

Commonwealth Of Kentucky

Court of Appeals

NOS. 2002-CA-002121-MR
and
2003-CA-000315-MR

GRW KENTUCKY, INC.;
GRW INTERNATIONAL, INC.;
and GRANT R. WILSON

APPELLANTS

v. APPEALS FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 97-CI-01830

STEEL TECHNOLOGIES, INC.;
and LAW FINANCE GROUP, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, SCHRODER AND VANMETER, JUDGES.

VANMETER, JUDGE: These are appeals from a judgment and a postjudgment order entered by the Franklin Circuit Court regarding the parties' rights to the proceeds of a court judgment. For the reasons stated hereafter, we affirm as to both appeals.

The voluminous record and the convoluted facts were well summarized by the circuit court in the findings of fact set out in its judgment entered on July 16, 2002, as follows:

1. On November 27, 2001, the Defendants in this action, Douglas Wise, DJSJ, Inc., Jeri M. Wise, the Jeri M. Wise Irrevocable Trust Agreement No. 1, and Jeri M. Wise 1998 Qualified Annuity Trust Agreement (the "Wise Defendants") deposited the amount of \$1,116,947.09 with this Court in satisfaction of a judgment entered against the Wise Defendants on March 9, 2000 in the amount of \$950,000, plus interest (the "Wilson v. Wise" Judgment). The Wilson v. Wise Judgment was affirmed by the Kentucky Court of Appeals in an Opinion rendered October 5, 2001. The Wilson v. Wise Judgment is final and no longer subject to appeal or change.

2. On January 9, 2002, the Court ordered that \$481,658.40 be paid to Wilson's attorney in satisfaction of his statutory attorney's lien.

3. The remaining funds (the "Court Funds") in the amount of \$635,288.69 plus any interest accrued are the subject of competing claims asserted by Steel Tech, GRW Intl., LFG, and Central Bank and Trust Company ("Central Bank").

4. Steel Tech obtained a judgment dated March 19, 1992, against Wilson, individually, in Franklin Circuit Court, Case Number 91-CI-01184 in the amount of \$589,255.88, plus interest at the rate of 12% per annum from November 27, 1991, until paid (the "Steel Tech Judgment"). The value of the judgment and interest calculated as of February 27, 2002, was \$1,885,043.50. The action was brought by Steel Tech to pierce the corporate veil of GRW Industries, Inc. and hold Wilson personally liable for

failing to pay Steel Tech for steel purchased. The Steel Tech Judgment was upheld by the Kentucky Court of Appeals in an Opinion dated June 25, 1993.

5. Proceeds from a Sheriff's sale reduced the amount owed to Steel Tech to \$569,827 plus interest. Steel Tech was unable to recover any other amounts. In September 2000, Steel Tech discovered that Wilson had obtained a judgment against the Wise Defendants, the Wilson v. Wise judgment.

6. The Wilson v. Wise Judgment was subsequently appealed by the Wise Defendants; however, a supersedeas bond was posted at that time.

7. Steel Tech served garnishments to all Wise Defendants on September 8, 2000. A letter was sent to Wilson's counsel on September 11, 2000, informing Wilson that Steel Tech had served the garnishments upon the Wise Defendants. In addition, Steel Tech filed the garnishments, along with a Notice of Filing to all parties including Wilson's counsel, in the Wilson v. Wise case on September 20, 2000. At the time the garnishments were filed, no assignments or liens against the judgments were filed of record in the Wilson v. Wise judgment.

8. The Wise Defendants submitted their affidavits of return of the garnishments stating that a supersedeas bond had been posted "so that any funds being held by the Garnishee" would not be remitted to Steel Tech. The supersedeas bond was posted by Ohio Casualty Insurance Company.

9. Steel Tech subsequently served garnishments to Ohio Casualty Insurance and Ohio Casualty Bonding Company. The Ohio Casualty Bonding garnishment was returned without funds.

10. The Wilson v. Wise decision was affirmed by the Court of Appeals on October 5, 2001. Steel Tech sent and filed a demand letter on the Wise Defendants asserting the September 8, 2000, garnishment lien. Steel Tech also served a second series of garnishments to the Wise Defendants, Ohio Casualty Insurance, and Ohio Casualty Bonding Company on October 16, 2001. Steel Tech also filed the garnishments, along with a Notice of Filing in Wilson v. Wise and served the notice on all parties on October 16, 2001. Wilson subsequently filed a Motion to Quash the October 16, 2001 garnishments, which was denied.

