1ST TEAM FITNESS, LLC, et. al. Plaintiffs and Counter-Defendants vs. **FRANK ILLIANO** Defendant and Counter-Plaintiff	IN THE CIRCUIT COURT FOR CARROLL COUNTY CASE NO. **06-C-13-63876**

MEMORANDUM OPINION

This dispute concerns post-judgment enforcement proceedings initiated by the Plaintiffs, 1st Team Fitness, LLC, individually, and derivatively on behalf of Pozzuoli, LLC (hereinafter "1st Team Fitness" or "Plaintiffs"). Specifically, on February 1, 2016, 1st Team Fitness filed a Petition for Show Cause for Constructive Civil Contempt[1] against Francesco Illiano (hereinafter "Illiano") and Illiano Property Management, Inc. (hereinafter "IPM"), alleging that Illiano and IPM failed to obey two separate Writs of Garnishment served on IPM. The contempt action came before the Court for a hearing on April 14, 2016 and August 16, 2016. After considering the evidence presented and the arguments of counsel, the Court held the matter *sub curia*.

Findings of Fact

The relevant facts are as follows. Following a four-day trial in October, 2014, the Court issued a Memorandum Opinion and Order and attendant Judgment on January 28, 2015, by which judgment was entered in favor of 1st Team Fitness and against Illiano in the amount of $263,915.00. On May 11, 2015, at Plaintiffs' request, the Clerk of this

[1] The Court will refer to this pleading simply as the Petition for Contempt.

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Court issued separate Writs of Garnishment of Wages and Garnishment of Property Other than Wages directed to IPM relative to the unpaid judgment. On June 15, 2015, IPM, garnishee, filed an Answer to the Writ of Garnishment of Wages and on July 24, 2015, it filed an Answer to the Writ of Garnishment of Property Other Than Wages. As to the former, IPM stated that Illiano was employed by IPM at a salary of $0[2], and as to the latter, IPM stated that it was not indebted to Illiano in any amount, nor did it have in its possession any property of the judgment debtor, i.e. Illiano.

The Petition for Contempt alleges that Illiano is the sole stockholder, president, director, and agent for IPM, that IPM pays various and sundry personal expenses for or on behalf of Illiano, that Illiano effectively controls IPM, and that Illiano (and by extension IPM) willfully failed or refused to obey the Writs of Garnishment. The Petition for Contempt further alleges that Illiano (and by extension IPM) failed to hold and safeguard money or property coming into IPM's possession after service of the Writs of Garnishment for the benefit of 1st Team Fitness, judgment creditor. 1st Team Fitness asks this Court to adjudge Illiano and IPM in constructive civil contempt, direct Illiano and IPM to provide an accounting of all sums paid by IPM to Illiano from June 2015 to the present, enter a judgment in favor of 1st Team Fitness and against Illiano and IPM for all sums found to be due to 1st Team Fitness, set an appropriate purge provision, and award attorney's fees to 1st Team Fitness pursuant to Md. Rule 1-341. Plaintiffs specifically did not request that Illiano be incarcerated.

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[2] As will be discussed below, Illiano filed an Amended Answer to Wage Garnishment on August 8, 2016.

The Court issued a Show Cause Order on February 5, 2016, directing Illiano and IPM to appear before the Court and show cause why the Court should not grant the relief request by Plaintiffs, and further directing Illiano and IPM to file with the Court an accounting as requested by the Plaintiffs prior to the Show Cause hearing.

In their written Opposition to the Petition for Contempt filed on April 13, 2016, Illiano and IPM interposed a singular defense. They assert that Illiano has a "membership interest"[3] in IPM jointly with his wife, Miia Illiano (hereinafter "Miia"), and that any interest that Illiano owns in IPM, as well as any income and property derived from that interest, is exempt from attachment as tenants by the entirety property.

On August 8, 2016, four months after the contempt hearing began, and eight days prior to the second day of the hearing, Illiano[4] reversed course, and filed an Amended Answer to Wage Garnishment reiterating that he is employed [by IPM], but adding for the first time that wages of $71,037.90 were paid to him or on his behalf from June 2015 to July 31, 2016, and that commencing August 1, 2016, he began earning a gross weekly salary from IPM of $2,500.00. In an Amended Opposition to the Petition for Contempt also filed on August 8, 2016, Illiano and IPM restated that any property interest that Illiano has in IPM is exempt from attachment as tenants by the entirety property, but noted that they recognized that "in accordance with standard accounting practices, all

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[3] It is undisputed that IPM is a Maryland corporation and that pursuant to Ann. Code of MD, Corp. Art. §2-201, an ownership interest in a corporation is evidenced by issuance of stock, whereas an economic interest in a Maryland Limited Liability Company is known as a membership interest. See generally, Corp. Art. §4A-604.

[4] It is not clear why Illiano, and not IPM filed the Amended Answer to Wage Garnishment inasmuch as IPM is the garnishee.

