[Cite as *Community Bus Servs., Inc. v. Greater Hts. Academy*, 2009-Ohio-6218.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92518

COMMUNITY BUS SERVICES, INC.

PLAINTIFF-APPELLANT

vs.

GREATER HEIGHTS ACADEMY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cleveland Municipal Court
Case No. 08 CVH 023645

BEFORE: Boyle, J., Gallagher, P.J., and Jones, J.

RELEASED: November 25, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Community Bus Services, Inc. ("Community Bus"), appeals from a judgment of the Cleveland Municipal Court dismissing a garnishment order against the Ohio Office of Budget and Management ("OBM"), finding that it lacked subject matter jurisdiction over OBM. Community Bus raises two assignments of error for our review:

{¶ 2} "[1.] The Municipal Court erred by holding that a garnishment order issued to [OBM] for the property of a community school judgment-debtor is barred by sovereign immunity.

{¶ 3} "[2.] The Municipal Court erred by holding that the garnishment order issued to [OBM] for the property of a non-sovereign judgment-debtor is barred by sovereign immunity, despite [OBM] complying with the order."

{¶ 4} Finding no merit to the appeal, we affirm.

Background Facts and Procedural History

{¶ 5} Greater Heights Academy ("GHA") is a community school (i.e., charter school) created under the authority of R.C. Chapter 3314. It receives its funding by statute through the Ohio Board of Education ("OBE"). GHA contracted Community Bus to transport its students in 2007 and 2008. GHA represented to Community Bus that it had adequate funds to meet its payment obligations under the agreement. At some point, however, GHA became delinquent on its payments and Community Bus filed suit.

{¶ 6} On September 18, 2008, Community Bus received a judgment in the Common Pleas Court against GHA for $831,127.96, plus interest. Community Bus then transferred the judgment to Cleveland Municipal Court for collection.

{¶ 7} Cleveland Municipal Court issued garnishment orders to three banks and OBM. One of the banks remitted $194,277.03 to the clerk of court and OBM remitted $382,709.82.

{¶ 8} Subsequently, GHA and OBM filed motions to vacate the garnishment orders. Both parties asserted that sovereign immunity barred the garnishment order against OBM. A magistrate agreed and vacated the garnishment order. After objections were filed, the trial court approved and adopted the magistrate's decision. The funds OBM deposited with the court were immediately released and returned. Community Bus appealed and moved to stay the funds, but this court denied it as moot since the funds had already been released and returned to OBM.

Standard of Review

{¶ 9} The standard of review an appellate court employs to determine whether a trial court erred in adopting the magistrate's decision is an abuse of discretion. That standard of review is not proper, however, if "a trial court's order is based on an erroneous standard or a misconstruction of law." *Castlebrook v. Dayton Properties* (1992), 78 Ohio App.3d 340, 346. When reviewing a pure question of law, the reviewing court may substitute its judgment for the judgment of the trial court. Id.

Garnishment Actions Against the State

{¶ 10} In its first assignment of error, Community Bus argues that because the state was not a party to the garnishment proceedings, but merely a named garnishee, sovereign immunity is inapplicable. It further argues that sovereign immunity does not apply because R.C. Chapter 3314, which created community or charter schools, allows them to contract for services necessary for the operation of the school, and explicitly allows them to "sue and be sued." Finally, it contends that prohibiting the garnishment order against OBM would violate basic principles of fairness and public policy.

{¶ 11} Garnishment is a procedure whereby a creditor (Community Bus in this case) can obtain the property of a debtor (GHA) that is in the possession of a third party, namely, the garnishee (OBM). Garnishments are purely statutory proceedings, set forth in R.C. Chapter 2716. Specifically, R.C. 2716.01(B) provides that "[a] person who obtains a judgment against another person may garnish the property, other than personal earnings, of the person against whom judgment was obtained, if the property is in the possession of a person other than the person against whom judgment was obtained, only through a proceeding in garnishment and only in accordance with this chapter."

{¶ 12} The issue raised in this case, namely, whether a sovereign can be subject to garnishment proceedings as a garnishee, has recently been addressed by the Tenth Appellate District. In *Doss v. Thomas*, 10th Dist. No. 08AP-674, 2009-Ohio-2275, the court held that the trial court did not have subject matter

jurisdiction over Franklin County Jobs and Family Services ("FCJFS") in a garnishment proceeding under R.C. 2716. Id. at ¶18. The plaintiff, Doss, had obtained a judgment against a daycare business. FCJFS funded the daycare business. To satisfy the judgment, Doss sought to garnish monies FCJFS owed to the daycare business. The trial court ordered FCJFS — as a named garnishee — to answer and deposit "money, property, or credits" that it had in its possession belonging to the daycare business. FCJFS refused and the trial court held it in contempt of court. Reversing, the Tenth District found that because the garnishment order against FCJFS was invalid, the contempt could not stand. Id. at ¶18.

{¶ 13} The Tenth District explained:

{¶ 14} "The general rule nationally is that the United States, the states, and their political subdivisions and agencies cannot be summoned as a garnishee in an action without clear and unequivocal statutory authorization, consent, or waiver. 6 American Jurisprudence 2d (1999), Attachment and Garnishment, Sections 78 and 80. See, e.g., *Hernando Cty. v. Warner* (Fla.App.1998), 705 So.2d 1053; *N. Sea Products, Ltd. v. Clipper Seafoods Co.* (1979), 92 Wash.2d 236, 240-41, 595 P.2d 938; *Ridge Lumber Co. v. Overmont Dev.* (1976), 34 Md.App. 14, 366 A.2d 125; *Hoyt v. Paysee* (1928), 51 Nev. 114, 269 P. 607 (holding a county is not subject to garnishment in absence of a clear expression of legislative intent).

{¶ 15} "As in the majority of states, courts in Ohio have concluded that the state, its political subdivisions, and their agencies and officials are not subject to garnishment absent a statutory provision explicitly authorizing the garnishment. *Palumbo v. Indus. Comm.* (1942), 140 Ohio St. 54 (holding that although the state is a 'body politic,' that phrase in a garnishment statute does not authorize a garnishment action against the state); *State ex rel. Meyers v. Ohio State Lottery Comm.* (1986), 34 Ohio App.3d 232, 234 (determining that, except as expressly set forth in R.C. 3770.07 and related administrative rules, state lottery winnings are not subject to garnishment while in the possession or under the control of the lottery commission); [*Bazzoli v. Larson* (1931), 40 Ohio App. 321] (holding that a county and its financial officials are not subject to garnishment where the legislature did not expressly name them as garnishees in the garnishment statute); [*S. Ohio Fin. Corp. v. Wahl*] (1929), 34 Ohio App. 518 (concluding a county was not subject to statute authorizing garnishment of a 'person, body politic or corporate')." Id. at ¶12-13.

{¶ 16} The *Doss* court further reasoned that "because legislative consent for counties and their agencies to be garnished must be stated explicitly, not impliedly," R.C. Chapter 2716 "does not authorize counties and their agencies to be summoned as a garnishee in a non-wage garnishment action." Id. at ¶18. It concluded that without express statutory authorization, the trial court's order and notice of garnishment was invalid. Id.

{¶ 17} Moreover, "[w]hen the General Assembly intends the state, its political subdivisions, or governmental agencies or officials to be subject to a garnishment proceeding, it clearly and unequivocally expresses that intention. See, e.g., R.C. 124.10(A) (authorizing an action or proceeding against the state for garnishment of a state employee's compensation); R.C. 148.09 (authorizing garnishment of public employee deferred compensation benefits in statutorily prescribed circumstances); R.C. 3770.07(D)(2)(b) (authorizing garnishment of a lottery prize winner's unpaid state lottery winnings only in statutorily prescribed circumstances)." *Doss*, supra, at ¶14.

{¶ 18} The *Doss* court relied on *Palumbo*, which is the seminal Ohio Supreme Court case on whether the state can be subject to a garnishment proceeding. Community Bus maintains that because its garnishment action was not "against the state," but against GHA — and OBM was merely a garnishee and thus, not a party to the proceeding — that the holding in *Palumbo* does not apply. We disagree. In *Doss*, the garnishment proceeding was not "against the state" either, but against the daycare center — that was funded by the state (just as here the community school is funded by the state). The Tenth District still applied the *Palumbo* holding. This court agrees and finds that *Doss* correctly applied the law.

{¶ 19} In *Palumbo*, the Ohio Supreme Court addressed the question of whether the state was a "body politic" and thus, could be subject to garnishment

under G.C. 11760 (precursor to R.C. 2333.01).[1] The judgment creditor joined the state of Ohio as a defendant in the proceeding, claiming that the state owed the judgment debtor salary that was due to him from the Industrial Commission, an agency of the state. The judgment creditor argued amendments to the Ohio Constitution in 1912, permitting the state to be sued "as may be provided by law," and through G.C. 11760, allowed the state, as body politic, to be sued in this instance.

{¶ 20} The Ohio Supreme Court determined that the amendment to the Ohio Constitution was not self-executory, and that there must be express statutory authority to bring actions against the state. Id. at 768. Although it admitted that the Webster definition of "body politic" would include the state, it disagreed that it meant that the statute permitted "garnishment actions against

[1] G.C. 11760 provided: "When a judgment debtor has no personal or real property subject to levy on execution sufficient 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 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, or body politic or corporate, shall be subject to the payment of the judgment, by action."

R.C. 2333.01 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 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 or body politic or corporate, shall be subject to the payment of the judgment by action."

the state." Id. It found that "body politic" was not an "express legislative consent that the state can be garnished." Id. at 769.

