

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

GENERAL ELECTRIC CAPITAL	:	September Term 2008
BUSINESS ASSET FUNDING	:	
CORPORATION OF CONNECTICUT,	:	No. 1661
Plaintiff,	:	
v.	:	
R3 FOOD SERVICES, LLC,	:	Commerce Program
Defendant.	:	
	:	2183/2489 EDA 2011

OPINION

This is a consolidated appeal of two orders. One dated June 28, 2011 which ordered the Receiver to reimburse Nagle-Yezer Associates for outstanding real estate taxes and to distribute to Nagle-Yezer the court approved distribution from the Receivership Estate. The other dated August 2, 2011 which awarded prejudgment interest and attorney fees to Nagle-Yezer. Nagle-Yezer Associates appealed the June 28, 2011 order and the Receiver appealed the August 2, 2011 order.

On September 11, 2008, General Electric Capital Business Asset Funding Corporation (“General Electric”) filed a complaint against the defendant R3 Food Services, Inc. seeking injunctive and other equitable relief. On September 12, 2008, General Electric filed an emergency petition seeking the appointment of a Receiver for R3 Foods Services, LLC (“R3 Foods”). The petition was granted on September 15, 2008 and Kevin T. O’Hallaran was appointed Receiver for R3 Foods. Pursuant to the court order, the Receiver took control and custody of 22 Taco Bell fast food restaurants located in Tennessee, Ohio and Pennsylvania.

On March 16, 2009, this court entered an order approving the sale of five Tennessee area stores for a sale price of \$500,000. The sale was completed on March 25, 2009.

General Electric Capital Business Asset Fund-OPFLD



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On June 2, 2009, the court entered an order establishing a claims process and bar date for creditors to file claims. 184 Nagle-Yezer Associates, LLC (“Nagle-Yezer”), a landlord of the Taco Bell store in Western Pennsylvania (hereinafter “West Mifflin Street property”), submitted a claim in the amount of \$512,512.53. The Receiver adjusted the claim to \$411,944.70 and ultimately allowed the amount of \$477,000.00 to be claimed.

In early 2009, the Receiver received an offer to purchase fifteen (15) Ohio and Pennsylvania area stores for a sale price of \$6,450,000.00, including the business located at the West Mifflin location. Nagle-Yezer objected to the proposed sale. Through court intervention and after a hearing, the objection was resolved by agreement and this court entered an order on July 1, 2009, approving the sale of fifteen (15) Ohio and Pennsylvania area stores for a sale price of \$6,450,000.00.¹ The July 1, 2009 order provided in part as follows:

The Receiver shall ensure that all real estate tax obligations through June 29, 2009 are current and will pay any real estate tax that is due and owing as of June 29, 2009, as well as providing proof of payment to Nagle-Yezer within 45 days of Closing.²

The sale closed on July 8, 2009. The Receiver contacted the tax collectors for the premises leased from Nagle-Yezer to determine whether any amount of real estate taxes were due on the Nagle-Yezer property. The Receiver was given payoffs and issued three checks to pay the amounts quoted as outstanding taxes.

On December 30, 2009, the Receiver filed a motion for an order approving a first and final distribution to creditors. On January 29, 2010, the court issued a Rule upon all parties and creditors of R3 Foods to show cause why the Receiver’s motion should not be granted. The

¹ N.T. June 29, 2009 pp. 5-6.

² See June 30, 2009 order ¶ 24 (i). This order was properly entered by the Honorable Judge Albert J. Sheppard in the Honorable Judge Mark I. Bernstein’s absence.

parties and creditors were directed to file written objections to the motion within twenty (20) days of the order and a hearing was scheduled for March 5, 2010. As a result of the Rule, the court received an objection from Earl N. Stevenson, a landlord for one of the Taco Bell stores located in Jackson, Tennessee. Nagle-Yezer alleges that it failed to receive a copy of the court's Rule and therefore never filed any objection. A hearing was held on March 5, 2010. Stevenson was permitted to participate telephonically at his request to present his objection. Stevenson's objection was overruled.

In late March 2010, prior to any distribution from the receivership estate, Nagel-Yazer informed the Receiver that it had received a real estate tax delinquency notice for 2008 pertaining to the West Mifflin property. The Receiver investigated the notice and discovered that indeed real estate taxes remained outstanding on the West Mifflin Store property. Although the outstanding 2008 real estate taxes were to be paid by the Receiver pursuant to the July 1, 2009 Sale Order, the Receiver unilaterally decided it was not responsible to pay outstanding taxes. The Receiver claims that because Nagle-Yezer failed to file an objection and did not submit a claim for taxes remaining unpaid, the July 1, 2009 order of the court could be ignored.

