IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

KEYSTONE FINANCIAL BANK N.A., successor by merger with NORTHERN CENTRAL BANK, Plaintiff	:	
v.	:	No. 99-00,466
TNMP ACQUISITION CORPORATION, TROY NEWS COMPANY, INC., and ROBERT RUBIN, Defendants	:	

OPINION and ORDER

In this action the court is asked to determine whether a judgment creditor who is engaging in discovery to learn about a debtor's assets must subpoena the debtor prior to taking his or her deposition. After failing to appear at a scheduled deposition, defendant Robert Rubin maintains he had no obligation to attend because he was not subpoenaed, pursuant to Pa.R.C.P. 3117. Mr. Rubin thus seeks sanctuary in the very rule intended to assist his creditors. This court rejects such a topsy-turvy interpretation of the rules in aid of execution. Such a use–or misuse–of the rules demonstrates that the Rules of Civil Procedure, as well as patriotism, can become the last refuge of scoundrels.

Procedural History

After obtaining a one million dollar judgment against the defendants, Keystone Financial Bank (Keystone) took advantage of the opportunity to learn about their assets by using Pa.R.Civ.P. 3117, Discovery in Aid of Execution. Keystone sent a notice of

deposition to Mr. Rubin, who lives in New York.[1] Mr. Rubin did not appear. Keystone then filed a Petition for Supplementary Relief in Aid of Execution, pursuant to Pa.R.C.P. 118, requesting the court to order him to attend a deposition. Mr. Rubin filed preliminary objections, claiming that the motion should be dismissed for lack of jurisdiction because the motion was not served within the Commonwealth. He also claimed he had no obligation to appear at the deposition because he was not subpoenaed. At argument on the motion, counsel for Mr. Rubin appeared for the purpose of contesting jurisdiction. During the argument counsel for Keystone made an oral motion for sanctions, which was later submitted in written form, again asking the court to direct Mr. Rubin to attend a deposition. Counsel for Mr. Rubin filed preliminary objections to the motion, arguing that the motion was not properly before the court and was not properly served.

Discussion

The two rules at issue in this case were obviously enacted to help creditors obtain the money owed to them. Rule 3117, entitled "Discovery in Aid of Execution," states:

> Plaintiff at any time after judgment, before or after the issuance of a writ of execution, may, for the purpose of discovery of assets of the defendant, take the testimony of any person, including a garnishee, upon oral examination or written interrogatories as provided by the rules relating to Depositions and Discovery. The prothonotary of the county in which the judgment has been entered or of the county within this Commonwealth where the deposition is to be taken, shall issue a subpoena to testify.

Rule 3118, entitled, "Supplementary Relief in Aid of Execution," provides a list of remedies

[1] It appears that Keystone mistakenly addressed the notice to "Robin" Rubin. However, there is no question that Robert Rubin received it and indeed, Mr. Rubin did not even raise this issue in his preliminary objections to the petition for Supplementary Relief in Aid of Execution.

available to creditors such as enjoining the transfer of the debtor's assets, directing the defendant or other person to preserve collateral security for the debtor's property, and directing that debtor property removed from the county or concealed to avoid execution be delivered to the sheriff for execution.

I. Necessity of Subpoena

Mr. Rubin first argues that he had no obligation to appear for his scheduled deposition because he did not receive a subpoena. While it is possible to interpret Rule 3117(a) as requiring defendants to be subpoenaed for a deposition, that interpretation would clash with Rule 4007.1(a), which states:

> A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action . . . . A party noticed to be deposed shall be required to appear without subpoena.

Rather than provoke a conflict between rules, this court prefers to be a peacemaker. This approach is in harmony with a basic rule of statutory construction: whenever possible, two statutes must be construed so that effect may be given to both. 1 Pa. C.S.A. § 1933; Pa.R.Civ.P. 127(b).

Rule 3117(a) need not be interpreted as requiring a defendant to be subpoenaed. In fact, the first sentence of the rule indicates precisely the opposite. It states that the plaintiff may take the testimony of the defendant upon oral examination "as provided by the rules relating to Depositions and Discovery." We therefore look to those rules for guidance as to how the deposition is set up and conducted, and Rule 4007.1(a) informs us that a party need not be subpoenaed. There is no reason why the pre-trial discovery rules should

not also apply to post-judgment discovery. On the contrary, Rule 4001 states that the discovery rules apply to "any civil action or proceeding at law or in equity brought in or appealed to any court which is subject to these rules . . . ."

While it is true that the last line of Rule 3117(a) states that the prothonotary "shall" issue a subpoena to testify, this is *after* the reader has been referred to the discovery rules. Under the discovery rules, non-parties must be subpoenaed for depositions. Therefore, the final sentence of Rule 3117(a) is merely informing us that if a subpoena is needed, it can be issued by either the prothonotary of the county in which the judgment has been entered or of the county where the deposition is to be taken. This *broadens* the deposition rules, allowing a subpoena to be issued in any county in the Commonwealth, regardless of whether judgment has been entered in the county or whether the deponent is a resident of the county. Clearly, the Supreme Court's intent in promulgating the rule was to make discovery in aid of execution *easier* than pre-trial discovery. Rule 3117(b) also permits all reasonable expenses in connection with the discovery to be taxed against the defendant if the deposition leads to knowledge of property liable to execution. This provision, too, demonstrates the Supreme Court's intent to facilitate the collecting of judgments.

Such a liberal interpretation of Rule 3117(a) is in line with appellate court statements regarding the rule. In Helms v. Chandler, 423 Pa. 77, 223 A.2d 30 (1966), the Supreme Court noted the rule's goal of supplying judgment creditors with tools to learn where assets of the debtor may be found. In Painewebber v. Devin, 442 Pa. Super. 40, 658 A.2d 409, 412 (1995), the Superior Court commented on the broad application of Rule 3117, which permits discovery at any time after judgment, even before a writ of execution has been

issued. The court discussed the rule's broad range, permitting discovery by oral examination, written interrogatories, and requests for production of documents. Id. at 413. The Superior Court also pointed out that the rule allows discovery requests to be directed toward any person who may have information regarding the location of the debtor's assets. Id. at 412-413. In fact, the "pure discovery" intent of the rule is "sufficiently broad to allow discovery even of persons known *not* to possess assets of the defendant where such discovery could provide information which would be relevant to the plaintiff's efforts to locate assets." Id. at 415. The court thus concluded that a trial court erred in quashing a subpoena where the plaintiff sought to learn whether a corporation had taken deductions that could confirm whether it was paying the debtor's living expenses in compensation for services performed.[2]

The Supreme Court's intention to help judgment creditors collect is also evident in the Rule 3118, which allows the creditor to act on information received through Rule 3117 to preserve the assets subject to execution. Under Rule 3118, a judgment creditor can petition a court for various types of relief to maintain the status quo with respect to a debtor's assets. The Superior Court called Rule 3118 "streamlined," and has ruled that to obtain relief under the rule the plaintiff need not prove the validity of the judgment, nor even establish the traditional requirements for an injunction in order to enjoin the debtor from transferring assets. Kaplan v. I. Kaplan, 422 Pa. Super. 215, 619 A.2d 322 (1993).

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[2] Of course, the scope of discovery under Rule 3117 is not unlimited. Any discovery conducted under the rule must be relevant to learning about the defendant's assets that are subject to execution. Moreover, under Rules 4011 and 4012 the discovery cannot be sought in bad faith, cannot cause unreasonable annoyance, embarrassment, oppression, burden or expense, and cannot relate to a privileged matter. Id. at 413.

In light of the Supreme Court's intent to ease the way for judgment creditors to obtain the money owed, this court simply cannot believe Rule 3117(a) requires a party to be subpoenaed for deposition. It is incongruous that Rule 3117(a) should act as a limitation on discovery otherwise available to the parties. In fact, the Superior Court has indicated that Rule 3117 should be viewed as allowing more types of discovery than explicitly mentioned in the text. In Painewebber, the court held that although Rule 3117 mentions only written interrogatories and oral depositions, it should be read to allow subpoenas duces tecum, as well. Painewebber, supra, at 413 n.1 (stating that under Rule 3117 the general mechanisms and procedures regarding written interrogatories and oral depositions in preparation for trial are also applicable in conducting discovery in aid of execution).[3] The intent is to make the creditor's job easier, not more difficult.

Mr. Rubin, in a final attempt to spare himself from the fate of being deposed, invokes the wisdom of Goodrich Amran. Without providing a reason for its conclusion, that legal oracle states: "As a general rule, a subpoena will be necessary to ensure the actual attendance of a party at a deposition and, unless it is shown that a defendant has been properly subpoenaed, the defendant will not be held in contempt." Goodrich Amran 3d § 3117(a):9. That passage, however, does not win the day for our defiant defendant. It merely proves that even the most esteemed legal gurus can sometimes be wrong.

II Service of the Petition for Supplementary Relief

[3] See also Norris v. Jonnett, 23 D. & C. 3d 155 (1982), where the trial court held that the rule allows a plaintiff to request the defendant to produce documents, even though the text does not explicitly state so.

Even though the court finds that Mr. Rubin had an obligation to attend his deposition, the court must dismiss Keystone's petition for supplementary relief because Mr. Rubin appears to be correct on one point: the petition was not properly served upon him. Rule 3118(b) states: "The petition and notice of the hearing shall be served only within the Commonwealth in the manner prescribed by Rule 440 for the service of legal papers other than original process." Although Rule 440(2)(i) permits a party to be served by mail, for some reason Rule 3118(b) appears to explicitly limit such service to areas within the Commonwealth. Therefore, the court cannot compel Mr. Rubin to attend his deposition under Keystone's petition for supplementary relief.[4]

III Motion for Sanctions

Unlike a petition for supplementary relief, a motion for sanctions may be served outside the Commonwealth. Under Rule 4019(a)(1)(iv) the court may issue an appropriate order if after notice a party fails to attend a deposition. However, the court must deny Keystone's motion for sanctions because, once again, it was not properly served. The record shows that the motion was served upon attorney Elliott Weiss, who represented Mr. Rubin only for purposes of contesting jurisdiction. Therefore, Mr. Rubin could not be served through Mr. Weiss. Although the Rules of Civil Procedure do not explicitly state this principle, this conclusion naturally follows from Rule 1012(a), which states:

> A party may enter a written appearance which shall state an address within the Commonwealth at which papers may be served. Such appearance shall

[4] As discussed in footnote one, the notice of deposition was flawed due to a mistaken first name. Although Mr. Rubin did not complain about that in his preliminary objections, that could be an additional reason to dismiss the petition.

> not constitute a waiver of the right to raise any defense including questions of jurisdiction or venue.

Appellate cases have explained that this rule abolishes the former doctrine of waiver by general appearance. *See* Monaco v. Montgomery Cab Co., 417 Pa. 135, 139, n. 1, 208 A.2d 252, 254, n. 1 (1965); Com., Dept. of Transp., etc. v. Samek, 71 Pa. Cmwlth. 209, 454 A.2d 229 (1983). *See also* Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A.2d 493, 497 n. 3 (1984) (stating that the mere fact that counsel entered appearances on behalf of parties does not mean that the parties waived the right to challenge the opposing party's failure to effect proper service of a writ of summons.)

If a party could be served when they appeared to contest jurisdiction, or if their in-state attorney contesting jurisdiction could be served, that party would effectively lose the right to challenge jurisdiction, for they would become a sitting duck–easy prey for their opponents to pick off by serving as soon as they walked through the courthouse door. This court, as well as the Rules of Civil Procedure, will not permit such unsportsmanlike behavior. Mr. Rubin must be served under Rule 440(a)(2)(i), by hand delivery, mail, fax, or by leaving it at his address or place of business.

O R D E R

AND NOW, this _____ day of May, 1999, for the reasons stated in the above opinion, the preliminary objections filed by Robert Rubin to the Petition for Supplementary Relief in Aid of Execution are sustained and the petition is dismissed. The preliminary objections filed by Robert Rubin to the Motion for Sanctions are also sustained and the motion is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell, Esq., Law Clerk
Hon. Clinton W. Smith
William Carlucci, Esq.
Elliott Weiss, Esq.
Gary Weber, Esq.