

COPY

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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF MARICOPA

8 ARIZONA CORPORATION
9 COMMISSION,

10 Plaintiff,

11 v.

12 TREND MANAGEMENT GROUP,
13 INC.; TREND CAPITAL, L.L.C.,

14 Defendants.

Cause No. CV 2006-016822

RECEIVER'S MOTION FOR ORDER
RELEASING SUPERSEDEAS BOND
DEPOSITED BY THE RECEIVER WITH
THE CLERK OF THE MARICOPA
COUNTY SUPERIOR COURT ON JUNE
27, 2007

(Assigned to the Honorable A. Craig
Blakey, II)

15 On June 14, 2007, the Court entered an Order against Peter S. Davis, in his
16 capacity as Receiver for Trend Management Group, Inc., Trend Capital, L.L.C.
17 and The Trend Group (the "Receiver"), and in favor of Armando Navas, Sr. and
18 Giselle Navas (the "Naveses") in the above-captioned matter. On June 27, 2007,
19 the Receiver filed a Notice of Appeal (and subsequently filed an Amended Notice
20 of Appeal on June 29, 2007) from the June 14, 2007 Order.
21

22 On June 27, 2007, the Court signed an "Order Approving Supersedeas
23 Bond" which was formally entered on June 29, 2007. On June 27, 2007, in

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1 connection with the Court's "Order Approving Supersedeas Bond," the Receiver
2 deposited with the Clerk of the Maricopa County Superior Court a cashier's check
3 made payable to the Clerk of the Court in the sum of \$200,000.00 as a supersedeas
4 bond in connection with the Receiver's Notice of Appeal filed on the same date.
5 (This sum included a \$500 bond for costs on appeal that was required by Rule 10,
6 Arizona Rules of Civil Appellate Procedure).

7
8 Subsequently, the Receiver's appeal was briefed and argued to the Arizona
9 Court of Appeals. On May 27, 2008, the Arizona Court of Appeals filed a
10 memorandum decision reversing the June 14, 2007 Order of the Superior Court. A
11 copy of the decision is attached to this motion and marked as Exhibit "A."

12 Because the Receiver was successful on appeal, he now requests that the
13 Court enter an Order directing the Clerk of the Maricopa County Superior Court to
14 release the supersedeas bond in the sum of \$200,000.00 to the Receiver. (This
15 includes the \$500.00 costs bond which was deposited to secure the payment of
16 costs "if the appeal is finally dismissed or the judgment affirmed" [Emphasis
17 added.] Rule 10(a), Ariz. R. Civ. App. P.) .

18 A proposed "Order Directing the Clerk of the Maricopa County Superior
19 Court to Release the Supersedeas Bond to Receiver," has been lodged on this date
20 with the Court in connection with this motion. The proposed Order sets forth that,
21 immediately following the entry of the Order, the Supersedeas Bond should be
22 released by the Clerk of the Superior Court to Peter S. Davis, Receiver for Trend
23

1 Management Group, Inc., Trend Capital L.L.C. and The Trend Group, in the form
2 of a check made payable to Mr. Davis, as Receiver, in the sum of \$200,000.00
3 (two hundred thousand dollars) and that the check should be mailed by the Clerk of
4 the Court to counsel for Mr. Davis, Ryan W. Anderson at the following address:

5
6 Ryan w. Anderson
Guttilla, Murphy, Anderson, P.C.
4150 West Northern Avenue
7 Phoenix, Arizona 85051

8 Counsel for the Appellees, Armando Navas, Sr. and Giselle Navas, have
9 advised the undersigned that they do not oppose this motion.

10 Respectfully submitted this 8th day of July, 2008.

11 GUTTILLA MURPHY ANDERSON, P.C.

12 

13 Alisan M.B. Patten
14 Attorney(s) for the Receiver

15 Original of the foregoing filed
16 this 8th day of July, 2008, with:

17 Clerk of the Court
18 Maricopa County Superior Court
201 West Jefferson
19 Phoenix, Arizona 85003
20
21
22
23

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1 Copy of the foregoing hand-delivered
this 8th day of July, 2008, to:

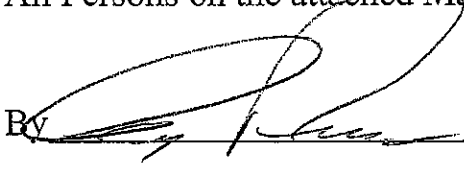
2
3 The Honorable A. Craig Blakey
4 Central Court Building, 4-B
201 West Jefferson
Phoenix, AZ 85003

5 Copy of the foregoing mailed
6 This 8th day of July, 2008, to:

7 Yvette Ansel
8 Hymson Goldstein & Pantiliat, P.C.
14646 N. Kierland Blvd., Suite 255
Scottsdale, AZ 85254

9 Attorney(s) for Armando and Giselle Navas

10 All Persons on the attached Master Service List.

11
12 By  _____

13 1027-010(76690)

14

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18

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23

MASTER SERVICE LIST

Arizona Corporation Commission v. Trend Management Group, Inc.

Maricopa County Superior Court

CV 2006-16822

(Rev. 2/28/08)

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Maricopa County Superior Court
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Phoenix, AZ 85003

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PETER S. DAVIS, Court-appointed)	1 CA-CV 07-0546
Receiver for Trend Management Group,)	
Inc., Trend Capital LLC, and the Trend)	DEPARTMENT A
Group,)	
)	MEMORANDUM DECISION
Appellant,)	(Not for Publication -
)	Rule 28, Arizona Rules
v.)	of Civil Appellate
)	Procedure)
ARMANDO NAVAS, SR. and GISELLE NAVAS,)	FILED 5-27-08
husband and wife,)	
)	
Appellees.)	

Appeal from the Superior Court in Maricopa County
Cause No. CV2006-016822

The Honorable Ruth Harris Hilliard, Judge

REVERSED AND REMANDED

Guttilla Murphy Anderson, P.C. Phoenix
By Alisan M.B. Patten, Patrick M. Murphy and Ryan W. Anderson
Attorneys for Appellant

Hymson Goldstein & Pantiliat, P.C. Scottsdale
By Loren Molever and Yvette D. Ansel
Attorneys for Appellees

E H R L I C H, Judge

¶1 Peter S. Davis, the court-appointed receiver for Trend Management Group, Inc. (Trend Management) and Trend Capital L.L.C. (Trend Capital), appeals the superior court's order lifting the receivership stay and directing him to pay in full from the receivership estate a money judgment earlier entered against Trend Management and in favor of Armando and Giselle Navas. Because we con-

clude that the Navases had no perfected lien on which to base their claim for priority treatment, we reverse the order and remand this matter for further proceedings consistent with this decision.

PROCEDURAL BACKGROUND

¶2 On November 2, 2006, the Arizona Corporation Commission filed a Verified Petition for Appointment of Receiver for Trend Management and Trend Capital. It alleged that the companies had engaged in fraud in the sale of unregistered securities and likely owed investors more than \$12,000,000 but had assets of approximately \$8,100,000. Trend Management and Trend Capital consented to the appointment of a receiver, and the superior court appointed Davis (the Receiver). The Order Appointing Receiver directed:

3. All persons ... who receive actual notice of this Order ... are enjoined from in any way interfering with the operation of the Receivership or in any way disturbing the Receivership Assets and from filing or prosecuting any actions or proceedings which involve the Receiver or which affect the Receivership Assets

13. Except by leave of this Court, during pendency of the Receivership ordered herein, all persons and entities be and hereby are stayed from taking any action to establish or enforce any claim, right, or interest for, against, on behalf of, in, or in the name of, TREND MANAGEMENT or TREND CAPITAL, ... including ... [c]ommencing, prosecuting, continuing, entering, or enforcing any suit or proceeding

¶3 On January 24, 2007, the Navases, as "interested parties," filed a Motion to Enforce Judgment Against Garnishee Trend Management Group, Inc. The history behind this motion was as follows as explained by the Navases: In May 2006, they instituted an action against Trend Capital and Trend Management for, among other

allegations, breach of contract, fraud, securities fraud and federal securities violations. They subsequently obtained a default judgment against Trend Capital and then instituted a garnishment action against Trend Management as the entity in which Trend Capital had placed its investment money. They asserted that Trend Management had placed those funds in its account at U.S. Bank. On October 24, 2006, they obtained a Judgment Against Garnishee Trend Management Group, Inc., in the principal amount of \$157,210.84, which judgment ordered Trend Management to "immediately transfer" that amount of money to them. In their motion, the Navases argued that they now were entitled to collect on their judgment without regard to other creditors because their judgment predated the appointment of the Receiver. The Receiver objected to the Navases' motion on the basis that enforcement of the judgment would give the Navases preference over similarly situated creditors, which would be contrary to the Receiver's obligation to prevent the inequitable distribution of assets.

