

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE: FARABAUGH CHEVROLET-
OLDSMOBILE, INC.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

APPEAL OF: RICHARD F. FLICKINGER,
ESQUIRE, AS ASSIGNEE FOR THE
BENEFITS OF CREDITORS OF
FARABAUGH CHEVROLET-OLDSMOBILE

No. 844 WDA 2012

Appeal from the Order Entered May 15, 2012
In the Court of Common Pleas of Westmoreland County
Civil Division at No(s): 9715 of 2009

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J.

FILED: July 30, 2013

Richard Flickinger, Esquire, as assignee for the benefit of creditors of Farabaugh Chevrolet-Oldsmobile ("FCO"), appeals from the order entered on May 15, 2012 in the Court of Common Pleas of Westmoreland County. For the reasons set forth herein, we quash the appeal.

The relevant factual and procedural history of this case has been set forth by this Court in a related appeal by Attorney Flickinger:

Thomas L. Farabaugh ("Thomas") was the owner of Farabaugh Chevrolet-Oldsmobile, Inc. ("FCO"), a General Motors ("GM") franchised dealership established by his father. Thomas and his ex-wife, Carol Farabaugh ("Carol"), also owned the building and real estate which FCO leased for the conduct of its automobile sales and service businesses. When FCO's businesses began to fail, Thomas sought an investor and recruited Edward P. O'Donnell ("O'Donnell"), who became a shareholder in FCO along with Thomas. O'Donnell eventually became the sole shareholder

* Retired Senior Judge assigned to the Superior Court.

of FCO but Thomas remained active in the business and continued as the dealership's GM representative.

O'Donnell and Thomas recognized that it was in their mutual interest to find a buyer for FCO's business and the real estate on which the business was operated. As a result, they entered into an agreement with a prospective purchaser, who agreed to acquire the business for \$325,000.00 and the real estate for \$300,000.00 in the context of mutually dependent transactions. The parties to the transaction agreed that [Attorney Flickinger] would serve as assignee for the benefit of creditors in order to resolve FCO's debt issues and avoid the filing of a bankruptcy petition which could potentially delay consummation of the proposed transaction.

The transfer of the FCO franchise required GM's consent. GM, however, denied the parties' request to transfer the FCO franchise and instead exercised its right to purchase the franchise for \$325,000.00. [Attorney Flickinger] claims that during discussions with GM, Thomas privately negotiated a \$300,000.00 payment from the automaker in satisfaction of FCO's obligations under the lease agreement.

Although GM preempted the proposed sale to the third party, it did not consummate its own purchase within the original time line. Eventually, however, GM paid the \$325,000.00 it owed to FCO and the funds were deposited into [Attorney Flickinger]'s account as assignee for the benefit of FCO's creditors. [Attorney Flickinger] used these and other funds obtained through the liquidation of FCO's automotive business to pay secured creditors, priority lien holders, and approved portions of claims of unsecured creditors. [Attorney Flickinger] set aside a portion of the funds until judicial approval for their final distribution could be obtained.

Thomas and Carol submitted a claim for alleged taxes and rent owed under their lease with FCO. When [Attorney Flickinger] refused to admit their claim, they filed a complaint to confess judgment against FCO in the amount of \$113,173.05, pursuant to a warrant of attorney provision in the parties' lease agreement. In response, [Attorney Flickinger], as assignee for the benefit of FCO's creditors, petitioned for leave to intervene in the action pursuant to Pa.R.C.P. 2327(1). In the petition, [Attorney Flickinger] averred that on July 31, 2008, FCO

appointed him as assignee for the benefit of creditors and assigned to him the proceeds of the sale of its assets. He claimed that notice of his appointment was filed with the Office of the Recorder of Deeds for Westmoreland County on August 12, 2008. [Attorney Flickinger] also asserted that pursuant to his obligations as assignee, he compiled a list of creditors and, from the proceeds received from the sale of FCO's assets, paid secured creditors in full and unsecured creditors a percentage of their claims. [Attorney Flickinger]'s petition alleged that he may be obligated to pay Thomas and Carol as creditors should they prevail in the action and judgment is entered against FCO.

[Attorney Flickinger] also attached a proposed answer to Thomas and Carol's complaint which he intended to file if permitted to intervene in the action. [Attorney Flickinger] raised as new matter the \$300,000.00 payment that GM made to Thomas and Carol. [Attorney Flickinger] argued that because GM allowed Thomas and Carol to retain ownership of the real estate, its payment was intended to benefit FCO by extinguishing its outstanding obligation under the lease agreement. [Attorney Flickinger] also argued that classifying Thomas and Carol as creditors of FCO despite their receipt of payment for sums allegedly due under the lease would allow them a double recovery far in excess of any amount actually owed while depriving unsecured creditors repayment for their claims.

