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# IN THE COURT OF APPEALS OF INDIANA

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| KARLEEN SPANN PERRY, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0610-CV-863 |
| | ) | |
| MADISON ACQUISITION, LLC, | ) | |
| | ) | |
| Appellee-Plaintiff, | ) | |
| | ) | |
| LARRY D. SPANN, LMS CONTRACTING, INC., and L.D. SPANN CO., LLC, | ) | |
| | ) | |
| Appellees-Defendants. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald S. Zore, Judge
Cause No. 49D07-0604-MF-16088

**August 21, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary

Karleen Spann Perry brings this appeal from the trial court's denial of her Motion to Transfer Venue and her Motion to Correct Error relating to the Partial Judgment and Decree of Foreclosure (the "Partial Judgment") in the lawsuit filed by Madison Acquisition, LLC ("Madison Acquisition") to foreclose its interests in various property through a receivership estate. Presented for our review are the issues of whether preferred venue lies in Marion County and whether the trial court's Partial Judgment is a valid order. As intangible personal property in the form of stock certificates is physically located in Marion County, the complaint includes a claim for foreclosure relating to those stock certificates, and the receivership estate is being administered in Marion County, we conclude that preferred venue exists in Marion County. Further, we conclude the Partial Judgment is a valid judgment, and we accordingly affirm.

## Facts and Procedural History

On March 20, 2003, Perry filed a divorce petition against Larry Spann. The Jefferson County Circuit Court entered an order that, among other things, "restrained" Larry Spann from "transferring, encumbering, concealing, or in any way disposing of any real or personal property except in the usual course of business or for the necessities of life." Appendix of Appellant at 223. A divorce decree was issued on December 22, 2005, and the court dissolved the marriage and entered judgment in favor of Perry in the amount of $3,354,298.50. Id. at 211.

Madison Acquisition is a limited liability company with its principal place of business in Indianapolis, Marion County, Indiana. Madison Acquisition is the current holder of a

security interest in all shares of common stock issued to Larry Spann by LMS Contracting, Inc., and LMS Environmental Contracting, Inc., both Indiana corporations with their principal places of business in Jefferson County.

On March 27, 2002, Larry Spann pledged the stock in a Stock Pledge Agreement to Travis Mack to secure Spann's obligation to Mack under numerous promissory notes. Mack filed Uniform Commercial Code financing statements with the Indiana Secretary of State to perfect his security interest in the stock. Mack later assigned his interests in the various loan documents to Madison Acquisition on April 11, 2006. Madison Acquisition took physical possession of the stock certificates through its sole and managing member, Mark Jacobs, on the date it acquired the loan. Madison Acquisition has maintained physical possession of the stock certificates at its principal place of business in Marion County, Indiana.

On April 18, 2006, Madison Acquisition filed the original complaint in this case in Marion County against Larry D. Spann, LMS Contracting, Inc., LMS Environmental, and L.D. Spann Co., LLC (collectively, the "Spann Defendants"). The complaint was for breach of contract on promissory notes, and recovery of property and money supporting various loans from the Spann Defendants to Mack, who assigned those notes to Madison Acquisition. The notes were secured by personal property, stock, and real property of the various Spann Defendants.

On May 1, 2006, Madison Acquisition filed its Amended Motion for Appointment of Receiver, which was granted that same day. A Receiver was appointed on May 23, 2006, for the "sole purpose of facilitating Madison Acquisition in the foreclosure of its security interests and mortgages in the Receivership Estate Property." The Receiver was ordered to

proceed with an orderly sale of those assets.

Thereafter, on June 13, 2006, Perry was added as a defendant through an amended complaint in order to adjudicate the priority of her interests in the property[1] owned by Spann. On June 28, 2006, Perry filed her Motion To Transfer Venue, seeking to transfer the case to Jefferson County.

However, on that same day, June 28, 2006, the Marion Superior Court issued its Partial Judgment. Perry was named in the caption.[2] Through this Partial Judgment, the trial court entered judgment in favor of Madison Acquisition against all defendants. The Partial Judgment included findings that Madison Acquisition holds a first priority security interest in the stock of LMS Contracting and LMS Environmental pursuant to the Stock Pledge Agreement; valid and superior mortgages on all of the relevant real estate, subject to the priority of Perry's judgment against Spann; and a first priority security interest in all of the personal property collateral. The Partial Judgment included an "Order of Sale." The Receiver scheduled an Auction Sale for the subject property for August 1, 2006.

