

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DAVIN S. LAMM AND MARC WISER

Appellees

v.

BROOK LENFEST, MARINER CHESTNUT
HOLDINGS, LLC, MARINER CHESTNUT
PARTNERS, LP AND CHESTNUT
PROPERTY GP, LLC

Appellants

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2955 EDA 2012

Appeal from the Order September 20, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 002232 May Term 2009

BEFORE: BENDER, PANELLA, and FITZGERALD,* JJ.

MEMORANDUM BY PANELLA, J.

FILED JULY 02, 2014

Appellants, Brook Lenfest, Mariner Chestnut Holdings, LLC, Mariner Chestnut Partners, LP, and Chestnut Property GP, LLC (collectively, "Appellants"), appeal from the order entered September 20, 2012, by the Honorable Mark I. Bernstein, Court of Common Pleas of Philadelphia County, which accepted the Final Report of Findings with Regard to General Partner Activities and Auction Sale of Assets and appointed Davin S. Lamm as Receiver. After careful review, we are constrained to quash Appellants' appeal.

A detailed recitation of the extensive facts and procedural history of this case is not essential to our disposition of the instant appeal. Briefly,

* Former Justice specially assigned to the Superior Court.

Appellees Davin S. Lamm and Marc Wiser (collectively, "Appellees") and Appellants were partners in "Mariner Chestnut Partners, L.P.," a Pennsylvania limited partnership (the "Partnership"). On May 18, 2009, Appellees initiated this action for breach of contract and breach of fiduciary duty. Appellees also requested an accounting and a court-supervised dissolution of the Partnership. Following discovery, all parties filed cross-motions for summary judgment. The trial court disposed of the motions for summary judgment by orders dated February 11, 2011 and April 5, 2011. The trial court also issued an order appointing Eric Freed, Esquire, as a Liquidating Trustee to evaluate all assets of the partnership, accumulating all assets and dissolving the partnership. Order, 4/5/11. On appeal, a panel of this Court affirmed all of the trial court's orders, including the order appointing the Liquidating Trustee.

[Subsequent thereto, t]he Liquidating Trustee faithfully and diligently performed his duties, conducted a fair and thorough review of partnership activities and issued a final report on July 31, 2012. ... In the final report the Liquidating Trustee determined that significant partnership assets may exist in the form of a claim against the former general partner, Brook Lenfest. However, because a third party refused to voluntarily provide documentation and the Liquidating Trustee was not permitted to subpoena third party records, the Liquidating Trustee could only conclude "that there was misconduct on the part of [the former general partner], but [it] is uncertain whether the misconduct gives rise to a valuable cause of action."

The Liquidating Trustee determined that at the same time the general partner represented to the limited partners and the public that the property located at 1441 Chestnut Street, the only partnership asset, was to be auctioned for use as a parking lot, the general partner had in fact secured an agreement or

agreement in principle to develop that property as a luxury Starwood Hotel. Accordingly, the partnership has the potential claim that the general partner in breach of his duties arranged to transfer the only partnership asset in adequate consideration to a different entity he controlled, for the exact purposes for which Mariner Chestnut Partners, L.P., had been created.

Accordingly, by Order dated March 20, 2012, the [trial court] directed that a meeting of all partners be convened and the Liquidating Trustee determine whether any individual partner, at his own personal expense, was prepared to pursue this litigation on behalf of the partnership. The Liquidating Trustee reported that limited partners Davin S. Lamm and Marc Wise were prepared to pursue that litigation on behalf of the partnership at their own personal expense. The [c]ourt entered an Order adopting the final report⁷ and replacing the liquidating trustee with limited partner Davin S. Lamm as Receiver for limited purposes.

So that this matter, which has already been in litigation for three and one half years, not remain interminably dormant, the [trial court] ordered that litigation based on the potential claims identified in the Liquidating Trustee's final report must be filed within 90 days or the partnership shall be immediately dissolved and all remaining assets distributed in accord with the partnership agreement. The [c]ourt further ordered that in the event the Receiver timely file[s] such litigation, upon termination of that litigation the Receiver's fees and costs personally incurred shall be paid and the remainder of any recovered assets shall be distributed to the partners in accord with the partnership agreement or as ordered by a court and the partnership thereafter dissolved. It is from this Order of September 20, 2012, that [Appellants] appeal.

⁷ The adoption Order specifically referenced that no factual findings were being made because the purpose of appointing the Liquidating Trustee was not to pursue potential claims but merely to identify (and if possible accumulate) potential assets prior to liquidating. This task was faithfully, diligently and admirably pursued by the Liquidating Trustee even though no definitive conclusion could be reached.

Trial Court Revised Opinion, 5/11/12 at 1-3 (some footnotes omitted).

