

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

1 THE BANK OF NEW YORK MELLON,)
 2 as trustees for Sewer Revenue)
 3 Refunding Warrants Series; Sewer) Case No. 2:08-cv-01703-RDP
 4 Revenue Capital Improvement)
 5 Warrants Series, et al.)
 6) Birmingham, Alabama
 7)
 8) February 25, 2009
 9)
 10) 9:15 a.m.
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 TRANSCRIPT OF HEARING IN THE ABOVE CASE
 HELD BEFORE THE HONORABLE R. DAVID PROCTOR
 UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: Larry B. Childs, Esq.
 Henry E. Simpson, Esq.
 Gerald Mace, Esq.
 Brian Malcom, Esq.
 Henry E. Simpson, Esq.
 George B. South, Esq.
 Hovey S. Dabney, Esq.

FOR THE DEFENDANT
 JEFFERSON COUNTY: Joseph B. Mays, Jr., Esq.
 Dylan C. Black, Esq.
 J. Patrick Darby, Esq.

Also Present: Jeffrey Sewell, Esq.
 Mark P. Williams, Esq.

COURT REPORTER: Anita M. McCorvey, RMR
 Hugo Black Courthouse
 1729 5th Avenue N., Ste 325
 Birmingham, AL 35203

1 process.

2 But are you confident that we're going to be able to at
3 least have some active discussion and decision-making about
4 some of those recommendations to see if we can head off the
5 need for a hearing like this?

6 MR. DARBY: Yes, sir, Your Honor, I think so. And,
7 you know, I think our recommendations to the Commission will
8 recommend doing some things to pursue some of the Special
9 Masters' recommendations.

10 THE COURT: All right.

11 MR. DARBY: Some other recommendations, we have some
12 continuing legal and other practical concerns about that we're
13 still trying to work through.

14 THE COURT: Okay. Fair enough. I had planned to
15 ask you about some specific things about the Special Masters,
16 and I know counsel are aware of this. I think it would be
17 important to state this just generally. I think there's a
18 misconception about the role of the Special Masters. I know
19 this, in part, because of people coming up to me on the street
20 asking about the Special Masters.

21 But generally the idea of the Special Masters was a
22 non-mandatory, neutral, recommended by both sides -- Mr. Young
23 recommended by the County and Mr. Ames recommended by the
24 plaintiffs -- who would meet together, confer, meet with
25 people at the County and put forward recommendations that

1 should be strongly considered. All right?

2 I did that because I thought, just as Mr. Dabney
3 suggested, that if we could reach some agreements in the
4 interim about interim management decisions that preserved both
5 parties' position throughout the litigation without the need
6 for a receiver being either suggested or appointed, that would
7 be a good thing.

8 All right. So that was the purpose of the Special Master
9 is an effort to try to hold off the need to even consider a
10 receiver.

11 I guess my greatest disappointment at this point is I'm
12 not so certain based upon what I've seen that the Commission,
13 in particular, understands that. And I'm not so certain that
14 the Commission understands that that is a great opportunity
15 and benefit to it. And I can drag the horse to the water but
16 I can't make it drink.

17 So that's one of the things I want to get across today is
18 I expect there to be substantive dialogue about some of those
19 things. I'm not saying any one recommendation is meritorious
20 or not meritorious. But what I am saying is I think the
21 Special Masters did a good job of going A to Z, things that
22 are very reasonable, things that may even be stretching the
23 boundaries of, you know, what we really need to consider; but
24 I asked them to make a recommendation about everything, and
25 that they've done, and I think it's a very solid effort on

1 their part.

2 I don't think that they are wedded to any particular
3 recommendation, but they wanted to get it out there for
4 discussion and dialogue, and I expect that to occur.

5 On the other side of the coin, I expect that the
6 plaintiffs will work reasonably with respect to those
7 recommendations and try to seek a win-win too. All right?

8 So I'm not lecturing just one side; I'm just laying out
9 my expectations of how we need to deal with this report within
10 the next few days before we have to have a hearing next month.

11 All right. Obviously there's some friction in there.
12 And you can stay there if you want to. You're not required
13 to.

14 MR. DARBY: Thank you, Your Honor.

15 THE COURT: I'm not addressing you personally; I'm
16 addressing everyone just generally.

17 MR. DARBY: Thank you.

18 THE COURT: I guess there's some questions that are
19 raised by some of these recommendations because some of them
20 involve personnel issues. I don't know exactly what extent
21 the County can unilaterally -- or the parties can agree, or
22 the Special Masters can recommend.

23 Some of these personnel issues -- because we have a
24 personnel board, for example, I know we have some legal issues
25 that aren't directly injected in this case that would be

1 MR. SEWELL: Your Honor, we would -- anything that
2 requires an amendment to the sewer rate ordinance, which is
3 the controlling document --

4 THE COURT: And I'm not talking about rate
5 increases, per se. I mean, I understand that's a process that
6 you have to have go on.

7 And, you know, I'll let one cat out of the bag. I'm not
8 really wild about non-user fees. You know, I don't know
9 exactly what that means and exactly what's being proposed,
10 but, Mr. Sewell, I think you've heard me loud and clear --

11 MR. SEWELL: I have heard you loud and clear.

12 THE COURT: -- that you have a substantial debt
13 load; you have limited revenues, and so far as I can tell,
14 your client has no plan. And that's a concern to me. That is
15 a big concern to me.

16 MR. SEWELL: Understood. Judge, it's not just sewer
17 rates. Impact fees. Restrap fees, connection permits. All
18 of those are in that sewer user plan.

19 THE COURT: I understand. I understand.

20 MR. SEWELL: And that will require a public hearing.

21 THE COURT: Well, there are two things that are in
22 that report at least. There's revenue enhancements. But
23 there is also expense controls.

24 MR. SEWELL: Yes.

25 THE COURT: I would expect that someone who was in

1 as great a debt as your client is wouldn't have to be chided
2 by a Special Master or the Court to look at expense controls.
3 Fair?

4 MR. SEWELL: Fair.

5 THE COURT: Okay. That's something that ought to --
6 we shouldn't have gotten to the point where the Special
7 Masters were making recommendations about expense controls.
8 That ought to have been whoever's at the Commission level
9 supervising that area engaging that practically, whether it's
10 all five or one or committee or I don't know who it is. I
11 don't know who's responsible for that ultimately, but that
12 seems to me that that needs to be being done yesterday, not
13 today or tomorrow.

14 So it seems to me a fair expectation of the Court that
15 I'm going to hear back from you in some formal way as far as a
16 record being built about what your responses are to the things
17 that you can control and can do and understanding that there
18 are certain things that you'll have to have a hearing on
19 because you can't unilaterally implement those. And it
20 wouldn't be good government; it wouldn't be good -- it
21 wouldn't be a fair process if you just unilaterally
22 implemented some of those things. But there are some things
23 that can be done and considered now.

24 MR. DARBY: That's correct, Your Honor. And just as
25 an example, in a further clarification of that point, our

1 the different Master recommendations.

2 THE COURT: Well, in stepping away from a few of
3 these trees we have been discussing and doing the forest
4 again, I still don't have any real understanding of when the
5 County expects that it will give us a fair response to some of
6 these recommendations; not just a litigation response but a
7 business response of -- and more what I would call stewardship
8 response of, you know, this makes sense to us; this doesn't.
9 This is something we could implement now that makes sense to
10 us; this is something that makes sense to us, but we have to
11 go through a process to implement it, and here's our plan to
12 engage that process.

13 I don't think that's an unfair expectation of the Court
14 or your opponents in this case that you would engage in that
15 type of dialogue at the Commission level in order to show that
16 we don't need a receiver because we can manage our own
17 affairs.

18 And I don't have a record of -- I don't have a record of
19 specific things that have been said or done; I'm concerned
20 that we're building a record of silence and non-engagement.

21 MR. DARBY: Your Honor --

22 THE COURT: Now, part of that I might know
23 extra-judicially, and I'm not going to consider that at any
24 hearing, I can assure you of that. But while we're on the
25 issue of pointing everybody in the right direction to avoid a

1 show-down, it seems to me that as you build this record -- and
2 I'm not asking for a response now. It may be in your best
3 interest not to give me a response now.

4 It's time to engage. It's time for your clients to get
5 their hands around this. And, look, they have a
6 responsibility that I don't have right now. I understand
7 that. I'm not trying to -- I'm a big believer in federalism
8 principles; that we don't need the Federal Government stepping
9 in and doing things just arbitrarily and invading a separate
10 sovereign.

11 Now, the case law on receivers has built that into the
12 quotient, and that's why there's a burden of proof placed upon
13 those who seek that remedy, and there's certain specific
14 things they have to show in order to gain that remedy. And
15 that's why there's defenses that are available to the County.

16 I don't approach this situation very lightly at all. In
17 fact, I'm very concerned about it. But what I want to do is
18 make sure you understand what I'm expecting in order for you
19 to be able to come in and show that they are not entitled to
20 the remedy because your client doesn't need a receiver; it's
21 doing what is necessary to engage this process.

22 Does that make sense?

23 MR. DARBY: Yes, Your Honor. We fully understand
24 our charge under your Court's prior Order as further explained
25 to us.

1 even shooting the parties. But I'm just saying look, we have
2 got a tremendously complex problem to work our way through,
3 and it's not going to happen unless we get the best efforts
4 and cooperation, not just from folks getting paid the hourly
5 rates but from the folks who have the opportunity to make a
6 difference on both sides. Okay? And some third parties who
7 might be listening out there.

8 All right? If there's nothing else, I'm going to
9 conclude the hearing and again express my thanks to all of you
10 for your hard work.

11 MR. DARBY: Thank you, Your Honor.

12 THE COURT: We'll be adjourned.

13 (Proceedings concluded.)

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15 C E R T I F I C A T E

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17
18 I certify that the foregoing is a correct
19 transcript from the record of proceedings in the
20 above-entitled matter.

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23 _____
24 Anita M. McCorvey, RMR

25 Official Federal Court Reporter