On July 6, 2006, Perry filed her Emergency Motion to Stay Execution of Partial Judgment. She sought to stay execution of the Partial Judgment in part to protect her rights before the disposition of the Motion To Transfer Venue. On July 11, 2006, the court entered

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[1] On July 17, 2006, Perry filed her Amended Motion for Proceedings Supplemental in the Jefferson County Circuit Court. That motion alleged that Spann violated the orders in the divorce action by entering into a security agreement with Mack providing security in assets and a mortgage in Spann's individual name that are now the subject of the foreclosure action pending in Marion County in this cause. She further seeks an order declaring that the assignment of the debt from Mack to Madison Acquisition is void in violation of the Indiana Uniform Fraudulent Transfer Act and that LMS Contracting, Inc., LMS Environmental Contracting, Inc., and L.D. Spann Co., LLC are alter egos of Spann, as an individual.

[2] At a hearing held on July 24, 2006, the timing of Perry's "Motion To Transfer Venue" and the entry of the trial court's Partial Judgment was discussed. The trial court noted that the "Motion To Transfer Venue"

an Order providing for a temporary stay of execution of the Partial Judgment until a status conference is held.

On July 24, 2006, after Madison Acquisition had filed its Response and Objection, the trial court held a hearing on the Motion to Transfer Venue. On July 31, 2006, that motion was denied.

On July 27, 2006, Perry filed her Motion to Correct Errors, requesting that the trial court vacate the Partial Judgment. That motion was denied on August 23, 2006.

On August 7, 2006, the court entered its Order on [Perry's] Emergency Motion To Stay Execution Of Partial Judgment, which specified that "[f]ollowing discussion between the Court and counsel for the parties, the Court indicated the terms of an Order that it would enter in this matter to protect and preserve the rights of each of the parties. Counsel were instructed to draft such an order, and this Order represents the form of order presented to the Court by counsel for the parties." Appendix of Appellee at 142. The Order vacated the order of July 11, 2006, which had provided for a temporary stay relating to the execution of the Partial Judgment. The Order also provided for rescheduling of the Receiver's Auction Sale to August 7, 2006, at 1:00 p.m. and directed that the Receiver proceed with the scheduled Receiver's Auction Sale pursuant to the terms of the Order. The Order also provided, in part, that none of the restrictions in the Order relating to the sale assets "shall prejudice or affect the rights of [Perry] to assert her claim that she is entitled to pierce the corporate veil of LMS Contracting, Inc. and LMS Environmental Contracting, Inc., …or as may be asserted in this cause." Id. at 147.

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"wasn't in the file when I saw it or it would have caught my eye." App. of Appellant at 29.

The Receiver conducted the Receiver's Auction Sale on August 7, 2006, and subsequently filed his Receiver's Supplemental Request For Confirmation of Sale and Consent of [Perry] To Confirmation of Sale. That document stated that the defendants consented to the court's confirmation of the sale. The trial court thereafter, on August 31, 2006, entered its Order Confirming Receiver's Sale, which stated that the trial court "confirms the Receiver's sale of the Sale Assets to Madison Acquisition, LLC for the sum of $900,000.00. The sale shall be subject to the restrictions contained in the ORDER ON [PERRY'S] EMERGENCY MOTION TO STAY EXECTUION OF PARTIAL JUDGMENT." App. of Appellant at 253.

Perry appeals both the denial of her "Motion To Transfer Venue" and the denial of her Motion to Correct Error relating to the Partial Judgment.

## Discussion and Decision

### I. Motion To Transfer Venue

#### A. Standard of Review

We review a trial court's order under Indiana Trial Rule 75 for an abuse of discretion. Phillips v. Scalf, 778 N.E.2d 480, 482 (Ind. Ct. App. 2002). An abuse of discretion occurs if a trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or if the trial court misinterpreted the law. Id.

#### B. Preferred Venue

Indiana Trial Rule 75 governs the venue requirements in Indiana. Rule 75(A) provides:

> Any case may be venued, commenced and decided in any court in any

> county, except, that upon the filing of a pleading or a motion to dismiss allowed by Rule 12(B)(3), the court, from allegations of the complaint or after hearing evidence thereon or considering affidavits or documentary evidence filed with the motion or in opposition to it, shall order the case transferred to a county or court selected by the party first properly filing such motion or pleading if the court determines that the county or court where the action was filed does not meet preferred venue requirements or is not authorized to decide the case and that the court or county selected has preferred venue and is authorized to decide the case.

