

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Andrew P. (Andy) Ballard,
Plaintiff,

vs.

Tim Roberson, Rick Thoennes, Rick
Thoennes III, and Warpath Development,
Inc.,

Defendants.

Case Number: 2008-CP-23-5739

**ORDER ALLOWING ENFORCEMENT OF
FULL AMOUNT OF JUDGMENT AGAINST
RICK THOENNES III**

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JUL 17 2017

SC Court of Appeals

This matter is before the Court on the motion (“Motion”) of Plaintiff Andrew P. (Andy) Ballard (“Ballard”) for the Court to make a determination as to what portion of the Judgment this Court entered in favor of Ballard against Rick Thoennes III (“Thoennes III”) on October 3, 2013 (“Judgment”), is attributable to oppression by Thoennes III occurring on or after the date Thoennes III filed a petition for bankruptcy on December 2, 2011 (“Petition”), and as a result was not discharged in the bankruptcy filing. The Motion was heard by the Court on January 27, 2017, along with several other motions. All parties were represented at the hearing by their respective counsel. The Court took the Motion under advisement and now enters this Order granting the Motion and allowing Ballard to enforce the full amount of the Judgment against Thoennes III.

Ballard requested the Court find that the entire amount of the Judgment of \$3,125,000¹ be found to be attributable to oppression that occurred after the Petition filing and therefore was not discharged in bankruptcy. In the alternative, Ballard asked the Court to apportion the Judgment amount between the time period before December 2, 2011, and the time period on or after December 2, 2011. Thoennes III's position is that the Judgment was discharged in bankruptcy and therefore that no amount of the Judgment is attributable to oppression occurring after the Petition date. The Court rejects the position of Thoennes III, grants the Motion of Ballard, and finds that Thoennes III is liable for and should share in the entirety of the Judgment amount of \$3,125,000, which is fully attributable to oppression occurring on or after the Petition date.

The factual and procedural background of this long-protracted litigation are set forth in the numerous prior orders of this Court, the 2012 decision of the South Carolina Supreme Court, and the 2015 decision of the South Carolina Court of Appeals, and will not be repeated here except to the extent particular facts are pertinent to the instant motion. Ballard originally presented this issue to the Bankruptcy Court, which determined in its October 27, 2015, Order (included in the Record as Exhibit B to the Motion) that any portion of the Judgment attributable to oppression occurring on or after the Petition date was not discharged in bankruptcy. The Bankruptcy Court further concluded that the state court is in the best position to make the determination of whether all or part of the Judgment is attributable to post-Petition oppression, which resulted in the present Motion. Specifically, the Bankruptcy Court made the following findings of fact and conclusions of law in its Order:

¹ This court entered Judgment in favor of Ballard against all of the defendants—jointly and severally, including Rick Thoennes III—on October 3, 2013, for \$3,589,297. The Judgment was reduced to \$3,125,000 on appeal by the South Carolina Court of Appeals. The South Carolina Supreme Court denied certiorari to review the decision of the Court of Appeals, and therefore the Judgment in that amount is now final.

1. Defendant Frederick Richard Thoennes, III's ("Thoennes") Chapter 7 petition was filed on December 2, 2011.
2. In accordance with 11 U.S.C. § 727(b), only those "debts that arose before the date of the order for relief [*i.e.*, the petition date]" are discharged by this court's discharge order dated March 26, 2012 ("Discharge Order").
3. The debt in question arises from an Order in favor of Ballard entered May 4, 2010, which was affirmed by the South Carolina Supreme Court in August 2012, and a Judgment in favor of Ballard entered on October 3, 2013 ("Judgment") in the action filed in the Court of Common Pleas in the County of Greenville, South Carolina, styled as *Andrew P. Ballard, individually and derivatively on behalf of Warpath Development, Inc. v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and Warpath Development, Inc.*, C/A No. 2008-CP-23-5739 ("State Court Action").
4. The amount of the Judgment ultimately was reduced to \$3,125,000 by the Court of Appeals of South Carolina ("State Court Judgment Amount").
5. **Any portion of the State Court Judgment Amount that is attributable to oppression by Thoennes occurring on or after December 2, 2011, is not discharged by the Discharge Order.**
6. The state court is in a better position to make the determination of whether all or any portion of the State Court Judgment Amount is attributable to oppression by Thoennes occurring on or after December 2, 2011.
7. This Adversary Proceeding is dismissed without prejudice in order for Ballard to seek this determination from the state court.

(*Id.* (emphasis added)). This Order of the Bankruptcy Court was entered by consent and was not appealed. Ballard subsequently presented the instant Motion to this Court.

Ballard contends, and this Court so finds, that Thoennes III's oppression of Ballard continued unabated through the hearing date on August 6, 2013, when this Court heard evidence of valuation and ultimately determined the amount of the Judgment to be entered against Thoennes III. As this Court has held in two prior orders, Ballard presented undisputed evidence at the August 6, 2013, valuation hearing "that the conduct of the defendants previously held to constitute shareholder oppression had continued unchanged and unabated up to the time of the

hearing.” (Order Appointing Receiver at 3 (Exhibit C to Motion); Charging Order at 2 (Exhibit D to Motion)). These orders were not appealed; they are the law of the case; and Thoennes III is therefore precluded from challenging these prior findings now. In addition, the Court reaffirms this finding of fact based on the evidence presented by Ballard at the August 6, 2013, hearing, which was not refuted or even challenged at that time by the defendants, including Thoennes III.²

