IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRIDEV ONE, LLC, d/b/a PIREES PIRI PIRI GRILL, JAY PATEL, and MEGHA PATEL	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-07-115 DCS
	)	N14C-09-019 DCS
REGENCY CENTERS, L.P.,	)	(Consolidated)
Defendant.	)	

REPORT AND RECOMMENDATION

This matter came before the Court upon the several Motions for Charging Orders[1] filed by Regency Centers, L.P. ("Regency") in the above captioned matter. The Motions are based upon the Judgment awarded to Defendant as a result of a long process. A full history of this matter can be found in the previous decisions of this Court. In short, on July 20, 2017, the Court entered judgment in favor of Regency and against Plaintiffs in the amount of $807,879.96, plus interest. Regency now moves for a Charging Order, pursuant to 6 Del. C. §18-703, against any limited liability company interest of Jay Patel (hereinafter "Patel"), one of the individual

[1] *See* Trans. ID #s 61560147, 61561454, 61560278, 61560242 and 61560207 (collectively referred to herein as the "Motions").

plaintiffs/debtors. The Motions seek the entry of a Charging Order to act as a lien against Patel's membership interests in various limited liability companies.

Plaintiffs submitted a Response in Opposition and argue: (1) the Motions fail to present sufficient proof that Patel has any current membership interest in the companies; (2) this Court lacks subject matter jurisdiction to grant the relief requested; and (3) the language in the prayer for relief is overly broad. A hearing was held on February 5, 2018 at which time argument was presented. Based upon the arguments presented by the parties and after reviewing the relevant legal authorities, it is my recommendation that the Motions should be granted.[2]

Plaintiffs' first and second arguments are intertwined. Plaintiffs argue that Regency relies on testimony and documentation dating from 2014 to 2016 to establish Patel's membership interests and due to age, this information is no longer reliable to establish Patel's current ownership interest. Presumably, Plaintiffs would have this Court deny the Motions as premature, Regency would then seek discovery of Patel's membership interests and then re-present the Motions to this Court (or another). However, before addressing that issue, Plaintiffs' second argument needs to be considered. Plaintiffs next argue that the Court of Chancery has exclusive

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[2] I have elected to submit a Report and Recommendation to the presiding judicial officer over the litigation due to the unique nature of the circumstances presented by this matter.

jurisdiction over matters involving Charging Orders. If correct, then the theory relied upon by Plaintiffs would also suggest that the Court of Chancery should determine any matters relating to discovery in aid of a Charging Order. Therefore, I will initially address the jurisdictional argument.

Section 18-703(a) of Title 6 of the Delaware Code provides that, "[o]n application by a judgment creditor of a member or of a member's assignee, ***a court having jurisdiction*** may charge the limited liability company interest of the judgment debtor to satisfy the judgment." (emphasis added) Historically, the Superior Court has issued Charging Orders as part of its powers to enforce judgments and execution of liens. Long ago, it was also recognized that the jurisdiction of the Superior Court over the subject matter, persons and property in a lawsuit is conferred by statute and cannot be conferred simply by the assent of the parties.[3] Therefore, these orders were based on the Superior Court's broad authority to act pursuant to 10 Del. C. §562, which allows the Superior Court to frame and issue all writs necessary for carrying out judgments of the Court into execution. Additionally, the Court of Chancery recognized approximately three decades ago

[3] *See Odessa Loan Ass'n v. Dyer*, 81 A. 469, 470 (1911); *Stidham v. Brooks*, 5 A.2d 522, 525-526 (1939).

that the Superior Court had the power to issue Charging Orders when enforcing judgments.[4]

In 1986, the Court of Chancery was presented with a complaint seeking an order under 6 Del. C. §17-703, the Delaware Uniform Limited Partnership Act, which was virtually identical to the statute at issue herein.[5] In *MacDonald*, the then Chancellor concluded that the Court of Chancery lacked subject matter jurisdiction with respect to the relief requested and that jurisdiction resided with the Superior Court. The Court of Chancery held that the charging order remedy was analogous to a garnishment, a remedy traditionally available from the Superior Court, and once the Superior Court reduced the foreign judgment to a stated amount, it may then charge the defendant's interest under the statute. The Superior Court's jurisdiction to issue Charging Orders then appears to have continued without contest until just recently.

In *Hanna v. Baier*, issued in December of 2017, the Superior Court granted a defendant's motion for protective order on the basis that jurisdiction to issue charging orders, and proceedings in aid of execution, rested exclusively with the

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[4] *See MacDonald v. MacDonald*, 1986 WL 5480 (Del. Ch. May 9, 1986) (hereinafter "*MacDonald*").

[5] In 1986, the limited partnership statute provided that "[o]n application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner…" *MacDonald*, 1986 WL 5480, at *4.

Court of Chancery.[6] In *Hanna*, the defendant sought protection from discovery aimed at a charging order issued in a foreign jurisdiction. The court reviewed Section 18-703 and concluded that the legislative amendment of 2005 divested the Superior Court of jurisdiction to issue charging orders. Specifically, in 2005, the General Assembly added a new subsection to the statute stating "The Court of Chancery shall have jurisdiction to hear and determine any matter relating to any such charging order."[7] According to *Hanna*, "[t]his amendment made clear that the proper jurisdiction to hear any matters relating to orders charging a member's interest in a limited liability company is exclusively in the Court of Chancery."[8] *Hanna* is the most recent legal authority on this issue.

Regency argues that the *Hanna* court may have misapplied the law and it was not the General Assembly's intent to divest the Superior Court of its jurisdiction to issue these orders. A review of the legislative history leading to the 2005 Amendment provides little guidance.[9] I do find though that the following provides some direction to the decision making herein.

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[6] *See Hanna v. Baier*, 2017 WL 6507187 (Del. Super., Dec. 19, 2017) (hereinafter "*Hanna*").

[7] *See* 6 Del. C. §18-703(f).

[8] *Hanna*, 2017 WL 6507187, at *2.

[9] *See* Del. Sen. B. 86, 143rd General Assembly (April 21, 2005).

The General Assembly chooses its words carefully.[10] Of note is the fact that in subparagraph (d) of Section 18-703, the statute states that the entry of a charging order is the "***exclusive*** remedy" (emphasis added) for a judgment creditor when dealing with a membership interest. That language existed when the 2005 Amendment was made and continues today. The word "exclusive" has been defined to mean "limited to possession, control, or use by a single individual or group."[11] When amending the statute, the General Assembly could have clearly stated that the Court of Chancery had "exclusive" jurisdiction, but it did not insert that word into newly added section (f). That term, having not been used by the General Assembly when given the opportunity, lends support to Regency's position that the 2005 Amendment was intended to create concurrent jurisdiction between the Court of Chancery and the Superior Court.

In *Glanding v. Industrial Trust Co.*, 45 A.2d 553 (Del. 1945), the Supreme Court analyzed a similar issue. In that case, the Court of Chancery had for years exercised exclusive jurisdiction to enter decrees of distribution. The Legislature eventually created the Orphans Court and the statute defining its jurisdiction

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[10] *See e.g., Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Memorial Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) (recognizing that "the General Assembly 'is presumed to have inserted every provision into a legislative enactment for some useful purpose and construction.'").

[11] *See Dewey Beach Enterprises, Inc. v. Board of Adjustment*, 1 A.3d 305, 309 (Del. 2010), quoting Merriam-Webster's Collegiate Dictionary, 10th Ed. At 404.

indicated that the "Court shall make a decree determining the distribution of the estate..." It was argued that this language divested the Court of Chancery of the power to enter decrees and vested that jurisdiction exclusively with the Orphans Court.[12] The Supreme Court disagreed and held that the Court of Chancery continued to exercise its jurisdiction until the Legislature granted jurisdiction exclusively to another tribunal, and that the jurisdiction conferred by the new statute was intended to be permissive or conditional, rather than absolute.[13]

Another case providing insight into this analysis is *In re Arzuaga-Guevara*, 794 A.2d 579 (Del. 2001). In that case, a father argued that the Family Court had exclusive jurisdiction to hear petitions for minor guardianship, despite the Court of Chancery's history exercising such power. The Supreme Court discussed the fact that it had previously issued a decision holding that the Court of Chancery alone was vested with the power to appoint guardians. Eight years after that decision, the General Assembly enacted an amendment indicating the Family Court "shall have authority to...appoint guardians of the person over minors under 18 years of age."[14] The Supreme Court believed that this enactment was a legislative response to its

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[12] *Id.* at 510-511.

