STATE OF MICHIGAN

COURT OF APPEALS

DONNY HELENE KORDA,

Plaintiff-Appellant,

v

OAKLAND COUNTY SHERIFF and MATTHEW J. CHODAK,

Defendants-Appellees.

UNPUBLISHED
August 12, 2010

No. 290920
Oakland Circuit Court
LC No. 2008-089483-CH

Before: WILDER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant, Matthew J. Chodak, in this case involving executions of judgment against plaintiff. We affirm.

This case arises out of four judgments against plaintiff in favor of Comerica Bank as trustee of the estate of Stefan Feher. After several failed attempts to identify and seize plaintiff's personal property to satisfy the executions of judgment, Oakland County Deputy Sheriff Matthew Chodak obtained levies of execution against three of plaintiff's properties for the amounts of the judgments against plaintiff. Subsequently, plaintiff sued to quiet title in the three properties alleging that defendants failed to satisfy statutory requirements related to the executions and levies. Motions for summary disposition were filed by the parties and the trial court eventually ruled in favor of defendants, dismissing the case. This appeal followed.

Plaintiff first argues that Chodak's failure to indorse the executions of judgment, as required under MCL 600.6002, rendered the executions invalid. We disagree. We review de novo issues of statutory interpretation, as well as a decision to grant a motion for summary disposition. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548; 685 NW2d 275 (2004); *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005).

It is undisputed that Chodak failed to indorse the executions at issue. MCL 600.6002 provides:

> (1) Upon receipt of any execution the sheriff or other officer receiving the execution shall indorse thereon the year, month, day, and hour of receipt and that time shall be the date of the execution.

> (2) Executions shall be made returnable not less than 20, nor more than 90 days, from that date.

The question in this case is whether the failure to comply with the indorsement requirement renders an execution unenforceable. MCL 600.6002 does not provide a remedy. Where a statute creates a duty but provides no remedy for the failure to fulfill the duty, the trial court has discretion to fashion an appropriate remedy. *Kowalski v Fiutowski*, 247 Mich App 156, 162; 635 NW2d 502 (2001). When fashioning an appropriate remedy, a court should consider other actions by the violating party, prejudice to other parties, and "any other factors relevant to the determination." *Id*. at 166. The failure to exercise discretion would be error requiring reversal. *Id*.

Here, the trial court determined that no remedy was necessary. The trial court concluded that the spirit of the indorsement requirement is to ensure compliance with MCL 600.6002(2). Plaintiff did not dispute the timing of defendants' actions and, in fact, there was separate, undisputed evidence of the date the executions were received by Chodak. The court further noted that defendants complied with the time requirement found elsewhere in the statute. There is no indication that defendants were engaging in a course of violative conduct and there is no suggestion that plaintiff was actually prejudiced by the failure to indorse the executions.

Defendants and the trial court also relied on *Shepard v Schrutt*, 163 Mich 485; 128 NW 772 (1910), for the proposition that the enforceability of an execution should not depend on the indorsement requirement. The Court in *Shepard* considered a statutory requirement that is nearly identical to MCL 600.6002: "Upon the receipt of any execution, it shall be the duty of the sheriff or other officer, to indorse thereon the year, month, day, and hour of the day when he received the same." *Shepard*, 163 Mich at 490. The *Shepard* Court cited approvingly the trial court's conclusion on this issue:

> If other proof than an indorsement made at the time of the receipt of the execution is permissible to show when the execution was received by the sheriff, then that fact is established with reasonable certainty as to time (1) by the oral testimony of the sheriff, and (2) by the indorsement permitted to be made upon the trial of this case. I think this statute is not mandatory, and that this execution should not be declared a nullity by reason of the sheriff's failure to indorse thereon the year, month, day, and hour of the day when he received the same. [*Id*. at 491.]

The Court did not expressly adopt this as its holding. *Id*. Instead the *Shepard* Court concluded that "[t]he meritorious question is whether upon the whole record the complainant should have the relief prayed for," concluding on "the entire record of evidence," that the defendants in that case acted fraudulently, regardless of the indorsement question. *Id*. at 491-492.

While the *Shepard* Court appeared to consider that the entirety of the circumstances is relevant to whether a sanction is required for violation of the statute, the Court did not expressly hold that the "statute is not mandatory," as opined by the trial court in that case. In fact, such a holding would be contradicted by considerable case law stating that the word "shall" is indeed mandatory. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008).

We conclude from reading *Shepard* and *Kowalski* together that the requirement to indorse an execution need not require that the execution be declared invalid, but that the surrounding circumstances should be considered in order to fashion an appropriate remedy, at the discretion of the trial court. See *Shepard*, 163 Mich at 490-492; *Kowalski*, 247 Mich App at 162-166. The trial court did not abuse its discretion when it concluded that no sanction was necessary in this case. Accordingly, the trial court did not err when it granted summary disposition in favor of defendants on this issue because the executions were enforceable.

