

[Cite as *Berg v. Sigcom Group, Inc.*, 2005-Ohio-6495.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 86180

FRANK BERG, ET AL. :
 : JOURNAL ENTRY
 Plaintiffs-Appellants :
 : and
 -vs- :
 : OPINION
 SIGCOM GROUP, INC., ET AL. :
 :
 Defendants-Appellees :
 :

DATE OF ANNOUNCEMENT DECEMBER 8, 2005
OF DECISION:

CHARACTER OF PROCEEDING: Civil appeal from
Common Pleas Court
Case No. CV-516820

JUDGMENT: Affirmed.

DATE OF JOURNALIZATION:

APPEARANCE:

For Plaintiffs-Appellants: KYLIE L. GRUMBINE
Judi Berg CHRISTOPHER M. DEVITO
Donald Berg Morganstern, Macadams & Devito
623 St. Clair Avenue, N.W.
Cleveland, Ohio 44113-1204

For Defendants-Appellees: SIGCOM GROUP, INC.
2940 Lee Blvd., Suite 214
Cleveland Heights, Ohio 44118

For Jeffrey Brown: JEFFREY BROWN, Pro Se
Carpentary and Contract Services
1510 Lake Front Street
East Cleveland, Ohio 44112

For Faith Temple Church
of God, Inc.:

JAMES W. GUEST, JR.
25400 Halburton Road
Beachwood, Ohio 44122

For Huntington National Bank:

JUDY M. OSTER
The Huntington National Bank
41 South High Street, HC0523
5th Floor
Columbus, Ohio 43287

PATRICIA ANN BLACKMON, A.J.:

{¶ 1} Appellants Frank and Jodi Berg appeal the trial court's decision granting summary judgment in favor of Sigcom Group, Inc., and Huntington National Bank. On appeal the Bergs assign the following errors for our review:

"I. The trial court erred in granting appellees' motion for summary judgment as a matter of law."

"II. A complaint for creditor's bill can be used to compel a third party to pay a judgment debtor for monies that have become due and are being held, when the judgment debtor deliberately request payment to subcontractors to circumvent the complaint for creditor's bill."

"III. The trial court erred in granting appellees' motion for summary judgment when a complaint for creditor's bill can attach to property that will become due to a judgment debtor after service of the complaint for creditor's bill."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} The history of the case reveals that appellants Frank and Jodi Berg hired appellees Sigcom Group, Martin Consentino, and Jeffrey Brown ("Sigcom Group") to perform construction work on the

basement of their home. It is undisputed that Sigcom Group failed to complete the work. Additionally, the work performed was of poor quality; it rendered the basement unusable, which resulted in the City of Avon Lake condemning the basement.

{¶ 4} Thereafter, the Bergs filed suit against Sigcom Group and on September 18, 2003, obtained a judgment in the amount of \$64,434, with 10% interest per annum, and \$306 in court cost. The Bergs executed bank attachments against Sigcom Group, but only \$2,506 was obtained as a result of the liens.

{¶ 5} The Bergs subsequently discovered that Sigcom Group was performing work on a construction project for Faith Temple Church ("Faith Temple"), which had obtained a construction loan from appellee Huntington National Bank ("Huntington"). Consequently, on December 10, 2003, the Bergs filed a complaint for a creditor's bill, pursuant to R.C. 2333.01, against Sigcom Group, Faith Temple Church, Jeffrey Brown, and Huntington.

{¶ 6} In the complaint, the Bergs alleged that Sigcom Group performed construction work or provided services for the construction of a church for Faith Temple. Further, they alleged Huntington provided financing to Faith Temple Church for the construction of the church. Finally, the proceeds of the loan Huntington made to Faith Temple should be paid to them to satisfy Sigcom Group's debt.

{¶ 7} In its Answer, Huntington denied that it had any money, chose in action, accounts receivable or other property in its possession that belonged to Sigcom Group. Huntington subsequently filed a motion for summary judgment, which the trial court granted on February 4, 2005.

SUMMARY JUDGMENT

{¶ 8} In the first assigned error, the Bergs argue the trial court erred in granting summary judgment in favor of Huntington. We disagree.

{¶ 9} We review an appeal from summary judgment under a de novo standard of review.¹ Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate.² 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.³

¹*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

²*Id.* at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

³*Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327.

{¶ 10} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.⁴ If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the nonmoving party fails to establish the existence of a genuine issue of material fact.⁵

{¶ 11} In the instant case, the Bergs contend that there is a genuine issue of fact as to whether they should be paid from the proceeds of the loan Huntington made to Faith Temple, on account of the construction work Sigcom Group performed for Faith Temple Church.

{¶ 12} R.C. 2333.01 provides as follows:

"When a judgment debtor does not have sufficient personal or real property subject to levy upon 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."

{¶ 13} A creditor's bill action enables a judgment creditor to secure a lien on those assets of the judgment debtor that cannot be

⁴*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

⁵*Id.* at 293.

reached by mere execution of the judgment.⁶ 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.⁷ The commencement of an action in the nature of a creditor's bill gives the plaintiff priority over creditors of the defendant not holding specific liens upon his interest in the property in suit.⁸

{¶ 14} There are three essential elements to a claim 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.⁹

{¶ 15} Here, it is undisputed that the Bergs had a valid judgment against Sigcom Group. Likewise, it is undisputed that Sigcom Group did not have sufficient assets to satisfy the judgment. Thus, the first and third essential elements of a claim

⁶*Union Properties, Inc. v. Patterson* (1944), 143 Ohio St. 192.

