

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 090578

STATE, EX REL LLOYD'S, INC.,

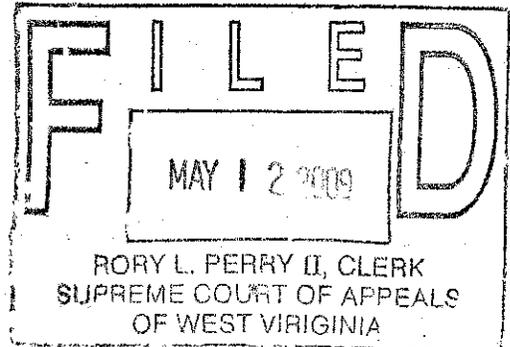
Petitioner,

v.

CIVIL ACTION NO. 04-C-39
Circuit Court of Braxton County

HONORABLE RICHARD A. FACEMIRE,
JUDGE OF THE CIRCUIT COURT OF BRAXTON
COUNTY,

Respondent.



CHARLES R. LLOYD'S RESPONSE TO THE PETITION
FOR WRIT OF PROHIBITION FILED BY LLOYD'S, INC.

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**CHARLES R. LLOYD'S RESPONSE TO PETITION FOR
WRIT OF PROHIBITION FILED BY LLOYD'S INC.**

COMES NOW, Charles R. Lloyd, by counsel, and respectfully offers the following response to the Petition for Writ of Prohibition filed by Lloyd's, Inc. In support of his Response, Charles R. Lloyd states as follows:

STATEMENT OF FACTS

Civil Action 04-C-39 came on for trial in the Circuit Court of Braxton County on March 27, 2007, the Honorable Richard A. Facemire presiding. On April 4, 2007, at the conclusion of the evidence, the parties orally moved for judgment as a matter of law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*. The Circuit Court, upon consideration of the motions, granted Charles R. Lloyd's motion for judgment as a matter of law against Lloyd's, Inc.

Pursuant to the Court's Judgment Order, entered March 5, 2008, Lloyds, Inc. was to pay the sum of One Hundred Thirty Two Thousand Dollars (\$132,000.00), with pre-judgment interest at the rate of five percent (5%) per annum from January 1, 1999 to April 4, 2007, and post-judgment interest thereafter at the rate of nine and three quarters percent (9.75%) per annum, to Charles R. Lloyd. (Exhibit A). Lloyd's, Inc. filed a Petition for Appeal with this Court. On December 8, 2008, this Court entered an Order refusing Lloyd Inc.'s Petition for Appeal. (Exhibit B).

As of January 25, 2009, Lloyd's, Inc. had refused to pay Charles R. Lloyd any amount in satisfaction of the Judgment Order. As such, Charles R. Lloyd filed an Abstract of Judgment and a Writ of Execution on January 26, 2009. (Exhibit C). On February 4, 2009, Lloyd's Inc. responded with a Motion to Quash Execution. (Exhibit D). In its Motion to Quash, Lloyd's Inc. did not deny that the Court's Order of March 5, 2008, awarded judgment against Lloyd's Inc. in the principal sum of One Hundred Thirty Two Thousand Dollars (\$132,000.00), with pre-judgment and post-judgment

interest. Instead, Lloyd's Inc.'s primary argument is that it was not permitted to adjudicate an alleged offset issue at the trial of this action and, alternatively, is attempting to adjudicate this issue in a separately filed civil action, 07-C-76. On February 11, 2009, Judge Facemire entered an Order denying Lloyd's Inc.'s Motion to Quash Execution. (Exhibit E). On that same date, Judge Facemire also entered an Order dismissing civil action 07-C-76.¹

On February 13, 2009, Charles R. Lloyd filed his post-judgment motion seeking to prevent Lloyd's, Inc. from transferring, dissipating or wasting assets. (Exhibit F). On March 6, 2009, Lloyd's Inc. filed its response to Mr. Lloyd's post-judgment motion to enjoin. (Exhibit G). The basis for Lloyd's Inc.'s objection was that the requirements for a complaint under the Uniform Fraudulent Transfers Act were not met. On March 19, 2009, Charles R. Lloyd filed his reply seeking to clarify his position that he was not filing a complaint under the Uniform Fraudulent Transfers Act, but simply seeking to enjoin Lloyd's Inc. from wrongfully transferring, wasting or dissipating assets in an effort to hinder Charles R. Lloyd from collecting on his valid judgment. (Exhibit H). Also on March 19, 2009, Charles R. Lloyd filed his "Motion to Appoint Commissioner in Aid of Execution." (Exhibit I).

On March 27, 2009, Judge Facemire entered an Order granting Charles R. Lloyd's motion to appoint commissioner in aid of execution and his post-judgment motion to enjoin. The Court found that Charles R. Lloyd was not asserting that Lloyd's Inc. had made a fraudulent transfer of assets, but was seeking to prevent a transfer that would inhibit his capacity to collect on what is a valid judgment. The Court also found that enjoining Lloyd's Inc. from transferring or wasting assets

¹ An appeal of the dismissal of civil action 07-C-76 is currently pending before this Court. This is an entirely separate civil action and the outcome in that action is completely irrelevant to Mr. Lloyd's execution on the valid judgement entered in this case, civil action 04-C-39.

is appropriate and will prevent possible litigation. Furthermore, the Court held that Lloyd's Inc. would not be unduly harmed by the injunction as the Court is only requiring Lloyd's, Inc. to remain as it is and keep its assets as they are, effectively remaining the status quo while the execution is carried out. (Exhibit J).

On April 10, 2009, Lloyd's Inc. filed a "Renewed Motion to Quash and/or Stay Execution on Behalf of Lloyd's Inc." (Exhibit K). On April 13, 2009, Lloyd's Inc. filed this Writ of Prohibition with the West Virginia Supreme Court of Appeals.

STANDARD OF REVIEW

"Prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers, and may not be used as a substitute for [a petition for appeal] or certiorari.' Syl. Pt. 1, *Crawford v. Taylor*, 138 W.Va. 207, 75 S.E.2d (1953); Syl. Pt. 3, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 583 S.E.2d 12 (1996).

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is

clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 583 S.E.2d 12 (1996).

ARGUMENT

I. *West Virginia Rules of Civil Procedure, Rule 65 Does Not Require a Hearing and Lloyd’s Inc. Was Given Notice and Opportunity to Respond.*

West Virginia Rules of Civil Procedure, Rule 65 states “No preliminary injunction shall be issued without notice to the adverse party.” Rule 65 does not require a hearing, only notice. Not only did Lloyd’s Inc. have notice of Mr. Lloyd’s post-judgment motion, but Lloyd’s Inc. was given the opportunity to file a response brief citing its objections thereto. Moreover, a factual record upon which to support the Order granting the post-judgment motion to enjoin is evident from the above recitation of the history of this case since the Circuit Court’s March 5, 2008 Judgment Order. Since that time, Lloyd’s Inc., has refused paying the valid judgment, even though the Judgment Order was affirmed in December 2008. Based on the litigation between these parties, the Court found that by enjoining Lloyd’s Inc. from transferring, wasting or dissipating its assets, it may be able to prevent future litigation involving the collection of this judgment. This was a valid reason for the Circuit Court to grant Mr. Lloyd’s post-judgment motion.

Likewise, the balancing of hardship test, referred to by Lloyd’s Inc. in its Petition for Writ of Prohibition, is favorable to Charles R. Lloyd, not to the Petitioner, Lloyd’s Inc. See *Jefferson County Board of Education v. Jefferson County Education Association, et al.*, 183 W.Va. 15, 393 S.E. 2d 653 (1990). Under the balancing of hardship test, the flexible interplay of four factors is considered: (1) the likelihood of irreparable harm to the Plaintiff, (2) the likelihood of irreparable harm to the defendant, (3) the plaintiff’s likelihood of success on the merits, and (4) the public interest. *Id.*

In this case, the likelihood of harm in not enjoining Lloyd's Inc. from transferring, wasting or dissipating assets lies only with Charles R. Lloyd. It is Mr. Lloyd who has a valid judgment that is being ignored and avoided by Lloyd's Inc. and it is Mr. Lloyd that will suffer irreparable harm if Lloyd's Inc. makes a valid judgment uncollectible by transferring assets. Conversely, Lloyd's Inc. cannot argue that it will be irreparably harmed by being ordered not to transfer, dissipate and/or waste assets, especially in light of the valid judgment against it. Lloyd's Inc. is merely being ordered to maintain the *status quo* and not transfer or waste assets while Mr. Lloyd is executing upon his judgment, with the aid of a court appointed Commissioner. Additionally, Charles R. Lloyd has a legitimate and valid judgment against the assets of Lloyd's Inc. Hence, Mr. Lloyd's success on the merits of the case is not only likely, as required under the balancing of hardship test, but certain. The judgment has already been entered and effectively affirmed on appeal.

Finally, the public interest would not be served in allowing Lloyd's Inc. to avoid and hinder payment on a valid judgment by transferring, dissipating and/or wasting assets upon which Mr. Lloyd has a valid judgment. The public's interest would surely lie in seeing the will and order of the judicial system carried out.

II. Charles R. Lloyd's Motion to Enjoin is a Post-Judgment Motion, not a Preliminary Injunction or Restraining Order Requiring Security.

It is undisputed that Charles R. Lloyd has a valid judgment against Lloyd's Inc. *West Virginia Rules of Civil Procedure*, Rule 65 (c), which requires security on injunctive relief, only applies to preliminary injunctions and restraining orders. By the specific terms of the very rule, security is required in preliminary injunctions "for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." *West Virginia Rules of Civil Procedure*, Rule 65 (c). Security is not required in this case where a valid Judgment

Order exists. Rule 65 (c) would only be applicable had Charles R. Lloyd filed a preliminary injunction or restraining order prior to the trial of this matter. Since this is a post-judgment motion seeking to enforce a valid judgment, the requirement for security is not applicable under Rule 65(c).

Additionally, W.Va. Code § 53-5-9 does not contemplate the situation in this case where a post-judgment motion to enjoin is at issue. The purpose of § 53-5-9 in requiring an injunction bond is to indemnify those against whom the injunction is sought against damages should the injunction be dissolved. This is clearly not the reasoning behind Mr. Lloyd's post-judgment motion to enjoin, which only seeks to prevent the Petitioner from transferring, wasting, or dissipating assets against which Mr. Lloyd has a valid judgment. If anyone should be required to post security or bond, Lloyd's Inc. should be required to in regard to its motion to stay, which basically seeks to enjoin Mr. Lloyd from collecting on his valid judgment while the Petitioner pursues appeal of the dismissal of 07-C-76, an entirely separate civil action. It is Mr. Lloyd that should be protected or indemnified from damages that may result in impeding his ability to collect on his judgment at this time.

III. Civil Action 07-C-76 Has No Bearing on the Validity of the Judgment Entered in 04-C-39.

Lloyd's Inc. routinely raises civil action 07-C-76 when seeking to avoid payment on the valid judgment entered in civil action 04-C-39. Issues raised in a separately filed civil action have no bearing on the validity of the Court's judgment entered in this action, 04-C-39, on March 5, 2008. The Judgment Order was entered after Lloyd's Inc. had the opportunity to present its argument concerning an alleged offset to the Circuit Court of Braxton County. The Circuit Court disallowed the argument due, in part, to the fact that it was not timely raised by Lloyd's Inc. as a defense in 04-C-39. Nothing that happens in Civil Action No. 07-C-76 will have any affect on the validity of the judgment in 04-C-39 which is at issue there. Should Lloyd's Inc. ultimately obtain a valid judgment

against Charles R. Lloyd in civil action 07-C-76, then Mr. Lloyd will be responsible to satisfy that judgment. However, it is improper to avoid paying a valid judgment in civil action 04-C-39 based solely on the allegation that Lloyd's Inc. may eventually obtain a judgment against Charles R. Lloyd in 07-C-76. Alleging that a judgment not yet obtained should operate as a set-off against a valid and affirmed judgment is without merit.

IV. Charles R. Lloyd Is Seeking To Enforce a Valid Judgment And This Court Should Refuse To Invoke Any Extraordinary Remedy To Prevent It.

Lloyd's Inc. has not made any payments towards the satisfaction of the valid judgment entered on March 5, 2008. Mr. Lloyd took no collection action while 04-C-39 was being appealed to this Honorable Court. After Lloyd's Inc.'s, appeal petition was denied in December 2008, Mr. Lloyd filed his Abstract of Judgment and Writ of Execution in January 2009. Since that time, Lloyd's Inc. has done nothing, but avoid paying the judgment, thus, forcing Mr. Lloyd to file his post-judgment motion to enjoin and motion to appoint a commissioner in aid of execution. Lloyd's Inc. continues to raise an alleged offset issue that has no bearing on the judgment entered in 04-C-36.

Instead of cooperation and compromise, Lloyd's Inc. has engaged in protracted post-judgment litigation and delay in an attempt to avoid payment to Mr. Lloyd. Mr. Lloyd is simply trying to execute on his valid judgment and ensure that assets are not wrongly transferred prior to said execution. Mr. Lloyd should not be made to suffer delay in effectuating his judgment while Lloyd's Inc. pursues appeal with in 07-C-79. Moreover, Lloyd's Inc. should not be allowed to undertake any actions which would hinder Mr. Lloyd's collection on his valid judgment such as transferring, dissipating or wasting the assets of Lloyd's Inc.

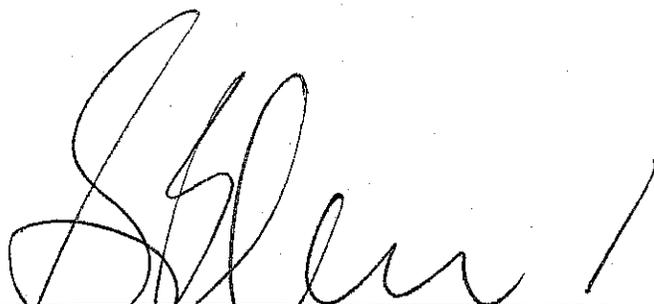
CONCLUSION

WHEREFORE, for the foregoing reasons, Charles R. Lloyd respectfully requests that this Court refuse the Petitioner's request for a Writ of Prohibition, allow Judge Richard A. Facemire's March 27, 2009 Order to stand which prohibits Lloyd's Inc. from transferring, dissipating and/or wasting assets, and allow the parties to proceed with the execution of the Judgment Order.

CHARLES R. LLOYD

Defendant,

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE