

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

Hon. S. Jackson Kimball, III, Master in Equity

RECEIVED
DEC 27 2017
SC Court of Appeals

C/A NO.: 2017-001254

TRIPLE M PARTNERS, LP

.....Plaintiff

v.

SUZETTE LEFEBVRE, as Individual and as Trustee of the

SUZETTE LEFEBVRE TRUST N/A, and BLANCO GmbH + CO.KG

.....Defendants

Of whom SUZETTE LEFEBVRE, as Individual and as Trustee of the

SUZETTE LEFEBVRE TRUST N/A,

.....Appellant

and

Of which BLANCO GmbH + CO.KG

..... Respondent

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SUZETTE LEFEBVRE TRUST N/A,

.....Appellant

and

Of which BLANCO GmbH + CO.KG

..... Respondent

SUPPLEMENTAL RECORD ON APPEAL

M. Heath Gilbert, Jr.
Baucom, Claytor, Benton,
Morgan & Wood, P.A.
PO Box 35246
Charlotte, NC 28235
Attorney for Defendant Appellant

Daniel J. Ballou
Morton & Gettys, LLC
331 E. Main Street, Suite 300
Rock Hill, SC 29731
Attorney for Plaintiff

Robert A. Bernstein
Bernstein & Bernstein, P.A.
PO Box 20519
Charleston, SC 29413
Attorney for Respondent

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Certificate of Service

Certificate of Service for the Motion of Blanco GmbH + CO.KG to Intervene, Affidavit in Support, Proposed Answer by Triple M Partners, L.P. filed on February 14, 2017

Motion

Motion by Blanco GmbH + CO.KG for Disbursement of Funds filed on April 14, 2017, Case No. 2016-CP-46-3382

Notice

Notice of Filing of Foreign Judgment by Blanco GmbH + CO.KG filed on October 3, 2014, Case No. 2014-CP-4603272

This the 18th day of December, 2017.



M. Heath Gilbert, Jr. SC Bar No. 72198
Attorney for Defendant Appellant
BAUCOM CLAYTOR BENTON
MORGAN & WOOD, PA
PO Box 35246
Charlotte, NC 28235
Telephone: (704) 376-6527

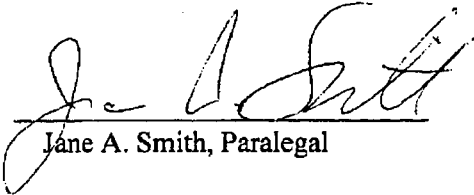
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK	)	Case No: 2016-CP-46-3382
)	
Triple M. Partners, L.P.,)	
)	
Plaintiff,)	
	)	CERTIFICATE OF SERVICE
v.)	
)	
Suzette LeFebvre, as individual, and as)	
Trustee of the Suzette LeFebvre Trust, N/A)	
)	
Defendant.)	
)	

The undersigned, an employee of Bernstein & Bernstein, P.A., does hereby certify that on February 13, 2017, she served a copy of the Motion of Blanco GmbH + Co., KG to Intervene, Affidavit in Support, Proposed Answer and motion coversheet upon Triple M. Partners, L.P. and Suzette LeFebvre, as individual and as Trustee of the Suzette LeFebvre Trust, N/A by placing a copy of the same in the United States Mail, postage prepaid, and addressed to the following:

Daniel J. Ballou, Esquire
MORTON & GETTYS
PO Box 707
Rock Hill, SC 29731

Ms. Suzette LeFebvre
6960 SW 32nd Terrace
Ft. Lauderdale, FL 33312

FILED-RECEIVED
2017 FEB 14 PM 1:58
DAVID HAMILTON
C.C.P. & GS
YORK COUNTY, SC


Jane A. Smith, Paralegal

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Triple M. Partners, L.P.,)
 Plaintiff)

CASE NO.:

v.)

46-03382
2016-CP-42-0605

Suzette LeFebvre, etc., et al.)
 Defendant)

MOTION INFORMATION FORM
AND COVER SHEET

check box above indicating submitting party)

name, S.C. Bar no. and address of plaintiff's attorney:
Robert A. Bernstein
Post Office Box 20519
Charleston, SC 29413
telephone: (843) 529-1111 fax: (843) 529-0035
e-mail: rbernstein@bernsteinpa.com other:

name, S.C. Bar no. and address of defendant's attorney:
Robert A. Bernstein
Post Office Box 20519
Charleston, SC 29413
telephone: (843) 529-1111 fax: (843) 529-0035
e-mail: rbernstein@bernsteinpa.com other:

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Disbursement of Funds

Estimated Time Needed: 30 minutes

Court Reporter Needed: YES / NO

SECTION II: Motion Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for Plaintiff / Defendant

April 12, 2017

Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$25.00
- EXEMPT: Rule to Show Cause in Child or Spousal Support (check reason) Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRPC)
 - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: _____
- Other: _____

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2017 APR 14 PM 1:58
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: _____

JUDGE

CODE: _____

Date: _____

CLERK'S VERIFICATION

Collected by: B. Hanke

Date Filed: _____

print name

MOTION FEE COLLECTED: *25

4/14/17

CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Triple M. Partners, L.P.,)
)
Plaintiff,)
)
v.)
)
Suzette LeFebvre, as individual, and as)
Trustee of the Suzette LeFebvre Trust, N/A)
and Blanco GmbH+CO.KG,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
Case No: 2016-CP-46-3382

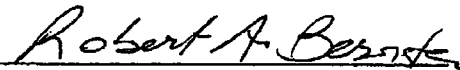
MOTION BY BLANCO GmbH + CO.KG
FOR DISBURSEMENT OF FUNDS

FILED-RECEIVED
2017 APR 14 PM 1:58
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

TO: ALL PARTIES TO THE PRESENT LITIGATION:

YOU WILL HEREBY TAKE NOTICE that as soon as they may be heard, the undersigned Attorneys for BLANCO GmbH + CO.KG will move before this Court for an Order disbursing the funds deposited with the Court by the closing attorneys for the sale of the property, pursuant to this Court's Order of February 23, 2017. Although the attorneys for Blanco GmbH+CO.KG strongly refute the assertions of Defendant Laera that she lacked notice and a right to be heard regarding the proposed disbursement of such funds, in the event that it is determined that she lacked such notice, the undersigned attorneys for Blanco GmbH+CO.KG seek that this Court conduct such hearing as aids necessary or desirable to consider and Order the disbursement of such funds. This Motion is made pursuant to Rules 52, 59, 61 and 67, SCRPC, and is supported by the memorandum of law and exhibits filed herewith.

BERNSTEIN & BERNSTEIN, P.A.



Robert A. Bernstein S.C. Bar No. 0677
5418-B Rivers Avenue
North Charleston, SC 29406-6129
(843) 529-1111; (843) 529-0035 (fax)
rbernstein@bernsteinpa.com
ATTORNEYS FOR DEFENDANT
BLANCO GmbH + CO.KG

April 12, 2017

STATE OF SOUTH CAROLINA FILED-RECEIVED IN THE COURT OF COMMON PLEAS
 COUNTY OF YORK 2017 APR 14 PM 1:58 CASE NO: 2016-CP-46-3382

Triple M. Partners, L.P.,
 DAVID HAMILTON
 C.C.C.P. & G.S.
 YORK COUNTY, SC

Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION BY BLANCO GmbH + CO.KG
v.	)	FOR DISBURSEMENT OF FUNDS AND
	)	IN OPPOSITION TO MOTION BY
Suzette LeFebvre, as individual, and as	)	DEFENDANT LEFEBVRE TO STAY
Trustee of the Suzette LeFebvre Trust, N/A	)	DISTRIBUTION OF FUNDS AND TO
and Blanco GmbH+CO.KG,	)	RECONSIDER THE SUPPLEMENTAL
	)	ORDER OF DEFAULT JUDGMENT
Defendants.)	

