COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP38 **Cir. Ct. No. 2007CV462**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

HOWARD C. NELSON,

PLAINTIFF,

HYRAD CORPORATION,

PLAINTIFF-RESPONDENT,

V.

NANCY FURRER, LEADER CORPORATION, REMOTE CONTROL SHOCKS, INC., DIGITAL SUSPENSION AND PACIFIC RIM SOURCES, INC.,

DEFENDANTS,

FREDERICK J. FURRER A/K/A FREDERICK JAMES FURRER A/K/A FRED FURRER AND HYRAD CORPORATION,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

INGMAR NELSON AND NELSON MARKETING, INC.,

THIRD-PARTY DEFENDANTS,

NATIONAL EXCHANGE BANK & TRUST AND M&I BANK,

GARNISHEES,

WEGNER CPAS LLP,

RECEIVER,

STEVEN P. O'CONNOR,

INTERVENOR-APPELLANT.

APPEAL from orders of the circuit court for Columbia County: JOSEPH G. SCIASCIA, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Steven O'Connor appeals the circuit court's decision and order directing the distribution of the proceeds of a sale of real property, and the court's subsequent order denying his motion for reconsideration. In its first decision and order, the circuit court ordered that those proceeds be distributed to plaintiffs Hyrad Corporation and Howard Nelson to satisfy a 2010 judgment requiring Hyrad to pay attorney's fees and costs to Boardman Law Firm, which successfully represented Hyrad and Nelson in this shareholder derivative action. O'Connor contends that those proceeds should instead be distributed to him to satisfy a 2012 judgment that he obtained in a separate action. The 2012 judgment ordered Hyrad to pay attorney's fees to O'Connor, who represented the defendants in this shareholder derivative action. For the reasons stated, we affirm.

BACKGROUND

¶2 The following facts are not disputed. Hyrad minority shareholder Nelson filed this shareholder derivative action on behalf of Hyrad against Hyrad officer and majority shareholder Frederick Furrer and other defendants. Boardman Law Firm represented Hyrad and Nelson, and O'Connor defended Furrer and the other defendants.[1] The circuit court found Furrer liable for theft and other wrongdoing, and judgment was entered against Furrer in favor of Hyrad in November 2010 and docketed in December 2010.[2] The 2010 judgment awarded damages, including attorney's fees and costs, to Hyrad, and specifically provided that damages be paid in the following order of priority: (1) attorney's fees and costs in the amount of $309,969.68 owed to Boardman Law Firm be paid "from HYRAD's available assets, as well as immediately upon recovery from [Furrer], until all outstanding fees and expenses owed to Boardman Law Firm are paid"; (2) costs awarded to Nelson in pursuing the action be paid "upon recovery after full payment of the attorneys' fees award, from HYRAD's available assets, and, thereafter, upon recovery from [Furrer] until all outstanding costs awarded

[1] Hyrad was a necessary party to this shareholder derivative action, as the real party in interest as a plaintiff, and nominally named also as a defendant. *See* ***Ross v. Bernhard***, 396 U.S. 531, 538 (1970) ("The claim pressed by the stockholder against directors or third parties 'is not his own but the corporation's.' The corporation is a necessary party to the action; without it the case cannot proceed. Although named a defendant, it is the real party in interest, the stockholder being at best the nominal plaintiff. The proceeds of the action belong to the corporation and it is bound by the result of the suit." (citation omitted)); 13 WILLIAM MEADE FLETCHER et al., FLETCHER CYCLOPEDIA OF LAW OF CORPORATIONS (2016), § 5997 (a minority shareholder plaintiff brings a derivative action on behalf of the corporation, and generally also lists the corporation as a defendant where "management is antagonistic toward the interests of the plaintiff").

[2] The judgment was also entered against Furrer's wholly-owned management company, Leader Corporation, a fact that is not relevant to this appeal.

are paid;" and (3) and the damages awarded be paid to Hyrad "after full payment of all outstanding amounts for fees and costs awarded as outlined above."

¶3 O'Connor subsequently sued Hyrad to recover the attorney's fees he charged for representing the defendants in this shareholder derivative action. As a result of that action, judgment in the amount of $49,447.25 was entered against Hyrad in favor of O'Connor, and the judgment was docketed in February 2012.

¶4 In January 2013, the circuit court appointed a receiver for Hyrad and authorized the receiver to liquidate all assets of Hyrad and to receive funds from Furrer in order to satisfy the 2010 judgment, and to "distribute the proceeds according to the provisions of the [2010] Judgment." In June 2014, in a foreclosure action initiated by the receiver, Hyrad obtained title to, and the receiver took possession of, a property owned by Furrer "in an attempt to effectuate the [2010 judgment] and satisfy the judgment of Hyrad against Furrer."