By order dated May 18, 2009, the trial court directed [Attorney Flickinger] to file, within 10 days, an accounting of all FCO assets presently in his possession. The court reasoned that this information was needed in order to determine whether the intervention should be permitted. The trial court noted that there would be no need for intervention if [Attorney Flickinger] no longer held any assets of the assignee since the result in the confession of judgment action would not affect [Attorney Flickinger]'s distribution of funds. If, however, [Attorney Flickinger] continued to hold assets of FCO, "a judgment in the instant case will affect [Attorney Flickinger]] and his obligation under the terms of the assignment." Trial Court Order, 5/18/09, at 1.

[Attorney Flickinger] timely complied with the court's order and filed a report showing a reserve of \$54,800.65. Accounting by Assignee for the Benefit of Creditors, 5/21/09, at 1. Thereafter, the court denied [Attorney Flickinger]'s petition to intervene

without a hearing, concluding that [Attorney Flickinger] did not have a legally enforceable interest in the distribution of FCO's assets and, alternatively, even if such an interest existed, [Attorney Flickinger]'s interests could adequately be represented by FCO as the named defendant and assignor. Trial Court Decision and Order, 5/28/09, at 3.

After obtaining a judgment against FCO and learning that [Attorney Flickinger] may be holding funds on behalf of the defunct auto dealer, Thomas and Carol served interrogatories in aid of execution upon [Attorney Flickinger]. Interrogatory number five and [Attorney Flickinger]'s corresponding response were as follows:

Interrogatory No. 5

At any time before or after you were served did [FCO] transfer or deliver any property to you or to any person or place pursuant to your direction or consent and if so what was the consideration therefor?

Answer:

On July 31, 2008, [FCO] received \$325,000.00 from [GM] for repurchase of the dealership franchise and on the same day voluntarily assigned the entire amount to [Appellant]. [Appellant] has since received \$17,489.52 from the sale of additional assets and various adjustments on accounts. All receipts have been used to pay claims or have been set aside to pay unsettled claims and administrative expenses. [Thomas and Carol's] claim is not admitted and is not included as an unsettled claim.

Attorney Flickinger's [Ans.] to Interrogatories, 9/2/09, at ¶ 5.

Based on [Attorney Flickinger]'s response, Thomas and Carol filed a praecipe to enter judgment against [Attorney Flickinger] pursuant to Pa.R.C.P. 3146(b)(1) (permitting judgment to be entered by the prothonotary against a garnishee for property of a defendant admitted to be in the garnishee's possession in answers to interrogatories). Judgment was thereafter entered against [Attorney Flickinger] in the amount of \$113,173.05. [Attorney Flickinger] responded with a petition to strike or open judgment, which was denied by the trial court. Subsequently,

[Attorney Flickinger] filed a timely notice of appeal from the order denying his petition to strike or open the judgment.

Farabaugh v. Farabaugh Chevrolet Oldsmobile, Inc., No. 1963 WDA 2009, unpublished memorandum, at 1-6 (Pa. Super. filed August 10, 2010).

We affirmed the trial court's denial of Attorney Flickinger's petition to strike or open judgment, holding that the trial court properly denied Attorney Flickinger's petition to intervene because his interest was adequately represented by FCO as the named defendant. ***Id.*** at 10. Furthermore, we found that the trial court correctly concluded that Attorney Flickinger was in possession of FCO's assets and judgment could be entered against him pursuant to Pa.R.C.P. 3146(b)(1). ***Id.*** at 14-15. Finally, we agreed with the trial court's assessment that Attorney Flickinger failed to comply with provisions of 39 Pa.S. § 49, governing assignments for the benefit of creditors, and affirmed the trial court's decision not to recognize Attorney Flickinger as an assignee. ***Id.*** at 18.

On August 23, 2010, Attorney Flickinger filed a Petition for Reargument, which we denied on October 19, 2010. He then petitioned the Supreme Court of Pennsylvania for allowance of appeal, which was also denied.

On June 13, 2011, Attorney Flickinger filed his Report of Assignee with the trial court and excluded Thomas and Carol as creditors of FCO. He petitioned the court for approval of his proposed distribution of FCO's assets.

On August 3, 2011, Thomas and Carol filed a response to Flickinger's Petition for Adjudication, asserting that their claim was improperly excluded.

On January 10, 2012, the trial court ordered that Attorney Flickinger release all FCO funds to Thomas and Carol, except \$17,000.00 for administrative fees. On January 19, 2012, Attorney Flickinger filed a Motion for Post-Trial Relief and Exceptions, which the court denied on May 15, 2012. Nine days later, Attorney Flickinger filed a timely notice of appeal.

On June 7, 2012, Thomas and Carol filed a motion to quash this appeal for lack of standing. In his response, Attorney Flickinger asserts that he has standing as an assignee for the benefit of creditors because he made distributions to creditors prior to court approval. Alternatively, he argues that he has standing as a garnishee because "a garnishee is not required to pay over funds to the judgment holder where the judgment is proven to be false and inflated." Answer and Brief in Opposition to Motion to Quash Appeal, 06/22/2012, at 5. For the reasons below, we quash his appeal.

