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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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BENJAMIN AMMONS vs. EMFAZE ASSOCIATES, LP and MAIN EVENT ENTERTAINMENT, LP

Collateral

The Uniform Commercial Code, which has been adopted by all states involved in the present action, is clear: the first to file their financing statement to perfect their security interest in collateral takes priority.

No. GD-18-001885. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. FACTUAL BACKGROUND

This case arises out of the default on financial obligations of various entities under the Latitude Global, Inc. ("Latitude Global") umbrella where both creditors, Benjamin Ammons ("Mr. Ammons") and Emfaze Associates, LP ("Emfaze"), possessed security interests in the same collateral. No Latitude entity is a party to this case; this case involves the creditors and a subsequent purchaser of the collateral.

Latitude Global is a company that owns various entertainment centers throughout the country, many of which include bowling and restaurant facilities. In 2011, Latitude 40 Group, LLC ("Latitude 40") leased property (the "Premises") from Emfaze in the Pittsburgh area to house one of these facilities. Through the lease agreement, Emfaze obtained a security interest in the bowling and kitchen equipment (hereinafter "the Collateral") that would be installed at this facility in 2013. In an unrelated 2015 transaction, Mr. Ammons loaned roughly $1.5 million to Latitude 360, Inc. ("Latitude 360"), another company under the Latitude Global umbrella. The bowling and kitchen equipment housed at the Latitude facility in Pittsburgh was offered to secure the Ammons loan. Main Event Entertainment, LP ("Main Event") is the entertainment company that purchased the Premises and its contents, including the Collateral, from Emfaze following Latitude 40's failure to pay rent and proper eviction. In the present action, Mr. Ammons's complaint contains four Counts: (I) Conversion, (II) Unjust Enrichment, (III) Replevin, and (IV) Declaratory Judgment. Defendants filed a Motion for Summary Judgment on all Counts, which was granted by this Court. A more detailed factual background of the relevant events in this case is as follows.

A. Emfaze possessed a valid security interest in the Collateral.

On March 28th, 2011, Emfaze signed a lease agreement (the "Lease") with Latitude 40 Group, LLC, a Florida entity, creating a landlord-tenant relationship between the two entities at the Premises. Through Article 41 of the Lease, Emfaze obtained a security interest in "all tangible personal property of Tenant situate in the Premises including, without limitation, furniture, fixtures, inventory and equipment." The Lease Article also contains language which required a list to be provided to Emfaze of "[a]ny equipment or machinery placed in the Premises that is leased by Tenant or otherwise subject to financing, where such lessor's or lender's security interest is superior to Landlord's." No such list was provided to Emfaze.

Pursuant to the terms of the Lease Agreement between Emfaze and Latitude 40 FL, Emfaze obtained a security interest in the Collateral at issue in the present case when it was installed on the Premises in 2013.

B. Mr. Ammons possessed an interest in the Collateral.

On September 16, 2015, Latitude 360, Inc., a Nevada entity, executed a Second Amendment to Security Agreement in which it granted a security interest in the Collateral to Mr. Ammons. This agreement was executed to secure Latitude 360's debts to Mr. Ammons under both a $1 Million Note and the $150,000 Note previously executed.

C. Latitude 40 and Latitude 360 both defaulted on their obligations.

By October of 2015, Latitude 40 began to fail to make rental payments to Emfaze under the obligations of the Lease. On February 28, 2016, Latitude 360 defaulted on its payment obligations to Mr. Ammons.

D. Emfaze perfected its security interest with its UCC-1 Financing Statement filing on February 9, 2016.

Emfaze filed a UCC-1 Financing Statement in Florida on February 9, 2016, perfecting its security interest in the Collateral.

E. Mr. Ammons perfected his security interest with his UCC-1 Financing Statement filing on March 16, 2016.

Mr. Ammons filed a UCC-1 Financing Statement in Nevada on March 16, 2016, perfecting his security interest in the Collateral.

