

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

POTOMAC GROUP WEST, INC. *et al.* *

Plaintiffs *

v. * **Civil No. 236402 (Track 6)**
Hon. Durke G. Thompson

POTOMAC INSURANCE MARKETING*
GROUP, INC, *et al.*

*

Defendants

**AMENDED AND CORRECTED
MEMORANDUM OPINION**

This protracted litigation, stretching over a number of years, is now in the trial remand stage after a partial reversal on issues decided by the trial court prior to the initial trial. This, in and of itself, is unremarkable during litigation, but affects the rights of the parties as it relates to attachments made on the assets of the plaintiff following the jury verdict and judgment rendered after trial.

The Plaintiff, Potomac Group West, Inc. in this matter was an insurance brokerage that sold and resold high end life insurance production which it placed with underwriters through the defendant BISYS. The defendant, Potomac Insurance Marketing Group, Inc.¹ originally owned by Ed Leisher, but purchased by BISYS, had a contractual relationship with PGW which called for the sharing of commissions on policies originated by both entities.

The Legal History of the Case Prior to the Motion.

After an extended trial, and upon a jury verdict, this Court, *inter alia*, entered judgment in favor of the Plaintiff on a sum of admitted liability of Ed Leisher in the sum of \$100,000. As a result of a contract provision, the trial court also entered judgment for the Defendant PGE in the

¹ Following trial in this matter, Potomac Group East, Inc. was renamed Potomac Insurance Marketing Group, Inc. BISYS was dismissed as a party except insofar as it was the purchaser of PIMG. Ultimately, BISYS was sold and absorbed by other corporate entities.

approximate sum of \$6.5 million dollars for attorney fees, costs and expenses. (See DE#1680 (5/19/08)).

As might be expected, PGW and Steven Leisher appealed the result of the trial and the judgment entered. Moving aggressively, PGE sought attachments for the unsatisfied portion of its judgment². The attachments were directed to certain insurance underwriters with whom policies had been placed and for commissions earned from them. The Plaintiff PGW, as a result of the judgment and the threat of attachments, sought bankruptcy protection in the federal courts of southern California leaving Steven Leisher as the remaining plaintiff. Profoundly affected by the attachment efforts, Leisher filed multiple motions to gain relief from the attachments, all to no avail. It is important to note that Leisher was admittedly without the resources to file a *supersedeas* bond with the court to toll the collection efforts by the Defendants. Over the course of time while the appeal was pending, the considerable sum of \$1.6 Million dollars was attached and paid over, but not condemned to the use of the Defendants. The monies, as they were received, were held and maintained in an escrow account in the name of the Defendants' law firm.

At this point in time, the parties directed themselves to the briefing and argument of the appeal and the law appeared to be working its will as intended. After taking the case under advisement after argument, the Court of Special Appeals considered the appellate issues and rendered a decision on or about December 3, 2009. The decision affirmed the actions taken in trial, but reversed a partial summary judgment decision made pre-trial. The Court also vacated the award of attorney's fees and costs because the Court reasoned that the trial court should re-examine the issue of an award after a trial on the remand issues. The parties are currently preparing for the remand trial.

² PGE, owing \$100,000 on the judgment to PGW, used the monies as a setoff against the greater sum owed it by PGW.

The Plaintiff Leisher, for reasons not fully explained to the trial court, discharged his counsel who had represented him and his corporation during the trial and on the appeal. That counsel, George Mahfood, and his law firm, Broad and Cassel, PA, sent notice to the Defendants' counsel holding the escrow funds asserting an attorney's lien. Before this Court heard argument on the motion to release funds to the Plaintiff and Defendant's opposition thereto, the Plaintiff and his former counsel agreed to a resolution as to the amount of the lien which was agreed to be in the sum of \$100,000. Thus, if this Court rules that the escrow should be released back to the Plaintiff, the attorney's lien would be honored in the sum agreed by the parties.

What is Before the Court?

At present, apart from the retrial of those issues presented to and ruled upon by the Court of Special Appeals, the issues that remain for this Court are whether the sums previously attached in this matter are to be released back to the Plaintiff as the original payee, or if they should continue to be held by the Defendants' counsel, or segregated in some other manner, such as paying into the court registry.

Plaintiff's Position.

The Plaintiff, as movant, urges this Court to release the monies back to the Plaintiff immediately if the trial court finds that the judgment has been vacated, Maryland Rule 2-643 (b). It is the Plaintiff's position that where there is no judgment, the attachments made on sums due the Plaintiff are void *ab initio* as a matter of law. Further, the Plaintiff expounds to continue to hold the sums would violate the Maryland Declaration of Rights by depriving the Plaintiff of his property without due process of law.

Defendant's Position.

