

[Cite as *Franklin Mgt. Industries, Inc. v. Motorcars Infiniti, Inc.*, 2011-Ohio-1693.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95391

FRANKLIN MANAGEMENT INDUSTRIES, INC.

PLAINTIFF-APPELLEE

vs.

MOTORCARS INFINITI, INC., ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-666009

BEFORE: Rocco, J., Kilbane, A.J., and Blackmon, J.

RELEASED AND JOURNALIZED: April 7, 2011

ATTORNEYS FOR APPELLANTS

Sarah Gabinet
Gregory P. Amend
Jon J. Pinney
Kohrman, Jackson & Krantz PLL
1375 East Ninth Street
One Cleveland Center, 20th Floor
Cleveland, Ohio 44114

ATTORNEY FOR APPELLEE

James B. Rosenthal
Cohen, Rosenthal & Kramer, LLP
Hoyt Block Building – Suite 400
700 West St. Clair Avenue
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} Defendants-appellants Motorcars Infiniti, Inc. and Motorcars East, Inc. (“Motorcars”) appeal from the trial court’s decisions that permitted execution to proceed on an arbitration award against them in favor of plaintiff-appellee Franklin Management Industries, Inc. (“FMI”), and subsequently granted FMI’s motions for orders of garnishment against Motorcars’ sole shareholders, James G. Pilla and Lee G. Seidman.¹

¹This court finds this appeal falls under the definition of a “final order”

{¶ 2} Motorcars present five assignments of error, arguing the trial court improperly granted FMI's motions for several reasons. Motorcars contend that: 1) orders of garnishment cannot be issued against "non parties"; 2) the "trust fund doctrine" has been supplanted by R.C. 1701.95, therefore, the trial court could not use it to enable FMI to garnish personal assets of Motorcars' shareholders; 3) FMI failed to establish shareholder liability for the debt owed by Motorcars to FMI; 4) FMI's claims against Motorcars' shareholders were time-barred; and, 5) since Motorcars retains an asset sufficient to satisfy FMI's judgment, the personal assets of Motorcars' shareholders cannot be subject to garnishment.

{¶ 3} Upon a review of the record, this court cannot find the trial court erred in this matter. Consequently, Motorcars' assignments of error are overruled, and the trial court's order is affirmed.

{¶ 4} This court previously reviewed some of the facts of this case in *Franklin Management Industries, Inc. v. Motorcars Infiniti, Inc.*, Cuyahoga App. No. 93630, 2010-Ohio-1871, stating as follows at ¶2-9:

pursuant to R.C. 2505.02(B)(2). Cf., *Marymount Hosp. v. Mitchell* (May 25, 1978), Cuyahoga App. No. 37344 (order directing a garnishee to pay into court money owing to a judgment debtor is not itself a judgment, but case was decided prior to amendments to R.C. 2505.02).

{¶ 5} “In February 1994, FMI and Motorcars entered into an agreement that allowed FMI to operate a bodyshop out of the basement of one of Motorcars’ dealerships. Pursuant to the agreement, FMI paid Motorcars rent and commissions in exchange for exclusive referrals to FMI’s bodyshop.

{¶ 6} “On February 11, 2000, Motorcars entered into an Asset Purchase Agreement with United Auto Group (“UAG”), which elected to terminate the existing agreement between FMI and Motorcars for bodyshop referrals. FMI pursued claims against Motorcars and UAG, and eventually arbitrated its claims separately against both entities. Only the outcome of the arbitration between FMI and Motorcars is relevant to this appeal.

{¶ 7} “On July 7, 2008, a panel from the American Arbitration Association awarded approximately \$1,100,000, including prejudgment interest, to FMI and against Motorcars and other parties not relevant to this appeal.

{¶ 8} “On July 25, 2008, FMI sought to confirm the arbitration award in the trial court.

{¶ 9} “On December 12, 2008, the trial court adopted the findings of the arbitration panel.

{¶ 10} “On February 12, 2009, the trial court entered judgment against Motorcars.

{¶ 11} “On March 6, 2009, FMI filed multiple writs of execution upon Motorcars in an attempt to collect upon the judgment debt. [These attempts were unsuccessful.]

