

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH ASHER,

Plaintiff/Counterdefendant-
Appellee,

v

SHIAWASSEE INVESTMENTS, LLC, ROBERT
BEALE, and DENISE BEALE,

Defendants/Counterplaintiffs,

and

CITIZENS BANK,

Intervening Party-Appellant.

UNPUBLISHED
November 27, 2012

No. 305912
Genesee Circuit Court
LC No. 09-092698-CK

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Intervening party, Citizens Bank, appeals by right from the trial court's order concluding that plaintiff was entitled to rent proceeds following the service of his writs of garnishment. We reverse.

Plaintiff obtained a monetary judgment against defendants. He sent a writ of garnishment to Citizens Bank, seeking to garnish defendants' accounts. In response, Citizens Bank advised plaintiff that the individual Beale defendants did not have any accounts and the account of the corporate defendant was claimed by Citizens Bank as a set off for a delinquent loan. Consequently, plaintiff sought to obtain rental proceeds from defendants' property tenants through writs of garnishment.

Citizens Bank filed a motion to intervene in the litigation and objections to these writs of garnishment. The bank alleged that it entered into a mortgage and assignment of rents with the corporate defendant in December 2007. However, this defendant defaulted, causing the bank to

accelerate the unpaid balance of the note by letter dated February 22, 2011. Citizens Bank alleged that it was entitled to the rental proceeds as a result of the default, and its interest took priority over any claim by plaintiff. On the contrary, plaintiff¹ asserted that “timing is everything,” and the timing favored plaintiff. Specifically, he claimed that the writs of garnishment were served by the sheriff on May 26, 2011. Therefore, plaintiff perfected his interest on the date of service. He asserted that Citizens Bank realized that it failed to perfect its interest by filing the notice of default with the county clerk and serving the tenants as required by statute. The bank rushed to record its interest, but that did not occur until May 31, 2011. Accordingly, plaintiff contended that his interest was perfected before any interest held by Citizens Bank. The trial court adopted plaintiff’s argument and ruled that plaintiff acquired his interest in the rental payments first. From this decision, Citizens Bank appeals by right.

The trial court’s ruling addressing the objection to a garnishment presents a question of law subject to de novo review. *Asset Acceptance Corp v Hughes*, 268 Mich App 57, 59; 706 NW2d 446 (2005). An issue of statutory construction is reviewed de novo. *Johnson v Pastoriza*, 491 Mich 417, 428-429; 818 NW2d 279 (2012). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Dep’t of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.*

Once a judgment is obtained, garnishment is a legitimate and common procedure to satisfy a claim. The design of a garnishment proceeding is to preserve a principal defendant’s assets in the control of the garnishee, *i.e.*, one who has property or money in the possession belonging to the defendant, so that the assets may later be accessible to satisfy a judgment against the principal defendant. Rather than being a new or different action, a garnishment proceeding is ancillary to the original suit. [*Ward v Detroit Auto Inter-Ins Exch*, 115 Mich App 30, 35; 320 NW2d 280 (1982) (footnotes omitted).]

Garnishment proceedings place in opposition the garnishor as plaintiff against the garnishee as defendant. *Sears, Roebuck & Co v A T & G Co, Inc*, 66 Mich App 359, 368; 239 NW2d 614 (1976). A garnishee is “[a] person or institution (such as a bank) that is indebted to or is bailee for another whose property has been subjected to garnishment.” Black’s Law Dictionary (9th ed), p 749. The court has the power to garnish personal property belonging to the person against whom the claim is made but which is in the possession or control of a third person. MCL 600.4011(1); *Berar Enterprises, Inc v Harmon*, 93 Mich App 1, 7; 285 NW2d 774 (1979). “Interests whose very existence is uncertain and contingent on future occurrences are generally not garnishable.” *Id.* at 10. Exemptions to garnishment set forth in the court rules and statutes are construed to afford maximum protection to the principal debtor. *Blow v Blow*, 134 Mich App 408, 410; 350 NW2d 890 (1984). A garnishee defendant may claim setoffs available to it against the principal defendant when determining its liability to that defendant. *Id.* at 411. “A setoff is

¹ Plaintiff did not oppose the motion to intervene.

traditionally a balancing of claims between the parties to the immediate action.” *Sears, Roebuck & Co*, 66 Mich App at 368. Accordingly, “a garnishee-defendant’s claim against the defendant will have priority over the plaintiff’s claim with regard to property being garnished.” *Blow*, 134 Mich App at 411.

