

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Master-in-Equity

Charles B. Simmons, Jr., Master in Equity

Case No. 2010-CP-23-3860
Appellate Case No. 2019-002047

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MAR 12 2020
SC Court of Appeals

Independence National Bank,

Respondent,

v.

Buncombe Professional Park,
LLC and David Decarlis s/a
David D. Decarlis,

Of who, David Decarlis is the

Appellant.

Initial Brief

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STATEMENT OF ISSUES ON APPEAL

DO THE FACTS SUPPORT THE FINDING BY THE MASTER IN EQUITY THAT DAVID DECARLIS HAS THE ABILITY TO ORDER THE BAYVIEW TRUST, FOR WHICH HE IS NOT THE TRUSTEE, TO SEND PROPERTY OF THE TRUST TO AN ACCOUNT IN SOUTH CAROLINA?

DID THE COURT ERR IN APPOINTING A RECEIVER IN THIS MATTER?

STATEMENT OF THE CASE

This is an appeal from the Master in Equity's Order Denying the Appellant's Motion for Reconsideration of its order dated October 8th, 2020 Ordering David Decarlis to "Repatriate" assets held in Bayview Trust.

This case arises from a foreclosure on commercial real property that was sold at a foreclosure auction in 2011. There was a deficiency judgment entered against Mr. Decarlis. The Respondents have filed and pursued supplemental proceedings against David Decarlis.

At a hearing held on September 20, 2019 pursuant a Rule to Show Cause Order, the Respondent asked the court to Order David Decarlis to have funds that were in possession of the Bayview Trust, a Trust existing under the Laws of the Cook Islands, transferred to the United States so that they could be seized and applied to the judgment. On September 25, 2019 the Appellant filed a Memorandum in Response to Plaintiff's Rule to Show Cause where he argued against the repatriation order as well as the Respondent's request for a receiver.

On October 2, 2019, the Respondent filed its Motion for the Appointment of a Receiver. On October 8, 2019 the Court issued its Order for Repatriation of Assets where it ordered David Decarlis to have the funds of The Bayview Trust delivered to his attorney, despite not being the trustee of the trust. On October 18th, the Motion to Reconsider was filed by the respondent. On October 29, 2019 a Motion for Contempt was filed, where the Plaintiff asked the court to hold Mr. Decarlis in Contempt and to incarcerate him until he repatriated the funds. A hearing was held on November 6th on both motions. The Order Appointing the

Receiver was entered on November 12th, 2019 and the Order Denying the Motion to Reconsider was filed on December 5, 2019.

The Notice of Appeal was filed by the Appellants on December 10, 2019.

STANDARD OF REVIEW

Supplemental proceedings before a Master in Equity are equitable in nature, so the court will review it de novo. *See* Ag-Chem Equip. Co., Inc. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). “In an equitable matter referred to a master for final judgment with direct appeal to the supreme court, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence. . . . The appellate court is not required, however, to disregard the findings of the master. *Id.*” Fast Photo Exp. v. 1ST Nat. Bank of Chicago, 630 S.E.2d 285, 369 S.C. 80 (S.C. App. 2006) citing Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n, 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct.App.1995).

ARGUMENTS

I. THE MASTER IN EQUITY'S CONCLUSION THAT DAVID DECARLIS HAS CONTROL OVER THE TRUST IS NOT SUPPORTED BY FACTS OR THE LAW.

a. David Decarlis does not have possession of the funds.

The entity that has the funds is The Bayview Trust, a legally recognized entity separate and distinct from the person of David Decarlis. The Bayview Trust was formed in 2009 and Mr. Decarlis was the Settlor. It is an irrevocable trust organized and existing in the Cook Islands, an independent and sovereign nation in the South Pacific. The trust is a separate legal entity established in the Cook Islands under the Cook Islands International Trust Act. The Trustee is SouthPac Trust International, Inc., a company incorporated in the Cook Islands. The Trustee is the legal owner of the assets of the trust, not the Settlor or the Beneficiary. *see* Russell v. Wachovia Bank, NA, 353 S.C. 208, 578 S.E.2d 329 (S.C. 2003). The proper subject of the court's order is the Trustee.