The undersigned attorney for BLANCO GmbH + CO.KG submits the present Memorandum in Support of its Motion for Disbursement of Funds, and in opposition to the pending motions made by Defendant LeFebvre. On March 22, 2017, this Court held a hearing on this Defendant's Motion for Amended Order of Default Judgment. The Defendant Suzette LeFebvre, though in default, was provided with a copy of the motion and advised of the hearing date of March 22, 2017; in addition, the attorneys for Ms. LeFebvre in related litigation were provided notice of the motion and of the hearing date for the Motion. The Defendant Suzette LeFebvre acknowledges receipt of the Motion and of the hearing, and submitted her position to the Court in writing; counsel from the related litigation also acknowledged receiving those documents, but replied that he was not representing Ms. LeFebvre in this matter. After the Court entered an Order amending the default judgment and making an Order as to the disbursement of funds, the same attorney has now made an appearance in this action and has asserted that the prior Order is faulty for several reasons, including an asserted lack of due process for the alleged failure to advise Defendant LeFebvre that the Court could rule upon the disposition of the proceeds then being held by the Court. The attorney for Ms. LeFebvre has submitted a motion to stay the Order disbursing the funds, as well as seeking that this court

AD #1

reconsider its Supplemental Order of Default Judgment. Defendant Blanco GmbH+CO.KG specifically denies that the notice and the prior hearing in any way failed to provide Defendant LeFebvre with sufficient or even any necessary notice; out of an abundance of caution, however, in the event that the Court determines that there was any insufficiency of notice provided to Defendant LeFebvre, Blanco GmbH+CO.KG has filed the present motion seeking the distribution of the proceeds from the sale, so that if they should be considered, the Defendant LeFebvre has the opportunity to present her arguments regarding the disposition of the proceeds.

A. Defendant LeFebvre is not entitled to a Stay of this Court's Order.

- 1) *Defendant LeFebvre has failed to present any grounds for the imposition of a Stay of this Court's Order.*

Defendant LeFebvre has moved that this Court stay its earlier Order while it considers additional matters raised in LeFebvre's Rule 60 Motion to Reconsider. This request lacks any basis under our rules of procedure, and fails to take into account the fact that the Plaintiff has been a judgment creditor of the prior owner of the property and has been seeking to recover the property for over two years. Defendant seeks a stay, without making provision for the lost value to Blanco of collecting on a judgment for which it has fought for two years.

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The filing of a Rule 60(b) motion "does not affect the finality of a judgment or suspend its operation." Rule 60(b). If the debtor wishes to stay enforcement of the judgment pending the trial court's disposition of the debtor's Rule 60(b) motion, the burden is on it to make the motion under Rule 62(b), SCRCP. Whether to grant such a stay rests in the court's discretion "on such conditions for the security of the [creditor] as are proper..." Rule 62(b). The policy expressed in Rule 60 and in Rule 62(b) favors the creditor over the debtor.

Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 426, 653 S.E.2d 274, 275-276 (2007). Having failed to present a basis for granting a stay nor proposed providing protection to the judgment creditor if its rights against the funds, Defendant LeFebvre has failed to make the most basic showing of entitlement to the grant of a stay.

2. *The existence of a pending federal court action does not provide grounds for the imposition of a stay.*

Defendant LeFebvre asserts that a pending federal court action will decide issues regarding the validity of and timing of the marriage between Defendant LeFebvre and Mr. Laera, and thus provide the answer whether or not Ms. LeFebvre has a Spousal Interest in the property. This assertion fails for numerous reasons, not the least of which is that the Defendant LeFebvre defaulted in response to the current action. Rule 12(b)(8) provides that a defense that another action between the parties covering the same subject matter is defense which must be raised by motion or in the Answer. The Defendant defaulted, has failed to raise the asserted defense, and cannot now raise it after the entry of judgment.

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#3

The assertion that the federal court will deal with the action is erroneous. The federal court case sought a ruling that there was a fraudulent conveyance, sought damages for participation in the fraudulent conveyance, and sought to have the property sold and the proceeds applied to the judgment (Exhibit 1). Since LeFebvre contracted for the sale of the property and the sale was consented to by Defendant Blanco, the issue of a fraudulent conveyance is moot, as is the proposed execution against the property. The fact that the issues of marriage and jurisdiction of the Family Court to issue an Order were parts of that litigation does not now save the matter from being moot. Since the sale of the property has obviated the need for a ruling from the federal court, Blanco has made a Motion to Dismiss that proceeding (Exhibit 2).

3. *The Motion for the issuance of a Stay is moot, since the funds were disbursed on April 5, 2017.*

Defendant LeFebvre seeks to stay a Order which has already been performed, and the issue is moot. The Clerk of Court issued and delivered its check to Blanco in compliance with this Court's Order on April 5, 2017. Defendant Lefebvre's attorney did not file a Notice of Appearance

until April 7, 2017, two days later. According to the on line docket, the Motion to Stay has yet to be filed with the Clerk. The issue now raised by Defendant LeFebvre for a stay is moot.

B. This Court has the authority to disburse the proceeds from the sale.

The Defendant Suzette LeFebvre failed to file an Answer in response to the Complaint, and is in default. Rule 67, SCRPC, provides that when any portion of the proceedings before the Court involves the disposition of some amount of money or some thing, the Court may Order it deposited with the Clerk of Court. As set forth in S.C. Code Ann. §15-65-110, "When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery which, being the subject of litigation, is held by him as trustee for another party or which belongs or is due to another party, the court may order such money or other thing to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court." This Defendant placed the right to those proceeds at issue herein, where it asserted in its Answer the prior right to those proceeds. The Court was therefore justified in ordering that the excess funds be deposited with the Court pending its further Order regarding the disposition of those funds.

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Defendant LeFebvre failed to appear or otherwise respond to the Complaint, and was declared to be in default. This Defendant sought to intervene and make claim to the funds to be held by the Court. This Court granted the Motion of Blanco to Intervene, and filed the Answer seeking the payment of the funds in excess of the mortgage payoff. It was not necessary for this Answer to be served upon Defendant LeFebvre, as she was in default for failure to appear, and the Court had granted a default judgment against her. Pursuant to Rule 5(A), SCRPC, "No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons

in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” The Answer did not seek new claims for relief against Ms. LeFebvre, but sought payment of funds deposited with the Court. Had the Defendant LeFebvre not defaulted, she could have made whatever claim she felt appropriate to the funds held by the Court. BY failing to appear and contest the action, the Defendant LeFebvre forfeited her right to notification of further actions by this Court in carrying out the Order for the disposition of funds.

Notwithstanding the fact that Defendant Lefebvre did not appear and was not entitled to any notice of the hearing, the Defendant contends in her motion that the notice of the Motion for Supplemental Order of Default Judgment failed to give her notice that the Court may disburse the funds. Ms. LeFebvre was, in fact, given notice of the claim to the funds and the hearing date, and chose not to attend or hire counsel to appear and contest the relief sought. It is disingenuous for Ms. LeFebvre to assert she was unaware that the Court could order the disposition of the funds held by the Clerk; in her e-mail submission directly to the Court prior to the hearing which is the subject of this motion, Ms. LeFebvre specifically asked that the Court enter an Order disbursing the proceeds to her. It lacks credulity that, having asserted that she was entitled to and requesting that the Court distribute the funds, the Defendant asserts that she did not have notice that this was a possible resolution of that court hearing. The fact that the ultimate Order regarding distribution was not to her does not give rise to an assertion that Ms. LeFebvre was denied her due process rights.

C. Even if entitled to Notice, Defendant LeFebvre has failed to establish any entitlement to the funds which were deposited with the Court.

Ms. LeFebvre contends that she was entitled to notice of the hearing so that she could assert her entitlement to the funds by reason of a claim against the property arising under S.C. Code Ann. §20-3-610.

Defendant maintains that despite the fact that she was not on the title to the property,

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she retained a Spousal Equitable Interest in the property pursuant to S.C. Code of Laws §20-3-610 and that due to the fact that her Complaint for Divorce against Vito Laera was filed on March 3, 2014, almost eight (8) months before BLANCO's judgment, Defendant has a priority interest in the real property and a priority interest in her portion of the proceeds under the Spousal Equitable Interest.