The “garnishee process cannot affect the contract rights of mortgagees.” *Daggett, Bassett & Hills Co v McClintock*, 56 Mich 51, 54; 22 NW 105 (1885). “Where a principal defendant has made an assignment of a claim or a transfer of property prior to the service of a writ of garnishment, the claim or property cannot be reached by garnishment in the absence of fraud in the assignment or transfer.” 27 Michigan Law & Practice (2d ed), Remedies § 96, p 286. “[G]arnishment proceedings cannot be sustained against a judgment debtor where it appears that the judgment, prior to the institution of the suit, had been assigned by the principal defendant to a third party unless it is established that the assignment was fraudulently made.” *Mihajlovski v Elfakir*, 135 Mich App 528, 534; 355 NW2d 264 (1984) citing *Blumenthal v Simons*, 110 Mich 42; 67 NW 1102 (1896).

In *Blow*, 134 Mich App at 409, the plaintiff pursued garnishment proceedings against the principal defendant for child support arrearages by serving two writs and affidavits of garnishment on the garnishee defendant, the defendant’s employer. The defendant worked as a designer salesperson and was paid on a commission basis, receiving six percent of his gross sales. To offset the fluctuation in furniture sales, the garnishee defendant advanced weekly payments to the defendant and considered them to be “loans” to the employee to cover necessary living expenses. At the time of the garnishment trial, the defendant owed the garnishee defendant over \$3,000. The trial court found that the garnishee defendant was not in possession or control of any property, money, goods, or chattel belonging to the defendant at the time of the service of the writs, and in any event, the garnishee defendant had a right of setoff against the defendant’s commission for loans or money previously advanced. *Id.* at 409-410.

The plaintiff appealed by right, and neither the defendant nor the garnishee defendant filed a brief on appeal. *Id.* at 409. Nonetheless, this Court affirmed the trial court’s ruling, noting that the garnishee defendant’s claim against the defendant took priority over the plaintiff’s claim, *id.* at 411, and held:

In this case, defendant entered into an agreement with garnishee-defendant allowing garnishee-defendant to deduct defendant’s entire disposable income in commissions, if necessary, and apply it toward the debt accrued by the defendant in advances. Garnishee-defendant thus had a right to apply defendant’s entire monthly commission to the debt owed. The trial court did not err in concluding that garnishee-defendant had no liability to plaintiff. We note that, in this case, there is no argument or evidence to suggest that the payment system worked out between defendant and garnishee-defendant was fraudulently designed to avoid defendant’s obligation to his creditors. [*Id.* at 411-412.]

Applying the above cited authority to the present case,² we conclude that the trial court erred in determining that plaintiff's service of the writ of garnishment took priority over the interest held by intervening party Citizens Bank. In December 2007, Citizens Bank and the corporate defendant executed a mortgage and assignment of rents and recorded the documents. Accordingly, plaintiff should have been on notice since December 2007, of Citizens Bank's entitlement to rental payments in the event of the defendant's default. In the absence of fraud, this contractual agreement and assignment takes priority over plaintiff's writs of garnishment over the rental proceeds. *Mihajlovski*, 135 Mich App at 534; *Blow*, 132 Mich App at 411-412; *Sears, Roebuck & Co*, 66 Mich App at 367-368.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Citizens Bank, as the prevailing party, may tax costs, MCR 7.219(A).

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

² We note that the parties did not brief this case with citation to the court rules governing garnishment, MCR 3.101 *et seq*, or the statute governing garnishment, MCL 600.4001 *et seq*. Rather, plaintiff asserted that the assignment of rents statute, MCL 554.231 and MCL 554.232, governed the resolution of this case. However, the plain language of those statutes does not address the priority between a judgment creditor and a mortgagee. *Dep't of Transp*, 481 Mich at 191; see MCL 600.4012 (addressing priority of writs). Those statutes also do not provide that the priority interest is determined based on race notice. *Id*. The statutes cited by plaintiff govern the notice to tenants. Additionally, we need not address the parties' reliance on *Otis Elevator Co v Mid-America Realty Investors*, 206 Mich App 710, 522 NW2d 732 (1994), and whether the date of recording a default is dispositive. A garnishee defendant's claim against a defendant has priority over the plaintiff's claim where there was an assignment of the interest prior to the garnishment proceeding in the absence of fraud. *Mihajlovski*, 135 Mich App at 534; *Blow*, 134 Mich App at 411-412.