Because this Court has found that the oppression of Thoennes III continued through the time of the valuation hearing in August 2013, following which the Judgment was entered on October 3, 2013, it necessarily follows that some or all of the amount of the Judgment was attributable to oppression by Thoennes III that occurred after he filed the bankruptcy Petition on December 2, 2011. Because the Bankruptcy Court held that the amount of the Judgment that is attributable to post-Petition conduct was not discharged in the bankruptcy, Ballard is entitled to an order indicating the amount of the Judgment that was not discharged in bankruptcy and for the enforcement of said Judgment amount. Otherwise, Thoennes III would have a license to continue his oppression into perpetuity simply because it began pre-discharge. *See O’Loughlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) (finding the creditor’s claims against the Chapter 9 debtor for its pre-discharge violations of the ADA were barred by the discharge, but the post-discharge claims that arose from additional “illegal conduct occurring after discharge” were not barred by the discharge); *see also Holcombe v. U.S. Airways, Inc.*, 369 Fed. Appx. 424, 428

² In particular, Ballard testified to, and presented documentary evidence of, joint conduct by all of the defendants, including Thoennes III, that continued their exclusion of Ballard from any participation in or knowledge of the management and planning for Warpath, that kept from Ballard any information concerning plans or discussions for financing the project, and that “the wrongful conduct has continued since 2011 through the present[t].” Transcript of Record, p.22, lines 21-22 (Aug. 6, 2013) (statement by Mr. Lightsey summarizing the evidence transcribed at pages 20-22). Testimony from the court-appointed expert corroborated the evidence presented by Ballard. *See, e.g., id.* at 67-68, 76-78 (testimony of Perry Woodside).

(4th Cir. 2010) (finding plaintiff's discrimination claims against the Chapter 11 debtor arising from discriminatory acts that occurred after confirmation of the plan were not discharged).

The only issue is how much of the \$3.125 Million Judgment against Thoennes III is attributable to oppression after his December 2, 2011, Petition. The Judgment amount was based upon the valuation of the company at the time of the hearing on August 6, 2013, which was after the Petition. Thus, the amount of the valuation, and hence the Judgment, would not increase or decrease based upon the amount of oppression or the time period of oppression. Indeed, the severity or length of the oppression would not be relevant to the valuation or Judgment amount. Instead, it is the existence of the oppression that matters. Accordingly, if the oppression simply existed after the bankruptcy discharge, then it follows that the full amount of the Judgment is attributable to this oppression. Given that the law of the case is that the oppression existed all the way up to the valuation hearing on August 6, 2013, it necessarily follows that the full amount of the Judgment is attributable to the oppression occurring after the Petition date and therefore was not discharged.

The fact that the oppression began before the Petition date is irrelevant. Otherwise, as discussed above, Thoennes III would have a license to continue his oppression into perpetuity simply because it began pre-discharge. Also, the bankruptcy court rejected this argument, as it declined to discharge the entire Judgment even though it was unquestionable that the oppression was occurring prior to the Petition date. The idea that oppression occurring following the Petition date fully supports the Judgment amount even though the oppression began prior to the Petition date may be analogized to the theory of joint and several liability in tort law.

In sum, for the reasons above, I find and conclude the following (which are denominated interchangeably as Findings of Fact and Conclusions of Law):

1. The oppression by Thoennes III continued unabated through the hearing date of August 6, 2013;
2. The Judgment is wholly attributable to and supported by oppression of Thoennes III occurring after the Petition date of December 2, 2011;
3. Under the Bankruptcy Court Order, it follows that none of the Judgment was discharged in bankruptcy;
4. Thoennes III remains subject to and liable for the full amount of the Judgment; and
5. Ballard may pursue collection efforts against Thoennes III for the entire amount of the Judgment.

Accordingly, **IT IS ORDERED** that Ballard's Motion is granted, that the Judgment amount is attributable in full to oppression occurring after the Petition date, that the Judgment was not discharged in the bankruptcy Petition, and that Ballard may enforce the entire amount of the Judgment against Thoennes III.

IT IS FURTHER ORDERED that the Order Appointing Receiver entered April 23, 2014 (as modified in the Order Modifying Order for Receivership entered February 17, 2017), applies in full to Rick Thoennes III. In footnote 1 of the Order Appointing Receiver, the Court ruled that the Findings of Fact applied to all Defendants but that the relief granted therein would not apply to Thoennes III until it was determined whether his bankruptcy discharge applied to the Judgment. Because this Court and the Bankruptcy Court have now ruled that the Judgment was not discharged in bankruptcy, the relief granted in the Order Appointing Receiver now fully applies to Thoennes III.

IT IS FURTHER ORDERED that the Charging Order entered April 23, 2014, applies in full to Rick Thoennes III. In footnote 1 of the Charging Order, the Court ruled that the relief granted therein would not apply to Thoennes III until it was determined whether his bankruptcy discharge applied to the Judgment. Because this Court and the Bankruptcy Court have now ruled

that the Judgment was not discharged in bankruptcy, the relief granted in the Charging Order now fully applies to Thoennes III.

IT IS SO ORDERED.

Edward W. Miller
Judge, South Carolina Circuit Court

_____, 2017
Greenville, South Carolina

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Greenville Common Pleas

Case Caption: Andrew P Andy Ballard , plaintiff, et al vs. Tim Roberson ,
defendant, et al
Case Number: 2008CP2305739
Type: Order/Other

So Ordered

s/ Edward W. Miller

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