Page 2, Defendant LeFebvre's Motion to Alter or Amend.

The assertions of Ms. LeFebvre lack any merit. There are numerous reasons why this assertion is faulty and why Ms. LeFebvre lacks any claim to the funds disbursed to Blanco GmbH+CO.KG.

1) *Defendant LeFebvre was notified of the hearing and given the opportunity to appear and present her assertions as to priority.*

As noted previously in this brief, although no notice at all was required, Defendant LeFebvre was given actual notice of the hearing in this matter and submitted a letter specifically requesting that the funds be distributed to her. Having been given the opportunity to appear and state her case, providing notice to her counsel from a related proceeding, and yet failing to appear in person or hire counsel to appear and set forth any specific claim to the funds, she cannot now object that she wasn't given notice of the hearing. Rule 61, SCRPC, provides:

HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. *The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.*

(Emphasis added).

Defendant was given every required - indeed, more than required - notice to appear and assert her position. The fact that she failed to avail herself of this opportunity does not provide her with a basis to attack this Court's correct ruling as to the disposition of the proceeds.

2) *Defendant LeFebvre has no prior right to the proceeds by claiming an interest*

under the Spousal Equitable Interest statute.

Defendant LeFebvre asserts that she had a special Spousal Equitable Interest in the real estate at question under S.C. Code Ann. §20-3-610, which provides:

SPOUSAL EQUITY AND OWNERSHIP RIGHTS.

During the marriage a spouse shall acquire, based upon the factors set out in Section 20-3-620, a vested special equity and ownership right in the marital property as defined in Section 20-3-630, which equity and ownership right are subject to apportionment between the spouses by the family courts of this State at the time marital litigation is filed or commenced as provided in Section 20-3-620.

It is undisputed that Ms. LeFebvre instituted marital litigation against Mr. Laera in York County on March 26, 2014, prior to the entry of the Plaintiff's judgment, and further that the deed transferring an interest in the property to Ms. LeFebvre was not entered filed until January 2015, after the entry of Plaintiff's judgment. The mere fact that Ms. LeFebvre filed marital litigation prior to the entry of the judgment, however, does not establish her interest in the property with priority over Blanco GmbH+CO.KG.

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- a) *Ms. LeFebvre failed to file a Lis Pendens at the time of the filing of the marital litigation, which is a necessity to asserting priority as to the property at issue.*

Even if it could be established that the York County Family Court had jurisdiction over the marital litigation (*Part C(2)(b) of this memorandum*) or indeed that Vito Antonio Laera and Suzette LeFebvre were ever legally married (*Part C(2)(c) of this memorandum*), the fact that Ms. LeFebvre failed to file a Lis Pendens with the York County Clerk of Court is fatal to any claim that a Spousal Equity Interest is entitled to priority over the Blanco Judgment.¹

¹It may make more sense to first address whether or not Ms. LeFebvre was ever married to Mr. Laera or whether the York County Family Court had jurisdiction to apportion the property prior to addressing the existence of a Lis Pendens and its effect on the property; by addressing the lack of a lis pendens first, the Court may avoid the necessity of ruling upon the more contentious issue of the legal status of the alleged "marriage" between LeFebvre and Laera, with

SECTION 20-3-670. Notice of pendency of action.

(A)(1) In a proceeding under this article, either party may record a notice of the pendency of proceedings in the manner provided in civil actions generally, which has the same effect as a notice in civil actions. *The rights and interests of each spouse in the other's property created by this article are not effective against third parties:*

(a) with regard to any parcel of real property in which an interest under this article is claimed until a Notice of Pendency of Action is filed as provided in Section 15-11-10 with the clerk of court of the county in which such parcel of real property is situated

Thus, if a spouse seeks to establish priority over the rights of third parties with respect to an asserted Spousal Interest claim in real estate claimed to be marital property, the spouse **MUST** file a Lis Pendens with the Clerk of Court. The right to a spouse to claim an interest in the property "*are not effective against third parties with regard to any parcel of real property until a Notice of Pendency of Action is filed as provided in Section 15-11-10 with the clerk of court.*" A review of all filings with the York County Clerk of Court show the existence of three Lis Pendens' filed with respect to the subject property: i) A lis pendens filed by Blanco GmbH+CO.KG, on June 3, 2015 (2015LP4600428), advising that it was contesting ownership of the property; ii) A lis pendens filed by U.S. Bank, N.A. on October 4, 2016 (2016LP4600615) seeking foreclosure upon its mortgage upon the property; and iii) A lis pendens filed in the present action by Triple M Partners on November 16, 2016, seeking specific performance of the contract of sale (Exhibit 3). It should be undisputed that neither Ms. LeFebvre, nor any attorneys in her behalf, filed a Lis Pendens under the statute in order to obtain priority over third parties for her claim to a spousal interest in the property. For this reason, Defendant LeFebvre's claim to a Spousal Equitable Interest under S.C. Code Ann. §20-3-630 fails as a matter of law to establish a priority interest in the property, and Defendant Blanco GmbH+CO.KG has a priority interest in the funds as a matter of law. For the foregoing

the consequences that could attend a finding that they were not married or that the Family Court lacked jurisdiction.

reason, the asserted failure to properly notify the defaulting Defendant, Ms. LeFebvre, in the prior Notice of Motion of the proposed distribution of funds has no legal significance, since Defendant LeFebvre's claim to the funds fails as a matter of law. This Court should therefore confirm the prior Order requiring the distribution of the said funds to Blanco GmbH+CO.KG.

- b) *The filing of the marital litigation by Ms. LeFebvre in March 2014 failed to establish a marital interest in the property as a matter of law, since the Family Court lacked jurisdiction to enter such an Order.*

Even if it could be established that Vito Antonio Laera and Suzette LeFebvre were ever legally married (*Part B(2)(c) of this memorandum*), the fact remains that Ms. LeFebvre could not claim an equitable spousal interest in the property because the York County Family Court lacked any jurisdiction to enter such an equitable distribution Order. Jurisdiction of the Family Court is established under S.C. Code Ann. §20-3-30:

SECTION 20-3-30. Residence requirement.

In order to institute an action for divorce from the bonds of matrimony the plaintiff must have resided in this State at least one year prior to the commencement of the action or, if the plaintiff is a nonresident, the defendant must have so resided in this State for this period; provided, that when both parties are residents of the State when the action is commenced, the plaintiff must have resided in this State only three months prior to commencement of the action.

Ms. LeFebvre's Complaint for divorce, filed in March 2014, asserts that Mr. Laera has been a resident of South Carolina for a year prior to the filing (Exhibit 4). Mr. Laera's Answer states that he lives in three places - North Carolina, Florida and South Carolina, but that he spent most of his time in South Carolina (Exhibit 5). That does not, however, establish residency. In her deposition, Ms. LeFebvre stated that her sole knowledge of the place of residence of Antonio Laera after he moved from the marital residence is that Mr. Laera told her that he had moved to the Fort Mill residence (Lefebvre Deposition, p. 51, Line 24 through p. 52, line 2)(Exhibit 6). In a Complaint

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filed on July 24, 2013, a mere eight months prior to the filing of the "divorce" action, Mr. Laera affirmatively alleged that jurisdiction was proper because he was a resident of Ft. Lauderdale, Florida (Exhibit 7). In numerous court filings in the United States District Court for the Southern District of Florida throughout the year 2013 and 2014, Mr. Laera stated under oath that he was a citizen and resident of Florida (Exhibit 8). Furthermore, in sworn testimony before the United States District Court for the Southern District of Florida, taken on December 19, 2014 (a mere **four months** prior to the filing of the divorce petition), Mr. Laera testified before the presiding federal court judge and under oath that he is a resident of Florida (Exhibit 9). Mr. Laera and Ms. Lefebvre are judicially estopped from asserting that he was a resident of South Carolina for the period of one year prior to filing the marital litigation.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. See Colleton Reg. Hosp. v. MRS Med. Rev. Syst., 866 F. Supp. 896 (D.S.C. 1994). The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. 31 C.J.S. Estoppel & Waiver § 139, at 593 (1996). Judicial estoppel generally applies only to inconsistent statements of fact. Cannon v. H.K. Porter Co., 705 F. Supp. 288 (E.D. Va. 1989). Although some courts have held to the contrary, the doctrine does not apply to conclusions of law or assertions of legal theories. See United States v. Siegel, 472 F. Supp. 440 (N.D. Ill. 1979).

PAB
#10

* * *

We now explicitly adopt the doctrine of judicial estoppel as it relates to matters of fact (not law). In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine thus punishes those who take the truth-seeking function of the system lightly. When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him. It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence

Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251-252, 489 S.E.2d 472, 477 (1997). The elements of the application of judicial estoppel are:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215-216, 592 S.E.2d 629, 632 (S.C. 2004).

The elements of judicial estoppel clearly apply in this case to prevent the assertion that Mr. Laera was a resident of South Carolina for the year prior to the filing of the Family Court proceeding. The assertion that he was a resident of South Carolina is clearly inconsistent with the prior testimony and filings with the federal courts in the Southern District of Florida. By asserting his residence as being in Florida in June of 2013, Mr. Laera invoked the diversity jurisdiction of that Court, and thus the assertion was accepted by that court for the benefit of Mr. Laera. Finally, Mr. Laera is attempting to mislead the Court for his own advantage in attempting to uphold a clearly fraudulent conveyance.

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#11

Since LeFebvre is in privity with Laera regarding the transfer of the interest in this property, and since Mr. Laera on numerous occasions invoked his Florida residence to his advantage in prior litigation to maintain diversity in federal court, the parties are estopped from asserting that Mr. Laera was a resident of South Carolina for the year preceding the filing of the South Carolina marital litigation. For these reasons, Ms. LeFebvre has no Spousal interest in the subject property as South Carolina law does not apply, the York County Family lacked any jurisdiction to hear or render any decision as to the property rights of the parties, and thus no prior spousal equitable interests exists in Ms. LeFebvre which would give her any prior rights over the judgment lien of Defendant Blanco

GmbH+CO.KG. The Court should thus confirm its prior judgment that the funds be disbursed to Blanco GmbH+CO.KG..

- c) *Suzette LeFebvre and Antonio Laera were never legally married and, as such, there could be no Spousal interest of Suzette LeFebvre in the property which could have priority over the judgment lien Blanco GmbH+CO.KG.*

The most basic reason why Suzette LeFebvre could not have a spousal interest in the property which is the subject of this action is that Ms. LeFebvre was never legally married to Vito Antonio Laera. The record is replete with evidence that the parties were never legally married. Since they were not married, there could be no divorce establishing equitable interests in Ms. LeFebvre as a spouse.

Mr. Laera and Ms. Lefebvre resided together in Florida prior to undergoing a marriage ceremony in Colorado during a weekend stay in 2001. The Defendants, however, were not residents of Colorado at the time, and the Defendants did not obtain a Colorado marriage license. While a Colorado marriage requires marriage license, Colorado at the time recognized the concept of common law marriage. Common law marriage is not recognized in either Florida, where the Defendants resided at the time of the ceremony, nor in North Carolina, where the parties resided at the time of the "divorce." While the Defendants cannot be common law man and wife under the laws of the state of Florida or North Carolina, if they were common law man and wife under another state's law, it could be recognized. A common law marriage does not require any kind of ceremony at all but only the agreement of the parties, followed by the mutual and open assumption of a marital relationship. *People v. Lucero*, 747 P.2d 660, 663 (Colo. 1987). "*In re Marriage of Cargill*, 843 P.2d 1335, 1339 (Colo. 1993). "Evidence concerning a common-law marriage should be clear, consistent and convincing; and in *Estate of Klipfel v. Klipfel*, 41 Colo. 40, 92 Pac. 26, we ruled that to establish the presumption of marriage by cohabitation and repute, the marriage contract must be established

PAB
#12

by convincing and positive evidence. " Employers Mut. Liability Ins. Co. v. Industrial Com., 124 Colo. 68, 73, 234 P.2d 901, 903 (Colo. 1951).

A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship. *People v. Lucero*, 747 P.2d 660 (Colo. 1987). Absent an express agreement, the two factors considered the most reliable in determining whether an intent to be married has been established are cohabitation and a general reputation in the community that the parties hold themselves out as husband and wife.

Whitenhill v. Kaiser Permanente, 940 P.2d 1129, 1132 (Colo. Ct. App. 1997).

When judged by the standards of Colorado law, it is abundantly clear that although the Defendants may have undergone a marriage ceremony, the Defendants did not obtain a "general reputation in the community that the parties hold themselves out as husband and wife," and thus could not be deemed to have a common law marriage. The record is replete that, following the ceremony, the Defendants continued to represent to the community that they were not married. Significantly, Defendant LeFebvre did not take the last name "Laera" and continued to refer to herself by her own last name. In multiple legal documents, Defendant LeFebvre and her alleged husband, Vito Antonio Laera, repeatedly referred to themselves as unmarried:

AA3
#13

1. On April 1, 2002, both Defendants entered into a modification of the credit line mortgage wherein they were referred to as "Vito A. Laera, an unmarried person and Suzette Lefebvre, an unmarried person": (Exhibit 10)
2. On August 29, 2003, both Defendants entered into a credit line mortgage wherein they were referred to as "Vito A. Laera, an unmarried person and Suzette Lefebvre, an unmarried person"; (Exhibit 11)
3. On January 14, 2005, Vito Antonio Laera entered into a mortgage wherein he was referred to as "a single man." (Exhibit 12)
4. On December 18, 2006, Vito Antonio Laera entered into a general warranty deed wherein he was referred to as "a single man." (Exhibit 13)
5. On December 18, 2006, Defendant Laera entered into a North Carolina Deed of Trust where he was identified as "Vito Antonio Laera, unmarried" (Exhibit 14)
6. On February 22, 2007, Defendant Vito Laera entered into a deed wherein he was identified as Vito Laera, a single man"; (Exhibit 15)
7. On May 1, 2007, both Defendants entered into a deed wherein they were referred to

- as "Vito Laera, a single man and Suzette Lefebvre, a single woman";(Exhibit 16)
8. On July 12, 2007, Defendant Laera entered into a deed where he was identified as "Vito Laera, unmarried";(Exhibit 17)
 9. On November 12, 2013, Defendant Laera entered into a Deed of Trust where he was referred to as "Vito A. Laera, unmarried".(Exhibit 18)
 10. On July 1, 2014, Defendant Laera entered into a North Carolina deed where he was identified as "Vito Laera, unmarried";(Exhibit 19)

Most importantly and conclusively, Defendant Laera testified under oath on October 29, 2013 (four months before the filing of the alleged "divorce" action and one year prior to the "divorce" decree") in the United States District Court for the Southern District of Florida:

Q. Okay. Your wife was never a shareholder?

A. I'm single, sir.

Q. Okay. Were you ever married?

A. It's a long story. I would rather not put that on record.

Q. Wouldn't want to delve into your personal life. You can answer yes or no, were you married at some point in time?

A. I was married at some point in time.

Q. Were you married to Ms. LeFebure?

A. No, sir. I shouldn't have said that because it's going to be on the record and whatever.

Q. Was Ms. LeFebure ever a shareholder in G-Tech-I, Inc.?

A. No.

Q. Okay. Was Ms. LeFebure ever a shareholder in Vlanco Industries, Inc.?

A. I prefer you don't even say that word LeFebure. She's just the mother of my children.

Q. Okay. was she ever a shareholder?

A. No, she doesn't own anything that I own, she doesn't -- we have no interest in -- whatever's hers is hers, whatever's mine is mine. The only thing we

RAB
#14

have is that house because we bought it 20 years ago and we can't even sell the thing.

