

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

MARCO FORTINI,

Appellant,

v.

Case No. 5D20-121

ANDREA DE PALMA, OPTIMUM  
SPRING MANUFACTURING INC.  
AND JOHN SUNDEMAN, RECEIVER,

Appellees.

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Opinion filed December 18, 2020

Appeal from the Circuit Court  
for St. Johns County,  
Bryan Rendzio, Judge.

William S. Graessle and Jonathan W.  
Graessle, of William S. Graessle, P.A.,  
Jacksonville, for Appellant.

J. Stephen Alexander, of Alexander Law  
Firm, LLC, St. Augustine, for Appellee, John  
Sundeman.

No Appearance for other Appellees.

COHEN, J.

This appeal is ancillary to divorce proceedings involving Marco Fortini (“Former Husband”) and Andrea De Palma (“Former Wife”). The parties’ business, Optimum Spring Solutions, Inc. a/k/a Optimum Spring Manufacturing, Inc. (“Optimum”), was joined as a

part of that dissolution action.<sup>1</sup> The issue before us relates to Optimum's management and subsequent liquidation. A detailed chronology is necessary to provide context to our resolution of that issue.

The parties married in 2000 and were the parents of triplets. Former Wife was the president and owned fifty-one percent of Optimum, and Former Husband owned the remaining forty-nine percent. Both were equally involved in Optimum until their triplets were born, at which point Former Wife reduced her involvement and began working from home.

In June 2016, Former Husband petitioned for dissolution of marriage, seeking, among other things, equitable distribution of the marital assets, including Optimum. After Former Wife answered and counter-petitioned for dissolution of marriage, she removed over \$40,000 from several of Optimum's bank accounts. She deposited those monies into another business bank account and changed the passwords, effectively blocking Former Husband's access to that account. The funds were returned only after Former Husband filed an emergency motion.

Eventually, Former Husband moved out of the marital home and into Optimum's office and warehouse. He changed the locks to the business and did not give Former Wife the new key. He also removed Former Wife's name from one of their joint accounts and put the funds into a separate account, from which he paid his personal expenses. Former Husband subsequently moved into a four-bedroom rental home and furnished it using Optimum's funds.

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<sup>1</sup> The trial court's disposition in the dissolution case was affirmed on appeal. Fortini v. De Palma, 295 So. 3d 252 (Fla. 5th DCA 2020). We have taken judicial notice of the records within the earlier appeal. See Scheffer v. State, 893 So. 2d 698, 699 (Fla. 5th DCA 2005).

During that same period, Former Husband formed a competing business, Optimum Alloy Spring Manufacturing, LLC, using the same location as the marital business, and opened a bank account to operate that entity. He also renewed Optimum's business license and designated himself as the vice president in order to open a new bank account for Optimum. Then, Former Husband stopped using Quickbooks, and thus, Former Wife could no longer access Optimum's accounting system; he subsequently informed her that Optimum had no money to pay any expenses as they had used it all for their personal expenses—paying for two households and two sets of lawyers.

In April 2017, Former Wife gained control of Optimum's new bank account and withdrew \$12,521.05, the remaining funds in the account. Around the same time, Former Husband instructed an employee to take Optimum's inventory, machine tools, and computers to another warehouse. The missing items prevented Optimum from continuing production and fulfilling its orders, and as a result, Former Wife sought her father's assistance to reorder the necessary items to run the company.

Following a hearing on various motions, the trial court enjoined Former Husband from engaging in a competing business. The trial court permitted both parties to have full access to Optimum's accounts and to continue utilizing those funds to pay for reasonable household expenses. Former Husband then moved to enjoin Former Wife from dissipating Optimum's assets, compel payment of his share of profits in Optimum, and remove Former Wife from the business. In turn, Former Wife moved for the return of Optimum's property that had been confiscated by Former Husband.

Based on the parties' conduct, the trial court appointed John Sundeman, a receiver, to take control of the business in December 2017. The trial court permitted Sundeman to act as the Chief Executive Officer of Optimum and to implement appropriate

accounting principles. Sundeman had full authority to take immediate action in the proceeding and was authorized to set a salary for himself and hire additional employees, if needed.