Pennsylvania Rule of Appellate Procedure 501 provides in relevant part that "any party who is aggrieved by an appealable order, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom." Pa.R.A.P. 501. Our court has interpreted this to mean that the harm to a party's interest must be "direct, immediate, substantial and pecuniary in nature." ***In re Harrison Square, Inc.***, 397 A.2d 1230, 1232 (Pa. 1979) (citations omitted).

Here, Attorney Flickinger claims that he is an assignee for the benefit of the creditors of FCO. An assignment for the benefit of creditors is an assignment of a person or entity's assets to one or more disinterested third parties for the benefit of creditors. 39 P.S. § 1 (2008). Generally, an assignee for the benefit of creditors has no standing to appeal distribution of funds because he has "no beneficial interest in his capacity as an assignee in the distribution of the funds in his hand." ***In re Harrison Square, Inc.***, 397 A.2d at 1232 (citations omitted). Still, Pennsylvania Courts have held that an assignee may be entitled to appeal from a decree of distribution of the funds in his hands when he "show[s] affirmatively that he is, in his own person, a party aggrieved." ***Mellon's Appeal***, 32 Pa. 121, (1858). For example, if an assignee is a creditor or an assignee of a creditor, he may appeal if he does so in the capacity in which he has been aggrieved. ***Singmaster's Appeal***, 86 Pa. 169 (1878); ***Appeal of Jordan***, 107 Pa. 75 (1844).

The trial court concluded that Attorney Flickinger's status was limited to that of a garnishee. Trial Court Opinion, 1/10/12, at 3. A garnishee is defined in Pennsylvania Rule of Civil Procedure 3101, which provides:

- (b) Any person may be a garnishee and shall be deemed to have possession of property of the defendant if the person
 - (1) owes a debt to the defendant;
 - (2) has property of the defendant in his or her custody, possession or control;

(3) holds as fiduciary property in which the defendant has an interest;

(4) holds the legal title to property of the defendant whether or not in fraud of creditors; or

(5) owns or possesses real property subject to a mortgage, judgment or other lien in which defendant has an interest.

Pa.R.C.P. 3101. Under Pennsylvania law, garnishment allows a judgment creditor to collect a debt from assets of his debtor that are in the hands of a third party. **Sevast v. Kakouras**, 841 A.2d 1062, 1066 (Pa. 2003). “The effect of a judgment against a garnishee is to state that on the day it is entered the garnishee is indebted to the defendant for the amount stated therein.” **Clardy v. Barco Constr. Co.**, 208 A.2d 793, 797 (Pa. 1965).

Generally, a third party has no standing to apply to open a judgment entered against another person as a defendant, though our Supreme Court has held that opening a judgment was the only remedy available to a garnishee whose rights were affected by a fraudulent judgment. **Renschler v. Pizano**, 198 A. 33, 35 (Pa. 1938). However, this exception has been restricted to “cases such as claims for indemnity, where the garnishee was not a party to the judgment which is being attacked as fraudulent.” **Bianco v. Pullo**, 171 A.2d 620, 623, (Pa. 1961) (Flood, J. concurring); **see also Conrad v. Duffin**, 44 A.2d 770, 772, (Pa. 1945). Finally, a garnishee may resist an attachment by showing a defense available against the judgment debtor. **Collins v. O'Donnell**, 191 A. 22, 23 (Pa. 1937); **see also** Pa.R.C.P. 3145.

Here, the Honorable Gary Caruso determined that Attorney Flickinger failed to comply with the statutory provisions governing assignees for the benefit of creditors. As such, he rejected Attorney Flickinger's status as an assignee, a ruling affirmed by this Court. **See Farabaugh, supra**, at 16. The trial court correctly concludes that it is bound by that determination. Therefore, Attorney Flickinger's status is restricted to that of a garnishee and he lacks standing to pursue the matter at bar as an assignee.¹

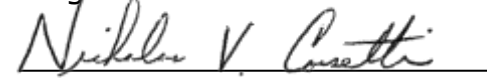
As a garnishee, Attorney Flickinger lacks standing to appeal the order to distribute funds. Unlike **Renschler**, this is not a claim for indemnity where a third party garnishee suggests the judgment was fraudulent. Furthermore, although Attorney Flickinger cites **Collins, supra**, that case addressed resisting an attachment by showing a defense available against the *judgment debtor*. In the present case, FCO is the judgment debtor, not Thomas and Carol. For these reasons, Attorney Flickinger lacks standing to appeal the trial court's order to distribute funds.

¹ Even if we accepted Attorney Flickinger's argument that he is an assignee for the benefit of creditors, he still has no standing to appeal. He is not personally a creditor or an assignee of a creditor. He has no beneficial interest in the distribution of the funds in his capacity as an assignee. Accordingly, he has no beneficial interest in his capacity as an assignee in the distribution of the funds in his hand. During the non-jury trial on August 8, 2011, Attorney Flickinger seemingly conceded this point when he told Judge McCormick, "I agree that whatever you decide here, I have no right of appeal. I agree that this is where my right of appeal ends. The Creditors have a right to appeal, but I, as assignee, do not have a right to appeal." N.T. Trial, 08/08/11, at 26-27.

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Appeal quashed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 7/30/2013