{¶ 21} The Supreme Court further noted: "There is an intimation in the adopted opinion of the court below that this type of action is something less than a suit against the state, which view would make the legal principles herein discussed inapplicable. True, if all goes smoothly, the state, in common parlance, will not be a loser. It will be moneys owed by the state to the judgment debtor that will be paid over." Id. at 769-770. But it disagreed with that argument because, "[w]hatever difference, if any, there may be between the right to maintain a suit against the state as garnishee and the right to maintain a suit against the state as the party which must primarily pay is, we believe, a factor for the consideration of the General Assembly and not for the courts." Id. at 770.

{¶ 22} Forty-five years later, this court felt "compelled to follow the holding in *Palumbo*" when addressing the same issue under the newer statute, R.C. 2333.01. See *State v. Pekoc* (1987), 39 Ohio App.3d 56. Community Bus claims *Pekoc* is distinguishable, just as it argued *Palumbo* was — because the state was a party to those proceedings. Again, we disagree. In *Pekoc*, the judgment creditor brought suit against the judgment debtor, naming the state of Ohio as a defendant, claiming that the state allegedly owed monies to the judgment debtor. We found that "despite the fact that this result flies in the face of the plain meaning of the phrase 'body politic,'" and despite that fact that we were "well aware that this action is merely a collection procedure, not an action

against the state," and despite the fact that we acknowledged "that the court of common pleas would be a more convenient and logical forum," we concluded that "it is the Supreme Court's role to make any changes in its prior determination in this matter," and held "that the trial court lacked jurisdiction over the appellant's claim." Id. at 59.

{¶ 23} Community Bus further contends that the trial court's reliance on *Avalon Distrib., Inc. v. P.S. Operations* (1991), 76 Ohio App.3d 615, was "inapt." We also disagree with this argument. Although Community Bus is correct that *Avalon* is not directly on point, we still find its holding to be instructive.

{¶ 24} In *Avalon*, unlike here, the plaintiff filed a "creditor's bill action" in the common pleas court against a state agency, the Ohio Department of Human Services ("ODHS"), pursuant to R.C. 2333.01. The plaintiff alleged that it had obtained a judgment against P.S. Operations ("PSO") and further alleged that ODHS was holding "certain Medicare or Medicaid reimbursement monies" that were owed to PSO. The plaintiff "sought an order directing ODHS to pay and apply all monies it held on PSO's behalf to satisfy the judgment it had taken against PSO."

{¶ 25} ODHS asserted that the Court of Claims had exclusive original jurisdiction over plaintiff's creditor's bill action against it. By contrast, the plaintiff claimed that the action against ODHS was a creditor's bill action, attempting only "to attach funds due and owing a third party as already established" by the judgment taken in Cuyahoga County. Id. at 617. As a result, the plaintiff

asserted that the action was "not truly against the state, and is therefore outside the original exclusive jurisdiction of the Court of Claims." Id.

{¶ 26} The *Avalon* court, relying on *Palumbo* and *Pekoc*, found that the state could not be sued without its express consent.[2] Id. Since "Ohio's general garnishment statute did not constitute an express legislative consent that the state can be garnished, or sued," the *Avalon* court held that the common pleas court did not have subject matter jurisdiction to address the plaintiff's claim against the state because the original, exclusive jurisdiction was in the Court of Claims. Id. at 618.

{¶ 27} Similarly, we find that OBM, as an agency of the state, could not be subject to the garnishment proceeding instituted by Community Bus. As such, the trial court did not have subject matter jurisdiction over OBM. Accordingly, we overrule Community Bus's first assignment of error.

Waiver

{¶ 28} In its second assignment of error, Community Bus maintains that even if "sovereign immunity had applied," OBM waived it by remitting funds belonging to GHA that it had in its possession. We disagree. Subject matter jurisdiction cannot be waived. *Lisboa v. Karner*, 167 Ohio App.3d 359,

[2]The court in *Palumbo* addressed a previous version of R.C. 2333.01 (G.C. 11760), but the *Avalon* court stated that the 1953 enactment of R.C. 2333.01 "is almost identical in wording to G.C. 11760."

2006-Ohio-3024, ¶12. Therefore, we overrule Community Bus's second assignment of error.

Conclusion

{¶ 29} Community Bus argues that prohibiting the garnishment order in this case would offend the "basic principles of fairness and public policy" because GHA contracted Community Bus for services. It contends that "the ruling below creates a significant disincentive for service providers to contract with any entity that relies significantly on state funding. The plaintiffs in *Palumbo* also argued that "it is sound public policy for citizens to pay their debts, and to that end that the pay of state employees should not be immunized from garnishment." Id. at 56. But the Ohio Supreme Court still ruled that it was the legislature's function to change such laws, not the judiciary's function. Although we can sympathize with Community Bus's arguments, as did the courts in *Palumbo*, *Pekoc*, and *Avalon*, Ohio law does not allow the state to be subject to such garnishment proceedings.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, P.J., and
LARRY A. JONES, J., CONCUR