IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

NORMAN WERTHER, M.D.,	:	APRIL TERM, 2001
Plaintiff,	:	NO. 01539
v.	:	COMMERCE PROGRAM
FIRSTRUST BANK,	:	Control No.: 17013832
Garnishee.	:	

ORDER

AND NOW, this 18th day of May, 2017, upon consideration of plaintiff judgment creditor's Motion for Partial Summary Judgment, the response of garnishee FirsTrust Bank thereto, and all other matters of record, and after hearing oral argument on the Motion, it is **ORDERED** that said Motion is **DENIED** for the reasons set forth in the Opinion issued simultaneously.

It is further **ORDERED** that this Order is certified for immediate appeal because this court is of the opinion that:

1. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion as to the applicability of the holding in Witco Corp. v. Herzog Brothers Trucking, Inc.[1] to the facts of this case; and

[1] 580 Pa. 628, 863 A.2d 443 (2004).

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2. An immediate appeal from this Order may materially advance the ultimate termination of the matter.[2]

BY THE COURT:

PATRICIA A. McINERNEY, J.

[2] 42 Pa. C. S. § 702.

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OPINION

In May, 2008, plaintiff Norman Werther, M.D. obtained a judgment of almost $5 million against defendant Craig Rosen, which Dr. Werther has been trying to collect ever since. Mr. Rosen has not made collection easy, and he has deliberately evaded Dr. Werther's collection efforts on occasion.

As reflected on this court's docket, in July, 2008, and again in September, 2008, Dr. Werther caused a Writ of Execution against Craig Rosen to be served on garnishee FirsTrust Bank ("FirsTrust").[1] FirsTrust answered the Interrogatories served with the first two Writs and identified two bank accounts held by Mr. Rosen and his wife as tenants by the entireties and therefore exempt from execution.[2] No other property of the debtor was identified by FirsTrust, and it does not appear there was any such property in 2008. FirsTrust requested in its Answers

[1] Dr. Werther claims to have served a third Writ on FirsTrust in March, 2013, and a fourth was served in June, 2014. In its Answers to Interrogatories in response to the fourth Writ, FirsTrust stated that Mr. Rosen had not at any time before or after June, 2014, delivered any property to FirsTrust. *See* Interrogatories filed on June 12, 2014; Answers to Interrogatories filed on June 27, 2014. FirsTrust also asked in its Answers that the fourth Writ be dissolved, but it never was. *See* Answers to Interrogatories filed on June 27, 2014.

[2] *See* Answers to Interrogatories filed on July 25, 2008; Answers to Interrogatories filed on October 14, 2008.

to the Interrogatories that the Writs be dissolved, but they never were.[3] The second Writ of Execution, which is still in effect, was directed to "any and all real or personal property of the defendants in the name of the garnishee."[4]

In October 2010, a company named Weinerman Pain and Wellness, LLC ("WPW") opened an account at FirsTrust. Mr. Rosen was listed as both an applicant and a cosigner on the WPW account.[5] Mr. Rosen was apparently a 1099 employee of WPW and received regular paychecks from WPW for approximately two years from 2011-2013.[6]

From September 1, 2013, through December 11, 2013, Mr. Rosen cashed employment checks drawn on, or withdrew money from, the WPW account at FirsTrust in a total amount of $196,700.[7] Many of the checks were in the amount of $9,900, just shy of the $10,000 cash limit at which FirsTrust would be required to report such transactions to the IRS.[8] FirsTrust's tellers handed the cash over to Mr. Rosen each time he brought in a WPW check made out to himself, and apparently no thought was given to the outstanding Writs of Execution lingering somewhere in FirsTrust's files.

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[3] Answers to Interrogatories filed on July 25, 2008; Answers to Interrogatories filed on October 14, 2008.

[4] Praecipe for Writ of Execution filed on September 17, 2008.

[5] *See* Motion for Summary Judgment ("SJM"), Ex. C.

[6] *See id.*, Ex. D.

[7] *See id.*, Ex. G. Dr. Werther moved for partial summary judgment against FirsTrust to collect these amounts paid in the latter half of 2013 because there is documentation of such transactions which FirsTrust admitted at oral argument is authentic. Depending upon the outcome of his Motion for Summary Judgment, Dr. Werther will presumably decide whether to undertake discovery and/or prosecute the other transactions against FirsTrust. According to a FirsTrust memorandum, Mr. Rosen may have cashed checks for as much as $411,651 in 2011, $843,596 in 2012, and $728,171 in 2013. *See id.*, Ex. H.

[8] The IRS first contacted FirsTrust in May, 2013 regarding these transactions, which the IRS viewed as illegal structuring. *See id.* At FirsTrust's request, the WPW account was closed in April, 2014. *See id.*, Exs. K, L, M, N.

