

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

DOCKETED

OCT 16 2015

R. POSTELL
COMMERCE PROGRAM

SCOTT CANTER and MERYL CANTER	:	August Term, 2008
	:	
<i>Plaintiffs</i>	:	
	:	Case No. 02455
v.	:	
	:	
ANDREW CAPPONI AND SHEMP, INC.	:	
	:	Commerce Program
<i>Defendants</i>	:	
	:	
and	:	
	:	
DUE AMICI DEVELOPMENT ASSOCIATES, L.P	:	
	:	Control Nos.
	:	
and	:	
	:	15093228, 15030657,
DUE AMICI DEVELOPMENT ASSOCIATES, L.L.C	:	15030910, 15030911,
	:	15031085
<i>Garnishees</i>	:	

ORDER

AND NOW, this 16th day of October, 2015, upon consideration of the petition of garnishees for a decree setting forth the terms whereby the interests subject to garnishment shall be purchased by the garnishees, the motion in limine filed by plaintiffs to dismiss the afore-named petition, plaintiffs' motion and application for a charging order and judicial sale to enforce judgment against defendant Andrew Capponi's limited partnership interest in garnishee, Due Amici Associates, L.P., plaintiffs' motion to adjudicate the contempt of Due Amici Associates, L.P., and plaintiffs' motion to adjudicate the contempt of Due Amici Development Associates, L.L.C., the respective responses in opposition and *memoranda* of law in support and

Canter Etal Vs Capponi -ORDOP



opposition thereto, and after a status conference held on September 10, 2015, and in accordance with this court's instructions contained in a *Memorandum Opinion* simultaneously filed herewith, it is **ORDERED** as follows:

- I. The petition of garnishees for a decree setting forth the terms whereby the interests subject to garnishment shall be purchased by the garnishees is **GRANTED-IN-PART AND DENIED-IN-PART**. The portion of garnishees' petition seeking a decree that garnishees shall purchase the interests subject to garnishment is **GRANTED**; the remainder of garnishees' petition, including the portion which seeks a decree setting forth the terms of said purchase is **DENIED**. The parties are directed to respectively select experts for the purpose of determining the percentage interest of defendant Andrew Capponi in Due Amici Development Associations, L.P. and Due Amici Development Associates, L.L.C, as well as appraisers for the purpose of assessing the market value of the interests subject to garnishment, to be purchased by the garnishees.¹
- II. Plaintiffs' motion *in limine* to dismiss the petition of garnishees for a decree setting forth the terms whereby the interests subject to garnishment shall be purchased by the garnishees is **DENIED**.
- III. Plaintiffs' motion and application for a charging order and judicial sale to enforce judgment against defendant Andrew Capponi's limited partnership interest in garnishee Due Amici Development Associates, L.P. is **DENIED** without prejudice.²

¹ "The interest charged ... in case of a sale being directed by the court, may be purchased without thereby causing a dissolution: (1) with separate property, by any one or more partners; or (2) with partnership property, by any one of more of the partners with the consent of all the partners whose interests are not so charged or sold." 15 Pa. C.S.A. § 8345(b).

² "On due application ... by any judgment creditor of a partner, the court ... may charge the interest of the debtor partner with payment of the unsatisfied amount of the judgment debt with interest thereon ... and

IV. Plaintiffs' motion to adjudicate the contempt of Due Amici Development Associates, L.P., and motion to adjudicate the contempt of Due Amici Development Associates, L.L.C., are **DENIED**

BY THE COURT,



GLAZER, J.

of any other money due or to fall due to him with respect of the partnership, and make all other orders ... which the circumstances of the case may require.” 15 Pa. C.S.A. § 8345(a).

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
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SCOTT CANTER and MERYL CANTER	:	August Term, 2008
	:	
<i>Plaintiffs</i>	:	
	:	Case No. 02455
v.	:	
	:	
ANDREW CAPPONI AND SHEMP, INC.	:	
	:	Commerce Program
<i>Defendants</i>	:	
	:	
and	:	
	:	
DUE AMICI DEVELOPMENT ASSOCIATES, L.P	:	Control Nos.
	:	
and	:	
	:	15093228, 15030657,
DUE AMICI DEVELOPMENT ASSOCIATES, L.L.C	:	15030910, 15030911,
	:	15031085
<i>Garnishees</i>	:	

MEMORANDUM OPINION

The court is asked to determine whether the rights of a judgment creditor shall be enforced through a charging order and public sale of the garnished partnership interests of debtor, or whether such judgment rights may be also enforced by allowing the garnished partnership interests of debtor to be purchased by any one of the partners. For the reasons below, the court finds that the rights of the judgment creditors may be enforced by allowing the garnished interests of debtor to be purchased by any one of the partners.

