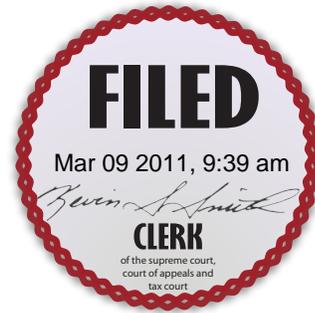


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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS P. BURKE,)

Appellant,)

vs.)

AMERICAN GENERAL FINANCIAL)
SERVICES, INC.,)

Appellee.)

No. 29A02-1008-PL-925

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0810-PL-1288

March 9, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Appellant-Defendant Thomas P. Burke (“Burke”) brings this interlocutory appeal challenging the Hamilton Superior Court’s grant of a motion to appoint a receiver filed by Appellee-Plaintiff American General Financial Services, Inc. (“AGFS”). On appeal, Burke claims that the trial court abused its discretion in appointing a receiver to take possession of records and files relating to collection accounts where Burke had acted as counsel on behalf of AGFS. Concluding that the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

Burke represented AGFS as legal counsel in consumer collection cases in Indiana for over twenty years. Burke’s compensation was determined by an Attorney Representation Agreement entered into by the parties. The Representation Agreement included a fee schedule which provided that Burke would generally receive a one-third contingency fee. If, however, an account became uncollectable, Burke would receive \$50 if a suit had been filed, \$75 if a suit had been filed and a judgment obtained, and \$100 if a judgment had been obtained and proceedings supplemental were initiated. The Representation Agreement gave examples of an account becoming “uncollectable” as including “death or bankruptcy of debtor, move out of state and client arranges for another attorney to collect.” Appellant’s App. p. 197. The Representation Agreement could be terminated by either party upon ten days written notice.

In 2007, AGFS was sued after Burke sent a collections letter to a customer who had received a discharge in bankruptcy. In 2008, the clerk of Fayette County courts informed AGFS that she had received notice from the IRS that Burke had an unpaid tax

lien. In accordance with the IRS's instructions, the clerk began to send garnishments on AGFS's cases to the IRS rather than Burke. As a result of these incidents, AGFS sent Burke a letter on May 23, 2008, terminating the Representation Agreement between Burke and AGFS. In the letter, AGFS also demanded that Burke return all account files, provide an accounting, and cooperate with AGFS's new attorney.

Burke, however, did not return the account files immediately, and ultimately did not do so until the trial court entered an order of replevin against him. And when Burke turned over the account files to AGFS, they did not contain adequate information concerning the status of the accounts, i.e. the amounts collected and the remaining balance. Burke did include an account activity report on some of the account files, which indicated the date of any judgment, the amount thereof, and the payments received, but these reports did not contain information regarding how much of the payments Burke had kept and how much he had remitted to AGFS. The activity reports lacked sufficient information to allow AGFS's new collections counsel to collect on the accounts.

AGFS then attempted to obtain the necessary account information through the discovery process, by sending Burke interrogatories and requests for document production in May 2009. Although Burke received two enlargements of time, he still did not respond. During this time period, AGFS also obtained information that Burke was continuing to receive payments for AGFS without informing AGFS of the payments or remitting the payments to AGFS.

As a result, AGFS filed a motion for appointment of a receiver on November 12, 2009. After Burke obtained a continuance of the scheduled hearing on this motion,

AGFS agreed to postpone the hearing provided that Burke fully respond to AGFS's discovery requests. Burke later gave AGFS a computer disc containing account activity reports, but these reports still did not indicate how much of the money received had been retained by Burke and how much had been remitted to AGFS. AGFS was also unsatisfied with Burke's response to its interrogatories, which failed to provide more detail than the account activity reports regarding the amounts collected and balances owed on the accounts. Burke also failed to provide detailed information concerning his banking accounts.

After unsuccessful attempts to get Burke to supplement his discovery responses, AGFS filed a request for a hearing on its previously-filed motion to appoint a receiver. At the July 23, 2010 hearing on the motion to appoint a receiver, Burke admitted that he had been receiving payments on AGFS accounts in 2009 and 2010—after AGFS had terminated the Representation Agreement—but had not remitted any portion thereof to AGFS and had not provided AGFS with an accounting. Burke testified that he had initially deposited money he had received on AGFS accounts into his client trust account, but he admitted that he transferred money out of this account into his own accounts for personal and professional expenses, without providing an accounting. Burke stated he did so because, he claimed, AGFS owed him fees under the Representation Agreement.

At the conclusion of the hearing, the trial court made several findings from the bench:

[T]he Court finds that [AGFS] employed the services of Mr. Thomas Burke as attorney to collect funds owed to [AGFS]. The Court further finds that funds owed to [AGFS] were received personally by Mr. Thomas Burke and

that Mr. Burke has failed to remit and provide an accounting of those funds that should have been remitted to [AGFS]. The Court further finds from the evidence presented that the property at issue, that being the funds and profits which would include the interest on those payments owed are in danger of being lost. By Mr. Burke's own testimony, even after this litigation has been pending and after the attorney-client relationship was terminated between Mr. Burke and [AGFS], he has kept and spent funds that he received on behalf of [AGFS]. The Court will appoint the services of BGBC Partners, LLC, to be paid for by [AGFS], reserving, however, any further appropriation of funds that may be appropriate for the payment of the receivership. So even though [AGFS] would be responsible for paying for the receivership, the Court will reserve at a later date any request by [AGFS] to employ some other means of payment if appropriate. The specific receivership will be for BGBC Partners, LLC to act as a receiver and to receive any and all funds payable to [AGFS] and conduct an audit of the books and records and forensic examination of those clients with which Mr. Burke has had any contact on behalf of [AGFS]. The Court specifically finds that under Indiana Code Section 32-[30-5]-1 under [Sub]section 1 that a receiver may be appointed by the Court in the following cases when action by a creditor to subject any property or fund to the creditor's claims which the Court finds to be applicable under this situation. AGF[S] being the creditor in this particular situation, although the Court understands that there are conflicting claims. And the Court also finds under [Sub]section 2 that an action between persons jointly interested in any property or fund and the appointment of a receiver is appropriate. In this particular case the evidence bears out that although there are funds due and owing to [AGFS] that Mr. Burke is making claim in part due to his attorney fees. Albeit, the evidence is sufficiently clear today that there have been occasions even within the few accounts that have been reviewed that Mr. Burke has kept over and above the contractual amounts that would have ben due and owing on those particular cases. The Court also finds that the appointment of a receiver is appropriate in all actions when it is shown that the property fund or profits in controversy are in danger of being lost, removed, or materially injured which the evidence certainly bears out in this case and which the Court has already referred to. Additionally, the Court finds that the appointment of a receiver is appropriate in other cases where in the discretion of the Court it may be necessary to secure ample justice to the parties and in this particular case there is overwhelming evidence that in order for [AGFS] to protect its interest and profits that a receiver is appropriate and necessary, to not only provide an accounting of those funds that are due and owing to [AGFS], but also to protect [AGFS] of future liability due to the failure . . . by Mr. Burke to provide appropriate accountings.

Tr. pp. 144-47. The trial court entered a written order granting AGFS's motion to appoint a receiver on July 27, 2010. Burke filed a motion to reconsider on August 19, 2010, which the trial court denied on August 26, 2010. Burke then filed his notice of appeal on August 25, 2010.¹

Discussion and Decision

The appointment of a receiver is an extraordinary and drastic remedy to be exercised with great caution in that it “affects one of man’s most cherished and sacred rights guaranteed by the United States Constitution—the right to be secure in his property.” Schrenker v. State, 919 N.E.2d 1188, 1191 (Ind. Ct. App. 2010), trans. denied (quoting Crippin Printing Corp. v. Abel, 441 N.E.2d 1002, 1005 (Ind. Ct. App. 1982)). Accordingly, the statute which grants such authority is strictly construed. Id. at 1192. The controlling receivership statute provides in relevant part:

A receiver may be appointed in the following cases:

- (1) In an action by a vendor to vacate a fraudulent purchase of property or by a creditor to subject any property or fund to the creditor’s claim.
- (2) In actions between partners or persons jointly interested in any property or fund.
- (3) In all actions when it is shown that the property, fund or rent, and profits in controversy are in danger of being lost, removed, or materially injured.

* * *

- (7) In other cases as may be provided by law or where, in the discretion of the court, it may be necessary to secure ample justice to the parties.

¹ Appeals from an interlocutory order “appointing or refusing to appoint a receiver” are “taken as a matter of right.” Ind. Appellate Rule 14(A)(6).

