[Cite as *Thurman v. Ohio Dept. of Ins.*, 2009-Ohio-5034.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
GREENE COUNTY

WILLIAM E. THURMAN, II	:	
	:	Appellate Case No.2008-CA-81
Plaintiff-Appellant	:	
	:	Trial Court Case No.2007-CV-882
v.	:	
	:	(Civil Appeal from
STATE OF OHIO	:	Common Pleas Court)
DEPARTMENT OF INSURANCE	:	
	:	
Defendant-Appellee	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 25th day of September, 2009.

. . . . . .

DIANNE F. MARX, Atty. Reg. #0017846, and KATHERINE L. EARLY, Atty. Reg. #0075380, Sebaly Shillito & Dyer, 1900 Kettering Tower, Dayton, Ohio
Attorney for Plaintiff-Appellant

RICHARD CORDRAY, Atty. Reg. #0038034, by AARON D. EPSTEIN, Atty. Reg. #0063286, Office of Ohio Attorney General, Constitutional Offices, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3400
Attorney for Defendant-Appellee

. . . . . .

BROGAN, J.

{¶ 1} William E. Thurman II appeals from the trial court's judgment entry upholding the Ohio Department of Insurance's revocation of his license to sell insurance.

{¶ 2} Thurman advances two assignments of error on appeal. First, he

contends the trial court erred in finding that he violated a 2003 order suspending the revocation of his insurance license on condition that he make restitution. Second, he claims the trial court erred in finding a violation of the 2003 order where the order itself was based on a non-existent breach of fiduciary duty.

{¶ 3} The record reflects that Thurman has been a licensed insurance agent for many years. In 2001, he received a misdemeanor conviction for attempted sale of unregistered securities. The conviction stemmed from his participation with his former boss, Don Owens, in the sale of promissory notes for a golf venture known as "Tee to Green." The operation ultimately went bankrupt, resulting in substantial losses to note holders.

{¶ 4} In October 2002, the Ohio Department of Insurance commenced disciplinary proceedings against Thurman due to his misdemeanor conviction. A hearing officer found that his conduct in connection with the sale of promissory notes constituted a breach of fiduciary duty and that his clients lost more than $300,000. The hearing officer recommended revocation of Thurman's insurance license with the revocation suspended contingent upon his making full restitution at a rate of $3,500 per month. Thurman did not file objections to the hearing officer's report and recommendation. The Superintendent of Insurance later issued a 2003 order and addendum adopting the hearing officer's conclusions. The Superintendent ordered Thurman to make restitution of $358,185.21 at a rate of $3,500 per month to be paid to all clients pro rata. These amounts were obtained from a repayment schedule that had been prepared and provided by Thurman himself. The Superintendent's order warned that "[f]ailure to maintain and complete the restitution schedule will result in

enforcement of the revocation order." Thurman did not appeal the Superintendent's ruling.

{¶ 5} Thereafter, a second revocation hearing was held in June 2007 following an inquiry into Thurman's compliance with the restitution order. During the hearing, Thurman admitted that he personally had not paid $3,500 per month in restitution and had not made his payments pro rata. In his defense, Thurman reasoned that he actually was "ahead of schedule" because a number of investors had forgiven his restitution obligation. He supported this assertion with affidavits from those investors. Following the hearing, a hearing officer made the following findings of fact:

{¶ 6} "(1) Had Mr. Thurman abided by the $3,500 per month payment schedule from the last quarter of 2003 through February, 2007, he would have paid approximately $143,500. But during that time, he only paid (at most) $31,784.69.

{¶ 7} "(2) Quarterly distributions were not made, pro rata or otherwise, nor was the Department ever provided with an accounting of the payments."

{¶ 8} The hearing officer found it "obvious that [Thurman] did not even make a good-faith attempt to make payments and restitution as required by the Superintendent's Order." As a result, the hearing officer recommended revocation of his insurance license. Over Thurman's objections, the Superintendent of Insurance issued a September 2007 order adopting many of the hearing officer's findings and permanently revoking his insurance license. Thurman appealed the revocation to Greene County Common Pleas Court. In August 2008, a magistrate filed an order upholding the revocation, finding that it was supported by reliable, probative

evidence. In October 2008, the trial court conducted its own independent review, overruled Thurman's objections, adopted the magistrate's decision, and affirmed the revocation. This timely appeal followed.