¶4 At a hearing on the Navases' motion, the Receiver agreed that creditors with a judgment would have priority in the sense that they possessed an established claim rather than a potential claim, but, he asserted, an order to pay the Navases would be premature because he first had to determine what other claims and other judgments might exist. In explaining their urgency, the Navases argued that they had obtained the judgment in October because Trend Management then had funds in U.S. Bank, although U.S. Bank

refused to release the funds because of the potential receivership. The Navases complained that, if the payment of their judgment was further delayed, the U.S. Bank funds would be depleted on other expenses and be insufficient to fully compensate them.

¶5 The superior court denied the Navases' motion, stating:

The [Navases] obtained a default judgment against Trend Management Group, Inc. on October 24, 2006 and instituted garnishment proceedings against Trend Management Group, Inc.'s assets on December 1, 2006. Although the judgment was obtained prior to the creation of the receivership, the [Navases] began their garnishment proceedings after the Order Appointing Receiver was entered.

¶6 The Navases filed a "Rule 60(c)(1)"^[1] Motion for Relief From This Court's April 20, 2007 Order on the Basis of Mistake or Inadvertence." They argued that the court's minute entry incorrectly stated that they had obtained a default judgment on October 24, 2006 and instituted the garnishment proceedings on December 1, 2006. The Navases explained that they had obtained a default judgment against Trend Capital on August 24, 2006, and a garnishment judgment against Trend Management on October 24, 2006.² Therefore, they argued, they had obtained a judgment before even the Request for Appointment of a Receiver.

¶7 After argument on the Rule 60(c) motion, the superior court acknowledged the mistake in its prior ruling, found that the

¹ Arizona Rule of Civil Procedure (Rule) 60(c)(1).

² The Navases acknowledged that the court's error was likely caused by a clerical error in their original motion.

Navases' judgment had been entered before the request for the appointment of a receiver and determined that they were entitled to have the judgment paid. It then ordered that the stay entered for the receivership be lifted to pay the Navases' judgment.

¶8 The Receiver asked the superior court to modify its ruling to allow him to delay payment until he could consider all of the claims. Alternatively, he sought the inclusion of language pursuant to Rule 54(b) and authority from the court to appeal its ruling. The court granted the Receiver's alternative request.

¶9 The superior court filed its Order to Enforce Judgment Against Garnishee Trend Management Group, Inc., directing the Receiver to pay the Navases' judgment, including post-judgment interest at the rate of ten percent from October 24, 2006, the date of the judgment. It also lifted the receivership stay for the limited purpose of paying the Navases' judgment, and the Receiver appealed.

DISCUSSION

¶10 A receiver is a ministerial officer of the court that appointed him, and he can act only pursuant to the court's order. *Stowell v. Ariz. Sav. & Loan Ass'n*, 93 Ariz. 310, 311, 380 P.2d 606, 607 (1963). Therefore, a receiver may appeal a ruling of the court only if the court authorizes the appeal. *Id.*

¶11 The Navases argue that, despite having the authorization of the superior court, the Receiver could not appeal the court's order regarding the distribution of assets from the receivership estate, citing *Bosworth v. Terminal Railroad Association of St.*

Louis, 174 U.S. 182 (1899), in which the Court outlined the circumstances when a receiver may engage in an action or file an appeal. The Court stated that a receiver may not challenge the orders of the court overseeing the receivership regarding the distribution of the receivership property. *Id.* at 186-87. It did not address the circumstances in which the oversight court authorized the receiver to appeal a ruling, and the Navases have not explained how *Bosworth* applies when the receiver obtains the court's permission to appeal. The United States Court of Appeals for the Seventh Circuit has interpreted *Bosworth* as describing the "very limited exceptions to [the] established rule allowing a receiver to appeal an order of the appointing court only after obtaining prior approval and permission." *Holland v. Sterling Enters., Inc.*, 777 F.2d 1288, 1291-92 (7th Cir. 1985). We likewise do not interpret *Bosworth* as precluding a receiver from filing a court-authorized appeal. The Receiver is therefore permitted to bring his case to this court.

¶12 The Receiver argues that the Navases are not entitled to priority over other creditors and that the superior court erred in ordering him to pay their judgment. We review for an abuse of its discretion the court's decisions regarding the procedures that it employs in connection with the receivership proceedings, including the distribution of the receivership estate, *S.E.C. v. Credit Bancorp, Ltd.*, 290 F.3d 80, 87 (2nd Cir. 2002); *S.E.C. v. Black*, 163 F.3d 188, 195 (3rd Cir. 1998), but we review questions of law *de*

novo. *Black*, 163 F.3d at 195; *Gravel Res. of Ariz. v. Hills*, 217 Ariz. 33, 36, ¶ 7, 170 P.3d 282, 285 (App. 2007).