Ind. Code § 32-30-5-1 (2002).²

The appointment of a receiver cannot be sustained unless proper statutory grounds for the appointment are sufficiently shown, and the power to appoint a receiver should be exercised only when it is clear that no other full and adequate remedy exists whereby justice between the parties may be affected and a wrong prevented, and only in a clear case of extreme necessity. Schrenker v. State, 919 N.E.2d at 1192. Thus, the standard by which the appointment can be justified is exceptionally stringent. Id.

On appeal, however, the scope of our review of an interlocutory order appointing a receiver is limited. Id. The appointment of a receiver is in the sound discretion of the trial court, and we review the court's decision only for an abuse of that discretion. Id. On appeal, we will not reweigh the evidence, and we must construe the evidence, and all reasonable inferences to be drawn therefrom, in favor of the trial court's decision. Id.

Here, the trial court found that the appointment of a receiver to be appropriate under the statute. Burke, however, argues that the trial court abused its discretion in appointing a receiver in numerous ways. First, he claims that the appointment of a receiver was improper because AGFS had an adequate remedy at law. In support of this argument, Burke claims that, by the time the receiver was appointed, he had already given the AGFS account files in his possession to AGFS. We note, however, that AGFS had sought these files for approximately two years before Burke eventually turned them over, and then only after AGFS had obtained a replevin order. And when Burke

² Subsections (4), (5), and (6) deal with mortgage foreclosures, corporations, and redemptions of real estate, none of which are at issue here.

eventually gave the account files to AGFS, they were in a state of disarray that made it difficult if not impossible for it to determine who owed AGFS and in what amount. We disagree with Burke that simply turning the files over to AGFS means that the appointment of a receiver was unnecessary.

Burke further claims that, once he had turned the account files over to AGFS, it could have protected its interest in the cases by simply entering an appearance in those cases. AGFS presented evidence, however, that its new collections counsel had declined to enter an appearance for fear that doing so would expose him to liability under the federal Fair Debt Collections Act, under which he would be obligated to provide an accurate account balance to any debtor who requested one, something he was unable to do given the state of the case files that Burke had provided. See 15 U.S.C. § 1692g(a)(1) (2006) (requiring a debt collector, within five days after the initial communication with a consumer in connection with the collection of any debt, to send the consumer a written notice containing the amount of the debt); Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C., 214 F.3d 872, 875-76 (7th Cir. 2000) (holding that, in order to comply with Fair Debt Collections Act, letter to debtor must contain more than just the principal balance, and that it was no excuse that it was “impossible” for the defendants in that case to comply with this requirement because the amount of the debt changed daily). Under these facts and circumstances, AGFS adequately explained why it had not filed an appearance in the cases where Burke had been representing AGFS.

Burke also argues that the appointment of a receiver was unnecessary because he was no longer in possession of any of AGFS’s property. The evidence favoring the trial

court's decision, however, established that even after AGFS had terminated the Agreement with Burke, he continued to receive money on AGFS accounts but failed to remit this money to AGFS and failed to provide an accounting of the funds he had received. Burke argues that he deposited all of the money he received on AGFS's cases into his client trust account. But he also admitted that he had taken money out of his trust account and used it for his own purposes, claiming that AGFS owed him fees. Moreover, Burke provided no support for his claim of fees. Indeed, it was not until the day of the hearing that Burke finally claimed that AGFS owed him "a minimum of \$60,000." Tr. p. 36. Simply said, the trial court was not obligated to believe Burke's testimony, and it did not.

Burke additionally claims that the appointment of a receiver was unnecessary because AGFS's interest could have been equally protected by a restraining order. This presumes, however, that Burke would have readily complied with such an order. Based on Burke's pattern of behavior thus far, we cannot fault the trial court for taking steps to ensure that AGFS's interests were protected during the current litigation. As noted, AGFS asked Burke for its case files but was rebuffed; when AGFS filed a replevin suit and asked for the files during discovery, Burke again failed to provide AGFS with the files; in fact, Burke did not turn over the files until the trial court issued its replevin order. Under these facts and circumstances, the trial court was well within its discretion to take more drastic measures and appoint the receiver.

Burke also claims that the receivership ordered by the trial court was overly broad. Burke complains that the receiver now has access to all of his legal files, which he claims

is a deprivation of his property without due process and in violation of the federal Fourth Amendment. Unfortunately, Burke provides no further analysis or support for his constitutional claims, and we therefore consider them waived. See Erwin v. Roe, 928 N.E.2d 609, 620 n.4 (Ind. Ct. App. 2010) (noting that this court will not consider a claim when a party fails to present a cogent argument supported by authority as required by Indiana Appellate Rule 46(A)(8)(a)).³

Burke further claims that the receiver now has access to all of his mail and bank accounts, regardless of whether these accounts contain any of AGFS's funds. The receivership was appointed over the relationship between Burke and AGFS, "including but not limited to, the physical and electronic files for all lawsuits Burke has filed on behalf of [AGFS] or in which Burke has represented the interest of [AGFS] ("the Accounts"), all monies Burke has received on behalf of [AGFS], and all future monies paid by debtors regarding the Accounts." Appellant's App. pp. 7-8. Because Burke received personal mail at the same address as his law practice mail, all mail sent to Burke is forwarded to the receiver. Since Burke had been receiving funds from AGFS customers, we cannot see how the receiver could adequately protect the status quo without receiving Burke's personal mail. Moreover, it appears that any mail not related to the scope of the receivership is returned to Burke.

As to the bank accounts, Burke admitted to withdrawing AGFS's funds from his client trust account without making any accounting of the funds. Although Burke claims

³ We nevertheless note that Burke had notice of the receivership motion and the hearing held thereon, appeared at the motion in person and by counsel, and even testified at the hearing. We fail to see how Burke's due process rights were violated.

he withdrew these funds because AGFS owed him money pursuant to the Agreement, the trial court was not required to believe him. It is for this reason that the trial court placed Burke's personal and professional bank accounts under the authority of the receiver.

Burke next claims that an allegation of simple fraud and/or conversion is insufficient to support the appointment of a receiver, citing Lafayette Realty Corp. v. Moller, 247 Ind. 433, 215 N.E.2d 859 (1966). Moller involved a situation where minority shareholders alleged that the corporate officers had misappropriated funds for the use of another corporation where the majority shareholders had an interest. Id. at 437-38; 215 N.E.2d at 861. The court noted that "alleged acts of overreaching and alleged acts of fraud alone are not sufficient grounds for a receiver in every case, but they must be of such magnitude and of such character that the survival of the corporation and its operations is immediately imperiled." Id. at 440; 215 N.E.2d at 862. There was no showing in Moller that the defendants were insolvent, and in fact, the corporation was growing and profitable. Id. at 438-39; 215 N.E.2d at 861-62. Therefore, the appointment of a receiver would have been practically fatal to the corporation's existence. Id. Under those facts and circumstances, the court held that another, less drastic remedy, such as an accounting and damages, was more appropriate. Id. at 439-40; 215 N.E.2d at 862.

The present case is readily distinguishable from Moller. First, the receiver was appointed only over the remaining relationship between Burke and his former legal client, AGFS. Moreover, the corporation in Moller was growing and profitable, and there was no indication that a receivership was necessary to protect the interests of the minority shareholders; in fact, a receivership would likely have been fatal to the corporation in

which the shareholders had an interest. In contrast, here, there was substantial evidence that Burke had delayed in returning AGFS's case files and that he had failed to remit or even account for money he received on behalf of AGFS. And the IRS even had taken some of these funds by way of a tax lien on Burke. Again, we cannot say that a less drastic remedy would have adequately protected AGFS's interests under these circumstances.

Burke also claims that AGFS slept on its rights and should not be able to seek the equitable relief of a receivership. See Wagner v. Estate of Fox, 717 N.E.2d 195, 201 (Ind. Ct. App. 1999) (noting that equity aids the vigilant, not those who sleep on their rights). Burke claims that AGFS slept on its rights for over two years before seeking the appointment of a receiver. We disagree.

When AGFS found out that Burke had been receiving money from its customers without remitting or accounting for these funds, it terminated his services and sought the return of the account files in Burke's possession. When Burke failed to turn over these files, AGFS sought and received a replevin order requiring Burke to turn over the files. When AGFS obtained the files and determined that the files failed to contain the information necessary to collect on the accounts, they sought such information from Burke via the discovery process. When this proved futile, AGFS sought the appointment of a receiver, but these efforts were delayed when Burke promised, but failed, to provide this information to AGFS. Only then did AGFS again renew its efforts to have the receiver appointed. Based on the record before us, it appears that AGFS repeatedly, but

unsuccessfully, attempted to get the information it needed to protect its interests from Burke. Thus, we cannot say that AGFS slept on its rights.

Conclusion

Upon our review of all of the facts and circumstances of the present case, we are unable to say that the trial court abused its discretion in granting AGFS's motion to appoint a receiver.

Affirmed.

FRIEDLANDER, J., and MAY, J., concur.