¶5 In July 2014, O'Connor moved to intervene in this shareholder derivative action and for an order attaching and turning over to him all Hyrad assets and proceeds from the sale of any property obtained by Hyrad from Furrer to satisfy O'Connor's 2012 judgment against Hyrad. Based on its review of the record and the parties' briefs, and after hearing arguments by counsel, the circuit court denied O'Connor's motion "to apply assets held by the receiver to the satisfaction of [O'Connor's] judgment." The court based its denial on several grounds, including that the doctrine of "in custodia legis" (which we define and discuss below) applies to preclude O'Connor's effort to attach the assets of Hyrad, including the proceeds from the sale of any property obtained by Hyrad from Furrer, because that property "was already in the hands of the court appointed receiver" when O'Connor moved to have it applied to his judgment.

¶6 The receiver subsequently received an offer from a third party to purchase the Furrer property from the receiver, and Hyrad moved the circuit court for an order "authorizing the Receiver to accept the [offer] ... free and clear of any lien from the 2012 O'Connor Judgment." Based on its review of the record and the parties' briefs, and after hearing arguments by counsel, the circuit court granted Hyrad's motion in part. The court approved the receiver's sale of the Furrer property subject to Hyrad's and O'Connor's stipulation to the release of the lien asserted by O'Connor and to the holding of the proceeds in escrow until further order by the court, directing how the proceeds from the sale should be distributed.

¶7 After additional briefing on whether the proceeds should be distributed to Boardman Law Firm, as directed in the 2010 judgment, or instead to satisfy O'Connor's 2012 judgment, the circuit court issued a "Memorandum Decision Regarding Priority of O'Connor Lien." Based on its review of the record the court ruled as follows:

> [T]he Court makes the following findings:
>
> On December 2, 2010, when [Hyrad's] judgment was docketed against Mr. Furrer, Furrer was owner of the real estate which is the subject of this motion. The [2010] judgment therefore was a valid lien on that property.
>
> The judgment of O'Connor, which was docketed against Hyrad on February 16, 2012, could not have attached to the subject property because the property was owned by Furrer.
>
> ….
>
> When the property came into the possession of the receiver, it was in custodia legis and the proceeds must be applied pursuant to paragraph 4, page three of the [2010] Judgment, which states: "That attorney's fees awarded pursuant to plaintiffs Bill of Costs be paid by Hyrad to Boardman Law Firm, from Hyrad's available assets, as well as *immediately upon recovery from defendants* until all outstanding fees

> and expenses owed to Boardman Law Firm are paid." (emphasis added).

¶8 Based on these findings and conclusions, the circuit court ordered that the proceeds of the sale of the Furrer property be distributed to Boardman Law Firm in accordance with the 2010 judgment. The court subsequently denied O'Connor's motion for reconsideration of that order, and this appeal follows.

DISCUSSION

¶9 O'Connor makes a number of arguments in support of his challenge to the circuit court's decision and order to distribute the proceeds of the sale of the Furrer property to satisfy the 2010 judgment awarding attorney's fees and costs to Boardman Law Firm. Because we conclude that the doctrine of in custodia legis applies here in favor of Nelson and Hyrad and that this is a dispositive conclusion, we confine our discussion to that topic and to O'Connor's arguments that the doctrine does not apply. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

¶10 The parties appear to agree that whether the doctrine of in custodia legis applies to undisputed facts is a legal question that we review de novo, and we will follow their lead.

¶11 In custodia legis, meaning "in the custody of the law," BLACK'S LAW DICTIONARY 885 (10th ed. 2014), is a common law doctrine that exempts from execution, garnishment, or attachment funds or property in the hands of a public official or officer of the court. *See* ***Welch v. Fiber Glass Eng'g, Inc.***, 31 Wis. 2d 143, 149, 142 N.W.2d 203 (1966) ("moneys *in custodia legis*, the management and distribution of which are already under the control of a court, are

not intended to be reached by garnishment proceedings") (quoting ***Williams v. Smith***, 117 Wis. 142, 145, 93 N.W. 464 (1903)); ***Hill v. La Crosse & M.R. Co.***, 14 Wis. 291, 293 (1861) (property held in custodia legis "cannot be seized on attachment or garnished by a third party" creditor). Thus, when property is deemed to be in custodia legis, there is "no question that" "no one could deprive the court or sheriff of either title to or the right to possess the property or could otherwise gain rights superior to that of the court." ***Plan Credit Corp. v. Swinging Singles, Inc.***, 54 Wis. 2d 146, 152, 194 N.W.2d 822 (1972).