Preferred venue is determined in accordance with the criteria listed in Rule 75(A)(1) through (9). It is possible that more than one county may be a county of preferred venue. Meridian Mutual Ins. Co. v. Harter, 671 N.E.2d 861, 862 (Ind. 1996). Rule 75(A) creates no preference among these subsections, and if suit is initially filed in a county of preferred venue, a trial court may not transfer venue. Bostic v. House of James, Inc., 784 N.E.2d 509, 510-11 (Ind. Ct. App. 2003), trans. denied.

Perry argues Marion County is not a county of preferred venue. She asserts the preferred venue is in Jefferson County because all of the property was located in Jefferson County, with the exception of the stock certificates of LMS Contracting and LMS Environmental. She asserts that although the stock certificates are located in Marion County, those stock certificates are intangible assets, representative only of the corporations themselves, both of which are located in Jefferson County. Perry argues that possession of the stock certificates in a particular venue does not vest that venue with jurisdiction.

Indiana Trial Rule 75(A)(2) provides that preferred venue lies in the county where the:

> chattels or some part thereof are regularly located or kept, if the complaint includes a claim for injuries thereto or relating to … such chattels, including without limitation claims for recovery of possession or for injuries, to establish use or control, to quiet title or determine any interest, to avoid or set aside

> conveyances, to foreclose liens, to partition and to assert any matters for which in rem relief is or would be proper.

Thus, for preferred venue to lie in Marion County, we must determine if (1) the shares of stock are chattel; (2) the chattel "or some part thereof" is "regularly located or kept" in Marion County; and (3) the complaint "includes a claim for injuries" to or relating to the chattel. Bostic, 784 N.E.2d at 512.

In Bostic, the plaintiff filed suit in Hamilton County and the defendant moved to transfer venue to Howard County. We held that plaintiff's action to renew a judgment against the defendant was properly venued in Hamilton County under Indiana Trial Rule 75(A)(2), finding that a judgment is a chattel located in the county of the court that issued the judgment, i.e., Hamilton County, and that the plaintiff's complaint to renew a judgment was sufficiently related to the underlying judgment. Id. at 512-13.

"Chattel" is defined as "[m]ovable or transferable property; personal property; esp[ecially], a physical object capable of manual delivery and not the subject matter of real property." R & D Transport, Inc. v. A.H., 859 N.E.2d 332, 333 n.1 (Ind. 2006) (quoting Black's Law Dictionary 251 (8th ed. 2004)). Both Perry and Madison Acquisition agree the shares of stock are intangible personal property. Indiana Trial Rule 75(A)(2) "does not distinguish between tangible and intangible chattels." Phillips, 778 N.E.2d at 483. Thus, the stock certificates are intangible personal property and qualify as chattel for purposes of Indiana Trial Rule 75(A)(2).

Next, we must determine if the chattel "or some part thereof" is "regularly located or kept" in Marion County. Perry does not dispute that the shares of stock are located in Marion

County. However, Perry argues the stocks are merely representative of rights to ownership, with no intrinsic value. Perry argues venue should not be determined on where the shares of stock are located. Rather, venue should be in the place where the corporation is located.

Madison Acquisition states the situs of intangible personal property is the legal domicile of the owner. Phillips, 778 N.E.2d at 483-84. However, under certain circumstances, intangible personal property may acquire a situs different from the domicile of its owner. Ind. Dep't of State Rev. v. Mercantile Mtg. Co., 412 N.E.2d 1252, 1254 (Ind. Ct. App. 1980). Property can acquire its own separate situs where the property is controlled and placed with some degree of permanency in a location different from the residence of its owner. Id. at 1254-55. To constitute such a business situs,

> it must be shown that possession and control of the property has been localized in some independent business or investment away from the owner's domicile so that its substantial use and value primarily attach to and become an asset of the outside business.

Id. at 1255 (quoting 1941 Op. Ind. Att'y Gen. 395, 397).

Madison Acquisition argues the stock certificates acquired a permanent business situs in Marion County. The stock was pledged to Mack through a Stock Pledge Agreement. Mack perfected his security interest in the stock by taking possession of the stock certificates and by filing UCC financing statements with the Indiana Secretary of State. Mack later assigned his interests in the stock to Madison Acquisition. To perfect its security interests, Madison Acquisition took physical possession of the stock certificates. Mark Jacobs, the sole managing member of Madison Acquisition, is in possession of the stock certificates. The stock certificates have been maintained at Madison Acquisition's place of business in

Marion County. If it were to relinquish physical possession of the certificates, Madison Acquisition would lose its perfected security interest in the stock, pursuant to Indiana Code section 26-1-9.1-314(c)(2)(A). Thus, as Madison Acquisition states, where stock certificates are the subject of property rights asserted in a foreclosure proceeding, and they are controlled and placed with some degree of permanency in a location apart from their owner, it is this location that serves as the situs of the chattels for the purpose of venue. We agree, and consequently conclude that the chattel or some part thereof is located in Marion County.

Finally, we must determine if the complaint "includes a claim for injuries" to or relating to the chattel. Here, the complaint includes a request for foreclosure of Madison Acquisition's security interest in the pledged stock. App. of Appellant at 38, 131.

Madison Acquisition argues the stock certificates acquired a permanent business situs in Marion County and as intangible personal property, a chattel, that is part of Madison Acquisition's proceeding to foreclose its lien, the shares of stock provide for preferred venue in Marion County. Indiana Trial Rule 75(A)(2) provides for preferred venue in the county where some of the personal property that constitutes the collateral is located or kept. The stock certificates are located and kept in Marion County. Based on the facts and the foreclosure relief requested in the complaint, preferred venue lies in Marion County. Each requirement of Indiana Trial Rule 75(A)(2) is satisfied. Thus, preferred venue for Madison Acquisition's complaint exists in Marion County. Consequently, the trial court did not abuse its discretion in denying Perry's motion to transfer venue to Jefferson County.

C. Receivership

On May 23, 2006, the trial court entered its Order Appointing Receiver. Indiana's

venue provision for receivership actions, Indiana Code section 32-30-5-22, provides that a transfer of venue is inappropriate in a proceeding that involves the administration of a receivership estate. That statute provides:

> (a) This section applies to any action, proceeding, or matter relating to or involving a receivership estate.
>
> (b) Except as provided in subsections (c) and (d), a party to a proceeding described in subsection (a) is entitled to a change of judge or a change of venue from the county for the same reasons and upon the same terms and conditions under which a change of judge or a change of venue from the county is allowed in any civil action.
>
> (c) This section does not authorize a change of venue from the county:
> (1) concerning expenses allowed by the court incidental to the operation, management, or administration of the receivership estate;
> (2) upon any petition or proceeding to remove a receiver; or
> (3) upon the objections or exceptions to any partial or final account or report of any receiver.
>
> (d) A change of venue is not allowed from the county of the administration of any receivership estate, or upon any petition or proceeding to remove a receiver, or upon objections or exceptions to a partial or final account or report of a receiver.

Perry argues the fact that there has been a receiver appointed does not necessitate venue remaining in Marion County. Perry states the section applies only to any action "relating to or involving a receivership estate." Indiana Code § 32-30-5-22(a). She maintains the provisions in sections (b) and (d) apply only when the thrust of the suit is a receivership. Perry argues that when there are separate triable issues, transfer of venue is appropriate even if a receiver has been appointed, pursuant to State ex rel. Interstate Finance, Inc. v. Superior Court of Marion County, Room 4, 244 Ind. 491, 494, 193 N.E.2d 909, 911 (1963) ("Whether or not the relator is entitled to a change of venue from the county in a

receivership is dependent upon whether or not the matter is one normally part of the routine administration of the receivership or is a separate triable issue which has the characteristics of a separate law suit."). Perry asserts that this is a breach of contract case involving the breach of several promissory notes, and incidental to those issues is the appointment of a receiver. Thus, she argues, the fact a receiver was appointed does not preclude a transfer of venue.

However, Madison Acquisition states that preferred venue exists in Marion County pursuant to Indiana Code section 32-30-5-22, which determines the venue of a receivership's administration. As Perry would not be entitled to a change of venue from Marion County under Trial Rule 75(A) because Marion County, where Madison Acquisition originally filed its foreclosure proceeding, is a county of preferred venue, Indiana Code section 32-30-5-22(b) will not afford the change of venue. Further, Indiana Code section 32-30-5-22(d) prohibits a change of venue from Marion County, which is the county of the administration of the receivership estate over the Spann Property. The receivership estate created by the trial court's order is being administered by the Receiver in Marion County. App of Appellant at 110, 253. The receivership remains ongoing over the sale assets by agreement of the parties and adjudication of the claims is essential to the administration of the receivership estate. Therefore, Madison Acquisition maintains, a transfer of venue is inappropriate under Indiana Code section 32-30-5-22(d).

The stock certificates provide for preferred venue in Marion County. Also, we agree with Madison Acquisition that as Marion County is the county of the administration of the receivership estate, the receivership statute prohibits change of venue from the county of the

administration of the receivership estate. Thus, the trial court did not abuse its discretion in denying a transfer of venue.

