

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOTMAN INTERNATIONAL, B.V. :
 :
 v. : CIVIL ACTION
 :
 INTERNATIONAL PRODUCE IMPORTS, : NO. 99-5088
 INC., ET AL. :

SURRICK, J.

JANUARY 31, 2006

MEMORANDUM & ORDER

Presently before the Court is Plaintiff's request for an Order authorizing payment of escrowed funds to Plaintiff¹, and Defendants' Motion For Stay Of Execution Pending Determination Of Appeal (Doc. No. 93). For the following reasons, we will deny the Motion for Stay of Execution and partially grant Plaintiff's request for an Order directing payment of escrowed funds to Plaintiff.

I. BACKGROUND

The facts in this case have been summarized in our Memoranda and Orders dated July 27, 2004 (Doc. No. 75) and June 29, 2005 (Doc. No. 86). The information pertinent to the instant request and Motion is as follows. On July 27, 2004, we issued a Memorandum and Order granting Summary Judgment in favor of Plaintiff and against Defendants on Defendants' First through Sixth Counterclaims, in favor of Plaintiff and against International Produce Imports, Inc. ("IPI") on Count I (Breach of Contract), Count II (Failure to Maintain Trust Under PACA), and Count IV (Breach of Fiduciary Duty) and in favor of Plaintiff and against Dirk J. Keijer on

¹Plaintiff's request came in the form of a letter dated November 14, 2005.

Counts IX (Breach of Fiduciary Duty – Constructive Trust) and Count XI (Breach of Fiduciary Duty – PACA). In that same Order, we denied Summary Judgment against IPI on Count III, against Dirk J. Keijer on Count X, and against Clare A. Keijer on all counts. (Doc. No. 75.) On June 29, 2005, we issued a Memorandum and Order granting Plaintiff's Motion for Final Judgment and entered judgment pursuant to our Order of July 27, 2004. (Doc. No. 86.)

In the request to this Court, Plaintiff seeks an order authorizing payment of escrowed funds to Plaintiff through its counsel in partial satisfaction of Plaintiff's judgment. The escrowed funds were deposited in defense counsel's trust account pursuant to the Stipulation and Order of February 13, 2002 (Doc. No. 70) and constitute funds derived from two sources: (1) funds from the sale of the residence of Clare and Dirk Keijer (approximately \$60,000), and (2) funds collected from the corporate Defendant's accounts receivable (approximately \$60,000).

Defendant Clare A. Keijer contends that the escrowed funds derived from the sale of the marital residence of Dirk and Clare Keijer constitute property held pursuant to an estate by the entirety and that as such, are not subject to the claim by Plaintiff, which is solely a creditor of Dirk Keijer. Plaintiff acknowledges that it could not execute against real estate held by the individual defendants as tenants by the entirety. However, Plaintiff argues that the sale of the property and the deposit of the proceeds into an escrow account have terminated the tenancy by the entirety so that the funds may now be used to partially satisfy the judgment against Defendant Dirk Keijer.

In addition to the opposition of Clare Keijer to Plaintiff's request to authorize payment of escrowed funds derived from tenancy by the entirety property, Defendants Dirk Keijer and IPI have also filed a Motion for Stay of Execution pending appeal. On July 28, 2005, Defendants

filed a timely Notice of Appeal to the Third Circuit Court of Appeals. Defendants contend that the Court should not permit execution on the judgment against them until the appeal has been resolved.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 62(d) provides the court with the power to grant a stay of judgment pending appeal.² There are four factors that a court must assess when determining whether a defendant is entitled to such a stay: “(1) whether [defendant] has made a strong showing that [it] is likely to succeed on the merits; (2) whether [defendant] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies.” *Bank of N.S. v. Pemberton*, 964 F. Supp. 189, 190 (D.V.I. 1997) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). However, “[w]here the latter three factors favor a stay, [a] defendant need only demonstrate a ‘substantial case on the merits’ to warrant issuance of a stay under Rule 62(d).” *Id.* (quoting *Morgan Guar. Trust Co. v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y.1988)).

III. LEGAL ANALYSIS

A. Tenancy by the Entireties

Under Pennsylvania law, tenancy by the entireties is a form of co-ownership of property, either real or personal. “In such a tenancy each spouse is seized *per tout et non per my*. There is

² Fed. R. Civ. P. 62(d) provides: “When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.”

but one legal estate, which, by a long course of judicial decisions, has been buttressed against inroads attempted either by the parties themselves or by their individual creditors.” *Sterrett v. Sterrett*, 166 A.2d 1, 2 (Pa. 1960).

In this case, Defendant Clare Keijer contends and Plaintiff acknowledges that the marital residence owned by Clare and Dirk Keijer constituted an estate by the entirety and could not be used to satisfy a judgment against only Dirk Keijer. *See Stop 35, Inc. v. Haines*, 543 A.2d 1133, 1135 (Pa. Super. Ct. 1988) (“A husband and wife do not own separate interests in an entirety property which can be reached by their individual creditors.”); *see also Probenki v. Am. Alliance Ins. Co. of N.Y.*, 176 A. 205 (Pa. 1935). The only issue in dispute is whether the sale of this property and the deposit of the proceeds into an escrow account severed the tenancy by the entirety thus making the sale proceeds divisible and available to satisfy a judgment against one party. Defendant Clare Keijer contends that the proceeds from the sale of the marital residence constitute property held pursuant to an estate by the entirety. Plaintiff, on the other hand, argues that “the acts of seeking court approval for sale of the real estate, the sale of the real estate, and the deposit of the proceeds in the escrow account have served to terminate the tenancy by the entirety.” (Doc. No. 100 at 1.)

There are four unities required for a tenancy by the entirety: “(1) unity of interest; (2) unity of title; (3) unity of time; and (4) unity of possession.” *Heagy v. Smith*, 15 Pa. D. & C.3d 656, 660 (Pa. Com. Pl. 1980). An estate by the entirety can be severed under a limited number of circumstances. Other than death, a severance may be achieved “only through divorce, a joint conveyance[,] or mutual agreement, either express or implied.” *Estate of Cambest*, 756 A.2d 45, 54 (Pa. Super Ct. 2000); *see also Stop 35*, 543 A.2d at 1135. It cannot be severed by “the

independent action of one spouse.” *Estate of Cambest*, 756 A.2d at 54.

Plaintiff, citing no specific case law in support of its argument, contends that when Dirk and Clare Keijer sold their marital property and deposited the proceeds into an escrow account, they severed the estate by the entirety because the Keijers no longer maintain unity of title or unity of possession in the escrowed funds. We disagree. The mere sale of the property does not, on its own, convert a tenancy by the entirety into a tenancy in common. *See Heagy*, 15 Pa. D. & C.3d at 660 (sales agreement does not destroy unity of interest and is not sufficient to show conversion from tenancy by the entirety to a tenancy in common). In addition, the placement of the sales proceeds in an escrow account in the joint names of Clare and Dirk Keijer does not, without anything else, sever the estate by the entirety. *See Estate of Maljovec*, 602 A.2d 1317, 1322 (Pa. Super. Ct. 1991) (holding that placement of rental income in an escrow account in both names, to the benefit of both and the exclusion of neither did not create an implied agreement to sever the tenancy by the entirety); *Patwardhan v. Brabant*, 439 A.2d 784, 785 (holding that plaintiff’s attempt to attach escrow fund held in name of defendant and his wife and constituting proceeds of sale of marital property was fatally flawed for failure to join wife as an indispensable party). *In re Branberry’s Estate* 156 Pa 628, 27 A. 405 (1893) (in Pennsylvania personalty may be held by the entirety. This includes proceeds from the sale of real estate.) Under the circumstances here present, we will not permit the proceeds of the sale of the Keijer’s marital residence, now held in escrow, to be used in partial satisfaction of Plaintiff’s judgment against Dirk Keijer.

B. Stay of Execution Pending Appeal

The escrowed funds derived from IPI’s accounts receivable are also the subject of

Defendants' Motion to Stay Execution. As discussed above, there are four factors that we must assess in determining whether to grant a stay of execution pending appeal: (1) whether on appeal Defendants are likely to succeed on the merits; (2) whether denial of a stay will result in irreparable injury to Defendants; (3) whether issuance of the stay will substantially injure the other parties; and (4) where the public interest lies. If the final three factors point towards granting the stay, Defendants need only demonstrate a "substantial case on the merits" on appeal. *Bank of N.S.*, 964 F. Supp. at 190.

We are satisfied that Defendants have not demonstrated a "substantial case on the merits", much less a "strong showing" of likely success. Defendants, in their Motion for Stay of Execution, state that the appeal is based on five independent grounds (Doc. No. 93 at 2-3) and that "there is no question that the Defendants have demonstrated a substantial case on the merits." (Doc. No. 94 at 3.) We disagree. Defendants have presented no new evidence or arguments in support of their assertion that our Order granting summary judgement was in error. The grounds presented on appeal include: (1) the existence of a genuine issue of material fact concerning Adri Botman's standing in the case; (2) the existence of a choice of law provision in the agreement between the parties designating the law of the Netherlands and not PACA as the governing law; (3) error of this Court in finding that IPI failed to maintain the PACA trust because the receivables were uncollectible; (4) error of this Court in finding against Dirk Keijer on the state law constructive trust claim where there was no evidence of fraud, detrimental reliance, or unjust enrichment; and (5) error of this Court in dismissing Defendants' counterclaims where there were genuine issues of material fact. Each of these arguments was fully examined and rejected in our Memoranda and Orders of June 29, 2005 (Doc. No. 86) and

July 27, 2004 (Doc. No. 75).³ These arguments possess no more merit now than they did when we addressed and rejected them in granting Summary Judgment. Defendants have failed to make a strong showing that they will succeed on appeal or even present a substantial case on the merits. *See Bank of N.S.*, 964 F. Supp. 189, 190-91 (D.V.I. 1997) (finding that defendant failed to make a strong showing or substantial case on merits where appeal presented no new arguments).