On April 20, 2010, the court granted the Receiver's motion to approve a first and final distribution to Creditors. On December 14, 2010, the Receiver filed with the court a final accounting and report of the Receiver together with a motion to close the receivership and release the Receiver from liability. The Receiver alleged that having fulfilled all duties he should be discharged.³ However, in its very motion, the Receiver admitted that it issued checks to all its creditors except Nagel-Yezer. The Receiver claimed in its motion that the money owed to Nagel-Yezer had not been disbursed because of the dispute about outstanding taxes. The

³ Motion of Receiver to Close the Receivership Case and Release the Receiver from Liability filed with the court on December 14, 2010.

Receiver was withholding money he admitted was owed Nagel-Yezer until the unrelated real estate tax issue was resolved.

On January 4, 2011, Nagel-Yezer filed with the court exceptions to the Receiver's Final Accounting and Report and Motion to Close the Receivership Estate. The basis for the exceptions was the Receiver's failure to pay the real estate taxes on the West Mifflin property pursuant to the July 2009 sale order.

On January 12, 2011, the court denied the Receiver's motion and ordered the parties to conduct discovery and submit supplemental memoranda with record evidence developed during discovery. After submission of the supplemental briefs, the court scheduled a non jury trial on June 21, 2011 on the issue of whether Nagle-Yezer had waived its right to seek payment of the real estate taxes on the West Mifflin Street property.

After a two day non jury trial, the court found in favor of Nagle-Yezer and against the Receiver. The court found Nagle-Yezer had not waived its right to payment of the real estate taxes because the Receiver "ensured" Nagle-Yezer in the July 2009 sale order that all real estate obligations through June 29, 2009 were current.⁴ The court awarded Nagle-Yezer the \$8,301.30, owed for the 2008 Allegheny Taxes and ordered the Receiver to release from escrow and distribute \$44,700.00 to Nagle-Yezer. The court denied Nagle-Yezer's request for attorney fees.

On July 14, 2011, Nagle-Yezer filed a reconsideration motion of the order of June 28, 2011 regarding the denial of attorney fees. On July 28, 2011, Nagle-Yezer filed an appeal of this court's June 28, 2011 order. On August 2, 2011, the court entered an order granting Nagle-Yezer's motion for reconsideration and ordered prejudgment interest on both the 2008 Allegheny County real estate taxes and also on the amount the Receiver wrongfully withheld from the date of the distribution order. The court also reconsidered its prior order and awarded reasonable

⁴ N.T. June 27, 2011 p. 89.

attorney fees. The court directed Nagle-Yezer to file with the court a motion to determine the reasonable attorney fees within twenty days for the order. This motion, filed on August 22, 2011, is currently pending before the court.

On August 10, 2011, the Receiver filed a motion to vacate the order of August 2, 2011. On August 31, 2011, the Receiver filed an appeal of the court's August 2, 2011 order. The motion to vacate remains pending.⁵

On November 2, 2011, the Superior Court quashed the respective appeals of the Receiver and Nagle-Yezer for failing to file post trial motions. Subsequently, these appeals were reinstated by the Superior Court directing the parties to address the issue of waiver for failing to file post trial motions in their briefs.

DISCUSSION

Pennsylvania Rule of Civil Procedure 227.1(c) requires the filing of a motion for post-trial relief within ten days after the filing of a decision in a non-jury trial. The filing of post-trial motions is mandatory to preserve issues for appellate review. Rule 227.1 requires that the trial court be given an opportunity to correct errors in its ruling and avert the need for appellate review.⁶ If an issue has not been raised in a post-trial motion, it is waived for purposes of appellate review.

The case at bar presents a procedural difficulty. This court conducted a non jury trial on the issue of whether Nagle-Yezer waived its right to payment of real estate taxes on the West Mifflin property by failing to timely file an exception. The court found there had been no waiver as set forth in an order dated June 28, 2011. Post trial motions were the proper procedural

⁵ See Pa. R. A. P. 1701.

⁶ See, L.B. Foster Co. v. Lane Enterprises, Inc., 551 Pa. 307, 710 A.2d 55 (1998).

mechanism to review that order. Instead a motion for reconsideration was filed together with an appeal.

This court respectfully suggests that if the appeals in this matter are quashed and the matter remanded, the parties may be permitted to engage in post trial proceedings nunc pro tunc in accordance with the Rules of Civil Procedure. Alleged errors may then be reviewed by the trial court and rectified if necessary. Moreover, pending before the court is Nagel-Yezer's petition for attorney fees, ripe for decision. A remand of this matter will permit this court to review alleged errors and rule on the Petition for Attorney Fees. This will alleviate piecemeal litigation and present a complete record for appellate review.

Nonetheless, this court will address the merits of the issues as presented on appeal. The court held that prejudgment interest and attorney fees were proper. It is well established that in contract cases, prejudgment interest is awardable as of right.⁷ The right to interest begins at the time payment is wrongfully withheld. Nagel-Yezer's right to payment of the real estate taxes for the Mifflin Street property and the payment of its claim for rent arise from contract. The award of pre-judgment interest was necessary and proper.

An award of attorney fees was proper pursuant to 42 Pa. C. S. § 2503 (9). Reasonable counsel fees may be awarded to a prevailing party if the party can demonstrate "the conduct of another party ... was arbitrary, vexatious or in bad faith." A party acts in an arbitrary manner when "conduct is based on random or convenient selection or choice rather than on reason or

⁷ Somerset Comm. Hospital v. Allan B. Mitchell & Assosc., 454 Pa. Super. 188, 685 A.2d 141 (Pa. Super. 1996).

nature." ⁸ An award for counsel fees under §2503 compensates an innocent litigant for costs caused by unnecessary actions of the opposing party.⁹

In this case, the evidence demonstrated that the Receiver's actions warranted the award of attorney fees. The Receiver refused to distribute to Nagle-Yezer the court approved distribution, which the Receiver admits was due and owing. The Receiver arbitrarily refused payment because there was an entirely separate dispute between the Receiver and Nagle-Yezer regarding payment of real estate taxes. Before any distribution was made from the Receivership Estate, the Receiver knew that real estate taxes were due and owing on the West Mifflin Street property. The evidence demonstrated that in March 2010, Nagel-Yazer had placed the Receiver on notice that it had received a real estate tax delinquency notice for the West Mifflin property. The Receiver investigated and acknowledged that real estate taxes were in fact outstanding. Despite the Receiver's unqualified obligation to pay all pre July 2009 taxes¹⁰, the Receiver withheld approved distribution to Nagle-Yezer and filed a motion to close the Receivership Estate and discharge all his obligations. ¹¹ This unsupportable position to refuse an owed distribution and disobey a court order was taken solely to force Nagle-Yezer to resolve a legitimate disputed

⁸ Strause v. DOT, 545 Pa. 607, 615, 682 A.2d 295, 299 (1996).

⁹ Westmoreland County Indus. Dev. Auth. v. Allegheny County Bd. of Prop. Assessment, Appeals & Review, 723 A.2d 1084 (Pa. Cmwlth. 1999).

¹⁰ See June 30, 2009 Sale Order ¶ 24 (i).

¹¹ On June 28, 2011, the court ordered the Receiver to reimburse Nagle-Yezer for the 2008 Real Estate taxes on the West Mifflin Street property. The court held that Nagle-Yezer did not waive its right to payment for the real estate taxes. The Receiver has not appealed this order.

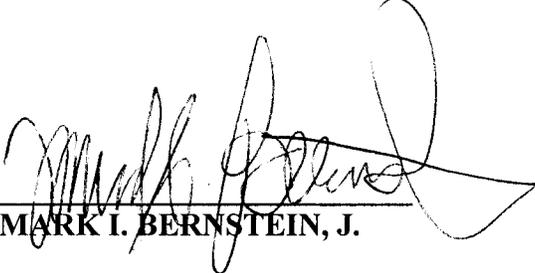
claim for payment of real estate taxes.¹² Attorney fees were warranted for this conduct.¹³

CONCLUSION

This court suggests the appeals be quashed and the matter remanded to this court for post trial proceedings nunc pro tunc so that all non-substantive procedural shortcoming may be cured and a proper appeal filed if warranted. However, should the appellate court deem this resolution inappropriate, the order granting prejudgment interest and attorney fees should be affirmed.

DATE: 3/1/12

BY THE COURT,


MARK I. BERNSTEIN, J.

¹² See Scalia v. Erie Ins. Exch., 878 A.2d 114 (Pa. Super. 2005)(attorney fees were warranted where plaintiffs persisted in litigation knowing the insurance company was justified in denying their claim); Kershbaumer v. Kershbaumer, 2009 Pa. Dist. & Cnty Dec. Lexis 290 (2009) (attorney fees warranted where counsel represented to the court there were no unsettled issues when in fact issues were still pending). See also, Rzicznek v. Rzicznek, 80 Pa. D. & C. 4th 146 (2006)(attorney fees warranted where wife's refusal to sign settlement document was not based on good faith legal theory but on intent to escape contractual agreement).

¹³ Attorney fees were also warranted pursuant to paragraph 12 of the lease agreement between Nagle-Yezer and the tenant which provides "In the event Lessee fails to make such tax payment, Lessee shall pay any and all penalties, delinquency charges, interest, etc." See Nagel-Yezer's Exception to the Receiver's Final Accounting and Report and Motion to Close the Receivership and Release of Liability, Exhibit "1".