¶13 The superior court directed the Receiver to marshal and maintain the receivership assets, and "to prevent the inequitable distribution of assets and determine, adjust, and protect the interests of persons with an interest in or claim against the Receivership Assets." In a receivership, creditors of the same class are treated on an equal basis without preference being given to one over the other, and they usually share the receivership assets on a pro rata basis. *Sisk v. White*, 50 Ariz. 103, 106, 69 P.2d 242, 244 (1937); 75 C.J.S. Receivers § 309. A preference can be given only based on a definite statutory provision or a fixed principle of common law that creates a superior right in one creditor over another. 75 C.J.S. Receivers § 309.

¶14 The Receiver maintains that the Navases' judgment against Trend Management did not give them priority over other claimants such that they were permitted to avoid the claims process and entitled to the immediate payment of the full judgment amount plus interest. He contends that the Navases, like other claimants, were required to submit their claim through the process to allow him and the oversight court to review and evaluate all of the claims so that like claims could be treated equitably. He elaborates that the Navases' judgment did not create a lien or any other priority rights in the receivership assets and that they presented no other legal basis to permit them to circumvent the claims process.

¶15 The Navases respond that, by obtaining their judgment, they had perfected a lien against the money held by Trend Management and that, because they obtained their judgment before the appointment of the Receiver and before any other general creditor had obtained a judgment, they have an interest superior to any other claimant, one that entitles them to immediate, full payment.

¶16 The record does not support the Navases' position that they acquired a lien when they obtained the judgment. A judgment against a garnishee is enforced like other judgments. *Jackson v. Phoenixflight Prods., Inc.*, 145 Ariz. 242, 245, 700 P.2d 1342, 1345 (1985). Although a lien may be created by a judgment when the object of the garnishment is specific property, when the object of the garnishment is not specific property but the payment of a debt, the Arizona Supreme Court has clearly held that no lien is acquired by virtue of the garnishment judgment. *Id.* at 245-47, 700 P.2d at 1345-47. "[W]e conclude that it is not until a plaintiff obtains a judgment against the garnishee and executes upon that judgment that a lien is created." *Id.* at 247, 700 P.2d at 1347 (Citation omitted).

¶17 The Judgment Against Garnishee Trend Management Group, Inc., obtained from the superior court by the Navases, ordered Trend Management to transfer \$157,210.84 to the Navases, but the judgment did not identify any property or account from which the

judgment was to be paid.³ Thus, the judgment was for a debt and not for specific property, and the judgment did not create a lien. *Id.*

¶18 On appeal, the Navases refer to their "recorded judgment," contend that they perfected a lien and state that they "attempted to execute upon their judgment." However, they do not explain with citations to the record what actions they took to ensure that they had acquired a lien.

¶19 The Navases further represent that they presented the Judgment Against Garnishee Trend Management, Inc., to Trend Management, that Trend Management instructed U.S. Bank to pay the judgment and that the bank refused. Again, there is no evidence in the record that the Navases actually executed on the judgment.

¶20 The Navases rely on *Earle v. Commonwealth of Pennsylvania*, 178 U.S. 449 (1900), as support for their position that their pre-receivership judgment is entitled to payment outside the receivership. In *Earle*, the plaintiff obtained a judgment against a bank, as garnishee, for payment of funds that the bank admitted that it possessed and that belonged to Long, plaintiff's judgment debtor. Before the bank paid the garnishment judgment, it closed

³ The Navases suggest that the judgment was for specific property, stating that the funds "were admittedly earmarked for the underlying debtor, Trend Capital, not merely funds held by Trend Management for people who had deposited money to accounts in Trend Management." They do not, however, direct us to any evidence in the record to support this statement, and we have found none.

and was placed in receivership. The receiver moved to vacate the attachment, asserting that the proceedings were void under federal law. The Court noted that the attachment against the garnishee was not an attachment on the garnishee's property in receivership but on the property belonging to the underlying debtor. *Id.* at 454. The Court then held that the receiver of the garnishee could not avoid payment because the receiver took the assets of the garnishee subject to the claim on the debtor's property. *Id.*

¶21 The Navases maintain that their circumstances are like those in *Earle*. They argue that they obtained a judgment against Trend Capital, that Trend Management admitted holding money for Trend Capital and that they obtained a judgment against Trend Management for the money held by it for Trend Capital. The Navases thus insist that Trend Management indisputably owes them the money that it holds that belongs to Trend Capital.

