

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS BURKE,

Plaintiff/Counter Defendant/
Garnishor-Appellee,

v

UNITED AMERICAN ACQUISITIONS AND
MANAGEMENT, INC. d/b/a UNITED
AMERICAN FREIGHT SERVICES, INC.,
STONEPATH LOGISTICS DOMESTIC
SERVICES, INC., and STONEPATH GROUP,

Defendants/Counter Plaintiffs,

and

RADIANT LOGISTICS GLOBAL SERVICES,
INC.,

Garnishee Defendant-Intervenor,

and

MASS FINANCIAL CORPORATION,

Intervenor-Appellant.

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Intervenor, Mass Financial Corporation (MFC), appeals as of right an order granting, in part, plaintiff's motion to dismiss MFC's objections to plaintiff's writs of garnishment and permitting plaintiff to draw on a letter of credit that had previously been ordered as security for payment of plaintiff's amended judgment. We reverse.

On October 22, 2004, plaintiff, Douglas Burke, filed a lawsuit against United American Acquisitions & Management, Inc. (United), Stonepath Logistics Domestic Services, Inc. (Stonepath Logistics), and Stonepath Group (Stonepath Group). Plaintiff alleged in his

complaint that: (1) on April 9, 2002, he entered into a stock purchase agreement with Stonepath Logistics, (2) on May 30, 2002, he entered into an employment agreement with United, and (3) on May 30, 2002, Stonepath Group guaranteed the performance of United and Stonepath Logistics under both agreements. Subsequently, both agreements were allegedly breached and plaintiff sued. On December 2, 2005, the trial court ordered binding arbitration, retaining jurisdiction for enforcement purposes. On May 24, 2007, the trial court entered a judgment on the arbitration award. Noting that Stonepath Group was subject to involuntary bankruptcy at the time, plaintiff was awarded a joint and several judgment against Stonepath Logistics and United in the amount of \$1,762,295.74. On June 15, 2007, several writs of garnishment were issued by the trial court at plaintiff's request.

On July 5, 2007, MFC and Radiant Logistics Global Services, Inc. (Radiant) moved to intervene and requested a preliminary injunction. The motions explained that: (1) on August 31, 2005, the Stonepath and United entities entered into a security agreement with Laurus Master Fund (Laurus) for all assets and personal property, including the accounts receivable, (2) on February 7, 2007, Laurus assigned that security interest to MFC, (3) on April 17, 2007, MFC defaulted the Stonepath and United entities, thus exercising its right to the assets covered by the perfected security agreement, (4) on May 21, 2007, MFC contracted with Radiant to manage and eventually purchase United; (5) on May 24, 2007, plaintiff secured a judgment against the Stonepath and United entities, and became a judgment lien creditor on June 15, 2007, after his writs of garnishment were issued. Because a prior perfected security interest has priority over a subsequent judgment lien creditor, the intervenors argued, they should be permitted to intervene in all of the garnishment actions filed by plaintiff. And because plaintiff's writs of garnishments were interfering with their ability to transact business, they requested a preliminary injunction.

On July 13, 2007, the trial court entered plaintiff's amended judgment which added Stonepath Group as a liable party. Plaintiff was awarded a joint and several judgment against United, Stonepath Logistics, and Stonepath Group in the amount of \$1,762,295.74, as well as \$461,933.70 against Stonepath Logistics and Stonepath Group. On that same date, the trial court entered an order allowing Radiant and MFC to intervene, but denying their request for a preliminary injunction.

On July 13, 2007, several writs of garnishment were issued by the court at plaintiff's request. On July 25, 2007, MFC and Radiant filed their objections to those writs of garnishment. They argued that MFC had a superior, perfected security interest; thus, plaintiff's writs of garnishment should be quashed. On August 14, 2007, the trial court issued a stipulated order regarding the garnishments. The order provided, in significant part, that MFC would obtain an irrevocable letter of credit in the amount of \$2,750,000 which would be drawn upon by plaintiff only if plaintiff prevailed under court order or under a written agreement by the parties.

Shortly thereafter, MFC filed a motion to enforce that August 14, 2007 order after plaintiff claimed that funds disclosed by garnishee defendant Key Bank were not within the scope of the order. The trial court agreed with plaintiff, holding that the letter of credit did not protect funds on deposit for Stonepath Group, it only protected United's receivables; thus, plaintiff was entitled to the Key Bank funds. On November 16, 2007, an order was entered directing Key Bank "to pay funds on account for Stonepath Group, Inc. as disclosed in response to 8/7/07 Writ to Plaintiff, Douglas Burke." MFC's application for leave to appeal the order was denied for failure to persuade this Court of the need for immediate review. *Burke v United*

American Acquisitions, unpublished order of the Court of Appeals, entered May 19, 2008 (Docket No. 282416).

Subsequently, MFC moved for summary disposition of its garnishment objections. MFC argued that, according to Michigan case law, the UCC, MCL 440.1101 *et seq.*, and Article 9, MCL 440.9101 *et seq.*, MFC with its earlier perfected security interest had priority over a subsequent judgment lien creditor like plaintiff. Thus, MFC argued, it was entitled to summary dismissal of its objections to plaintiff's writs of garnishment and a declaration that MFC is the rightful owner of United's accounts receivable, as well as all other garnished funds. Plaintiff opposed the motion, arguing that MFC sold to Radiant the United accounts receivable in November of 2007, five months after plaintiff obtained a lien on those assets.

Additional briefs were filed by the parties. MFC argued that the law is clear—a perfected security interest has priority over a conflicting and subsequent unperfected security interest. See MCL 440.9317(1)(b) and 440.9322(1)(c). MFC further argued that its right to United's accounts receivable was not affected by the fact that MFC entered into management and sale agreements with Radiant on May 21, 2007, which provided that Radiant would operate the United asset base and would assume the cost as well as receive the benefit of its operations until a sale could be consummated. MFC owned United's accounts receivable both before and after the May 21, 2007 agreement it had with Radiant; thus, the management agreement in no way affected MFC's priority as a secured creditor. Likewise, the amendment to that asset purchase agreement on November 1, 2007, was of no consequence. Accordingly, MFC argued, it was entitled to summary disposition with respect to the garnished funds that involved United's accounts receivable. MFC was a secured creditor with priority over plaintiff, a subsequent judgment lien creditor. And as a secured creditor, MFC was not liable for the debts of United or its subsidiaries. Plaintiff replied, in pertinent part, that MFC relinquished or waived any security interest that it had in United's accounts receivable generated after May 21, 2007, when it entered into the management agreement with Radiant.

On November 11, 2008, the trial court issued its opinion and order, granting in part and denying in part MFC's motion for summary disposition. The court agreed with MFC that it had priority over United's accounts receivable that were generated prior to May 21, 2007, and these accounts were not subject to garnishment by plaintiff. Plaintiff became a judgment lien creditor after MFC perfected its security interest in the pre-May 21, 2007 accounts receivable; thus, MFC's motion for summary disposition as to this asset was granted.

Then the trial court turned to the issue "who has rights to those receivables which were generated after the May 21, 2007 Purchase and Management Agreements were entered into between [MFC] and Radiant." After review of the May 21, 2007 purchase agreement and November 1, 2007 amended purchase agreement, the court concluded that, by their plain language, Radiant did not purchase the accounts receivable from MFC. However, the trial court agreed with plaintiff that MFC waived its security interest in those receivables.

In support of its holding, the trial court relied on the bankruptcy case of *In the Matter of Edward Harold Thomas*, 43 BR 201 (Bankr MD GA, 1984). The trial court then set forth the following:

In *Thomas*, the debtor was a dairy farmer who obtained loans from the Farmers Home Administration (FmHA) and granted a security interest in the livestock. *Id.* at 204. The debtor regularly sold milk to Dairymen, Inc. *Id.* The debtor, FmHA, and Dairymen executed an “Assignment of Proceeds from the Sale of Dairy Products and Release of Security Interest.” *Id.* Under the terms of the assignment, a portion of the debtor’s monthly milk sales to Dairymen was to be withheld by Dairymen and paid to FmHA to reduce the debtor’s debt. *Id.* The debtor subsequently experienced financial trouble and requested that the FmHA release the assignment for a specified period of time, which FmHA did. The Court found that the release of the assignment acted as a waiver of FmHA’s security agreement where the assignment was released so that the debtor could use the proceeds to pay bills, buy feed, and pay other farm expenses. *Id.* at 206. The Court also noted that the proceeds were to be used to make payments to other creditors and that the FmHA did not require the debtor to account for his use of the proceeds.