F. Emfaze obtained judgment and eviction against Latitude 40 and held a sheriff's sale with public notice.

In April 2016, Emfaze filed a Praecipe for Writ of Possession with this Court, Praecipe for Writ of Possession Upon a Confessed Judgment, Emfaze Assocs. v. Latitude 40 Grp., LLC, No. GD-16-002931 (Allegheny Cnty. Ct. Com. Pl. Apr. 12, 2016), followed by a Complaint in Confession of Judgment for Money Damages against Latitude 40 FL in May 2016, Complaint in Confession of Judgment for Money Damages, Emfaze Assocs. v. Latitude 40 Grp., LLC, No. GD-16-009198 (Allegheny Cnty. Ct. Com. Pl. May 27, 2016). Emfaze's Praecipe for Writ of Execution was filed in July 2016, Praecipe for Writ of Execution Upon a Confessed Judgment, Emfaze Assocs. v. Latitude 40 Grp., LLC, No. GD-16-009198 (Allegheny Cnty. Ct. Com. Pl. July 6, 2016), and Emfaze proceeded to conduct a sheriff's sale of personal property located within the Premises in August 2016, as authorized by this Court, Sheriff Return, Emfaze Assocs. v. Latitude 40 Grp., LLC, No. GD-16-009198 (Allegheny Cnty. Ct. Com. Pl. Oct. 13, 2016). The Collateral was included in this property. Emfaze published notice of the sheriff's sale pursuant to Pa.R.Civ.P. 3128, et. seq. At no point during that process did Mr. Ammons file any objections.

G. Emfaze sold the Premises and Collateral to Main Event.

Emfaze sold the Premises and Equipment to Main Event in November 2016. This sale included the Collateral at issue in the present action. Defendants allege that despite his UCC-1 Financial Statement filing in March 2016, Mr. Ammons did not contact either of the Defendants until he contacted Main Event on January 18, 2017, months after Main Event purchased the Collateral. Mr. Ammons did not contest this allegation during argument.

Throughout the course of this litigation, Mr. Ammons has gained possession of the Collateral, but this fact is not relevant for the Court's analysis in granting the Motion for Summary Judgment.

II. ASSIGNMENTS OF ERROR

Mr. Ammons's Concise Statement of Errors Complained of On Appeal contains thirty-seven paragraphs, each containing a reason this Court may have granted Defendants' Motion for Summary Judgment. Given that the Court did not issue an opinion when it granted the Motion for Summary Judgment in this case, it is understandable that the Parties do not know the reason(s) for the Court's ruling. In the present case, the Court did not grant the Motion for Summary Judgment for any of the thirty-seven

reasons listed by Mr. Ammons. Rather than address and deny each of the thirty-seven paragraphs submitted by Mr. Ammons, for the sake of efficiency and clarity, the Court will simply present its legal reasoning for granting the Motion.

III. ANALYSIS

A. Standard of Review for a Motion for Summary Judgment

The Court shall enter summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery." Toy v. Metro. Life Ins. Co., 928 A.2d 186, 195 (Pa. 2007); Pa.R.Civ.P. 1053.2(1). When considering a motion for summary judgment, the Court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Toy, 928 A.2d at 194-195. The Court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Id.

B. Three possible state laws are involved in the present case: Florida, Nevada, and Pennsylvania. All three states agree that the first party to file and perfect their security interest takes priority over others when the same collateral is in dispute.

Pennsylvania law provides that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection and the priority of a security interest in collateral." 13 Pa.C.S.A. § 9301(a) (2008). Additionally, "[w]hile collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection and the priority of a possessory security interest in that collateral." 13 Pa.C.S.A. § 9301(b) (2008). The debtors in this case are Latitude 40 in Florida and Latitude 360 in Nevada. The Collateral has always been located in Pennsylvania. The Uniform Commercial Code (UCC) has been adopted by all three states involved here, and their state statutes are materially the same.

According to the UCC, a financing statement must be filed to perfect all security interests. 13 Pa.C.S.A. § 9310(a) (2013); Fla. Stat. Ann. § 679.3101(1) (2010); Nev. Rev. Stat. § 104.9310(1) (2005). Priority among conflicting security interests in the same collateral is determined in all three states by the same rule: "Conflicting perfected security interests . . . rank according to priority in time of filing or perfection. Priority dates from the earlier of the time filing covering the collateral is first made or the security interest . . . is first perfected." 13 Pa.C.S.A. § 9322(a)(1) (2001); Fla. Stat. Ann. § 679.322(1)(a) (2002); Nev. Rev. Stat. § 104.9322(1)(a) (2001).

Emfaze perfected its security interest in the Collateral when it filed its UCC-1 Financial Statement in Florida on February 9, 2016. Mr. Ammons perfected his security interest in the Collateral when he filed his UCC-1 Financial Statement in Nevada on March 16, 2016. Pennsylvania, Florida, and Nevada all agree: Because Emfaze perfected its security interest in the Collateral before Mr. Ammons did, their interest in the Collateral takes priority over Mr. Ammons's. This "first to file" determination is the basis for this Court's dismissal of Mr. Ammons's claims on summary judgment.

