

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

GREAT LAKES CRUSHING, LTD.,	:	O P I N I O N
Plaintiff-Appellant,	:	
- VS -	:	CASE NO. 2014-L-041
ROBERT P. DEMARCO, TRUSTEE, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 12 CV 003001.

Judgment: Affirmed.

Richard N. Selby, II, Dworken & Bernstein Co., L.P.A., 60 South Park Place,
Painesville, OH 44077 (For Plaintiff-Appellant).

Joseph J. Triscaro and Robert P. Demarco, Demarco & Triscaro, Ltd., 30505
Bainbridge Road, Suite 110, Solon, OH 44139 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Great Lakes Crushing, Ltd, appeals the judgment of the Lake County Court of Common Pleas denying, in part, its motion for summary judgment on its claim for a creditor's bill against appellees, Robert P. DeMarco, Trustee, et al. Appellant argues the trial court erred in finding that, while appellant, as a judgment creditor, was entitled to a creditor's bill, i.e., a lien, on the equitable interest of its debtor, appellee, the estate of John F. Neff, in a certain trust, appellant was not entitled to an

order terminating the trust and requiring the distribution of its assets to appellant to satisfy its judgment against the estate. For the reasons that follow, we affirm.

{¶2} On June 29, 2012, appellant obtained a judgment against Jack F. Neff Sand & Gravel, Inc. and the estate of John F. Neff in the amount of \$462,000. Jack F. Neff Sand & Gravel, Inc. and the estate appealed the judgment, and this court affirmed the judgment in *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd*, 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875.

{¶3} On August 7, 2001, John F. Neff, Cinda Lu Chandler, and Sandra Petsche created a trust pursuant to a written trust agreement called the “Lucinda Neff Estate Distribution Trust Agreement,” dated August 7, 2001. Pursuant to the trust, John F. Neff, Cinda Lu Chandler, and Sandra Petsche are the grantors and beneficiaries of the trust. According to the trust, each grantor transferred his or her interest in the real property owned by the estate of Lucinda Neff to the trust. The trust property is comprised of several parcels of real property located in Wickliffe, Ohio. The trust provided that if the real property was sold, John F. Neff would receive 40 per cent of the proceeds and Cinda Lu Chandler and Sandra Petsche would each receive 30 per cent. On the other hand, if the trust terminated before the property was sold, John F. Neff would receive a 40 per cent undivided interest in the property and Cinda Lu and Sandra would each receive a 30 per cent undivided interest. The trust also provided that if a grantor/beneficiary was deceased at the time of distribution, his or her interest would pass to his or her estate. John F. Neff died on September 25, 2011. The trust is still in place and its parcels have not yet sold.

{¶4} Three months after appellant recovered judgment against Jack F. Neff Sand & Gravel Inc. and John F. Neff’s estate, on November 14, 2012, appellant filed a

“complaint-creditor’s bill” pursuant to R.C. 2333.01 against appellees. In its first cause of action, appellant sought an accounting of the trust assets and a determination of the part thereof that is distributable to the John F. Neff estate. In its second cause of action, appellant sought a creditor’s bill ordering that the Lucinda Neff trust by its terms be terminated and that the assets of the trust in which the estate of John F. Neff has an interest be transferred to appellant to satisfy its judgment.

{¶5} Appellees, Robert P. DeMarco and Keith W. Kern, trustees of the Lucinda Neff trust, and appellees, the estate of John F. Neff, Cinda Lu Chandler, and Sandra Petsche, grantors and beneficiaries of the trust, filed their joint answer, denying the material allegations of the complaint.

{¶6} Appellant subsequently filed a motion for partial summary judgment directed only to its second cause of action for a creditor’s bill. Appellees filed a brief in opposition.

{¶7} The trial court entered judgment granting in part and denying in part appellant’s motion for partial summary judgment. The court granted the motion to the extent it sought to attach the interest of the estate of John F. Neff in the trust, and granted appellant a lien on any property or amounts of cash distributed from the trust to the estate of John F. Neff. However, the court denied the motion as to appellant’s request to terminate the trust, finding that Ohio case law did not support this request.

{¶8} Appellant appeals that part of the trial court’s judgment that denied its motion for partial summary judgment, asserting the following for its sole assignment of error:

{¶9} “The trial court erred when it held that it did not have the authority to terminate the trust.”