The trial court held that the facts in this case were sufficiently similar and supported finding a waiver in that (1) MFC was a secured party with rights in certain accounts receivable, (2) MFC surrendered its rights to collect the receivables for a specific period of time (until December 31, 2007) via the management agreement it had with Radiant, (3) MFC allowed Radiant to conduct the ordinary affairs of United’s business until MFC could dispose of United’s asset base, and (4) MFC completely turned over the management of the business to Radiant, who was not required to account for its use of the receivables. The court concluded:

Because [MFC], a secured creditor, surrendered its rights to collect the receivables for a specific period of time, knew that the proceeds would be used to allow United’s business to continue during the bankruptcy stay, and did not require Radiant to account for its use of the receivables, the Court finds that [MFC] could not have reasonably expected the proceeds to continue to be its security during the period of time that Radiant managed the receivables. Accordingly, the Court concludes that [MFC’s] agreement with Radiant whereby Radiant collected the receivables constituted a waiver of [MFC’s] security interest in the accounts receivables generated during the time the Management Agreement was operative.

Thus, the court held that MFC did not have priority over the post-May 21 accounts receivable that were garnished by plaintiff and MFC’s motion for summary disposition with regard to this asset was denied.

On November 26, 2008, MFC appealed the November 11, 2008 order which denied in part MFC’s motion for summary disposition. The appeal was dismissed for lack of jurisdiction. *Burke v United American Acquisitions*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 289136).

On February 9, 2009, the trial court entered a stipulated order withdrawing objections and dismissing Radiant consistent with a release and settlement agreement executed by the parties.

On February 9, 2009, the trial court entered an order declaring that plaintiff was entitled to all receivables from and after May 21, 2007, as disclosed in garnishee defendants' verified disclosures in the amount of \$2,350,295.66; accordingly, plaintiff was permitted to draw on the letter of credit in its entirety. On that same date, the trial court also entered an order granting, in part, plaintiff's motion to dismiss MFC's objections to his writs of garnishment. The order provided that the objections were dismissed to the extent the garnishee defendants' verified disclosures were for receivables generated on or after May 21, 2007. This appeal by MFC followed.

On appeal, MFC first argues that the trial court erred in concluding that MFC waived its security interest in United's post-May 21 accounts receivable by entering into a management agreement with Radiant. We agree. Whether MFC waived its security interest presents a question of law that is reviewed de novo on appeal. See *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001); *Bennett v Weitz*, 220 Mich App 295, 299; 559 NW2d 354 (1996).

Generally, at issue in this case is whether the security agreement entered into by Laurus with United, Stonepath Logistics, and Stonepath Group—which Laurus subsequently assigned to MFC—created a security interest that had priority over the claims of subsequent creditors, including plaintiff. Plaintiff had not challenged the validity of the security agreement, and the trial court assumed without deciding that the security agreement was valid. Nevertheless, we have determined that the August 31, 2005 security agreement between Laurus and Stonepath Group, Stonepath Logistics, and United properly disclosed plaintiff's pending lawsuit. Plaintiff's pending lawsuit was also properly disclosed in the February 7, 2007 assignment agreement between Laurus and MFC. Further, it appears that plaintiff's pending litigation did not prevent Stonepath Group, Stonepath Logistics, and United from granting the security interest to Laurus nor was Laurus prevented from assigning that interest to MFC. And, throughout the lengthy legal proceedings, plaintiff did not challenge the enforceability of either the security agreement or assignment under, for example, the uniform fraudulent transfer act, MCL 566.31 *et seq.* See *Nationsbank Mortgage Corp of Georgia v Luptak*, 243 Mich App 560, 567-568; 625 NW2d 385 (2000). Thus, we conclude that the prior-perfected security agreement and subsequent assignment were valid and enforceable against plaintiff's claim, as a judgment lien creditor, against the collateral at issue.

Next, we consider whether the trial court properly concluded that MFC waived its security interest in United's accounts receivable that were generated after May 21, 2007, when Radiant began operating the United business. We hold that MFC did not waive its security interest in those receivables and reverse the trial court's decision.

The trial court relied on the bankruptcy case of *In the Matter of Edward Harold Thomas*, 43 BR 201 (Bankr MD GA, 1984), to support its holding. In that case, in 1979, a dairy farmer entered into a security agreement in favor of Farmers Home Administration (FHA), granting FHA a security interest in, among other things, farm products like milk. Thereafter, in late 1981, the farmer, FHA, and a customer of the farmer, Dairyman, executed an "assignment of proceeds from the sale of dairy products and release of security interest." Under the terms of that assignment, a portion of the farmer's milk sales to Dairyman was to be withheld by Dairyman and paid directly to FHA, which FHA applied to reduce the farmer's debt. Eventually, the farmer experienced financial trouble and requested, in 1982, that FHA return a portion of the

proceeds to him that Dairymen was paying to FHA. FHA agreed and the farmer was able to then pay farm expenses. Subsequently, in September of 1982, the farmer requested that FHA formally release the assignment, which FHA agreed to do through April of 1983. FHA sent a letter to Dairymen on September 22, 1982, which advised Dairymen that it had released the milk assignment through April of 1983.

Thereafter, Dairymen paid the farmer directly for the farmer's milk. However, in about March of 1983, another company, Ralston Purina, filed a garnishment action against the farmer and Dairymen, which resulted in payment in the amount of \$18,983.22 being made from Dairymen to Ralston, rather than to the farmer. The farmer filed a bankruptcy petition, and requested to receive the garnished funds back. The bankruptcy trustee also sought to receive the garnished funds as a superior interest holder. And FHA sought to receive the garnished funds, in light of its perfected security interest. The farmer and the bankruptcy trustee argued that FHA's agreement to release the assignment operated as a waiver of FHA's security interest in the milk proceeds. The bankruptcy court agreed, holding that FHA agreed to release its security interest in milk proceeds through April of 1983 by letter dated September 22, 1982. Further, the court held: "Since the \$18,983.22 in milk proceeds at issue . . . was realized after the assignment was released, the Court need not decide whether the 'assignment of proceeds from the sale of dairy products and release of security interest' served to release [FHA's] security interest in the milk proceeds." *Id.* at 205. The court went on to explain that a party can waive his security interest by subsequent behavior and, here, clearly, FHA did release the assignment through a date certain and did not expect the proceeds to continue to be FHA's security after the assignment was released. *Id.* at 206. Thus, the court concluded, the bankruptcy trustee's security interest in the money was superior to FHA's interest. *Id.* at 207.

The facts of this case are clearly distinguishable from the facts in *Thomas, supra*. First, and most importantly, the farmer himself entered into the security agreement and subsequent assignment with FHA, i.e., the farmer was the debtor, Radiant was not the debtor. FHA clearly and voluntarily relinquished its assignment rights with respect to the farmer—the debtor—before the proceeds at issue were even realized and garnished; thus, FHA had no right to those garnished proceeds. Plaintiff in this case merely became a judgment lien creditor of United and the Stonepath entities after those entities had entered into a security agreement with Laurus that was subsequently assigned to MFC. Plaintiff argued, and the trial court agreed, that once MFC entered into a management agreement with Radiant—by which Radiant would bear the expense of operation as well as receive the revenues from its operation—MFC was effectively waiving its security interest as to proceeds that followed that May 21, 2007 agreement. Because of this alleged waiver to Radiant's benefit, and even though Radiant was not the debtor, the trial court held that plaintiff was entitled to garnish the proceeds that accrued after May 21, 2007. We disagree.