It should be noted that Defendants dispute that Mr. Ammons possessed a valid security interest in the Collateral. In January 2017, Latitude 360 filed for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. Chapter 11 Involuntary Petition Against a Non-Individual, In re: Latitude 360, Inc., No. 3:17-bk-00086-JAF (Bankr. M.D. Fla. Jan. 10, 2017). In May 2017, Mr. Ammons attempted to join the action as a secured creditor regarding the Collateral at issue in the present case. Proof of Claim, In re: Latitude 360, Inc., No. 3:17-bk-00086-JAF, Claim 17-1 (Bankr. M.D. Fla. May 15, 2017). The Trustee objected to this filing, alleging that Mr. Ammons's claim was unsecured because the Debtor did not own the Collateral at the time the case was commenced. Chapter 11 Trustee's Objection to Proof of Claim No. 17, In re: Latitude 360, Inc., No. 3:17-bk-00086-JAF, Doc 309 (Bankr. M.D. Fla. Nov. 26, 2019). In January 2020, the Bankruptcy Court filed an Agreed Order Sustaining the Chapter 11 Trustee's Objection, which found Mr. Ammons's claim to be unsecured and which was consented to and signed by Mr. Ammons himself. Agreed Order Sustaining the Chapter 11 Trustee's Objection to Claim No. 17 Filed by Benjamin Ammons, In re: Latitude 360, Inc., No. 3:17-bk-00086-JAF, Doc 359 (Bankr. M.D. Fla. Jan. 14, 2020).

Defendants argue that res judicata applies here, that this Court must find that Mr. Ammons did not possess a security interest in the first place, and that Mr. Ammons's claims should fail for that reason. Mr. Ammons argues that the issue was not properly adjudicated before the Bankruptcy Court and that res judicata does not apply in the present case. The Pennsylvania Supreme Court has stated that "[r]es judicata . . . prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication." Wilkes ex rel. Mason v. Phoenix Home Life Mut. Ins. Co., 587 Pa. 590, 607 (Pa. 2006).

Rather than dive into the nuances of whether res judicata should apply in the present instance, this Court proceeded in the light most favorable to the non-moving party in deciding whether it should grant summary judgment and proceeded in its analysis under the assumption that Mr. Ammons did, indeed, have a valid security interest in the Collateral. Nevertheless, the Court arrived at the same result, regardless of whether Mr. Ammons's security interest was valid and perfected.

C. Main Event is a bona fide purchaser.

This Court has found that Mr. Ammons possessed no right to the Collateral at the time of its sale to Main Event, concluding that Mr. Ammons therefore has no claim against Main Event. However, even if Mr. Ammons did have a right to the Collateral when it was sold to Main Event, Mr. Ammons's claims against Main Event still fail because Main Event is a bona fide purchaser of the Collateral.

The Pennsylvania Commercial Code states, "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." 13 Pa.C.S.A. § 2403 (1992). Pennsylvania courts have consistently held that a good faith purchaser from a convertor acquires no interest in the goods bought. Hoyt v. Christoforou, 692 A.2d 217, 224 (Pa. Super. Ct. 1997).

Mr. Ammons argues that Emfaze was a convertor and that Main Event, therefore, is not a good faith purchaser of the Collateral. This is simply incorrect. The Superior Court has held that in the event of a default, "a secured party has the absolute right to reclaim goods in the possession of a debtor. This may be accomplished through judicial process . . ." Hoyt, 692 A.2d at 221. Emfaze was a secured party, and Latitude 40 was a debtor in default. Emfaze properly utilized the judicial process to evict Latitude 40 and acquire legal possession of the Collateral. Emfaze was not a convertor. Main Event had no reason to believe Emfaze did not have title of the Collateral.

Therefore, Main Event is a good faith purchaser of the Collateral, and the claims against them fail as a matter of law.

D. Mr. Ammons's Count I for Conversion fails.

Pennsylvania law defines the tort of conversion as "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." Stevenson v. Econ. Bank

of Ambridge, 197 A.2d 721, 726 (Pa. 1964). Because Mr. Ammons lost his right to the Collateral once Emfaze perfected its security interest in the Collateral, his Count I for Conversion fails as a matter of law.

E. Mr. Ammons's Count II for Unjust Enrichment fails.

Pennsylvania law defines the elements necessary to prove unjust enrichment as follows: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Durst v. Milroy Gen. Contracting, Inc., 52 A.3d 357, 360 (Pa. Super. Ct. 2012). Mr. Ammons could not confer benefits on Defendants through the Collateral because he lost his right to the Collateral once Emfaze perfected its security interest in the Collateral. For this reason, Mr. Ammons's Count II for Unjust Enrichment fails as a matter of law.