[13] *Id.* at 512-514.

[14] *Id.* at 583.

earlier ruling. The Supreme Court then held that the new statute included no language purporting to vest the Family Court with "exclusive" jurisdiction, thus the statute should be interpreted as creating concurrent jurisdiction.

I conclude that a logical inference from the 2005 Amendment is that the General Assembly intended to address any concern over the Court of Chancery's power to issue charging orders. The record is devoid of any intent by the General Assembly to vest "exclusive" jurisdiction with the Court of Chancery, but rather the amendment now clarifies and confirms the Court of Chancery's concurrent power to issue charging orders, something that the *MacDonald* decision held the court would not, or could not, do. I find that the reasoning of *MacDonald* simply makes sense. In that decision, the Court of Chancery acknowledged that once the Superior Court reduced a matter to a monetary judgment, it should issue orders of execution on that same judgment. There is no reason to diverge from that practice, especially when it has been the historical practice.

Further, "[t]he law does not favor repeal by implication."[15] To interpret the 2005 Amendment as repealing the Superior Court's power under Section 562 to issue charging orders would be illogical when the legislative history fails to mention

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[15] *Board of Assessment Review of New Castle County v. Silverbrook Cemetery* Co., 378 A.2d 619, 621 (Del. 1977) (recognizing that the doctrine of implied repealer will only apply if a subsequent enactment creates an "irreconcilable inconsistency" with a pre-existing statute).

any intention to divest this Court of a power it has long exercised. The 2005 Amendment contains no limiting language, no express prohibitory negative language, nor does it do so through implication of affirmative language. Like *Glanding* and *Arzuaga-Guevara*, the General Assembly's usage of the permissive "shall" without the limiting term "exclusive" was meant to extend power and not distinguish it. Therefore, the Superior Court can grant the Motions.

With respect to the Plaintiffs' first argument regarding the "stale" data, I find that the information relied upon by Regency was not unreasonable under the circumstances. The history of this matter would easily disclose the contentious nature of the litigation. Plaintiffs' counsel represented at the hearing that membership interests are being cancelled or transferred but he did not produce any documentation in support nor offer anything concrete to contradict the sworn testimony. Either way, discovery in aid of execution would be appropriate and I was not convinced that entry of the orders now would create any undue prejudice to the companies.

Finally, Plaintiffs object to the extent the proposed orders contemplate allowing a Charging Order to extend to any amounts which may be payable to Patel, without limitation. Regency was prepared at the hearing to adjust its form of orders as necessary or appropriate. In light of Regency's concession, as well as my review of the applicable statute, I find that any order granting the Motions should be limited

to Patel's "distribution or distributions" from the limited liability company. Section 18-703(a) of Title 6 of the Delaware Code provides as follows:

> On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any ***distribution or distributions*** to which the judgment debtor would have otherwise been entitled in respect of such limited liability company interest.[16] (emphasis added).

The statute specifically references "distributions." To the extent Regency sought relief that was broader than that authorized by statute, the relief should be denied and any order granting the Motions, if entered, should be limited as set forth above.

In consideration of the foregoing, I recommend that the Court decline to follow *Hanna* and that the Motions be granted subject to the modification to the form of orders set out above.

IT IS SO ORDERED THIS 9th day of February, 2018.

The Honorable Katharine L. Mayer

Original to Prothonotary
cc: Richard L. Abbott, Esquire
Richard S. Gebelein, Esquire
David J. Soldo, Esquire

[16] *See* 6 Del. C. §18-703(a).