

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Wesbanco Bank, Inc.,	:	
	:	No. 14AP-452
Plaintiff-Appellee,	:	and
v.	:	No. 14AP-455
	:	(C.P.C. No. 13 CV 5729)
	:	
Ashraf Ettayem et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellants.	:	
	:	

D E C I S I O N

Rendered on March 31, 2015

Law Office of Jeffrey B. Sams, LLC, and Jeffrey B. Sams, for appellee WesBanco Bank, Inc.

Griffith Law Offices, and Matthew J. Roda, for appellant Ashraf Ettayem.

Hollern & Associates, and Edwin J. Hollern, for appellant Timothy Thomas.

APPEALS from the Franklin County Court of Common Pleas
KLATT, J.

{¶ 1} Defendants-appellants, Ashraf Ettayem and Timothy Thomas, appeal a judgment of the Franklin County Court of Common Pleas that granted plaintiff-appellee, WesBanco Bank, Inc. ("WesBanco"), relief on a creditor's bill. For the following reasons, we affirm that judgment.

{¶ 2} WesBanco filed a creditor's bill action against defendants on May 23, 2013. The complaint alleged that WesBanco had a valid and unsatisfied judgment against Ettayem in the amount of \$292,536.88. The complaint also alleged that Ettayem did not have sufficient personal or real property to satisfy the judgment, but he did have an

interest in monthly lease payments owed to him by Thomas, who was renting property owned by Ettayem. Through its creditor's bill action, WesBanco sought a judgment granting it a lien on those lease payments.

{¶ 3} All parties moved for summary judgment. WesBanco argued that it had established the three elements necessary for entitlement to a judgment in a creditor's bill action. In response, Ettayem argued that WesBanco had not established one element: the existence of a type of interest obtainable through a creditor's bill. Alternatively, Ettayem contended that, even if WesBanco had established the three elements necessary for relief via a creditor's bill, WesBanco could not recover under that equitable remedy because it had failed to exhaust its legal remedies. Ettayem pointed out that WesBanco's unsatisfied judgment was a judgment in foreclosure that held Ettayem and his co-debtor jointly and severally liable for the \$292,536.88 due WesBanco. The co-debtor was liable as owner and mortgagor of the property, and Ettayem was liable as guarantor of the mortgage loan. Ettayem contended that WesBanco could not seek recovery from him until the mortgaged property was sold and the proceeds applied to WesBanco's judgment.

{¶ 4} In their own summary judgment motions, defendants argued that WesBanco had chosen an inappropriate method of relief. According to defendants, WesBanco could only reach the lease payments through garnishment because those payments constituted Ettayem's personal earnings. WesBanco responded that lease payments do not fit within the rubric of personal earnings.

{¶ 5} The trial court granted WesBanco's motion for summary judgment and denied defendants' motions. On May 6, 2014, the trial court entered judgment in WesBanco's favor.

{¶ 6} Both defendants appeal the May 6, 2014 judgment. Ettayem assigns the following errors:

[1.] THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF BASED UPON ITS FAILURE TO CHARACTERIZE RENT AS A LEGAL INTEREST, NOT SUBJECT TO A CREDITOR'S BILL.

[2.] THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FAILING TO CONSIDER THE EQUITABLE NATURE OF A CREDITOR'S BILL, PARTICULARLY THROUGH ITS FAILURE TO REQUIRE PLAINTIFF TO

EXHAUST ITS REMEDIES PRIOR TO INITIATING THE CREDITOR'S BILL.

{¶ 7} In his appeal, Thomas assigns the following errors:

I. THE TRIAL COURT ERRED BY GRANTING PLAINTIFF/APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND OVERRULING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY DEFENDANTS-APPELLANTS.

II. BECAUSE PLAINTIFF/APPELLEE DID NOT ASSERT A STATUTORY CREDITOR'S BILL CLAIM IN ITS COMPLAINT, APPELLEE CANNOT ASSERT A LIEN ON RENT PAID TO THE JUDGMENT DEBTOR PRIOR TO THE FINAL JUDGMENT IN APPELLEE'S FAVOR.

{¶ 8} Both defendants challenge the trial court's summary judgment decisions. A trial court will grant summary judgment under Civ.R. 56 when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 9} We will address Ettayem's and Thomas' first assignments of error together because they assert similar arguments. By those assignments of error, defendants argue that WesBanco pursued the wrong method to satisfy its judgment. Defendants maintain that WesBanco could only reach the lease payments through garnishment, and, thus, the trial court erred in granting WesBanco relief via a creditor's bill action. We disagree.

{¶ 10} "[A] creditor's bill is an action in equity by which a judgment creditor seeks to subject an interest of the judgment debtor that cannot be reached on execution to the payment of the creditor's existing judgment." *In re Estate of Mason*, 109 Ohio St.3d 532,

2006-Ohio-3256, ¶ 18; accord *Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C.*, 181 Ohio App.3d 479, 2009-Ohio-1105, ¶ 25 (10th Dist.) ("Simply, a creditor's bill enables a judgment creditor to secure a lien on those assets of the judgment debtor that mere execution of the judgment at law cannot reach."). The creditor's bill action originated as a common-law remedy, but was codified into statute. *Olive Branch Holdings* at ¶ 29. Today, R.C. 2333.01, the creditor's bill statute, provides:

When a judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment, any equitable interest which he has in real estate as mortgagor, mortgagee, or otherwise, or any interest he has in a banking, turnpike, bridge, or other joint-stock company, or in a money contract, claim, or chose or action, due or to become due to him, or in a judgment or order, or money, goods, or effects which he has in the possession of any person or body politic or corporate, shall be subject to the payment of the judgment by action.

Under this statute, a judgment creditor must prove three elements to succeed in a creditor's bill action: (1) the existence of a valid judgment against the debtor, (2) the existence of an interest of the type enumerated in the statute, and (3) the debtor's lack of sufficient personal or real property to satisfy the judgment. *Waterfield Fin. Corp. v. Gilmer*, 10th Dist. No. 04AP-252, 2005-Ohio-1004, ¶ 29; *Huntington Ctr. Assocs. v. Schwartz, Warren & Ramirez*, 10th Dist. No. 00AP-35 (Sept. 26, 2000).

{¶ 11} Like a creditor's bill, garnishment is a method a judgment creditor may use to obtain satisfaction of its unpaid judgment. The garnishment procedures are codified in R.C. Chapter 2716. Generally, "[g]arnishment is an action in law 'by which a creditor seeks satisfaction of the indebtedness out of an obligation due the debtor from a third person, the garnishee.' " *In re Estate of Mason* at ¶ 18, quoting *Union Properties, Inc. v. Patterson*, 143 Ohio St. 192, 195 (1944). If the obligation at issue is for payment of personal earnings, a judgment creditor's sole remedy is garnishment. R.C. 2716.01(A) ("A person who obtains a judgment against another person may garnish the personal earnings of the person against whom judgment was obtained only through a proceeding in garnishment of personal earnings and only in accordance with this chapter.").

{¶ 12} In the case at bar, defendants argue that the monthly rent Thomas was obligated to pay Ettayem constituted Ettayem's personal earnings. Therefore, defendants

assert WesBanco cannot use a creditor's bill to obtain the rent; it must, instead, use garnishment. WesBanco responds that rent is not personal earnings and, thus, it may pursue a creditor's bill action against defendants.

{¶ 13} To resolve this dispute, we turn to the definition of "personal earnings" found within the statutory chapter dealing with garnishment. R.C. 2716.01(C)(2) defines "personal earnings" as "money, or any other consideration or thing of value, that is paid or due to a person in exchange for work, labor, or personal services provided by the person to an employer." "Employer" means "a person who is required to withhold taxes out of payments of personal earnings made to a judgment debtor." R.C. 2716.01(C)(1). Therefore, pay equates to "personal earnings" if it is acquired through work, labor, or personal services and provided by a person required to withhold taxes from it. *See BancOhio N.A. v. Box*, 63 Ohio App.3d 704, 706 (11th Dist.1989) (real estate commissions are not "personal earnings" because they are not provided by an employer).

{¶ 14} Here, defendants' stumbling block is the necessity that an employer provide the earnings. Ettayem concedes that Thomas does not qualify as his employer. The lease payments, consequently, are not personal earnings subject to garnishment under R.C. Chapter 2716.

{¶ 15} Finding no succor in Ohio law, Ettayem turns to federal law; namely, 15 U.S.C. 1673, which is part of the Consumer Credit Protection Act ("CCPA"). That section limits the amount that a creditor can garnish from a debtor's disposable earnings—generally protecting 75 percent of a debtor's earnings from garnishment. Pursuant to 15 U.S.C. 1673(c), "[n]o court of the United States or any State * * * may make, execute, or enforce any order or process in violation of this section."

{¶ 16} The CCPA's definition of "garnishment" encompasses "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. 1672(c). Given this broad definition, a creditor's bill action is subject to the strictures of the CCPA if it attempts to reach a debtor's earnings. This presents a problem due to the nature of a creditor's bill. A creditor's bill entitles a judgment creditor to the entirety of the payment at issue; it does not protect a percentage of the payment from collection as required by 15 U.S.C. 1673. Consequently, the CCPA

bars a court from granting judgment on a creditor's bill that seeks to appropriate a debtor's earnings. *Rhodes v. Sinclair*, 7th Dist. No. 11 MA 181, 2012-Ohio-5603, ¶ 35.

{¶ 17} To determine if the CCPA would bar the instant action, we must examine whether Thomas' lease payments constitute "earnings" as the CCPA defines that term. Pursuant to 15 U.S.C. 1672(a), "earnings" means "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." This definition exceeds the scope of R.C. 2716.01(C)(2) because it jettisons the requirement that pay issue from an employer. Under the CCPA, all compensation for personal services—no matter what form that compensation takes—constitutes earnings. *In re Jones*, 318 B.R. 841, 850 (Bankr.S.D.Ohio 2005).

{¶ 18} Applying CCPA's expansive definition of "earnings," we must focus on whether Thomas paid Ettayem rent as compensation for Ettayem's personal services. "Rent" is "[c]onsideration paid, usu[ally] periodically, for the use or occupancy of property (esp[ecially] real property)." *Black's Law Dictionary* (9th Ed.2009); accord *Dayton Metro. Hous. Auth. v. McKee*, 37 Ohio App.3d 102, 104 (2d Dist.1987) ("The ordinary meaning of the term 'rent' implies an amount paid as consideration for use or occupancy of property."). This definition is consistent with the terms of Ettayem and Thomas' lease agreement, whereby Thomas agreed to pay \$2,750 per month in rent in order to occupy the leased premises.

{¶ 19} Because rent is the receipt of income for allowing another to use one's property, " 'rent is payable based solely on a superior right of possession—not on the particular intellectual or manual labor, service, or performance by the owner.' " *In re Adams*, 506 B.R. 688, 693 (Bankr.E.D.N.C.2014), quoting *In re Dillon*, Bankr.M.D.N.C. No. 05-10428C-7D (July 8, 2005); accord *In re Lockbaum*, Bankr.N.D.Ill. No. 09 B 05704 (Sept. 2, 2010) (rent is owed by virtue of the tenant's occupancy of the debtor's property, not because the debtor provided repair and other incidental services). Rent, therefore, does not constitute compensation for personal services. *In re Douglas*, 497 B.R. 168 (Bankr.D.D.C.2013). Consequently, the CCPA does not bar WesBanco from recovering on a creditor's bill.

{¶ 20} Defendants offer one further argument that garnishment, not a creditor's bill, is the appropriate avenue for relief. Defendants analogize this case to *In re Estate of Mason*, 109 Ohio St.3d 532, 2006-Ohio-3256, wherein the Supreme Court of Ohio held that:

[A] legatee's interest in an estate is equitable and attachable only by a creditor's bill until the probate court makes an order of distribution or until the fiduciary holds a definite amount ready to distribute to the legatee. After that point, the legatee's interest in the estate becomes an attachable legal interest subject to garnishment.

Id. at ¶ 22. Defendants argue that Ettayem's interest in future rent payments is like the latter interest and, thus, only attainable through garnishment. We are not persuaded. A judgment creditor may reach a legatee's interest in an unsettled estate through a creditor's bill because the estate property has yet to vest in, or become the property of, the legatee. Similarly, a judgment creditor may pursue a creditor's bill for future rent because the rent does not become the property of the debtor until the date it is due.

{¶ 21} Finally, we must address Ettayem's argument that WesBanco failed to establish one of the three elements necessary for success in a creditor's bill action; namely, the existence of one of the types of interests enumerated in R.C. 2333.01. Ettayem argues that a judgment creditor may only use a creditor's bill to obtain equitable interests, and no such equitable interest exists here. We disagree with Ettayem's interpretation and application of R.C. 2333.01.

{¶ 22} When statutory language is unambiguous, a court must apply it as written. *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, ¶ 16. Pursuant to the plain language of R.C. 2333.01, a judgment creditor may use a creditor's bill to reach a debtor's equitable interest in real estate, as well as "any interest" a debtor has in other types of enumerated assets, including a money contract. As the word "any" appears before "interest," the enumerated interests that follow may be of any type—either equitable or legal. Here, WesBanco established that Ettayem had one of those enumerated interests: an interest in a lease agreement, which is a money contract.¹

¹ While a lease agreement gives a tenant an interest in the real estate he leases, it gives a landlord an interest in the money the tenant owes under the lease. Hence, the interest at issue here is an interest in a money contract.

{¶ 23} In sum, we reject all of the arguments that defendants present to support their first assignments of error. Therefore, we overrule both Ettayem's and Thomas' first assignments of error.

{¶ 24} By Ettayem's second assignment of error, he argues that the trial court erred in granting WesBanco relief on its creditor's bill action when Ettayem's co-debtor still retains property that could be sold to satisfy the underlying judgment. We disagree.

{¶ 25} As we explained above, Ettayem is jointly and severally liable on the judgment that WesBanco seeks to satisfy with Thomas' lease payments. Ettayem admits that he lacks sufficient real or personal property to satisfy the judgment. However, Ettayem argues that his co-debtor possesses real property, i.e., the property that WesBanco foreclosed upon, and WesBanco must obtain proceeds from that property's sale before it may assert a creditor's bill against him.

{¶ 26} Ettayem bases his argument on the rule that "equity will intervene only when legal remedies are inadequate." *Salem Iron Co. v. Hyland*, 74 Ohio St. 160, 166 (1906). A creditor's bill is an action in equity. *In re Estate of Mason* at ¶ 18. Recognizing that legal remedies must come first, the General Assembly restricted the use of a creditor's bill action to situations in which "a judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment." R.C. 2333.01. This limitation generally ensures that a judgment creditor will first use ordinary legal execution processes before resorting to the equitable remedy of a creditor's bill.

{¶ 27} The limitation, however, does not assist Ettayem because he does not own the real property at issue; his co-debtor does. R.C. 2333.01 requires a sufficiency determination as to the property owned by the judgment debtor who is the subject of the creditor's bill, not the property that any co-debtors may own. Ettayem, therefore, falls back on general principle to argue that, due to its equitable nature, a creditor's bill action may not proceed until WesBanco has exhausted its legal relief, i.e., execution against the co-debtor's property. We find this argument unpersuasive because it mistakes the nature of the relief that Ettayem claims must occur first.

{¶ 28} The underlying judgment at issue here arises from a foreclosure action, which is a civil action in equity. *Chemical Bank v. Neman*, 52 Ohio St.3d 204, 210 (1990). Such an action " 'involves a long series of steps,' " including the " 'actual sale' " of the

mortgaged property. *Id.*, quoting Nelson & Whitman, *Real Estate Finance Law*, Section 7.11, at 506 (2d Ed.1985). Consequently, WesBanco does not have to use a legal remedy—execution against the co-debtor's property—to satisfy its judgment. WesBanco has within its disposal two equitable remedies—sale of the mortgaged property (as part of the foreclosure action) and a creditor's bill. Nothing prevents WesBanco from simultaneously pursuing those two equitable remedies. Accordingly, we overrule Ettayem's second assignment of error.

{¶ 29} By Thomas' second assignment of error, he argues that WesBanco pleaded a common-law creditor's bill action and, consequently, WesBanco's lien on the rental payments did not begin with commencement of the action. This argument does not present a basis on which this court could reverse or affirm the trial court's summary judgment decisions. Rather, it relates to a controversy that arose after the trial court entered summary judgment. The trial court must first consider this argument; our resolution of this issue at this point would amount to an improper advisory opinion. *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 120 Ohio St.3d 386, 2008-Ohio-6254, ¶ 43. Accordingly, we decline to address Thomas' second assignment of error.

{¶ 30} For the foregoing reasons, we overrule Ettayem's first and second assignments of error, we overrule Thomas' first assignment of error, and we decline to address Thomas' second assignment of error. We affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and DORRIAN, JJ., concur.