F. Mr. Ammons's Count III for Replevin fails.

In Pennsylvania, an action in replevin may be brought "wherever one man claims goods in the possession of another . . . provided he has the right of possession." Harlan v. Harlan, 15 Pa. 507, 513 (Pa. 1850). Mr. Ammons cannot bring a possessory action in replevin for goods for which he does not have the right of possession. For this reason, Mr. Ammons's Count III for Replevin fails as a matter of law.

G. Mr. Ammons's Count IV for Declaratory Judgment fails.

The Declaratory Judgment Act states that "[c]ourts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 42 Pa.C.S.A. § 7532 (1978). The Superior Court has described declaratory judgments as "nothing more than judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status or other relation," adding, "They may not be used to search out new legal doctrines." Doe v. Johns-Manville Corp., 471 A.2d 1252, 1254 (Pa. Super. Ct. 1984).

Mr. Ammons does not have a current existing legal right of possession of the Collateral. Therefore, his Count IV for Declaratory Judgment fails as a matter of law.

IV. CONCLUSION

The Uniform Commercial Code, which has been adopted by all states involved in the present action, is clear: the first to file their financing statement to perfect their security interest in collateral takes priority. Everyone else is simply out of luck. Emfaze filed their UCC-1 Financial Statement before Mr. Ammons filed his. Therefore, Emfaze had the right to sell the Collateral to Main Event. Mr. Ammons does not possess a right to the Collateral, and all his claims fail as a matter of law.

BY THE COURT:
/s/ The Hon. Christine A. Ward

NORTH SIDE, LLC vs. O'NEILL MAINTENANCE and SCHENLEY CAPITAL PARTNERS, LLC vs. O'NEILL MAINTENANCE vs. TOP CHOICE REAL ESTATE, Intervenor

Abandoned and Blighted Property Conservatorship Act

North Side is within 2,000 feet of the blighted property and, therefore, is a "party in interest."

CASE NO. GD21-3444 (Superior Court docket nos. 269 WDA 2023 and 348 WDA 2023) and CASE NO. GD22-8535. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. May 5, 2023.

OPINION

I. BACKGROUND

This Abandoned and Blighted Property Conservatorship Act proceeding (see 68 P.S. §§1101-1111) was commenced by North Side LLC ("North Side") against O'Neill Maintenance, the owner of 505-507 East Ohio Street, Pittsburgh, PA 15212 ("the property") at docket number GD21-3444. A second proceeding was commenced by Schenley Capital Partners, LLC ("Schenley Capital") against O'Neill Maintenance relative to the same property at GD22-8535. I consolidated the two proceedings on October 25, 2022. I also permitted Top Choice Real Estate to intervene as it had a written agreement to purchase the property from O'Neill Maintenance. On January 19, 2023 I presided over an evidentiary hearing for the purposes of determining if the property was abandoned and blighted, whether a conservator should be appointed; or, if the owner could remediate the blighted condition by selling the property, with a determination of the costs for preparing and filing the petition and the conservator's fee. See 12/16/2022 Order of Court and 68 P.S. §1105.

During the evidentiary hearing, Schenley Capital and Top Choice attempted to show that North Side was not a business owner within 2,000 feet of the property and should have its conservatorship petition dismissed. Schenley Capital also filed a written motion to dismiss as to North Side LLC because it was not within 2,000 feet of the property. See 68 P.S. §§1103 and 1104(a). Benjamin Klein, Esquire served as the attorney for Schenley Capital during the evidentiary hearing and also is an owner of Schenley Capital. North Side's counsel, near the end of the hearing, asserted that this violated Pennsylvania's Rules of Professional Conduct for attorneys because it was not disclosed sooner. He also indicated attorney Klein could be disqualified in the future due to his potential interest in the conservator's fee.

On January 23, 2023 I signed an order that resolved all issues raised during the evidentiary hearing. I denied the request for dismissal of North Side that was premised on it not being within 2,000 feet of the property. I determined the property met the conditions for conservatorship under 68 P.S. §1105(d), or, in other words, was abandoned and blighted. I determined that the condition of the property would be abated by a sale to Top Choice, subject to a $69,194 lien for preparation and filing the petition and the conservator's or developer's fee. North Side filed a written motion to disqualify attorney Klein on the same day as my rulings, January 23, 2023. See document 46 in the Department of Court Records electronic docket. After Schenley Capital filed a response, on February 7, 2023 I signed an order denying the motion to disqualify attorney Klein.

On February 21, 2023 North Side filed a notice of appeal to the Superior Court of Pennsylvania from my January 23, 2023 order. Then, on March 6, 2023 Schenley Capital also filed a notice of appeal to the Superior Court from my January 23, 2023 order.

