# STATE OF MICHIGAN

# COURT OF APPEALS

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DOUGLAS BURKE,

Plaintiff/Counter Defendant/
Garnishor-Appellee,

v

UNITED AMERICAN ACQUISITIONS AND MANAGEMENT, INC. d/b/a UNITED AMERICAN FREIGHT SERVICES, INC., STONEPATH LOGISTICS DOMESTIC SERVICES, INC., and STONEPATH GROUP,

Defendants/Counter Plaintiffs,

and

RADIANT LOGISTICS GLOBAL SERVICES, INC.,

Garnishee Defendant-Intervenor

and

MASS FINANCIAL CORPORATION,

Intervenor-Appellant.

UNPUBLISHED
August 5, 2010

No. 290590
Wayne Circuit Court
LC No. 04-433025-CZ

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Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

ZAHRA, P.J. (*dissenting*).

Because I conclude that intervenor Mass Financial Corporation (MFC) was not a real party in interest in the litigation, I respectfully dissent. I conclude that MFC relinquished its secured interest in the funds at issue effective May 21, 2007. I would affirm the judgment entered by the trial court.

While this is an incredibly fact intensive case, the dispositive issue at hand is relatively simple. Plaintiff Burke held a judgment against United American Acquisitions & Management, Inc. (United) and Stonepath Logistics Domestic Services, Inc. (Stonepath Logistics) and

Stonepath Group (Stonepath Group) (collectively referred to as "Defendants"). In August, 2005, before the judgment was entered, Defendants gave to Laurus Master Fund (Laurus) a secured interest in all their assets and personal property, including accounts receivables. In February 2007, also before plaintiff obtained a judgment against Defendants, Laurus assigned its perfected secured interest to MFC. On April 17, 2007, MFC issued a notice of default to Defendants, thus exercising its rights to the assets covered under the perfected security agreement. However, effective May 21, 2007, MFC executed a management agreement and a purchase agreement with Radiant Logistics Global Services, Inc (Radiant) that gave to Radiant all rights to manage and operate for Radiant's exclusive benefit certain assets of the Defendants. MFC did not assign to Radiant its rights under its security agreement. Plaintiff filed garnishment actions to collect accounts receivable owed to some of the Defendants, which receivables were being collected by Radiant. MFC intervened claiming it has a superior right to the receivables, pursuant to its perfected security agreement.

The dispositive legal issue is whether MFC's secured interest remained valid after the effective date of the Management Agreement and the Purchase Agreement it executed with Radiant. I conclude it did not.

"A real party in interest is one who is vested with the right of action on a given claim . . . ." *Blue Cross & Shield v Eaton Rapids Community Hosp,* 221 Mich App 310, 311 (1997). Here, the terms of the Management Agreement between MFC and Radiant establishes that MFC had no interest in the funds in question. This agreement provides, in pertinent part:

> WHEREAS, Radiant desires to acquire from [MFC] and [MFC] desires to transfer to Radiant, certain of the assets used in the operation of [United American Freight Services, Inc (United)], all of which are identified as "Collateral" in the Loan Documents, and all of which are included n the description of Purchased Assets in the Asset Purchase Agreement the parties are executing in conjunction with the Agreement (hereafter "Purchased Assets or "Asset Base");
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> * * *
>
> Section 2.3. Receipts and Liabilities. [Radiant] shall be entitled to all revenues generated and shall be solely responsible for all liabilities accrued as a result of business conducted using the Asset Base after [May 21, 2007. MFC] shall be entitled to all revenues generated prior to [May 21, 2007] and shall be solely responsible for all liabilities accrued from April 17, 2007 to [May 21, 2007] as a result of business conducted using the Asset Base.

It is clear from the above quoted language that Radiant was given the right to run United for the exclusive benefit of Radiant. MFC had no right to collect, hold or use any revenue generated from operation of United after May 21, 2007. This fact is also made clear from review of the amendment to the purchase agreement, dated November 1, 2007, in which the following was added to the original Purchase Agreement:

> As soon as possible following Closing, Seller and Buyer shall determine which payments received from [United] customers are property of [MFC] and which are property of [Radiant], based on the criteria set forth in Section 2.3 of the

> Management Agreement, and each shall promptly remit to the other. The parties shall continue to reconcile and settle the accounts on a not less than weekly basis until all sums owed to the other have been accounted for.

Accepting that MFC was a secured creditor of United, it nonetheless had no right to proceeds generated after May 21, 2007, the effective date of the Management and Purchase Agreements. I would affirm.

/s/ Brian K. Zahra