Due to the byzantine nature of United States tax law, Mr. Decarlis is still the responsible party for any tax liabilities those laws say he has incurred, but he has no control or authority over those assets beyond what is retained in the operating documents of the trust. (Transcript Sept. 20, 2019 p 8 line 6-7).

The Court does not have jurisdiction over the Trust or the Trustee and the Respondent has not sought to bring either into this action. Nor has the Respondent sought to bring an action against the Trust or the Trustee in their own jurisdictions. Because of this, the court has not ordered the proper party to act.

b. Mr. Decarlis cannot force or order the Trustee or the Trust to deliver the funds.

It is not in dispute that Mr. Decarlis has no personal possession of the funds. They are in bank accounts in the Cook Islands and he is not a party to those accounts and has no access to those accounts. At the hearing, certain documents which governed the formation and control of this trust were entered into evidence. One of these documents is the Trust Agreement between David Decarlis, as Settlor of the Trust, and Southpac Trust International, Inc., a Cook Island Company, as the trustee of the trust. (Transcript Sept 20, 2019 page 19, line 22)

The Order Denying the Motion to Reconsider mentions several items the court considered evidence to the contrary:

First, the court says the timing of the trust, the court found suspicious. This is completely irrelevant as to the question of whether or not Mr. Decarlis actually has control of the funds or the trust now.

Second, the law firm that organized the trust for Mr. Decarlis, apparently, “specializes in minimizing creditors’ abilities to collect judgments through establishment of ‘offshore trusts’.” (Order Denying Motion to Reconsider) Once again, this is irrelevant to the fact that Mr. Decarlis cannot get the money and have it sent back to South Carolina.

Third, the court mentioned that both the trust and the mortgagee are organized outside of the United States. Once again, this is irrelevant as to the issue of Mr. Decarlis’ ability to control the funds or the trust.

Fourth, the Court found that Mr. Decarlis' using personal funds to pay for trustee services as being indicative of his having control over the funds. All this shows is that Mr. Decarlis made a payment to the Trustee in order to prevent the trust corpus from making the payment. Because he is the Settlor of the trust, there would have been a significant tax liability.

Fifth, the court found the transfer of \$100,000.00 to a friend for a business venture to indicate Mr. Decarlis could have the \$902,000 amount sent to South Carolina for the payment of his creditors. This was simply not true. The evidence before the court showed that Mr. Decarlis had to request this money from the Trustee and only after satisfying the trustee did the trust send the money. At no point and in no way can Mr. Decarlis demand or force the Trustee to deliver the money. (Transcript September 20, 2019 p22 line 17 to p23 line 7) The Trustee always maintains the power to refuse Mr. Decarlis for any reason. This ability to use Trust assets but at the same time only have limited use of them is what spendthrift provisions are designed to do.

Sixth, the court cites to the fact that Mr. Decarlis changed the beneficiary of the Trust from himself to his dependents. This is also irrelevant as it in no way shows that Mr. Decarlis can deliver the funds to his creditors. Changing a beneficiary is not the same as emptying the trust of its assets or ordering the trust to convey funds to a beneficiary or third party. Besides this, the Respondent (and any strawman acting on its behalf) would be barred from being named a beneficiary under the documents of the trust.

Examining the Court's reasoning, many of its reasons for finding Mr. Decarlis can and should repatriate the funds do not even touch on Mr. Decarlis' ability to do what he is being ordered to do. The Court expresses a dislike of how the trust is structured and how it is set up, who set it up, and when it was set up 11 years ago. There is no evidence, however, that Mr. Decarlis has the ability to do what he is being ordered to do.

In fact, Mr. Decarlis attempted to have \$350,000.00 of the funds sent to him so that he could pay them to this creditor. (Transcript Sept 20, 2019 page 28 line 12 to page 33 line 8). He sent three separate emails and each time the Trustee asked for more information. Mr. Decarlis knew that it was possible the trustee would decline to cooperate if it knew the full reasons for the request. His first request was very simple and provided no details. The trustee asked for more information. The second request provided more information, and on the third request he told them the funds were so he could pay a creditor. After this information was provided, the Trustee refused to transfer the money saying it was prohibited from sending it under the Trust Agreement. (transcript September 20, 2019 page 29 line 3 to page 33 line 8). Despite this, the respondent has accused Mr. Decarlis of merely feigning compliance. (transcript November 6, 2019 page 10 and Memorandum). First, Mr. Decarlis cannot feign compliance when there was no order ordering him to repatriate the funds. Second, there is nothing on the record showing this was anything other than a good faith attempt to pay money to his creditors. In fact, both counsel for the Respondent and the court expressed doubts regarding Mr. Decarlis' ability to repatriate the funds. Mr. Angell said,