³ We addressed Defendants' argument regarding Adri Botman's standing in our June 29, 2005 Memorandum and Order. (Doc. No. 86 at 6 n.5.) We are not persuaded that the standing of this individual has any impact on the granting of summary judgment for the corporate Plaintiff. The argument that IPI did not fail to maintain the PACA trust because the trust was fully funded was addressed in our Memorandum and Order of July 27, 2004. (Doc. No. 75 at 23.) It should be noted that we denied summary judgment on the dissipation of trust assets claim (Count III) and only granted summary judgment on the claims that IPI failed to maintain the trust as required by PACA (Count II) and breached its fiduciary duty (Count IV) because IPI did not make its assets "freely available to satisfy [its] outstanding obligations." (Doc. No. 75 at 23.) The argument regarding Dirk Keijer's breach of fiduciary duty-constructive trust was addressed and rejected in our July 27, 2004 Memorandum and Order. (*Id.* at 26.) Finally, Plaintiff's argument that genuine issues of fact remain regarding their counter-claims was also addressed and rejected in the July 27, 2004 Memorandum and Order. (*Id.* at 9-16.)

With regard to Defendants' argument regarding a choice of law provision in the parties' agreement, we addressed this argument in part in our January 29, 2002 Memorandum and Order denying Defendants' Motion for Reconsideration of Their Prior Motion to Dismiss the Action for Lack of Subject Matter Jurisdiction. In that opinion, we found that this Court had subject matter jurisdiction regardless of whether the choice of law provision precluded application of PACA. (Doc. No. 69.) In addition, Defendants seem to suggest that they intend to argue on appeal that PACA does not apply at all because of the choice of law provision. However, Defendants failed to raise this argument in response to Plaintiff's Motion for Summary Judgment, a failure which effectively waives their ability to raise this argument on appeal. *Brown v. Johnson*, 116 Fed. Appx. 342, 346 (3d Cir. 2004) ("[i]t is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal." (quoting *Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir. 1983))). As a result, this argument similarly does not persuade us of a substantial case on the merits on appeal.

In addition to Defendants' failure to persuade us of the likelihood of success on appeal, we are not persuaded that the remaining three factors support a stay of execution of judgment pending appeal. While Defendants claim that they will be irreparably injured should we direct that the funds held in escrow be used to partially satisfy payment of Plaintiff's judgment, this argument is unconvincing. The funds at issue consist of \$60,000 from IPI's accounts receivable. Defendants' contention that they will be injured if forced to pay Adri Botman and then later discover that he had no legal right to those funds is, as Plaintiff suggests, a red herring. The judgment is in favor of the corporate Plaintiff, Botman International, B.V. and Adri Botman's standing and legal right to the corporate Plaintiff's claims is not and should not concern Defendants. Rather, Mr. Botman's right to those funds is an issue between him and the Botman corporation and is not relevant to these proceedings. It is similarly clear that a stay of execution would certainly injure Plaintiff, which has been entitled to those funds at least since July 2004 and should not be forced to wait any longer.

Finally, as Plaintiff states, the public interest supports execution of the judgment. The PACA statute was enacted to protect sellers of perishable produce and to ensure payment of the goods they deliver. *See Weis-Buy Servs., Inc. v. Paglia*, 411 F.3d 415, 420 (stating with respect to PACA: "It is clear that Congress intended to create a system by which producers and growers would be secured in their transaction with buyers.")). Further delay of the payment that is owed to Plaintiff under PACA would certainly not serve the public interest. Moreover, given the fact that Defendants have failed to present a substantial case on appeal, it is clear that "the public interest is served neither by a court system clogged with meritless appeals nor by the waste of property which could otherwise be placed into the stream of commerce and put to use by a new

owner.” *Bank of N.S.*, 964 F. Supp. at 191. Accordingly, we will grant Plaintiff’s request and order that the escrowed funds that represent money from IPI’s accounts receivables be paid towards partial satisfaction of Plaintiff’s judgment.

An appropriate Order follows.

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ORDER

AND NOW, this 31st day of January, 2006, upon consideration of Plaintiff's request for an Order authorizing payment of escrowed funds to Plaintiff and Defendants' Motion For Stay Of Execution Pending Determination Of Appeal (Doc. No. 93), it is ORDERED that Defendants' Motion is denied and Plaintiff's request is granted in part and denied in part.

Mark Mandell, Esquire, is directed to release to Plaintiff counsel the escrow funds that were derived from International Produce Imports, Inc.'s accounts receivable to be paid in partial satisfaction of Plaintiff's judgment. The funds in escrow that represent the proceeds of the sale of Dirk and Clare Keijer's marital residence shall remain in escrow.

IT IS SO ORDERED.

BY THE COURT:

S/ R. Barclay Surrick
U.S. District Court Judge