Testimony of Evidentiary Hearing October 29, 2013, p. 25, line 21 through p. 26, line 16. (Exhibit 9)

The Defendant's spent several days in Colorado and had a ceremony. They did not cohabitate in Colorado. Although they cohabitated in Florida and North Carolina, they did not hold themselves out as husband and wife. Mr. Laera kept his name, and Ms. LeFebvre kept her name. They entered into multiple significant legal documents after the ceremony identifying themselves as single. Mr. Laera testified under oath prior to the "divorce" that he was single and never married to Ms. LeFebvre. Ms. LeFebvre and Mr. Laera were not and cannot be deemed to be common law married under Colorado law, since they did not hold themselves out to the public as married. The parties never cohabitated in South Carolina, so they could not be deemed in a common law marriage under South Carolina law. Since the states of their cohabitance, Florida and North Carolina, do not recognize common law marriage, they could not be deemed common law man and wife under those state laws. Since Mr. Laera and Ms. LeFebvre were neither married under statutory law nor under common law, there can be no equitable spousal interest of Ms. LeFebvre entitled to priority over the Blanco judgment.

AAB
#15


For the foregoing reasons, Defendant LeFebvre has shown no basis for staying this Court's Order for the disbursement of funds, and further has shown no plausible basis upon which she could claim a priority interest in the proceeds over the interest of Blanco. Defendant LeFebvre was not entitled to receive any notice of the Motion for Modification of the Default Judgment Order, but nonetheless received actual notice and advised the Court of her position. Even if she was entitled to some notice, she can show no entitlement to the funds under the theory that she had a spousal interest in the property, since she failed to file a lis pendens associated with the marital litigation

filed in March 2014, there was no jurisdictional basis for filing the March 2014 martial litigation and, indeed, there is no credible evidence that Suzette LeFebvre and Vito Antonio Laera were ever legally married or occupied the status of common law husband and wife. This Court properly determined that Blanco GmbH+CO.KG was entitled to the proceeds from the sale of the property in excess of the first mortgage. This Court should therefore enter its Order confirming the prior Order for the disbursement of funds or, if it has any issue with the notice given to Defendant LeFebvre prior to the previous hearing, now issue its Order that the funds were properly disbursed to Blanco GmbH+CO.KG.

#16

Respectfully Submitted,

BERNSTEIN & BERNSTEIN, P.A.


Robert A. Bernstein S.C. Bar No. 0677
5418-B Rivers Avenue
North Charleston, SC 29406-6129
(843) 529-1111; (843) 529-0035 (fax)
rbernstein@bernsteinpa.com
ATTORNEYS FOR DEFENDANT
BLANCO GmbH&CO.KG

STATE OF SOUTH CAROLINA

COUNTY OF YORK

BLANCO GMBH+CO. KG,

Plaintiff(s)

vs.

Vito Antonio Laera, VLANCO INDUSTRIES, LLC, G-TECH-1, Inc., Robert Johnson, Joseph Napolitano and Vilanco Industries, Inc.

Defendant(s)

Submitted By: Anthony D. Hoefler

Address: 207 N. Washington St.

P.O. Drawer 730 Sumter, S.C. 29151

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 46- 03272

2014 OCT -3 PM 12:49

FILED-RECEIVED

DAVID P. MILTON
CLERK OF COURT
YORK COUNTY, S.C.

SC Bar #: 2547
Telephone #: 803-773-8431
Fax #: 803-775-9011
Other:
E-mail: lwhhd@ftc-i.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
 This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
 This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
 This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case # 20-CP-..., Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Label (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Comm. (990), Employment Security Comm (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions (650), Motion to Quash Subpoena in an Out-of-County Action (660), Sexual Predator (510)

Submitting Party Signature:

[Handwritten Signature]

Date: September 29, 2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

2014CP460327A

BLANCO GMBH+CO. KG,)
Plaintiff)

vs)

Vito Antonio Laera, VLANCO INDUSTRIES, LLC,)
G-Tech-1, Inc., Robert Johnson, Joseph Napolitano)
and Vilanco Industries, Inc.,)
Defendants.)

NOTICE OF FILING OF
FOREIGN JUDGMENT

DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

FILED-RECEIVED
2014 OCT -3 PM 12:49

TO: VITO ANTONIO LAERA, DEFENDANT.


YOU WILL PLEASE TAKE NOTICE That Plaintiff above named, by its undersigned attorneys, has filed the Foreign Judgment, a certified copy of which is attached hereto and made a part hereof, with the Clerk of this Court.

YOU WILL PLEASE TAKE FURTHER NOTICE That you have thirty (30) days from the date of the receipt of this notice to seek relief from the enforcement of this Judgment and that if the Judgment is not satisfied and no relief is sought within that thirty (30) days, the said judgment will be enforced in this State in the same manner as a Judgment of this State.

Plaintiff: BLANCO GMBH+CO. KG,
c/o Steven Mitnick, Esq.
SM Financial Services Corporation
Post Office Box 429
Frenchtown, New Jersey 08825

Clerk of Court: Honorable David Hamilton
Clerk of Court, York County
Post Office Box 649
York, South Carolina 29745-0649

LEVI, WITTENBERG, HARRITT,
HOEFER & DAVIS

By 
Attorneys for Plaintiff
207 N. Washington Street
P. O. Drawer 730
803 773 8431

Sumter, South Carolina

Sept. 29, 2014.

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

0014CP460327a

BLANCO GMBH+CO. KG,

Plaintiff

vs

Vito Antonio Laera, VLANCO INDUSTRIES, LLC,
G-Tech-1, Inc., Robert Johnson, Joseph Napolitano
and Vilanco Industries, Inc.,

Defendants.

AFFIDAVIT

FILED-RECEIVED
2014 OCT -3 PM 12:49
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Personally appeared before me, Steven Mitnick, Esq., who, first being duly sworn, on oath, states that she/he is the attorney of record for the Plaintiff in the judgment heretofore obtained in the State of Florida against the above named Defendants, as appears by reference to the attached Exemplification of the said judgment, along with Abstract of same, to which reference is craved for the full itemization of the said judgment and that he makes this Affidavit pursuant to Section 15-35-900, et seq., 1976 Code of Laws of South Carolina, as amended for the purpose of enforcing Plaintiff's judgment in the County and State captioned above:

The Plaintiff above named obtained a judgment on January 21, 2014, against Defendant above named for a principal amount of Six Hundred Thousand and /100 (\$600,000.00) Dollars plus attorney's fees in the amount of Two Hundred Twenty-Seven Thousand Three Hundred Eighty-Seven and 00/100 (\$227,387.00) Dollars, non-taxable costs in the amount of Six Thousand Four Hundred Seventy-Seven and 56/100 (\$6,477.56) Dollars and taxable costs in the amount of Seven Hundred Sixty-Nine and 75/100 (\$769.75) Dollars, that the said judgment is final; that it is not further contested and is unsatisfied; that the ~~statutory-judgment-interest-rate-in-Florida-accrues at 4.75%~~ per annum on the aforesaid unpaid principal from January 21, 2014, until the said judgment is docketed, indexed, and rendered enforceable in the State of South Carolina in the same manner as a judgment of that State, and that said principal sum plus accruing interest as aforesaid, plus the costs of filing this judgment in South Carolina is to be the amount that will be docketed and indexed in the office of the Clerk of this Court.



SWORN to before me this 23rd
day of September, A. D., 2014
Lindsay Rene Adams
Notary Public for the State of New Jersey
My Commission Expires: Sept. 6 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61580-CIV-LENARD

BLANCO GMBH + CO. KG,
Plaintiff,

vs.

VLANCO INDUSTRIES, LLC, et al.,
Defendant.