The Defendant, anticipating the attack on the judgment attachments, now asserts that the attachments in place may continue as an attachment before judgment on the basis that Steven Leisher is a non-resident and that Leisher has committed fraud. On this latter point of fraud, this Court has thus far declined to adopt the concept of fraud, but it is indisputable that Steven Leisher is a non-resident. Additionally, Defendant argues that if the monies are released back to the Plaintiff, they will be consumed in the Plaintiff's confusing financial picture and will never again be available for attachment. This circumstance is even more onerous to the Defendant because it believes that the trial of the remaining issues will be favorable to their position, and, more importantly, the economic consequence of the remanded portion of the case is dwarfed by the already decided portion of the case. Therefore, Defendant argues, the result of the overall case, even if the remaining portion of the case is favorable to the Plaintiff, the trial court will be obligated to award fees that are in excess of the attached sums.³ In this observation, the Defendant is probably correct.

Plaintiff's Rebuttal.

Plaintiff, in its rebuttal, turns to the applicable statutes and rules to buttress its position. First, pointing out that the attachment before judgment statute, Md. Code Ann., Cts. & Jud. Proc. §3-302, was a legal principle not known in the common law. Thus, Cts & Jud. Proc. §3-302 is in derogation of the common law and must be narrowly construed, *United States v. Coumantaros*, 165 F. Supp. 695 (D. Md. 1958).

Additionally, Plaintiff observes that Maryland Rule 2-115(a) requires,

“[a]t the time of filing a complaint commencing an action or while the action is pending, a **plaintiff entitled by statute** to attachment before judgment may file a request for an order directing the issuance of a writ of attachment for levy or garnishment of property or credits of the defendant; (emphasis supplied).

³ The Court of Special Appeals had the benefit of a written opinion with which to consider the merits of an appeal attacking the award of fees and costs. As mentioned above, the appellate court declined to consider fees or to provide guidance on the aborted award.

Plaintiff takes the position that Defendant is ineligible for treatment as an entitled party to levy upon an attachment before judgment. Due to the vacated judgment in this case, Plaintiff argues this Court must release the funds.

Discussion.

Despite the able briefing to the Court in this matter, neither party was able to cite any Maryland precedent to guide the Court. This Court accepts the proposition that there is a high likelihood that the attached funds will be outside the reach of the Defendant if it should ultimately prevail in this matter and if those funds are released from levy. It is also the Court's belief that whether or not the Defendant prevails subsequently there is significant possibility that the Defendant will prevail on the question of attorney's fees based on the issues decided and not appealed further. And, as of this point in the case, this Court finds that Steven Leisher is a resident of California and a non-resident of Maryland. Because the Defendant has shown that one of the conditions for the issuance of attachment before judgment has been shown, it is unnecessary to address whether the Plaintiff has perpetrated some level of fraud, or fraud on creditors.

This Court has the discretion to issue an attachment before judgment either at the beginning of a case or while it is pending as in this instance. C&J §3-302. It is not clear whether the party entitled to a writ of attachment must be the plaintiff in the matter. Certainly, in the instance where a claim is filed and is answered by a defendant, who then files a counterclaim, the defendant becomes a counter-plaintiff. To the extent that the counterclaim would more than offset the claim, or if the original claim is dismissed, the relative positions of the parties are reversed for the purpose of the governing statutes and rules. In the instant case, the Defendant's claim does not have its origin in a counterclaim, but Defendant's rights to claim arise under the contract which is the subject of dispute, albeit, not over the application of the contractual fee

shifting provision. Squarely put, the issue is whether a party, who is neither denominated as the plaintiff nor a counter-plaintiff, can still request a possible attachment before judgment.

In analyzing the issue, this Court notes that the Maryland Rules and the applicable statutes do not have consistent language. Maryland Rule 2-115 and C&J §3-302 states that a “plaintiff” is entitled to a writ of attachment before judgment whereas C&J §§3-303 and the other statutes speak of “creditors and debtors.”

In this case, this Court believes that the denial of a writ of attachment to the Defendant on its claim for attorney fees and costs already adjudicated, but vacated would be to stand the applicable statute on its head. Clearly, Defendant has a cognizable claim upon which it has a high likelihood of prevailing. Failure to preserve the *status quo* can result in the harm or the ultimate loss of the monies attached. Since no condemnation of the attached sums has occurred, and the attached funds are held in escrow, it is difficult to see why they should be released back to the Plaintiff to the presume prejudice of the Defendant.

Despite the above logic and reasonable potential damaging result, the Plaintiff makes a powerful argument that the Plaintiff is being denied due process on the funds. Even though the argument is at first appealing, it does not withstand the above logic and the express language of Maryland Rule 2-643 (c) which states, “Upon motion of the judgment debtor, the court **may release** some or all of the property from a levy if it finds that (1) the judgment has been vacated.

. . .”. The quoted language of the rule is discretionary in form and allows a denial of the motion. It is difficult to see the distinction of situations arising under Rule 2-643 and the facts of the current case. The very language of the rule drafters implies that an attachment may be maintained even though the underlying judgment is vacated. It is upon this thin ice of logic and inference that this Court rests its decision and denies the Motion to Release Garnished Funds Held by Arent Fox.

April 28, 2010

DURKE G. THOMPSON, JUDGE
Circuit Court for Montgomery
County, Maryland