

CLYNG CORP. dba HAMLIN-STEVEN,	:	IN THE COURT OF COMMON PLEAS
Plaintiff,	:	OF THE 26th JUDICIAL DISTRICT
	:	COLUMBIA COUNTY BRANCH, PENNA.
vs.	:	
	:	
ALL AMERICAN LIGHTING CORP.,	:	
Defendant,	:	No. 730-CV of 2003
	:	
vs.	:	
	:	No. 159-ED of 2003
M&T BANK,	:	
Garnishee,	:	
	:	
FCI CORPORATION,	:	
Petitioner.	:	
	:	

APPEARANCES:

PAUL M. SCHOFIELD, Jr., ESQUIRE, GORDON & WEINBERG, P.C., 21 South 21st Street, Philadelphia, PA 19103, Attorney for Plaintiff, CLYNG CORP. dba HAMLIN-STEVEN.
FRANK BEDOSKY, pro se, for Defendant, ALL AMERICAN LIGHTING, CORP., 350 South Poplar Street, Berwick, PA 18603.
TIMOTHY P. POLISHAN, ESQUIRE, HOEGEN, HOEGEN & KELLEY, LLP, 152 South Franklin Street, P.O. Box 346, Wilkes-Barre, PA 18703-0346, Attorney for Petitioner.

OPINION

June _____, 2004, James, J.

Before us for disposition is the Petition of FCI Corporation to Set Aside Execution and Obtain Related Relief. The relevant facts and procedural history in this case are as follows:

1. On July 2, 2003, the Plaintiff, Clyng Corp. dba Hamlin-Steven ("Clyng"), filed a Civil Complaint against the Defendant, All American Lighting Corp. ("All American"), claiming

damages of \$51,166.00 plus interest, etc., based upon All American's default on a promissory note.

2. On August 29, 2003, Clyng entered default judgment against All American in the amount of \$56,226.38.

3. On November 14, 2003, Clyng filed a Praecipe for Writ of Execution, and on November 17, 2003, the Prothonotary issued Writ of Execution No. 159-ED of 2003 to the Columbia County Sheriff against the Defendant, All American, and M&T Bank ("M&T") as garnishee.

4. On November 20, 2003, the Columbia County Sheriff served the Writ of Execution on M&T as garnishee.

5. On December 4, 2003, M&T filed answers to Interrogatories in Attachment indicating it had in its possession property of All American consisting of account #8890703740 in the amount of \$5,778.06.

6. On December 5, 2003, All American filed a Claim for Exemption with the Columbia County Sheriff seeking exemptions for the following items: (1) \$300.00 statutory exemption, (2) wages, (3) employee wages and (4) taxes, however, because All American did not pay the Sheriff's fee for filing its Claim for Exemption on December 5, 2003, the Sheriff did not file his Notice of Claim for Exemption and Request for Hearing with the Court until All American paid the filing fee on or about January 22, 2004. (see ¶ 10, *infra*).

7. On December 22, 2003, Clyng entered Judgment Upon Admission against M&T as garnishee in the amount of \$5,778.06.

8. On January 13, 2004, M&T paid the sum of \$5,778.06 to Clyng's counsel who then made disbursement to Clyng.

9. On January 20, 2004, Clyng entered Judgment Upon Admission against M&T as garnishee in the amount of \$6,096.38 based upon M&T's answers to Interrogatories in Attachment indicating that it had in its possession property of All American consisting of account #8890703740 in the said amount of \$6,096.38.

10. On January 22, 2004, the Columbia County Sheriff filed a Notice of Claim for Exemption and Request for Immediate Hearing based upon the Claim for Exemption filed in the Sheriff's Office by All American on December 5, 2003, and by Order dated January 27, 2004, and filed January 28, 2004, the Court scheduled a hearing thereon for February 4, 2004.

11. On January 27, 2004, a copy of the Property Claim of Claimant FCI Corporation was faxed to the Columbia County Sheriff in which FCI claimed \$11,048.08 of the funds in All American's M&T account #8890703740.

12. On January 29, 2004, M&T paid the sum of \$6,096.38 to Clyng's counsel who then made disbursement to Clyng.

13. On February 3, 2004, FCI Corporation ("FCI") filed the pending Petition to Set Aside Execution and Obtain Related

Relief, and a Rule was issued on Clyng with a Return date of February 18, 2004.