(sums paid by IPM to and for the benefit of Illiano from June 2015) to date are to be treated as net wages." On July 21, 2016, IPM issued a check in the amount of $27,000.00 to Plaintiffs, representing 25% of Illiano's net wages from June 2015 through July 2016. The Amended Opposition also stated that effective August 1, 2016, IPM began withholding from Illiano's wages and remitting to Plaintiffs the sum of $429.65 per week, calculated based on a gross annual salary of $130,000.00. IPM continues to maintain that except as to its obligation to withhold and remit money from Illiano's wages, it is not indebted to Illiano, and does not hold any non-exempt property that belongs to Illiano.

Illiano was called to testify as a witness by the Plaintiffs on the first day of trial. He acknowledged answering interrogatories in aid of execution on or about March 17, 2015 (P. Ex. 3), and further agreed that he stated in those answers that he incurred personal monthly expenses in the amount of $11,956.00. When shown the transcript of his oral examination in aid of enforcement taken on December 15, 2015 (P. Ex. 2), Illiano admitted that he testified at that time that IPM pays the mortgage on his primary residence, along with all the other personal expenses itemized in his answers to interrogatories; he characterized those benefits paid by IPM as either dividends, or re-payment of capital contributions that he and his Miia invested in IPM. J. Michael Per, Illiano's accountant, who testified on the second day of trial, explained that based on the accountings prepared by Illiano and IPM in response to the Show Cause Order (P. Ex. 5 and D. Ex. 8), Illiano's answers to interrogatories and Illiano's testimony on April 14, 2016 regarding payment of personal expenses by IPM, those payments by IPM had to be treated as wages paid to Illiano.

Plaintiffs challenged Illiano's claim that he and his wife own a 100% interest in IPM as tenants by the entirety. They presented Illiano with the transcript of his testimony from his deposition taken in this matter on December 3, 2013, in which Illiano testified that he was the sole owner of IPM, and there were no other owners (P. Ex. 1). He explained at the contempt hearing that when he said in December, 2013 that he was the sole owner, he misunderstood the term "sole owner," and that he only meant to say that as IPM's president, treasurer and CEO he was solely responsible for making business decisions, but he maintained that he and his wife have jointly owned 100% of the stock in IPM since its inception in 2004. Not satisfied with that explanation, Plaintiffs confronted Illiano with documents subpoenaed from New Windsor State Bank (hereinafter "NWSB") pertaining to IPM's checking account with NWSB.[5] Those records recognize the authorized signatories on IPM's account as Illiano, Amber R. Ryan, Illiano's daughter, Todd Himes, Amber Himes, and Faith Breno, but not Miia. Illiano responded that a corporation is not required to designate all stockholders as signatories on its accounts, and the fact that Miia is not an authorized signatory on IPM's accounts does not mean that she is not a shareholder.

Illiano testified that he has been continuously married to Miia since 1992. Illiano and IPM introduced a copy of a stock certificate dated November 29, 2004 that Illiano testified was issued by IPM to him and his wife (D. Ex. 1). Illiano initially testified that he did not remember when the stock certificate was prepared. After his counsel showed him a copy of the Articles of Incorporation for IPM which are dated November 29, 2004

[5] The NWSB records at times identify IPM as Illiano Properties, Inc., and at times as Illiano Property Management Inc., despite the fact that the NWSB records contain the Articles of Incorporation for Illiano Property Management, Inc.

(D. Ex. 2), he recalled that the certificate was prepared in November 2004. Curiously, the Articles of Incorporation were filed with the Maryland State Department of Assessments and Taxation on November 30, 2004[6]; thus technically, if IPM issued the stock certificate to Illiano and Miia on November 29, 2004, the corporation did not legally exist at the time the stock was issued (*see* MD. Code Ann. Corp. Art. §2-102(a)). Moreover, although Corp. Art. §2-209 requires each corporation to main a stock ledger which contains: (1) the name and address of each stockholder, and (2) the number of shares of stock of each class which the stockholder holds, Illiano did not introduce IPM's stock ledger at trial.

Illiano identified copies of IPM's corporate Federal Income Tax Returns for the years 2010–2014, which were prepared on April 12, 2016 and April 13, 2016 (D. Ex. 3-7). He explained that he had not realized until discovery was conducted in this matter that IPM had never filed tax returns for those years, and when he discovered the oversight, he instructed Mr. Per to prepare returns for the missing years. As to each year's tax return, Illiano testified that all books and records of IPM were provided to Mr. Per, who used the information to prepare the returns. For each of those tax years, IPM reported on its tax returns no compensation paid to any officer of the corporation. Illiano also testified that he and his wife invested several million dollars in IPM over the years, and that the source of that money was loans obtained by Mr. and Mrs. Illiano.

In support of his testimony, Illiano directed the Court to Line 23, Schedule L, of IPM's 2010 tax returns, as proof that he and his wife had accrued paid in capital to IPM in the amount of $2,329,952.00 as of the commencement of that fiscal year, and

[6] This is shown on a copy of the Articles of Incorporation included within the NWSB records.