11. The Wise Defendants decided not to file a Motion for Discretionary Review with the Kentucky Supreme Court.

12. After the Wise Defendants deposited the Court Funds, Steel Tech served a third series of garnishments to the Franklin Circuit Court Clerk and filed the garnishments, along with a Notice of Filing, in the Wilson v. Wise action on November 29, 2001.

13. LFG's claim to the Court Funds arises out of a Partial Assignment of Judgment executed by Wilson and GRW KY on October 19, 2000, executed by LFG on November 21, 2000, and filed with the Court in the Wilson v. Wise action on or about November 26, 2000.

14. Prior to execution of the Partial Assignment of Judgment, Wilson's counsel had received the Notice of Filing of Steel Tech's garnishments served on the Wise Defendants. In addition, the garnishments had been filed in Wilson v. Wise and LFG had been notified of the Steel Tech Judgment.

15. The Partial Assignment of Judgment assigned the first \$310,000 of the Wilson v. Wise judgment to LFG.

16. In return for the Partial Assignment of Judgment, LFG paid Wilson and GRW KY \$155,000. LFG's President, Michael Blum, testified that LFG recognized that it was taking "all the risk" and that, if successful, LFG essentially would double its investment.

17. LFG filed financing statements with the Kentucky Secretary of State on November 27, 2000 and the Franklin County Clerk on November 27, 2000.

18. GRW Intl., a company in which Wilson has a 75% ownership interest, also asserts a claim to the Court Funds. The claim of GRW Intl. arises from a promissory note and security agreement executed by GRW Intl. on November 17, 1989, in the amount of \$500,000. The security agreement grants GRW Intl. a security interest in the following assets of GRW KY (located in Frankfort, Kentucky at the time of execution): a) equipment b) inventory c) present and future intangibles, including accounts receivable, chattel paper, contract rights and other choses in action and d) charges in favor of the creditor.

19. GRW Intl. did not file a financing statement at the time of the 1989 loan transaction with GRW KY. GRW Intl. filed a financing statement on January 18, 1990. This financing statement filed in London, Ontario, covers GRW KY's "buildings, land, equipment, office equipment, accounts receivables and corporate shares." A second financing statement was filed by GRW Intl. in the Franklin County Clerk's office on June 21, 2001. The second financing statement did describe the Wilson v. Wise judgment in the description of collateral.

20. Central Bank is the final claimant to a portion of the Court Funds pursuant to a Notice of Partial Assignment of Judgment filed in the Wilson v. Wise action on

November 14, 2001, in the amount of \$13,450.08 plus interest in the amount of \$3.62 per day thereafter.

The court then made the following conclusions of law:

1. The garnishments served by Steel Tech to the Wise Defendants on September 8, 2000, created a garnishment lien, as the garnishments were served upon the garnishees (the Wise Defendants) who were indebted to Grant Wilson at the time the garnishments were served [KRS 425.501(5)].

2. The supersedeas bond filed by the Wise Defendants stayed execution on the Wilson v. Wise judgment. The garnishment lien was not released because a supersedeas bond stayed execution during the appeal process. Steel Tech's garnishment lien remains in effect both because the bond stayed the garnishment and because Steel Tech filed additional garnishments as soon as the Wilson v. Wise appeal was concluded. Steel Tech's actions preserved and protected its garnishment lien.

3. The case relied upon by GRW Intl., Wilson and LFG, *South Bay Enterprises, Inc. v. Mirada Bay Petroleum, Inc.*, Ky. Ct. App., 957 S.W.2d 287 (1997), does not result in Steel Tech losing its lien creditor status when the September 8, 2000 garnishments were returned by the garnishees. In *South Bay*, an execution was returned and marked "no property found" by the garnishee. The Court held that the garnishor lost its status as a lien creditor when the execution was returned, because the garnishee had no property capable of attachment. This is not the situation with the Steel Tech garnishments. The Wise Defendants had assets available to satisfy the garnishments, but could delay remitting funds while a supersedeas bond was in place. The Court in *South Bay* noted that if the garnishor had continued to issue executions

until it found property of the garnishee, the garnishor would have maintained its status as a lien creditor. *Id.* at 289.