Both parties would likely agree that what Mr. Rosen did was wrong, in that he was deliberately evading both judgment creditors and the IRS. However, the question before this court is whether FirsTrust did anything wrong, not Mr. Rosen. In Dr. Werther's view, FirsTrust should have acted in accord with the outstanding Writs; each time the teller was asked to convert a check to cash, the teller should have seized the check or the cash on behalf of Dr. Werther, the judgment creditor, rather than handing the cash over to Mr. Rosen. FirsTrust argues that it was obligated instead to hand the cash to Mr. Rosen, since it was his wages,[9] and it would be extremely impractical to require every bank teller to consult a list of every writ the bank had received over a five year period whenever the teller cashed a check at his/her window.[10]

In Pennsylvania, the leading case on such garnishment issues is the Supreme Court's 2004 opinion in Witco Corp. v. Herzog Bros. Trucking, Inc.[11] In Witco, the plaintiff obtained a judgment against defendant Herzog Bros. Trucking, Inc., just as Dr. Werther did against Mr. Rosen. The plaintiff served a Writ of Execution against National City Bank of Pennsylvania ("Bank") just as Dr. Werther did against FirsTrust. The Bank responded to plaintiff's interrogatories by identifying, and freezing, an account belonging to the judgment debtor, Herzog Bros. Similarly, FirsTrust identified two accounts belonging to Mr. Rosen, but could not freeze them because they were held by Mr. Rosen and his wife as tenants by the entireties. Identifying bank accounts, and freezing them where appropriate, is what banks normally do

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[9] FirsTrust relies on 42 Pa. C.S. § 8127 to support this argument. However, that statute states that "the wages, salaries and commissions of individuals shall **while in the hands of the employer** be exempt from any attachment, execution or other process . . ." *Id.* (emphasis added). Once the wages leave the employer's hands, *i.e.*, when WPW gives a check to Mr. Rosen and FirsTrust cashes it, they are no longer exempt under this statute.

[10] It would not be as impractical, however, to require the bank's attorneys to follow-up to make sure that each Writ was properly dissolved or otherwise terminated.

[11] 580 Pa. 628, 863 A.2d 443 (2004). The case was presented to the Pennsylvania Supreme Court on a Petition for Certification of Questions of Law from the United States Court of Appeals for the Third Circuit.

when they receive a Writ of Execution, and it is usually all that the judgment creditor expects of a bank.

While the Writ was open and outstanding against the Bank in Witco, and while the Herzog Bros.' account was frozen, the Bank was involved in a series of over-the-counter transactions with the judgment debtor, Herzog Bros., just as FirsTrust was with Mr. Rosen. In Witco,

> Herzog Brothers purchased at least 131 cashier's checks from the Bank, using personal checks and cash. As to each purchase of a cashier's check, Herzog presented his personal checks or cash to the Bank at the teller windows whereupon the Bank would issue "official checks" drawn on the Bank and payable to various designees specified by Herzog. The aggregate value of these checks exceeds $6,000,000. During the same time period, the Bank made fourteen payments to itself totaling $22,718.86 from funds presented to the Bank's tellers by Herzog in the form of personal checks or cash. The Bank's own internal policy required that all funds used for the issuance of "official checks" in an amount in excess of $3,000 first be deposited into an account at the Bank. The Bank also customarily placed a hold on funds from foreign bank checks in order to verify that the accounts on which the checks were drawn contained sufficient funds to cover the checks. Both of these policies were waived in the Bank's dealings with Gary Herzog and Herzog Brothers. [The waiver allegedly began long before the garnishment proceedings occurred.][12]

In this case, Mr. Rosen presented checks made out to himself and received cash from FirsTrust's tellers, so the transactions are not identical to those in Witco. The question is whether this and other factual distinctions between the two cases make a legal difference with respect to the outcome.

In Witco, the court held that the Bank had a duty under the Writ to seize the funds, both checks and cash, that the judgment debtor proffered to the teller:

> [Pa. R. Civ. P.] 3101(b) unambiguously provides that a garnishee is deemed to be in possession of property of the defendant if the garnishee "has property of the defendant in his or her custody, possession or control." Black's Law Dictionary (8th Ed. 2004) defines possession as: "The fact of having or holding property in

[12] Witco, 580 Pa. at 630–31, 863 A.2d at 444–45.

> one's power; the exercise of dominion over property." Here, when Herzog Brothers purchased 131 cashier's checks from the Bank, the Bank came into physical possession of the personal checks and cash proffered by Gary Herzog. The Bank then had the power to control Herzog Brothers' access to those funds and the manner in which the funds were disbursed. Indeed, pursuant to its ordinary business policies, the Bank had the power to hold the checks Gary Herzog presented until it determined that sufficient funds existed in the banks upon which the checks were drawn before making the funds available to Herzog Brothers. In addition, the Bank's internal policy provided that funds for a cashier's check in excess of $3,000 were to be deposited into an account with the Bank prior to issuance of the cashier's check. That the Bank chose in the case of this particular customer/ judgment debtor not to follow its usual practices, and thereby declined to hold the checks or require that the funds be deposited in a Herzog Brothers' account, does not negate that the Bank had those powers over the funds - powers which derived from the fact that they were in possession of the funds, if only for a brief time. Thus, applying the common and approved definition of the term "possession," we conclude that the Bank was in possession of the checks and cash once Herzog handed them over to the Bank's tellers, for purposes of Rule 3101(b), notwithstanding that Herzog did not formally deposit the funds into Herzog Brothers' account with the Bank.[13]