$2,837,187.00 as of the end of the fiscal year. No other proof was offered at trial to substantiate the capital contributions reflected on the tax returns, or the loans that Illiano and his wife purportedly obtained. When asked to explain why Miia testified at her deposition on April 5, 2016, that she did not pay any money for her ownership interest in IPM (P. Ex. 6), Illiano surmised that she probably did not understand the question that was asked of her. Illiano did not, however, call his wife to testify at trial to refute the deposition testimony she had given. The 2014 tax return, the last year for which IPM filed a return, indicates that the capital contributions at the commencement of that year were $3,116,929.00, and $3,126,293.00 at year end, suggesting that between fiscal year ending 2010 and fiscal year ending 2014, the Illianos made additional contributions to IPM in the amount of $289,106.00. Again, no back-up documentation was offered at trial to corroborate the information contained in the 2014 tax returns.

The Court notes that for the years 2010–2014, IPM's tax returns show that salaries and wages were paid in the following amounts: 2010 ($138,068.00); 2011 ($127,399.00); 2012 ($311,174.00); 2013 ($120,229.00); and 2014 ($112,012.00). No evidence was presented as to whether Illiano or his wife were among the employees to whom wages were paid, but Illiano testified that on the day the Writ of Wage Garnishment was served on IPM, IPM did not owe Illiano any wages. Miia testified at her April 5, 2016 deposition that she does not receive a salary from IPM. She also testified that IPM does not pay any of her "marital bills," which directly contradicted her husband's testimony on that issue (See P. Ex. 6, p. 33). Illiano specifically denied receiving any money directly from IPM in the past year. He further denied directly receiving any distributions from IPM during the tax years 2010-2014, though as Plaintiffs' accountant, Andrew Runge would point

out, IPM's tax returns appear to tell a different story. IPM's answers to interrogatories dated February 5, 2016 were admitted into evidence (P. Ex. 14, 15). In them, IPM denied that it paid wages to either Illiano or Miia; rather, IPM stated that it made joint distributions to or on behalf of the shareholders. IPM's answers to interrogatories also included an extensive list of personal expenses that it paid on behalf of Illiano and Miia, covering the period from January 29, 2015 through January 28, 2016.

Contrary to his December 2015 deposition testimony, Illiano denied at the contempt hearing that he or his wife ever received a dividend payment from IPM, explaining that when he testified at his deposition that monies paid on his behalf by IPM represented dividends from different companies, he did not understand the difference between a return of capital contribution and payment of a dividend. He testified that he is not an accountant, nor does he have any training in accounting. Notwithstanding, Illiano's professed ignorance of accounting practices, he had no difficulty explaining at trial that the reason he never received a K-1 from IPM, was that IPM is a "C" Corporation.

Andrew J. Runge, CPA, testified for the Plaintiffs. The Court accepted Mr. Runge as an expert in the fields of forensic accounting services, forensic fraud investigation, and business valuations. Approximately 60%-70% of Mr. Runge's income is derived from litigation support. He was shown IPM's 2010–2014 tax returns. He testified that from a review of the tax returns, he was unable to determine the owners of IPM because Schedule K thereof omitted any reference to the number of shareholders. On cross examination, he acknowledged that the failure to list the number of shareholders on its returns is not something that would draw the attention of the IRS. Mr. Runge also took

issue with Illiano's testimony that there had been no distributions to Illiano by IPM. Mr. Runge directed the Court's attention to Schedule M-2 of IPM's 2012 tax return (D. Ex. 5), which indicates cash distributions to shareholders in the amount of $620,527.00. Similarly, the 2011 tax return lists cash distributions to shareholders in the amount of $510,440.00. He also testified that he reviewed Illiano's personal tax returns for those years and found no record of receipts of distributions or dividends from IPM reflected on Illiano's personal returns[7]. In other words, according to Mr. Runge, the distributions to shareholders reflected on IPM's tax returns do not square with the absence of receipts shown on Illiano's personal tax returns. He acknowledged that the 2014 IPM tax return showed no distributions, which was consistent with Illiano's 2014 personal tax return that showed no receipts from IPM. He also acknowledged that the distributions shown on the corporate returns could include certain types of disbursements that would not have to be reported as income to shareholders on the recipient's individual tax returns, and that in general, there is nothing inappropriate about a shareholder receiving a return of capital contributions and not treating that as a taxable event. He also acknowledged that if IPM made a distribution to Illiano as a return of capital, IPM would not be required to report the distribution as a taxable event. Ultimately, Mr. Runge testified that he has no confidence in the accuracy of the IPM tax returns because of the discrepancies with Illiano's testimony, and because the tax returns were prepared so recently.

Mr. Per testified for the Defendant, albeit he was not offered as an expert witness. He has been a certified public accountant for 35 years, and has been the accountant for

[7] Only Illiano's 2014 personal tax return was admitted into evidence at trial.