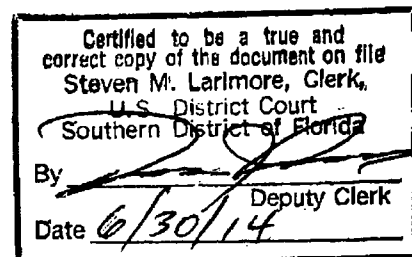
AMENDED CLERK'S ENTRY OF FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and the Court's Order directing Clerk to enter an Amended Judgment (DE 264), this Amended Final Judgment is entered in favor of Plaintiff Blanco GmbH+Co. KG and against Vito Antonio Laera, Vilanco Industries, LLC, G-Tech-I, Inc., Robert Johnson, Joseph Napolitano, and Vilanco Industries, Inc., jointly and severally, for liquidated damages in the amount of \$600,000.00, attorneys' fees in the amount of \$227,387.00, non-taxable costs in the amount of \$6,477.56, and taxable costs in the amount of \$769.75.

DONE AND ORDERED this 24th day of June, 2014 in the Southern District of Florida.

Steven Larimore
Clerk of Court

BY: s/ Deloris McIntosh
Deputy Clerk



SR-023

2014CP4603272

UNITED STATES DISTRICT COURT

SOUTHERN

District of

FLORIDA

DAVID HAMILTON
CLERK
YONK COUNTY, SC

2014 OCT -3 PM 12:49

FILED RECEIVED

EXEMPLIFICATION CERTIFICATE

I, Steven M. Larimore, Clerk of this United States District Court, keeper of the records and seal, certify that the attached documents:
Case Number 12-CV-61580 DE# 265 Amended Clerk's Entry of Final Judgment

are true copies of records of this Court.

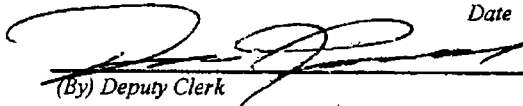
In testimony whereof I sign my name and affix the seal of this Court, in this District, at Fort Lauderdale on 6/30/2014

City

Date

Steven M. Larimore

Clerk



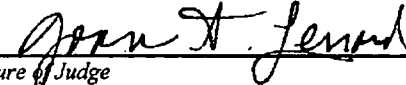
(By) Deputy Clerk

I, Joan A. Lenard, a Judicial Officer of this Court, certify that Steven M. Larimore, named above, is and was on the date noted, Clerk of this Court, duly appointed and sworn, and keeper of the records and seal, and that this certificate, and the attestation of the record, are in accordance with the laws of the United States.

Date

7/7/14

Signature of Judge



United States District Court Judge

Title

I, Steven M. Larimore, Clerk of this United States District Court, keeper of the seal, certify that the Honorable Joan A. Lenard,
Judge

named above, is and was on the date noted a Judicial Officer of this Court, duly appointed, sworn and qualified, and that I am well acquainted with the Judge's official signature and know and certify the above signature to be that of the Judge.

In testimony whereof I sign my name, and affix the seal of this Court at Fort Lauderdale in this State, on 6/30/2014

City

Date

Steven M. Larimore

Clerk



(By) Deputy Clerk

AO 451 (Rev. 01/09) Clerk's Certification of a Judgment to be Registered in Another District

UNITED STATES DISTRICT COURT

for the

Souther District of Florida

RECEIVED
USDC, CLERK GREENVILLE, SC



2014 APR -7 PM 1:53

6:14-107

BLANCO GMBH + CO. KG

Plaintiff

v.

VLANCO INDUSTRIES, LLC, G-TECH-I, INC., et.al

Defendant

Civil Action No. 12-61580-CIV-ROSENBAUM/HUNT

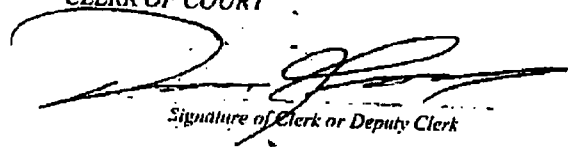
CLERK'S CERTIFICATION OF A JUDGMENT TO BE REGISTERED IN ANOTHER DISTRICT

I certify that the attached judgment is a copy of a judgment entered by this court on (date) 01/21/2014

I also certify that, as appears from this court's records, no motion listed in Fed. R. App. P. 4(a)(4)(A) is pending before this court and that no appeal has been filed or, if one was filed, that it is no longer pending.

Date: 3/21/14

CLERK OF COURT



Signature of Clerk or Deputy Clerk

AO 132 (Rev. 12/03) Exemplification Certificate

RECEIVED
USDC, CLERK GREENVILLE, SC
2014 APR -7 PM 1:58

UNITED STATES DISTRICT COURT

District of _____

EXEMPLIFICATION CERTIFICATE

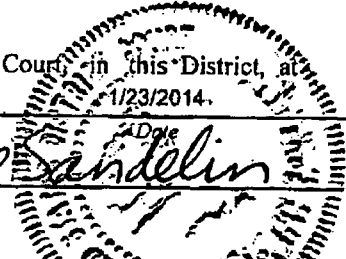
I, Steven M. Larimore, Clerk of this United States District Court, keeper of the records and seal, certify that the attached documents:

are true copies of records of this Court.

In testimony whereof I sign my name and affix the seal of this Court in this District, at Fort Lauderdale on 1/23/2014.

Steven M. Larimore
Clerk

Joanne Sandelin
(By) Deputy Clerk



Robin S. Rosenbaum, a Judicial Officer of this Court, certify that Steven M. Larimore, named above, is and was on the date noted, Clerk of this Court, duly appointed and sworn, and keeper of the records and seal, and that this certificate, and the attestation of the record, are in accordance with the laws of the United States.

1/23/2014
Date

Robin S. Rosenbaum
Signature of Judge
U.S. District Judge
Title

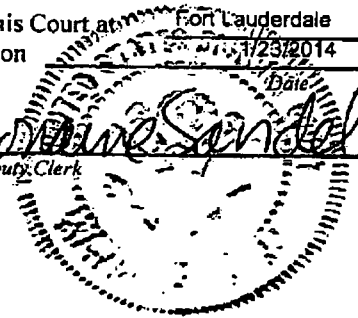
Steven M. Larimore, Clerk of this United States District Court, keeper of the seal, certify that the Honorable Robin S. Rosenbaum, Judge

named above, is and was on the date noted a Judicial Officer of this Court, duly appointed, sworn and qualified, and that I am well acquainted with the Judge's official signature and know and certify the above signature to be that of the Judge.

In testimony whereof I sign my name, and affix the seal of this Court at Fort Lauderdale in this State, on 1/23/2014.

Steven M. Larimore
Clerk

Joanne Sandelin
(By) Deputy Clerk



**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 12-61580-CIV-ROSENBAUM/HUNT

BLANCO GMBH + CO. KG,

Plaintiff,

v.

VLANCO INDUSTRIES, LLC, G-TECH-I, INC.,
and VITO ANTONIO LAERA,

Defendants.

**AMENDED ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION**

This matter is before the Court on Plaintiff's Motion to Re-open and for an Order to Show Cause [ECF No. 79], Plaintiff's Second Motion for Order to Show Cause [ECF No. 95], Defendant's Motion for Order to Show Cause [ECF No. 125], Plaintiff's Motion for Preliminary Injunction [ECF No. 126], Plaintiff's Motion for Default Judgment [ECF No. 153], and Defendant's Motion for Default Judgment [ECF No. 157], which were previously referred to the Honorable Patrick M. Hunt for a Report and Recommendation. Judge Hunt issued a Report and Recommendation on all of the Motions [ECF No. 185], and Defendant Laera has filed objections to the Report and Recommendation [ECF No. 189]. Plaintiff has also filed Objections [ECF No. 188]. For the reasons set forth below, the Court overrules Defendant's Objections, sustains in part and overrules in part Plaintiff's Objections, and adopts Judge Hunt's Report and Recommendation.

I. Background

Plaintiff Blanco GmbH+Co. KG brought this action against Defendants Vlanco Industries, LLC, G-Tech-I, Inc., and Vito Antonio Laera, asserting claims for trademark infringement, cyber-

squatting, and unfair competition. The parties ultimately reached a settlement, and the Court entered a Final Judgment Upon Consent [ECF No. 76], in which the Court retained jurisdiction to enforce the terms of the parties' agreement. The various motions addressed by the Report and Recommendation relate to various issues arising after entry of the Consent Judgment.