On appeal, Appellants seek to raise the following issues for our review:

1. Did the [c]ourt err in granting the Liquidating Trustee's motion and adopting and accepting its findings and conclusions when the decision was not based on adversary proceedings the [c]ourt made no findings of fact and the Appellants rebutted the liquidating trustee's finding and conclusions with record evidence?
2. Did the [c]ourt err in allowing a derivative action to proceed where the Liquidating Trustee was unable to identify any damages suffered by the limited partnership, but was empowered to seek information regarding potential damages, including by the issuance of a third party subpoena?
3. Did the [c]ourt err in appointing a self-interested receiver that was adverse to the limited partnership in litigation and filed a meritless appeal against the limited partnership?
4. Did the [c]ourt err in prospectively granting attorney fees for actions not yet initiated that will be heard by other judges?
5. Did the [c]ourt err by engaging in ex parte communications with the Liquidating Trustee, declaring the Liquidating Trustee the [c]ourt's agent, resolving the Liquidating Trustee's motion in its favor while making no factual findings and approving the fees and costs of the Liquidating Trustee and its counsel in an amount in excess of \$500,000 without conducting a hearing or considering any evidence regarding the propriety of the fees and costs?

Appellants' Brief at 5.

Preliminarily, we must address the Appellees' argument that the order of September 20, 2012, from which Appellants take their appeal, is not a final order. The Pennsylvania Supreme Court has discussed the finality of orders as follows:

It is, of course, well settled that an appeal will lie only from a final order unless otherwise permitted by statute. A final order is one which usually ends the litigation, or alternatively, disposes of the entire case. In determining what constitutes a final order

... we look to "a practical rather than technical construction" of an order.... "Whether an order is final and appealable cannot necessarily be ascertained from the face of a decree alone, nor simply from the technical effect of the adjudication. The finality of an order is a judicial conclusion which can be reached only after an examination of its ramifications." We have also said that if the practical consequence of the order by the trial court is effectively to put an appellant "out of court" the order will be treated as final. Similarly, an order is "final" if it precludes a party from presenting the merits of his claim to the lower court.

Grant v. Blaine, 582 Pa. 1, 3, 868 A.2d 400, 402 (2005) (citing **Pugar v. Greco**, 483 Pa. 68, 394 A.2d 542 (1978)).

Appellants do not argue that the instant appeal is authorized by statute. Rather, they contend that the court's September 20, 2012 order appointing replacing the Liquidating Trustee with David S. Lamm as Receiver to pursue any potential litigation based upon the claims made in the Liquidating Trustee's report "put an end to the first litigation by appointing Lamm as the receiver and directing him to file a new lawsuit or dissolve the limited partnership." Appellant's Reply Brief at 4. Appellees counter that the September 20, 2012 order authorizing Davin S. Lamm "to pursue litigation on behalf of the partnership based on the claims identified in the Trustee's Report[]" is simply a continuation of the authority the April 6, 2011 order originally granted to the Liquidating Trustee "[t]o continue to prosecute or to institute in the name of Mariner Chestnut Partners, L.P. any and all suits or other legal proceedings, in this Commonwealth or elsewhere, and to abandon the prosecution of claims he deems unprofitable to pursue."

Appellees' Brief at 17-18 (citing Orders dated September 20, 2012 and April 5, 2011).

We agree with Appellees' contention that the September 20, 2012 order appointing Davin S. Lamm as receiver is not a final and appealable order. Although Appellants argue that the order "put an end to the first litigation," we find that there was no ongoing litigation to end at the time the order was entered. Rather, we are persuaded by the argument advanced by Appellees that the September 20, 2012 order was merely a continuation of the authority granted in the trial court's prior order of April 5, 2011.

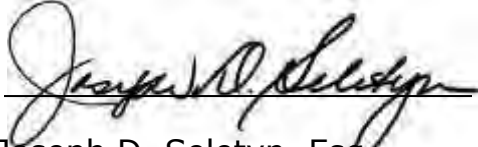
Significantly, nothing in the court's order places any party "out of court" or otherwise imperils a party's ability to present the merits of any claim in the court below. Moreover, we find that while the September order appointing the receiver surely authorizes the pursuit of any potential litigation, there is no guarantee that any litigation will result.¹

Accordingly, as we find that the September 20, 2012 order does not constitute a final and appealable order, we are constrained to quash

¹ To the extent that the court adopted the final report of the Liquidating Trustee, we note that it appears to have done so solely in order to advance the proceedings in the case, and specifically did not make any factual findings with regards to the averments made therein. Order, 9/20/12 n.7.

Appellants' appeal. Due to our disposition we need not address Appellants' remaining claims at this time.²

Appeal quashed. Jurisdiction relinquished.
Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/2/2014

² Of course, our decision in this matter has no bearing upon Appellants' ability to raise any remaining claims when the matter is ripe for adjudication.