[J-78-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WITCO CORPORATION,	:	No. 2 WAP 2004
	:	
Appellant	:	
	:	Certified questions of law from the United
	:	States Court of Appeals for the Third
v.	:	Circuit, accepted by Order entered
	:	January 6, 2004 at No. 20 WM 2003.
	:	
HERZOG BROTHERS TRUCKING, INC.,	:	
	:	
Appellee	:	ARGUED: May 11, 2004
	:	
	:	
v.	:	
	:	
	:	
NATIONAL CITY BANK,	:	
	:	
Appellee	:	

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: DECEMBER 21, 2004**

I do not agree that pursuant to Pa.R.C.P. 3101(b), a garnishee bank obtains "possession" of a defendant's[1] property when a bank sells a cashier's check to a defendant purchaser. Therefore, a bank does not violate any duty imposed upon it pursuant to Pa.R.C.P. 3111(c) by engaging in such a transaction. Lastly, I find that the public policy

[1] Pennsylvania Rule of Civil Procedure 3101(a) defines "defendant" as "any party against whom a judgment has been entered."

underlying Pennsylvania garnishment law is not offended when a garnishee bank sells a cashier's check to a defendant purchaser. Accordingly, I respectfully dissent.

I begin by noting that in this matter, the United States Court of Appeals for the Third Circuit has asked this Court to answer three complex questions of law concerning the interpretation of our rules of civil procedure and this Commonwealth's public policy. In answering the questions raised by the Court of Appeals for the Third Circuit, the Majority places great weight and emphasis on the facts of this case, particularly the fact that, in dealing with Herzog Brothers, National City waived its internal policies regarding the issuance of cashier's checks. At the time of these challenged transactions, before a National City bank issued a cashier's check, National City's policies required that all funds to be used toward the issuance of a cashier's check in excess of $3,000 first be deposited into an account at the bank and that a hold be put on all funds derived from foreign bank checks to verify that those accounts contained a sufficient balance to cover those funds. However, when a purchaser buys a cashier's check in Pennsylvania, the law governing such a transaction does not require the bank to deposit the purchaser's funds into an account at the bank prior to the bank issuing a cashier's check nor does the law require a bank to hold funds derived from foreign checks in such scenarios. Moreover, National City's decision to waive its internal policies was not illegal and, therefore, was a choice that the bank was free to make. As such, the fact that National City waived its internal policies in dealing with Herzog Brothers is irrelevant to an analysis of the questions posed by the Third Circuit.

By answering the Third Circuit's far reaching legal questions based primarily on the facts of the case *sub judice*, in my view, the Majority simply has sought to do equity. The answers to these questions, however, require an analysis driven by the law, not by the facts. Consequently, a dispassionate legal analysis must answer these important questions of first impression.

Turning to the rules of construction that govern the interpretation of the Pennsylvania Rules of Civil Procedure, "[t]he object of all interpretation and construction of rules is to ascertain and effectuate the intention of the Supreme Court." Pa.R.C.P. 127(a). Furthermore, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases...[that] have acquired a peculiar and appropriate meaning or as are expressly defined by rule shall be construed according to such peculiar and appropriate or express meaning or definition." Pa.R.C.P. 103(a). Additionally, when ascertaining the intent of this Court, it is presumed that in promulgating rules, we do not intend a result that is absurd, that is impossible of execution, or that is unreasonable. Pa.R.C.P. 128(a). With these rules in mind, I consider the questions raised in this matter.

Pennsylvania Rule of Civil Procedure 3101(b)(2) states that a garnishee "shall be deemed to have possession of property of the defendant if the [garnishee]…has property of the defendant in his or her custody, possession or control." However, neither Rule 3101(b)(2) or any other rule of civil procedure defines "possession." In construing "possession" as it is utilized in this context, the Majority defines the word as"[t]he fact of having or holding property in one's power; the exercise of dominion over property." Majority Opinion at 5 (citing Black's Law Dictionary (8th Ed. 2004)). I find this definition to be adequate in regard to garnishment law. I, however, disagree with the Majority that, under this definition, a bank possesses the property of a purchaser by engaging in the sale of a cashier's check.