In March 2018, a hearing was held on Former Wife's motion to return the confiscated property and on Former Husband's motion to remove Former Wife from Optimum. Former Wife explained that soon after she regained access to Optimum, her father lent Optimum \$35,000, which was used to replace the confiscated equipment. Former Wife testified that Optimum incurred additional expenses in production as a result of the missing items. She testified that she had complied with all of Sundeman's requests and that she sent a \$5000 check to him to pay bills on behalf of Optimum. Former Wife also acknowledged that she used Optimum's assets to pay her attorney's fees.

Sundeman testified that he met with Former Wife several months before the hearing and told her that all deposits coming into Optimum must be transferred to the receivership bank account, as that account would be responsible for paying all future expenses. He explained to her that no expenses were to be paid without his permission, including attorney's fees, yet despite his instructions, she made payments to a law office and to her father. Sundeman testified that Former Wife had not provided him with an accounting statement even though Quickbooks was running on the office computer. However, Sundeman's main concern was the flow of funds transferring in and out of Optimum's accounts without his permission. Sundeman opined that Former Wife deliberately cleaned out Optimum's accounts and that she was detrimental to the company.

Sundeman stated that he met with Former Husband soon after he was appointed as receiver, and based on that meeting, had an understanding that Former Husband was

working on returning the confiscated inventory. After that meeting, Sundeman suggested to the parties that they figure out a plan to return the inventory in a logical way because he had to “inventory the inventory.” Despite that plan having been confirmed through a February 2018 email, at the time of the March hearing, the property had not been returned.

Former Husband admitted that it was wrong for him to take the inventory. He claimed that he had tried to return the inventory at the meeting with Sundeman but was told to hold onto it. Unsatisfied with that explanation, the trial court found that Former Husband violated the standing family law order by taking the inventory and ordered that he return it within the week or face incarceration. The trial court found that both parties had unclean hands and that their behavior may necessitate the liquidation of Optimum.

Later that month, the trial court ordered liquidation and removed Former Wife from the business. In its order, the trial court noted that Former Husband, while represented by counsel:

[P]roceeded to the marital business, and essentially stole computers, software, tool and dies, scanners, raw material including wire and springs. He then set up a business with a similar name to compete with the marital business. It is inconceivable to the Court that his attorney could have allowed him to do it without reporting the matter to the Court.

The trial court also found that after Sundeman’s appointment, Former Wife repeatedly disregarded his instructions that all payments must run through the receiver account. Thus, the trial court determined that both parties had severely impeded Optimum and were either incompetent or unwilling to follow its orders.

After mandating liquidation, Sundeman issued a letter to the trial court, indicating that some of the inventory was returned, but the parties had conflicting lists of what had

been taken. He explained that he tried to reconcile the books, but it was difficult due to the parties' poor accounting records.

Former Wife subsequently moved for rehearing, seeking to remove Sundeman as receiver, cancel the scheduled public auction, and obtain Optimum's personal property.

The trial court denied the motion, explaining that it:

[Found] no reason to set aside its previous ruling of March 13, 2018 ordering corporate property sold due to misfeasance, theft, incompetence, by both parties involving the marital business. The actions by both parties have put the Court in a corner with little options to protect any remaining assets. In addition, the Court has learned today, April 10, 2018, that the Wife characterized payments made to her Father (which she justified as repayment of loans) as outlined in this Court's March 13th order, as "consulting services" on QuickBooks which subjects the corporation to additional 30% tax liability for FICA, Income Taxes, etc. (approximately \$10,000.00) since the Wife's Father was on a vacation Visa to the United States when the payments were made to him contrary to the Receiver's explicit instructions. Further, the Wife's argument that she was not put on notice that liquidation of corporate assets might be a remedy is without merit. The Court had admonished the parties repeatedly at several previous case management hearings and that the appointment of a Receiver and possible liquidation of corporate assets as a contempt sanction would be considered if either party continued to violate Court orders with regard to corporate assets. The hearing on March 9, 2018 was based, in part, on the Husband's Motion for Contempt and to Remove the Wife from Access to the Company, in addition to the Wife's Motion to Order the Husband to Return Business Property.