{¶ 9} In his first assignment of error, Thurman disputes the trial court's finding that he violated the 2003 order requiring him to make restitution to avoid permanent revocation of his insurance license. Notably, he admits failing to pay restitution of $3,500 per month as ordered. He stresses, however, that the intent of the restitution order was to make the victims whole rather than to impose punishment. Because the order was for the investors' benefit, he reasons that they were able to decline payment. He then cites nine "affidavits of forgiveness" he obtained from certain investors on the eve of the June 2007 revocation hearing. Thurman asserts that five of these affidavits collectively forgave restitution in the amount of $152,944.94. He reasons that if he had paid $3,500 per month in restitution as ordered, the most he would have been obligated to pay through the June 2007 revocation hearing would have been $150,000, which is $2,944.94 less than the five investors forgave. Therefore, Thurman asserts that he actually was "ahead" of his monthly restitution obligation. Finally, he cites post-hearing letters from two additional investors stating that they do not want him to lose his license and that they have reached new repayment agreements with him.

{¶ 10} Upon review, we find Thurman's first assignment of error to be unpersuasive. When reviewing an administrative appeal brought under R.C. 119.12, a trial court may affirm the agency's order "'if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is

supported by reliable, probative, and substantial evidence and is in accordance with law.'" *Bartchy v. State Bd. of Edn*., 120 Ohio St.3d 205, 2008-Ohio-4826, ¶35-36, quoting R.C. 119.12. Our review is more limited. "'It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the trial court has abused its discretion.'" Id. at ¶41, quoting *Rossford v. Exempted Village School dist. Bd. of Edn. v. State Bd. of Edn*. (1992), 63 Ohio St.3d 705. "An abuse of discretion 'implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.'" Id., quoting *State ex rel. Commerical Lovelace Motor Freight, Inc. v. Lancaster* (1986), 22 Ohio St.3d 191. The record reveals no abuse of discretion in Thurman's case.

{¶ 11} As set forth above, Thurman admitted during the June 2007 hearing that he had not complied with the order to pay restitution of $3,500 per month. As the Department of Insurance properly notes, most of the early payments he did make were lump-sum (not pro rata) payments to certain investors who had testified on his behalf during the initial 2003 hearing. During the second quarter of 2004, Thurman came closer to following a proper payment schedule, but then stopped making restitution payments. The record reflects that he paid nothing in the third quarter of 2004. For the second half of 2004 through the end of 2005, he paid less than $13,000. He then paid virtually nothing more through the date of the June 2007 revocation hearing. Even if Thurman's argument about the affidavits is credited, it is not an abuse of discretion to conclude that those affidavits do not retroactively cure his non-payment of restitution for the preceding years.

{¶ 12} Thurman's reliance on the affidavits is unpersuasive for other reasons as well. Most notably, his own evidence establishes that several investors who did not sign affidavits remained unpaid at the time of the 2007 hearing. At that time, Thurman still owed Ralph Dobson more than $22,000. He owed Athlene Kern more than $56,000. He owed Dale and Shirley Sill together nearly $60,000, and he owed John Lawson $10,000. Thurman also owed investor Donald Bowman more than $52,000 but inexplicably gave himself a "credit" for this amount because Bowman had the misfortune of dying before being repaid. Even if some other investors forgave the restitution owed to them, it is not an abuse of discretion to conclude that Thurman should have continued making $3,500 per month payments pro rata to the remaining victims rather than taking more than a year off and then retroactively granting himself credits through affidavits of forgiveness.

{¶ 13} We are equally unpersuaded by Thurman's citation to post-hearing letters from two investors indicating that they do not want him to lose his license and that they have reached repayment agreements with him. The letters were addressed to the trial court judge and attached as exhibits to Thurman's objections to the magistrate's ruling. The first letter was from Dale and Shirley Sill, who Thurman still owed nearly $60,000. It stated that Thurman had agreed to repay them "when he can." It also stated that the Sills did not want Thurman to lose his insurance license because he "definitely could not pay us back if he had no means of earning any income." The second letter was from Ralph Dobson, who was still owed more than $22,000. It indicated that he and his wife "would like to get paid back" and, therefore, did not want Thurman to lose his license.

{¶ 14} The Department of Insurance argues that Thurman never moved to reopen the record to have the foregoing letters admitted into evidence. But even if we consider them, they do nothing to establish an abuse of discretion in the trial court's ruling. The Sills and the Dobsons plainly indicated that they wanted restitution. If Thurman wished to comply with his $3,500 per month restitution obligation, he could have made monthly payments to the Sills and the Dobsons rather than failing to pay anything and then claiming a retroactive credit based on affidavits from other investors. In short, the record fully supports the magistrate's finding that "[a]lthough there was some evidence of loan forgiveness, it does not quiet the fact that Appellant has demonstratively for several years failed to adhere to the terms of the 2003 order." We see no abuse of discretion in the trial court's adoption of this finding.

{¶ 15} In reaching the foregoing conclusion, we are unpersuaded by Thurman's reliance on *Sutton v. State Pharmacy Bd. of Ohio*, Trumbull App. No. 2008-T-0053, 2008-Ohio-6887. Sutton was a pharmacist who had his license suspended. Reinstatement was conditioned on his submission of a treatment plan for anger management. Sutton failed to submit such a plan because his clinical psychologist determined that he had no diagnosable condition and needed no treatment. Upon review, the Eleventh District concluded that Sutton had complied with the "spirit and general substance" of the reinstatement condition. Under the circumstances, the appellate court reasoned that it was impossible for Sutton to submit a treatment plan for a condition he did not have.

{¶ 16} Thurman reasons by analogy that it was impossible for him to comply with the restitution order because several investors declined restitution or accepted

alternative payment plans. Unlike *Sutton*, however, Thurman could have continued making $3,500 per month payments to the investors who did not forgive his restitution obligation rather than doing nothing and ignoring his financial obligation to them. Because investors existed who would take the money and who remained unpaid, it is not an abuse of discretion to find that Thurman, at a minimum, could have made monthly payments to those investors. Therefore, even if we accept Thurman's reliance on the affidavits of forgiveness, paying restitution as ordered was not impossible.

{¶ 17} We are equally unpersuaded by Thurman's assertion that the unpaid investors someday might recover money from Steven Blumhagen, the alleged mastermind behind the Tee to Green venture. The record does not reflect that the investors have recovered their money from Blumhagen, and the possibility that they someday might does not negate Thurman's own 2003 restitution obligation.

{¶ 18} Finally, we note Thuman's disagreement with the Department of Insurance calling into question the credibility of his affidavits, accusing him of "double counting" some payments, and discounting the post-hearing letters he obtained from the Sills and the Dobsons. For purposes of our analysis herein, however, we have accepted the veracity of the affidavits, we have not presumed any double counting by Thurman, and we have considered the letters. Despite these concessions, the fact remains that he made little or no progress on his restitution payments for several years. After failing to make any payments at all for a lengthy period of time, he appeared at the June 2007 hearing and claimed a retroactive credit. For the reasons set forth above, the trial court acted within its discretion in rejecting Thurman's

argument that this credit brought him into compliance with the 2003 restitution order.

{¶ 19} Accordingly, the first assignment of error is overruled.

{¶ 20} In his second assignment of error, Thurman challenges the 2003 order revoking his insurance license, but suspending the revocation provided he pay full restitution. Specifically, Thurman disputes the Department of Insurance's determination that his conduct in connection with the sale of promissory notes constituted a breach of fiduciary duty and that his clients lost more than $300,000. Thurman insists that no fiduciary relationship existed and that even if one did exist his conduct did not breach it. He also criticizes the Department of Insurance for saddling him with a "completely unreachable" restitution goal of $3,500 per month and for requiring him to pay restitution to victims who were clients of his colleague Don Owens.

{¶ 21} Upon review, we find no merit in Thurman's second assignment of error. As the Department of Insurance notes, his arguments constitute a collateral attack on the 2003 order. If he wished to dispute whether a fiduciary relationship existed or whether he breached a fiduciary duty, he was obligated to appeal from the 2003 administrative order that found a breach of fiduciary duty resulting in his clients' loss of more than $300,000. Likewise, if he wished to challenge the propriety of a $3,500 per month restitution order that included payments to victims who were clients of Owens, Thurman should have appealed from the 2003 order imposing the obligation. He did not appeal, however, and cannot raise those issues now.

{¶ 22} It is well settled that "res judicata, whether claim preclusion or issue preclusion, applies to administrative proceedings that are 'of a judicial nature and

where the parties have had an ample opportunity to litigate the issues involved in the proceeding.'" *Grava v. Parkman*, 73 Ohio St.3d 379, 381, 1995-Ohio-331, quoting *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals* (1987), 31 Ohio St.3d 260, 263. The administrative hearing before the Department of Insurance that culminated in the 2003 order plainly was judicial in nature. Thurman appeared at the hearing represented by counsel. He presented evidence and questioned adverse witnesses. The record reveals that he had ample opportunity to litigate the issues he now seeks to dispute. Therefore, res judicata precludes him from relitigating whether he breached a fiduciary duty or whether he should have been ordered to pay $3,500 per month to victims who included some of Owens' clients. Thurman's second assignment of error is overruled.

{¶ 23} Based on the reasoning set forth above, the judgment of the Greene County Common Pleas Court is affirmed.

. . . . . .

FAIN and FROELICH, JJ., concur.

Copies mailed to:

Dianne F. Marx
Katherine L. Early
Richard Cordray
Aaron D. Epstein
Hon. J. Timothy Campbell