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Court of Appeals No. 63156-0-1

BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

NATHAN S. YIN,
Appellant

vs.

WESTERN CARTAGE, INC., SEATTLE BULK RAIL STATION, INC.,
WASHINGTON TRANSPORTATION, INC., and SEATTLE
TRANSLOAD, INC.,
Respondents

On Appeal from the King County Superior Court

RESPONDENTS' BRIEF

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ORIGINAL

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I. SUMMARY

The lower Courts Order was legally and factually correct and should be affirmed by this Court. This appeal should be dismissed and pursuant to RAP 18.1 and RCW 9A.82.100(1)(a), respondent should be awarded attorneys fees for this appeal.

II. STATEMENT OF THE CASE

Respondents Western Cartage, Inc., Seattle Bulk Rail Station, Inc., Washington Transportation, Inc., and Seattle Transload, Inc. (hereinafter collectively “respondents”), are related corporations which provide inter-related trucking and transloading services. Located in the Seattle Container Yards in the Port of Seattle, respondents engage in transloading bulk rail cargoes for purposes of shipping and other transportation, as well as trucking, dispatching, and other services related to transloading bulk rail cargoes for purposes of transportation.¹

Respondents hired appellant Nathan S. Yin (“Yin”) in approximately 2002 or 2003 as their accountant. Yin’s wife, Bunthoeun “Denise” Yin worked in various clerical and/or administrative capacities with respondents. Yin had access to respondents’ checking account and financial information.² Starting sometime in 2004, Yin devised an

¹ Clerk’s Papers (“CP”) 107-108

² *Id.*

elaborate embezzlement scheme to defraud respondents—first by altering checks at the respondents’ bank accounts at Viking Bank, and then later by altering checks at the respondents’ bank accounts at Bank of America. Yin continued this embezzlement scheme until on or about February 8, 2008, when respondents discovered his activities.³ When confronted, Yin admitted both the existence of the scheme and that he had embezzled money from the respondents.⁴

In a signed statement to the Port of Seattle Police Department, Yin made the following admissions:

- That since the Summer of 2007, Yin had been creating fraudulent checks made out to three different truck drivers from the Bank of America account in different amounts of money;
- Yin would print out the checks (about one a week) and have the owners of respondents sign the check the same day, and then go to the Bank of America branch on 1st Avenue, South Industrial Branch, to cash it;
- Yin would take the cash and use it to gamble at the Muckleshoot Casino or Emerald Queen Casino. Yin admitted he had a gambling

³ CP 107-112; 113-125

⁴ *Id.*

problem;

- Yin could not recall how many checks he cashed. However, he admitted spending all of the money or losing it gambling. He stated he was willing to repay all of the money to the company.⁵

After Yin's embezzlement became known to respondents, they initiated an investigation and established that Yin embezzled at least \$819,135.91.⁶

On May 9, 2008, respondents' initiated legal action against Yin, and Denise Yin to recover the proceeds of the embezzlement scheme, together with additional remedies authorized under the Washington Criminal Profiteering Act (RCW 9A.82.100(3)).⁷ Respondents obtained an Order to Show Cause against the Yins regarding a pre-judgment attachment, set for hearing on January 23, 2009. Respondents also moved for Partial Summary Judgment, set for hearing that same day. Respondents noted the depositions for each of the Yins for January 15, 2009 to examine their assets as set forth in the Order to Show Cause.⁸

On January 9, 2009, Yin moved for an order to completely stay the proceedings, based upon the fact he was arrested and administratively

⁵ CP 109-112

⁶ CP 113-125

⁷ CP 74-84

⁸ CP 89-91

booked on February 19, 2008, and was currently awaiting imminent criminal indictment by the King County District Attorney.⁹ On January 9, 2009, Judge William Downing denied Yin's motion, and deferred ruling on the motion to stay as it related solely to the amount sought by the plaintiff's motion for partial summary judgment that was set to be heard later that month. The Court further ordered that the deposition of defendants on January 19, 2009 go forward, but be limited solely to an examination of defendants' assets and liabilities in the context of respondents' prejudgment attachment writ.¹⁰

On January 23, 2009, the Honorable Andrea Darvis entered partial summary judgment in favor of respondents and against appellant Yin. Final judgment was entered on February 12, 2009.¹¹

III. ARGUMENT

1. STANDARD OF REVIEW

A court's determination on a motion to stay proceedings or grant a protective order is discretionary, and is reviewed only for abuse of discretion. *State v. Music*, 79 Wn.2d 699, 716, 489 P.2d 159 (1971),

⁹ CP 14-23

¹⁰ CP 33-35. Charges were eventually filed by the King County District Attorney's office against appellant on June 1, 2009. Please see Appellants Brief, p. 1.

¹¹ CP 63-66; 67-73

judgment vacated in part, 408 U.S. 940 (1972) (stay); *Marine Power & Equip. Co. v. Dep't of Transp.*, 107 Wn.2d 872, 875, 734 P.2d 480 (1987) (protective order); *King v. Olympic Pipe Line Co.*, 104 Wash.App. 338, 16 P.3d 45 (2000). A trial court abuses its discretion only if its ruling is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

2. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION FOR A COMPLETE STAY

The court has the inherent authority to grant a stay. See *King*, supra, 104 Wn.App. at 350. However, in *King* the defendants were not seeking a stay of the entire action—only a stay of discovery. *Id.* at 349. In his appeal, Yin asserts that the trial court erred in not completely staying the proceedings below, but then inconsistently argues that “discovery” should have been stayed.¹² The lower court clearly did not abuse its discretion by denying Yin’s motion for a complete stay, but issued an order limiting discovery solely to the issues of assets available for pre-judgment attachment.

In *King*, supra, the defendants were individuals being sued by the family of one of the victims of the Olympic Pipeline disaster in 1999.

¹² See Appellant’s Brief, page 4.

While the civil suit was pending, a federal grand jury was investigating criminal charges against the individuals named in the civil suit. The defendants twice moved the lower court for a temporary, partial stay of discovery pending the Federal Government's investigation, arguing that their Fifth Amendment rights would be impacted if they were compelled to provide discovery in a concurrent civil action. In the second motion, they also sought, in the alternative, a protective order under CR 26 to preclude the dissemination of the discovery to non-parties. In both cases, the trial court denied the defendants' motions. The Court of Appeals granted discretionary review, and issued a temporary stay pending review.

In analyzing Federal case authority on this issue, the *King* court established a “balancing process...in which ‘[a] wide array of options are available to courts in performing this balancing.’” *Id.* at 353. The factors the *King* court considered included:

- The “extent to which a defendant’s Fifth Amendment rights are implicated”;
- Similarities between the civil and criminal cases;
- Status of the criminal case;
- The interest of the plaintiffs in proceeding expeditiously with litigation or any particular aspect of it, and the potential prejudice

to plaintiffs of a delay;

- The interests of persons not parties to the civil litigation; and,
- The interests of the public in the pending civil and criminal litigations. *Id.* at 352-3

As will be demonstrated below, the lower court properly balanced the *King* factors, and did not abuse its discretion by denying Yin a full, complete stay of the underlying action.

In *King*, the court observed that although an indictment had not yet been filed, that did not lessen the impact of whether or not the court must balance the implication of the Fifth Amendment if there is a concurrent criminal investigation. The Court further noted that unlike other cases, the defendants in *King* had not made statements which would have waived the Fifth Amendment. See for example, *FSLIC v. Molinaro*, 889 F.2d 899 (9th Cir. 1989) – where the defendant had given a partial deposition to FSLIC attorneys without invoking his privilege and therefore had waived it. *Id.* at 903.