Illiano and his various businesses for the past 25 years. For the past 10 years, he has prepared tax returns and performed payroll services for Illiano and his businesses, but he does not handle IPM's accounts payable. He testified that he prepared the tax returns for 2010–2014 for IPM in May 2016. He explained that the reason the returns were not prepared earlier is that the company's books and records were in disarray, and he credited this litigation for encouraging Illiano to get the records organized. In that regard, Mr. Per's testimony contradicted Illiano's testimony, who said that the reason the returns had not been filed sooner was that it was only as a result of post-judgment discovery, that he realized the returns had not been filed. It seems highly unlikely that Mr. Per would not have told Mr. Illiano for a period of 5 years that he could not prepare IPM's tax returns because IPM's books and records were in disarray. The Court's inference is supported by Mr. Per's testimony that once a year he reviews Illiano's Quickbooks accounts, and relies solely on the entries that Illiano has made in Quickbooks to prepare the corporate tax returns. If that is the case, then Mr. Per no doubt would have told Illiano at least annually that he was unable prepare IPM's tax returns. Perhaps more significantly, the Court finds that Mr. Per knew or should have known from his annual review of the Quickbooks accounts that IPM had been paying substantial personal expenses for or on behalf of Illiano before the tax returns were prepared, because those expenses would have been reflected in the Quickbooks accounting records.

Mr. Per was shown P. Ex. 5 and D. Ex. 8, the accountings that Illiano and IPM prepared in response to the Court's Show Cause Order. He testified that he first saw the initial accounting (P. Ex. 5) in June 2016. He said that as a result of seeing that

information, IPM's 2014 tax return will have to be amended to reflect personal payments made by IPM on behalf of Illiano and his wife. He said that he was not aware at the time he prepared the tax returns in April of 2016 that IPM had paid personal expenses on behalf of Illiano. As noted above, the Court finds that testimony to be suspect. In addition to his annual review of IPM's Quickbooks records, Plaintiffs' pointed out on cross-examination that Mr. Per has for several years had year-round access to Illiano's Quickbooks records. The Court also finds that Illiano knew that IPM paid personal expenses for or on his behalf at least as of the time of his December 2015 deposition. That conclusion stands to reason, given Mr. Per's testimony that Illiano entered the information into Quickbooks.

Mr. Per testified that he is treating the payments reflected on P. Ex. 5 and D. Ex. 8 as a salary and not a distribution, explaining that distributions are typically made quarterly, such as dividend payments, whereas recurring payments such as those reflected in P. Ex. 5 & D. Ex. 8 should be treated as salary to Illiano. He testified that he took the payments reflected on P. Ex. 5 and D. Ex. 8, and "grossed them up" for taxes, to arrive at an annual salary to Illiano of $130,000.00. Based on that calculation, Mr. Per determined Illiano's gross weekly salary to be $2,500.00 as reflected in Illiano's paystub (D. Ex. 14). Twenty-five percent (25%) of Illiano's net wages, i.e. $429.65, is being deducted from Illiano's salary and remitted to the Plaintiff's weekly in accordance with the Writ of Garnishment.

Discussion

1. Garnishment

The starting point for the Court's analysis is the Maryland Rules of Procedure, and more specifically, Rules 2-645,"Garnishment of Property Generally" and Rule 2-646, "Garnishment of Wages." Md. Rule 2-645,"Garnishment of Property Generally" states, in relevant part:

> **(a) Availability.** Subject to the provisions of Rule 2-645.1, this Rule governs garnishment of any property of the judgment debtor, other than wages subject to Rule 2-646 and a partnership interest subject to a charging order, in the hands of a third person for the purpose of satisfying a money judgment. Property includes any debt owed to the judgment debtor, whether immediately payable or unmatured.
> ...
> **(e) Answer of Garnishee.** The garnishee shall file an answer within the time provided by Rule 2-321. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the judgment debtor could assert. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished property, which shall then be treated as if levied upon by the sheriff. A garnishee who has filed an answer admitting indebtedness to the judgment debtor or possession of property of the judgment debtor is not required to file an amended answer solely because of an increase in the garnishee's indebtedness to the judgment debtor or the garnishee's receipt of additional property of the debtor.
> ...
> **(g) When Answer Filed.** If the garnishee files a timely answer, the matters set forth in the answer shall be treated as established for the purpose of the garnishment proceeding unless the judgment creditor files a reply contesting the answer within 30 days after its service. If a timely reply is not filed, **the court may enter judgment upon request of the judgment creditor,** the judgment debtor, or the garnishee. If a timely reply is filed to the answer of the garnishee, **the matter shall proceed as if it were an original action between the judgment**

creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions (emphasis supplied).

Md. Rule 2-646, "Garnishment of Wages," states in relevant part:

> **(e) Response of Garnishee and Debtor**. The garnishee shall file an answer within the time provided by Rule 2-321. The answer shall state whether the debtor is an employee of the garnishee and, if so, the rate of pay and the existence of prior liens. The garnishee may assert any defense that the garnishee may have to the garnishment, as well as any defense that the debtor could assert. The debtor may file a motion at any time asserting a defense or objection.
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> ...
>
> **(g) When Answer Filed**. If the answer denies employment, the clerk shall dismiss the proceeding against the garnishee unless the creditor files a request for hearing within 15 days after service of the answer. If the answer asserts any other defense or if the debtor files a motion asserting a defense or objection, a hearing on the matter shall be scheduled promptly.