{¶ 12} “On April 30, 2009, FMI filed what it termed a motion for orders for garnishment of property other than personal earnings, in which it requested that the trial court garnish the personal assets of two of Motorcars’ shareholders. The trial court granted this motion on June 18, 2009.”

{¶ 13} Motorcars filed a notice of appeal from the June 18, 2009 order. This court dismissed the appeal for lack of a final order. *Id.*, ¶16-17.

{¶ 14} By the time the matter came before the trial court once again, the court already had conducted a garnishment hearing. *Id.*, at Footnote 1. Thus, on June 25, 2010, the trial court issued a judgment entry permitting “garnishment [to] proceed.”

{¶ 15} On July 6, 2010, the trial court issued a journal entry that stated in pertinent part as follows:

{¶ 16} “ * * * [T]he Court hereby finds that garnishee Lee G. Seidman has in his possession money of Judgment Debtors [Motorcars] in the amount of \$2,241,876, and he is hereby

{¶ 17} “ORDERED to pay * * * the sum of \$1,100,000 plus \$42,433.60 in interest through December 31, 2008, plus \$627.80 in costs through June 9,

2010, plus interest at the rate of \$55,000 in interest from January 1, 2009 through December 31, 2009, plus interest at the rate of \$120.55 per day from January 1, 2010 through such date as the amount is paid.

{¶ 18} “It is further ordered that the Clerk * * * shall place such funds in an interest-bearing account and from such funds shall remit to Judgment Creditor [FMI] an amount sufficient to satisfy the judgment entered in this case on February 12, 2009, and remit any remaining balance back to the garnishee.

{¶ 19} * * * .”

{¶ 20} That same day, the trial court issued an identical order that referred to “garnishee James G. Pilla.”

{¶ 21} Motorcars filed their notice of appeal in this case from those July 6, 2010 orders, and from the June 25, 2010 order that permitted garnishment to proceed.² They present the following six assignments of error:

{¶ 22} “**I. The Trial Court erred by authorizing the issuance of Orders of Garnishment against non-parties.**

{¶ 23} “**II. The Trial Court erred by failing to recognize that the ‘trust fund doctrine’ was supplanted by the Ohio General Assembly**

²Motorcars raises no challenge to the trial court’s February 12, 2009 decision to enter judgment on the arbitrators’ award and the amounts of the judgment set forth therein.

with the 1955 codification of corporate dissolution statutes that expressly govern the liability of shareholders of a dissolved corporation.

{¶ 24} “III. The Trial Court erred by authorizing FMI to ‘garnish’ the personal assets of Motorcars Infiniti and Motorcars Mercedes’ shareholders without requiring FMI to establish shareholder liability under R.C. 1701.95.

{¶ 25} “IV. The Trial Court erred by failing to recognize that any claim that FMI could have against the shareholders is time-barred.

{¶ 26} “V. The Trial Court erred by permitting FMI to ‘garnish’ the personal assets of Motorcars’ shareholders even though FMI has admitted that Motorcars Infiniti and Motorcars Mercedes have a corporate asset sufficient to satisfy the judgment.

{¶ 27} “VI. The Trial Court erred by holding that the ‘trust fund doctrine’ enables FMI to garnish the personal assets of Motorcars Infiniti and Motorcars Mercedes’ shareholders.”

{¶ 28} In their first assignment of error, Motorcars argue the trial court could not lawfully authorize FMI to obtain a judgment against their shareholders, because the shareholders were never made parties to this

proceeding. Taking this argument to its logical conclusion, Motorcars would lack standing to raise it. Nevertheless, this court disagrees.

{¶ 29} Civ.R. 71 provides in pertinent part that “ * * *[W]hen obedience to an order may lawfully be enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.”