Pursuant to 13 Pa.C.S. §3104, a "cashier's check" is defined as "a draft with respect to which the drawer and drawee are the same bank or branches of the same bank." This simply means that when a customer purchases a cashier's check, the issuing bank draws the check from the bank's own account. As such, a cashier's check is the bank's obligation rather than the purchaser's personal obligation. Douglas J. Landy, Failure of Consideration

is Not a Defense to a Bank's Refusal to Pay a Cashier's Check: Revised UCC §3-411(c), 115 Banking L.J. 92, 102 (February 1998).

Except in limited circumstances, see, e.g., 13 Pa.C.S. §3411(c), the bank "is obliged to pay the [cashier's check] according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or if the issuer signed an incomplete instrument, according to its terms when completed…." 13 Pa.C.S. §3412. In fact, if a bank wrongfully refuses to pay a cashier's check that it issued, then the bank exposes itself to liability in the form of expenses, loss of interest, and even consequential damages. 13 Pa.C.S. §3411. Based on the heightened obligation that a bank incurs in issuing a cashier's check, payees of these checks are alleviated from the dangers associated with accepting other, riskier methods of payment, such as personal checks. See, Landy, supra at 96-101. Consequently, when a purchaser conveys his or her funds to bank for a cashier's check, in exchange for the funds paid, the purchaser receives a unique product, *i.e.*, a check that the bank is obligated to pay, assuring payees of these checks of the availability of the funds represented on the checks. See, id. at 101.

This type of transaction is akin to other types of sales transactions where purchasers relinquish ownership of funds in return for an interest in a good. See, 13 Pa.C.S. §1201 (providing for the definitions of "purchaser" and "purchase," as the words are used in the various Articles of the Uniform Commercial Code).[2] Accordingly, if a garnishee bank never deposits a defendant purchaser's funds into an account managed by the defendant but, rather, exchanges a cashier's check for funds conveyed by the purchaser, then the instant that the bank receives the funds from the defendant, the funds immediately become the property of the bank, and the cashier's check becomes the property of the purchaser.

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[2] Section 1201(a) defines "purchaser" as "[a] person who takes a purchase[,]" and Section 1201(b) defines "purchase," in pertinent part, as "[i]ncludes taking by sale…or any other voluntary transaction creating an interest in the property."

While it is true that a bank exercises dominion over the funds that a purchaser of a cashier's check conveys to the bank, this is simply because, upon receipt of the funds, the bank obtains unfettered ownership of the funds. Thus, in such a scenario, the bank does not possess the defendant's property as contemplated by Pa.R.C.P. 3101(b).

Contrary to this view, the Majority proposes that when National City came into physical possession of Herzog Brother's cash and checks, "[t]he Bank then had the power to control Herzog Brother's access to those funds and the manner in which the funds were disbursed." Majority Op. at 5. This simply is not the case. Under the Majority's rationale, a bank could hold out to a purchaser that it is unconditionally willing to accept the purchaser's funds for the immediate exchange of a cashier's check; however, upon receiving the purchaser's funds, the bank would have no obligation to fulfill its end of the bargained for exchange - to provide the purchaser with a cashier's check. This result is not only absurd, see, Pa.R.C.P. 128(a); it is tantamount to authorizing fraudulent inducement. Moreover, a garnishee has a "general duty to act with reasonable care and to take no steps that would unfairly prejudice the judgment debtor. In addition, the garnishee must act in good faith and exercise a high degree of care to protect the rights of all parties." See generally 13 Standard Pennsylvania Practice 2d at 77:39 (explaining garnishees' general duties owed to defendants)(footnotes omitted). If a garnishee bank conducted business with a defendant in the manner forwarded by the Majority, then the bank most certainly would be breaching these general duties. Based on the legal analysis provided above, I find that a garnishee bank does not possess the property of a defendant as contemplated by Pa.R.C.P 3101(b) when a defendant purchaser buys a cashier's check from a garnishee bank with funds that are never deposited in the defendant's account.[3]

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[3] The fact that National City did not deposit the funds Herzog Brothers conveyed to the bank into an account managed by Herzog Brothers prior to the bank issuing the cashier's checks is precisely what distinguishes the legal analysis employed by the Eighth (continued…)

Turning to the second question posed by the Third Circuit, the court asks whether a garnishee bank that receives "possession" of a judgment debtor's property has a duty under Pa.R.C.P. 3111(c) to restrain from paying any "debt" to the judgment debtor in exchange for that property, even if that "debt" arises during a transaction with a brief duration akin to that of a sales transaction. Pursuant to Pa.R.C.P. 3111(c), a garnishee bank that receives "possession" of a defendant's property would be restrained from paying a debt to or on the account of the debtor with that property. For the reasons stated above, however, a bank does not come into possession of a defendant purchaser's property, as contemplated by Pa.R.C.P. 3101(b), by engaging in the sale of a cashier's check. Therefore, because a garnishee bank never takes possession of a defendant's property when the bank sells a cashier's check to the defendant, a garnishee bank cannot possibly pay a debt to or for the account of the defendant with the defendant's property as a result of

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(…continued)
Circuit in In re Southwestern Glass Co., 332 F.3d 513 (8th Cir. 2003) from the proper legal analysis that the matter *sub judice* requires. Witco and the Majority rely on Southwestern Glass for the proposition that no matter how briefly a garnishee bank possesses a judgment debtor's funds, the instant the funds come into the bank's possession, the bank is obligated to hold the funds for the judgment creditor. As the Majority relates, in Southwestern Glass, the garnishee bank extended a line of credit to the judgment debtor and allowed the judgment debtor to draw checks on this line of credit. Id. at 517. However, this arrangement required the funds to flow through an account *managed by the judgment debtor*. Id. While the funds remained in the line of credit, they were not subject to garnishment; however, the instant that the funds were transferred into the judgment debtor's account, the judgment debtor obtained an ownership interest in the funds. Id. at 518. Although the transferred funds only briefly passed through the judgment debtor's account, the Eighth Circuit determined that for the brief time that the funds were in the judgment debtor's account, the funds belonged to the judgment debtor, and therefore, the judgment creditor's writ of garnishment captured these funds.

In the matter *sub judice*, the funds conveyed by Herzog Brothers were never deposited into a personal account. Rather, the bank issued the cashier's checks immediately upon receipt of Herzog Brothers' funds. Therefore, the bank never possessed these funds as contemplated by Pa.R.C.P. 3101(b), and the funds, consequently, could not be captured by Witco's writ of garnishment.

such a transaction. As such, selling a cashier's check to a defendant purchaser does not trigger a garnishee bank's duties under Pa.R.C.P. 3111(c).

Lastly, the Third Circuit asks whether the public policy underlying Pennsylvania garnishment law requires a garnishee bank to refrain from engaging in transactions with a judgment debtor when doing so permits the judgment debtor to avoid the garnishment of its assets, particularly when engaging in such transactions is to the financial benefit of the bank. This Court has stated that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest." Hall v. Amica Mutual Insurance Co., 648 A.2d 755, 760 (Pa. 1994). The laws of this Commonwealth allow for the garnishment of many types of arrangements between a judgment debtor and a garnishee. See, e.g., 23 Pa.C.S. §3502(e)(8)(allowing for the attachment of wages when a party to a court order of equitable distribution fails to comply with the order); and Pa.R.C.P. 3101(b)(3)(stating that a fiduciary who holds property, in which the defendant has an interest, possesses the defendant's property and, therefore, has property subject to a writ of garnishment). These laws contemplate that in order for a writ of garnishment to capture funds or property of a defendant being held by a third-party garnishee, the garnishee must either owe a debt to the defendant or actually possess the property of the defendant. See Pa.R.C.P. 3101(b). These laws do not, however, suggest that a writ of garnishment should capture a defendant's funds when the defendant engages in the purchase of a cashier's check, a transaction akin to that of other sales transactions. Accordingly, because our laws governing garnishment do not contemplate the garnishment of funds exchanged in such scenarios, the public policy of this Commonwealth is not offended by such an exchange and, therefore, does not require a garnishee from refraining from engaging in such transactions, regardless of whether the garnishee profits from such transactions.

For all the reasons above, I dissent.