14. On February 4, 2004, the original of the Property Claim of Claimant FCI Corporation previously faxed to the Columbia County Sheriff (see ¶ 11, supra) was filed in the Columbia County Prothonotary's Office.¹

15. By Order of Court dated February 4, 2004, and filed February 13, 2004, All American's claim for exemption was granted to the extent of \$300.00 with regard to the funds garnished.

16. On February 11, 2004, the acting Columbia County Sheriff filed a Notice of Claim for Exemption and Request for Immediate Hearing based upon a second Claim for Exemption filed in the Sheriff's Office by All American on February 10, 2004,² and by Order of Court dated and filed February 12, 2004, the Court scheduled a hearing thereon for February 18, 2004.

17. By Amended Order of Court dated February 18, 2004, and filed February 25, 2004, the Court reconsidered it prior

¹The original of FCI'S Property Claim was never filed in the Columbia County Sheriff's Office as required by PaRCP 3202, nor did the Sheriff ever make a determination of the claimant's title as required by PaRCP 3204. Accordingly, we find that FCI'S Property Claim is not properly before this Court at this time and will not be dealt with herein.

²All American claimed an exemption as follows: "Money in account is money covering check to PA. Dept. of Revenue."

Order dated February 4, 2004, (see ¶ 15, supra) and denied All American's first claim for exemption.

18. By Order of Court dated February 18, 2004, and filed February 25, 2004, the Court denied All American's second claim for exemption.

19. On or about November 6, 2003, FCI owed All American approximately \$2,774.52 for oven and urn assembly services provided to FCI by All American.

20. On or about November 6, 2003, Neil Eisenband, Vice President of FCI, intended to use a computer program to schedule a one-time wire transfer of \$2,762.02 (the \$2,774.52 owed All American less the \$12.50 wire transfer fee) on November 7, 2003, from FCI's bank account to the M&T bank account of All American (account number 8890703740).

21. Mr. Eisenband mistakenly and unknowingly clicked the portion of the computer screen that caused the intended **one-time** wire transfer for \$2,762.02 to become a **periodically recurring** wire transfer that would be sent "November 7, 2003, and each Friday thereafter until notified."

22. Mr. Eisenband did not discover the erroneously created recurring wire transfer until he reviewed FCI's November 30, 2003, bank statement on December 16, 2003, by which time five additional wire transfers had occurred, for a total amount of \$13,810.10.

23. In an effort to correct the situation, Mr. Eisenband issued a reverse wire transfer request to M&T to refund the wire transfers made in error, and M&T rejected the request.

24. When Mr. Eisenband learned from Frank Bedosky of All American that a judgment creditor of All American (i.e., Clyng) had frozen All American's M&T account, Mr. Eisenband obtained the name of Clyng's counsel, Paul M. Schofield, Jr.

25. On or about December 17, 2003, Mr. Eisenband telephoned Attorney Schofield and informed him that the funds in the subject M&T account were paid into the account by FCI in error and that none of that money was owed to either All American or Clyng by FCI for any reason. Attorney Schofield responded that despite receiving this notification from FCI, Clyng intended to keep any funds it could obtain from All American's M&T account, but Clyng "might" consider releasing the funds in question to FCI if FCI could assist Clyng in locating other bank accounts of All American.

26. From on or about December 17, 2003, to the end of the year, Mr. Eisenband unsuccessfully attempted to resolve this matter amicably through discussions with Attorney Schofield, discussions with Mr. Bedosky of All American, telephone calls to M&T and attempts to reverse the erroneous wire transfers so that by mid-January 2004, FCI had retained legal representation in this case.

DISCUSSION

FCI's Petition asserts that the execution proceedings in this case, and particularly the garnishment of the funds in M&T account #8890703740 of All American,³ should be set aside on the grounds that certain rules of procedure were not followed in this case.⁴ We agree.

FCI contends that the entry of judgments upon admission in answer to interrogatories pursuant to PaRCP 3146(b) against M&T as garnishee on December 22, 2003, for \$5,778.06 (see ¶ 7, supra) and on January 20, 2004, for 6,096.38 (see ¶ 9, supra) violated PaRCP 3123.1(c). This Rule provides in pertinent part as follows:

³There is no dispute whatsoever that the funds totaling \$11,874.44 in All American's M&T account #8890703740 levied on and eventually paid to Clyng (see ¶'s 7, 8, 9 & 12, supra) in the course of the execution proceedings in this case were funds owned by and belonging to FCI which through a computer error were mistakenly deposited by wire transfers into All American's M&T account (see ¶'s 19, 20, 21 & 22, supra).

⁴PaRCP 3183(d) provides as follows:

(d) The court may on application of any party in interest set aside the writ or service

(1) for a defect therein; or

(2) upon a showing of exemption or immunity of property from execution; or

(3) upon any other legal or equitable ground.

. . . If a claim for exemption is pending, judgment pursuant to Rule 3146(b) may be entered only by agreement of the parties or by leave of court.

In this case, All American filed a Claim for Exemption with the Columbia County Sheriff on December 5, 2003, but did not pay the Sheriff's filing fee at that time. (see ¶ 6, supra). The filing fee was not paid by All American until January 22, 2004, at which time the Sheriff filed with the Court his Notice of Claim for Exemption and Request for Immediate Hearing pursuant to PaRCP 3123.1(b). (see ¶ 10, supra). Clyng argues that All American's Exemption Claim was not filed on December 5, 2003, because the Sheriff's filing fee was not paid at that time, and that the effective date for the filing was instead January 22, 2004,⁵ when the fee was paid. We do not agree.

In the eminent domain case of *Kobulnicky v. Commonwealth*, 439 Pa. 281, 266 A.2d 668 (1970), after a jury trial, the Commonwealth had judgment entered on the verdict but did not pay the jury fee and costs required to be paid at the time the judgment was entered. Sixty-five days later, the property owners filed their notice of appeal. The eminent domain code at that time provided that either party in a condemnation

⁵By January 22, 2004, Clyng had already entered its two judgments against M&T as garnishee pursuant to PaRCP 3146(b). The first had been entered on December 22, 2003, for \$5,778.06 (see ¶ 7, supra), and the second on January 20, 2004, for \$6,096.38 (see ¶ 9, supra).

case may appeal to the Pennsylvania Supreme Court from any final judgment of the court of common pleas within forty-five day from entry of the judgment. The Commonwealth filed a motion to quash the appeal on the grounds that it was filed after the forty-five day appeal period allowed by the statute. The property owners argued that the Commonwealth's failure to pay the necessary jury fee when the judgment was entered was fatal to the entry of a final judgment. The Pennsylvania Supreme quashed the appeal holding that the property owners could not avoid the effect of the statute requiring their appeal to be filed within the forty-five day appeal period. [See also **First Union National Bank v. F.A. Realty Investors Corp.**, 812 A.2d 719 (Pa.Super. 2002), where the Pennsylvania Superior Court held that a notice of appeal filed within the allowable time period without the requisite fee was still considered valid].

Likewise in the instant case, we find that the failure of All American to pay the Sheriff's filing fee on December 5, 2003, did not in any manner effect the filing of the Claim for Exemption on that date as argued by Clyng. To the contrary, All American's Claim for Exemption was duly filed and pending as of December 5, 2003. The Sheriff merely delayed the filing of his Notice of Claim for Exemption and Request for Immediate Hearing with the Court until January 22, 2004, when he received the filing fee from All American.

Since the Claim for Exemption by All American was pending at the time Clyng entered its judgments against M&T as garnishee on December 22, 2003, in the amount of \$5,778.06 (see ¶ 7, supra) and on January 20, 2004, in the amount of \$6,096.38 (see ¶ 9, supra), those judgments were improperly entered in the absence of an agreement of the parties or leave of court to do so as required by PaRCP 3123.1(c).

Accordingly, we enter the following:

ORDER OF COURT

AND NOW, to wit, this _____ day of June, 2004, for the reasons set forth in the foregoing Opinion, it is hereby ORDERED and DECREED as follows:

1. The writ of execution by the Plaintiff, Clyng Corp. dba Hamlin-Steven, against the garnishee, M&T Bank, is hereby set aside, and in particular, the judgments entered against M&T Bank as garnishee on December 22, 2003, for \$5,778.06, and on January 20, 2004, for \$6,096.38, are hereby stricken from the record in this case.

2. The Plaintiff, Clyng Corp. dba Hamlin-Steven, is hereby directed to pay the sum of \$11,874.44 to the Petitioner, FCI Corporation, within thirty (30) days from the date of this Order.

BY THE COURT:

