 73434-2

FILED
Decemnber 31, 2015
Court of Appeals
Division I
State of Washington

No. 73434-2-I
(Appeal of King County No. 13-2-25989-3)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PER and MELODY WESTERDAL,

Appellants,

v.

NAME INTELLIGENCE, INC., JAY WESTERDAL,
AND WESTERDALCORP, LLC,

Respondents.

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF ARGUMENT

Resolution of the appeal requires the court to interpret the Receivership Statute. RCW 7.60. This review is *de novo* because it involves statutory interpretation. *State v. Ammons*, 136 Wn. 2d 453, 693 P.2d 812 (1998).

While receiverships are generally equitable in nature, when the determination requires interpretation of the statutory language, the trial court is not entitled any deference. "'[T]he question of whether equitable relief is appropriate is a question of law,' *Niemann v. Vaughn Cmty. Church*, 154 Wash.2d 365, 374, 113 P.3d 463 (2005), and like all issues of law our review is de novo." *Bank of Am., N.A. v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17, 19 (2007).

The court should not countenance the wrongful conduct of the Appellees to defeat the aims and purposes of the receivership.

II. LEGAL ARGUMENT

This dispute has the potential to produce a useful read for law students and young lawyers learning about equity and the limits on the purposes to which a court should lend its good offices. There is evidence of wrongdoing – a pattern of wrongdoing, even – and a court choosing to look the other way. The victims are dismissed with a wave of the hand,

told to start from scratch another day, in another court, from a diminished legal position because their statutory rights were stripped from them. Appellees' Response Brief ("Appellees' Brief") presents this case as one of expediency. Appellees' Brief prioritizes its assertions that the Receivership Plaintiff, Bero,[1] was paid and that Appellee Jay Westerdal's ("Jay") conduct is "irrelevant." *Appellees' Brief* at 4. Appellees' Brief, at least insofar as their own conduct is concerned, is about ends, not means.

Appellees' Brief thus begs a question that lies at the heart of this appeal: Do the means matter? The Senior Westerdals believe they do. The means are the mechanism by which courts protect their integrity and ensure that disputes are administered in accordance with the applicable statutory framework as well as settled principles of law and equity. The judiciary is constructed on means, and articulated in evidentiary and procedural rules in order to ensure that disputes are resolved justly and premised on truth. Process is important.

The trial court erred when it, like Appellees, focused on the end over the means. The trial court showed no interest in the serious allegations of misconduct and was unmoved by the fact that at pertinent moments, Appellees' counsel was conflicted. It was not concerned that its

[1] Capitalized terms not defined herein have the same meaning given to them in the Brief of Appellants filed with this Court.

own exclusive jurisdiction over receivership property, and the integrity of the receivership process, was subverted by the subject of the Receivership. Adding insult to injury, the trial court rewarded the alleged wrongdoer, releasing to the Appellees the estate's remaining proceeds and conferring on them a preferred legal position as against the Senior Westerdals.

The trial court's error in terminating the Receivership is manifest. It must be reversed.

A. This Appeal is Dominated by Issues of Law.

In addition to serious questions of public policy, questions of law dominate this appeal and it is proper that this Court review the trial court's termination of the Receivership *de novo*. The Appellees' Brief leaves to the side that this Court's review is *de novo*, choosing instead to assume that this Court will review the trial court's decision to terminate the Receivership for abuse of discretion. This is contrary to law. *See Bank of Am., N.A. v. Prestance, supra.*

It is perhaps useful to reiterate the central issue that is before this Court: The trial court erred when it terminated the Receivership. The trial court justified its action through an interpretation of ¶ 2.52 of the Receivership Order, which states:

> This Receivership Order shall terminate only upon payment in full of all amounts due the Receiver and satisfaction in full of all amounts due under the Judgment,

> including any advances made by Plaintiff as provided for herein.

CP 220. Unlike Judge Schubert, who signed the Receivership Order and presided over the case through the end of 2014, Judge Kessler interpreted this clause to mean that upon payment in full to Plaintiff Bero, termination of the Receivership was required. The Senior Westerdals appealed Judge Kessler's erroneous interpretation of the Receivership Order. Determining what the language of a court order means is a matter of law. *See, e.g., Williams v. Principi*, 310 F.3d 1374, 1377 (Fed. Cir. 2002), citing *YBM Magnex, Inc. v. Int'l Trade Comm.*, 145 F.3d 1317, 1320 (Fed. Cir. 1998).

