NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

MARKS & SOKOLOV, LLC Appellee v. ALEXANDER FINANCE C.D., INC., ALEXANDER HOLDING, LLC, ANDREW CHAROFF, AND EUGENE URITSKY Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 293 EDA 2012

Appeal from the Order Entered December 8, 2011
In the Court of Common Pleas of Philadelphia County
Civil Division at No.: July Term, 2003, No. 02046

BEFORE: BENDER, P.J., GANTMAN, J., PANELLA, J., DONOHUE, J., SHOGAN, J., LAZARUS, J., MUNDY, J., OTT, J., and WECHT, J.

DISSENTING MEMORANDUM BY WECHT, J. **FILED DECEMBER 04, 2013**

I respectfully dissent from the esteemed Majority's decision to quash the instant appeal. In my view, Eugene Uritsky ("Appellant") properly appealed from the trial court's December 8, 2011 order. Additionally, it seems plain to me that the learned trial court transgressed Pa.R.C.P. 3118 when it adjudicated ownership of EU Glass, Inc. without a full-dress equity proceeding. Consequently, I believe that the law compels us to vacate the trial court's order.

The Majority aptly sets forth the factual and procedural history of this case (Maj. Op. at 1-7). I need not repeat that information here. Stated

succinctly, the Majority concludes that Appellant cannot appeal from the trial court's December 8, 2011 order because it is not the "final order" in the instant case. Rather, the Majority characterizes the trial court's December 8, 2011 order as a mere clarification of the trial court's final January 19, 2011 order. I disagree.

The Pennsylvania Rules of Appellate Procedure define a final order as any order that (1) disposes of all claims and of all parties; or (2) is expressly defined as a final order by statute; or (3) is entered as a final order pursuant to Pa.R.A.P. 341(c). ***See*** Pa.R.A.P. 341(b)(1)-(3). More generally, our Supreme Court has opined that an order is "final" when it "ends the litigation, or alternatively disposes of the entire case." ***T.C.R. Reality, Inc. v. Cox***, 372 A.2d 721, 724 (Pa. 1977) (citing ***Pitzer v. Independence Savings & Loan Ass'n***, 319 A.2d 677, 678 (Pa. 1974); ***James Banda Inc. v. Virginia Manor Apartments, Inc.***, 303 A.2d 925, 926 (Pa. 1973)). "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 only be reached after an examination of its ramifications." ***Bell v. Beneficial Consumer Discount Co.***, 348 A.2d 734, 735 (Pa. 1975) (citing ***Cohen v. Beneficial Industrial Loan Corp.***, 337 U.S. 541, 546 (1949)).

The Majority concludes that the January 19, 2011 trial court order "was a final, appealable order, as it disposed of all the claims and requests

for relief set forth in the both the Emergency Petition and the Supplemental Motion." Maj. Op. at 10 (citing 42 Pa.C.S. § 742; Pa.R.A.P. 341(b)(1)). In my view, the trial court's January 2011 Order cannot be deemed "final" within the meaning of Pa.R.A.P. 341(b)(1) because that order did not dispose of all claims and parties. ***See*** Pa.R.A.P. 341(b)(1). Rather, the January 2011 order merely disposed of the supplemental relief sought by Marks & Sokolov, LLC ("Appellee"). The relief sought by Appellee pursuant to Rule 3118 was not a self-contained legal controversy, and the trial court's adjudication of Appellee's Rule 3118 petition did not end the litigation or dispose of the entire case between Appellant and Appellee. Rather, the supplemental relief sought by Appellee was in furtherance of Appellee's ongoing effort to collect the tens of thousands of dollars owed by Appellant under the terms of the April 2005 default judgment.[1]

The January 2011 order had the following effects: (1) all shares of EU Glass, Inc., along with various corporate documents, were to be turned over to the Philadelphia Sheriff's Office for "safe keeping"; (2) Appellant was ordered to attend a deposition on January 24, 2011; (3) Appellant was further ordered to bring "all documents previously requested by [Appellee] in [its] request for production of documents"; (4) Appellant also was

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[1] Appellee's December 10, 2010 praecipe for a writ of execution fixed Appellant's total amount owed at $169,586.00 as of that date. Appellee's Praecipe for Writ of Execution, 12/10/2010, at 2.

directed to "answer all questions with specificity regarding ownership of assets"; (5) Appellee was advised to file a "Petition for Contempt" if Appellant failed to comply with the court's order; and (6) Appellant was advised that he could petition for the return of EU Glass' corporate property after February 3, 2011. Order, 1/19/2011, at 1-2.

