

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

MELVYN P. SALUCK, : CIVIL ACTION  
Plaintiff, :  
 :  
v. :  
 :  
STEVEN ROSNER, HEAVEN SENT, LTD. :  
and CATHY ROSNER, :  
Defendants. : No. 98-5718

MEMORANDUM AND ORDER

J. M. KELLY, J.

FEBRUARY , 2003

Presently before the Court is a request for an ex parte temporary restraining order, styled as an Order to Show Cause, filed by Plaintiff Melvyn P. Saluck ("Saluck") against Defendant courier business Heaven Sent, Ltd. ("Heaven Sent") and Defendant Steven Rosner ("Rosner") (collectively referred to as the "Defendants"), a majority shareholder of Heaven Sent. Saluck, a minority shareholder of Heaven Sent, seeks satisfaction of an award issued by the American Arbitration Association ("AAA") that was later approved by this Court as a judgment entered in favor of Saluck and against Defendants. According to Saluck's allegations, following an unsuccessful attempt to levy Heaven Sent stock certificates in Rosner's possession, Rosner repeatedly stated that he would file for bankruptcy should Saluck attempt any further collection efforts. In light of Rosner's repeated assertions and the possible outcome that Saluck would then lose the value of his Heaven Sent stock interest, Saluck contends that an ex parte temporary restraining order is appropriate. Saluck

requests that this Court declare him a secured creditor with a secured lien to the stock certificates or, in the alternative, require Rosner to deliver the stock certificates to either the United States Marshal Service or Saluck immediately. This Court is not persuaded by Saluck's arguments and, for the following reasons, Saluck's request for ex parte relief is **DENIED**.

#### I. BACKGROUND

This matter arises from litigation initiated by Saluck in September 1998 when he sought recovery for the financial injuries he suffered as a result of Defendants' misconduct. The matter was referred to arbitration and, on May 23, 2001, a three-member panel of the AAA issued an award that determined Saluck a 20% minority shareholder of Heaven Sent and that required Rosner or Heaven Sent to buy out Saluck's share of Heaven Sent for \$300,000.00. On August 9, 2001, this Court confirmed the AAA award. (See Memorandum and Order dated Aug. 9, 2001.)

According to Saluck's ex parte motion papers, the facts precipitating his instant request for relief are as follow. After initial negotiations seeking amicable satisfaction of the judgment failed, Saluck commenced collection efforts. On March 25, 2002, United States Marshal Michael Green ("Marshal Green") served a writ of execution, which specifically included any and all stock held by Rosner in Heaven Sent, at Heaven Sent's office

and principal place of business in Philadelphia, Pennsylvania. Saluck's attorney, Brian D. Heun, Esquire ("Heun") accompanied Marshal Green to Heaven Sent's office, which, as a courier business, is not open to the general public. Accordingly, Heun and Marshal Green entered Heaven Sent's office through a door marked "Couriers Entrance." General Manager Michael Montana ("Montana") escorted them from the courier waiting area to the office area. Since Rosner was not present at the office, Montana was served with the writ of execution. It was believed that the stock certificates were located in Rosner's locked office, but Montana would not willingly unlock that office.

Rosner's counsel was contacted, and a telephone discussion ensued between Rosner's counsel and Marshal Green. That conversation was followed by a discussion between Rosner's counsel and Marshal Green's supervisor, and then a discussion between Rosner's counsel and an attorney at the United States Department of Justice. The Department of Justice attorney then instructed Marshal Green and Heun to leave the property since Rosner's counsel argued that they did not enter Heaven Sent through a public entrance. Marshal Green and Heun left the property before they could inventory or take possession of any property, including the stock certificates, necessary to satisfy judgment.

In the days following service of the writ of execution,

Defendants' attorney, Robert A. Kargen, Esquire ("Kargen"), engaged in discussions with Heun and repeatedly advised him that a bankruptcy petition had already been drafted and that, if any efforts were made to continue collection efforts, Defendants would immediately file the petition. Saluck understood these statements as jeopardizing his ability to seek satisfaction of judgment. Nevertheless, the parties engaged in further discussions to settle the matter without collection efforts, but to no avail.

Saluck believes that, if collection efforts are recommenced, the Defendants would respond by imminently filing a bankruptcy petition. Presently Saluck seeks an ex parte order from this Court declaring that, under the circumstances that he served the writ of execution, he is a secured creditor with a secured lien to Rosner's stock certificates. In the alternative, Saluck requests an ex parte order requiring Rosner to deliver the stock certificates to Marshal Green or to Saluck prior to seeking bankruptcy relief. In accordance with Saluck's request, given that Defendants could moot his instant application by filing for bankruptcy as repeatedly advised, this Court will consider Saluck's styled Order to Show Cause as an application for an ex parte temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b).

## II. STANDARD OF REVIEW

To qualify for a temporary restraining order, the movant must demonstrate that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." Fed. R. Civ. P. 65(b). The requirements for a temporary restraining order are the same as those for a preliminary injunction. Bieros v. Nicola, 857 F. Supp. 445, 446-47 (E.D. Pa. 1994). Specifically, an applicant must demonstrate: (1) a likelihood of success on the merits; (2) the probability of irreparable harm if the relief is not granted; (3) that granting injunctive relief will not result in greater harm to the other party; and (4) that granting relief will be in the public interest. Frank's GMC Truck Center, Inc. v. G.M.C., 847 F.2d 100, 102 (3d Cir. 1988). A plaintiff must prove a "clear showing of immediate irreparable injury," not just a "risk of irreparable harm." Ecri v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987) (citation omitted). The requisite feared injury or harm must be irreparable and "of a peculiar nature, so that compensation in money cannot atone for it." Id. (citation omitted). Thus, a request for a temporary restraining order will be denied if an applicant fails to demonstrate that immediate and irreparable harm will result. Berman v. Lamar, 874 F. Supp. 102, 105-06 (E.D. Pa. 1995).

### III. DISCUSSION

In the instant ex parte motion, Saluck seeks a declaration by this Court that he is indeed a secured creditor with a secured lien on the Heaven Sent stock certificates in Rosner's possession.<sup>1</sup> Should the Court deny such declaratory relief, Saluck seeks, in the alternative, a preliminary injunction<sup>2</sup> requiring actual delivery of the Heaven Sent stock certificates to the United States Marshal Service prior to any bankruptcy filing by Defendants or, should bankruptcy be filed prior to the delivery of the stock, a declaration that the stock certificates are deemed delivered prior to the bankruptcy filing. For the following reasons, this Court is neither authorized nor inclined to grant any of the relief Saluck requests.

In support of his request for an ex parte declaration by

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<sup>1</sup> It appears from Saluck's ex parte motion papers that he is explicitly requesting a temporary restraining order at the same time that he is seeking, implicitly, declaratory relief from this Court. As declaratory judgment must be requested pursuant to Rule 57 of the Federal Rules of Civil Procedure and in accordance with 28 U.S.C. § 2201, none of which authority has been addressed by Saluck, this Court will construe Saluck's motion as a request for an ex parte temporary restraining order only.

<sup>2</sup> As a point of clarification, preliminary injunctions cannot be issued ex parte, as Saluck requests in his memorandum of law. See Fed. R. Civ. P. 65(a)(1). However, as discussed above, this Court will consider Saluck's motion as one for a temporary restraining order, which may be issued ex parte, and which requirements are similar to those for a preliminary injunction. See Fed. R. Civ. P. 65(b); Bieros, 857 F. Supp. at 446-47.

this Court that he is a secured creditor, Saluck relies exclusively upon In re Railroad Dynamics, 97 B.R. 239 (Bankr. E.D. Pa. 1989). Specifically, Saluck cites it for the proposition that he effectuated a proper levy to create a secured lien of the stock certificates, and that it was due only to Defendants' wrongful act that it was impossible for a judicial officer to take the property into his actual possession. See In re Railroad Dynamics, 97 B.R. 239, 244 (Bankr. E.D. Pa. 1989). Significantly, however, while that court set forth the standard for when a properly effectuated levy will render a creditor's claim secured under Pennsylvania law, it expressly dismissed the principle that a valid levy against a debtor's property would remove that property from the bankruptcy estate. Id. at 244 n.1 ("However, as the Supreme Court unanimously held . . . , the proposition that effectuation of a lien on property places that property beyond the bankruptcy court's jurisdiction is now irrelevant because of the expanded jurisdiction of bankruptcy courts under the Bankruptcy Code.") (citations and quotations omitted). Based on a one-sided presentation of the facts, we surmise that Saluck believes if he is declared a secured creditor of the stock certificates, then the stock certificates would somehow fall outside the bankruptcy estate should Defendants file for bankruptcy as repeatedly advised, and his interest in those certificates would be preserved.

As a preliminary matter, Saluck's exclusive reliance on In re Railroad Dynamics is unfounded, as that case was decided in a distinctly different forum, specifically, in a bankruptcy court, after the filing of a bankruptcy petition and with the benefit of having arguments advanced by all interested parties. In contrast, the instant matter presents itself to a district court, pre-petition and ex parte. Notwithstanding the significant procedural distinctions between In re Railroad Dynamics and the instant matter, were this Court even authorized in the current procedural posture to declare Saluck a secured creditor, the very case Saluck relies upon undermines his position. See id. It is, therefore, the opinion of this Court that whether a proper levy was effectuated in the instant matter should be adjudicated by a bankruptcy court, after the filing of a petition and with the benefit of briefing by all affected parties, and not in the form of an ex parte motion.

This Court is similarly disinclined to grant the alternative relief Saluck requests in the form of a temporary restraining order that requires immediate delivery of Heaven Sent stock certificates to the United States Marshal Service or to Saluck himself. Simply put, Saluck cannot demonstrate irreparable injury and, as such, his request must be denied. See Berman, 874 F. Supp. at 105-06. Under certain circumstances, "the unsatisfiability of a money judgment can constitute irreparable



injury." Hoxworth v. Blinder, 903 F.2d 186, 206 (3d Cir. 1990). However, it is unclear to this Court how extraordinary ex parte injunctive relief could be warranted when Saluck continues to have an adequate remedy at law in the form of a money judgment, and fails to demonstrate how Defendants' alleged statements is cause sufficient to demonstrate that his money judgment would be unsatisfiable.

#### IV. CONCLUSION

This Court declines to declare Saluck a secured creditor, as a bankruptcy court, at the appropriate juncture and with arguments advanced by all parties, would be in the better position to determine whether a proper levy was effectuated to exclude the aforementioned stock certificates from the bankruptcy estate. This Court also declines to grant Saluck's alternative request for a temporary restraining order where there is an absence of irreparable harm. For these reasons, Saluck's request for a temporary restraining order is **DENIED**.

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Plaintiff,	:	
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STEVEN ROSNER, HEAVEN SENT, LTD.	:	
and CATHY ROSNER,	:	
Defendants.	:	No. 98-5718

O R D E R

**AND NOW**, this                    day of February, 2003, in  
consideration of the ex parte request for a temporary restraining  
order, styled as an Order to Show Cause (Doc. No. 35), and other  
supporting documents, including the Declaration of Brian D. Heun,  
Esquire (Doc. No. 36) and the Brief in Support of Order to Show  
Cause Seeking Temporary Relief (Doc. No. 37), filed by Plaintiff  
Melvyn P. Saluck ("Saluck"), it is **ORDERED** that Saluck's ex parte  
request for a temporary restraining order is **DENIED**.

BY THE COURT:

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JAMES MCGIRR KELLY, J.