BACKGROUND

Due Amici Development Associates, LP (“Due Amici LP”), is a Pennsylvania

limited partnership. Due Amici Development Associates, LLC (“Due Amici LLC”), is a Pennsylvania limited liability company and a limited partner of Due Amici LP.

Whenever required, Due Amici LP and Due Amici LLC will be referred to as “Garnishees.” Defendant Andrew Capponi (“Capponi”), is a Pennsylvania resident who owns a direct interest in Due Amici LLC and an indirect interest in Due Amici LP.

On November 21, 2008, Scott Canter and Meryl Canter (“Plaintiffs”), served a writ of attachment upon the Garnishees and against the interests owned by Capponi in Due Amici LP.¹ On September 19, 2011, Plaintiffs filed a motion for judicial sale of the interests of Capponi in Due Amici LP.² On October 3, 2011, Capponi commenced Chapter 7 bankruptcy proceedings and, on October 19, 2011, this court dismissed the motion for judicial sale without prejudice, pending the outcome of the bankruptcy proceedings.

On March 3, 2015, after the close of the bankruptcy proceedings, Garnishees filed a petition for an Order decreeing that certain garnished interests of defendants Andrew Capponi and Shemp, Inc. shall be purchased by the Garnishees.³ Through this petition, Garnishees ask the court to decree that the garnished interest of judgment debtor Capponi shall not be subject to a sheriff’s sale, but shall be purchased instead by the Garnishees as allowed under 15 Pa. C.S.A. § 8345.⁴ Three days after the filing of this petition, Plaintiffs re-filed their motion for a charging order and judicial sale of the

¹ Garnishees’ petition, ¶ 1; response in opposition of Plaintiffs, ¶ 1.

² *Id.*, ¶ 2; response in opposition of Plaintiffs, ¶ 2. The judicial sale of Due Amici LP would necessarily require the judicial sale of Capponi’s interest in Due Amici LLC which is a limited partner of Due Amici LP.

³ Motion control No. 15030657.

⁴ *Memorandum* of law in support of the Petition of Garnishees for a decree setting forth the terms whereby the interest subject to garnishment shall be purchased by the Garnishees, motion control No. 15030657, pp. 4–7.

interest of Capponi in Due Amici LP.⁵ In this motion, Plaintiffs also rely 15 Pa. C.S.A. § 8435 for the proposition that a money judgment shall be enforced against the interest of a judgment debtor, such as those of Capponi, through the procedure of a charging order and a judicial sale thereof.⁶

On September 10, 2015, the parties convened for a status conference as scheduled by the court. At the conference, the parties reiterated their respective positions regarding the manner in which Capponi's interest in Due Amici LP should be disposed. Counsel for Plaintiffs indicated that he would file a motion *in limine* asking the court to dismiss Garnishees' petition for a decree setting forth the terms whereby the interests subject to garnishment shall be purchased by the Garnishees. Plaintiffs did file the afore-mentioned motion *in limine*, and Garnishees timely filed their response in opposition on October 8, 2015. Plaintiffs' motion *in limine*, Garnishees' petition for a decree setting forth the terms whereby they shall purchase the interest of Capponi, and Plaintiffs' motion and application for a charging order and judicial sale to enforce the judgment against Capponi, shall be all resolved herein.⁷

DISCUSSION

Plaintiff's motion in limine asserts that this court should dismiss Garnishees' petition for a decree setting forth the terms whereby Garnishees shall purchase the garnished interests of Capponi. Plaintiffs argue that pursuant to 15 Pa. C.S.A. § 8345, the petition for a decree should be dismissed because this court lacks subject matter

⁵ Motion control No. 15030910.

⁶ *Memorandum* of law in support of Plaintiffs' motion and application for a charging order and judicial sale to enforce judgment against Capponi's limited partnership interest, motion control No. 15030910, pp. 3-9.