4. Steel Tech did maintain its status as a lien creditor by re-issuing garnishments on October 16, 2001, after the Court of Appeals affirmed this Court's decision, and again on November 29, 2001, when the Wise Defendants deposited the amount of the judgment into the Court.

5. Both LFG and Central Bank attempted to receive assignments of the proceeds of the Wilson v. Wise judgment after Steel Tech served its garnishments on September 8, 2000. The concept of "first in time, first in right" has historically applied to priorities among competing liens or claims, meaning that the first creditor to file has priority over subsequently filed liens. The relevant time for purposes of determining whether a garnishment has priority over later liens is the time when the notice of garnishment is served. *Freedom Group, Inc. v. Lapham-Hickey Steel Corporation*, 50 F.3d 408, 411 (7th Cir. 1995).

6. The "first in time, first in right" rule is applicable in this case. See *Midland-Guardian Company v. McElroy*, Ky. App., 563 S.W.2d 752, 754 (1978) and *United States Fidelity & Guaranty Co. v. McHayne*, Ky., 97 S.W.2d 831, 834 (1936). LFG and Central Bank had notice of Steel Tech's garnishment liens at the time they executed assignments with Wilson and GRW KY because all garnishment liens were either on file in Wilson v. Wise or were actually sent to known parties with an asserted interest in the judgment. Wilson and his attorney had knowledge of Steel Tech's judgment and garnishment lien when he agreed to assign a portion of the Wilson v. Wise judgment to LFG and Central Bank. The garnishments were filed as a matter of public record in Wilson v. Wise, thus LFG and Central Bank were

charged with notice of the garnishments. **Most importantly,** Wilson's counsel specifically informed LFG of the Steel Tech Judgment against Wilson prior to execution and filing of the LFG Partial Assignment of Judgment in documentation sent to LFG prior to LFG's execution of the assignment.

7. The Court finds that Steel Tech's September 8, 2000, garnishments created a garnishment lien in the Court Funds, which has priority over the assignments subsequently executed and filed by LFG and Central Bank.

8. Steel Tech's garnishment lien also has priority over GRW Intl.'s asserted security interest in the Court Funds. In order to have a perfected security interest in the assets of GRW KY enumerated in the November, 1989 security agreement, GRW Intl. would have been required to file a financing statement in the appropriate location. Over a decade after the promissory note and security agreement were executed, GRW Intl. filed financing statements in London, Ontario and Franklin County, Kentucky. The first financing statement did not contain a description of the collateral sufficient to give GRW Intl. a perfected security interest in the Court Funds [KRS 355.9-108(2)]. The second financing statement (filed in June, 2001) was filed after Steel Tech obtained its garnishment lien; thus, it is subordinate to Steel Tech's lien [KRS 355.9-317(1)(b)].

9. Both financing statements filed by GRW Intl. are invalid, as they were filed in the wrong location. KRS 355.9-401(1)(c), in effect at the time of the filing, required a creditor to file a financing statement "in the county of the debtor's residence." GRW KY's county of residence was listed in the Kentucky Secretary of State's records as Fayette County, Kentucky at the time the financing statements were filed. Therefore,

the financing statements should have been filed in Fayette County, rather than Ontario and Franklin County.

10. The Court finds that Steel Tech's garnishment lien created on September 8, 2000, has priority over GRW Intl.'s unperfected security interest in the Court Funds.

11. Wilson and GRW KY, jointly, obtained a judgment in a jury trial against the Wise Defendants on March 9, 2000, in this Court and the Court of Appeals affirmed this Court's judgment in favor of Wilson and GRW KY in an Opinion rendered October 5, 2001. The judgment is a matter of public record. Wilson was a named plaintiff at all stages of this case, from the complaint to the appellate brief. In joint pleadings, GRW KY requested that both GRW KY and Grant Wilson be granted judgment in favor of both parties. GRW KY failed to file a motion to dismiss Grant Wilson during the case. Grant Wilson failed to request a voluntary dismissal prior to or at trial (even if he would have had to remain a counterclaim defendant). The judgment and appellate decision are final. The Plaintiffs jointly obtained their judgment. The Plaintiffs jointly had their joint judgment upheld on appeal. Lienholders of either have the right to garnish the entire judgment. Steel Tech is entitled to garnish the judgment of Grant Wilson and has effectively done so.