⁷*Hoover v. Professional & Executive Mtge. Corp.* (1985), 21 Ohio App.3d 223, 225.

⁸*Swanbeck v. Sheaves* (Mar. 7, 1986), 6th Dist. No. L-85-237; *Tischler v. Tischler* (1901), 21 Ohio C.C. 166.

⁹*Richardson v. Fairbanks* (Oct. 28, 1997), 10th Dist. No. 97APE03-384.

under R.C. 2333.01 have been satisfied. However, the requirement that Sigcom Group have an interest in property held by Huntington at the time the complaint was filed is lacking.

{¶ 16} The record before us reveals that on November 15, 2002, Faith Temple and Huntington entered into a business loan agreement, whereby Huntington agreed to lend Faith Temple the sum of \$450,000 for the construction of a new church. In addition, on March 23, 2004, Huntington made a second loan to Faith Temple in the amount of \$40,000. Pursuant to the business loan agreements, Huntington would disburse the loan proceeds to Faith Temple as construction of the church progressed.

{¶ 17} The record reflects that Huntington made disbursements pursuant to the loan agreement at the request and direction of Faith Temple. Prior to receiving the complaint for the creditor's bill, Huntington made the following disbursements to Sigcom Group namely: \$15,000 on December 6, 2002, \$12,000 on March 13, 2003, and \$27,000 on August 14, 2003. After the complaint for creditor's bill was filed, the record reveals that no further disbursements were made to Sigcom Group. Although the Bergs contend that Sigcom Group deliberately requested payment to subcontractors to circumvent the complaint for creditor's bill, our independent review of the records reveal no evidence to support these assertions.

{¶ 18} The Bergs' attempt to recover money via the proceeds of the aforementioned loans, by virtue of the work Sigcom Group

performed in the church construction project is misplaced. Sigcom Group was not a party to either loan and did not have an equitable interest in the proceeds, irrespective of whether they performed work on said project. It is well settled that a judgment creditor has no better rights in the judgment debtor's property than the judgment debtor.¹⁰

{¶ 19} Further, in *Bain Builders, et al., v. The Huntington National Bank*,¹¹ we held that only a party to a contract or an intended third-party beneficiary of the contract may bring an action on a contract or enforce a right to payment under the contract. Here, Sigcom Group was not a party to the contract between Faith Temple and Huntington. Likewise, Sigcom Group cannot be said to be a third-party beneficiary of the contract between Faith Temple and Huntington. In order for Sigcom Group to be considered a third-party beneficiary, it must appear that the parties to the contract intended Sigcom Group to receive a benefit under their agreement in order for the Bergs to succeed on their claim.¹² A third party who simply receives a benefit from an

¹⁰*Toledo Trust Co. v. Niedzwiecki* (1993), 89 Ohio App.3d 754.

¹¹(July 5, 2001), Cuyahoga App. No. 78442.

¹²*Laverick v. Children's Hosp. Medical Ctr. of Akron* (1988), 43 Ohio App.3d 201, 204.

agreement, without more, is only an incidental beneficiary and may not sue under the contract.¹³

{¶ 20} Moreover, Robin Griggs, vice president in the business banking department at Huntington, averred that she was responsible for the lending relationship between the bank and Faith Temple Church. Griggs further averred, and as previously noted, the record confirms that Huntington did not receive any request or direction from Faith Temple to pay or make disbursements to Sigcom Group after the complaint for creditor's bill was filed.

{¶ 21} Most important, and in contravention of the Berg's assertions, Griggs averred that from December 24, 2003, when the bank was served with the complaint for creditor's bill, the bank did not have in its possession any equitable interests of Sigcom Group in real estate, banking, turnpike, bridge, or other joint-stock company, or any interest of Sigcom Group in a money contract, claim, or chose in action, that was due to them as of December 24, 2003.¹⁴ A creditor's bill and, consequently the interest of the judgment creditor extends only to the equitable interest of the judgment debtor that exists at the time the complaint is served.¹⁵

¹³*Visintine & Co. v. New York, Chicago & St. Louis Rd. Co.* (1959), 169 Ohio St. 505, 507.

¹⁴Griggs Affidavit.

¹⁵*Bank of Ohio v. Lawrence* (1954), 161 Ohio St. 543. See also, *Brusman v. Susanjar* (1960), 113 Ohio App. 544, *Good v. Crist* (1926), 23 Ohio App. 484.

{¶ 22} As such, the Bergs' action against Huntington pursuant to R.C. 2333.01, seeking to attach or execute on property of judgment debtor Sigcom Group that the Bergs claim was due and owing to Sigcom Group, is misplaced. It is clear from the record that Sigcom Group had no such property for the Bergs to attach.

{¶ 23} Based on the foregoing, we conclude that the trial court properly granted summary judgment in favor of Huntington. Accordingly, we overrule the Bergs' first assigned error.

{¶ 24} Our disposition of the Bergs' first assigned error, renders the remaining errors moot.¹⁶

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas 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.

ANTHONY O. CALABRESE, JR., J., and

MICHAEL J. CORRIGAN, J., CONCUR.

¹⁶App.R. 12(A)(1)(c).

PATRICIA ANN BLACKMON
ADMINISTRATIVE JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).