II. Partial Judgment and Decree of Foreclosure

On the date Perry filed her Motion To Transfer Venue, the trial court issued its Partial Judgment. The court entered judgment in favor of Madison Acquisition as against all defendants. The court set out several findings of fact, including that Madison Acquisition holds a first priority security interest in the stock of LMS Contracting and LMS Environmental; valid and superior mortgage liens on all of the relevant real estate, subject to the court's later determination of the priority of Perry's judgment lien against Larry Spann; and a first priority security interest in all of the personal property collateral. App. of Appellant at 147-48.

Perry now argues the trial court did not have jurisdiction to enter the Partial Judgment on June 28, 2006, the day she filed her Motion to Transfer Venue. She argues the Partial Judgment is null and void pursuant to Bd. of Trustees of Purdue Univ. v. Severson, 729 N.E.2d 1020 (Ind. Ct. App. 2000), trans. denied. In Severson, we held that once the motion to transfer venue was filed in the trial court, the trial court had jurisdiction to rule only on that motion and on emergency matters pursuant to Indiana Trial Rule 78.

Perry further asserts she is not bound by the terms of the Partial Judgment because, although she was a party in the lawsuit at the time the Partial Judgment was entered, her Answer was not yet due and she did not consent to the entry of the Partial Judgment as did the other defendants. She complains the Partial Judgment binds her to factual findings with which she disagrees.

However, Madison Acquisition maintains the Partial Judgment is a valid judgment of the Marion County court and the effects of the Partial Judgment as to Perry should be determined pursuant to the subsequent Order of August 7, 2006. Madison Acquisition points out the August 7, 2006, Order on [Perry's] Emergency Motion To Stay Execution Of Partial Judgment was negotiated and drafted in part by Perry, and provides the procedures to which Perry has previously consented.

That order modifies the Partial Judgment and provides Perry with the opportunity to litigate her claims concerning the Spann property she now requests. The August 7 Order identifies certain real and personal property of Spann as "Restricted Sale Assets," which may be sold by the Receiver subject to certain terms and conditions. Among the conditions is that Madison Acquisition, as the successful bidder at the Auction Sale, may not transfer, assign, sell, or encumber the Restricted Sale Assets. The order further provides that those restrictions terminate upon the determination that the claims asserted by Perry in her motion filed in Jefferson County, relating to the Restricted Sale Assets, either do or do not allow for Perry to obtain a judgment that the security interests, promissory notes, or mortgages assigned to Madison Acquisition relating to the Restricted Sale Assets are voidable or were fraudulent transfers. These claims asserted by Perry were identified as the "Preserved Spann/Perry Claims," and were not extinguished by either the Partial Judgment or Sale, pursuant to the August 7 Order. Thus, it appears Perry already has the remedy she now seeks.

Also, Madison Acquisition states the evidence reflects only that Perry's filing of her Motion To Transfer Venue and the entry of the trial court's Partial Judgment occurred

sometime during the same day. Madison Acquisition points out Indiana Trial Rule 78 only expressly addresses the subject matter jurisdiction of a trial court between the time a motion to transfer venue is filed and the time it is granted. Further, in Severson, the trial court did not deny the defendants' motion to transfer venue until over a year after the defendants had filed their motion. 729 N.E.2d at 1022. Madison Acquisition argues that Trial Rule 78 should not be found to divest a trial court of jurisdiction before the trial court even becomes aware that the motion to transfer venue has been filed.[3]

Perry has not shown the actions of the trial court constituted an abuse of discretion. The documents submitted on appeal fail to show that Perry filed her Motion To Transfer Venue before the trial court entered the Partial Judgment. Thus, the Partial Judgment constitutes a valid order of the trial court.

## Conclusion

The trial court did not abuse its discretion in denying the Motion To Transfer Venue. Preferred venue existed in Marion County under Indiana Trial Rule 75(A)(2) because Marion County is the county in which Madison Acquisition filed its complaint for foreclosure and where intangible personal property in the form of stock certificates is physically located on a permanent basis. Marion County is also where the receivership estate is being administered within the scope of Indiana Code section 32-30-5-22. Further, the Partial Judgment is a valid judgment.

Affirmed.

[3] Madison Acquisition points out that one inference that could be drawn from the record is that if the Motion to Transfer Venue was filed, as it was served, by United States first class mail to the Marion County Clerk's Office on June 28, 2006, from an Indianapolis address, it could not have reached the Clerk's Office on the same day it was mailed, but spent at least one day in transit.

SULLIVAN, SR. J., and VAIDIK, J., concur.