12. As Steel Tech's garnishment lien has priority over the liens and claims asserted by GRW Intl., LFG and Central Bank, Steel Tech is entitled to be paid the entirety of the Court Funds in the amount of \$635,288.67, plus interest accumulated to the date of payment.

The circuit court denied the joint motion of appellants GRW Kentucky, Inc., GRW International, Inc. and Grant R. Wilson to

alter, amend or vacate its judgment. The court subsequently entered a postjudgment order directing that "approximately \$133,410.00 currently held by the Franklin County Circuit Clerk in this action" should be paid to appellee Law Finance Group, Inc. (LFG). These appeals followed.

First, in Appeal No. 2002-CA-002121 appellants contend that the trial court erred by failing to find that GRW Kentucky, rather than Wilson, is the real party in interest. They assert in their brief on appeal:

GRW Kentucky is the real party in interest regarding the contract claims, jury findings and subsequent rulings from the Court of Appeals. Wilson was an employee, as an officer and director, of GRW Kentucky. Despite his listing as a plaintiff in this action, his status neither afforded the right nor the ability for him to personally maintain a separate cause of action for breach of contract against Wise. . . . He has no legal right to recover personally for GRW Kentucky's contract causes of action.

Despite this claim, it is clear from this court's October 5, 2001, final opinion that the parties in the previous appeal and cross-appeal to this court, including GRW Kentucky and Wilson, never disputed that GRW Kentucky and Wilson were both real parties in interest with separate rights of recovery. In fact, a review of our 2001 opinion plainly shows that Wilson actively and personally participated in the matters addressed by the prior proceedings. Clearly, there is no merit to appellants'

contentions that the trial court erred by failing to find that Wilson is not a real party in interest herein, or by concluding that GRW Kentucky and Wilson are joint owners of the earlier judgment in their favor.

Next, appellants contend that the trial court erred by failing to find that Steel Tech's garnishment liens are invalid. We disagree.

As noted by the trial court, in 1993 this court upheld a money judgment in favor of Steel Tech against Wilson individually, but Steel Tech was able to recover little. However, on September 8, 2000, after learning of the Wilson v. Wise judgment which was then pending on appeal, Steel Tech served garnishments on the Wise defendants. On September 20 Steel Tech filed in the Wilson case the garnishments and notices of filing to all parties, including Wilson's counsel. At that point no other assignments or liens had been filed against the judgment. Because a supersedeas bond had been posted, the Wise defendants declined to remit funds to Steel Tech. Steel Tech then served garnishments on Ohio Casualty Insurance Company, which had posted the bond, and on Ohio Casualty Bonding Company. The bonding company garnishment was returned without funds.

In October 2001, after the Wilson case was affirmed on appeal, Steel Tech sent the Wise defendants a demand letter reasserting its September 2000 garnishment lien. On October 16,

Steel Tech served a second series of garnishments on Ohio Casualty Insurance Company, Ohio Casualty Bonding Company, and the Wise defendants. Steel Tech served notice on all parties and filed copies of the new garnishments and notices in the record. After Wilson's motion to quash the October 16 garnishments was denied, the Wise defendants deposited the amount of the judgment with the circuit court clerk. On November 29, Steel Tech filed garnishments in the record and served a series of garnishments on the court clerk.

Despite Steel Tech's continued efforts to preserve its status as a lien creditor with superior rights, appellants argue that under *South Bay Enterprises, Inc. v. Mirada Bay Petroleum, Inc.*, Ky. App., 957 S.W.2d 287 (1997), those rights were lost when Steel Tech's garnishment was returned without funds by Ohio Casualty Bonding Company. We disagree.

South Bay was a lien creditor which delivered a writ of execution to the Fayette County Sheriff seeking to attach or levy Mirada's property in satisfaction of a default judgment. The writ was returned with the notation of "no property found to satisfy this." South Bay took no further action to establish the priority of its interests, and its claim was found to be subordinate to that of another creditor since the funds which South Bay attempted to attach did not exist.