¶12 A receiver is an officer of the court. ***Delbridge v. Kaukauna Fibre Co.***, 165 Wis. 435, 440, 162 N.W. 478 (1917). Under the in custodia legis doctrine, when "a receiver has been appointed by one court to take possession of property, no steps can be taken in another court which will affect the title or possession of the receiver." ***Milwaukee & St. Paul R.R. Co. v. Milwaukee & Minnesota R.R. Co.***, 20 Wis. 165, 172 (1865). *See also* ***Nick v. Holtz***, 237 Wis. 407, 413, 297 N.W. 387 (1941) ("As the possession of the receiver was the possession of the court, the property was *in custodia legis* ....").

¶13 As explained above, the circuit court here appointed a receiver in January 2013 to liquidate all Hyrad assets and to receive funds recovered from Furrer to satisfy the 2010 judgment, and to distribute the proceeds as directed by the provisions of that judgment. There is no reasonable dispute that the 2010 judgment attached to the Furrer property. Thus, under the in custodia legis doctrine described above, upon appointment of the receiver, the Furrer property became in custodia legis and not subject to attachment. When the Furrer property was sold to Hyrad pursuant to a foreclosure action initiated by the receiver on Hyrad's behalf, the property remained in custodia legis because it came into possession of the receiver, as directed by the order appointing the receiver.

Indeed, the circuit court found that the property "was already in the hands of the court appointed receiver" when O'Connor moved to have it applied to his judgment, and O'Connor does not show that that finding is clearly erroneous. In sum, we conclude that the property at issue was in custodia legis and exempt from O'Connor's lien.

¶14 Turning to O'Connor's arguments, we begin by noting that O'Connor does not develop an argument that the doctrine of in custodia legis has been superseded by statute or that it has been written out of the law by case law.[3] Instead, he takes various approaches in challenging the application of the doctrine to these circumstances, which we now address.

¶15 One argument is based on an inaccurate summary of the circuit court's decision. O'Connor asserts that the court "held that once the real estate came into possession of the receiver, the real estate became held in custodia legis to be used to pay the plaintiff shareholder Nelson's attorney fees." In fact, the court ruled that the receiver held the property in custodia legis to be used to satisfy the 2010 judgment in favor of Hyrad and against Furrer, and there can be no dispute that the 2010 judgment ordered that Boardman Law Firm's attorney's fees and costs be paid "from Hyrad's available assets, as well as immediately upon recovery from [Furrer]." Thus, the court did not use the in custodia legis doctrine "to safeguard a debtor's [Hyrad's] assets from its creditors," as O'Connor argues,

[3] We decline to address O'Connor's flat assertion, without citation to supporting legal authority, that the doctrine of in custodia legis is an equitable doctrine that cannot apply in the context of the "statutory priority of liens." *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered.").

but rather to secure Furrer's assets on behalf of Hyrad as the judgment creditor, to satisfy the judgment against the judgment debtor Furrer.

¶16 O'Connor argues that the doctrine of in custodia legis may not be used to help a debtor place its assets "off limits" to creditors. This argument is completely misframed. Hyrad is not the judgment debtor here; rather, it is the judgment creditor, and Furrer is the judgment debtor. Because O'Connor is not a creditor of Furrer, his argument fails.

¶17 O'Connor argues that the doctrine of in custodia legis applies only "to establish priorities [among] creditors, not between a debtor and its creditors." However, the only authority he cites for this proposition does not remotely support it, and we address this topic no further. *See* ***Plan Credit Corp.***, 54 Wis. 2d at 152-53 (because initial writ of attachment had not been dissolved by court order, when subsequent writ was issued on the same property, property was in custodia legis, and subsequent writ was inferior to initial writ).

¶18 O'Connor argues that the facts show that the Furrer property "was not within the custody of the [circuit] court when O'Connor obtained his" lien against Hyrad in 2012. O'Connor does not explain how that matters when the Furrer property did come within the custody of the court upon the court's appointment of the receiver in January 2013.

¶19 Finally, O'Connor argues that while Hyrad may have had a valid lien on Furrer's property when the 2010 judgment against Furrer in favor of Hyrad was docketed, Hyrad could no longer maintain that lien when the receiver took possession of the property on Hyrad's behalf in 2014, because at that point O'Connor's lien on Hyrad's property became operative. Whatever other defects this argument may have, at a minimum it would directly contravene the 2013 order

appointing the receiver to effectuate the 2010 judgment. O'Connor's argument would prevent the receiver, as an officer of the court, from disposing of the Furrer property in accordance with the purpose for which it was acquired. That is exactly what the doctrine of in custodia legis is designed to prevent. *See* ***Hill***, 14 Wis. at 294 (stating that the garnishment of money held by an officer of the court "would not only greatly interrupt the due and speedy administration of the law, and prevent the courts from consummating their judgments, but it would involve the ministerial officers of the courts in interminable difficulties and delay in the discharge of their duties.").

CONCLUSION

¶20 For the reasons stated, we affirm.

By the Court. – Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.