Examining the legal ramifications of the trial court's January 19, 2011 order, I cannot conclude that it had the effect of "end[ing] the litigation, or alternatively dispos[ing] of the entire case." ***Cox***, 372 A.2d at 724. Rather, the order was intended to facilitate further legal proceedings by providing that the corporate shares be safely held and by pointedly directing Appellant to participate fully in discovery. Moreover, even the text of the order itself contemplated further proceedings, setting time limits for prospective motions from both Appellant and Appellee. Order, 1/19/2011, at 2. In addition, there is no indication that the trial court's order did anything to dispose of the overall controversy at issue in this case – Appellant's arrears owing to Appellee. "When a trial court does not dispose of all of the claims or parties, and no statute expressly defines the type of order as final, the trial court order is not final pursuant to Rule 341(b)(1)[.]" ***Pullman Power Products of Canada Ltd. v. Basic Engineers, Inc.***, 713 A.2d 1169, 1172 (Pa. Super. 1998) (citing ***McKinney v. Albright***, 632 A.2d 937, 938-39 (Pa. Super. 1993)). Accordingly, I cannot agree that the trial court's January 19,

2011 order was final. Consequently, I would not quash this appeal pursuant to Pa.R.A.P. 903(a). ***See*** Maj. Op. at 11-12.

Applying the same rationale, I also cannot conclude that the December 8, 2011 order is final within the meaning of Pa.R.A.P. 341(b)(1). Accordingly, it is necessary to ascertain whether the December 8, 2011 order is appealable under any alternative doctrine.[2] For the following reasons, I conclude that Appellant was permitted to appeal from the December 2011 order, inasmuch as this is an appeal from an interlocutory order as of right.[3]

"Under Pennsylvania law, an appeal may only be taken from an interlocutory order as of right, from a final order, from a collateral order, or from an interlocutory order by permission." ***Continental Bank v. Andrew Bldg. Co.***, 648 A.2d 551, 553 (Pa. Super. 1994) (internal citations omitted).

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[2] "The question of the appealability of an order goes to the jurisdiction of the Court requested to entertain the question. Questions relating to jurisdiction are not waived by the failure of parties to raise them, and may properly be raised by the court *sua sponte*." ***Commonwealth v. Scarborough***, 64 A.3d 602, 607 n.10 (Pa. 2013) (quoting ***Fried v. Fried***, 501 A.2d 211, 212 (Pa. 1985)).

[3] For the sake of clarity, I note that the December 8, 2011 order explicitly modified the terms of the December 15, 2010 order. ***See*** Order, 12/8/11, at 1 ("This Court's December 15, 2010 Order is **modified** as follows . . . .") (emphasis added). My analysis focuses solely upon these two orders based upon the claims raised by Appellant. The January 19, 2011 order, although related in subject matter, was a separate entry that did not affect or alter the substance of either the December 15, 2010 order or the December 8, 2011 order. ***See*** Order, 1/19/2011, at 1-2.

Relevant to this case, an interlocutory appeal may be taken as of right from "[a]n order that grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction." Pa.R.A.P. 311(a)(4).[4] With reference to what qualifies as an injunction for the purposes of Rule 311(a)(4), we have held that "[a]n order which grants a request to enjoin certain conduct . . . is an interlocutory matter specifically authorized for appeal as of right by Rule 311(a)(4)." ***Penna. Orthopaedic Soc. v. Independence Blue Cross***, 885 A.2d 542, 547 (Pa. Super. 2005).

Much of the relief available to petitioners pursuant to Rule 3118 has been described by our Supreme Court as exhibiting the qualities of an injunction: "[Rule 3118] generally provides for **injunctive relief**, discovery and similar assistance to the judgment creditor unavailable in ordinary execution proceedings." ***Greater Val. Terminal Corp. v. Goodman***, 202 A.2d 89, 92 (Pa. 1964) (emphasis added). Moreover, I find our holding in ***Chadwin v. Krouse***, 386 A.2d 33 (Pa. Super. 1978) to be persuasive regarding the injunctive quality of orders entered pursuant to Rule 3118. In ***Chadwin***, an order filed pursuant to Rule 3118 enjoined the appellant from

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[4] The only statutory restriction on interlocutory appeals as of right under Rule 311(a)(4) applies to (1) orders entered pursuant to 23 Pa.C.S. §§ 3323(f) and 3505(a); and (2) orders in the form of a decree nisi. ***See O.D. Anderson, Inc. v. Cricks***, 815 A.2d 1063, 1068-69 (Pa. Super. 2003) (citing ***Wynnewood Dev., Inc. v. Bank & Trust Co. of Old York Road***, 711 A.2d 1003, 1005 (Pa. 1998)). Neither restriction applies to the instant case.