Each appealing party filed a statement of matters complained of on appeal, which I will address as required by Pennsylvania Rule of Appellate Procedure 1925(a). The four matters complained of on appeal by North Side will come first. However, as will be explained below, the topics North Side indicates it is appealing are not appropriate for an appeal.

II. Topics Appealed by North Side

North Side first contends that I made an error "in overruling an objection raised by the Attorney for North Side LLC questioning the truthfulness of Mr. Terry O'Neill's right and authority to sell the Subject Matter Property on behalf of O'Neill Maintenance." The evidentiary hearing was "fully and accurately" transcribed by the Court Reporter. See Non-Jury Trial Transcript, January 19, 2023 ("T" hereafter), p. 150. Terry O'Neill was present at the evidentiary hearing and affirmed that he wanted to sell the property (see T, p. 8). But, at no point during the hearing is his right and authority to sell the property questioned. Hence, my overruling an objection to Mr. O'Neill's right and authority to sell the property could not and did not occur. North Side also did not raise any issue with Terry O'Neill's right to sell the property of O'Neill Maintenance by motion before the hearing. The issue was not raised until after North Side filed its appeal. To summarize, I could not have made an error overruling North Side's objection over Mr. O'Neill's authority to sell the property because no such objection was made.

North Side next contends that I made an error "by failing to permit testimony or evidence to show that the individual purporting to represent the Respondent did not have the legal right to sell the Subject Property to a Third-Party Buyer." However, North Side never attempted to submit testimony or evidence, or make an offer of proof that Terry O'Neill did not have the legal right to sell the property. See T, pp. 8-11. This issue was never raised in any manner until after North Side filed its appeal. I was never presented with an opportunity to rule on whether testimony or evidence of Mr. O'Neill's lack of right to sell the property was permitted. Hence, I made no error because I made no ruling that failed to permit such testimony or evidence.

North Side next contends that I made an error "in relying on a defective title report from Richards & Richards, a title settlement company, in order to establish that the Respondent's representative had the authority to sale [sic] the Subject Property." North Side is incorrect as I did not examine a title report from Richards & Richards before my ruling on January 23, 2023. I recall reviewing the "vesting deed" to "O'Neill Maintenance, a Pennsylvania general partnership" (the coal notice in the deed appears to have been signed by Terrence O'Neill and Timothy O'Neill) in the petitions. I also recall reviewing the agreement for the sale of commercial real estate between Terrance O'Neill, Kevin O'Neill and O'Neill Maintenance as sellers (it appeared to be signed by both Terrance and Kevin O'Neill) and Top Choice Real Estate as Buyer and a proposed settlement statement prepared by settlement agent Richards & Richards in connection with the conferences I held in October and November of 2022. The Abandoned and Blighted Property Conservatorship Act vests in trial judges the discretion to allow the owner to attempt to abate the blighted conditions by selling the property (see 68 P.S. §1105(f)), but it does not mandate that they scrutinize the settlement agent's title report, determine which signatures are required on the deed conveying the blighted property or otherwise supervise the sale process. The proposed settlement statement appeared to have been professionally prepared, and it showed Top Choice would be purchasing title insurance (which involves an evaluation of who must sign the deed). The testimony of Yauhena "Eugene" Trasko, the owner of Top Choice, established the proposed purchaser's ability to abate the blighted conditions. As set forth above, I was unaware that North Side was questioning Mr. O'Neill's authority to sell the property until it appealed and filed a statement of matters complained of on appeal.

I also had no reason to think an issue would be raised as to Terry O'Neil's authority to sell the property. Schenley Capital alleged in its petition that Timothy O'Neill is deceased and that O'Neill Maintenance is comprised of two brothers, Kevin O'Neill and Terrance O'Neill, and it alleged in its pre-trial statement that it served the petition on both brothers. The Agreement to sell to Top Choice appears to have been signed by both of them, but only Terry participated in the conferences and the evidentiary hearing. If Kevin O'Neill had an interest in O'Neill Maintenance, it would not be unusual if he decided he would avoid court involvement and let his brother handle court matters for the partnership. There are multiple other possibilities that do not amount to Terry O'Neill lacking authority to sell the property (e.g., Timothy or his heirs and Kevin conveyed their partnership interest to Terry, Kevin released any claim he had to the property, etc.). I also do not believe there was any witness present at the evidentiary hearing who could have provided admissible testimony of Terry O'Neill lacking authority to sell the property. By February 28, 2023 O'Neill Maintenance sold the property to Top Choice (see 2/28/2023 entry in the Department of Court Record electronic docket, "Court Funds Deposited $69,193.55"), which indicated an intention to promptly abate the blighted conditions. Thus, the primary objective of the Abandoned and Blighted Property Conservatorship Act appears likely to be achieved. I do not believe North Side has the standing in this proceeding to challenge Terry O'Neill's authority to sell the property. This would have to be done by Kevin O'Neill or another party that claims to have some authority to sell the property for O'Neill Maintenance.