II. Discussion

A. Plaintiff's Emergency Motion for Preliminary Injunction [ECF No. 126]

Plaintiff moved for the entry of a preliminary injunction on the grounds that Laera purportedly impersonated Plaintiff and its intellectual property counsel, Franka Kuschnirek, by changing the domain-name account of a GoDaddy domain name registrar to falsely reflect Plaintiff and Kuschnirek as the account owners. See ECF No. 126. Judge Hunt recommended that the Motion be denied because Plaintiff failed to satisfy the elements necessary for a preliminary injunction. The Court agrees. In particular, Plaintiff has failed to show that it lacks an adequate remedy at law or that it will suffer irreparable injury if its motion is not granted.

The purpose of a preliminary injunction is to restrain conduct "in those extraordinary situations where irreparable injury might result from delay or inaction." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1133 (11th Cir. 2005) (citing *United Bonding Ins. Co. v. Stein*, 410 F.2d 483, 486-87 (3d Cir. 1969)). Because its sole function is to forestall future harm, injunctive relief is "completely at odds with a sanction for past conduct that may be addressed by adequate remedies at law." *Id.* As such, even if Defendant wrongfully impersonated Plaintiff, no indication exists that Defendant's alleged wrongdoing is ongoing. Thus, no threat of irreparable injury exists. To the extent that Plaintiff seeks relief from any harm imposed by Defendant's past conduct, Plaintiff

may pursue a legal remedy; hence, equitable relief is barred. Plaintiff's Motion for Preliminary Injunction is therefore denied.

B. Plaintiff's Motions for Contempt [ECF Nos. 79, 95]

1. Plaintiff's Motion to Re-Open and for an Order to Show Cause [ECF No. 79]

Plaintiff requests that the Court find Defendants in contempt of the parties' Consent Judgment. ECF No. 79. In this regard, Plaintiff avers that Defendants (i) filed three applications with the United States Trademark Office containing prohibited designations; (ii) registered fifty-five new domain names containing prohibited designations; (iii) re-directed a number of domain names to a website using the prohibited designation "BLANCO;" and (iv) refused to cooperate in the transfer of certain domain names and transferred ownership of such domain names to third parties. ECF No. 79 at 2-3. In the Report and Recommendation, Judge Hunt found that Plaintiff presented sufficient evidence showing that Defendants, or persons acting in concert with Defendants, violated, and continue to violate, the terms of the Consent Judgment. The Court agrees with Judge Hunt's determination.

The Consent Judgment provides, in pertinent part, that

2. Defendants, their officers, servants, agents, employees, attorneys, and representatives, and/or anyone acting in active concert or participation with any or all of them, are hereby permanently restrained and enjoined from actively engaging in any of the following acts:

- (a) applying to register with the U.S. Trademark Office and/or using the Infringing Marks and/or any other slogan, name, or mark confusingly similar to the BLANCO Marks, including, without limitation, VALANCO, VIANCO, VLANCO, or BLANCO, but excluding VILANCO and VALCO, which the Defendants may use

(c) registering any domain name which consists of or incorporates any slogan, name or mark confusingly similar to the BLANCO Marks, including, without limitation VALANCO, VIANCO, VLANCO, or BLANCO, but excluding VILANCO and VALCO, which the Defendants may use

ECF No. 76 at 2-3. After entry of the Consent Judgment, a third party, Robert Johnson, filed trademark applications that included the term "VLANCO" and registered domain names containing the terms "BLANCO," "VIANCO," and "VLANCO"—all of which constitute prohibited designations under the Consent Judgment.

According to Plaintiff, Robert Johnson is either an alias of Laera or a person acting in concert with Laera. In support of this contention, Plaintiff notes that Johnson's pending trademark applications are virtually identical to those originally filed by Defendants. Indeed, several of the specimens attached to Johnson's applications contain photographs that match those of Defendants' products included in the parties' Stipulation of Settlement and in Plaintiff's original Complaint. *See e.g.*, ECF No. 2-3; ECF No. 79-6; and ECF No. 79-8. Interestingly, the address listed for Robert Johnson in the trademark applications belongs to a leasing office, and no record exists of a Robert Johnson having lived or worked there.

As further evidence of Defendants' relationship with Robert Johnson, Plaintiff points to Defendants' redirection of their former domain names. The Consent Judgment required the registrars of Defendants' infringing domain names to transfer ownership of the domain names to Plaintiff. ECF No. 76 at 7. The Stipulation of Settlement, in turn, required Plaintiff to redirect those domain names to an IP address provided by Defendants for a limited transition period. ECF No. 79-

6 at 6. The IP address provided by Laera, however, redirects users to "blancoamerica.us," a domain name registered to Robert Johnson.

Finally, Robert Johnson is currently listed as the registered agent for Defendant Vilanco Industries, LLC.¹ Laera initially formed the company and was its manager and authorized representative. A Google search of "Vito Laera and Robert Johnson" also revealed a now-inactive Facebook page for "ViLanco-Vito Laera and Company," which stated: "We ship internationally. Ask for Robert Johnson." ECF No. 79-2.

The Court agrees with Judge Hunt that Plaintiff has satisfied its burden of establishing a prima facie case of contempt. "A party seeking civil contempt bears the initial burden of proving by clear and convincing evidence that the alleged contemnor has violated an outstanding court order." *Commodity Futures Trading Com'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992). Whether or not Robert Johnson is merely an alias—although the facts strongly suggest that he is—ample support exists for the notion that Robert Johnson was at least an agent of Defendants and acted in concert with Laera, and the actions undertaken by them are clear violations of the Consent Judgment. Indeed, it appears that Defendants were utilizing Robert Johnson in order to attempt to circumvent the Consent Judgment.

Once a prima facie showing of contempt has been made, the burden shifts to the contemnor to show that he was unable to comply with the Court's order. *See Commodity Futures Trading*

¹ In January 2013, Defendant changed its name from "Vlanco Industries, LLC," to "Vilanco Industries, LLC." *See* Articles of Amendment to Articles of Organization, www.sunbiz.org.

Com'n, 950 F.2d at 1529. In Laera's opposition brief to Plaintiff's Motion, Laera stated simply that he had "no information or belief" on the subject. See ECF No. 132 at 47. Additionally, he did not raise the issue in his Objections to the Report and Recommendation. The corporate Defendants have filed no response to Plaintiff's motion, and Judge Hunt therefore recommended that the Court grant Plaintiff's Motion for Default. See ECF No. 153. Because Laera and the corporate Defendants have failed to rebut Plaintiff's showing, the Court concurs with Judge Hunt that Defendants are in contempt of the Consent Judgment.

2. Plaintiff's Second Motion for an Order to Show Cause [ECF No. 95]

Plaintiff then filed a Second Motion for Contempt, alleging further violations of the Consent Judgment by Laera and third parties Joseph Napolitano, Vilanco Industries, Inc., and Robert Johnson. In particular, Plaintiff avers that Laera, in concert with these non-parties, sought to evade the Consent Judgment by filing an ancillary lawsuit and assigning certain trademark rights.

On May 21, 2013, Joseph Napolitano and Vilanco Industries, Inc., instituted an action against Laera in the United States District Court for the District of South Carolina. ECF No. 95-4. In that lawsuit, Joseph Napolitano and Vilanco Industries, Inc., sought a judgment against Laera for the same rights to the trademark and domain names that are encompassed in the Consent Judgment. The basis for the lawsuit involved several license agreements—executed after the commencement of this lawsuit—that purported to grant a license from Laera to Vilanco Industries, Inc., to use numerous trademarks and domain names that are the subject of the present action.