In this case, Yin had already waived his Fifth Amendment rights by signing a statement admitting that he stole money from the respondents, and that he had developed the fraudulent embezzlement scheme all on his

own.¹³ The lower court correctly found that the pending motions for a pre-judgment attachment and partial summary judgment did not negatively impact Yin's Fifth Amendment rights—since Yin had already admitted his actions. See ER 801(d)(2). As such, the lower court did not abuse its discretion in denying Yin's motion for stay as to those two pending proceedings. Moreover, the lower court *limited* any discovery of the Yins to only discovery of assets subject to attachment, and not to any substantive information regarding the embezzlement. Accordingly, Yin's Fifth Amendment rights were properly taken into account with regard to the discovery and Yin's argument that all discovery should have been stayed must be rejected.

3. The Court Properly Granted Summary Judgment Without Staying The Action

As noted above, the *King* case was directed primarily to the partial stay of discovery—not the complete stay of the action. As the *King* court observed, quoting United States Supreme Court Justice Nathan Cardozo:

{T}he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if

¹³ CP 110-112

there is even a fair possibility that the stay for which he prays will work damage to someone else. *Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both* (Emphasis added). Citing *Landis v. North Am. Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 81 L. Ed. 153 (1936). *Id.* at 350.

As Justice Cardozo noted, only in “rare” circumstances will the

trial court’s ordering of a full stay be affirmed. See *Lloyd v. Superior Court for Walla Walla County*, 42 Wash. 2d 908, 259 P.2d 369 (1953), where the trial court ordered the stay of an entire action pending the appeal of a similar action where the defendant was involved in both cases. The Washington Supreme Court reversed the holding

“We are always exceedingly hesitant to conclude that a trial court has abused its discretion because of its superior knowledge of the subject it has considered, but we have reviewed all that has been presented to us and are of the opinion that by its order the court has denied to relator the right to as early a trial of his action as the due administration of the business of the court reasonably will permit. We do not regard the grounds and reasons given by respondent sufficient to warrant the stay order made.”

Id. at 909

In the instant case, the trial court properly denied Yin’s motion for a full stay, and did not abuse its discretion. Because Yin had admitted that he had stolen money from respondents and masterminded the scheme of

embezzlement, the trial court correctly denied Yin's motion and deferred any further balancing under the *King* factors for the *amount* of liability upon the consideration of the motion for summary judgment. Because Yin does not address the Court's Order granting summary judgment, his appeal must be rejected, since the lower court did not abuse its discretion by refusing to stay the entire action based solely upon the threat of a pending criminal action. To the extent necessary, the lower court properly protected Yin's interests under the *King* standard by limiting discovery and by deferring any further balancing at the summary judgment hearing.

4. Respondents Should Be Awarded Their Attorney's Fees on Appeal

Rule of Appeal 18.1(a) provides: "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court." In the instant case, the lower court granted respondents' the right to recover their attorney's fees pursuant to RCW 9A.82.100(1)(a).¹⁴ Since respondents were the prevailing party below, and should prevail on this appeal, respondents are entitled to an award of attorney's fees to be fixed

¹⁴ See CP 63-66, 164-170, 156-160, 171-172

by a motion for costs following appeal.

IV. CONCLUSION

For the foregoing reasons, respondents respectfully submit that this Court affirm the lower court's order denying the motion to stay. Further, respondents request that this Court award respondents their attorney's fees and costs on appeal.

Respectfully submitted,

Dated: August 13, 2009

LAW OFFICES OF ROBERT B. GOULD

By 

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Attorneys for Respondents Western
Cartage, Inc., Seattle Bulk Rail, Inc.
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DECLARATION OF SERVICE

On August 13, 2009, I caused to be delivered via United States Postal Box with correct first class prepaid postage a true and accurate copy of the attached document, to the following:

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The original of this document was also sent via legal messenger to be filed in the Court of Appeals.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Nicole C. Cattin, Paralegal
LAW OFFICES OF ROBERT B. GOULD

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