In summary, I did not rely on Richards & Richards' title report to establish Terry O'Neill had the authority to sell the property. I instead relied on the other documentation that I received, the circumstances and lack of any evidence to the contrary to establish Terry O'Neill had the authority to sell the property. Therefore, I did not make the error that North Side contends I made.

North Side last contends that I made an error "by refusing to disqualify the Counsel for Schenley Capital Partners based on admissions and evidence submitted to the Court by Schenley Capital Partners and further outlined in the Motion to Disqualify the Counsel for Schenley Capital Partners." However, my order that denied North Side's motion to disqualify counsel is dated February 7, 2023 and North Side's notice of appeal to the Superior Court states that it is an appeal from only my January 23, 2023 order. Hence, it is clear my refusal to disqualify counsel for Schenley Capital cannot be part of this appeal.

Even if my refusal to disqualify Schenley Capital's counsel could be part of this appeal, my ruling was correct. Attorney Klein did not violate Rule of Professional Conduct 3.7, "Lawyer as Witness," since he was not a necessary witness. Attorney Klein's father, Bruce Klein, testified and was the best and only witness needed by Schenley. See T, pp. 41-42 and 66. Attorney Klein also did not violate Rule 8.4(c). While he should have been more forthright about being a member of Schenley Capital, this did not rise to the level of "dishonesty, fraud, deceit or misrepresentation." He also did not violate Rule 8.4(d), as his conduct did not impact my ability to administer justice. Discipline ordinarily is the consequence for violating the Rules of Professional Conduct, and disqualifying counsel is limited to situations "where disqualification is needed to ensure the parties receive the fair trial which due process requires." Vertical Resources, Inc. v. Bramlett, 2003 PA Super 462, 837 A.2d 1193, 1201 quoting In re Estate of Pedrik, 505 Pa. 530, 482 A.2d 215, 221 (1984). Attorney Klein being a member of Schenley Capital did not impact the fairness of the evidentiary hearing nor do I expect it to impact the fairness of the litigation remining. His interest in the litigation is similar to that of a personal injury plaintiff's attorney with a contingent fee agreement. Therefore, my refusal to disqualify attorney Klein was not erroneous.

III. Topic Appealed by Schenley Capital

Schenley Capital's only contention is that I made an error by finding North Side a "party in interest," which qualified it to file a petition for appointment of a conservator. See 68 P.S. §1104(a). In North Side's petition, and during the evidentiary hearing, North Side asserted that it met the definition of a "party in interest" by being "A…business owner within 2,000 feet of the building." See 68 P.S. §1103. There was no testimony by any expert (e.g., a surveyor or engineer) that North Side was not within 2,000 feet of the property. Instead, Schenley Capital introduced a Google Map that displayed three walking routes from 1004 Constance Street to 505 East Ohio Street that indicated each route was a distance of 0.5 miles, which is 2,640 feet. Interstate 279, a limited access highway, passes between these two points and requires pedestrians (as well as cars) to travel on an indirect route around and then on a bridge above it. I believe 2,000 feet should be calculated "as the crow flies" to maximize the "opportunity for communities to…improve the quality of life…" (68 P.S. §1102(5)) by having a conservator appointed "to make the necessary improvements before the building deteriorates further and necessitates demolition…." (68 P.S. 1102(6). A direct measurement of the 2,000 feet creates more potential conservators, increasing the chances one of them will decide to be a conservator who rehabilitates a blighted building. This interpretation is, therefore, consistent with the purpose of the Abandoned and Blighted Property Conservatorship Act.

Top Choice introduced a Google Map that showed the direct distance between North Side and the Building is 0.4 miles, which is 2,112 feet. There was neither lay testimony nor expert testimony on the precision of the distances calculated by the Google Maps. However, it is more likely than not that the 0.5 and 0.4 calculations are approximations, as it is improbable that the distances are actually 0.500 and 0.400 miles. Additionally, Schenley Capital's Google Map indicates all three routes are 0.5 miles, but one route is a ten minute walk while the other two are eleven minute walks. It also is not possible that all three alternative routes measure exactly 2,640 feet. If 0.4 is an approximation for .378, the distance would be 1,995.84 feet. What also establishes by a preponderance of the evidence that the distance is less than 2,000 feet is that the 0.4 mile approximation was calculated using two incorrect addresses, with both more distant from each other than the correct addresses. The 0.4 miles approximation was between 1004 Constance Street and 505 East Ohio Street. See T, p. 144. However, there was credible testimony from Walter Whitney, the owner of North Side, that the address of that business is 1000 Constance Street. See T, p. 19, 1.6-15 and p. 20, 1.10-18. 1000 Constance is closer to 505 East Ohio Street than 1004 Constance. 505 East Ohio Street also was an incorrect address to use for the blighted building. The vesting deed states the building is known as 505 and 507 East Ohio Street, with 507 East Ohio Street being closer to 1000 Constance than 505. Hence, I correctly decided North Side is within 2,000 feet of the blighted property and, therefore, is a "party in interest."

BY THE COURT:
/s/ The Hon. Alan Hertzberg

COMMONWEALTH OF PENNSYLVANIA vs.MICHAEL RAMONE WILLIAMS

Motion to Suppress – Inevitable Discovery Doctrine

Officers responded to scene where they observed defendant unconscious and hanging partially out of the driver side of a motor vehicle. Officers searched backpack to find identification and recovered a firearm, pills and a quantity of cash. Once they identified defendant they learned he had an active arrest warrant. Court held search of backpack was lawful.

No. CP-02-CR-8310-2020. Superior Court No.: 633 WDA 2022. In the Court of Common Pleas of Allegheny County, Pennsylvania. Criminal Division. Howsie, J. December 19, 2022.

OPINION

Appellant, Michael Ramone Williams, appeals from Judge Cashman's Order dated September 15, 2021, denying his Motion to Suppress Evidence. Following argument that same date, prior to the non-jury trial, the Court entered an order denying the Appellant's motion to suppress evidence. Alexa Roberts, Esquire appeared on behalf of the Commonwealth and Ashley Cagle, Esquire appeared on behalf of the Appellant. Officers Nicholas Molo and Frank Scatena of the Crafton borough Police Department appeared as witnesses for the Commonwealth.

STATEMENTS OF FACT AND PROCEDURAL HISTORY

On August 24, 2020, police officers and medics were dispatched to the 1500 block of Barr Avenue for a report of an unresponsive male. When Officer Molo arrived, he observed a blue Dodge Durango with its driver's side door ajar and viewed a body from the waist down hanging outside the driver's side of the vehicle. He also observed several pill bottles that were blue in color on the sidewalk and grassy area near the sidewalk as well as a large sum of money. (Transcript, P.4).

With the assistance of a flashlight, Officer Molo observed Appellant, who appeared to be highly intoxicated, motionless and lifeless inside of the vehicle. Shortly thereafter, Appellant began to awaken somewhat and attempted to respond to Officer Molo's inquiries. However, his speech was too slurred to understand his responses. Officer Molo was unable to determine the Appellant's name and the Appellant's eyes were bloodshot and glassy. (Transcript P. 5). Appellant needed to assistance to exit the vehicle and stand on the ground. Moments later Officer Scatena arrived at the scene and ed out of the vehicle onto the ground. At that point, Officer Scatena arrived on the scene and the Appellant continued to mumble incoherently and made statements indicating that he did not want to get shot. The officers made inquiries regarding the Appellant's name and date of birth and the Appellant was frisked for identification without success. Officer Scatena obtained the Appellant's consent to search his vehicle. During the search, Officer Scatena recovered prescriptive bottles, containing marijuana and stacks of money totaling approximately $12500.00. Additionally, the officers observed the odor of raw marijuana emanating from the Appellant's red backpack. Following a search of the backpack, the officers recovered additional pill bottles that contained suspected marijuana. Officer Molo recovered a Glock 26 firearm from the backpack as well as the Appellant's ID. Officer Molo checked the Appellant for warrants, and he learned that the Appellant had an outstanding warrant for a probation violation. The Appellant was escorted to the hospital for medical evaluation and after he was cleared for incarceration, he was transported to the Allegheny County Jail.

Appellant, Michael Ramone Williams was charged by Criminal Complaint dated August 25, 2020, with one count of person not to possess a firearm, one count of possession of a firearm with an altered manufacturer number, one count of carrying

a firearm without a license, one count of possession with intent to deliver, one count of possession of a controlled substance, one count of possession of drug paraphernalia, and one count of public drunkenness.