“So, do I know if we will ever be able to get that money back? No, I don’t know that, Your Honor.” (Transcript November 6, 2019 page 10, line 15-16). The Court also expressed doubt during the hearing that Mr. Decarlis had the ability to force the transfer of the money.

The position, really, seemed to be that the only way they could know if Mr. Decarlis really had the ability to repatriate the funds would be to Order him to do it and then throw him in jail to see what happened. This is a dangerous way to wield the Court’s contempt power. (transcript Sept 20, 2019 page 22 line 2-5)

Mr. Decarlis attempted to have funds repatriated for the purposes of paying this debt off. The Trustee refused. There is nothing Instead of crediting him with an attempt to cooperate and do what the court was going to order him to do, the Respondent used this as an opportunity to slander Mr. Decarlis before the court claiming these attempts were some sort of coded message to frustrate the purposes of the court. (Motion for Contempt, page 6). There was no coded message and Mr. Decarlis was attempting to gain access to funds so he could deal with this creditor.

Without actual proof that Mr. Decarlis has the ability to do what the court has ordered; its decision should be reversed.

c. The Trust Agreement prevents the repatriation of the funds under court order.

The Trust Agreement does not allow the Trustee to transfer the funds in this situation. To do so would expose the Trustee to suit for breach of the agreement.

The Trust was formed on April 21, 2009 and registered on May 27, 2009.

The Trust Agreement outlines the relationship between David Decarlis as the Settlor and the Trustee. Section 9.1 of the Trust Agreement says:

9.1 Subject to Clause 14, during the lifetime of the Settlor, the Trustee shall distribute the Trust Fund or any part thereof to such one or more Beneficiaries, on such terms and conditions, either outright or in trust, as the Settlor may from time to time appoint by a signed written instrument delivered to the Trustee, with such instrument specifically referring to and exercising this power of appointment.

...

9.3 Notwithstanding anything to the contrary contained in this Agreement, such powers of appointment shall be non-general in nature, and may not be exercised to any extent or in any manner in favour of the Settlor, the Settlor's estate, the Settlor's creditors, or the creditors of the Settlor's Estate.

Mr. Decarlis, as the Settlor, has exercised his right under section 9.1 to request the Trustee pay funds from the trust to other parties. When that request was made, \$100,000.00 was transferred to Priority Partners International, Ltd. This was accomplished when Mr. Decarlis sent a written request to the Trustee and the Trustee granted the request. The funds were sent directly to Priority Partners

International, Ltd. This was done at the discretion of the Trustee and did not violate any term of the Trust Agreement..

Prior to the hearing on September 20, 2019, Mr. Decarlis requested \$350,000.00 in funds to be distributed to him to pay to the Plaintiff. He sent a written request but the Trustee asked for more detail. On the third request, the Trustee denied the request on the grounds that the money was for the benefit of Mr. Decarlis' creditors. (*pp 28-33 September 20, 2019 transcript*).

The trustee is prohibited from distributing funds for the purpose of payment to Mr. Decarlis' creditors under the Trust Agreement. Section 14 of the Trust Agreement says:

14.0 Compulsion

14.1 Notwithstanding any other provision of this Agreement, in the event that any right power or discretion vested in or reserved to any person is in the bona fide opinion of the Trustee holding office immediately prior to the exercise or purported exercise of such right, power or discretion:

- (a) exercised or omitted to be exercised by that person under duress or influence of an outside force, or by compulsion;
- (b) not in the Trustee's opinion voluntary in nature;
- (c) exercised by any legal process or like authority; or
- (d) instigated by any directive, order, ruling or like decree of any court, tribunal or administrative body, or by

bankruptcy-in-trustee, official assignee, or any other similar appointee or person;

(e) otherwise involuntary in nature,

and such exercise or failure thereof is not in the opinion of the Trustee for the benefit of the beneficiaries immediately prior to such exercise or failure to exercise, then such exercise or failure to exercise shall be deemed to be invalid and of no effect.

Furthermore, the Trustee has absolute discretion under the Trust because of the Spendthrift Clause of the Trust Agreement.

30.0 Spendthrift Clause

30.1 In keeping with the wholly discretionary nature of this Trust and all separate Trusts created hereunder, no Beneficiary, except as regards any irrevocable vesting in his favour, shall have any ascertainable proportionate, actuarial or otherwise fixed or definable right to or interest in all or any portion of the Trust Fund and in no case shall any Beneficiary have any right to alienate, transfer, assign, encumber or hypothecate his expected interest therein, either present or future, nor shall any interest of any Beneficiary be subject to claims of his creditors, or liable to attachment, execution or other process of law.

The black and white terms of the Trust Agreement show that Mr. Decarlis has no power or authority to coerce The Bayview Trust to deliver him any amount of funds. When the transfer would be for the benefit of Mr. Decarlis' creditors, the Trustee must refuse and, in all cases, has discretionary authority to refuse. Mr. Decarlis has already attempted to do what the Court is now ordering him to do and he has been unsuccessful. Using the court's powers of contempt will not change this.

The Order of the Court concludes that the transfer by the Trustee of \$100,000.00 to Priority Partners International, Ltd is evidence of the control Mr. Decarlis has over the trust. This is not true for several reasons. First, any transfer out of the trust is done completely at the discretion of the Trustee. Second, creditors are prohibited beneficiaries under the terms of the trust. Mr. Decarlis can request the funds be transferred, as he already has done, but he cannot demand it. In this case, his request was refused. Third, Mr. Decarlis testified that he asked SoutPac to send the \$100,000 to Priority Partners International, Ltd, but there is no evidence or testimony that Mr. Decarlis has any more control beyond the power to request the funds.

d. The Court's Order is an attempt to exert its control over a party it does not have jurisdiction over.

"[A] judgment is void ... if a court acts without [personal] jurisdiction."
EX PARTE SOUTH CAROLINA DEPT. OF REVENUE, 350 S.C. 404, 566 S.E.2d 196 (S.C. App., 2002) citing Thomas & Howard Co. v. T. W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); The court cannot make any

ruling or judgment regarding the interests of a party if it does not have personal jurisdiction over that party. Since the court does not have control over the Trust or the Trustee, it cannot affect the interests of those entities.

What the repatriation order is attempting to do is exert control over the Trust and/or the Trustee through Mr. Decarlis. The court is ordering Mr. Decarlis to force a third-party to act. If that third-party refuses to act, Mr. Decarlis will be placed in jail for an indefinite period of time. Literally, Mr. Decarlis does not have the keys to his jail cell in this situation. This is not an application seeking to enforce a court's power and authority; it is the court punishing someone for something they did before the court ever had jurisdiction.

The Respondent has taken the position that this situation is of Mr. Decarlis' own making and he should have to face the consequences of those decisions. That takes this beyond the court's power of contempt. The court can use its power of contempt to either coerce a party to act or to punish a party for disobeying an order. In this situation, Mr. Decarlis cannot act. In fact he has and remains open to acting in any way the court orders, but he cannot force the Trust to act. What the Respondent really wants to do is to punish Mr. Decarlis for actions that occurred in 2009 and 2010 before any court ever had jurisdiction over him. This is simply not within the bounds of what the court can use its contempt power to do.

- e. The Respondent has failed to show any fraud on the part of the Defendant in not repatriating the funds.**

The Respondent wants the court to ignore the existence of the Trust and claims that it is a fraud. (transcript November 6, 2019 and Memorandum for Contempt). The problem is that there is no evidence presented that it is a fraud. There has never been any doubt raised that the Trust exists as a separate entity and that the Mr. Decarlis is neither the Trustee nor does he control the Trustee as a member, officer, shareholder, etc. The controlling documents have been produced and there is no way under those documents to coerce the transfer of the funds. Additionally, there is no dispute that the court does not have jurisdiction over the trust or the trustee. The proper way to resolve this conflict would be to obtain jurisdiction over the person that has the funds. Frankly, if this was a situation with a trust and/or a trustee in another state that is what would happen. If the Trust and/or the Trustee were in another state, there would be no question of the need to go to where they existed. Just because it is difficult is no reason to suspend the proper exercise of justice in this case.