"selling, transferring, assigning, or otherwise negotiating any of the issued or outstanding shares" of stock in appellant's company. 386 A.2d at 35. We identified the order as an "injunction," and we evaluated it as such. ***See id.*** at 36, 37.

The order entered by the trial court on December 8, 2011, which specifically modified the December 2010 injunction,[5] must properly be characterized as a modification of an injunction pursuant to Rule 311(a)(4). In this regard, I disagree squarely with the Majority's contention that the trial court's December 2011 order did not expand the scope of the December 2010 order. The Majority's argument contends essentially that the "extremely broad" nature of the December 2010 order already fully encompassed the modifications made under the December 2011 order. I believe this to be error.

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[5] Based upon the significant amount of conduct enjoined by the trial court's December 2010 order, I conclude that it fits squarely within both the statutory definition of an injunction at Rule 311(a)(4) and our precedent interpreting that rule. ***See Independence Blue Cross****, supra*; ***see also*** Pa.R.A.P. 311(a)(4). The trial court's December 15, 2010 order had the following effects: (1) Appellant and EU Glass, Inc. were enjoined from transferring any EU Glass stock "pending further order"; (2) Appellant and EU Glass were enjoined from "transferring, removing, conveying, disposing or assigning assets of EU Glass, Inc. out of the ordinary course of business"; (3) Appellant and EU Glass, Inc. were "prohibited from making any payments to or for the benefit of [Appellant] in excess of $5,000 per month"; (4) Appellant and EU Glass, Inc. were directed to "provide an accounting of EU Glass, Inc.'s assets and liabilities"; (5) Appellant was ordered to provide a "verified statement of all his assets"; and (6) Appellant was ordered to appear for a deposition. Order, 12/15/2010, at 1-2.

The trial court's December 2011 order provided as follows:

> AND NOW, this 8th day of December, 2011, upon consideration of the Plaintiff's Emergency Petition for Supplementary Relief in Aid of Execution Pursuant to Pa.R.Civ.P. 3118, and any response thereto, and after a hearing thereon, and for good cause shown, it is hereby; ORDERED and DECREED that:
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> A. This Court's December 15, 2010 Order is modified as follows: [Appellant] and EU Glass are prohibited from making any payment outside of the ordinary course of business for any personal uses of [Appellant], his wife, or family, including mortgage payments, car payments, or any other personal expenses in excess of $5,000 per month.
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> B. Any further violations of the December 15, 2010 Order will result in sanctions.

Order, 12/8/2011, at 1. The Majority minimizes the significance of this expansion on the basis that the prohibited distributions of money are only forbidden "to the extent that they are used to satisfy family obligations." Maj. Op. at 12. The Majority concludes that, because the satisfaction of such obligations is "unquestionably for the benefit" of Appellant, "such distributions were already prohibited by the more comprehensive language of the December 2010 Order." ***Id.***

An examination of the language of both orders substantiates my disagreement with the Majority's interpretation. The language of the December 2011 order widened the scope and import of the December 2010 order by broadening its restrictions to apply to Appellant's wife and his entire family. A plain reading of the December 2011 order indicates that monetary

distributions were not prohibited only to the extent that they were used to fulfill Appellant's family obligations. Rather, such payments were listed as mere examples of the types of payments that the trial court was circumscribing. This conclusion is clearly supported by the conjunctive language of the order and the catch-all phrase "or any other personal expenses." ***See*** Order, 12/8/2011, at 1.

In addition, I disagree with the Majority's conclusion that any and all potential payments from EU Glass for the "personal use" of any member of Appellant's family qualifies as being "unquestionably for the benefit of Appellant" under the December 2010 order. The personal interests of Appellant, his family, and his wife are not necessarily or assumedly coextensive, and the Majority's conclusion regarding such interests is speculative. The original December 2010 order did not mention Appellant's family or wife, did not pronounce any restrictions on their respective actions, and did not directly address EU Glass' relationship with Appellant's family. The Majority's conclusions regarding the scope of the December 2011 order find no support in the trial court's actual orders themselves.