Because the security agreement entered into by Laurus was legally valid and the assignment of that security interest to MFC was legally valid, MFC could foreclose on the defaulted debtors and assume control and dispose of the collateral. MCL 440.9610 provides:

- (1) After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(2) Every aspect of a disposition of collateral, including the method, manner, time, place and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public use or private proceedings, by 1 or more contracts, as a unit or in parcels, and at any time and place and on any terms.

* * *

(4) A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract.

In this case, MFC entered into asset purchase and management agreements with regard to United. While the involuntary bankruptcy involving Stonepath Group was pending, MFC could not sell United, an apparent subsidiary of Stonepath Group. Therefore, MFC entered into an agreement with Radiant whereby Radiant was to manage that asset until such time as the sale could be completely consummated. Although the rights of a creditor under a security agreement may be waived,¹ MFC never waived the assignment with regard to the *debtors* as in the case of FHA in *Thomas, supra*. FHA clearly waived the assignment with regard to its debtor, the farmer.

“Principles of waiver and estoppel may bar the creditor from asserting that the debtor is in default” 68A Am Jur 2d, Secured Transactions, § 585, p 510. Here, MFC never allowed United or the Stonepath entities to financially benefit from the operation of United. MFC was selling United to Radiant and, until such time as the sale could be completed, Radiant was to assume control of United, running it as if Radiant was already the owner of United. Radiant was the sole beneficiary of the proceeds that flowed from its operation of United.

On appeal, MFC argues that to effect a waiver, one must voluntarily and intentionally abandon a known right, which it did not. We agree. A waiver is “the voluntary and intentional relinquishment of a known right, claim, or privilege.” 28 Am Jur 2d, Estoppel & Waiver, § 197, p 601. To establish an effective waiver, one must prove: (1) an existing right, (2) knowledge of the right, and (3) an actual intent to relinquish the right. *Id.*, § 201, p 606.

Here, MFC had a right to foreclose on its security interest, knew of that right, and asserted that right by actually foreclosing on the United and Stonepath entities and taking possession of that collateral. At no time did MFC choose not to assert its rights as a secured interest holder with respect to the debtors. That is, plaintiff has presented no evidence that would lead to a conclusion that MFC had an actual intent to relinquish its security interest, i.e., contract rights, with respect to the debtors. To the contrary, MFC entered into an agreement to sell United, as well as an agreement to preserve the business assets of United until that sale could be completed. Because Radiant was in the freight-forwarding and transportation business like United was, Radiant was better able to preserve the business assets of United while the sale was

¹ 68A Am Jur 2d, Secured Transactions, § 7, p 57.

pending. Throughout this process, MFC argues, it was exercising its rights as a secured creditor. As discussed above, by operation of MCL 440.9610, we agree.

Plaintiff argues that “while allowing the debtor to retain collateral after default is not in and of itself a waiver, [MFC] allowed a third party other than itself (which was not acting as its agent) to keep revenues generated from the use of the collateral.” This argument is not persuasive. Following MFC’s foreclosure of the security interest, it could not entirely dispose of the assets because of the pending bankruptcy involving Stonepath Group. The third party, Radiant, had agreed to purchase the collateral. In the interim, to preserve United’s worth, Radiant was in essence acting as if it had, in fact, purchased the collateral. This circumstance is analogous to Radiant “leasing” the collateral from MFC. MFC had the right, under MCL 440.9610, to enter into such a “lease” or other disposition of the property. And the asset purchase and management agreements contained termination provisions whereby Radiant or MFC could terminate their agreements. If either party invoked those provisions, MFC would have retained all of its rights to United. Thus, MFC never waived its rights in the collateral as to the debtors, against which plaintiff had a judgment. And the receivables that Radiant generated, after expending its own efforts and funds, belonged to Radiant not the debtors. Accordingly, plaintiff is not entitled to those receivables because Radiant was not liable for the debtors’ debt to plaintiff.

Plaintiff also argues that MFC was not a real party in interest and lacked standing to assert objections to the writs of garnishment with respect to revenues generated from United on or after May 21, 2007, because Radiant, not MFC, was entitled to those revenues. This argument is without merit.

MCL 2.201(B) provides that an “action must be prosecuted in the name of the real party in interest” A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. *Hofmann v Auto Club Ins Ass’n*, 211 Mich App 55, 95; 535 NW2d 529 (1995). This “real party in interest” rule is concerned only with the standing of the plaintiff then before the court to bring suit. *Id.* Clearly, MFC was not a plaintiff in this matter. After the writs of garnishment—binding post-judgment orders—were issued, MFC moved to intervene in the action pursuant to MCR 2.209 to protect its interests that were affected by plaintiff’s garnishments. Plaintiff does not contend that MFC was improperly permitted to intervene, nor would such an argument be persuasive.

Further, MFC entered into the asset purchase and management agreements with Radiant on May 21, 2007, before plaintiff’s judgment was entered on May 24, 2007. The agreements were entered into by the parties in reliance on MFC’s prior perfected security interest in United. Thus, MFC was the proper party to defend against plaintiff’s challenge as to any of the rights that MFC had with regard to United, including MFC’s right to enter into such agreements with Radiant. In reliance on MFC’s claim that it had the right to enter into such agreements, Radiant expended its own funds to operate United under the asset purchase and management agreements. Thus Radiant appears to have incurred substantial liability for which it might seek legal recourse against MFC if MFC did not have the right to enter into such agreements with Radiant. Accordingly, MFC clearly was an interested party with the right to challenge the enforcement of plaintiff’s writs of garnishment with regard to United, including those funds that Radiant earned pursuant to the asset purchase and management agreements.

In summary, MFC had a right to, in a commercially reasonable manner, “dispose of collateral by public use or private proceedings, by 1 or more contracts, as a unit or in parcels, and at any time and place and on any terms.” MCL 440.9610(2). Because MFC never relinquished its security interest as to the debtors, MFC did not waive its security interest in the collateral, including United. Thus, the trial court’s dismissal of MFC’s objections with regard to the writs of garnishment is reversed. Accordingly, the trial court’s order permitting plaintiff to draw on the letter of credit is also reversed.

Next, MFC argues that the trial court’s order requiring garnishee defendant Key Bank to pay over monies to plaintiff that Key Bank disclosed in its verified disclosure should be reversed. We agree.

Following the trial court’s amended judgment of July 13, 2007, which added Stonepath Group to the judgment, plaintiff caused to have issued several writs of garnishment, including one to Key Bank. In its verified disclosure, Key Bank indicated that it was liable to Stonepath Group in the amount of \$131,932.76. The court ordered the funds released to plaintiff because Key Bank was not included in the letter of credit that the court ordered to secure payment to plaintiff if he prevailed in this lawsuit. However, MFC had a valid, enforceable, and prior-perfected security interest in all of the collateral of United, as well as the Stonepath entities. This security interest was perfected before plaintiff became a judgment lien creditor; thus, the Key Bank funds were improperly released to plaintiff. A creditor with a perfected security interest has priority over a subsequent lien creditor of the debtor.² A secured creditor with a security interest in a deposit account may instruct the bank to pay the balance of the account to it. 68A Am Jur 2d, Secured Transactions, § 541, p 469. Accordingly, the trial court’s order of November 16, 2007, that directed Key Bank to pay over these monies to plaintiff is reversed, and plaintiff is ordered to pay those funds to MFC.

In conclusion, the trial court’s order directing the Key Bank funds to be released to plaintiff is reversed and plaintiff is ordered to pay those funds to MFC. The trial court’s order granting, in part, plaintiff’s motion to dismiss MFC’s objections and declaring that plaintiff is entitled to United’s accounts receivable generated on or after May 21, 2007, is reversed and plaintiff is ordered to pay those funds, if any, to MFC. Further, the trial court’s order granting plaintiff’s motion to draw upon the letter of credit in its entirety is also reversed and plaintiff is ordered to pay those funds, if any, to MFC.

Reversed and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

² 68A Am Jur 2d, Secured Transactions, § 262, p 269.