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The Court also finds the Receiver, John Sundeman, CPA, has addressed the pending financial mess in an appropriate, timely, and responsible matter and finds no evidence that he has shown favoritism to either party in this action. As such, the Court finds no reason to cancel the sale. Trial is in May, both parties have breached their fiduciary duty to the corporation, there is no other person presented to the Court that can operate this business and the Receiver has arranged for the sale of corporate assets and corporate real estate. The Florida Statutes authorize early distribution of the parties'

property. Not to be outdone, since the March 13th Order, the Wife has allowed another overdraft of a business account for payment of personal non-business expenses. The actions of the parties have consequences and the Court must act expeditiously before all assets are dissipated. The Wife's only recommendation is to put her back into the office running the business which the Court cannot do based on her previous misfeasance outlined herein.

In June 2018, the trial court entered its final judgment of dissolution, which ordered equitable distribution of the liquidation proceeds. As noted, that final judgment was affirmed on appeal.

In December 2018, Sundeman moved for discharge and to distribute the remaining proceeds from Optimum's sale, recommending equal distribution. Attached to the motion were various accounting records of Optimum's assets and liabilities. In turn, Former Husband moved to disqualify Sundeman, arguing that he had failed to file an inventory and an accounting as required by the Florida Rules of Civil Procedure. The motion was summarily denied. Approximately one week later, Sundeman filed an amended motion to distribute proceeds, which maintained equal distribution.

Several months later, Former Husband again moved to disqualify Sundeman as receiver and to require an inventory and accounting; he also sought reimbursement to Optimum for the attorney's fees Sundeman had charged against the company. Former Husband alleged that Sundeman misappropriated Optimum's funds by unnecessarily retaining an attorney and that counsel was obtained solely to defend against Sundeman's failure to file an inventory.

At this juncture, the case was transferred from Judge Alexander to Judge Rendzio.<sup>2</sup> In April 2019, a hearing was held on Sundeman's motion to distribute proceeds and for his termination as receiver; Former Husband's motion was also considered.

Sundeman testified that based on his experience, he was familiar with a receiver's obligations mandated under the rules of civil procedure. He explained that he had not filed an inventory or accounting because there were extenuating circumstances. Sundeman also acknowledged that he obtained legal representation without permission from the parties but did so for two reasons; the first was to assist in filing the motions to distribute proceeds and the second was to respond to a complaint for attorney's fees filed in Duval County ("Duval County action") by Former Wife's previous attorney. The hearing was continued until August.

Between the hearings, Sundeman filed a second amended motion for distribution of proceeds, this time recommending an unequal distribution in favor of Former Wife. The motion recommended that she receive \$23,041 of the proceeds while Former Husband should receive \$2141. The unequal distribution was a credit to Former Wife for the additional attorney's fees Sundeman would charge against the liquidation proceeds as a result of Former Husband's objections to an equal distribution.

At the August 2019 hearing, Sundeman explained that there were several issues related to Optimum's property that prevented him from creating an inventory. The first was Former Husband's theft, and when some items were returned, they did not match Former Wife's list of what had been confiscated. Sundeman explained that he also had no way of knowing whether the list was accurate.

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<sup>2</sup> The case was transferred because Former Husband had moved to disqualify the trial judge based on a familial relationship with an attorney hired by Sundeman.



Sundeman explained that another issue preventing him from creating an inventory was the lack of records detailing sales, purchases, and inventory ownership. He explained that the records were in shambles and that neither party had been helpful in providing information to him. Sundeman testified that such records were even more important considering the allegations of Former Husband's wrongdoing. Additionally, the parties commingled their personal assets with Optimum's, and there were third party claims to the inventory stored at the business. Overall, Sundeman testified that:

It was a physical impossibility to sort everything out because of the lack of records and the lack of any inventory records at all. The parties produced me [sic] with no inventory records at all from the business. . . . Also, I want to add this was a very difficult case because both parties, the husband and wife, repeatedly and blatantly refused the orders of Judge Alexander. It was only until Judge Alexander removed the wife from the business and threatened the husband to put him in jail until I started getting some compliance in this case.

Sundeman confirmed that he obtained counsel to file the initial motion to distribute proceeds because both parties were reluctant to do so. He explained that his reason for recommending an unequal distribution was due to the fees incurred from having to attend both hearings and file motions. He testified that \$2500 of his attorney's fees was to respond to the Duval County action and the remaining charges were to file the motions to distribute proceeds and to have representation at the two hearings. Former Husband did not object to the reasonableness of Sundeman's attorney's fees.