Similarly, interpreting statutory language is a question of law. *See, e.g., U.S. West Comms., Inc. v. Utilities and Trans. Comm'n*, 937 P.2d 1326, 1329 (Wash. Ct. App. 1997), *quoting Waste Mgmt. of Seattle, Inc. v. Utilities and Trans. Comm'n*, 123 Wash. 2d 621, 627, 869 P.2d 1034 (Wash. 1994).

Appellees invoke RCW 7.60.290(5) to support their position that termination of a receivership is left to the trial court's discretion. That subsection provides:

> Upon motion of any party in interest, or upon the court's own motion, the court has the power to discharge the receiver and terminate the court's administration of the property over which the receiver was appointed. If the

> court determines that the appointment of the receiver was wrongfully procured or procured in bad faith, the court may assess against the person who procured the receiver's appointment (a) all of the receiver's fees and other costs of the receivership and (b) any other sanctions the court determines to be appropriate.

RCW 7.60.290(5). The courts have yet to give meaning to this provision. Doing so now entails not only an analysis of RCW 7.60.290(5) itself – for example, whether the sanctions language suggests by negative implication that termination is not permitted when the court is presented with evidence of wrongful conduct or bad faith on the debtor's part – but also other provisions of RCW Chapter 7.60 that implicate the reach and limitations of a trial court's authority to terminate a receivership.

Appellees cannot help but concede that RCW 7.60.290(5) is subject to limitation. Paragraph 2.52 of the Receivership Order is, after all, a limitation on the trial court's discretion, *i.e.*, if Plaintiff Bero was not paid in full, the court was without authority to terminate the Receivership.

Also bearing on the authority conferred by RCW 7.60.290(5) are statutory provisions regarding claims. Foremost among these is RCW 7.60.220(1), which states: "Claims properly served upon the general receiver and ***not disallowed by the court are entitled to share in distributions*** from the estate" in accordance with priorities set forth by statute, but not relevant here. (Emphasis added.) The statutory language is

not equivocal and it affords no discretion. It plainly requires the trial court to rule affirmatively that a claim is disallowed; unless and until it does so, the claim is allowed and the claimant is entitled to share in estate distribution.[2]

Removing any doubt that might linger is the placement of the language requiring affirmative disallowance of claims, which immediately follows the subsection's language authorizing receivers and parties in interest to object to claims. Structured as it is, RCW 7.60.220(1) permits objections then requires that they be sustained. The first was present in the proceedings below; the latter was not. Indeed, in the Order denying the Senior Westerdals' motion to reconsider its termination of the Receivership, the trial court expressly stated:

> The court's March 27 order [terminating the Receivership] does not address the merits of any outstanding claims which may be pursued by separate causes of action.

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[2] The Senior Westerdals wish to clarify that the facts underlying their claim are not before this Court; neither are Appellees' allegations of untimeliness. In the proceedings below, the trial court never ruled on Appellees' objection to the Senior Westerdals' claim. Instead, the trial court acknowledged that the Senior Westerdals did in fact have a meritorious claim to assert while refusing to permit the claim to proceed within the Receivership. Because the trial court did not rule on Appellees' timeliness argument, or any other aspect of their objection to the Senior Westerdals' claim, Appellees' question of timeliness remained unanswered when the trial court ordered the Receivership terminated. This creates a conundrum for Appellees. On the one hand, their position before this Court is partly premised on a legal issue that is outside the scope of this appeal and, thus, not within this Court's jurisdiction to decide. On the other hand, to either challenge the merits of the Senior Westerdals' claim or its timeliness before this Court given its posture below reveals the self-defeating nature of the argument because it necessarily implicates the impropriety of terminating the Receivership without addressing the Senior Westerdals' claim.

CP 987. Moreover, Appellees acknowledge that the Senior Westerdals had a claim in the Receivership, which they admit having paid down while the Receivership was still pending. The Appellees suggest that the partial payment puts the matter at an end, a suggestion that is beside the point because it is not properly before this court, *see, supra,* n.2, and contradicted by the above-quoted language from the trial court's order denying the Senior Westerdals' motion to reconsider termination of the Receivership.

The trial court therefore erred as a matter of law by terminating the Receivership in derogation of the mandatory terms of RCW 7.60.220(1). Properly understood, RCW 7.60.220(1) imposes a limitation on the court's termination authority set forth in RCW 7.60.290(5) when a general receivership is ordered, as was done in this case. This point is underscored by the mandatory language of RCW 7.60.220(1) (allowed claims "are entitled to share in distributions") compared to the permissive language of RCW 7.60.290(5) ("the court has the power" to terminate a receivership).

The authority vested in the trial court by RCW 7.60.290(5) also bumps up against RCW 7.60.055, which confers on the trial court:

> Except as otherwise provided for by this chapter, the court in all cases has exclusive authority over the receiver, and the **exclusive possession and right of control with**

> **respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed**, wherever located, and the **exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property**, and all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties. However, the court does not have exclusive jurisdiction over actions in which a state agency is a party and in which a statute expressly vests jurisdiction or venue elsewhere.

(Emphasis added.) The Senior Westerdals' claim includes their ownership interest in the Holiday.com domain name, a Receivership asset, and damages stemming from the loss of the asset's value occasioned by Jay's interference with the auction in November 2014. The Senior Westerdals also presented the trial court with evidence that Jay transferred Holiday.com, apparently to the entity who supplied the funding Appellees used to satisfy Plaintiff Bero.

The Senior Westerdals' claim is accordingly rooted in the "collection, preservation, application, and distribution of" Receivership property and was a matter within the trial court's exclusive control and jurisdiction. If "exclusive jurisdiction" means "an action must be filed there and nowhere else," *Ledgerwood v. Lansdowne*, 85 P.3d 950 (Wash. Ct. App. 2004), then a trial court's authority to terminate a Receivership is necessarily limited. The court must, at a minimum hear matters only it is empowered to resolve.

As the foregoing makes clear, this appeal involves matters of law, and this Court should review the trial court's actions *de novo*. Upon such review, this court cannot help but conclude that the trial court erred.

B. Trial Court's Unwillingness to Exercise its Authority Should Not be Confused with Discretion.

The actions of the trial court in this case are troublesome. As discussed in the preceding section, the trial court had exclusive authority over the Receivership estate and exclusive jurisdiction to hear matters arising in the Receivership.

The facts before it should have given the trial court pause: There was substantial evidence of misconduct by Jay. The Senior Westerdals detail this misconduct in their opening brief. To summarize:

First, the Receivership itself was partly premised on misconduct. Specifically, Plaintiff Bero's complaint alleged that Jay sold property that, under the Settlement Agreement, was pledged to Plaintiff Bero and that Jay failed to account for proceeds he received from these sales.

Second, Jay interfered with the Receiver's, and thus the trial court's, exclusive authority over receivership property. Jay's letter to Breathe Luxury, with whom he entered into a pre-receivership contract for the auction of Holiday.com, a receivership asset, speaks for itself:

> This letter is to inform you that you are in breach of our agreement with myself and that you have not fulfilled your

> obligations under the contract. At this point with a breach of the agreement, I do not consent to a sale and you are not allowed to sell the domain name under the terms of the agreement we have signed.

CP 307. Jay's letter further (1) purported to claim a breach of the brokerage agreement; (2) demanded that all sale efforts cease; and (3) threatened legal action. *Id.*

Third, Jay shrouded in mystery the source of the funds he used to pay Plaintiff Bero, forcing the Receiver to expend resources in an attempt to understand how the funds were acquired and whether estate property was affected. At the time, Debtors were represented by the Senior Westerdals' former attorney.

Fourth, the Senior Westerdals presented evidence that Jay transferred the domain name Holiday.com, a Receivership asset in which the Senior Westerdals assert an ownership interest, apparently to Appellees' angel benefactor.

As Appellees do in their brief, the trial court ignored these red flags and essentially abdicated its supervisory role over the Appellees and the Receivership property.

The trial court likewise cast aside not only the statutory mandate regarding allowance of claims, as discussed in the preceding section, it

ignored a tool specifically designed to deal with complex claims: the power of estimation codified at RCW 7.60.220(3).

Although discretionary by its own terms, when read in conjunction with 7.60.220(1), the trial court's authority to estimate claims plainly did not confer on it the power to choose neither estimation nor adjudication. This is true not only as a matter of law, but also based on the facts of this case. The estate was solvent. The trial court could easily have first estimated the Senior Westerdals' claim and, second ordered liquidation of Receivership assets sufficient to satisfy the claim.

Curiously, the Appellees' Brief is silent on the issue of estimation. Since there is no Washington authority on point, and because the language of RCW 7.60.220(3) is identical to the estimation provision of the federal Bankruptcy Code, the Senior Westerdals rely on bankruptcy jurisprudence in their brief. Appellants' Brief at 19. Appellees' response is that bankruptcy is different, a conclusory statement that is of no consequence, except to permit the Senior Westerdals' arguments to stand without answer.[3] Washington law is clear that courts will look to federal interpretation of nearly identical statutes. "When a Washington statute has the same purpose as its federal counterpart, we look to federal

[3]Appellees offer the same non-answer to the Senior Westerdals' discussion of RCW 7.60.210(4), which confers a presumption of validity on the Senior Westerdals' claim using language nearly identical to that found in Bankruptcy Rule 3001(f).

decisions to determine the appropriate construction of the statute." *Lee Cook Trucking & Logging v. State, Dep't of Labor & Indus.*, 109 Wn. App. 471, 478, 36 P.3d 558, 562 (2001), citing *Clarke v. Shoreline School Dist. No.* 412, 106 Wash.2d 102, 118, 720 P.2d 793 (1986).

Even under an abuse of discretion standard, the trial court erred. To argue otherwise is to grant a trial court the authority to do as it pleases without regard to the statutory framework within which it is operating, the damage done to creditors by a misbehaving debtor, or the purposes the legislature intended that framework to serve. *See* Appellants' Brief at 24-25, n.7 (RCW Chapter 7.60 revision intended "to create more comprehensive, streamlined, and cost-effective procedures … for the benefit of creditors and other persons having an interest therein").

C. The Trial Court's Termination of the Receivership Produced Waste, Inefficiency, and Substantial Prejudice to the Senior Westerdals.

The Senior Westerdals addressed the prejudice, waste, and inefficiency in their opening brief. The Appellees' response is to make the simple assertion that "No one was prejudiced by termination of the receivership." Appellees' Brief at 20. Regarding waste and inefficiency, Appellees rely primarily on the Receiver's terms of compensation. Appellees' Brief at 19, 21.

This second component of Appellees' Brief is easily dispensed with because the Receiver's compensation is a red herring that is contradicted by Appellees' own arguments. Appellees argue at length that the trial court has seemingly limitless discretion, yet they fail to acknowledge that such discretion would include amendment to the terms of the Receiver's compensation. Indeed, RCW 7.60.180 specifically allows parties, such as Appellees, to object to the Receiver's compensation requests. On a more practical note, it is ludicrous to assume that the Receiver, a longtime practitioner with a solid reputation in the local legal community, would even ask for the agreed-upon monthly fee while the court resolved the Senior Westerdals' claim.

However, in putting forth this argument, the Appellees set aside the waste and inefficiency inherent in the trial court's decision to terminate the Receivership. The trial court had before it both the Senior Westerdals' claim and the Appellees' objections thereto; it had control of assets that were at the heart of the dispute that would enable it to address the red flags raised by Jay's behavior. RCW 7.60.055(1). The Receiver was on hand, serving as an arm of the court. Appellees' Brief at 10. The trial court had the power to estimate the Senior Westerdals' claim. RCW 7.60.220(3).

In short, the trial court was perfectly positioned to resolve the Senior Westerdals' claim while protecting Receivership assets against further diminution at Jay's hands. Its decision to instead terminate the Receivership is the epitome of waste and inefficiency. Leaving aside the concern about whether a separate court would have jurisdiction to hear a separate suit, discussed *supra*, the trial court hit the reset button, putting the onus first on the Senior Westerdals to file a separate suit and then on another court to start over from scratch, but without the benefit of the asset preservation, claim estimation, or the Receiver's insight. *That* is waste and inefficiency, and it constitutes prejudice against the Senior Westerdals.

The prejudice suffered by the Senior Westerdals is deepened when the panoply of statutory rights afforded to creditors under RCW Chapter 7.60 is taken into account. The Senior Westerdals have addressed these issues herein and in their opening brief, but they include: (1) that their claim was deemed allowed absent affirmative disallowance by the trial court; (2) the trial court had a statutory mechanism to reduce time and expense through claim estimation; and (3) a presumption in the Senior Westerdals' favor that their claim was valid. The trial court likewise deprived the Senior Westerdals of the protection of their interest in Holiday.com. *That* is prejudice.

III. CONCLUSION

Based on the foregoing, and the arguments set forth in the Senior Westerdals' brief, it is clear that the trial court erred as a matter of law, and abused whatever discretion it might have had, when it terminated the Receivership. Accordingly, this Court should reverse the trial court's order terminating the Receivership and remand this case with instructions to reinstate the Receivership.

Respectfully submitted this December 31, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the State of Washington that on December 31, 2015, I served a copy of this document on all parties by email per agreement as follows:

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