The transfer may be a fraudulent transfer to the trust, but that is a separate issue from the current location of the assets and Mr. Decarlis' control over them. The Respondent makes this accusation of fraud to say that Mr. Decarlis is lying about his control over the trust but all he has to support that is guesswork.

Independence did file with the court an Affidavit for a supposed expert on International Trusts. First, this affidavit should not have been relied on for the Motion to Reconsider. It was filed with the Respondents Motion for Contempt. Second, there was no way for the Appellant to question or cross examine the expert and it was filed less than 10 days prior to the hearing.

Furthermore, Mr. Adkisson failed to even consider the entire Trust Agreement. Mr. Adkisson mentioned that the settlor (Mr. Decarlis) could use a 'friendly person' as an intermediary. The problem with that is that neither the court nor Mr. Decarlis have any real control over this 'friendly person.' It is moot anyway because that person would be an excluded beneficiary under the trust documents.

In Short, the Court is ordering Mr. Decarlis to make third parties (The Bayview Trust and SouthPac, the Trustee) do something which he has no power or authority to do. The effect of this order is an attempt to circumvent the fact that the court lacks jurisdiction over both of those entities. The Supreme Court of the United States has said, "to jail one for a contempt for omitting an act he is powerless to perform would ... make the proceeding purely punitive, to describe it charitably." Maggio v. Zeitz In re Luma Camera Service, Inc, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948). That is exactly what is happening here.

II. THE COURT SHOULD NOT HAVE GRANTED THE MOTION TO APPOINT THE RECEIVER.

There exist no statutory grounds for the appointment of a receiver in this action. S.C. Code Section 15-65-10 says:

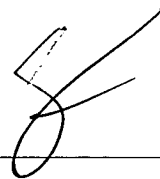
"A receiver may be appointed by a judge of the circuit court, either in or out of court, . . . (3) After judgment to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment."

In this case, this is a money judgment so other than the non-exempt assets of the debtor there is no property that is the subject of the judgment. The statute says that the party seeking a receiver must show that the debtor is withholding assets that can be used to apply towards the debt. This has not been demonstrated. Mr. Decarlis has not refused to apply his assets to satisfaction of this judgment. In fact, Mr. Decarlis has attempted to have the Bayview Trust re-patriate a portion of the funds to pay to the creditors, but this request was refused. He cannot sell the house at 216 Cleveland because there is a mortgage on it in excess of the current value. Finally, there are no distributions out of 3009 Palm Blvd LLC to go to a receiver. Mr. Decarlis pays money into 3009 Palm Blvd LLC in order to pay the mortgages against the property every year. The receiver cannot be appointed over 3009 Palm Blvd, LLC. The court has no jurisdiction over that LLC and the judgment is against Mr. Decarlis, not the LLC.

The Plaintiff has failed to show where Mr. Decarlis is withholding assets that he could use to pay to the Plaintiff. For this reason it would be improper for the receiver to be appointed.

III. CONCLUSION

The lower court has incorrectly ordered Mr. Decarlis to repatriate assets that he has no legal control over and should be reversed. Furthermore, the Respondent has not shown that Mr. Decarlis is willfully withholding assets that could be applied to the debt. Without such a finding, there is no grounds for the appointment of a receiver and the Order should be reversed.



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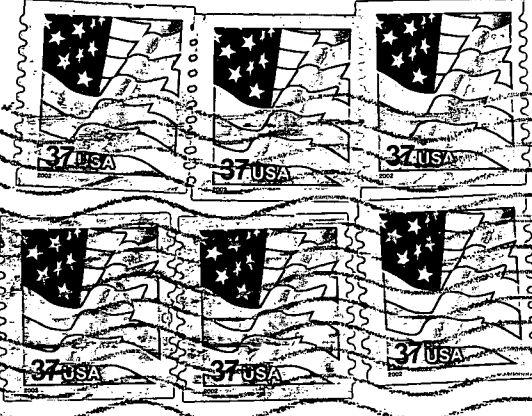
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