The trial court granted Sundeman's second amended motion for distribution of proceeds, adopting the unequal distribution, and denied Former Husband's motion to disqualify receiver, require inventory, and reimburse attorney's fees. The trial court found:

After reviewing the previous Court Orders, it is apparent to the Court that the receiver could not prepare an inventory when the parties repeatedly failed to produce the documents and other items necessary to produce the inventory. The Court is

mindful of Former Husband's claim that he cooperated throughout the process. However, there was conflicting testimony from Mr. Sundeman and given the totality of the evidence presented, the Court does not find that the February 16, 2018 email alone refutes the numerous claims by Mr. Sundeman that the parties were not in fact cooperating with the receiver. Mr. Sundeman testified that Former Husband took a substantial amount of inventory and equipment and only returned some of it after a threat of incarceration. Mr. Sundeman further testified that the inventory and equipment returned did not match the inventory and equipment the Former Wife alleged was taken by the Former Husband.

The trial court also found that under the circumstances, it was fair and equitable to adopt the unequal distribution recommended by Sundeman. As such, Former Husband received \$21,411 of the proceeds and Former Wife received \$23,041. This appeal followed.

Former Husband raises three issues on appeal: (1) whether the trial court erred in not requiring Sundeman to file a complete and accurate inventory; (2) whether the trial court erred in permitting Sundeman to use Optimum's assets to pay his attorney's fees and in crediting Former Wife for those fees in the distribution of the liquidation proceeds; and (3) whether the trial court erred in its calculation of Sundeman's attorney's fees.

Florida Rule of Civil Procedure 1.620(b) provides:

(b) Report. Every receiver shall file in the clerk's office a true and complete inventory under oath of the property under the receiver's control or possession under the receiver's appointment within 20 days after appointment. Every 3 months unless the court otherwise orders, the receiver shall file in the same office an inventory and account under oath of any additional property or effects which the receiver has discovered or which shall have come to the receiver's hands since appointment . . . . When a receiver neglects to file the inventory and accounts, the court shall enter an order requiring the receiver to file such inventory and account and to pay out of the receiver's own funds the expenses of the order and the proceedings thereon within not more than 20 days after being served with a copy of such order.

Fla. R. Civ. P. 1.620(b).

Former Husband argues that the trial court erred in forgiving Sundeman's failure to file an initial inventory or any other report, including an accounting. He suggests that rule 1.620(b) is unequivocal and mandatory and that Sundeman's explanation for not conducting an inventory—that Former Husband stole inventory from Optimum—is false. Former Husband adds that, at a minimum, Sundeman was required to inventory the assets that were in his control.

Although rule 1.620(b) is clear that a receiver shall file a true and complete inventory of the receivership property within twenty days of appointment and for updated inventories every three months, the trial court found that it was impossible for Sundeman to do so. As detailed above, that finding is amply supported by record. Former Husband is also hard-pressed to complain when he waited one year to demand an inventory. See Frank v. Feller, 188 So. 2d 17, 18 (Fla. 3d DCA 1966).

Next, Former Husband's argument that Sundeman is not entitled to collect attorney's fees from Optimum's assets is unpersuasive. As a general rule, a receiver is entitled to compensation for the protection of the rights of the estate, including a reasonable sum for attorney's fees. See Se. Bank, N.A. v. Ingrassia, 562 So. 2d 718, 721 (Fla. 3d DCA 1990); In re Fredcris, Inc., 108 So. 2d 901, 904 (Fla. 3d DCA 1959). The order appointing Sundeman permitted him to hire employees as needed, and the trial court accepted Sundeman's testimony, which established two legitimate needs for securing counsel. First, he retained counsel to file a motion to distribute the liquidation proceeds after neither party did so. The second reason was to respond to the Duval County action filed by Former Wife's prior attorney. The failure to defend against that action could have adversely impacted the receivership assets. We find no error in the trial court's determination.

While it is conceivable that some of Sundeman's attorney's fees were incurred in response to Former Husband's motions seeking to remove him as receiver and require an inventory, Former Husband did not argue that the award of fees should be reduced by some portion to account for those fees.<sup>3</sup> Rather, Former Husband argues that Sundeman was not entitled to the payment of any attorney's fees. We reject that assertion.

We now turn to Former Husband's challenges to the unequal distribution of Optimum's liquidation proceeds. Trial courts are accorded broad discretion in determining who should bear the costs of a receivership. Barredo v. Skyfreight, Inc., 430 So. 2d 513, 513 (Fla. 3d DCA 1983). However, there must be an evidentiary basis to support the distribution. See Deauville Corp. v. Blount, 34 So. 2d 537, 537–38 (Fla. 1948); Kelley v. Kelley, 177 So. 3d 292, 293 (Fla. 4th DCA 2015). We find that all but the assignment of the attorney's fees incurred to defend against the Duval County action were properly assessed against Former Husband.

Initially, Former Husband complains that the unequal distribution was improper because Judge Alexander exhibited frustration with the parties. We find this point unpersuasive. Judge Alexander's exasperation at the conduct of both parties to this action was well earned and stemmed from the failure of both to comply with court orders. Additionally, it was Judge Rendzio who ordered the unequal distribution, not Judge Alexander.

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<sup>3</sup> The attorney's fees associated with Sundeman defending his failure to file an inventory arguably should have been paid by him rather than Optimum because those fees were to defend his actions, not to benefit the estate. Cf. Creative Prop. Mgmt., Inc. v. Gen. Elec. Credit Corp. of Ga., 314 So. 2d 807, 808 (Fla. 3d DCA 1975); Fredcris, 108 So. 2d at 904. Indeed, Sundeman had a personal interest in excusing the necessity of filing an inventory because under rule 1.620(b), he would have had to bear the costs of creating the inventory since it was untimely. Fla. R. Civ. P. 1.620(b).

The evidence established that all the contentiousness surrounding the distribution of the liquidation proceeds was caused by Former Husband's litigiousness. In accordance with the final judgment of dissolution, Sundeman's first motion for distribution of proceeds recommended an equal distribution. After Former Husband's motion to disqualify Sundeman and require inventory was summarily denied by the trial court, Sundeman filed an amended motion to distribute proceeds, again recommending equal distribution of the liquidation proceeds. Not to be outdone, Former Husband filed another motion seeking to remove Sundeman, require an inventory, and for reimbursement of attorney's fees, which, in addition to Sundeman's motion, proceeded to the two 2019 hearings. Sundeman only recommended an unequal distribution of proceeds to account for attorney's fees after the first hearing was continued. Notably, Former Wife did not object to an equal distribution of the liquidation proceeds.

The final judgment of dissolution called for equal distribution of the liquidation proceeds, yet Former Husband wanted an unequal distribution. Despite the issue having been decided in a final order, which followed a three-day trial, Former Husband obtained new counsel and continued with contentious litigation. Even then, Sundeman still recommended equal distribution until a second hearing was required to resolve the distribution of the proceeds. Under these circumstances, the trial court did not abuse its discretion in assigning to Former Husband the attorney's fees that were incurred as a result of the litigation caused by him. See Deauville Corp., 34 So. 2d at 538.

However, we do agree with Former Husband that the trial court erred in assigning him Sundeman's attorney's fees incurred from the Duval County action. The trial court's reasoning for assigning those fees to Former Husband was that had he agreed to the

equal distribution proposed by Sundeman, Sundeman “would likely have” completed the receivership before the suit was filed. That finding is speculative at best.

Former Husband’s initial objection to an equal distribution of the proceeds occurred during a meeting with Sundeman in October 2018, and the Duval County action was filed approximately one and a half months later. Even if Former Husband had agreed to the equitable distribution of the proceeds in October 2018 and filed a motion to distribute proceeds immediately, there was no evidence to demonstrate that the proceeds would have been distributed before the Duval County action was filed. Likewise, there was no evidence presented that Sundeman would have completed the receivership before the Duval County action was instituted. Thus, while Sundeman’s attorney’s fees were legitimate receivership expenses recoverable against Optimum, the trial court’s assignment to Former Husband of the \$2500 in attorney’s fees in defense of the Duval County action was error.

We find Former Husband’s final claim to be without merit.

**AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

WALLIS and EDWARDS, JJ., concur.