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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
LAW DIVISION, SPECIAL CIVIL PART
DOCKET NO. DC-004705-16

SYNCHRONY BANK,

Plaintiff,

v.

APRIL DANIELS,

Defendant.

APPROVED FOR PUBLICATION

August 10, 2020

COMMITTEE ON OPINIONS

Decided: November 12, 2019

Paul Myron, attorney for plaintiff (Selip and Stylianou, LLP, attorneys).

April Daniels, defendant, pro se.

ANKLOWITZ, J.S.C.

The legal issue is whether a bank account containing wages previously garnished can be levied on.

Plaintiff filed a complaint on September 27, 2016. A request for default judgment was filed and included a certification showing that plaintiff was the original creditor and a copy of the last periodic credit card billing statement.

Judgment was entered by default on November 14, 2016, in the amount of

$3991.39 including costs and statutory attorney's fees. R. 6:6-2(a) (costs to be added by the clerk on default judgment); N.J.S.A. 22A:2-42 (statutory attorney's fees in the Special Civil Part).

On April 11, 2019, a Writ of Execution Against Goods and Chattels was issued. The Writ showed that no payments had been made on the judgment.

On October 18, 2019, a court officer levied on a bank account of defendant at PNC Bank in the amount of $1506.98. The court officer gave notice of the levy by affidavit.

On October 29, 2019, defendant filed an objection to the levy. Pursuant to Rule 4:59-1(h) and Rule 6:7-1(c), the matter was required to be heard on the record within seven days.

The written objection filed by defendant indicated that the basis was that defendant was not the debtor in this case and all of the money in the account belonged to her. On the record on October 31, 2019, defendant admitted to being the debtor and that the address for the periodic billing statement continued to be her address at all times relevant.

Having conceded the basis for the objection identified in the papers, defendant then raised a new objection. Defendant asserted that her wages had been garnished by a different creditor, and the non-garnished amount deposited into her PNC Bank account was the exempt portion of her wages and was not subject to

execution by plaintiff.

The court issued an order adjourning the hearing for one week. The order identified the issue regarding previously garnished wages and directed defendant to provide a copy of supporting proofs to plaintiff.

Plaintiff opposed the objection. Plaintiff argued that a judgment-creditor may proceed with multiple writs of execution pursuant to N.J.S.A. 2A:17-4 including "a wage garnishment and a bank levy at the same time."

At the adjourned hearing on November 7, 2019, defendant produced bank statements and paystubs. The paystubs showed 10% of defendant's wages were being garnished based on a judgment in another case.

Defendant testified that the bank froze the account when the levy was applied. The bank statements showed that the levy caused the account to be in overdraft by $88.29. The bank statements further showed that all of the money in the account at the time of the levy came from the previously garnished wages.

Under the federal Consumer Credit Protection Act, the amount of wages that exceed 25% of net wages or 30 times the federal minimum wage, whichever is less, may be garnished. 15 U.S.C. § 1673(a). The protection under the Consumer Credit Protection Act no longer applies once wages are paid, following a permissible garnishment, and deposited into the debtor's bank account. Usery v. First Nat'l Bank, 586 F.2d 107, 110 (9th Cir. 1978); see also United States v.

Berry, 951 F.3d 632, 638 (5th Cir. 2020); Long Island Trust Co. v. United States Postal Serv., 647 F.2d 336, 342 (2d Cir. 1981).

Although the objection to levy is not supported by federal law, the question is whether there is any exemption under New Jersey law. Subject to federal law, New Jersey statutes allow 10% of the gross wages to be garnished. N.J.S.A. 2A:17-56(a) states:

> In no case shall the amount specified in an execution issued out of any court against the wages, debts, earnings, salary, income from trust funds or profits due and owing, or which may thereafter become due and owing to a judgment debtor, exceed 10%, unless the income of such debtor shall exceed 250% of the poverty level for an individual taking into account the size of the individual's family, in which case the court out of which the execution shall issue may order a larger percentage.
>
> [N.J.S.A. 2A:17-56(a).]

