astroline Company were under extreme pressure to execute an agreement before the FCI license revocation hearing resumed because a minority distress sale could not have been completed after the revocation hearing commenced. (Exhibit 6 at 104-05). Negotiations between counsel for Astroline Company and FCI continued through May 29, 1984, when a Purchase and Sale Agreement was executed. (Exhibit 8). The agreement contemplated the sale of the license under the FCC minority distress sale policy by FCI to an entity known as ACCLP, for the discounted price of $3,100,000, of which $500,000 would be paid in cash and the balance by a promissory note.

At the time Astroline Company began its negotiations with FCI on May 14, 1984, ACCLP had not only not been created, but also had not located a minority group member to become the applicant necessary to qualify under the FCC minority distress sale provisions. (Exhibit 6 at 105-106). It was not until Memorial Day, Monday, May 28, 1984, that Sostek and Boling first met Richard Ramirez, a former television advertising salesman with no experience as a manager of a television station. (Exhibit 9 at 391). Hart had recommended Ramirez to Sostek and Boling. (Exhibit 1 at 118-19). Ramirez was, however, Hispanic and could, therefore, serve to qualify the then to be created entity of ACCLP as a qualified minority business under the provisions of the FCC distress sale policy.

ACCLP was formed on May 29, 1984, the same day on which it agreed to purchase Channel 18 from FCI. The parties of ACCLP were described in the Partnership Agreement as follows: ACCLP was owned by Richard Ramirez, the sole individual general partner who held a 21% interest; WHCT-TV Management, Inc.,[1] a general partner

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[1] At its inception, Astroline Company owned 100% of WHCT Management, Inc., a Massachusetts corporation whose address was 231 John Street, Reading, Massachusetts. Astroline Company later transferred its interest in WHCT Management, Inc. to Sostek, Boling and the Gibbs brothers. (Exhibit 14).

that held a 9% interest; and Astroline Company, purportedly as limited partner, held the remaining 70%. (Defendants' Exhibit A). Ramirez made an initial capital contribution of just $210 for his 21% interest in ACCLP and never made any further contribution. Astroline Company made an initial capital contribution of $440,616 and made further contributions over time in excess of $20 million. (Exhibit 26; Defendants' Exhibit A). In December 1984, the FCC approved FCI's petition for permission to assign its broadcast license to ACCLP pursuant to the minority distress sale policy. Metro Broadcasting, supra, at 550. In January 1985, FCI sold WHCT-TV to ACCLP. ACCLP made the $500,000 payment to FCI from funds made available to it by Astroline Company. (Exhibit 10). For $210, Ramirez had become a general partner and 21% owner of a television station whose purchase (for $3,100,000) was arranged and funded by individuals that he had first met on the day the agreement to purchase was signed.

II. Astroline Company

Astroline Company had been formed in 1981 as a general partnership for the purpose of making passive investments in businesses managed and operated by others. (Exhibit 6 at 78). The partners of Astroline Company had each received substantial cash distributions on the liquidation of Gibbs Oil Company, a wholesale petroleum business, principally owned by the Gibbs family, where Sostek and Boling had been employed for many years. (Exhibit 6 at 68, 72). In his deposition, Boling explained that prior to forming ACCLP, Astroline Company's investments were "passive" because neither Astroline Company nor any of its partners had direct involvement in day-to-day operations or decision-making authority relating to the business. (Exhibit 6 at 77-80). Prior to its creation of ACCLP, the largest single investment made by Astroline Company in any one business was $1,000,000. (Exhibit 6 at 85-86).

Initially, Astroline Company's maximum investment in ACCLP was also initially intended to be $1,000,000, consistent with its prior "passive" investments. Astroline Company expected to fund the $500,000 down payment and just $500,000 more for working capital. (Exhibit 6 at 120-22; Exhibit 10). Astroline Company contemplated that all additional funds necessary to operate the station (anticipated in 1984 to be as much as $20,000,000), would be provided by institutional financing sources. (Exhibit 6 at 128-129). Unexpectedly, however, Astroline Company's efforts to obtain such financing were unsuccessful. (Exhibit 6 at 144).

Accordingly, by the end of 1984, prior to the consummation of the purchase from FCI and before any capital contributions were made (except for the commitment to purchase the station), the partners of Astroline Company knew that no financing was available. Although its partners initially contemplated an equity investment of just $1,000,000, Astroline Company had to decide whether to abandon the venture (almost before it began) or to fund ACCLP's cash operations and capital needs itself. (Exhibit 6 at 161-162). When it chose the latter course (in an amount in excess of $25,000,000), Astroline Company's partners could no longer afford to allow the investment to be "passive". Whether or not Astroline Company may have intended Ramirez to control ACCLP when the venture posed just a $1,000,000 risk, Astroline Company and its partners could not, and did not, allow Ramirez, a person they had just briefly met, and who had no experience running a television station, to control the business while Astroline Company passively sat by.

III. Operations of ACCLP

In order to protect its unexpectedly substantial equity investment in ACCLP and to secure significant personal tax advantages for its partners, Astroline Company modified the terms of the partnership agreement so that Ramirez no longer owned 21% of the partnership's equity. Ramirez's partnership interest was reduced to below 1% and he was given the right to receive 21% of all partnership distributions after Astroline Company had been repaid its equity contributions in full. (Defendants' Exhibit A).[2] Moreover, in choosing to embark on what Astroline Company and its partners knew by late 1984 would be, by far, their single largest investment. Astroline Company also abandoned any idea of allowing Ramirez exclusively to control ACCLP. To protect its significantly greater risk, Astroline had to take control over ACCLP.

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[2] It is interesting that ACCLP's United States Partnership tax returns reflect a change in the ownership of capital from 1984 to 1985 for Astroline Company from 70% to 82.0286% and for Richard Ramirez from 21% to .75%. (Exhibit 11). Nevertheless, Ramirez continually advised the FCC, under penalty of perjury, that he owned 21% of the equity of ACCLP in order for ACCLP to comply with the FCC minority distress sale provisions. (Exhibit 9 at 409-10).

Astroline Company exerted control over the finances of ACCLP to the remarkable point that: (a) at no time during the four years of operation of the television station prior to the bankruptcy did ACCLP have a checkbook in its Hartford, Connecticut offices; (b) all operating revenues received by ACCLP, were deposited in a lock box account in a Connecticut bank, with a weekly sweep feature that transferred all funds in the account to a bank account in Massachusetts, to which neither ACCLP nor Ramirez had access; and (c) all checks to pay any invoice issued to ACCLP had to be requested from and prepared by personnel in Astroline Company's office in Massachusetts. Moreover, Astroline Company, through its general partners Sostek and Boling, maintained continuous contact with Ramirez, and in so doing, controlled the significant issues of partnership business.

Notwithstanding Astroline Company's control over the Debtor, an involuntary bankruptcy petition was filed on October 30, 1988, at a time when the Debtor's financial statements prepared by Arthur Anderson & Company, showed accounts payable to creditors in the amount of $25,477,546, and current assets of just $1,259,151. (Exhibit 12). On November 2, 1988, two days after the involuntary petition was filed, Astroline Company was purportedly dissolved and all of its assets transferred to Astroline Company, Inc., a Massachusetts corporation of which Gibbs, Sostek, Boling and Richard Gibbs are the officers, directors and shareholders. (Exhibit 4 at 25-27; Exhibit 13). It was also after the bankruptcy petition was filed that Astroline Company took the first steps to separate itself from ACCLP by sending the checks for ACCLP's bank accounts to ACCLP's offices in Hartford. (Exhibit 9 at 431, Exhibit 27 at 126-27). It was also post-petition that the individual shareholders of WHCT-TV Management, Inc. transferred all of their shares, for no consideration, to Ramirez. (Exhibit 14). As of the date of the petition, Astroline Company ceased funding ACCLP and, for the first time, acting as a general partner of ACCLP.

ARGUMENT

I. The Trustee Has Standing to Assert Claims Against Limited Partners Who Act As General Partners

In his Complaint, the Trustee claims that Astroline Company, a putative limited partner of the Debtor, and its general partners should be held liable as general partners of the Debtor because they controlled the Debtor's business and finances in substantially the same way as a general partner. In his brief, Gibbs does not dispute the substantial control exercised by Astroline Company over the Debtor. Rather, Gibbs argues that even if Astroline Company, through its general partners, controlled the business of the Debtor and acted as a general partner, the Trustee has no legal standing to pursue partners of the Debtor possessing the title of "limited partner".

A. The Trustee May Pursue Limited Partners Directly Under 11 U.S.C. § 723.

In denying Gibbs' motion for summary judgment, the Bankruptcy Court relied on its earlier holding in Hoffman v. Ramirez (In re Astroline Communications Co. Ltd. Partnership), 161 B.R. 874, 879 (Bankr. D. Conn. 1993), that the Trustee had standing to maintain this action under Section 723(a) of the

Bankruptcy Code. As it has been uniformly interpreted by the courts, Section 723 empowers Chapter 7 trustees seek recovery from limited partners who exercise such pervasive control of a debtor to render them liable as general partners under state law. Section 723(a) of the Bankruptcy Code provides as follows:

> If there is a deficiency of property of the estate to pay in full all claims which are allowed in a case under this chapter concerning a partnership and with respect to which a general partner of the partnership is personally liable, the trustee shall have a claim against such general partner for the full amount of the deficiency.

In an effort to evade liability, Gibbs contorts the letter and spirit of Section 723, arguing that it only authorizes the Trustee to pursue "general partners" who are denominated as such, not limited partners who, having exercised the requisite control over the partnership, become liable as general partners under state law. As all of the cases addressing this issue have concluded, Section 723 cannot fairly be read as Gibbs advances.

In In re Lamb, 36 B.R. 184 (Bankr. E.D. Tenn. 1983), the trustee commenced an action pursuant to Section 723 against an individual who the trustee contended had so comported himself as to be held liable as a general partner. Applying state law, the court analyzed the conduct of the defendant and found him to be liable as a general partner under Section 723.

A similar conclusion was reached by the bankruptcy court in In re Verses I, 15 B.R. 48 (Bankr. W.D. Pa. 1981), where the court stated that if the defendants had acted so as to become liable as general partners under state law, then they would be liable to the trustee under Section 723. In his brief, Gibbs misreads this case to hold that the Verses defendants were held liable only because they had failed to comply with the statutory requirements of the Limited Partnership Act. To the contrary, the court said, "[t]he dispute is whether the [defendants] so deported themselves as to become general partners." Id. at 50. The Verses defendants had argued that a failure to comply with the statutory requirements for formation of a limited partnership meant that they were not partners at all and therefore not liable for the partnership debts. The Court rejected that argument, holding that the putative limited partners exercised control over the partnership and held themselves out as partners. It was not the failure to file the limited partnership certificate that resulted in general partnership liability. Id.

More recently, in In re The Ridge II, 158 B.R. 1016, 1023-24 (Bankr. C.D. Cal 1993), the trustee sought to make limited partners generally liable because of the degree of control they exercised over the debtor. Although the court dismissed the Trustee's claims on the merits, it held that Section 723 can be used to pursue limited partners that acted as general partners:

> On its face, § 723(a) reaches only "general partners" of a debtor. Nevertheless, I have explored the limits of § 723(a) beyond its plain meaning because the arguments of the Trustee insinuate that such is required. I find precedent for referring to state law in analyzing § 723(a) because § 723(a) is, itself, conceptually based on state partnership law and other Bankruptcy Courts have relied upon state partnership law in other contexts.

Id. at 1023.

Consistent with the above-cited cases, the Bankruptcy Court in this case held that Section 723 "is the vehicle through which limited partners who act as general partners may be held liable to a Chapter 7 Trustee." In re Astroline, 161 B.R. at 879. While it is obvious that Congress intended to exclude legitimate limited partners from the reach of Section 723,[3] it is absurd to suggest (and no court has ever held) that merely because Congress used the words "general partner" in Section 723, it intended to insulate from liability those, who while calling themselves limited partners, exercise sufficient control over the partnership so that they would be liable under state law as general partners. In fact, Congress has expressly stated that because the Bankruptcy Code does not define the term general partner or limited partner, non-bankruptcy state law definitions is to be utilized. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 381 (1977). Therefore, state law is used to determine who is a general partner or liable as one.

In claimed support for the proposition that Section 723 applies only to general partners so denominated, Gibbs cites Federal Deposit Ins. Corp. v. Meyer, ___ U.S. ___, 114 S.Ct. 996 (1994). This case, however, addresses neither Section 723 nor the term "general partner" and states only the fundamental principle of statutory construction that a court should construe a statutory

[3] Despite Gibbs' persistent, erroneous claims in his brief, (see Appellant's Brief at 10), the Trustee is not attempting to expand the liability of legitimate limited partners who do not exercise control in a manner consistent with a general partner.

term in accordance with its ordinary or natural meaning. When read in conjunction with the legislative history, the plain and ordinary meaning of Section 723 is that the Trustee is allowed to pursue limited partners who, under state partnership law, are liable as general partners. A contrary interpretation would leave the Trustee — the only party entitled to maintain actions for generalized claims of the estate — without any recourse against controlling limited partners. It is another basic principle of statutory construction that courts must not interpret statutes in a manner that leads to an absurd result. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1981).

Accordingly, Gibbs' principal claim in his brief that Astroline Company and its partners are shielded from liability under Section 723, even if they acted as general partners, simply because they did not call themselves "general partners", is wrong and the Bankruptcy Court's denial of summary judgment must be affirmed.

B. <u>The Trustee May Assert A Claim Under RULPA § 19 Against Gibbs Pursuant To § 544(a).</u>

While recognizing that Section 723 of the Bankruptcy Code authorizes the Trustee to pursue claims against putative limited partners of the Debtor, the Bankruptcy Court noted that Section 544 also gives the Trustee the authority to pursue such claims. In re Astroline, 161 B.R. at 879 ("Even if § 723 were not available to the trustee in pursuing limited partners who have acted as general partners, the trustee may rely on the 'strong arm' clause of Bankruptcy Code § 544."). Under Section 544(a), the Trustee is vested with all rights and powers of a hypothetical judicial lien creditor. The status of the Trustee is that of "the ideal creditor, irreproachable and without notice, armed cap-a-pie with every right and power which is conferred by the law of the state upon its most favored creditor". In re Hurst, 27 B.R. 740, 742 (Bankr. D. Vt. 1983).

In his brief, Gibbs engages in a tortured analysis of a limited partner's obligations to the partnership and its other partners in concluding that the Trustee does not have standing. (See Appellate Brief at 14). Such arguments are misdirected.

The Trustee in this case is not asserting claims that the partners have against each other, but general claims that the estate's creditors have against the partners.

Pursuant to Section 544, the Trustee is given the "full gamut of remedies that applicable state law make available to any creditor of the debtor, who might be in a position to assert them, whether any such creditor exists or not." In re Louisiana Indus. Coatings, Inc., 31 B.R. 688, 692 (Bankr. E.D. La. 1983). Because creditors can pursue RULPA and alter ego actions under state law, so too may the Trustee under Section 544(a) of the Bankruptcy Code. In re Verses I, 15 B.R. at 51; cf. In re IMFC Fin. Corp., 11 B.R. 874, 877 (Bankr. S.D.N.Y. 1981)("a trustee has not only the rights of the bankrupt, but the rights of a bankrupt's creditors").

Significantly, there is no requirement to show creditor reliance in 19(a) of the Revised Uniform Limited Partnership Act, Mass. Gen. Laws, ch. 109, § 19(a), when, as the Trustee has alleged, the purported limited partner's participation in the control of the business was substantially the same as the exercise of the powers of a general partner.[4] Gibbs' liability to such acts extends to all creditors. It is beyond dispute here that the Trustee can assert a claim that could be asserted by all creditors. St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 701 (2d Cir. 1989).

The basis for a trustee's standing to pursue limited partners under Section 544 is best explained in In re City Comm., Ltd., 105 B.R. 1018, 1021 (Bankr. N.D. Ga. 1989). In that case, the court concluded for purposes of trustee standing that it is irrelevant whether the claims belong to the debtor or to its creditors. Outside bankruptcy it could hardly be expected that a debtor would pursue an alter ego action or a contribution action against those individuals who control it. Thus, creditors may pursue those actions directly. The purposes and policies of bankruptcy law and normal partnership law, however, are entirely different. In bankruptcy, the trustee is the "logical and proper party to pursue such a claim" and "[p]ractically, if the Trustee is prevented from asserting [these] claims against the Defendants,

[4] The element of creditor reliance was not introduced until the statute was revised effective March 1, 1989, four months after the bankruptcy petition was filed here.

no other party is in a position to do so". Id. at 1022-23. The court explained that the claims against the limited partners arising from their control over the debtor were functionally equivalent to alter ego claims. As such, in construing Georgia's adaptation of RULPA § 19(a) (identical in all material respects to the statute at issue here), the court concluded that

> [l]iability results, not from injury to a particular creditor or class of creditors but from the behavior of a limited partner which is seen as an abuse of the limited partnership devise.... As a result, the Trustee has standing to assert Defendants are liable as general partners because, as limited partners, they exercised control of the business.

Id. at 1023.[5]

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[5] Contrary to Gibbs' claims in his brief (see Appellant's Brief at 25-26), the state law cause of action under RULPA is property of the estate under Section 541 and may be pursued by the Trustee. According to Section 541(a), property of the estate includes "all legal and equitable interests." See In re Lima Days Inn, Ltd., 10 B.R. 173, 174-75 (Bankr. N.D. Ohio 1981); Steyr-Daimler-Puch of America Corp. v. Pappas, 852 F.2d 132, 135 (4th Cir. 1988) (alter ego claim was property of the estate and pursuable by the trustee); In re Litchfield County of S.C. Ltd. Partnership, 135 B.R. 797, 803 (W.D.N.C. 1992) (state law partnership contribution claim held to be property of the estate assertable by the Trustee).

C. <u>The Trustee's Claims Against Gibbs Are Not Personal Claims Of Only Certain Creditors.</u>

In his brief, Gibbs concocts four supposedly distinct classes of creditors of the Debtor's estate. Claiming that he personally has no liability to one or more of these classes, Gibbs theorizes that the claims are therefore "specific and personal" and thus, the Trustee has no standing to pursue him under Section 544. Such a formalistic claim, however, is without any merit.

"A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause." <u>Koch Refining v. Farmers Union Central Exchange, Inc.</u>, 831 F.2d 1339, 1348 (7th Cir. 1987), <u>cert.</u> <u>denied</u>, 485 U.S. 906 (1988). Where, however, there is no special damage to the creditor suing, and the claim is common to other creditors, then it is a general action on behalf of all creditors which the trustee may pursue. <u>In re Western World Funding, Inc.</u>, 52 B.R. 743, 775 (Bankr. D. Nev. 1985). The key factor is the commonality of the injury alleged and whether it is peculiar and personal to the claimant. <u>Koch</u>, at 1349.

In this case, the Trustee is not pursuing and need not prove any special damages of particular creditors. As noted above, the Trustee's claims under Section 544 do not depend on reliance by any single creditor. Instead, they are general claims common to all of the creditors. The fact that Gibbs was nominally a limited partner of Astroline Company until August, 1986 (two years before the petition) and that Astroline Company transferred all of its assets to Astroline Company, Inc. two days after the involuntary petition was filed,[6] is entirely irrelevant. Liability here is premised solely on the factual issue of Astroline Company's control over the Debtor's business and finances. The fact that Gibbs might have a contribution claim against his partners to compensate him for payment of more than his proportionate share of the deficiency does not render the claim against him a "personal" or "particularized" claim. All creditors have a claim against Astroline Company, of which Gibbs was a general partner.

[6] Astroline Company, Inc. is a Massachusetts corporation of which Gibbs, Sostek, Boling and Richard Gibbs are the officers, directors and shareholders.

More importantly, however, unlike Section 544, an action under Section 723 is, by definition, a general action inuring to the benefit of all creditors. The statute states simply that "[i]f there is a deficiency of property of the estate to pay in full all claims . . . the trustee shall have a claim . . . for the full amount of the deficiency." 11 U.S.C. § 723(a). The referenced "deficiency" is a general term and does not depend on the claim of any one creditor. All creditors benefit from recovery under Section 723. Gibbs' formal status as a limited partner of Astroline Company at any particular time is irrelevant. If, as the Trustee has alleged, the factfinder concludes that Astroline Company, through its partners, comported itself such that it must be held liable as a general partner, then Gibbs is derivatively liable under Section 723 for the deficiency.

Gibbs' reliance on Steinberg v. Buczynski, 40 F.3d 890 (7th Cir. 1994), for the proposition that the Trustee is suing on behalf of specific creditors is misplaced. In Steinberg, it was undisputed that the claim being asserted by the trustee against the debtor's shareholders — unpaid contributions to an employee pension fund — was "'personal,' not 'general.'" Id. at 893.

As the court expressly noted, "the only injured person here is the pension fund," and the "the fund can sue [the shareholders] directly, outside of bankruptcy, since neither the fund not the [shareholders] are bankrupt." Id. at 892-93.[7]

In this case, however, there is no single injured person with a "personal" injury. Rather, the Trustee is seeking to recover on behalf of all of the creditors of the estate. Under such circumstances, it is the Trustee, not an individual creditor, who is the proper party to maintain this action. St. Paul Fire & Marine Ins. Co. v. PepsiCo, Inc., 884 F.2d 688, 701 (2d Cir. 1989) ("If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action.").

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[7] The other case cited by Gibbs in his brief, In re Southwest Equip. Rental, Inc., 102 B.R. 132 (E.D. Tenn. 1989), is similarly distinguishable. That case involved claims brought by the trustee under the Fair Labor Standards Act, 29 U.S.C. § 217, which provided the debtor's employees with "a 'personal' cause of action to collect past due wages" against the debtor, which was "directly liable as the employer for the payment of the wages sought."

Gibbs' classification of creditors, like his strained interpretation of Section 723, is a hollow attempt to elevate form over substance. Under our bankruptcy system, which emphasizes the recovery and liquidation of property of the estate and the equitable distribution of the proceeds to creditors, any interpretation of the law whereby "limited" partners may escape liability regardless of their misdeeds is intolerable. It simply cannot be the law that those who call themselves limited partners but have comported themselves as general partners may entirely escape liability to the Trustee by the simple device of choosing the correct label. The limited partnership form is not, nor was it intended to be, a shield for limited partners that behave like general partners. The Trustee has standing to pursue the claims.

II. A Genuine Issue Of Fact Exists As To Whether Astroline Company Acted Substantially In The Same Way As A General Partner.

A. Summary Judgment Standards

In his brief, Gibbs does not attempt to contradict the substantial evidence that exists which demonstrates the control exerted by Astroline Company and its partners over the business of

ACCLP. Such uncontroverted evidence demonstrates that a genuine issue of material fact exists which must be decided at trial, not on summary judgment.

It is beyond contest that "properly used, summary judgment permits a court to streamline the process for terminating frivolous claims and to concentrate its resources on meritorious litigation." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 12 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987). While summary judgment is properly regarded a tool with which to secure a quick and inexpensive resolution to an action, concerns of speed and efficiency are not paramount. As the U.S. Supreme Court explained in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), such concerns must be balanced by a due regard for the rights of a plaintiff who has asserted factually supported claims to have those claims tried to a jury. Id. at 327. For this reason, the Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), cautioned the trial courts against the improvident granting of summary judgment. As the Court noted, the availability of a summary judgment remedy "by no means authorizes trials on affidavits. Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not those of a judge." Id. at 255. See also Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54 (2d Cir 1987) ("summary judgment must be used selectively to avoid trial by affidavit.")

The standard for granting a summary judgment is high: the moving party must show that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Schwabenbauer v. Board of Ed., 664 F.2d 348, 351 (2d Cir. 1981). By contrast, the non-moving party need not show that such issues are unequivocally to be resolved in its favor, but merely that there is some uncertainty as to the true state of a fact which will require a jury to resolve. "Uncertainty as to the state of any material fact defeats a motion for summary judgment." Gibson v. American Broadcasting Companies, Inc., 892 F.2d 1128 (2d Cir. 1989). Only if a fair-minded jury could not, under any circumstances, reasonably find for the non-moving party should summary judgment be granted. See id. at 1132. Anderson, 477 U.S. at 248 ("summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the non-moving party"). "Moreover, there can be no controversy as to inferences which may be drawn from the facts of record. The 'court must resolve all ambiguities and draw all reasonable inferences against the moving party.'" Danpar Assoc's v. Porter, 43 B.R. 423, 427 (D. Conn. 1984) (citing Schwabenbauer).

Courts have consistently refused to grant summary judgment on issues of whether a putative limited partner's conduct made him liable as a general partner under state law. See, e.g., Gateway Potato Sales v. G.B. Investment Co., 822 P.2d 490, 497 (Ariz. App. 1991) ("Whether a limited partner has exercised the degree of control that will make him liable to a creditor has always been a factual question."); Board of Mgrs. v. Fairways at North Hills, 545 N.Y.S.2d 343, 348 (N.Y. App. 1989) ("The issue of the extent of a limited partner's participation in the control of the business in an issue of fact requiring a trial."); Micheli Contracting Corp. v. Fairwood Assoc., 68 A.2d 460, 465, 418 N.Y.S.2d 164, 167 (1979); Gast v. Petsinger, 323 A.2d 371 (Pa. Super. 1974).

In his brief, Gibbs fails to demonstrate that there exists no genuine issue of material fact as to the nature and extent of Astroline Company's control over the affairs of the Debtor such that it, and its partners, should not be held liable as general partners. The evidence from which a finder of fact could conclude after a trial that Astroline Company acted substantially in the same way as a general partner far exceeds the standard necessary to defeat a motion for summary judgment. The evidence to be offered at trial could fairly support an inference that the general partners of Astroline Company never intended to (and did not) allow a man they had met just once (and hired principally because of his ethnicity) to control their $25 million television stations.

B. Massachusetts Law — Liability As A General Partner

Under the Massachusetts Uniform Limited Partnership Act, Mass. Gen. Laws ch. 109, § 19(a) ("MULPA"), a limited partner loses its limited liability and becomes liable for partnership debts as if it were a general partner if he exercises "substantially" the same control over the business as would a general partner.[8]

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[8] The complete text of 19(a) in effect prior to March 1, 1989, follows:

In what apparently is the only case applying Massachusetts law to measure the level of control by a limited partner necessary to result in general partnership liability, the court in Plasteel Products Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959), held that the limited partners' selection of the partnership's general sales manager was insufficient to hold the limited partners liable as general partners. Although the sales manager was required to co-sign all checks signed by the general partner, the court did not impose general partner liability on the limited partners because the general partner had the absolute right to discharge the sales

> (a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business; provided, however, that if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transaction business with the limited partnership with actual knowledge of his participation in control.

Mass. Gen. Laws, ch. 109 § 19(a) (1983).

manager at any time and defeat the joint signing requirement. Id. at 356 (citing Grainger v. Antoyan, 48 Cal. 2d 805, 313 P.2d 848 (1957) (absent other evidence of control, fact that limited partner could, but was not required to, co-sign checks signed by general partner, does not impose general partner liability on the limited partner)).

In its discussion, the Plasteel court took pains to distinguish Holzman v. DeEscamilla, 86 Cal. App. 2d 858, 195 P.2d 833 (1948). In Holzman, the court found, after a trial, that the two claimed limited partners: (1) had "absolute power" to withdraw all of the partnership funds in the banks without the knowledge or consent of the general partner; and (2) could take "control of the business" from the general partner by refusing to sign checks. The court concluded that the limited partners "clearly . . . took part in the control of the business of the partnership" and thus became liable as general partners. Id. at 834. It seems obvious that the summary judgment in Plasteel would have been reversed had there been a factual question on the check-signing authority issue. Here, of course, Ramirez was, at all times prior to the start of bankruptcy case, denied physical possession of checks.

Gibbs does not dispute that Astroline Company or its partners exercised "unchecked decision-making authority", Gast v. Petsinger, 323 A.2d 371, 375 (Pa. Super. Ct. 1974), or had an "equal voice" in partnership decisions, Mount Vernon Savings & Loan v. Partridge Associates, 679 F. Supp. 522, 528 (D.Md. 1987). In the light of the uncontroverted evidence that Astroline Company had "absolute power" over partnership funds, at a minimum, a genuine issue of material fact exists as to the extent and nature of Astroline Company's control over the business.

The most significant evidence of Astroline Company's control over the Debtor was its complete dominion over partnership funds. As Ramirez himself acknowledged in his deposition, the "lifeblood of any business is money," and Astroline Company had the "power of the purse" over ACCLP. (Exhibit 9 at 378-79, 457). Indeed, the undisputed evidence shows that ACCLP could not buy a paper clip unless Astroline Company approved and sent a check from Astroline Company's headquarters in Reading, Massachusetts to Hartford to pay for it.

It is undisputed that every invoice received by the Debtor was sent to Astroline Company's office in Massachusetts, along with a transmittal memorandum, back-up documentation and a check request. (Exhibit 9 at 424-31). Astroline Company demanded that this procedure be followed, notwithstanding the fact that ACCLP had a fully functional office in Hartford. In fact, Ramirez acknowledged that ACCLP could not obtain a check from Astroline Company's office in Massachusetts without submitting the proper documentation. (Exhibit 9 at 437-38). After review and approval by Peter Siciliano, the Controller of Astroline Corporation (an affiliate of Astroline Company owned by the general partners of Astroline Company) checks would be prepared by Astroline Corporation clerks in their Massachusetts office. At no time prior to the bankruptcy were any checks maintained in ACCLP's office in Hartford. (Exhibit 27 at 125).

Significantly, none of the over 5,500 checks paid by the Debtor prior to the bankruptcy was prepared in the offices of the Debtor and all were prepared in the offices of the limited partner, after the Debtor complied with rigorous accounts payable procedures. (Exhibit 9 at 424-31). Even the address printed on the ACCLP checks (for each bank at which ACCLP maintained a checking account) was 231 John Street, Reading, Massachusetts 01867, the address of Astroline Corporation. (Exhibit 16).

In addition to absolute control over the expense side of ACCLP, Astroline Company exercised equivalent dominion over ACCLP's income. All revenues of ACCLP ($2,509,459 in 1987, for example) were deposited into a lock box account at Bank of Boston Connecticut and the collected balance was transferred on a weekly basis to Astroline Company's account at State Street Bank in Boston. (Exhibit 9 at 432-33; Exhibit 18). Neither ACCLP nor Ramirez had any control over (or even access to) any of its funds. By virtue of its complete control over ACCLP's capital and income, a genuine issue of fact exists as to whether Astroline Company and its partners controlled the business of ACCLP in substantially the same way as a general partner.

The evidence also demonstrates Astroline Company's control of ACCLP by its involvement in financial reporting and planning. (Exhibit 19). Financial projections for the business were prepared by ACCLP's accountants for review by Boling and Sostek.

Drafts of annual financial statements were prepared by ACCLP's accountants and submitted to Fred Boling for his review and input. Ramirez regularly submitted income and expenses projections for ACCLP to Sostek and Boling for their review and approval. (Exhibit 9 at 458-59). In fact, at one point the level of frequency of Ramirez' financial reporting did not satisfy Sostek and Boling, which compelled Ramirez to apologize. Astroline Company's involvement in these issues supports an inference that Astroline Company was acting substantially in the same way as a general partner.

Lastly, further evidence to support a finding of fact that Astroline Company acted as a general partner are two documents in which Astroline Company or its general partners were actually identified as general partners of ACCLP. (Exhibit 25). First, in an Authority for Deposit and Borrowing, submitted to State Street Bank in Boston, Massachusetts, Boling signed the document stating that he, Sostek, Joel Gibbs, Richard Gibbs and himself were the general partners of ACCLP. Second, in a document submitted to the FCC on May 29, 1985, Ramirez certified that Astroline Company was a general partner, owning 70% of the equity of the partnership.

These documents support a factual finding that Astroline Company was a general partner of the Debtor.

The evidence supports the claim that Astroline Company exercised substantially the same control over ACCLP as would a general partner. Neither state law nor the Bankruptcy Code permits a limited partner to exercise absolute control over the finances of a partnership or to take an active role in business management while evading responsibility for such actions. There is, most certainly, a genuine issue of fact for which the Trustee is entitled to a trial. A factfinder could easily conclude that Astroline Company, through its partners, exercised complete control over the affairs of ACCLP in the same manner as a general partner.

III. <u>Gibbs' Acknowledged Failure To Comply With Local Rule 9(c)(1) Precludes Summary Judgment.</u>

It is undisputed that Gibbs' Motion for Summary Judgment was procedurally defective because he failed to file a "separate, short and concise" statement of the material facts as to which he claimed there was no genuine issue to be tried, as required by Local Rule 9(c) of the Local Rules of Civil Procedure. Indeed, in his Motion for Reconsideration dated October 20, 1994, Gibbs admitted that he was not "technically in compliance" with the Local Rules, (Motion for Reconsideration at 8). Based on his noncompliance, the fact that Gibbs was not a general partner of Astroline Company until June 30, 1986 (approximately two and one-half years before this bankruptcy case commenced), was not before the Bankruptcy Court, and his motion for summary judgment was properly denied.

Rule 9(c)(1) of the Local Rules of Civil Procedure states in pertinent part:

> Upon motion for summary judgment there shall be annexed to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

It is well-established in this District that Local Rule 9(c) is "strictly interpreted." Ross v. Shell Oil Company, 672 F. Supp. 63, 65 (D. Conn. 1987) *(citing* Knowles v. Postmaster General, United States Postal Service, 656 F. Supp. 593, 598 (D. Conn. 1987)). The "mere filing" of a memorandum which contains a statement of facts "does not fulfill the requirement" of a separate, discrete statement of facts. Ross, 672 F. Supp. at 66. Failure to abide by Rule 9(c) is alone a proper basis for denying summary judgment relief. Id.

In support of his Motion for Summary Judgment, Gibbs' "attorney in charge" chose to ignore the Local Rules, and rather, expressly relied on the Local Rule 9 Statement filed by Gibbs' "local counsel" on behalf of other defendants in the case. In the Statement of Undisputed Facts filed on behalf of Astroline Company, Astroline Company, Inc., Herbert A. Sostek, Fred J. Boling, Jr. and Richard H. Gibbs, dated April 22, 1994, it stated in Paragraph 1 that

> Randall Gibbs was either a general or limited partner of Astroline Company.

Accordingly, the summary judgment record here failed to include as a statement of undisputed fact that Gibbs was temporarily a limited partner of Astroline Company. Summary judgment was appropriately denied on that failure alone.

CONCLUSION

For the foregoing reasons, the Bankruptcy Court's denial of Gibbs' motion for summary judgment on Count I of the Trustee's Complaint must be affirmed by this Court.

PLAINTIFF, MARTIN W. HOFFMAN,
TRUSTEE

By______________________________

John B. Nolan (ct05583)
Steven M. Greenspan (ct00380)
Day, Berry & Howard
CityPlace I
Hartford, CT 06103-3499
(203) 275-0100
His Attorneys

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent, postage prepaid, to:

Office of the U.S. Trustee
105 Court Street
Suite 402
New Haven, CT 06510

Matthew D. Gordon, Esq.
Skelly Rottner
12 Charter Oak Place
Hartford, CT 06134-0890

WHCT Management Inc.
c/o CT Corporation System
2 Oliver Street
Boston, MA 02109

Thomas A. Hart, Jr.
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036

Robert A. Izard, Jr., Esq.
Robinson & Cole
One Commercial Plaza
Hartford, CT 06103-3597

Ben M. Krowicki, Esq.
Bingham, Dana & Gould
100 Pearl Street
Hartford, CT 06103

Lewis K. Wise, Esq.
Rogin, Nassau, Caplan,
Lassman & Hirtle
CityPlace
Hartford, CT 06103-3460

Michael J. Durrschmidt, Esq.
Hirsch & Westheimer, P.C.
25th Floor, NationsBank Center
700 Louisiana
Houston, TX 77002-2728

Steven M. Greenspan