¶22 A flaw in the Navases' reliance on *Earle* is that, unlike the situation in *Earle*, the property of both the underlying debtor, Trend Capital, and the garnishee, Trend Management, are subject to the receivership. The funds being sought belong to Trend Capital and therefore are part of the receivership estate and not merely being held by the receivership estate for an outside party as in *Earle*. Because the funds are part of the receivership estate, absent a lien on those funds in favor of the Navases, the funds are available for the administration of the receivership estate.

¶23 The Navases contend that two bankruptcy cases bolster their contention that a garnishment protects their interests and provides them with a claim superior to any other general creditor, *In re Eldercare Housing Foundation*, 205 B.R. 210, 213 (B.A.P. 9th Cir. 1996), and *In re J.H. Welsh & Son Contracting Co.*, 68 B.R. 520 (Bankr. D. Ariz. 1986). They argue that *Eldercare* supports their position because the court stated that, "under Arizona law, a party does not attain an interest superior to a subsequent purchaser ... until judgment in the case of a garnishment proceeding." 205 B.R. at 213.

¶24 *Eldercare* was a defendant in a civil action and subject to pre-judgment writs of garnishment. *Id.* at 211. Before the plaintiffs obtained a judgment on their complaint, *Eldercare* filed for bankruptcy and sought to release the writs on the basis that the writs constituted avoidable transfers under the bankruptcy code. *Id.* Whether the transfers were avoidable depended on when the transfers were perfected, which, under federal law, occurs "when a creditor ... [could not] acquire a judicial lien ... superior to the interest of the transferee." *Id.* at 212 (citation omitted). The court noted that, under Arizona law, service of a writ of garnishment did not create a lien but had the effect of impounding an asset pending resolution of a garnishor's claim. *Id.* See *Jackson*, 145 Ariz. at 246, 700 P.2d at 1346 ("Instead of creating a lien, we believe that the effect of a writ of garnishment is to impound any asset or property of defendant which is found in the

garnishee's hands pending resolution of the merits of the garnishor's claim.") (Citation omitted.). Because the plaintiffs had not obtained a judgment against Eldercare, the court concluded that no lien was perfected by the service of the pre-judgment writs of garnishment. 205 B.R. at 212.

¶25 The statement on which the Navases rely may appear to support their position, but a statement that a judgment is necessary before a party attains an interest superior to others does not establish that only a judgment is required. In addition, the court in *Eldercare* was concerned only with pre-judgment writs of garnishment. To construe the case for the proposition that a judgment against a garnishee in a post-judgment garnishment proceeding in itself creates a lien would contradict the clear language to the contrary in *Jackson* that execution on a judgment is required to create a lien. 145 Ariz. at 247, 700 P.2d at 1347.

¶26 The Navases cite *In re J.H. Welsh & Son* for the proposition that, given the absence of statutory language providing for the creation of a lien on a writ of garnishment, a garnishor's interest is protected with a judgment. The *Welsh* case concerned a pre-judgment writ of attachment, not a writ of garnishment, and the court considered the question of when a writ of attachment created a lien such that property could be deemed transferred under the bankruptcy code. 68 B.R. at 521-22. In concluding that by statute a lien was created when the pre-judgment writ of attachment was levied, the court noted that the same was not true of a writ of

garnishment, which required that a judgment be obtained before a lien was created. *Id.* at 523.

¶27 The *Welsh* decision does not stand for the position the Navases attribute to it. First, although the bankruptcy court did state that a judgment was required on a writ of garnishment before a lien is created, the case concerned a writ of attachment, so any discussion of the requirements for a lien with respect to a writ of garnishment was dicta. In addition, as with *Eldercare*, a statement that a judgment is necessary does not establish that only a judgment is necessary, and the plain language of *Jackson* establishes that the creation of a lien requires not only a judgment but execution of that judgment.

CONCLUSION

¶28 The Receiver, having the permission of the superior court, was entitled to pursue this appeal, but the court erred in its Order to Enforce Judgment Against Garnishee Trend Management Group, Inc., by directing the Receiver to immediately pay the Navases the full amount of their judgment. Its order is reversed, and this matter is remanded for further proceedings consistent with this decision.

SUSAN A. EHRLICH, Presiding Judge

CONCURRING:

PHILIP HALL, Judge

G. MURRAY SNOW, Judge