The court agrees with plaintiff in that multiple writs may be issued, but only one wage garnishment can apply at a time. N.J.S.A. 2A:17-52. Therefore, 90% of defendant's wages are exempt from wage garnishment. The Writ of Execution here is not a wage garnishment. The Writ of Execution here applies to goods and chattels. The court has to decide how these two kinds of Writs interact.

Other states have addressed the interaction of bank account levies and wage garnishments. In Alabama, the court found that, "while a debtor may have both exemptions-the wage and the personal property exemption-and thereby protect one

hundred percent of his wages from garnishment, he cannot have both exemptions if the value of his personal property, including the amount of wages remaining after the wage exemption is taken, exceeds $1000." Holley v. Crow, 355 So. 2d 1123, 1126 (Ala. Civ. App. 1978).

The Alabama state constitution protects $1000 of property. Ala. Const. art. X, § 1. When debtor lived paycheck to paycheck and never accumulated more than $1000, the paycheck could not be garnished. Merrida v. Credit Acceptance Corp., 238 So. 3d 1249 (Ala. Civ. App. 2017). This is the reverse of wages losing their exemption upon deposit in a bank account; the wages become, or change to, personal property subject to an exemption (up to $1000).

However, Ala. Code § 6-10-6.1(b), enacted on July 11, 2015, "exclude[s] from the meaning of personal property the wages, salaries, or other compensation of a resident for the purposes of the personal property exemption . . . ." The court in Merrida reasoned the statute did not apply to the judgments on appeal because the statute was passed after the judgments were issued. 238 So. 3d at 1251-52.

The New York state exemption statute is similar to that of New Jersey for wage exemption of 90% of the gross pay. The court in In re Breslin Realty Development Corp., 30 N.Y.S.3d 496 (N.Y. Sup. Ct. 2016), reasoned that since wages deposited in a retirement account are not needed for current expenses, the 90% exemption does not apply post-deposit. See also In re Breslin Realty Dev.

Corp. v. Morgan Stanley, 10 N.Y.S.3d 841 (N.Y. Sup. Ct. 2015).

Arizona, Connecticut, Delaware, Kansas, Kentucky, Michigan, Wisconsin and Wyoming courts have held that wages are no longer wages for exemption purposes once deposited in a bank account. Frazer, Ryan, Goldberg, Keyt & Lawless v. Smith, 907 P.2d 1384 (Ariz. Ct. App. 1995); Cadle Co. v. Fletcher, 151 A.3d 1262 (Conn. 2016); Tressler v. Lunt, 158 A. 709 (Del. Super. Ct. 1932), overruled in part by K-M Auto Supply Inc. v. Reno, 236 A.2d 706 (Del. 1967); Dillon Cos. v. Davis, 181 P.3d 570, 573 (Kan. Ct. App. 2008); Shafizadeh v. Shafizadeh, 444 S.W.3d 437, 457 (Ky. Ct. App. 2012) (citing Brown v. Kentucky, 40 S.W.3d 873, 879 (Ky. Ct. App. 1999)); Edwards v. Henry, 293 N.W.2d 756 (Mich. Ct. App. 1980); John O. Melby & Co. Bank v. Anderson, 276 N.W.2d 274 (Wis. 1979); In re Walsh, 96 P.3d 1 (Wyo. 2004).

In Alaska, California, Colorado, Florida, Idaho and Iowa there were statutory grace periods in effect so that wages deposited in a bank continued to be exempt from levy for a certain period of time. Miller v. Monrean, 507 P.2d 771 (Alaska 1973) (the statute upon which this case was decided was repealed); Sourcecorp, Inc. v. Shill, 142 Cal. Rptr. 3d 414 (Cal. Ct. App. 2012); Rutter v. Shumway, 26 P. 321 (Colo. 1891); Broward v. Jacksonville Med. Ctr., 690 So. 2d 589, 592 (Fla. 1987); Elliot v. Hall, 31 P. 79 (Idaho 1892); Midamerica Sav. Bank v. Miehe, 438 N.W.2d 837, 839-840 (Iowa 1989).

The courts in Ohio and Nevada relied expressly on their respective state statutes to hold that wages in a bank account retain their full exemption so long as they are traceable as exempt wages. Christensen v. Pack, 149 P.3d 40, 45 (Nev. 2006); Daugherty v. Cent. Trust Co., 504 N.E.2d 1100, 1103 (Ohio 1986).

In Texas, earnings from personal services are exempt from garnishment by state constitution. Tex. Const. art. XVI, § 28. However, 25% of commissions can be garnished (subject to the federal standard). Tex. Prop. Code Ann. § 42.001(d).

A Texas appellate court in Barlow v. Lane, 745 S.W.2d 451 (Tex. App. 1988) found that wages were not exempt once paid. However, the court had the option to apply a hardship standard for necessities such as food and shelter in reducing the amount of a levy. Id. at 454. A different Texas appellate court held that "[s]ubjecting wages to turnover once they are received by a wage earner thwarts the purpose of the exemption." Burns v. Miller, Hiersche, Martens & Hayward, P.C., 948 S.W.2d 317, 323 (Tex. App. 1997).

Upholding the appointment of a receiver of 100% of debtor's paychecks for enforcement of a foreign judgment, the court found that the federal wage garnishment exemption did not apply. Caulley v. Caulley, 777 S.W.2d 147, 151 (Tex. App. 1989). "[O]nce the paycheck has come into proper possession or control of the employee, the [federal wage exemption] Act does not apply." Ibid.

All the states that have addressed the issue have at least one thing in

common. They followed their state statutes. The New Jersey Supreme Court holds that we do the same. "When the clear language of the statute expresses the Legislature's intent, our analysis need go no further." McClain v. Bd. of Review, Dep't of Labor, 237 N.J. 445, 456 (2019).

Although the New Jersey statutes direct that only one wage garnishment can issue at a time, the statute did not address what happens to the part of the money exempt from wage garnishment once paid. N.J.S.A. 2A:17-52. There is no grace period or exemption for money traceable to wages in that statute.

A judgment-debtor's money can be levied on. N.J.S.A. 2A:17-15. Personal property of any kind, not just money, is subject to an $1,000 exemption plus wearing apparel. N.J.S.A. 2A:17-19.

Some wage earners live paycheck to paycheck. There is no money left from the last paycheck when the next one arrives. A garnished wage earner who lives paycheck to paycheck, has $1000 or less in net wages, and no other assets, cannot have their exempt wages levied on due to the personal property exemption. The personal property exemption controls once wages are paid.

In the present case, the levy on the bank account was for more than $1000 and there was no assertion of the personal property exemption. The objection to levy based on the money in the account having been previously subject to a wage garnishment is overruled.

The court considered that defendant's paystub showed defendant to be single and have no allowances for dependents for New Jersey withholding tax. The annual income indicated by the paystub would be more than 250% of federal Health and Human Services (H.H.S.) poverty guidelines for 2019 for a household with three household members. Since there is no pending motion in this case to decrease defendant's 90% wage exemption, the court gives the 250% consideration no weight.

Defendant raised the negative balance on the account during the hearing. Since the account was frozen at the time of the levy, the negative balance cannot be due to a check clearing the account after the levy was imposed. The negative balance must have been from the levy and any applicable bank fees. Banks can charge a levy processing fee and, thereby, reduce the amount of money available for the levy. T & C Leasing, Inc. v. Wachovia Bank, N.A., 421 N.J. Super. 221, 224 n.2 (App. Div. 2011); N.J.S.A. 17:16S-2.

A writ of execution cannot force a judgment-debtor to take an overdraft loan. Cameron v. Ewing, 424 N.J. Super. 396, 407-08 (App. Div. 2012) (citing Sears, Roebuck & Co. v. Romano, 196 N.J. Super. 229, 236-37 (Law Div. 1984)). The objection to levy based on the overdraft is sustained.

The overdraft amount of $88.29 is released from levy. The remainder of the $1506.98 may be the subject of an appropriate motion to turn over.