

No. 1-18-0336

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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WELLS FARGO BANK, N.A.,	)	Appeal from the
	)	Circuit Court of
Plaintiff,	)	Cook County.
	)	
(BankFinancial, N.A., as respondent to third-party	)	
citation to discover assets,	)	
	)	
Petitioner-Appellant),	)	
	)	
v.	)	No. 14 L 50758
	)	(cons. with 14 L 50833)
ANDREW J. FILIPOWSKI,	)	
	)	
Defendant,	)	
	)	
(Andrew J. Filipowski and the Thomas A. DePasquale	)	
Management Trust,	)	
	)	
Respondents-Appellees).	)	Honorable Alexander White
	)	Judge Presiding.

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Pierce and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court had jurisdiction to enter the temporary restraining order. The circuit court did not abuse its discretion when it refused non-movant’s request to require an injunction bond.

¶ 2 Third-Party Citation Respondent BankFinancial appeals from the circuit court’s entry of a temporary restraining order against it. The Thomas A. DePasquale Management Trust (“the Trust”) filed a motion for a temporary restraining order in an attempt to stop BankFinancial from continuing collection proceedings against defendant Andrew Filipowski, particularly to stop certain proceedings in Florida. The circuit court found that it was proper to temporarily restrain BankFinancial from continuing its collection activities until the court could hear the Trust’s pending motion for a preliminary injunction. BankFinancial appeals, and we affirm.

¶ 3 **BACKGROUND**

¶ 4 The case goes back several years beginning with BankFinancial securing a judgment of nearly \$1.4 million against Filipowski in DuPage County, Illinois. SMS Financial Recovery Services and Wells Fargo Bank later secured judgments of more than \$5 million each against Filipowski in North Carolina. Wells Fargo initiated supplementary proceedings and petitioned to register its foreign judgment in Cook County in October 2014. SMS initiated supplementary proceedings the following month and personally served Filipowski with a citation to discover assets. Both Wells Fargo and BankFinancial attempted to serve Filipowski by leaving a copy of the citation with the doorman at his apartment in Chicago. The Trust acquired SMS Financial’s judgment rights. In the meantime, Filipowski moved to Florida and became domiciled there.

¶ 5 BankFinancial filed a motion to intervene in this case and filed a general appearance. The circuit court consolidated the three supplementary proceedings pending against Filipowski in Cook County into this case in June 2015 so that the creditors could resolve their competing claims.

¶ 6 Subsequently, BankFinancial instituted collection proceedings in Florida and filed an affidavit as a judgment creditor. BankFinancial claims that filing that affidavit gave it a statutory lien against Filipowski's property in Florida. On the other hand, the Trust contends that it has a statutory lien on Filipowski's property wherever located because it personally served him with the direct citation to discover assets in this Cook County action and its lien was first in time. The circuit court quashed the citation that Wells had left with Filipowski's doorman in Chicago. Filipowski moved to quash BankFinancial's citation too, because BankFinancial had attempted to effectuate service in the same way. BankFinancial voluntarily dismissed its 2014 citation proceedings in Cook County and has continued to pursue collection activities in Florida. The Trust subsequently purchased Wells Fargo's judgment rights too.

¶ 7 At the heart of the matter now is that BankFinancial continues to pursue its collection activities in Florida and the Trust continues to pursue its activities in Cook County. BankFinancial was granted charging orders by the Florida court even though the Trust intervened and attempted to stop their issuance. The Florida court, however, declined to rule on the ultimate priority status of the parties' competing liens. Also, while the issue was not squarely before the Florida court, when the Trust asked the Florida court to rule that the Illinois charging orders be held to have priority to the Florida orders, the court stated "I'm going to let [the Cook County judge] make that decision or the parties can fight it out." BankFinancial has since filed a motion in the Florida court asking the court to determine lien priority. The Trust filed a motion for a preliminary injunction in Cook County on January 13, 2018 and, on January 31, 2018, filed the motion for the temporary restraining order now at issue.

¶ 8 The Trust argues that the temporary restraining order is necessary to preserve the status quo and to give the circuit court time to rule on the motion for a preliminary injunction before the court in Florida perhaps assigns priority to the charging orders it issued. Filipowski joined the Trust's motions arguing that without a preservation of the status quo he could be ordered by two different courts to perform mutually exclusive activities, putting him in danger of being forced to choose which court's order to obey and which to disobey. The circuit court entertained oral argument on the motion and issued a temporary restraining order on February 15, 2018. The circuit court ordered BankFinancial to not continue with its collection efforts in Florida or anywhere else until the court could rule on the motion for a preliminary injunction. The circuit court refused to require a bond over BankFinancial's objection.

¶ 9 Another wrinkle in the case is that counsel for BankFinancial had a vacation planned that has potentially prohibited the parties from getting to the preliminary injunction hearing in an expedited manner after the temporary restraining order was entered. The parties agreed during oral argument that if the circuit court granted the temporary relief, that all matters in the case would be stayed until further notice. However, the only issue before us is whether the circuit court erred when it entered the temporary restraining order. No objection is raised as to its duration or any aspect other than the propriety of the initial order and the court's refusal to require a bond.

¶ 10 We received this appeal on an expedited basis. Yesterday, we entered an order affirming the circuit court's order with an indication that we would follow up with an order including our analysis. BankFinancial has a motion before the court in Florida asking it to determine

priority lien status and the parties were due to appear in court tomorrow, March 1, 2018, in Florida.

¶ 11

#### ANALYSIS

¶ 12 The real issue in the case will ultimately be whether the Trust has perfected liens against Filipowski's assets wherever located as a result of (its predecessor in interest) personally serving Filipowski with a direct citation to discover assets. The Trust's position is that it has the superior lien priority because serving that citation creates a lien "upon all personal property belonging to the judgment debtor" (citing 735 ILCS 5/2-1402 (m)(1) (West 2012)). BankFinancial's position is that there is a distinction between assets and "Florida assets" and that it has the priority lien over the Florida assets. But that issue is not currently before this court. Today, we are called on to determine whether the circuit court erred when it issued a temporary restraining order requiring BankFinancial to not proceed with its Florida case until the circuit court can rule on the motion for a preliminary injunction.

¶ 13 In general, the party seeking a temporary restraining order must demonstrate that it has a protectable right, that it will suffer irreparable harm if injunctive relief is not granted, that its remedy at law is inadequate, and that there is a likelihood of success on the merits. *In re Estate of Wilson*, 373 Ill. App. 3d 1066, 1075-76 (2007). The party seeking a temporary restraining order is not required to make out a case that would entitle it to relief on the merits; rather, it need only show that it raises a "fair question" about the existence of its right and that the court should preserve the status quo until the case can be decided on the merits. *Id.* at 1076. Whether to grant or deny a motion for a temporary restraining order is within the sound discretion of the trial court and will not be disturbed on appeal absent

an abuse of discretion. *C.D. Peters Construction Co. v. Tri-City Regional Port District*, 281 Ill. App. 3d 41, 47 (1996).

¶ 14 BankFinancial argues that the circuit court lacked jurisdiction to enter a temporary restraining order against it because the Trust never filed a complaint against it. BankFinancial argues that the filing of a complaint against a person is a prerequisite to the court having jurisdiction to enter a temporary restraining order against that person (citing *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1062-63 (2000)). BankFinancial also seems to intimate that because it voluntarily dismissed its collection case in Cook County, the circuit court cannot enjoin it in these supplementary proceedings. However, the Illinois supplementary proceedings statute gives the court wider latitude than what BankFinancial suggests.

¶ 15 The supplementary proceedings statute states that “[t]he court may enjoin *any person, whether or not a party* to the supplementary proceeding, from making or allowing any transfer or other disposition of, or interference with, the property of the judgment debtor not exempt from the enforcement of a judgment.” (Emphasis added.) 735 ILCS 5/2-1402(f)(2) (West 2012). Under Illinois law, injunctions can be issued against non-parties in citation proceedings. *Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010).

¶ 16 The broad language in the statute is sufficient to cover a third-party judgment creditor also engaged in collection activities that threatens to interfere with the property of the judgment debtor potentially covered by the Trust’s judgment. See *O’Connell v. Pharmaco, Inc.*, 143 Ill. App. 3d 1061, 1068 (1986) (provisions of Code of Civil Procedure regarding supplementary proceedings are to be liberally construed); see also *Kirchheimer Bros. Co. v. Jewelry Mine, Ltd.*, 100 Ill. App. 3d 360 (1981) (enjoining a non-party insurance company

that may or may not ever hold an asset belonging to the debtor). The court's ability to grant injunctive relief in supplementary proceedings does not specifically require that there be a complaint on file against the party to be enjoined. See, *e.g.*, *Shipley v. Hoke*, 2014 IL App (4th) 130810, ¶¶ 88-89; 735 ILCS 5/2-1402(f)(2) (West 2012).

¶ 17 Moreover, BankFinancial has been more than just a passive third party in the supplementary proceedings in Cook County. BankFinancial moved to intervene in this case on April 6, 2015 and participated for a year and a half. The supplementary proceedings against Filipowski were all consolidated into this case, including two proceedings initiated by BankFinancial. It only voluntarily dismissed its supplementary proceedings after BankFinancial became aware that the circuit court quashed Wells Fargo's citation in which service was attempted by the same means. BankFinancial participated in the instant temporary restraining order hearing and has responded to the motion for a preliminary injunction, among other things, always having a full and fair opportunity to respond. BankFinancial has actively participated in this case, requested relief from the court, and actively participated in opposing the merits of the Trust's claims throughout. See *O'Connell*, 143 Ill. App. 3d at 1068-69.

¶ 18 Along with the statutory authority to restrain a person who is relevant to supplementary proceedings, it has long been established in Illinois that a court has the power to restrain a person over whom it has jurisdiction from instituting a suit or proceeding with a suit in a foreign state. *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 43 (1992) (*overruled on other grounds by ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 534-36 (2010)). The longstanding rule has been that a trial court has the authority to restrain the prosecution of a foreign action when the foreign action will result in fraud, gross wrong, or oppression;

equitable considerations must clearly require the interposition of such an order to prevent manifest wrong and injustice. *Pfaff*, 155 Ill. 2d at 58. What constitutes a wrong and injustice requiring such relief must necessarily depend upon the particular facts of the case. *Id.* We have also explained that the factors a court is to consider to inform its decision on whether to enjoin a suit in a foreign jurisdiction include comity, prevention of multiplicity, vexation and harassment, likelihood of obtaining complete relief in foreign jurisdiction, and the *res judicata* effect of foreign judgment in local forum. *John Crane Inc.*, 391 Ill. App. 3d 693, 700 (2009).

¶ 19 Prevailing precedent makes clear that the circuit court has the authority to order BankFinancial to desist from pursuing its case in Florida, especially for a very limited time under a temporary restraining order until it can address the pending motion for a preliminary injunction. This case is first in time as opposed to the case in Florida. The circuit court found that the two cases have the same or substantially the same parties and the same issue of collecting against Filipowski's assets. There is evidence here from which the circuit court could have concluded that it was necessary to restrain BankFinancial to avoid a wrong or injustice. There is also evidence in the record from which the circuit court could conclude that BankFinancial is attempting to invoke the jurisdiction of the foreign court in order to interfere with the circuit court's jurisdiction. The circuit court was entitled to find that a temporary injunction is justified in order to allow it to consider the issues of the case to prevent a manifest wrong or injustice, vexation, oppression, comity, harassment, and the *res judicata* effect of a foreign judgment on this proceeding. The evidence raises a fair question as to whether BankFinancial has a proper purpose for maintaining the Florida action. Final findings on all of the above considerations are yet to be entered, but the circuit court made



affirmative provisional findings on this evidence in favor of the Trust, and against BankFinancial, and it did not abuse its discretion by temporarily restraining BankFinancial from continuing to prosecute its case in Florida.

¶ 20 BankFinancial argues that there is no emergency and recites the elements traditionally needed for a temporary restraining order arguing that the Trust has either not pled the necessary facts or appropriately demonstrated that those requirements have been met (see *supra* ¶ 13). However, in its order granting the temporary restraining order, the circuit court specifically found that the Trust had established the required elements. Each of the requirements is supported by some evidence in the record or adequately pled so as to support the circuit court's conclusion. The circuit court also found that it "does not perceive any harm to BankFinancial from the issuance of the TRO," contrary to BankFinancial's assertions.

¶ 21 Lastly, BankFinancial argues that the circuit court erred when it refused to enter an order requiring that an injunction bond be posted. Section 11-103 of the Illinois Code of Civil Procedure gives the circuit court authority to require that a bond be posted when it enters a temporary restraining order. 735 ILCS 5/11-103 (West 2012). However, the statute makes the bond requirement discretionary. *Id.* BankFinancial presented the issue to the circuit court and the court rejected its request that a bond be required. BankFinancial has failed to explain why a bond is necessary in this case except as to point out that it has a large money judgment against Filipowski. However, BankFinancial does not explain how its judgment is in any danger of an adverse effect, even if it is found to have been wrongfully restrained during the short period between the entry of the temporary restraining order until the time the circuit court rules on the motion for a preliminary injunction. The preliminary injunction motion is either fully briefed or nearly so, and the parties all agreed to a stay if the temporary relief was

granted in order to allow counsel to take a previously-planned vacation. The circuit court did not abuse its discretion when it rejected BankFinancial's request that the Trust post an injunction bond. See *Gold v. Ziff Communications Co.*, 196 Ill. App. 3d 425, 436 (1989).

¶ 22

CONCLUSION

¶ 23 Accordingly, we affirm.

¶ 24 Affirmed.