{¶ 30} According to the Ohio Supreme Court:

{¶ 31} “Prior case law has unequivocally held that *a garnishee is not a party to a garnishment proceeding*. As stated in the second paragraph of the syllabus in *Secor v. Witter* (1883), 39 Ohio St. 218, ‘ * * * a garnishee who is summoned to answer is not a party, nor has he his day in court in that [garnishment] action. His duty is to appear and answer all questions touching the property and *credits of defendant in his possession* or under his control, and truly disclose the amount owing by him to defendant, whether due or not * * *.’” The *Secor* court held that an order to pay into court merely *assigned the defendant debtor’s claim against the garnishee to the plaintiff creditor*. See *id.* at paragraph four of the syllabus. It remained for the plaintiff to enforce the assigned claim against the garnishee in a *separate* civil action authorized by statute. *Id.*

{¶ 32} “ * * * .

{¶ 33} “*The present statutes governing postjudgment garnishment continue to apply these principles.* The garnishee continues to be treated as a nonparty for purposes of the garnishment proceeding. * * * In short, *the garnishee is a stakeholder or witness and not a party* to the garnishment proceeding for purposes of the present statutes. (Emphasis added.)” *Januzzi v. Hickman* (1991), 61 Ohio St.3d 40, 572 N.E.2d 642.

{¶ 34} R.C. 2716.11 presently provides:

{¶ 35} “A *proceeding for garnishment* of property, other than personal earnings, *may be commenced after a judgment has been obtained* by a judgment creditor *by the filing of an affidavit in writing made by the judgment creditor or the judgment creditor’s attorney setting forth all of the following:*

{¶ 36} “(A) The name of the judgment debtor whose property the judgment creditor seeks to garnish;

{¶ 37} “(B) A description of the property;

{¶ 38} “(C) The name and address of *the garnishee who may have in the garnishee’s hands or control money, property, or credits, other than personal earnings, of the judgment debtor.* (Emphasis added.)”

{¶ 39} FMI filed such an affidavit on April 20, 2009. It fully complied with the requirements set forth in the statute.

{¶ 40} Moreover, R.C. 2716.01(B) states:

{¶ 41} “(B) A person who obtains a judgment against another person may garnish the property, other than personal earnings, of the person against whom judgment was obtained, *if the property is in the possession of a person other than the person against whom judgment was obtained, only through a proceeding in garnishment* and only in accordance with this chapter (Emphasis added).”

{¶ 42} The record reflects the trial court conducted a hearing pursuant to R.C. 2716.13(A), at which the court had the opportunity to consider, in accordance with that section of the statute, “the amount of money, property, or credits, other than personal earnings, of [Motorcars] in the hands of the garnishee[s], if any, that can be used to satisfy all or part of the debt owed by the judgment debtor to the judgment creditor.”

{¶ 43} In fact, at that hearing, Seidman and Pilla informed the trial court through their attorney that they did not dispute FMI’s assertion that “they received distributions of [Motorcars] assets in excess of the amount of FMI’s claim.” Motorcars also has not appealed from the trial court’s decision to confirm the arbitration award in FMI’s favor.

{¶ 44} In light of those facts, the trial court committed no error in granting FMI's motion for orders of garnishment against Motorcars' shareholders. Motorcars first assignment of error, therefore, is overruled.

{¶ 45} Motorcars argues in its second and sixth assignments of error that the "trust fund doctrine," upon which FMI relied in seeking garnishment from Motorcars' shareholders, has been abrogated by statute, viz., R.C. 1701.95, enacted in 1955.³ The Ohio Supreme Court has held otherwise.

³R.C. 1701.95, **Liability of directors and shareholders for unlawful loans, dividends, or distributions**, provides in pertinent part:

"(A)(1) In addition to any other liabilities imposed by law upon *directors* of a corporation and except as provided in division (B) of this section, *directors shall be jointly and severally liable to the corporation* as provided in division (A)(2) of this section * * * .

" * * *

"(D) A *shareholder* who knowingly receives any dividend, distribution, or payment made contrary to law or the articles shall be *liable to the corporation* for the amount received by that shareholder that is in excess of the amount that could have been paid or distributed without violation of law or the articles.

" * * *

"(F) No action shall be brought by or on behalf of a corporation upon any cause of action *arising under division (A)(1)(a) or (b) of this section* at any time after two years from the day on which the violation occurs.

"(G) *Nothing contained in this section shall preclude a creditor whose claim is unpaid from exercising the rights that that creditor otherwise would have by law to enforce that creditor's claim against assets of the corporation paid or distributed to*

shareholders (Emphasis added)."

{¶ 46} In discussing the statutory scheme with respect to this very issue, the supreme court stated as follows:

{¶ 47} “ * * * [T]he General Assembly *intended to codify the ‘trust-fund’ doctrine* expressed by this court in *Rouse, Trustee v. Merchants’ National Bank* (1889), 46 Ohio St. 493, 22 N.E. 293, 5 L.R.A. 378. Judge Williams, speaking for a unanimous court, after stating that when a corporation becomes insolvent the corporate property becomes a trust fund for the benefit of creditors, stated further:

{¶ 48} “ *‘In equity the corporate property becomes the property of the creditors, and their equities are equal. Every creditor, who became such by parting with his money, property or other things of value to the corporation, contributed to the accomplishment of its purposes, and augmented its corporate fund; and where the fund is no longer demanded for the purposes of the corporation, the rights of the creditors become fixed instantly and equally, for each, having contributed to the common fund, has an interest in it, in proportion to his claim, equally with every other creditor.’*

{¶ 49} “ *‘The trust comes into being when the certificate of dissolution is filed. Thereafter the assets are no longer needed to carry out the purposes for which the corporation was formed. This property is held by those in*

charge of winding up the affairs of the corporation to satisfy claims against the corporation and to distribute what remains to the shareholders. *The creditors of a dissolved insolvent corporation are the beneficial owners of its assets. This is the theory behind the statutory grant of power to the Common Pleas Court to issue injunctions, stay proceedings, determine claims and issue other orders. The court is to ensure that each beneficial owner receives his due according to the equities of the situation* (Emphasis added).” *Cay Machine Co. v. Firestone Tire & Rubber Co.* (1963), 175 Ohio St. 295, 194 N.E.2d 425.

{¶ 50} In light of the supreme court’s endorsement of the continued viability of the “trust fund doctrine,” Motorcars’ second and sixth assignments of error also are overruled.

{¶ 51} Motorcars argues in its third assignment of error that before authorizing Motorcars to garnish its shareholders’ assets, FMI should have been required to establish “shareholder liability.” However, this was the purpose of the hearing the trial court held pursuant to R.C. 2713.16(A). Since Motorcars’ shareholders did not dispute the fact that corporation assets were distributed to them that were sufficient to satisfy FMI’s judgment, this assignment of error also is overruled.

{¶ 52} In its fourth assignment of error, Motorcars argues that FMI's claims against the corporation are barred by the limitations period contained in R.C. 1701.95(F). By its terms, however, R.C. 1701.95(F) applies only to actions brought "under Division (A)" against a corporation's "directors." FMI's action to confirm the arbitration award did not fall under that provision. See, also, *Octavia Coal Co. v. Cooper T. Smith Corp.* (June 15, 2001), Licking App. No. 00CA00223.

{¶ 53} R.C. 1701.95(G), on the other hand, provides that "nothing" in the statute precludes a creditor of a corporation "whose claim is unpaid from exercising the rights that that creditor *otherwise would have by law* to enforce that creditor's claim against assets of the corporation paid or distributed to shareholders (Emphasis added)." According to the Ohio Supreme Court, under the law of equity, an unpaid creditor may invoke the "trust fund doctrine" to obtain corporate funds that were distributed to shareholders. *Cay Machine Co.*

{¶ 54} Motorcars' fourth assignment of error, therefore, also is overruled.

{¶ 55} Motorcars next argues that since it still retains a corporate asset even after its dissolution, viz., the "Indemnification Letter," the trial court should have required FMI to garnish that asset, rather than assets of the

shareholders. Motorcars presents no legal authority for this argument as required by App.R. 16(A)(7). Consequently, pursuant to App.R. 12(A)(2), this court declines to address it, and Motorcars' fifth assignment of error is overruled.

{¶ 56} The trial court's orders, accordingly, are affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, JUDGE

MARY EILEEN KILBANE, A.J., and
PATRICIA ANN BLACKMON, J., CONCUR