

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

IREDELL COUNTY

16 CVS 2877

W. AVALON POTTS, derivatively on
behalf of Steel Tube, Inc.,

Plaintiff,

v.

KEL, LLC; RIVES & ASSOCIATES,
LLP;

Defendants,

and

STEEL TUBE, INC.,

Nominal Defendant,

and

LEON L. RIVES, II,

Defendant/
Counterclaimant/
Third-Party Plaintiff,

v.

AVALON1, LLC,

Third-Party Defendant/
Counterclaimant.

**ORDER ON JUDGMENT CREDITORS'
MOTION TO ENFORCE CHARGING
ORDER, APPOINT A RECEIVER FOR
R&A, AND ORDER RIVES AND R&A
TO APPEAR AND SHOW CAUSE WHY
THEY SHOULD NOT BE HELD IN
CIVIL CONTEMPT**

1. Following the entry of a judgment in favor of W. Avalon Potts and Avalon1, LLC (together “Judgment Creditors”), the Court issued an order charging Leon L. Rives, II’s ownership interest in Rives & Associates, LLP (“R&A”) with the unsatisfied amount of the judgment. (*See* ECF No. 255.) Pending is Judgment Creditors’ motion to enforce the charging order. (*See* ECF No. 270.)

2. **Background.** In December 2019, a jury found Rives liable for breach of fiduciary duty, constructive fraud, conversion, and fraud. (*See* ECF Nos. 209, 211.) Based on that verdict, the Court entered a judgment in favor of Judgment Creditors with damages and interest exceeding \$2 million. (*See* ECF No. 212.) The judgment went unsatisfied.

3. In March 2020, the North Carolina Board of Certified Public Accountant Examiners (“Board of Examiners”) issued an emergency order and suspended Rives’s certificate as a Certified Public Accountant. Citing the jury’s verdict and the final judgment, the Board of Examiners found “substantial evidence” that Rives “has engaged in general and specific conduct demonstrating that he is no longer fit to continue to hold” the certificate. (ECF No. 285.7.) Under applicable ethics rules, Rives’s suspension jeopardized his ownership interest in R&A. *See* N.C. Admin. Code 08N.0302(f)(4) (2023) (“[A] non-CPA owner shall be of good moral character and shall be dismissed and disqualified from ownership for any conduct that, if committed by a licensee, would result in a discipline” by the Board of Examiners.).

4. In April 2020, Judgment Creditors moved to charge Rives’s ownership interests in various entities, including R&A, with payment of the unsatisfied amount of the judgment. (*See* ECF Nos. 235, 241.) Judgment Creditors also moved for an order in aid of execution under N.C.G.S. § 1-358. (*See* ECF No. 243.) Although Rives mostly opposed those motions, he conceded that the Court had “the power to exercise its discretion to enter a charging order charging the interest of Leon L. Rives II in Rives and Associates, LLP, and requiring any distribution of profits be made to the”

Judgment Creditors. (ECF No. 247.) Rives made no mention of his suspension by the Board of Examiners or the effect of that suspension on his ability to maintain ownership in R&A.

5. Judgment Creditors also served discovery requests concerning Rives's assets. In his May 2020 responses, Rives stated that he owned interests in R&A as well as four other entities. He further stated that "there have been discussions between [himself] and Rives and Associates, LLP of a cancellation or repurchase of his ownership interest" but that "no transfer of ownership interest nor its terms have been finalized." (ECF No. 272.2.)

6. In late June 2020,¹ the Court held a hearing on the motions for a charging order and for an order in aid of execution. Neither side suggested that Rives had given up his interest in R&A, and following the hearing, the parties tendered a proposed charging order stating that R&A was one of the entities in which "Rives owns interests." On 9 July 2020, the Court granted the motions for a charging order and charged Rives's interests in the entities listed in the proposed order, including R&A. (ECF No. 255.) On the same day, the Court denied the motion for an order in aid of execution, noting that "the record [did] not show that [Rives was] threatening to conceal or dispose of assets." (ECF No. 256.)

7. Long after the entry of these orders, Judgment Creditors learned that Rives had transferred his interest in R&A without informing them. They asked Rives's counsel for an explanation and served more discovery requests. In response, Rives

¹ The timing of this hearing and much of the briefing related to Judgment Creditors' motions was driven by the onset of the COVID-19 pandemic in early 2020.

stated that he “was required to return his interest in R&A to the firm” following his suspension by the Board of Examiners and that he received no consideration for his interest other than continued employment. (ECF No. 272.3.) He also stated that he surrendered his interest on 20 March 2020—nearly four months before the charging order was entered—and produced a so-called “Involuntary Agreement” that purported to document the transfer. (ECF No. 272.6.)

8. This dismayed Judgment Creditors, who questioned the legitimacy of the Involuntary Agreement, the timing and terms of the transfer of Rives’s interest, his failure to disclose it sooner, and his earlier contradictory representations that he retained an interest in R&A as late as July 2020. Other documents that Rives produced showed that his wife became a partner in R&A around the time that he was supposed to have surrendered his interest. To Judgment Creditors, this meant that the Involuntary Agreement was a sham designed to conceal the transfer of Rives’s partnership interest to his wife. Citing these concerns, they moved to enforce the charging order and for an order appointing a receiver and directing Rives and R&A to appear and show cause why they should not be held in civil contempt. (ECF No. 270.)

9. The Court held an initial hearing in March 2023. The hearing highlighted gaps and inconsistencies in Rives’s document production, including admitted errors in R&A’s tax returns regarding the amount and categorization of his compensation. The Court took the motion under advisement pending further discovery and supplemental briefing. (ECF Nos. 300, 302, 306.)

10. After the parties filed their supplemental briefs, the Court held a second hearing on 23 October 2023. In addition to their request for enforcement of the charging order, Judgment Creditors also urged an *in camera* review of documents that Rives and R&A contend are protected by the attorney–client privilege. The Court agreed to do so and has now completed its review. (ECF No. 336.) The motion is ripe for decision.

11. **Charging Order.** Judgment Creditors argue that the Involuntary Agreement is a sham, that Rives continued to own an interest in R&A at least through the end of 2020, and that he received payments from R&A that should have been put toward the judgment under the charging order. Rives counters that he could not have violated the charging order because he had surrendered his interest in R&A before it was entered.

12. Although the Involuntary Agreement is dated 20 March 2020, there are good reasons to believe that Rives signed it much later. Rives himself told Judgment Creditors throughout the spring of 2020 that he was considering whether to transfer his ownership interest in R&A but had not yet finalized terms. And the metadata show that the agreement was created on 19 June 2020. Perhaps, as Rives claims, the metadata simply record the date that someone scanned a preexisting physical copy. But if that is the case, it is still rather odd that he could not produce an earlier electronic copy.

13. In any event, the evidence shows that Rives signed the Involuntary Agreement and surrendered his interest in R&A no later than 19 June 2020. The

Court need not determine the exact date: even if Rives and R&A finalized the agreement in June and backdated it to March, that was well before the Court issued the charging order in July. The upshot is that the charging order charged an interest that Rives no longer possessed. Having surrendered his interest, Rives has not received payments on account of that interest, and thus, the Court concludes that he has not violated the charging order.

14. Judgment Creditors resist this conclusion on a few grounds. First, they argue that the Involuntary Agreement is a sham and that Rives retained his interest throughout 2020 and possibly longer. This is not a compelling argument. The Involuntary Agreement is valid, preceded the charging order, and plainly extinguishes Rives's interest. Moreover, it did not come out of the blue. When the Board of Examiners suspended Rives's accounting certificate in March 2020, he could not continue to hold an ownership interest in R&A under governing regulations. It seems certain that R&A would have been subject to discipline, possibly including closure and dissolution, had Rives kept his ownership interest. Judgment Creditors offer no reason to believe otherwise. This context suggests that the Involuntary Agreement was a natural, possibly necessary response to the action of the Board of Examiners.

15. To be sure, some documents—financial statements and tax returns—suggest that Rives held himself out as a partner long after surrendering his interest. As an example, he named himself as the signing partner on R&A's 2021 tax return as late as September 2022. (*See* ECF No. 319.26.) This may mean that Rives falsely

represented his status to the Internal Revenue Service and the North Carolina Department of Revenue. But that is all it is: a *false* representation, not a *true* representation that Rives maintained ownership in R&A. Making a false statement to taxing authorities, however wrong that may be, is not a violation of the charging order. And if Rives or R&A committed tax fraud or other abuse, those authorities are well equipped to deal with it.

16. Next, Judgment Creditors rely on principles of judicial estoppel. “Broadly speaking, judicial estoppel prevents a party from acting in a way that is inconsistent with its earlier position before the court.” *Powell v. City of Newton*, 364 N.C. 562, 569 (2010). Judgment Creditors contend that Rives, having represented in the first half of 2020 that he continued to own an interest in R&A, cannot now take the opposite position that he had surrendered his interest before the charging order was entered. There is no doubt that Rives’s positions have changed, and it is fair to wonder why he wasn’t truthful at the time. But estoppel is a poor fit. The issue facing the Court in 2020 was whether to charge Rives’s ownership interests with payment of the judgment going forward. That issue differs in essential ways from the one that exists now, which is whether Rives violated the charging order. Put simply, Rives’s concession that the Court had the power to charge his interest in R&A in the spring of 2020 does not bar him from arguing that he has not received any payments on account of that interest in the intervening years.

17. Third, Judgment Creditors argue that the transfer of Rives’s interest under the Involuntary Agreement was fraudulent and seek to set it aside. This the Court

cannot do. Judgment Creditors' remedy, if any, is to bring a civil action under the Uniform Voidable Transactions Act. *See* N.C.G.S. § 39-23.7 (allowing a creditor to file "an action for relief"); *see also UBS Fin. Servs., Inc. v. Lacava*, 2018 Ohio App. LEXIS 3442 (Ohio Ct. App. Aug. 9, 2018) (addressing action for fraudulent conveyance aiming to satisfy monetary judgment).²

18. In sum, the evidence shows that Rives transferred his ownership interest in R&A sometime between March and June 2020. The Court concludes that he has not received any payments on account of that interest after the entry of the charging order in July 2020. Absent a violation of that order, the Court denies Judgment Creditors' motion to hold Rives and R&A in contempt or to appoint a receiver.

19. **Prohibition on Circumvention.** Although the record does not show that Rives violated the charging order, it does show his lack of candor. Judgment Creditors worry that he might transfer his other ownership interests without notice, thwarting the purpose of the charging order. They ask the Court to enjoin Rives from transferring or disposing of those interests.

20. A trial court may "forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution." N.C.G.S. § 1-358. Whether to do so lies in the trial court's sound discretion. *See* 84

² Judgment Creditors rely on the *UBS* case to support their argument. There, though, the court was not faced with a postjudgment motion to set aside a transfer. Rather, it was a new civil action presenting a claim that a judgment debtor fraudulently transferred his ownership interest in an LLC to his wife to avoid paying a monetary judgment (somewhat analogous to Judgment Creditors' belief that Rives's wife obtained his interest in R&A).

Lumber Co. v. Habitech Enters., Inc., 2007 N.C. App. LEXIS 2425, at *4 (N.C. Ct. App. Dec. 4, 2007).

21. Judgment Creditors' concerns are entirely fair. At no point has Rives adequately explained why he kept the Involuntary Agreement from Judgment Creditors and the Court during and after the briefing and argument on the motions for a charging order. Nor has he offered any convincing assurances regarding the other interests that he holds. The Court therefore grants this request and will enjoin Rives from transferring or disposing of ownership interests subject to the charging order.

22. **Other Relief.** Following the first hearing on Judgment Creditors' motion to enforce the charging order, Rives agreed to produce a variety of financial records and other documents. Rives also withheld nearly 200 documents on the ground that they are protected by the attorney–client privilege. As additional relief, Judgment Creditors urged the Court to review these documents *in camera* and to determine whether to pierce the privilege under the crime–fraud exception. Rives agreed to provide the documents, and after reviewing them, the Court concludes that Judgment Creditors have not shown that any attorney–client communications were used in furtherance of any crime or fraud allegedly committed by Rives and R&A. *See Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC LEXIS 54, at *46 (N.C. Super. Ct. Aug. 16, 2019) (stating that the party invoking the exception must “show[] by a preponderance of the evidence that the opposing party was committing or intending to commit a crime or fraud and that the attorney-client

communications were used in furtherance of the alleged crime or fraud”). The Court therefore declines to pierce the privilege on that ground.

23. **Conclusion.** For all these reasons, the Court **GRANTS in part** and **DENIES in part** Judgment Creditors’ motion as follows:

- a. The Court **ENJOINS** Rives from transferring or otherwise disposing of his ownership interests in BPR Investments, LLC, School Efficiency Consultants, LLC, R&A Holdings, and Rives Family, LLP;
- b. In its discretion, the Court concludes that Judgment Creditors need not post a bond or other security; and
- c. In all other respects, the Court **DENIES** the motion.

SO ORDERED, this the 12th day of January, 2024.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases