COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

Enviropower, L.L.C. v. Bear, Stearns & Co., Inc.

Enviropower · No. 01-04-01111-CV · Decided February 21, 2008

SUMMARY

In this concurring opinion on an en banc order, Justice Bland addresses how a judgment debtor's net worth should be calculated for purposes of setting a supersedeas bond. The opinion distinguishes net worth, measured as assets minus liabilities, from the unrealized market value or potential sale value of a company. It concludes that a proposed sale's unrealized gain does not constitute current net worth, while recognizing that the trial court may protect the judgment creditor if a sale later produces a realized gain.

CASE DETAILS

COURT	Court of Appeals for the First District of Texas
WRITING FOR THE COURT	Jane Bland; Chief Justice Radack; Justice Taft; Justice Nuchia; Justice Jennings; Justice Keyes; Justice Alcala; Justice Hanks; Justice Higley; Justice Bland
JURISDICTION	Texas
DECIDED	February 21, 2008
DOCKET	01-04-01111-CV
DISPOSITION	other
PROCEDURAL POSTURE	Appeal concerning the amount and basis of a supersedeas bond, followed by en banc reconsideration and an en banc order and opinion.
STANDARD OF REVIEW	Whether the trial court applied the correct legal standard in determining net worth for purposes of setting a supersedeas bond; an erroneous legal standard constitutes error as a matter of law.
PRECEDENTIAL VALUE	Published concurring opinion accompanying an en banc opinion and order; the concurrence's independent reasoning is not itself a majority opinion, although it joins the en banc disposition.
PARTIES	Enviropower, L.L.C. v. Bear, Stearns & Co., Inc.

TOPICS

appellate procedure · civil procedure · commercial litigation · remedies

PRACTICE AREAS

appellate procedure | civil procedure | commercial litigation | remedies

QUESTIONS PRESENTED

1. Whether unrealized gain reflected in a proposed sale of a company may be treated as current net worth when setting a supersedeas bond.
2. Whether net worth for supersedeas-bond purposes is calculated as assets less liabilities under basic accounting principles.
3. Whether the trial court may protect the judgment creditor by requiring an escrow or other security if a proposed sale is completed and produces a realized gain.

HOLDINGS

1. Market value based on an unrealized gain from a proposed sale of the company does not equal current net worth for purposes of setting a supersedeas bond.
2. Although an unrealized gain may not be counted as current net worth, the trial court may require the company to escrow an amount sufficient to post an appropriate bond if a completed sale produces a realized gain that moves the company from negative to positive net worth.

KEY QUOTATIONS

> *"But "market value" based upon the unrealized gain from a proposed sale of the company does not equal current net worth for the purposes of setting a supersedeas bond under the Texas Civil Practice and Remedies Code and Texas Rule of Appellate Procedure 24."*

> *"By using market capitalization as the standard for determining Ramco Energy's net worth, the trial court applied an incorrect legal standard and erred as a matter of law."*

FACTUAL BACKGROUND

The trial court found that Enviropower, the debtor company, had a negative $12 million net worth when liabilities were subtracted from assets. Enviropower continued operating because its first-lien secured creditor provided an operating allowance and had apparently refrained from enforcing the debt. The trial court nevertheless found an $8 million value based on a third party's offer to purchase the company and used the potential gain from that sale to require a $200,000 supersedeas bond.

PROCEDURAL HISTORY

The 164th District Court of Harris County found that Enviropower had a negative $12 million net worth when calculated as assets minus liabilities, but found a positive $8 million value based on a third party's offer to purchase the company. The trial court required a $200,000 supersedeas bond based on the potential gain from that proposed sale. En banc reconsideration was requested and approved by a majority of the Court of Appeals; Justice Bland specially concurred in the en banc opinion and order.

DISPOSITION

other

CASES CITED

- Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge), L.L.C., 171 S.W.3d 905, 913-14 (Tex. App.--Houston [14th Dist.] 2005, no pet.)
- LMC Complete Automotive v. Burke, 229 S.W.3d 469, 485-86 (Tex. App.--Houston [1st Dist.] 2007, pet. denied)

OPINION

PER CURIAM.

Opinion issued February 21, 2008 In The Court of Appeals For The First District of Texas NO. 01-04-01111-CV ___________ ENVIROPOWER, L.L.C., Appellant V. BEAR, STEARNS & CO., INC., Appellee On Appeal from the 164th District Court Harris County, Texas Trial Court Cause No. 2004-37741 CONCURRING OPINION ON EN BANC ORDER The trial court found that the net worth of EnviroPower, L.L.C. ("EnviroPower"), the debtor company, is a negative $12 million dollars, if calculated by subtracting liabilities from assets.

EnviroPower is operating solely because its first lien secured creditor provides it with an operating allowance, and to date, appears to have forborne calling in the debt it holds. The trial court also found that EnviroPower's "net worth for purposes of setting a supersedeas bond" is a positive $8 million, based on a third party's offer to purchase the company.

It is the potential gain from this sale upon which the trial court required a $200,000 supersedeas bond. Determining the market value of particular assets, however, is one thing; the market value of a company as a whole is another.

The former would place the value of an asset on the books at its current worth rather than at its book value (or cost basis), in instances in which accounting principles allow for it. The latter is a hoped-for gain (or an unhoped-for loss) should the company be sold, or a capitalization above or below the company's book value, based upon expectations about potential future earnings.

See Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge), L.L.C., 171 S.W.3d 905, 914 (Tex. App. --Houston [14th Dist.] 2005, no pet.). Such gains generally are not recognized under accounting principles unless or until they are realized.

The market value finding in this case is based on the latter concept. As our sister court observed in Ramco, for purposes of statutory interpretation, courts traditionally define net worth to mean assets less liabilities under basic accounting principles. See id. at 913-14 (collecting cases interpreting statutes that contain net worth as a term defined as assets less liabilities under generally accepted accounting principles); see also Tex. R. App.

P. 24.2 (c) (1) ("A judgment debtor who provides a bond, deposit, or security under (a)(1)(a) in an amount based on the debtor's net worth must simultaneously file an affidavit that states the debtor's net worth and states complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained."). Such an interpretation could leave room for differences of opinion as to the current market value of particular assets, but not the more ethereal (at least when trying to borrow against it to post a bond) unrealized gain that potentially could be had if the judgment debtor company was sold in the future, and the unrealized gain distributed among its assets to increase their value beyond their capitalized cost basis, without any notion that a market exists for those assets separate from a sale of the company that has yet to occur.

Of course, should a gain from the sale of the company be realized, an appropriate bond must be posted. And, since a potential gain in this case is more than speculative, the trial court is within its authority to require that the company escrow an amount sufficient to post a bond upon the completion of the sale, if the completed sale results in the company moving from the red to the black in terms of assets minus liabilities.

See Tex. R. App. P. 24.1(e) ("The trial court may make any order necessary to adequately protect the judgment creditor against loss or damage that the appeal might cause."). But "market value" based upon the unrealized gain from a proposed sale of the company does not equal current net worth for the purposes of setting a supersedeas bond under the Texas Civil Practice and Remedies Code and Texas Rule of Appellate Procedure 24.

See Ramco Oil & Gas, Ltd., 171 S.W.3d at 914 ("By using market capitalization as the standard for determining Ramco Energy's net worth, the trial court applied an incorrect legal standard and erred as a matter of law.").

The dissent correctly observes that this case and our court's decision in LMC v. Burke are not wholly incompatible because no party in the LMC case asserted that the trial court should set a supersedeas bond based on an overall market value that was unreflected by the company's book value. LMC Complete Automotive v. Burke, 229 S.W.3d 469, 485-86 (Tex. App.-- Houston [1st Dist.]

2007, pet. denied). The dissenting view in this case cannot be squared, however, with our sister court's well-reasoned decision in Ramco, in which the court noted the distinction between valuing a company based on its net worth and valuing one based on its market capitalization, or market value, and held that net worth, for purposes of setting a bond, is assets less liabilities.

See Ramco Oil & Gas, Ltd., 171 S.W.3d at 913-14. Because disputes about the determination of net worth arise with regularity in the jurisdictions encompassed by our two courts, the litigants and trial courts are entitled to some uniformity in our decisions on the setting of appeal bonds. I therefore join the en banc opinion and order. Jane Bland Justice Panel consisted of Justices Taft, Keyes, and Hanks.

En banc consideration was requested. Tex. R. App. P. 49.7. A majority of the justices of the Court voted in favor of reconsidering the case en banc. See id. The en banc Court on reconsideration consists of Chief Justice Radack and Justices Taft, Nuchia, Jennings, Keyes, Alcala, Hanks, Higley, and Bland. Justice Keyes, writing for the majority of the en banc Court, joined by Chief Justice Radack and Justices Jennings, Alcala, Higley, and Bland.

Justice Bland, joined by Justice Jennings, specially concurring with the opinion of the en banc Court. See id. Justice Hanks, joined by Justices Taft and Nuchia, dissenting from the order and opinion of the en banc Court.