{¶10} Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion, which is adverse to the non-moving party. Civ.R. 56(C); *Frano v. Red Robin International, Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, ¶12 (11th Dist.). The moving party has the initial burden of setting forth specific facts that demonstrate his entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). If the movant fails to meet this burden, summary judgment must be denied; however, if the movant meets this burden, the nonmoving party must establish the existence of a genuine issue of material fact based on the record evidence. *Id.* at 293. If the nonmoving party does not do so, summary judgment, if appropriate, shall be entered against him. *Id.*

{¶11} Since a trial court's decision ruling on a motion for summary judgment involves only questions of law, we conduct a de novo review of the court's judgment. *Jaronovic v. Iacofano*, 11th Dist. Lake No. 2011-L-070, 2012-Ohio-1581, ¶22. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court's decision. *Id.*

{¶12} There is no dispute concerning the facts in this case; rather, the dispute involves a legal question. That question is, can a judgment creditor pursuant to R.C. 2333.01 obtain a creditor's bill ordering the termination of a trust and the distribution to it of assets in the trust in which a judgment debtor has an equitable interest in order to satisfy the creditor's judgment against the debtor? Based on our review of the case law that follows, we answer this question in the negative.

{¶13} Appellant's amended complaint sought a creditor's bill pursuant to R.C. 2333.01, which provides as follows:

{¶14} 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 * * * money contract, claim, or chose in 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 * * *, shall be subject to the payment of the judgment by action.

{¶15} There are three essential elements that must be satisfied in order to establish a claim for a creditor's bill under R.C. 2333.01: "(1) the existence of a valid judgment against a debtor, (2) the existence of an interest in the debtor of the type enumerated in the statute, and (3) a showing that the debtor does not have sufficient assets to satisfy the judgment against him." *Am. Transfer Corp. v. Talent Transp., Inc.*, 8th Dist. Cuyahoga No. 94980, 2011-Ohio-112, ¶9, citing *Richardson v. Fairbanks*, 10th Dist. Franklin No. 97APE03-384, 1997 Ohio App. LEXIS 4832, (Oct. 28, 1997).

{¶16} There is no dispute that each of these elements as alleged in the amended complaint has been established. Consequently, appellant was entitled to a creditor's bill, and the trial court thus granted to appellant a lien on the equitable interest of the estate of John F. Neff in the real estate held by the trust. However, appellant did not merely seek to attach the estate's interest so that any *future distributions* would be paid to it. Appellant also alleged the trust by its terms should have terminated years ago, and requested an order terminating the trust and requiring that the trust assets in

which the estate of John F. Neff has an equitable interest be transferred to appellant to satisfy its judgment. In effect, appellant sought an attachment or garnishment of the assets in the trust.

{¶17} A creditor's bill action allows a judgment creditor to secure a lien on an equitable interest of the judgment debtor that cannot be reached by regular execution of the judgment. *Am. Transfer Corp., supra*, at ¶8, citing *Union Properties, Inc. v. Patterson*, 143 Ohio St. 192 (1944). An action in the nature of a creditor's suit under R.C. 2333.01 is wholly equitable in nature and, as such, permits the judgment creditor to reach equitable assets which, by reason of uncertainties respecting title or valuation, cannot be effectively subjected under the ordinary legal process of execution by way of judgment liens, attachment, or garnishment. *Am. Transfer Corp., supra, Hoover v. Professional & Executive Mtge. Corp.*, 21 Ohio App.3d 223, 225 (9th Dist.1985). See also *Berg v. Sigcom Group, Inc.*, 8th Dist. Cuyahoga No. 86180, 2005-Ohio-6495, ¶13.

{¶18} In contrast, a garnishment is an action at law. *Lakeshore Motor Freight Co. v. Glenway Industries, Inc.*, 2 Ohio App.3d 8 (1st Dist.1981), paragraph one of the syllabus. In a garnishment, the judgment creditor seeks satisfaction of his debt out of an obligation presently owed to the judgment debtor by a third party. *Id.*

{¶19} Appellant does not cite any case law authority holding that a creditor's bill can be used to obtain an order terminating a trust and requiring the distribution of the trust assets in which the judgment debtor has an equitable interest to the judgment creditor to satisfy its judgment.

{¶20} The trial court found this case was similar to cases in which a judgment creditor attempts to attach his debtor's interest in a chose in action, i.e., a claim or cause of action. The court cited *Lakeshore Motor Freight, supra*, in which the First

District held that, “[w]hile the anticipated proceeds of a judgment debtor’s chose in action may fairly be subject to an equitable lien [creditor’s bill], since such property represents a claim ‘to become due’ under R.C. 2333.01, the right to prosecute the suit should not be subject to the same encumbrance.” *Id.* at paragraph two of the syllabus. Applying that holding here, the trial court found that, while R.C. 2333.01 allowed appellant to attach future distributions from the trust, it did not allow it to prosecute the estate of John F. Neff’s potential claim against the trustees for failure to terminate the trust in accord with its terms.