Based upon all of the above, I conclude that the December 2011 order constituted an interlocutory order that was appealable as of right. As Appellant properly took an appeal as of right from the modification of an injunction, and filed his notice of appeal within the thirty-day time limit

contemplated by Pa.R.A.P. 903(a), I believe that he has properly preserved his claims.[6]

Turning to the merits of Appellant's claims, I agree with the Majority that Appellant's "first three issues collectively raise the same question[,] . . . whether the December 2011 Order made a factual determination that [Appellant] was the owner of EU Glass and thus exceeded the scope of relief permitted under Pa.R.Civ.P. 3118." Maj. Op. at 7.

Appellant's questions challenge the trial court's disposition of a petition for relief in aid of execution under Pa.R.C.P. 3118. Our standard of review regarding such claims is limited to a determination of whether the trial court abused its discretion in entering the order at issue. ***See Kaplan v. Kaplan***, 619 A.2d 322, 325 (Pa. 1993). An abuse of discretion occurs "when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Rettger v. UPMC Shadyside***, 991 A.2d 915, 924 (Pa. Super. 2010).

Rule 3118 provides for action by the trial court in aid of execution of judgments on the following limited bases:

Rule 3118. Supplementary Relief in Aid of Execution

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[6] The trial court entered its order on December 8, 2011. Appellant filed his notice of appeal on January 6, 2012.

> (a) On petition of the plaintiff, after notice and hearing, the court in which a judgment has been entered may, before or after the issuance of a writ of execution, enter an order against any party or person
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> > (1) enjoining the negotiation, transfer, assignment or other disposition of any security, document of title, pawn ticket, instrument, mortgage, or document representing any property interest of the defendant subject to execution;
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> > (2) enjoining the transfer, removal, conveyance, assignment or other disposition of property of the defendant subject to execution;
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> > (3) directing the defendant or any other party or person to take such action as the court may direct to preserve collateral security for property of the defendant levied upon or attached, or any security interest levied upon or attached;
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> > (4) directing the disclosure to the sheriff or the whereabouts of property of the defendant;
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> > (5) directing the property of the defendant which has been removed from the county or concealed for the purpose of avoiding execution shall be delivered to the sheriff or made available for execution; and
> >
> > (6) granting such other relief as may be deemed necessary and appropriate.

Pa.R.C.P. 3118. In accordance with the plain language of Rule 3118, our Supreme Court has emphasized that the summary nature of proceedings conducted pursuant to the Rule operates as a limiting factor in the Rule's application. "Rule 3118 authorizes summary proceedings in aid of execution for the purpose of maintaining the *status quo* as to the judgment-debtor's property and it may be used only for that purpose." ***Goodman***, 202 A.2d at

94. Accordingly, this Court has taken a similar stance regarding proceedings under Rule 3118:

> As the comment to Rule 3118 indicates, the value of proceedings in aid of execution is that they provide a speedy means for the judgment creditor to obtain satisfaction of his judgment without resort to "full dress equity proceedings." It is the streamlined nature of a Rule 3118 proceeding, however, which militates against its use for any purpose other than to maintain the status quo with respect to the debtor's assets.

Chadwin, 386 A.2d at 37.

"[T]he rule of law we extract from the case law is that the nature of a Rule 3118 proceeding is strictly limited, regardless of which party is assisted thereby." ***Kaplan***, 619 A.2d at 326. All creditors seeking relief under Rule 3118 must establish at least "(1) the existence of an underlying judgment; and (2) property of the debtor subject to execution." ***Marshall Ruby & Sons v. Delta Min. Co.***, 702 A.2d 860, 862 (Pa. Super. 1997) (citing ***Kaplan***, 619 A.2d at 326). When a creditor acts for purposes other than maintenance of the *status quo* or seeks a determination of issues of fact not previously adjudicated pursuant to entry of the underlying judgment, he must invoke the process of a "full dress equity proceeding." ***See Chadwin***, 386 A.2d at 37.

Instantly, the trial court modified its December 2010 order limiting Appellant's and EU Glass' abilities to dispose of their respective assets. The trial court's December 2011 order further circumscribed in more detail Appellant's and EU Glass' prerogatives to pay more than $5000 per month,

outside the ordinary course of business, for the benefit of Appellant's wife or family. Appellant challenges that order, arguing that the scope of the limitation imposed by the trial court exceeded the bounds of Rule 3118 insofar as it adjudicated the disputed question of ownership of EU Glass. Brief for Appellant at 12-13. Specifically, Appellant argues that the trial court erred in its conclusion that EU Glass was Appellant's asset. Appellee responds that "the trial court merely prevented [Appellant] from syphoning assets out of EU Glass" pending "a final hearing to determine whether the EU Glass assets are subject to execution." Brief for Appellee at 21. And yet, significantly, even the learned Majority today acknowledges that "the trial court's issuance of orders pursuant to Rule 3118 required some recognition that EU Glass was, in whole or in part, [Appellant's] property." Maj. Op. at 9.

Ostensibly, the provisions of the trial court's December 2010 order derived from Appellant's assertion, during an earlier proceeding in a different case, that he owned "all the stock" of EU Glass, Inc.[7] Yet, Appellant's wife, Erica Uritsky, later contradicted Appellant's assertion of ownership. During a June 2011 deposition, she claimed exclusive ownership of EU Glass, Inc. Appellant's wife stated that she was the "one hundred percent owner" of EU

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[7] ***See*** Appellee's Supplemental Filing in Support of Plaintiff's Emergency Petition for Supplementary Relief in Aid of Execution Pursuant to Pa.R.Civ.P. 3118 and Contempt, 12/8/2010, at 5 (citing Exhibit 2 at 188).

Glass, and that, while Appellant "runs the company for [her]," Appellant was not an owner and received no salary or commission for his services. Deposition of Erica Uritsky, 6/14/2011, at 38.

The express language of the Pennsylvania Rules of Civil Procedure, as well as our longstanding precedent, mandate that a debtor's ownership of assets to be seized is a condition precedent to a Rule 3118 order.

> Only property the title to which is clearly in the judgment-debtor is subject to the terms of those paragraphs. The reference in each of the first five paragraphs [of Rule 3118] to "property of the defendant" is clearly indicative of this intent. Hence, since the first five paragraphs of Rule 3118 do not envision the type of relief which necessitates the trial of title to property, the catchall statement in paragraph six, which must be read in conjunction with and as effectuating the same purpose as the other five paragraphs, cannot be read [to the contrary].

Goodman, 202 A.2d at 92-93; ***see also Chadwin***, 386 A.2d at 35-36 (determination of ownership of the stock in question was stipulated to by both parties in the entry of the Rule 3118 order); ***Kaplan***, 619 A.2d at 324 (ownership of the machinery in question was established through a bank sale following default on a loan); ***Marshall Ruby and Sons***, 702 A.2d at 861 (ownership of hydraulic crane in question was established following two hearings specifically addressing the issue of title).

Let me be plain. I recognize that Erica Urtisky's testimony is hardly above suspicion. I know that we ultimately may learn that Appellant does in

fact own "all the stock" of EU Glass as he apparently once claimed.[8] However, regardless of the veracity of the witnesses' respective testimonies, the fact remains that, as a matter of law, the obvious discrepancy between the competing versions of ownership cannot be resolved summarily and without a proper evidentiary determination by the trial court.

> If the courts of Pennsylvania are to have the power to adjudicate title to property in plenary proceedings supplementary to execution, either the Legislature or our Rules of Court must specifically so provide. Rule 3118 authorizes summary proceedings in aid of execution for the purpose of maintaining the status quo as to the judgment-debtor's property and it may be used only for that purpose.

Goodman, 202 A.2d at 94.

Rule 3118 hearings were designed deliberately to avoid "the necessity of a full dress equity proceeding . . . . The Rule thus envisions something less than a full hearing prior to the granting of relief." ***Id.*** at 93. It is well-established that such proceedings are proper for the purposes of maintaining the status quo. When the status quo is muddled by conflicting assertions of ownership, our law discerns a scenario in which "full dress equity proceedings" are required. ***See Chadwin***, 386 A.2d at 37.

Although rational and comprehensible in its motivation, the trial court's order of December 8, 2011 is nonetheless undone by plain legal error. Although satisfaction of the judgment against Appellant may ultimately

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[8] ***See*** *supra* n.7.

prove available from the assets of EU Glass, this cannot be achieved pursuant to Rule 3118 in the absence of a factual determination of record, made following an appropriate hearing, that EU Glass is, in fact, Appellant's asset.

For the foregoing reasons, I would vacate the trial court's order.[9] I respectfully dissent.

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[9] I would vacate the trial court's order based upon the merits of the claim raised by Appellant's first three issues. Consequently, I do not address Appellant's fourth issue.