

COURT OF APPEALS
MORROW COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MCNAUGHTON-MCKAY ELECTRIC
COMPANY OF OHIO, INC.

Relator

-vs-

STEVE BRENNEMAN, MORROW
COUNTY SHERIFF

Respondent

JUDGES:

Hon. John W. Wise, P. J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CA 9

OPINION

CHARACTER OF PROCEEDING:

Writ of Mandamus

JUDGMENT:

Dismissed

DATE OF JUDGMENT ENTRY:

September 23, 2009

APPEARANCES:

For Relator

MARK J. SHERIFF
300 Spruce Street
Floor One
Columbus, Ohio 43215

For Resondent

TOM C. ELKIN
ASSISTANT PROSECUTOR
60 East High Street
Mt. Gilead, Ohio 43338

Wise, P. J.

{¶1} This matter came before the Court upon a Complaint for Writ of Mandamus filed by McNaughton-McKay Electric Company of Ohio, Inc. (hereinafter “MMEC”). The Complaint is filed against Morrow County Sheriff Steve Brenneman (hereinafter “Sheriff”). MMEC requests a Writ of Mandamus be issued ordering the Sheriff to comply with a Writ of Execution issued by the Morrow County Clerk of Courts. The Sheriff has filed a Motion to Dismiss suggesting the instant Complaint has become moot because a receivership has been established. Relator has not filed a response to the motion to dismiss.

STATEMENT OF THE FACTS

{¶2} On January 19, 2007, MMEC obtained a judgment against Taylor’s Industrial Services (hereinafter “Taylor’s”) in the amount of \$394,013.67 plus interest. Soon thereafter, MMEC caused a Certificate of Judgment to be filed in the Morrow County Court of Common Pleas.

{¶3} More than two years after the judgment was obtained, MMEC filed a praecipe with the Morrow County Clerk of Courts requesting the issuance of a Writ of Execution ordering the Sheriff to levy on Taylor’s assets. The requested Writ of Execution was issued on May 29, 2009. As of the filing of the Complaint on July 30, 2009, the Sheriff had not complied with the order to levy on Taylor’s assets.

{¶4} One day after the instant Complaint was filed, an “Agreed Order for Appointment of Receiver” was filed in the Franklin County Court of Common Pleas. The Franklin County Case was initiated by Huntington National Bank against Taylors. The Agreed Order provides in part,

{¶15} “IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that all creditors, claimants, bodies politic, parties in interest, and all sheriffs, marshals, and other officers and their respective attorneys, servants, agents, and employees, and all other persons, firms and corporations be, and they hereby are, jointly and severally, enjoined and stayed from commencing or continuing any action at law, wherever situated, or suit or proceeding in equity to foreclose any lien or enforce any claim against said defendant, corporation or limited liability company or their property, shareholders, members or against the Receiver in any court. All such entities are further stayed from executing or issuing or causing the execution or issuance out of any Court of any writ, process, summons, attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with, or enforcing any claim or lien upon any property owned by or in the possession of the said Receiver, and from doing any act or thing whatsoever to interfere with the Receiver in the discharge of his duties in this proceeding with the exclusive jurisdiction of this Court over said properties and said Receiver. This Order shall be in full force and effect as of the date of its journalization with the Clerk of this Court.”

I.

{¶16} The issue before us is whether the Complaint for Writ of Mandamus should be dismissed because a receiver has been appointed.

{¶17} For a writ of mandamus to issue, the Relator must have a clear legal right to the relief prayed for, the Respondent must be under a clear legal duty to perform the requested act, and Relator must have no plain and adequate remedy in the ordinary

course of law. *State, ex rel. Berger v. McMonagle* (1983), 6 Ohio St.3d 28, 6 OBR 50, 451 N.E.2d 225.

{¶8} Relator suggests in its Complaint it has a clear legal right to have the Sheriff levy on the requested goods pursuant to R.C. 2329. Chapter 2329 of the Revised Code governs the execution against property by a judgment creditor and the corresponding duties of the official ordered to levy upon such property. Relator has not identified in its Complaint any specific portion of this chapter as the section from which Respondent's duty arises.

{¶9} At this juncture, Taylor's property is in possession of the court appointed receiver. The property of the judgment debtor is held in custodia legis by the receiver, "[F]unds held by a court-appointed receiver for a corporation are *in custodia legis*, *Brickell v. Roach* (1930), 122 Ohio St. 117." *Deutsch v. Harris* (1989) 2nd Dist. App.No. 9008. Therefore, it is not subject to attachment without leave of court, "It is well settled . . . that funds *in custodia legis* (in the custody or keeping of the law) are not subject to proceedings in attachment, execution, or garnishment. *See, e.g., Spires v. Allread* (1927), 117 Ohio St. 584." *Id.*

{¶10} We note the receivership court has issued a stay prohibiting Respondent from levying on any goods owned by the judgment debtor, therefore, Respondent currently has no legal duty to return the writ of execution. Further, we find Relator has or had an adequate remedy at law by seeking leave of the receivership court to pursue the levy or in the alternative, for any relief the receiver may permit.¹

¹ Although it has not been raised, we have considered the amercement statute as a possible adequate remedy at law. We also note there may be a defense of good faith to an amercement proceeding.

{¶11} We find Relator has failed to establish the duty on the part of Respondent to act under these facts and further has failed to demonstrate Relator does not have an adequate remedy at law, therefore, the writ will not issue.

{¶12} MOTION TO DISMISS GRANTED.

{¶13} COMPLAINT DISMISSED.

{¶14} COSTS TO RELATOR.

{¶15} IT IS SO ORDERED.

By: Wise, P. J.

Edwards, J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ JULIE A. EDWARDS

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 0909

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JUDGMENT ENTRY

Case No. 09 CA 9

For the reasons stated in our accompanying Memorandum-Opinion, the Complaint for a writ of mandamus is dismissed.

Costs assessed to Relator.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ PATRICIA A. DELANEY_____

JUDGES