

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FLORENCE A. MARSHALL and : No. 02-00635
DONALD FISCHER, Individually :
and on behalf of others :
Similarly situated, :
Plaintiffs :
vs. : CIVIL ACTION - LAW
PREMIUM FINANCE TRUST and :
MALLALIEU-GOLDER INSURANCE :
AGENCY, INC., :
Defendants : 1925(a) Opinion

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WOODLANDS BANK, : No. 02-00893
Plaintiff :
vs. : CIVIL ACTION - LAW
MALLALIEU-GOLDER INSURANCE :
AGENCY, INC., :
Defendant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's Orders issued April 29, 2003 to the two above-captioned case numbers.

Plaintiffs Florence A. Marshall and Donald Marshall individually and on behalf of others similarly situated filed a Complaint on or about April 16, 2002 against Defendant Premium Finance Trust and Mallalieu-Golder Agency, Inc. to case No. 02-00635. Plaintiffs were investors in the Premium Finance Trust and Premium Finance Trust, II, which were wholly

owned subsidiaries of Mallalieu-Golder. In return for their investments, Plaintiffs were given promissory notes in which Mallalieu-Golder guaranteed the principal and interest payments. Upon the death of Larry Fiorini, owner of Mallalieu-Golder, on March 22, 2002, it was determined that there was not sufficient funds in the trusts to pay the outstanding payments on the promissory notes to all investors in the Premium Finance Trusts. This led to Mr. Fiorini's surviving partner, David Eakin, writing a letter dated April 10, 2002 to all Premium Trust investors informing them that the amount of obligations owed to the investors "far exceeds the current assets available to repay the same." Mr. Eakin explained he had no idea what had caused the significant shortfall of assets and he was turning the matter over to the appropriate law enforcement authorities for a complete investigation.

This letter led to Plaintiffs filing their Complaint on or about April 26, 2002. Plaintiffs' Complaint requested that the case be certified by the Court as a class action on behalf of all persons who were investors with Defendant Premium Finance Trust. In an Order dated May 17, 2002, the Court signed certified case 02-00635 as a class action without objection from Defendants Premium and Mallalieu-Golder.

The amount of money owed by Defendants Premium and Mallalieu-Golder to Class Plaintiffs exceeded six (6) million dollars. With the agreement of defense counsel, the Court signed an Order submitted by class counsel on May 29, 2002

that dealt with \$1,500,000.00 of life insurance proceeds which were being paid to Mallalieu-Golder due to the death of Larry Fiorini, who handled the Premium Finance Trust funds. William Knecht, Esquire, counsel for the Defendants, was seeking to maintain Mallalieu-Golder in business with the prospect of selling the business to a third party. Mr. Knecht and Attorney Joseph Orso, counsel for the Class, therefore, sought to create an agreement and Court Order that would preserve funds for the class while allowing Mallalieu-Golder to remain in business. In effectuating this intention, the Court Order of May 29, 2002 spoke to the placement of these funds. The Order transferred \$250,000.00 of the life insurance funds to Attorney Knecht's law firm as agent for Mallalieu-Golder Insurance Agency, Inc. These funds were to be used for the ongoing business of Mallalieu-Golder. This provision indicated that Mallalieu-Golder should provide proof of any payments to the insurance company creditors of Mallalieu-Golder Insurance Agency, Inc. from the \$250,000.00 fund to Class counsel. Provision 4 further indicated that such payments could not be made without consent of the class counsel if payment was made prior to any sale of Mallalieu-Golder; however, class counsel could not unreasonably withhold consent. The remaining approximately 1.2 million dollars of the insurance proceeds were transferred to Attorney Orso's law firm for the benefit of Plaintiffs.

Provision 5 of the Court Order further indicated Mallalieu-Golder must obtain an Order of Court or consent of

class creditors prior to any sale and/or transfer of Mallalieu-Golder Insurance Agency's assets including stock.¹

Provision 6 of the Order stated that the class creditors shall retain all claims, rights, causes of action and demands against Mallalieu-Golder, Premium Finance Trust or any known or unknown entity that may have liability to the class creditors.

Finally, provision 7 of the Order stated, "any aggrieved party may seek relief via further Order of Court".

On December 12, 2002 a stipulated Order was signed by the Court that entered judgment in favor of Plaintiffs and against Defendants in the amount of \$6,686.079.07 in case number 02-00635.

With this background in mind, the events of a separate litigation, also subject of this appeal in which Mallalieu-Golder was a defendant, became important. In case No. 02-00,893, Plaintiff Woodlands Bank sued Mallalieu-Golder Insurance Agency, Inc. On July 3, 2002, Woodlands Bank obtained judgment against Mallalieu-Golder in the amount of \$157,030.69. In seeking to collect on this judgment, Woodlands Bank obtained judgment as garnishee against Attorney William Knecht's law firm, counsel for Mallalieu-Golder in the amount of \$150,629.68 on August 20, 2002. As previously

¹ Although the Court did not hold an evidentiary hearing concerning this matter, in fact, Mallalieu-Golder was sold to a third party. The Court believes this sale was with approval of class counsel and the sale was approved with the thought of some advantage to the Plaintiff class in seeing the business sold as a viable entity. See the Court's Order and Stipulation dated October 29, 2002 approving the sale of Mallalieu-Golder to Henry Dunn, Inc.

stated, Mr. Knecht's law firm was holding the sum of \$250,000.00 pursuant to the Court Order of May 29, 2002 in this Class Action lawsuit.

On or about September 4, 2002, Attorney Knecht wrote a letter to Attorney Orso, class counsel. In this letter Attorney Knecht informed Attorney Orso of the Woodlands Bank judgment against Mallalieu-Golder and informed him that Woodlands Bank garnished the escrow account containing the \$250,000.00 subject to the May 29, 2002 Order. In his letter Mr. Knecht also sought Mr. Orso's consent to release the funds to pay the judgment.² It is not disputed that Mr. Orso did not agree to this payment to Woodlands Bank. It is also undisputed that Mr. Orso did not at that time take any further action such as a petition to this Court or an effort to intervene in the Woodlands Bank case.

On or about October 24, 2002, Woodlands Bank filed a Praecipe for Entry of Judgment against Jersey Shore State Bank for the sum of \$150,629.68 based upon Mr. Knecht's Answers to Interrogatories for execution of judgment in case number 02-00,893, Woodlands Bank v. Mallalieu-Golder. A Writ of Attachment was also filed. See Answer to Petition to Intervene at averment 8 filed by Attorney Knecht on April 11, 2003. Jersey Shore State Bank then released funds in the amount of \$150,629.68. Apparently, the \$250,000.00 fund discussed in the Court's Order dated May 29, 2002, was being

² With consent of all parties at the argument before the Court regarding this matter, Attorney Knecht's letter to Mr. Orso was entered into

held in Jersey Shore State Bank and therefore this fund was diminished by the payment to Woodlands Bank in the amount of \$150,629.68.

Several months after the garnishment actions by Woodlands bank in October 2002, class counsel filed several motions to this Court. On or about April 7, 2003, class counsel filed a Petition to Intervene in the case of Woodlands Bank v. Mallalieu-Golder, Case No. 02-00,893. This motion was filed over five (5) months after Attorney Knecht sent class counsel his letter dated September 4, 2002 notifying Attorney Orso of Woodlands Bank's garnishment activities. Class counsel also filed a motion directed to Attorney Knecht, entitled "Motion for Sanctions for violation of the Court Order of May 29, 2002," and also, a Petition to Set Aside Execution and for Return of the Funds obtained by Woodlands Bank to the \$250,000.00 escrow fund discussed in the Court's Order of May 29, 2002.

The Court heard argument by counsel on the Petition to Intervene in the Woodlands case on April 11, 2003. Attorney Orso appeared for the Plaintiff class, Attorney Knecht appeared for Mallalieu-Golder, and Attorney William Carlucci, appeared for Woodlands Bank.³ After considering the positions and arguments of all parties, the Court entered its

evidence.

³ There was some confusion among the Court and all counsel as to which of the many motions filed were scheduled for argument on the date in question. The Court heard argument on the Petition to Intervene. In response to the arguments, the Court felt its Order of April 29, 2003 resolved all the outstanding motions and the Court did not schedule further argument or hearing.

Orders of April 29, 2003, which it believes resolved the outstanding motions and petitions in both cases. See this Court's Order of April 29, 2003 to each above-captioned case numbers explaining the Court's decision.

On or about May 9, 2003, class counsel filed Notice of Appeal to the April 29, 2003 Order in case number 02-00635.

The Court ordered class counsel to file Statement of Matters Complained of on Appeal. On or about May 20, 2003, class counsel filed their Statement and listed the following two (2) issues:

1. The Court's determination that a portion of the proceeds of the life insurance policy were in custodia legis and a portion of the proceeds were not in custodia legis is without a legal basis and error as a matter of law.

2. The Court committed error by making factual findings without any record.

On or about May 29, 2003, class counsel filed a Notice of Appeal to the April 29, 2003 Order in Woodlands Bank v. Mallalieu-Golder Insurance Agency, Inc., case number 02-00893. The Court ordered counsel to file and Statement of Matters Complained of on appeal. On or about June 9, 2003, Attorney Orso filed Matters Complained of on Appeal to the Woodlands Bank v. Mallalieu-Golder case, No. 02-00893. The following three issues are raised by Attorney Orso:

1. The Court's finding that a party cannot Intervene after a Judgment is entered was in error as the Interveners have no remedy to the garnishment of property in

which the Investors have a legal interest, as a garnishment is, by definition, a post-judgment procedure.

2. The Court committed error by denying the Petition to Set Aside Execution as the Court had custody of the garnished funds pursuant to Court Order and doctrine of in custodia legis.

3. The Court committed error by making factual findings without any record.

The purpose of this opinion is to supplement our Orders of April 29, 2003 to the above-captioned cases and to respond to the Matters Complained of on Appeal in each case.

Issues 1 and 2 in the Marshall appeal are basically the same as issues 2 and 3 in the Woodlands Bank case appeal. Therefore, the Court will discuss them together. Class counsel argues in both cases that Woodlands Bank should not have been able to execute upon the \$250,000 fund controlled by Mallalieu-Golder and their counsel, Attorney William Knecht, because this fund was in custodia legis and was under Court control. Class counsel disagrees with the Court's ruling and Orders of April 29, 2003, where it distinguished \$1.2 million fund from the \$250,000 fund. As stated in the Order of April 29, the \$1.2 million fund is for the benefit of the Class and it should not be subject to attachments, executions or other claims. In fact, this Court has denied petitions of other creditors of Mallalieu-Golder who have sought to intervene in case number 02-00635 to assert a claim in the \$1.2 million Class fund. See the Order of April 17, 2003 denying a

Petition to Intervene filed by Lloyd Burns and Walter Lord. However, the \$250,000 fund was earmarked for Mallalieu-Golder to continue operation as a business entity and to pay its creditors. Thus, the Court does not believe the \$250,000 is in custodia legis.

Even if the funds were in custodia legis, the Court would not have set aside the execution on the \$250,000 fund. The Court Order of May 29, 2002, created two separate accounts: the \$1.2 million account for the class and the \$250,000 account for Mallalieu-Golder creditor. If Mallalieu-Golder had come to the Court for approval of this transfer of funds, the Court would have approved the transfer, because it was used to pay a legitimate creditor of Mallalieu-Golder. See also, the Court's discussion of this issue in its Orders of April 29, 2003, pp. 5-6.

Next, class counsel argues that the Court erred in not holding a further evidentiary hearing. When he was before the Court on April 29, 2003, class counsel agreed to admit into evidence Attorney Kencht's letter dated September 4, 2002 to Attorney Orso. In their written request for reconsideration filed to this Court, class counsel has not identified what additional facts would need to be developed to decide the legal issues presented. The status of the separate \$1.2 million fund and the \$250,000 fund and the purpose of each fund is not in dispute. Therefore, the Court does not see how an additional factual hearing would be of any benefit in light of the issues presented.

Finally, class counsel complains the Court erred in ruling that the Plaintiff Class in case No. 02-00635 could not intervene in the case of Woodlands Bank v. Mallalieu-Golder, No. 02-00893. However, as noted by the Court in its April 29, 2003 Order, the Woodlands Bank case was complete and was no longer in litigation when the Class sought to intervene in case No. 02-00893. Rule 2327 provides that a party may intervene during the pendency of an action if one of four criteria are met. Pa.R.Civ.P. 2327. In light of the arguments regarding in custodia legis, Class counsel is apparently asserting the class would fall within subparagraph (2) of this rule. However, by the time class counsel filed the Petition to Intervene on April 7, 2003, the Woodlands Bank case was no longer pending. The Intervention Petition was filed nine (9) months after Woodlands Bank obtained its judgment against Mallalieu-Golder and more than five (5) months after the Woodlands Bank judgment was paid. There was no case in existence when the Class sought to intervene.

Even assuming the class was an entity that could intervene under Rule 2327, the Court properly denied the petition under Rule 2329(3). Rule 2329(3) provides: "an application for intervention may be refused, if . . . (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." The Court finds undue delay on the part of the petitioner. William Knecht, counsel for Mallalieu-Golder,

informed class counsel on or about September 4, 2002 that Woodlands Bank was attempting to execute on the \$250,000 fund. Class counsel, however, did not file a petition to intervene until April 7, 2003, which was seven months after Attorney Knecht's letter and five months after Woodlands Bank had already obtained the amount of its judgment from the fund.

In summary, the Court denied the Petition to Intervene and the Petition to Set Aside Execution because: (1) there no longer was a pending action in which to intervene; (2) the petitioner unduly delayed making an application for intervention; and (3) the fund from which Woodlands Bank obtained monies was a fund designated for creditors of Mallalieu-Golder. Similarly, the Court denied the Motion for Sanctions because: (1) Attorney Knecht did not voluntarily pay Woodlands Bank; (2) the monies came from the creditor fund and not the class fund; and (3) if a petition had been filed for Court approval to release the funds, the Court would have granted it.

DATE: _____

By The Court,

Kenneth D. Brown, Judge

cc: Joseph F. Orso, III, Esquire
William Knecht, Esquire
William Carlucci, Esquire
Work file
Gary Weber, Esquire (Lycoming Reporter)