

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BAMBI ALICIA HERRERA-EDWARDS,

Appellant,

v.

Case No. 8:17-cv-328-CEH

BERNARD EDWARDS COMPANY, LLC
and JESS S. MORGAN & CO., INC.,

Appellees.

**APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S
MOTION FOR CLARIFICATION, OR ALTERNATIVELY, FOR REHEARING¹**

Appellees, Bernard Edwards Company, LLC ("BEC") and Jess. S. Morgan & Co., Inc. ("JSM") (collectively, "Appellees"), file this response ("Response") in opposition to the portion of Appellant's Motion for Clarification, or Alternatively, for Rehearing (Doc. 23) ("Motion") that seeks clarification of this Court's Opinion and Order (Doc. 20) (the "Opinion"), and state as follows:

Response to Motion for Clarification

Likely in an attempt to avoid the stringent legal standard applicable to a motion for rehearing, Appellant captions the first approximately two pages of its Motion as a "Motion for Clarification," and unsuccessfully attempts to inject uncertainty into this Court's Opinion.² Appellant's efforts are misguided and do not merit serious consideration.

¹ Pursuant to Rule 8022 of the Federal Rules of Bankruptcy Procedure, Appellees are not permitted to respond to a motion for rehearing absent this Court requesting that they do so. *See e.g. In re Baumann*, 2016 WL 1755972, at ft. nt. 1 (M.D. Fla. May 3, 2016). Accordingly, this Response addresses only the portion of the Motion seeking clarification.

² All capitalized terms used but not defined in this Response shall have the meanings ascribed to them in the Opinion.

This Court's Opinion is not unclear. As an initial matter, the Opinion specifically affirms the bankruptcy court's finding that the Settlement Agreement was the operative document between the parties, and further finds that "Edwards could hardly argue otherwise" because the "Settlement Agreement was the only document executed by all of the interested parties, it was the only document approved by the probate court as required under Connecticut law, and it was the only document expressly preserved by the General Release." (*Id.* at 14-15). Consistent with that finding, the Court's Opinion goes on to specifically reject Appellant's argument that extrinsic evidence should be considered in interpreting the Settlement Agreement because Appellant failed to identify any ambiguity in the Settlement Agreement. (*Id.* at 15).

The conclusion that the unambiguous Settlement Agreement is the operative document is critical because it clearly provides that Appellant would receive only an interest in the income stream from the Copyrights:

Bambi Edwards agrees to accept and the estate agrees to take any and all steps necessary to assign a *37 ½ percent participation in the income stream from the copyrights* owned by Bernard Edwards Estate on the date of Bernard Edward's death after payment of all costs, expenses and debt related to the copyrights.

(Doc. 10-133 at ¶ 2(c)) (emphasis added). The Settlement Agreement goes on to provide that the parties would execute a co-publishing agreement under which Franson would have "full and complete administration rights therein" and that Appellant "will have no administration rights whatsoever regarding the copyrights." (*Id.* at ¶ 5). Finally, the Settlement Agreement provides that "Bambi Edwards acknowledges that she has no administration rights in the copyrights." (*Id.* at ¶ 6).

Significantly, after concluding that the unambiguous Settlement Agreement is the operative document, the Court's Opinion affirmed the bankruptcy court's decision that Appellant's

interest – specifically identified as a “37.5% interest in the income stream from the copyrights” - did not include artist and producer royalties. (Opinion, at 17-18) (emphasis added).

The Court also directly addressed and rejected Appellant’s contention that “she is a copyright ‘owner’ and...as an owner, she necessarily possesses administration rights” and thus could reject the Co-Publishing Agreement to obtain the administration rights. (*Id.* at 11). The Court found that the bankruptcy court relied “on well-settled rejection concepts” in rejecting Appellant’s claim, “most notably, the principle that rejection may not be used to change the substantive rights of the parties to the contract.” (*Id.* at 11) (internal citations omitted). The Court further found that “Edwards’ failure to address [that principle] is fatal to her appeal.” (*Id.*). It was fatal to Appellant’s appeal because Appellant ignored the “controlling language in the court-approved Settlement Agreement and in the copyright assignments” which granted her no such rights:

The Settlement Agreement expressly states: “Bambi Edwards acknowledges that she has no administration rights in the copyrights.” Likewise, the copyright assignments withhold from Edwards “the exclusive right to administer” the copyrights and instead transfer 100% of the administration rights to the children’s trusts and to BEC.

(*Id.* at 11) (internal citations omitted). The Court concluded that the related Co-Publishing Agreement was “consistent with both the Settlement Agreement and copyright assignments,” and the Co-Publishing Agreement provided that its provisions “are irrevocable for any cause whatsoever.” (*Id.* at 11-12). The Court then applied clearly established rejection case law to bar Appellant from using rejection to re-write the relevant agreements and obtain the administration rights. (*Id.* at 11-13).

In discussing applicable law, the Court stated that this case was similar to *Thompkins v. Lil’ Joe Records, Inc.* because while Appellant may have “some degree of Copyright ownership”

(that is, ownership of 37 ½% of the income stream from the Copyrights), the administration rights associated with the Copyrights were “fully executed pursuant to the copyright assignments, the Settlement Agreement, and the Co-Publishing Agreement.” (*Id.* at 12-13); 476 F.3d 1294 (11th Cir. 2007). Read in context, the Court’s statement is entirely consistent with the rest of the Opinion, which clearly concludes that Appellant received only an income stream, not outright ownership of the Copyrights. (*Id.* at 11-12, 13, 17-18). This is again made clear just a few sentences later when the Opinion states that Appellant cited no authority that would permit “the bankruptcy court, acting under 11 U.S.C. § 365(a), to re-write the terms of the copyright assignments and the court-approved Settlement Agreement.” (*Id.* at 13). Appellant’s failure to identify a basis for the Court to “re-write” the terms of the assignments and Settlement Agreement was fatal to her claims because those documents provided that Appellant would only receive an income stream, not ownership in the Copyrights.

The “clarification” portion of the Motion attempts to rehash this same unsuccessful argument. (Motion at 3). It is absolutely clear that the Court’s Opinion did not accept any of Appellant’s arguments, did not grant Appellant any relief of any type, and affirmed in full the bankruptcy court’s orders on appeal. (*Id.* at 19-20). Beyond that, the Opinion: (i) specifically affirmed the bankruptcy court’s finding that Appellant received a “37.5% interest in the income stream from the copyrights” which did not include artist and producer royalties; and (ii) rejected Appellant’s argument that she was a copyright owner with administration rights because that argument ignored “controlling language” in the Settlement Agreement and copyright assignments, and failed to identify any basis under which the Court could re-write that controlling language. (*Id.* at 17-18, 11-13). No reasonable person can interpret the Court’s Opinion as reversing the bankruptcy court’s finding that Appellant received only an income stream from the Copyrights

and not ownership of the Copyrights. (*See* Doc. 10-2 at 10, 11, 16-18). Thus, no “clarification” of this Court’s Opinion is necessary.

Finally, it must be noted that nearly half of “clarification” portion of the Motion is used informing the Court that Appellant has passed away, that she was survived by minor children, that the bankruptcy estate is having difficulty obtaining an advance or loan secured by Appellant’s income stream because it does not include administration rights, and that the bankruptcy estate and the newly-formed probate estate could avoid “significant adverse tax consequences” if this Court were to reverse its decision via clarification. (Motion at 1-2). Stated simply, this information is entirely irrelevant and should not have been included. Appellees respectfully request that the Court disregard this extraneous information in ruling on the portion of the Motion captioned as a “Motion for Clarification.”

WHEREFORE, Appellee, Bernard Edwards Company, LLC, respectfully requests that the Court enter an order denying the portion of Appellant’s Motion captioned as a “Motion for Clarification,” and granting all other relief that is appropriate under the circumstances.

Dated this 29th day of November, 2017.

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