Plaintiff posits that the South Carolina lawsuit was merely an attempt by Laera to obtain an order allowing him to use the trademarks that he had been prohibited from using by the Consent Judgment. In support of this assertion, Plaintiff provides evidence that demonstrates a clear relationship between Laera, Joseph Napolitano, and Vilanco Industries, Inc. Specifically, Laera was the company's incorporator and was listed as the president and registered agent of Vilanco Industries, Inc., in various corporate documents, including the Articles of Dissolution. *See, e.g.*, ECF Nos. 95-5, 95-6. Joseph Napolitano also appears to be an officer of Vilanco Industries, Inc. ECF No. 95-7. The Florida address associated with both Joseph Napolitano and Vilanco Industries, Inc., is Laera's Florida homestead property, and the mailing address provided in the company's Annual Report corresponds to a property owned by Laera. *See* ECF No. 185 at 24. Based on these affiliations, Plaintiff maintains that Joseph Napolitano is an alias of Laera's, and the lawsuit was actually brought by Laera against himself in an effort to retain rights to the use of the prohibited designations.

In light of the evidence provided by Plaintiff, Judge Hunt determined that the South Carolina action was a subversive tactic designed to shirk the terms of the parties' settlement agreement. Judge Hunt noted that compelling evidence existed supporting the notion that Joseph Napolitano was merely an alias, but regardless, Plaintiff had presented enough evidence demonstrating that Joseph Napolitano and Vilanco Industries, Inc., had actual notice of the Consent Judgment and acted in concert with Laera in violating its terms. Moreover, Laera provided insufficient explanation for the license agreements and the ancillary lawsuit, and Laera did not address the issue in his Objections

to the Report and Recommendation. As a result, the Court agrees that Laera, Joseph Napolitano, and Vilanco Industries, Inc., are in contempt of the Consent Judgment.²

Plaintiff has also presented evidence that Laera assigned a fifty-percent ownership interest in twenty-four trademarks to Robert Johnson, in violation of the parties' Stipulation of Settlement. This, along with the other evidence of Robert Johnson's affiliation with Laera, led Judge Hunt to again appropriately conclude that Robert Johnson had notice of the Consent Judgment and acted in concert with Laera in violating its terms.

3. Damages

The Consent Judgment provides for \$150,000 in liquidated damages per violation. ECF No. 76 at ¶ 10. Judge Hunt noted that "the evidence strongly indicates that [Laera] has been using fake names, shell companies, and subversive tactics to violate [the] agreement" and recommended that the Court award Plaintiff \$150,000 per categorical violation. In this regard, Judge Hunt divided the violations into four categories, amounting to a total of \$600,000 in liquidated damages, exclusive of attorney's fees and costs, for which Defendants, Robert Johnson, Joseph Napolitano, and Vilanco Industries, Inc., are jointly and severally liable. *See* ECF No. 185 at 33. Judge Hunt concluded that injunctive relief is unnecessary because the Consent Judgment already prohibits the conduct that Plaintiff seeks to enjoin. He further recommended that the Court direct the Registrars and Registries

² A non-party may be held in contempt where the non-party violated an order in active concert or participation with a named party and had actual notice of the enjoined acts. *See* Rule 65, Fed. R. Civ. P.; *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) ("[Parties] may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.").

of the domain names containing prohibited designations identified in the Consent Judgment to transfer ownership of the domain names to Plaintiff and that the Court direct the United States Trademark Office to comply with the Consent Judgment and enter judgment in favor of Plaintiff in the opposition/cancellation proceedings identified in Schedule A of the Consent Judgment. The Court finds that the relief recommended is appropriate.

In its Objections to the Report and Recommendation, Plaintiff requests that the Court also direct the United States Trademark Office to abandon with prejudice the three pending trademark applications filed by Robert Johnson. As the Court has determined those applications to be in violation of the Consent Judgment, the Court grants Plaintiff's request. Plaintiff also asks the Court to award injunctive relief with respect to the license agreements between Laera, Vilanco Industries, Inc., and Joseph Napolitano. But such relief is unnecessary because the license agreements are already in direct violation of the Consent Judgment. As the conduct has previously been enjoined, no additional injunction is required.

Finally, the Court agrees with Judge Hunt that Plaintiff must continue to abide by the terms of the Consent Judgment. Despite Defendants' actions in this matter, the Court finds no good cause to relieve Plaintiff of its obligations at this time.

D. Defendant Laera's Motion for an Order to Show Cause [ECF No. 125]

Laera asserts that Plaintiff failed to abide by the terms set forth in the Consent Judgment. Specifically, Laera appears to contend that Plaintiff wrongfully challenged Laera's use of certain designations because he believes that the Consent Judgment allows him to register any name or mark "confusingly similar to 'VILANCO and 'VALCO.'" See, e.g., ECF No. 125 at 4, 10, 11. This

contention is wholly incorrect. The Consent Judgment makes clear that Defendants are permanently enjoined from registering any slogan, name, mark, or domain name that is confusingly similar to "BLANCO," with the *exception* of "VILANCO" and "VALCO." ECF No. 76 at 2-3. Thus, although Defendants are permitted to use the designations "VILANCO" and "VALCO," other confusingly similar designations are expressly prohibited. As a result, Plaintiff's challenges to Defendants' use of the prohibited designations were proper.

Laera also asserts that Plaintiff failed to redirect certain domain names as required by the Stipulation of Settlement. As noted by Judge Hunt, however, Plaintiff has already demonstrated its compliance with the parties' agreement. *See* ECF No. 185 at 36. For these reasons, Defendant's Motion for an Order to Show Cause is denied.

E. Defendant Laera's Motion for Entry of Default Judgment [ECF No. 157]

Finally, Laera moves for an entry of default judgment against Defendants G-Tech-I, Inc., and Vilanco Industries, LLC, because of their failure to respond to Laera's Counterclaim. Because Judge Hunt granted Plaintiff's Motion to Strike Defendant's Counterclaim [ECF No. 184 at 6], Laera's Motion was properly denied as moot.

III. Conclusion

For the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1. Magistrate Judge Hunt's Report and Recommendation [ECF No. 185] is hereby **ADOPTED**;

2. Plaintiff's Emergency Motion for Preliminary Injunction [ECF No. 126] is **DENIED**;
3. Plaintiff's Motion to Re-Open and for an Order to Show Cause [ECF No. 79], Plaintiff's Second Motion for an Order to Show Cause [ECF No. 95], and Plaintiff's Motion for Entry of Default Judgment [ECF No. 153] are **GRANTED IN PART** as follows:
 - a. Defendants Vito Antonio Laera, Vilanco Industries, LLC, and G-Tech-I, Inc., and Third-Party Defendants Robert Johnson, Joseph Napolitano, and Vilanco Industries, Inc., are in contempt of this Court's Final Judgment on Consent [ECF No. 76];
 - b. Defendants Vito Antonio Laera, Vilanco Industries, LLC, and G-Tech-I, Inc., and Third-Party Defendants Robert Johnson, Joseph Napolitano, and Vilanco Industries, Inc., are jointly and severally liable for \$600,000 in liquidate damages awarded to Plaintiff;
 - c. The Registrar(s) and Registry(ies) of the domain names containing prohibited designations identified in the Consent Judgment and licensed in the license agreements at issue in the South Carolina action discussed herein shall transfer ownership of the domain names to Plaintiff, including vlanco.cn and vlanco.it;

- d. The United States Trademark Office shall comply with the Consent Judgment and is directed to abandon with prejudice the following applications submitted by Robert Johnson: U.S. Trademark Application Serial Nos. 85/911,435 for "VLANCO" (stylized); 85/911,213 for "WWW.VLANCO.COM" (stylized), and 85/911,425 for "VLANCO.COM" (stylized);
 - e. Plaintiff shall continue to comply with the Consent Judgment;
 - f. Plaintiff is entitled to attorney's fees and costs associated with this action pursuant to the Consent Judgment;
- 4. Defendant Laera's Motion for an Order to Show Cause [ECF No. 125] is **DENIED**;
 - 5. Defendant Laera's Motion for Entry of Default Judgment [ECF No. 157] is **DENIED**.

DONE and ORDERED in Fort Lauderdale, Florida, this 21st day of January 2014.


ROBIN S. ROSENBAUM
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record

Vito Antonio Laera
5960 SW 32 Terrace

Ft. Lauderdale, FL 33312