{¶21} While *Lakeshore Motor Freight, supra*, provides persuasive authority for the trial court’s judgment, our research shows that Ohio case law regarding creditor’s bills in the context of decedent’s estates provides additional authority for the proposition that a judgment creditor is not entitled to use a creditor’s bill to terminate a trust. In *Orlopp v. Schueller*, 72 Ohio St. 41 (1905), the Ohio Supreme Court held that “[p]roperty or money held by the executor * * * of an estate in his representative capacity cannot be reached by attachment or garnishee processes in an action against a legatee [i.e., a beneficiary] before an order of distribution has been made.” *Id.* at paragraph one of the syllabus.

{¶22} Further, in *Union Properties, supra*, the Ohio Supreme Court held that “[a] judgment creditor, during the administration of the estate in probate court, and before an order of distribution is made, may maintain an action in the nature of a creditor’s bill in the Court of Common Pleas to reach an interest of the judgment debtor-legatee in funds or property in the hands of the executor of such estate.” *Id.* at syllabus.

{¶23} Together, these cases hold that a judgment creditor of a beneficiary must use a creditor’s bill to attach the beneficiary’s interest in an estate *prior to an order of*

distribution and a garnishment to attach the beneficiary's interest in an estate *after there has been an order of distribution*. *In re Estate of Mason*, 3d Dist. Hancock No. 2-04-01, 2004-Ohio-5644, ¶22

{¶24} In *Mason*, the Third District, in citing *Orlopp, supra*, stated that while the estate is unsettled and the property to be distributed to the beneficiary is undetermined, the beneficiary's claim remains in the hands of the executor and is an equitable claim subject to attachment only through a creditor's bill. *Id.* at ¶27. However, once the executor has a definite amount ready for distribution to the beneficiary, the claim becomes legal and is subject to garnishment. *Id.* Thus, the Third District held: "a legatee's interest in an estate remains equitable, and thus only attachable through a creditor's bill, until such time as the executor has a definite amount ready for distribution to the legatee. Once this occurs, the legatee's interest becomes legal and may be attached by a garnishment order." *Id.* at ¶30.

{¶25} Recently, the Seventh District approved the holding of the Third District in *Mason, supra*, in *Rhodes v. DiBlasi*, 7th Dist. Mahoning No. 11 MA 181, 2012-Ohio-5603, stating:

{¶26} From a review of the case law, a creditor's bill is used in situations such as when there is a potential settlement for insurance proceeds or an interest in an estate. For instance, it has been explained that a legatee's interest in an estate remains equitable, and thus only attachable through a creditor's bill, until such time as the executor has a definite amount ready for distribution to the legatee, which * *

* at that point attachment may be done through garnishment.

Rhodes, supra, at ¶20, citing *Mason, supra*, at ¶30.

{¶27} Apparently recognizing a creditor's bill cannot be used to terminate the trust and attach its assets, appellant argues for the first time on appeal that it is entitled to such relief under the guise of a declaratory judgment and that it satisfied the required elements of such claim. However, in its amended complaint, appellant did not allege any of the elements of an action for declaratory judgment. Instead, appellant's amended complaint sought a creditor's bill only and alleged the elements of that claim, and, consequently, the trial court properly considered appellant's second cause of action as a claim for a creditor's bill. Further, appellant did not argue in its motion for summary judgment that the claim in its second cause of action was one for declaratory relief. It is well-established that an appellant may not assert a new theory for the first time before an appellate court. *Kalish v. Trans World Airlines*, 50 Ohio St.2d 73, 77 (1977). Further, because appellant did not allege in its amended complaint or argue in its motion for summary judgment that it was seeking a declaratory judgment, appellees would have had no reason to, and did not, argue in their opposition to summary judgment against appellant's alleged entitlement to such relief.

{¶28} In any event, even if appellant had asserted a claim for declaratory judgment, it would not have been entitled to such relief because appellant did not demonstrate each of the elements of such claim had been met. "In order to obtain declaratory relief, [a] plaintiff must establish (1) a real controversy between the parties, (2) a justiciable controversy, and (3) that speedy relief is necessary to preserve the rights of the parties. * * *." *Cafaro Leasing Co. v. K-M I Assocs.*, 11th Dist. Trumbull No. 2006-T-0115, 2007-Ohio-6723, ¶27, quoting *R.A.S. Entertainment, Inc. v. Cleveland*, 130 Ohio App.3d 125, 128 (1998).

{¶29} Here, appellant has not established by any Civ.R. 56(C) evidence that speedy relief is necessary to preserve its rights. Specifically, there is no evidence in the record that if a distribution is not made until the trust is terminated, appellant's share under the trust would be diminished in any way.

{¶30} In light of the foregoing analysis, we hold the trial court did not err in finding that appellant was entitled to a creditor's bill on the equitable interest of the estate of John F. Neff in the trust assets, but was not entitled to an order terminating the trust and transferring to it the parcels in which the John F. Neff estate has an equitable interest to satisfy its judgment.

{¶31} For the reasons stated in this opinion, the assignment of error lacks merit and is overruled. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.