Plaintiff next argues that MCL 565.25(2)[1] requires that the levies in this case be accompanied by "[a] full and fair accounting of the facts." MCL 565.25(2) provides:

> Except as otherwise provided in subsection (3), the recording of a levy, attachment, lien, lis pendens, sheriff's certificate, marshal's certificate, or other instrument of encumbrance does not perfect the instrument of encumbrance unless both of the following are found by a court of competent jurisdiction to have accompanied the instrument when it was delivered to the register under section 24(1) of this chapter:
>
> > (a) A full and fair accounting of the facts that support recording of the instrument of encumbrance and supporting documentation, as available.
> >
> > (b) Proof of service that actual notice has been given to the recorded landowner of the land to which the instrument of encumbrance applies.

Defendants argue, and the trial court agreed, that MCL 565.25(3)(d) provides a relevant exception to this requirement: "Subsection (1) does not apply to any of the following: . . . (d) The filing of an encumbrance authorized in a final order by a court of competent jurisdiction."

Plaintiff appears to understand defendants' argument to be that the execution *was* a final order, and thus not required to be accompanied by an accounting of the facts. Rather, as is plainly stated in the statute, if the encumbrance (in this case, the levy) is *authorized* in a final order, a "full and fair accounting" is not required. It is undisputed that the executions and levies in this case arose out of the judgments against plaintiff; thus, plaintiff's argument is unavailing.

Plaintiff next argues that MCL 600.6005 requires that successive executions be obtained after they have been unsuccessfully served and this requirement was not met in this case. MCL 600.6005 provides:

> Successive or alias executions may be issued one after another upon return of any execution unsatisfied in whole or in part, for the amount remaining unpaid thereon. Several executions may be issued at the same time to officers of different counties, district court districts, or municipalities and enforced by them therein.

[1] MCL 565.25 was amended in 2008 to eliminate subsection 1 and renumber following subsections. The preamended version of MCL 565.25 was in force during the events of this case; citations herein are to that version.

This argument is not properly directed at defendants in this case. Plaintiff argues, in effect, that the judgment creditor should have obtained successive executions to present to defendants. There is no evidence in the record regarding whether there were successive executions. There are only copies of the executions that were in possession of defendants. Defendants merely attempted to serve the executions and, when unsuccessful, levied plaintiff's property; defendants had no part in obtaining the executions. Plaintiff has not presented any evidence that defendants knew anything about the history of the executions that were presented to them or that they were under any duty to take any actions other than those they took. Plaintiff's argument is unavailing.

Plaintiff next argues that MCR 3.103 requires the executions in this case be supported by an affidavit. MCR 3.103 expressly pertains to alleged contractual indebtedness, tortious injury, or a foreign judgment, during the pendency of an action. MCR 3.103(A)-(D). This court rule is entirely inapplicable to the executions of judgment in the instant case.

Plaintiff next argues that defendants made no attempt to collect personal property before levying plaintiff's real property. MCL 600.6004 requires officers to make execution against personal property before making executions against realty:

> Executions against realty shall command the officer to whom they are directed to make execution against the realty of the judgment debtor only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered.

Deputy Sheriff Chodak, and two other process servers testified that they attempted to identify and seize plaintiff's personal property. Chodak also communicated with the judgment creditor's attorney regarding the history of the case. Chodak specifically stated that he did not levy plaintiff's real property until after making these attempts. He stated after his attempt to visit plaintiff's property that "no personal property was seen that could satisfy such a large money judgment of over $160,000." In response, plaintiff makes the unsupported statement that defendants "made no attempts" to collect personal property. Plaintiff has not presented any evidence of personal property to satisfy the judgment. There is no evidence to dispute Chodak's sworn statement that he attempted to locate personal property before levying plaintiff's property.

Plaintiff next argues that she "forwarded to [defendants] instruments [which,] if properly indorsed would fully satisfy the alleged indebtedness." Plaintiff never presented any evidence of these instruments. Upon questioning, plaintiff's attorney told the trial court simply that the instruments were bonds, without further explanation. Further, plaintiff's attorney could not provide copies for the trial court to examine. The trial court did not err when it concluded that plaintiff's unsupported statements are insufficient from which to conclude that plaintiff proffered "personal property" to defendants in the face of Chodak's affidavit stating that he was unable to identify or seize personal property before levying on plaintiff's real property.

Plaintiff's final argument is that the judgments underlying three of the executions in this case are for attorney fee sanctions and, therefore, are not entitled to interest. Each execution lists a judgment amount and an interest amount. This is another argument improperly directed at defendants. The executions were obtained by the judgment creditor, from a circuit court, and

presented to defendants for seizure of property in satisfaction of the stated debts. Defendants need not have had any knowledge of or involvement in the judgment debts or the issuance of the executions. Plaintiff has not argued that they did. This argument is inapplicable to defendants.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly