STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

LEONARD POZNER,

Plaintiff,

vs. Case No. 18CV3122

JAMES FETZER,

Defendant.

PLAINTIFF, LEONARD POZNER'S, REPLY BRIEF IN SUPPORT OF MOTION FOR TURNOVER OF PROPERTY TO SATISFY JUDGMENT

Plaintiff, Leonard Pozner ("Plaintiff"), by his attorneys Quarles & Brady LLP, by Randy J. Pflum and The Zimmerman Law Firm, by Jacob Zimmerman, respectfully submits this Reply Brief in Support of Plaintiff's Motion for Turnover of Property to Satisfy Judgment.

INTRODUCTION

The Court may order any non-exempt property of the judgment debtor or due to the judgment debtor to be applied toward the satisfaction of the judgment. Wisconsin's turnover statute, Wis. Stat. § 816.08, does not prohibit a judgment debtor's copyright, or other intellectual property, from execution. Copyrights are a form of intangible personal property. Unless an exception or exemption applies, Wisconsin law permits Plaintiff to levy Dr. Fetzer's copyrighted works in an attempt to satisfy the Judgment (as defined below).

BRIEF FACTS

On December 12, 2019, Plaintiff obtained a $457,395.13 defamation judgment against Dr. Fetzer after he published several false statements accusing Plaintiff of circulating a fake death

certificate for Plaintiff's son, who was killed in the mass shooting at Sandy Hook Elementary School (the "Judgment"). (Doc. No. 348). On April 7, 2020, at 11:36 a.m., Plaintiff docketed the Judgment in Dane County Circuit Court Case No. 2018CV003122.

On March 3, 2020, Dr. Fetzer sat for a supplemental proceeding before Commissioner Bryan Cahill at Godfrey & Kahn, S.C., One East Main Street, Suite 500, Madison, WI 53703 (Affidavit of James Fetzer, Ph.D. ("Fetzer Aff.") at ¶ 19).

At the supplemental proceeding, Dr. Fetzer produced a curriculum vitae on which he identified an ownership interest in *Nobody Died at Sandy Hook* (Moon Rock Books, 2015; 2nd Ed. 2016). Further, Dr. Fetzer produced a list of the following domain names: (1) jamesfetzer.org; (2) jamesfetzer.net; (3) falseflagnews.org; and (4) falseflagnews.net, in which he testified that he had ownership. (Fetzer Aff. at ¶ 19, Ex. B, 82:9-16).

On April 26, 2022, Plaintiff filed a motion for an order from this Court directing Dr. Fetzer to turn over the following property to satisfy the Judgment:

Books:

1. Nobody Died At Sandy Hook, 1st Edition (2015)
2. Nobody Died At Sandy Hook, Banned Edition (2015)
3. Nobody Died At Sandy Hook, PDF Edition (2015) (the "PDF Version")
4. Nobody Died At Sandy Hook, 2nd Edition (2016)

Collectively as the "Books."

Domain and Websites:

1. www.jamesfetzer.org
2. www.jamesfetzer.net
3. www.falseflagnews.org
4. www.falseflagnews.net

Collectively as the "Domain Names."

Contradicting his testimony during the supplemental proceeding, on June 3, 2022, Dr. Fetzer filed a response brief and supporting affidavit where he disclaimed any ownership to the Books or Domain Names.

The Judgment remains unsatisfied. Plaintiff respectfully requests that the Court order Dr. Fetzer to turn over any interest Dr. Fetzer has in the copyrights to the Books to satisfy the Judgment. As described below, and in light of his contradictory testimony about his ownership of jamesfetzer.org, Plaintiff respectfully requests that if Dr. Fetzer is not the owner of the domain name jamesfetzer.org, he instead be ordered to turn over his copyright interest in the content on that website. To the extent it is required to effectuate the requested relief, Plaintiff respectfully requests that the Court appoint a supplemental receiver over Dr. Fetzer's interest in the Books and jamesfetzer.org.

ARGUMENT

Wisconsin law requires Dr. Fetzer to turn over the copyrights to the Books and the content of jamesfetzer.org because: (1) Plaintiff has a properly docketed judgment against Dr. Fetzer; (2) through the docketed judgment, Plaintiff obtained an unsecured inchoate interest in Dr. Fetzer's personal property, tangible and intangible against which to levy; (3) Dr. Fetzer, as the works' author, owns the copyrights; and (4) the copyrights are not exempt under Wisconsin or Federal law.

I. Dr. Fetzer Owns the Copyrights to the Books

An author's copyright in a work arises by operation of law when she or he creates a copyrightable work. *See* 17 U.S.C. § 102(a)(1); *see also*, Melville B. Nimmer & David Nimmer, 2 Nimmer on Copyright § 7.16[A][1] (1998). According to the U.S. Copyright Office "[y]our work is under copyright protection the moment it is created and fixed in a tangible form that is

perceptible either directly or with the aid of a machine or device." *See* https://www.copyright.gov/help/faq/faq-general.html. An original literary work is copyrightable. *See* 17 U.S.C. § 102(a)(1). A compilation of non-original literary works is also eligible for a copyright. *See* 17 U.S.C. § 103.

Copyright law gives the author the exclusive right to, among other things, reproduce the copyrighted work, prepare derivative works, distribute copies, and display the work publicly. *See* 17 U.S.C. § 106. An author may transfer ownership of a copyright—but only by executing a written instrument. *See* 17 U.S.C. § 204(a). A copyright owner may expressly or impliedly grant a license under the rights of § 106 without a written agreement. *See*, *e.g.*, *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 774-775 (7th Cir. 1996) (recognizing implied and express copyright licenses).

Dr. Fetzer argues that Plaintiff cannot execute on his copyright because Dr. Fetzer does not control the ISBNs for the Books. An ISBN is an "International Standard Book Number." *See* https://www.isbn-international.org/content/what-isbn. An ISBN is a glorified bar code, described by the international coordinating body for ISBNs as "…a product identifier used by publishers, booksellers, libraries, internet retailers and other supply chain participants for ordering, listing, sales records and stock control purposes." *Id*. According to that organization, "[t]he ISBN is an identifier and does not convey any form of legal or copyright protection." *Id*. None of Dr. Fetzer's opinions about ISBNs impact Plaintiff's motion in any way.

Although Dr. Fetzer colloquially refers to himself as an "editor," he is the "author" of the Books for purposes of copyright law. The Copyright Act uses the legal term "author" to describe the creator of any copyrightable work, whether that work is literature, music, choreography, pictorial, sculpture, motion picture, sound recording, or architectural. *See* 17 U.S.C. § 102. As Dr. Fetzer has often stated, *Nobody Died at Sandy Hook* is a collection of chapters written by various

contributors (including Dr. Fetzer). *See*, *e.g.*, Doc. 231 at 127:7-11 (describing the book as a compilation of articles by thirteen authors). The Copyright Act defines such "collective works" as "compilations," and establishes that such can be an "original work of authorship." 17 U.S.C. §§ 101-103. From a copyright law perspective, Dr. Fetzer is the "author" of each edition of *Nobody Died at Sandy Hook*. Thus, ownership of the copyright in each of those Books automatically arose and vested in Dr. Fetzer, regardless of his claim to be a mere "editor."

Dr. Fetzer has not produced any written documents evidencing transfer of his ownership in any of the copyrights. In the absence of such a written agreement, any such transfer would be invalid. *See* 17 U.S.C. 204(a). Instead, his affidavit demonstrates that he impliedly or expressly licensed his publishers, CreateSpace and Wrongs Without Wremedies, to publish the physical copies of the Books. Fetzer Aff. at ¶¶ 4, 14. Dr. Fetzer voluntarily released the PDF Version of the book on the Internet for free. *Id*. at ¶ 8. Nothing in his affidavit demonstrates transfer of ownership. Having never transferred the copyrights that arose as a matter of federal law, Dr. Fetzer currently owns each of the copyrights for the Books.

II. Copyrighted Works are not Inherently Exempt from Execution

Section 201(d) of the Copyright Act states that "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law…." Federal law outlines requirements under which a copyright may be involuntarily transferred. That statute, 17 U.S.C. 201(e), prohibits involuntary seizure or transfer of certain copyrights other than via title 11 (bankruptcy). However, Section 201(e) applies only when an author's ownership of a copyright *or of any of the exclusive rights* under a copyright, has *not been voluntarily transferred by the copyright owner*. *Id*. (emphasis added); *see also Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 996 (9th Cir. 2014). Sections 201(d) and (e) demonstrate that prohibitions on involuntary

transfers of copyrights are not universal and thereby undermine Defendant's argument that *Ager* flatly prohibits execution of copyrights.

Dr. Fetzer has already voluntarily granted to third-parties one or more of his exclusive copyright rights to each of the Books. He granted CreateSpace the right to publish the first edition of *Nobody Died At Sandy Hook*. Fetzer Aff. at ¶ 4. He voluntarily uploaded the PDF Version on the Internet, and did not restrict its use, display, or distribution. *Id*. at ¶ 8; *see also* Dkt. 338 at 3-18 (testifying that he made the PDF Version available on the Internet "for free."). That operates as a voluntary grant of the right to publicly display the copyrighted material. *See* 17 USC 106. Further, Dr. Fetzer granted Wrongs Without Wremedies the right to publish the later versions of the Books. *Id*. at ¶ 14. Because he voluntarily transferred at least one right in each work, Section 201(e) does not restrict the involuntary transfer of any of the requested copyrights.

Modern federal law does not exempt Dr. Fetzer's copyrights from execution. Dr. Fetzer relies on *Ager v. Murray*, 105 U.S. 126, 127-131 (1881) to argue that intellectual property is exempt from execution. Def. Resp. Br. at 4. More recent cases have found that *Ager* predates Federal Rule of Civil Procedure 69, which states that "[t]he procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located . . . ." *See*, *e.g.*, *Hendricks & Lewis PLLC*, 766 F.3d at 996 (holding that musician's copyrights were subject to execution to satisfy judgment); *see also Skycam, LLC v. Bennett*, 62 F. Supp. 3d 1261, 1264 (N.D. Okla. 2014) (Held: Judgment creditor has the right to execute on a judgment debtor's intellectual property to satisfy a judgment). Thus, Wisconsin law determines whether or not the Books may be applied toward satisfaction of the Judgment.

In *Skycam*, the court looked to the Oklahoma statutes which state that "any property of the judgment debtor, including any equitable interest he may have, unless by law expressly excluded from being reached by creditors shall be subject to the payment of such judgment." *Id.* at 1264; Okla. Stat. tit. 60, § 9. Like the Oklahoma statute above, Wis. Stat. § 816.08 provides that the court may order "*any property* of the judgment debtor . . ., not exempt from execution, to be applied toward the satisfaction of the judgment[.]" (emphasis added). It follows that Dr. Fetzer's copyright(s) to the Books are not barred from execution simply because they are intellectual property.

Plaintiff has an interest in Dr. Fetzer's non-exempt personal property that is superior to any other unsecured creditor. *See Assoc. Bank N.A. v. Collier*, 2014 WI 62, ¶¶ 3 and 23, 355 Wis. 2d 343, 354-55, 852 N.W.2d 443, 448-49. By docketing his Judgment on April 7, 2020, at 11:36 a.m., Plaintiff obtained an unsecured, inchoate interest with regard to Dr. Fetzer's personal property, tangible and intangible, against which to levy. *See id*. at ¶ 23. Further, Plaintiff may levy specific, non-exempt personal property, which includes intangible property, "by obtaining a court order to apply that property in satisfaction of the judgment." *Id*. at ¶ 26.

Applying those factors, here, Plaintiff has an unsecured interest in Dr. Fetzer's personal property. Plaintiff has identified specific personal property of Dr. Fetzer's, namely, his copyright interest in the Books. And finally, the copyrights are not exempt from execution under Wis. Stat. § 815.18.

III. Copyrights are Intangible Personal Property

Dr. Fetzer offers no basis to exclude intellectual property from the definition of "personal property." Defendant's argument boils down to if property is not physical, it is not subject to execution. That is wrong. Indeed, to do so would exclude vast categories of personal property from

execution—even those that are a traditional focus of execution. For example, Wisconsin courts have held that bank accounts, stocks, bonds, securities, notes and cash deposits are all "*intangible* personal property." *Matter of Est. of Larson*, 196 Wis. 2d 231, 235, 538 N.W.2d 802, 803 (Ct. App. 1995)(emphasis added), citing *Pabst v. Department of Taxation*, 19 Wis. 2d 313, 316, 120 N.W.2d 77, 79 (1963). As those cases indicate, under Wisconsin law, intangible property is a subset of personal property. Dr. Fetzer has offered no legal basis by which Wisconsin law must treat copyright ownership differently than any other intangible personal property that is subject to execution.

IV. Wisconsin Law Does Not Prohibit Turnover of the Books

Dr. Fetzer argues that the Books have no value. The only reasons he offers are that he would need to get new ISBN numbers and that this litigation leaves him unable to distribute the content of the Books. Fetzer Aff. at ¶ 16. Neither of those reasons render the assets valueless. Dr. Fetzer's unwillingness to voluntarily turn over the Books' copyrights demonstrates that they have value. That he reserves the right to exercise an exemption to retain the Books demonstrates that they have value. Indeed, Dr. Fetzer earned $25,000 in royalties from sales of the later editions of *Nobody Died At Sandy Hook* from Wrongs Without Wremedies the period before Wrongs Without Wremedies stopped selling it pursuant to its settlement agreement with Plaintiff. (*See* Fetzer Aff. at Ex. B (Suppl. Exam) at 46:13-51:12). Clearly, the Books have significant potential value.

V. Turnover of the Domain Names

Dr. Fetzer testified under oath that he owned www.jamesfetzer.org. (Fetzer Aff. at ¶ 20). Facing a motion to compel him to turn over ownership of that domain name, Dr. Fetzer now claims that his publisher (and former co-defendant) Wrongs Without Wremedies ("WWW") owns the domain name. Although Plaintiff believes that WWW acted as Dr. Fetzer's agent in acquiring the

domain name and that Dr. Fetzer is the proper legal owner of the domain, Plaintiff will nevertheless drop its request that jamesfetzer.org be transferred. Dr. Fetzer is correct that he cannot be ordered to turn over property that he does not own.

However, Dr. Fetzer's belated determination that he does not own the website bearing his name does not mean he should be entitled to keep the value of that asset. Plaintiff requests that the copyrights to all of the blog content created or uploaded by Mr. Fetzer to the domain www.jamesfetzer.com be transferred to Plaintiff.

Defendant Fetzer testified that www.jamesfetzer.com was "my website" and that he manages it. Fetzer Aff. at ¶ 25. In his supplemental exam, Dr. Fetzer testified that his blog "…has probably got 1,100 blogs that I've written." (Fetzer Aff. at. Ex. B (Supplemental Exam) at 81:12-82:8). Because Dr. Fetzer previously testified that he owned jamesfetzer.org, Plaintiff could not previously seek turnover of the contents of Dr. Fetzer's website. Section 201(e) of the Copyright Act prohibits involuntary transfer of copyrights that had not previously been voluntarily assigned or licensed.

An author has the exclusive right to authorize others to "display the copyrighted work publicly…." 17 U.S.C. § 106(5). If WWW owns the domain, Dr. Fetzer has, by posting his works on that domain, expressly or impliedly granted WWW a voluntary license to display his copyrighted works publicly. *See* 17 U.S.C. § 106 (describing a copyright owner's exclusive right to display copyrighted material publicly).

Section 201(e) does not restrict involuntary transfer of a work for which any previous ownership was assigned or for which an exclusive right was voluntarily transferred. *See*, *e.g.*, *Hendricks & Lewis PLLC*, 766 F.3d at 996 (holding that § 201(e) did not apply to work that had been the subject of a prior assignment). Dr. Fetzer should therefore be ordered to turn over his

ownership in the copyrights to all of that content to Mr. Pozner in partial satisfaction of the Judgment.

VI. In the Alternative, a Supplemental Receiver Should be Appointed to Direct Dr. Fetzer to Turn Over his Interest in the Books

Wisconsin's turnover statute provides that the court may order "any property of the judgment debtor or due to the judgment debtor not exempt from execution, to be applied toward the satisfaction of the judgment[.]" Wis. Stat. § 816.08. Despite this clear language, Dr. Fetzer argues that § 816.08 does not require him to "relinquish his control and ownership rights in property to a judgment creditor to utilize as it sees fit." Def. Resp. Br. at 5.

As described, Plaintiff has an unsecured, inchoate interest with regard to Dr. Fetzer's personal property, tangible and intangible, against which to levy. *See Assoc. Bank N.A. v. Collier*, 2014 WI 62, ¶ 23. Dr. Fetzer's ownership interests in the Books and domain name or website content constitute identifiable, although intangible, personal property upon which Plaintiff can levy.

Dr. Fetzer cites *Attorney's Title Guar. Fund, Inc. v. Town Bank*, 2014 WI 63, 355 Wis. 2d 229, 850 N.W.2d 28 for the proposition that there is a difference between intellectual property (a claim) and proceeds from that intellectual property. Def. Resp. Br. at 6. In that case, the Wisconsin Supreme Court addressed whether the rights to an unliquidated legal malpractice claim were assignable to a third-party. *See id.* at ¶¶ 20-21. The court held that the proceeds from the legal malpractice claim were assignable, while the actual claim was not. *See id.* at ¶ 24. Plainly, there is a stark difference between assigning an unliquidated legal malpractice claim, where the assigned party has no attorney-client relationship, from an identifiable copyright to a book where the legal instrument, a copyright, is already in existence and was specifically identified by the judgment

debtor and has not been pledged to any other creditor. Thus, *Town Bank* does not prevent turnover of Dr. Fetzer's copyright in the Books.

Although Dr. Fetzer avers that he has no ownership interest in the Books, he is wrong as a matter of law. Dr. Fetzer's copyrights arose as an operation of law. He has not offered any evidence that he transferred ownership of those copyrights. All of the steps he took before this lawsuit indicate that he was the owner of the copyrights: he licensed publishers to publish the Books; he publicly displayed copyrighted content from the PDF Version of the book and from his blog jamesfetzer.org on the Internet for free; and he earned tens of thousands of dollars in royalties from his publishers. He has offered no evidence that any other entity has any interest in any of the copyrights, much less an adverse interest. However, if the Court concludes that another party has an adverse interest in the Books, then Plaintiff respectfully requests that the Court appoint a supplemental receiver over the Books to liquidate the property.

CONCLUSION

For the reasons stated herein, Plaintiff, Leonard Pozner, respectfully requests that this Court grant his Motion for Turnover of Property to Apply Property to Satisfy Judgment, and grant Plaintiff such further relief as may be allowed by law.

Dated: June 9th, 2022.

MESHBESHER & SPENCE LTD.
Genevieve M. Zimmerman (WI #1100693)
1616 Park Avenue South
Minneapolis, MN 55404
Phone: (612) 339-9121
Fax: (612) 339-9188
Email: gzimmerman@meshbesher.com

THE ZIMMERMAN FIRM LLC
Jake Zimmerman (*Pro Hac Vice*)
1043 Grand Ave. #255
Saint Paul, MN 55105
Phone: (651) 983-1896
Email: jake@zimmerman-firm.com

QUARLES & BRADY LLP

Electronically signed by Randy J. Pflum
Randy J. Pflum (WI SBN: 1096694)
33 East Main Street
Suite 900
Madison, WI 53703
Phone: (608) 251-5000
Fax: (608) 251-9166
Randy.Pflum@quarles.com

Attorneys for Plaintiff Leonard Pozner