Similarly, in this case, FirsTrust came into possession of the checks made out to Mr. Rosen when Mr. Rosen presented the checks, endorsed with his signature on the back, to the FirsTrust tellers. However, the checks presented by Mr. Rosen in this case were drawn on a FirsTrust customer's account, not a third party bank as in Witco. Furthermore, there is no evidence in this case that FirsTrust, like the Bank in Witco, violated its own internal policies in handling the checks made out to the judgment-debtor. Instead, FirsTrust simply cashed a paycheck drawn on its depositor WPW's account for the judgment debtor, Mr. Rosen, just as it presumably would for any employee or creditor of WPW who came into the bank with a check from WPW made out to him/her/it.

There is no indication in this case that FirsTrust, like the Bank in Witco, profited from its transactions with Mr. Rosen, nor that FirsTrust, like the Bank in Witco, knowingly aided Mr.

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[13] Witco, 580 Pa. at 633–34, 863 A.2d at 446–47.

Rosen in evading his obligations to plaintiff judgment creditor.[14] These facts were determinative in Witco:

> We do not accept the Bank's characterization of the cashier's check transactions with its judgment debtor customer in this case as akin to other innocent purchases and sales transactions. What obviously separates the situation *sub judice* from other everyday sales transactions is that the Bank maintained a banking relationship with Herzog Brothers and had been served with a writ of execution precisely because of that banking relationship. The nature of the relationship renders the Bank's conduct in waiving its usual policy and issuing no-delay cashier's checks in exchange for cash and personal checks tendered by its apparently preferred customer suspect. Even if it was not the Bank's specific intent, it appears that the Bank engaged with Herzog Brothers in transactions patently calculated to thwart the garnishment process. It is undisputed that the Bank was aware of the judgment against Herzog Brothers and had been served with a writ of execution. Nevertheless, over the course of thirteen months, the Bank processed more than $6 million in cash and checks exchanged for at least 131 of the Bank's cashier's checks - without any consideration for its lawfully imposed duty as garnishee. In light of these facts, we reject the notion that the conduct at issue amounted to a series of simple, innocent sales transactions having nothing to do with the Bank's relationship with its customer as an account holder whose account was subject to garnishment.[15]
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> By using cashier's checks instead of checks drawn on its own accounts, Herzog Brothers successfully processed more than $6 million dollars of its funds and used those funds to pay its obligations to creditors other than Witco without depositing one penny of those funds into its accounts with the Bank. The Bank permitted this conduct and even derived its own financial benefit, making the Bank a player in this activity, not an innocent bystander. Were this Court to sanction this type of conduct on grounds of "public policy," we would, as Witco argues, be placing a stranglehold on judgment creditors in their efforts to collect judgments. In addition, we would be giving carte blanche to judgment debtors who are sharp enough in their business dealings to devise creative methods to avoid collection of valid judgments obtained lawfully against them. Such a course is clearly not within the spirit or intent of the garnishment rules, and we will not allow conduct that so eviscerates that spirit and intent, under the guise of enforcing some other public policy.[16]

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[14] Instead, after FirsTrust was alerted by the IRS to the nefarious nature of the WPW/Rosen transactions, it eventually asked them both to cease doing business with the bank.

[15] Witco, 580 Pa. at 636–37, 863 A.2d at 448.

[16] *Id.*, 580 Pa. at 640–41, 863 A.2d at 450–51.

Clearly, the Bank in Witco was unjustly enriched at the expense of the judgment creditor when it received payments from the judgment debtor, and the court viewed the Bank as, effectively, a co-conspirator of the judgment debtor's. In this case, there is no evidence that FirsTrust profited by its transactions with Mr. Rosen, so its hands are as clean as those of the judgment creditor; both FirsTrust and Dr. Werther were Mr. Rosen's dupes.

While the court does not wish to "giv[e] carte blanche to judgment debtors [like Mr. Rosen] who are sharp enough in their business dealings to devise creative methods to avoid collection of valid judgments obtained lawfully against them,"[17] the court also does not wish to impose impossible burdens on the local banking industry. So long as a bank does not bend its own rules to facilitate, and does not profit from, a debtor's sharp business practices, the bank should not play surety for the checks and cash of the debtor that they may handle for their own account holders, through their tellers, briefly and over-the-counter.

For all the foregoing reasons, Dr. Werther's Motion for Partial Summary Judgment is denied. However, the court recognizes that the question it has answered here is a very close one and there is substantial ground in the Witco opinion for difference of opinion as to the outcome in this case. Therefore, the court will certify its Order denying summary judgment for interlocutory appeal as was requested at oral argument.

BY THE COURT:

PATRICIA A. McINERNEY, J.

[17] *Id.*, 580 Pa. at 641, 863 A.2d at 451.