Prior to trial, appellant's counsel filed an Omnibus Pretrial Motion seeking to suppress the evidence obtained following the search of the Appellant's backpack. Following testimony and argument, Judge Cashman denied the Motion to Suppress. Subsequently, the Appellant filed a pro se Notice of Appeal and his attorney of record, Ashley Cagle withdrew as counsel. In Appellant's Notice of Appeal, the Appellant filed his Concise Statement of Matters Complained of on Appeal, alleging errors of law related to Judge David Cashman's denial of the Motion to Suppress Evidence.

After the Motion to Suppress was denied, Williams proceeded to file a Notice of Appeal pro se and shortly thereafter Attorney Cagle withdrew as counsel. The case was reassigned to Judge Howsie, and on January 5, 2022, the court appointed Robert Staley Carey, Jr., Esquire to represent Michael Williams. The Appellant's appeal before the Pennsylvania Superior Court was quashed on January 31, 2022, and newly appointed counsel, Robert Carey, filed a Motion to Reconsider. The motion was denied by the court on March 2, 2022, and the parties proceeded to a non-jury trial. On March 7, 2022, the Court found Michael Williams guilty of one count of person not to possess a firearm, and one count of carrying a firearm without a license, and one count of public drunkenness. The Court imposed a sentence of four-to-eight-years of incarceration followed by an 18-month period of probation.

The Appellant raised the following issues in his Statement of Matters Complained of on Appeal:

1. Did the Suppression Court violate Pennsylvania rules of Criminal Procedure 581 when Judge Cashman denied the motion to suppress without entering on the record a Statement of Fact and Conclusions of Law as to the unlawful seizure of evidence?

2. Did the Suppression Court err in denying the Motion to Suppress Evidence when officers without consent unlawfully seized a backpack from the Defendant's person and conducted a prohibited warrantless search and seizure of evidence from the backpack?

3. Did the Suppression Court err in denying the Motion to Suppress Evidence when officers lacked a valid legal basis to detain and arrest the Defendant?

STANDARD OF REIVEW

When reviewing an Order denying a Motion to Suppress Evidence, the Appellate Court must determine whether the trial court's factual findings are supported by the evidence of record. Commonwealth v. Blair, 860 A.2d 567,571, (PA. super 2004), if the evidence supports the Trial Court's findings, we are bound by these and may reverse only if the legal conclusions drawn therefrom are erroneous. See Commonwealth v. Blair, 860 A.2d 567.

DISCUSSION

Following the conclusion of the hearing regarding counsel's Motion to Suppress Evidence, counsel for the Appellant argued that Williams was coherent and alert during the interaction with the police officers. Counsel further argued that Williams was able to state his name and answer the officers' questions. Judge Cashman responded by stating the following: "How do you know he was not in danger of death? He was basically incapacitated. Whether it was drugs or alcohol." (Suppression Hearing, P. 27). Although defense counsel argued that Williams was responding to the officers and was speaking, Judge Cashman maintained that Williams was nonresponsive. Furthermore, his responses were incoherent and the officers indicated that Williams was making noises, which sounded like he was talking in a different language.

In its Argument, Commonwealth indicated that the evidence recovered from the Defendant's backpack was admissible because the officers were trying to identify a person that was in medical distress when they recovered the evidence. (Suppression Hearing p. 33-34). The Commonwealth further argued that pursuant to the inevitable discovery doctrine, once the officers learned that Williams had an active warrant for his arrest he would have been taken into custody and subject to a search incident to arrest. Given that the backpack was strapped to Williams' person, the evidence would have been recovered during that search. (Suppression Hearing p. 36).

Judge Cashman agreed that the officers did not violate Williams' rights when they opened his backpack to determine his identity, during what appeared to be a medical emergency. Contrary to Attorney eagle's argument, Judge Cashman correctly concluded that the police did not violate Williams' constitutional rights during the search of his backpack. Therefore, the court did not violate Rule 581.

Appellant contends that Judge Cashman erroneously denied his Motion to Suppress Evidence. Appellant further argues that the officers unlawfully seized his backpack and conducted a warrantless search. Judge Cashman heard the testimony adduced at trial and correctly concluded that the officers arrived on scene to investigate a report of an unconscious person. The officers attempted to awaken Williams, without success. The Appellant was nonresponsive, and repeatedly gave unintelligible responses to their questions. In turn, the officers looked inside of the Appellant's backpack in order to determine his identification and observed a firearm.

Judge Cashman heard the testimony of the officers; listened to the arguments of counsel; and reasonably concluded that the officers lawfully searched the backpack and recovered the firearm.

CONCLUSION

Accordingly, Judge Cashman's decision to deny appellant's Motion to Suppress Evidence should be affirmed.

BY THE COURT:
/s/The Hon. Elliot Howsie