"A garnishment proceeding is, in essence, an action by the judgment debtor for the benefit of the judgment creditor which is brought against a third party, the garnishee, who holds the assets of the judgment debtor....The sole purpose of the garnishment proceeding therefore is to determine whether the garnishee has any funds, property or credits which belong to the judgment debtor." *Fico, Inc. v. Ghingher*, 287 Md. 150, 159, 411 A.2d 430 (1980)

Garnishment proceedings, therefore, are separate cases, even though filed in the underlying action. Md. Rule 2-645(g); *Mayor and City Council of Baltimore v. Utica Mut. Ins. Co.*, 145 Md. App. 256, 802 A.2d 1070 (2002), *certiorari granted* 810 A.2d 961, 371 Md. 613, *appeal dismissed* 374 Md. 81, 821 A.2d 369. Once the writ of garnishment is issued and laid in hands of the garnishee, he is bound to safely keep assets of debtor in his possession, together with any additional assets that come into his possession up to time

of trial. *Catholic University of America v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 775 A.2d 458 (2001), *certiorari granted* 783 A.2d 221, 366 Md. 246, *affirmed* 368 Md. 608, 796 A.2d 744.

Neither party has directed the Court to any specific authority for the Court to exercise its contempt powers in a situation such as the one presented here. Rule 2-646(f) authorizes a finding of contempt against a garnishee who fails to file a timely answer to a writ of garnishment. That is not the case here, as IPM filed a timely answer to the writ of garnishment of wages. Rule 2-645(h) permits the Court to "enter an order in compliance with Rule 15-206 [constructive civil contempt] treating the [garnishee's] failure to answer [interrogatories] as a contempt and may require the garnishee to pay reasonable attorney's fees and costs." That is likewise not the situation here, as IPM answered interrogatories served upon it in the garnishment proceeding.[8]

Neither Rule 2-645 nor 2-646 appear to explicitly sanction a contempt finding against a garnishee who fails to obey a writ of garnishment. Moreover, each rule prescribes a different procedure following the filing of an answer by the garnishee. Rule 2-645(h) provides that "the court may enter judgment upon request of the judgment creditor, the judgment debtor, or the garnishee," and further provides that "[i]f a timely reply is filed to the answer of the garnishee, the matter shall proceed as if it were an original action between the judgment creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions." It is clear that Rule 15-201, et. seq., "Contempt," applies to civil actions. Moreover, the Court of Appeals has

[8] At the time the Petition for Contempt was filed, IPM had not yet answered Plaintiffs' interrogatories. IPM's answers to interrogatories were served on Plaintiffs on or about February 5, 2016.

recognized that a petition for constructive civil contempt constitutes a civil action. *See Arrington v. Dep't of Human Res.*, 402 Md. 79, 935 A.2d 432 (2007). Thus, Rule 2-645 (h) at least implicitly authorizes the initiation of a contempt proceeding against a garnishee in a garnishment action.

Rule 2-646 (g) states merely that "[i]f the answer asserts any other defense [i.e. other than that the debtor is not employed by the garnishee] or if the debtor files a motion asserting a defense or objection, a hearing on the matter shall be scheduled promptly." The Court concludes that it is not constrained by the remedies enumerated in Rule 2-645 and 2-646. The Court's power against a garnishee is not limited by that which is conferred by rule of procedure, but is an inherent, substantive power that the Court has in order to resolve disputes within its jurisdiction and to make its decision. *Hunt Valley Masonry, Inc. v. Fred Maier Block, Inc.*, 108 Md. App. 100, 671 A.2d 47 (1996) (holding that the trial court had the authority to enter a judgment against a garnishee employer who ignored a writ of garnishment of wages, even though the statute and the rule did not expressly give the trial court authority to enter judgment directly against a garnishee who failed to comply with the writ of garnishment).

In sum, with respect to the writ of garnishment of property other than wages in this case, Rule 2-645 (h) makes clear that contempt actions are applicable to such proceedings, and with regard to the writ of garnishment of wages, this Court concludes that its inherent power includes the authority to use its contempt powers to resolve the disputes at issue and render a decision regarding those disputes.

2. Contempt

This is civil contempt proceeding, as contrasted with a criminal contempt proceeding. In *Dodson v. Dodson*, 380 Md. 438, 845 A.2d 1194 (2004) (quoting *State v. Roll and Scholl*, 267 Md. 714, 726-728, 298 A.2d 867, 875 (1973)), the Court of Appeals observed:

> "The purpose of civil contempt is to coerce present or future compliance with a court order, whereas imposing a sanction for past misconduct is the function of criminal contempt (267 Md. at 728, 730, 298 A.2d at 876, 877)...A civil contempt proceeding is intended to preserve and enforce the rights of private parties to a suit and to compel obedience to orders and decrees primarily made to benefit such parties. These proceedings are generally remedial in nature and are intended to coerce future compliance. Thus, a penalty in a civil contempt must provide for purging. On the other hand, the penalty imposed in a criminal contempt is punishment for past misconduct which may not necessarily be capable of remedy. Therefore, such a penalty does not require a purging provision...The degree of proof required to establish a civil contempt need be proved only by a preponderance of the evidence, while a criminal contempt must be shown beyond a reasonable doubt."

The procedure for constructive civil contempt is controlled by Md. Rule 15-206. *See also Station Maintenance Solutions, Inc. v. Two Farms, Inc.*, 209 Md. App. 464, 60 A.3d 72 (2013). Contempt is the willful or contumacious failure to comply with a court order. *Dodson*, 380 Md. at 452, 845 A.2d at 1202. A negligent failure to comply with a court order is simply not contemptuous in a legal sense. *Id.* In a contempt proceeding, "[w]illful conduct is action that is '[v]oluntary and intentional, but not necessarily malicious.' " *Gertz v. Maryland Dept. of Environment*, 199 Md. App. 413, 23 A.3d 236 (2011) (*citing Royal Inv. Group, LLC v. Wang*, 183 Md. App. 406, 448, 961 A.2d 665 (2008)), *cert. dismissed*, 409 Md. 413, 975 A.2d 875 (2009). Resolution of the Plaintiffs' Petition for

Contempt, therefore, turns on whether IPM or Illiano failed to comply with the writs of garnishment, and if so, whether that failure was willful.

3. Illiano and IPM Committed Constructive Civil Contempt

With the above principles in mind, the Court will turn its attention to the issues presented. As explained in detail below, the Court finds that Illiano (and by extention IPM) failed to comply with the Writ of Garnishment of Property Other than Wages and the Writ of Garnishment of Wages, and that his failure was voluntary and intentional (i.e., not merely negligent), and was therefore willful.

A. The Writ of Garnishment of Property Other Than Wages

As it relates to the Writ of Garnishment of Property, IPM's sole defense to the Petition for Contempt is that because Plaintiffs obtained a judgment against Illiano only, not Illiano and his wife, any garnishment against IPM's assets is ineffective, inasmuch as all of IPM's stock is owned by Illiano and his wife as tenants by the entirety.

It is well settled in Maryland that property held in a tenancy by the entirety is "exempt from process by creditors of an individual spouse." *Schlossberg v. Barney*, 380 F.3d 174, 178 (4th Cir.2004) (applying Maryland law); *East. Shore v. Bank of Somerset*, 253 Md. 525, 532, 253 A.2d 367, 371 (1969). In addition, the right to use and enjoyment, rents, and profits of entireties property are also exempt from process by creditors of an individual spouse. *Cruickshank–Wallace v. County Banking & Trust Co.*, 165 Md. App. 300, 312–313, 885 A.2d 403, 410–411 (2005), *cert. denied* 391 Md. 114, 892 A.2d 477 (2006). It is also the case that a conveyance to a husband and wife jointly, without restrictive or

qualifying words, creates a rebuttable presumption under Maryland law that the property was conveyed as tenants by the entireties. *Kolker v. Gorn,* 193 Md. 391, 67 A.2d 258 (1949); *M. Lit, Inc. v. Berger,* 225 Md. 241, 170 A.2d 303 (a conveyance to a husband and wife of property gives rise to a presumption that the property is held as tenants by the entireties unless the contrary is designated) (citations omitted). In the case at bar, the Court need not concern itself with this presumption, because the stock certificate on its face purports to convey ownership of the shares in IPM to Illiano and Miia as tenants by the entireties. The stock certificate unequivocally states "This Certifies that Francesco & Miia Illiano Tenants by Entirety is the registered holder of One Hundred Shares." Thus, there is no question here as to the intent or effect of the words used in connection with the conveyance.

The issue before the Court instead pivots on whether the Court is persuaded based on the evidence presented, that the shares in IPM are in fact owned by Illiano and Miia as tenants by the entirety. The Court is not. The Court finds that despite what the stock certificate purports to demonstrate, Illiano has not met his burden of proving that he and his wife own stock in IPM as tenants by the entirety. The short explanation for the Court's finding is quite simple. The Court had the opportunity to listen to and observe Illiano both during the trial in October 2014, and again in this contempt proceeding. The Court simply does not find Illiano's testimony regarding the tenants by the entirety ownership to be credible. A more detailed explanation follows.

The stock certificate and Illiano's testimony that he and Miia have always owned IPM stock as tenants by the entirety, were all the evidence that Illiano presented on the issue. He did not call Miia as a witness to corroborate his testimony, despite her

deposition testimony that she never paid anything for her interest in the corporation. Neither did he present any documentary evidence to substantiate his claim, such as the corporation's stock ledger, or proof of money or other consideration that he and Miia paid for the stock. Illiano, who has always been the president, treasurer, and CEO of IPM, did not know when the stock certificate was prepared. It was only after his counsel refreshed his recollection by showing him the Articles of Incorporation, that he "recalled" that the certificate was prepared in November 2004. It strikes the Court as improbable that the stock certificate was prepared, dated and issued before the Articles of Incorporation were accepted by the Maryland State Department of Assessments and Taxation. It also strikes the Court as improbable that Miia, who purportedly has been a joint owner in IPM since its inception, would never have been made a signatory on its primary account held at NWSB.

In the final analysis, the countervailing evidence of IPM's stock ownership is more probative than the stock certificate itself. Illiano testified at his deposition in December 2013, that he was the sole owner of IPM. At that point, Illiano presumably had no reason to testify otherwise, and Illiano surely would have known by 2013 that Miia was a joint owner with him. The Court does not believe that Illiano misspoke in December 2013. For the foregoing reasons, the Court finds Illiano and IPM in contempt of the Writ of Garnishment of Propertry Other Than Wages.

B. The Writ of Garnishment of Wages

As it pertains to the Writ of Garnishment of Wages, the Court has little difficulty concluding that Illiano (and by extension IPM) willfully disobeyed the Writ when IPM

answered that Illiano was employed at a salary of $0. It was disingenuous and misleading of Illiano to suggest that he earned no salary from IPM, when he knew that IPM was paying just shy of $12,000.00 per month in personal expenses for him and Miia. Consequently, by answering the Writ of Garnishment of Wages in that manner, Illiano voluntarily and quite deliberately refused to honor the Writ. Moreover, it is of no avail that some 14 months after IPM's initial Answer to the Wage Garnishment, and after the contempt hearing had begun, IPM filed an Amended Answer to the Writ and began garnishing Illiano's salary. Clearly, it did so only after Illiano was "caught with his hand in the cookie jar." When the Wage Garnishment was served on IPM, Illiano knew, or should have known that IPM's payment of substantial personal expenses on his behalf constituted income to him, and should have been treated as salary.

Despite his attempt to cast himself as a naïve small business owner, the Court finds Illiano to be far more sophisticated than he lets on. As the sole or joint owner of some 13 businesses, ranging from restaurants, to property management companies, to shopping centers, Illiano displayed during the trial and the contempt hearing, more than a modest level of business acumen. The Court simply does not accept as credible, Illiano's claim that the payments by IPM of personal expenses on his behalf constituted either repayment of capital contributions or dividends. Furthermore, Mr. Per has been Illiano's accountant for the past 25 years, and has year-round access to Illiano's Quickbooks accounts. The Court found it telling that Illiano's and Mr. Per's testimony differed on the reason why IPM had not filed income tax returns for 2010-2014. Illiano claimed that he did not realize that the returns had not been filed until post-judgment discovery began, while Mr. Per blamed the delay on the disorganized state of Illiano's

recordkeeping. The Court does not accept that Mr. Per would not have known, and would not have told Illiano before August 2016 that IPM's payment of personal expenses for Illiano had to be treated as salary. Once, however, Illiano went on record in these proceedings, detailing the personal expenses paid by IPM, he had no choice other than to amend his answer to the wage garnishment, and acknowledge that the payment of those personal expenses constituted salary. For the foregoing reasons, the Court finds Illiano and IPM in contempt of the Writ of Garnishment of Wages.

D. The Remedy

Because the purpose of civil contempt is to coerce or facilitate compliance with court orders, the sanction imposed for civil contempt "must provide for purging." *See, e.g., State v. Roll and Scholl*, 267 Md. at 728, 298 A.2d at 876. Furthermore, sanctions in civil contempt proceedings may not be imposed upon a contemnor unless it is shown he or she has the present ability to purge the contempt. *Dodson*, 380 Md. at 450, 845 A.2d at 1201(citing *Thrower v. Support Enforcement*, 358 Md. 146, 161, 747 A.2d 634, 642 (2000)). Moreover, the Court of Appeals has held that compensatory damages may not ordinarily be recovered in a civil contempt action. *Dodson*, 380 Md. at 453, 845 A.2d at 1203.[9] The Court of Special Appeals, however, upheld the trial court's imposition of a $75,000.00 fine as a purge provision against a contemnor based on a finding of exceptional circumstances. *Royal Investment Group, LLC*, 183 Md. App. at 453, 961 A.2d 694. The

[9] The Court of Appeals' specific holding was that compensatory damages may never be recovered in a civil contempt action based upon a past negligent act by the contemnor. The Court did not address the issue of whether, under exceptional circumstances, a willful violation of a court order, clearly and directly causing the petitioner a monetary loss, could form the basis for a monetary award in a civil contempt case.

Court there found that a willful violation of a court order, which clearly causes the plaintiff a monetary loss, can form the basis for a monetary award in a civil contempt case. *Id.*

In the case *sub judice*, the Court finds exceptional circumstances warranting the imposition of compensatory damages for Illiano's and IPM's contempt. As the Court previously found, Illiano's actions in disobeying the Writs of Garnishment were willful and deliberate, and were done with the intention to frustrate Plaintiffs' efforts to collect on their judgment. This is not a situation where the Plaintiffs issued a writ of garnishment to a garnishee over which Illiano had no control. He is the owner, president and treasurer of IPM, and he directed that IPM pay personal expenses for him and his wife in the amount of $11,956.00 per month. He therefore had exclusive control over IPM's accounts, and the ability to determine, wrongfully as it turns out, that IPM neither held property belonging to him, nor paid him any salary. Whether or not Illiano fabricated the stock certificate after the Plaintiffs' obtained their judgment in this case, and to be clear, the Court has not made such a finding in this case, the Court does find that Illiano diverted assets and income from IPM that should have otherwise been available to at least partially satisfy the Plaintiffs' judgment.

Plaintiffs' Exhibit 17 summarizes the funds that should have been available to satisfy the Plaintiffs' judgment, based on the accountings filed by Illiano. The Court finds P. Ex. 17 to contain an accurate accounting of those funds, which establishes that $99,157.15 was paid by IPM to Illiano for the period covered by the accountings; i.e. from June 2015 through July 2016. That figure is more than a function of the salary attributable to IPM. It represents cash that should have been available in IPM's accounts

at the time the Writs of Garnishment were served, and which IPM was legally obligated to pay to Plaintiffs in accordance with the Writs. As noted above, Illiano tendered a check to Plaintiffs in the amount of $27,000.00, contemporaneous with the filing of his Amended Answer to Writ of Garnishment of Wages. P. Ex. 17 properly credits Illiano with that amount. Having found Illiano and IPM in contempt, the Court will allow Illiano and IPM to purge their contempt by entering a judgment against IPM and in favor of Plaintiffs for the sum of $72,157.15, which the Court finds is the proper measure of damages for Illiano's and IPM's willful and contumacious conduct.

E. Attorney's Fees

Plaintiffs have requested attorneys' fees in this matter pursuant to Md. Rule 1-341. The Rule provides, in relevant part:

RULE 1-341. Bad Faith--Unjustified Proceeding

> **(a) Remedial Authority of Court.** In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification, the court, on motion by an adverse party, may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorneys' fees, incurred by the adverse party in opposing it.
>
> **(b) Statement Regarding Costs and Expenses, Including Attorneys' Fees.**
>
> (1) Generally. A motion requesting an award of costs and expenses, including attorneys' fees, shall include or be separately supported by a verified statement that sets forth the information required in subsections (b)(2) or (b)(3) of this Rule, as applicable.
>
> (2) Costs and Expenses Other Than Attorneys' Fees. The statement in support of a request for costs and expenses other

> than attorneys' fees shall itemize the type and amount of the costs and expenses requested and shall include any available documentation of those costs and expenses.

The Rule is intended to serve as a deterrent against frivolous litigation. *Worsham v. Greenfield*, 435 Md. 349, 78 A.3d 358 (2013). It has been said that "Rule 1-341 sanctions are judicially guided missiles pointed at those who proceed in the courts without any colorable right to do so." *Legal Aid Bureau, Inc. v. Bishop's Garth Assoc. Ltd. Partnership*, 75 Md. App. 214, 224, 540 A.2d 1175, 1180 (1988). It has also been said that the Rule should be used sparingly because granting an award of attorney's fees under it is an extraordinary remedy. *Seney v. Seney*, 97 Md. App. 544, 549, 631 A.2d 139 (1993). What constitutes bad faith or lack of substantial justification has been the subject of numerous appellate opinions in this State. In analyzing whether a party lacked substantial justification in filing its claim, the Court must determine "whether [the offending attorney or party] had a reasonable basis for believing that the claims would generate an issue of fact ...." *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 268, 596 A.2d 1049 (1991). Furthermore, a party acts in bad faith when it acts "vexatiously, for the purpose of harassment or unreasonable delay, or for other improper reasons." Id. at 268, 596 A.2d 1049.

For many of the same reasons that the Court found Illiano and IPM in contempt, the Court finds that both of the parties acted in bad faith and without substantial justification in this contempt proceeding. There was no reasonable basis for believing that IPM held no property belonging to Illiano, nor was there a reasonable basis for believing that Illiano received, or should have received no salary from IPM. The Court

further finds that Illiano's actions were done for the purpose of unreasonably delaying IPM's obligation to honor the Writs of Garnishment.

During his closing argument, Plaintiffs' counsel requested that if the Court concluded attorneys' fees and costs were appropriate pursuant to Rule 1-341, the Court schedule another hearing to permit Plaintiffs to present evidence of attorneys' fees and costs incurred. The Court finds nothing in Rule 1-341 which would preclude the Court from doing so. Accordingly, the Court will direct that a hearing be set before this Court pursuant to Md. Rule 1-341, for the purpose of having the Court receive evidence of Plaintiffs' attorneys' fees and costs incurred in this contempt proceeding.

Conclusion

For the reasons set forth in this Memorandum Opinion, the Court finds Illiano and IPM in constructive civil contempt for their willful failure to obey the May 11, 2015 Writs of Garnishment of Wages and Garnishment of Property Other than Wages. Illiano and IPM shall be permitted to purge their contempt by the entry of a judgment against IPM and in favor of Plaintiffs in the amount of $72,157.15. Finally, a hearing shall be set before this Court pursuant to Md. Rule 1-341, for the purpose of having the Court receive evidence of Plaintiffs' attorneys' fees and costs incurred in this contempt proceeding. The Court will enter a separate Order for Constructive Civil Contempt, consistent with the findings of fact and conclusions of law set contained herein.

September 29, 2016
DATE

JUDGE FRED S. HECKER
Circuit Court for Carroll County