⁷ In addition to the afore-mentioned petition and motions, the court will decide the two motions to adjudicate contempt, asserted by Plaintiffs against Due Amici, LP (motion control No. 15030911), and Due Amici LLC (motion control No. 15031085).

jurisdiction to grant the relief requested by Garnishees.⁸ In their motion *in limine*, Plaintiffs advance a corollary argument –namely, that a judicial sale of the garnished interests of Capponi is an adequate method “to protect and enhance the interest” of all the non-garnished defendants in this action.⁹ In the response in opposition, Garnishees also rely on 15 Pa. C.S.A. § 8345, and argue that pursuant to the statute, this court has subject matter jurisdiction not only to issue a charging order and compel the judicial sale as demanded by Plaintiffs, but also to decree the purchase by Garnishees of the attached interests of Capponi.¹⁰ To resolve the conflicting positions herein, this court will focus upon the relevant statutory provisions on General Partnerships at 15 Pa. C.S.A. § 8301 *et seq.*, as well as pertinent case law.

15 Pa. C.S.A. § 8345, on General Partnerships, states in pertinent part as follows:

(a) General rule.—On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, **may** charge the interest of the debtor partner with payment of the unsatisfied amount of the judgment debt with interest thereon and **may** then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, **and make all other orders, directions, accounts and inquiries which the debtor partner might have made or which the circumstances of the case may require.**¹¹

- I. The court has the discretionary power to enter a charging order and to compel the public sale of the partnership interests of a judgment debtor.

A straightforward reading of § 8345(a) shows that the court **may** at its discretion charge the partnership interest of a judgment debtor with payment of the unsatisfied

⁸ Memorandum of law in support of Plaintiffs’ motion *in limine*, control No. 15093228, pp. 3–7.

⁹ *Id.* pp. 7–9.

¹⁰ Memorandum of law in opposition to Plaintiff’s motion *in limine*, control No. 15093228 (improperly filed under control No. 15030657), pp. 3–9 (numberless).

¹¹ Pennsylvania Consolidated Statutes Annotated: 15 PA. C.S.A. § 8345 (emphasis supplied).

debt, which includes any interest, and **may** make all other orders which the circumstances of the case **may** require, including entering an Order for the judicial sale of the debtor’s interest in the partnership. However, nothing in the afore-quoted language indicates that a court **shall** charge the partnership interests of a judgment creditor, or compel disposition of the partnership interests of the debtor through the mechanism of a judicial sale.¹² Indeed, Pennsylvania case law stands for the proposition that “a charging order is discretionary with the court [and the] ... exercise of this discretion has been said to be equitable after a full inquiry into the facts. Shor v. Miller's Flower Shop, 84 Pa. D. & C. 164, 165 (Com. Pl. 1953). The court in Shor explained its rationale as follows:

While the court recognizes the ultimate right of a creditor to recover the whole amount from any ... obligor, an appeal for an equitable procedure for recovery must produce equitable results. Should [the court] grant the prayer [for a charging order in] this petition, it might result in the disruption of a partnership affecting adversely the interest of other parties not concerned with the present dispute or debt....¹³

Plaintiffs nevertheless contend that in this case entering a charging order and compelling the public sale of the partnership interests of a judgment debtor is the sole method to enforce the rights of a judgment creditor. Specifically, Plaintiffs cite Shirk v. Catebone, 193 A.2d 564 (Pa. Super. 1963) and Frankil v. Frankil, 15 D. & C. 103 (Phila Co. 1931) in support of the argument that this court shall enter a charging order and compel the public sale of the garnished interest of Capponi. The court has read both

¹² “If a right, privilege, or power is conferred, the [legal] draftsman should use ‘may ...’. If an obligation to act is imposed, he should use ‘shall ...’”. REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 130 (1965).

¹³ Shor v. Miller's Flower Shop, 84 Pa. D. & C. 164, 165 (Com. Pl. 1953) (explaining why principles of equity applied to the Uniform Partnership Act of March 26, 1915, P. L. 18, part VII, sec. 28, a statute which was subsequently replaced in Pennsylvania by the enactment of 15 Pa. C.S.A. § 8301 *et seq.*

cases and concludes that Plaintiffs' reliance on these cases is misplaced. Reliance is misplaced because both cases stand for the propositions that a court "**may** charge the interest of the debtor partner with payment of the unsatisfied ... judgment" and "**has a right** to order the sheriff to sell the interest charged."¹⁴ In essence, the permissive words employed by the courts in the afore-cited cases merely underscore the discretionary powers of the court to issue a charging order and compel the public sale of a partnership interest: they do not direct the court to take such actions.

II. The court has authority to allow Garnishees to purchase the garnished partnership interests of Capponi.

In the response in opposition to Plaintiffs' motion *in limine*, Garnishees argue that this court has subject matter jurisdiction over their petition for a decree setting forth the terms whereby Garnishees shall purchase the partnership interests of Capponi.¹⁵ Garnishees advance this argument on grounds that entering a charging order against Capponi, and compelling the public sale of his partnership interests, "would likely result in grave economic injury to innocent parties, *i.e.* Eric Gorsen," a non-debtor partner of Capponi.¹⁶ Specifically, Garnishees assert that if the partnership interests of Capponi were sold at a public auction, then Garnishees would suffer economic harm by being compelled under the terms of certain loan agreements to immediately repay the loans in full.¹⁷ In support of this argument, Garnishees rely on a separate section of 15 Pa. C.S.A. § 8345(b.). That section of the General Partnership Statute states as follows:

¹⁴ Shirk v. Catebone, 193 A.2d 564, 547 (Pa. Super. 1963); Frankil v. Frankil, 15 D. & C. 103, 104 (Phila Co. 1931) (emphasis supplied)

¹⁵ *Memorandum of law in opposition to Plaintiffs' motion in limine*, pp.3–5, motion control No. 15093228 (improperly numbered 15030657).

¹⁶ Garnishees' response in opposition to Plaintiffs' motion *in limine* ¶ 12.

¹⁷ Id.

(b) Redemption.—The interest charged may be redeemed at any time before foreclosure or, **in case of a sale being directed by the court, may** be purchased without thereby causing a dissolution:

- (1) with separate property, by any one or more of the partners; or
- (2) with partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.¹⁸

A straightforward reading of this section shows that to avoid dissolution of a partnership, the court **may** at its discretion direct the sale of the garnished interests thereof.¹⁹ To avoid such dissolution, the court **may at its discretion** allow any one partner to acquire the interest through the use of separately-owned property, or allow any one partner to acquire the interest, with property of the partnership itself, upon consent given by the other partners whose interests are not charged or sold. This language leaves no doubt: the court has subject matter jurisdiction to entertain Garnishees' petition for a decree setting forth the terms whereby Garnishees shall purchase the garnished partnership interests of Capponi.

In conclusion, § 8345(a), which is invoked by Plaintiffs, provides the court with the discretionary power to enter a charging order and direct the public sale of the garnished partnership interests of Capponi; whereas § 8345(b), which is invoked by Garnishees, provides the court with the power to direct the sale to Garnishees of Capponi's garnished partnership interests. Pursuant to these discretionary powers, the court shall strive to enforce the rights of Plaintiffs as judgment creditors, while simultaneously protecting a viable partnership from suffering unnecessary financial

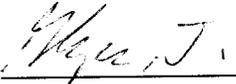
¹⁸ Pennsylvania Consolidates Statutes Annotated, 15 Pa. C.S.A. § 8345(b) (emphasis supplied).

¹⁹ 15 Pa. C.S.A. § 8351 defines the expression "dissolution of a partnership" as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from winding up, of the business."

hardships. To achieve these objectives, the court directs that Garnishees shall purchase the garnished interests of Capponi through payment of the market value thereof. Valuation of such interests shall take place through the appraisal method described in this court's Order filed simultaneously herewith. At the appropriate time after the parties provide their respective appraisals, the court shall determine the market value of the garnished interests which Garnishees shall purchase.

For these reasons, Plaintiffs' motion *in limine* and motion and application for a charging order and judicial sale to enforce judgment are denied; Garnishees' petition for a decree setting forth the terms whereby the interest subject to garnishment shall be purchased by the garnishees is granted-in-part and denied-in-part, consistent with the Order issued simultaneously herewith.²⁰

BY THE COURT,



GLAZER, J.

²⁰ Plaintiffs' motion to adjudicate the contempt of Due Amici LP and award of sanctions, control No. 15030911, and motion to adjudicate the contempt of Due Amici LLC and award of sanctions, control No. 15031085 are denied. These motions claim that Due Amici LP and Due Amici LLC transferred to third parties the garnished funds and partnership interests of these entities in violation of Pa. R.C.P. 3111, and in violation of their respective writs of attachment. In view of potential purchase by Garnishees of the garnished partnership interests of Capponi, the two motions to adjudicate contempt are dismissed as moot.