Here, unlike *South Bay*, the judgment funds which Steel Tech attempted to attach did exist, and they would have been available to Steel Tech but for the fact that a supersedeas bond had been posted pending resolution of the judgment's appeal. Although as in *South Bay*, Steel Tech's bonding company garnishment was returned without funds, that fact is immaterial to the outcome since Steel Tech also served a garnishment on the insurer which actually posted the supersedeas bond. Further, since Steel Tech on two subsequent occasions reasserted its garnishments on the parties, counsel and the court, it simply cannot be argued that Steel Tech somehow subsequently lost its priority status by failing to create and maintain a valid levy on the property.

Moreover, we are not persuaded by appellants' reliance on *Keiser v. Shaw*, 104 Ky. 119, 46 S.W. 524 (1898), which addressed the futility of judgment creditors' attempts to prematurely garnish future annual payments to a debtor. That case is inapposite to the matter now before us, where funds had been ordered to be paid but simply were not yet subject to distribution due to the existence of a pending appeal and a supersedeas bond.

Further, we are not persuaded by appellants' assertion that Steel Tech failed to comply with KRS 425.501 when it served garnishments on appellants' attorney, rather than on appellants

individually. Although KRS 425.501(3) requires an order of garnishment to be served "on the persons named as garnishees," KRS 425.501(7) specifies that such service should be "in accordance with the Rules of Civil Procedure." CR 5.02 in turn provides that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney, . . . the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Thus, Steel Tech's service of garnishments on appellants' attorney was sufficient.

Next, appellants contend that the trial court erred by failing to find that GRW International had a valid January 1990 lien against the Wilson v. Wise judgment which took priority over any lien held by Steel Tech. Appellants assert that the trial court erred by concluding in its judgment that GRW International filed a financing statement in Ontario "[o]ver a decade after the [November 1989] promissory note and security agreement were executed." This conclusion was contradicted by the court's earlier finding in the same judgment that "GRW Intl. filed a financing statement on January 18, 1990 in London, Ontario, [which] covers GRW KY's 'buildings, land, equipment, office equipment, accounts receivables and corporate shares.'" However, the discrepancy and apparent error in the court's finding and conclusion were not prejudicial since, in

any event, GRW International's January 1990 lien and security agreement did not describe, and was not enforceable against, the Wilson judgment which was rendered ten years later in 2000. Even if we assume that appellants properly filed liens in June 2001, such liens have secondary status to the garnishment liens properly obtained by Steel Tech in September 2000. Moreover, since Steel Tech was found to be entitled to the entire value of the Wilson judgment, appellants' arguments regarding the priority of their claims against those of other claimants such as LFG are rendered moot.

Finally, in Appeal No. 97-CI-000315-MR appellants contend that the trial court erred by entering a postjudgment order directing that "approximately \$133,410.00 currently held by the Franklin County Circuit Clerk in this action" should be paid to LFG. Appellants assert that LFG "was a losing party that did not appeal," that "the stipulation was only enforceable as between the GRW entities," that the award is not supported by "case law or court's findings," and that the court's order leaves appellants without further recourse. We disagree.

As noted above, the trial court awarded Steel Tech "the entirety of the Court Funds in the amount of \$635,288.67, plus interest accumulated to the date of payment." Not mentioned in the judgment is the fact that some three months earlier, Steel Tech and LFG entered into a partial settlement

agreement which provided that if Steel Tech prevailed and was found entitled to the total Wilson judgment of \$635,288 plus interest, Steel Tech and LFG would divide that sum so that Steel Tech would receive \$501,877, and LFG would receive \$133,410. Therefore, the court's postjudgment distribution of \$500,000 to Steel Tech, and \$133,410 to LFG, was simply an order enforcing an agreed out-of-court settlement between those two parties to divide proceeds awarded to one of the parties.

As we are affirming the trial court's award to Steel Tech of the entire amount held by the circuit court clerk, appellants' challenge to the distribution of those funds in accordance with a private settlement agreement is rendered moot. Given these circumstances, we also conclude that appellants' remaining contentions, regarding the court's failure to require LFG to file a supersedeas bond, are also rendered moot.

The court's judgment and postjudgment order are affirmed.

ALL CONCUR.

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