[Cite as *Brown v. Natl. City Bank*, 2010-Ohio-5641.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Dennis Brown	Court of Appeals No. H-10-009
Appellant	Trial Court No. CVH 2009 0657
v.	
National City Bank	**DECISION AND JUDGMENT**
Appellee	Decided: November 19, 2010

* * * * *

Thomas J. Stoll, for appellant.

Patricia B. Fugee and Amy L. Butler, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant, Dennis Brown, appeals the judgment of the Huron County Court of Common Pleas, granting summary judgment to appellee, National City Bank, nka PNC Bank. For the reasons set forth below, we affirm in part, and reverse in part.

{¶ 2} In February 1999, Shirley Brown pledged certain certificates of deposit ("CDs") as collateral for loans made by appellee, both personally and in connection with a farming operation, to her son, Douglas Brown[1] and his wife, Rose Brown. Shirley Brown entered into a hypothecation agreement[2] with appellee granting it a security interest in CDs held at both Home Savings and Loan ("Home Savings") and Citizens Banking Company ("Citizens"). Along with the agreement, Shirley Brown and appellee signed various assignments of the accounts as collateral for "any and all liabilities" of Douglas and Rose Brown to appellee.

{¶ 3} Among the liabilities owed to appellee by Douglas and Rose Brown were three loans made to Boulder Ridge Farms, Inc. ("Boulder Ridge"), a family farm owned and operated by several members of the Brown family, including Douglas and Rose Brown. By March 2003, all three Boulder Ridge loans and the personal loan were in default for a total outstanding debt exceeding $850,000 owed by Douglas and Rose Brown. In April 2003, appellee obtained a judgment against Boulder Ridge for the amount of the business loans, as well as judgment against Douglas and Rose Brown, both for the personal loan and in their capacity as guarantors for the business loans.

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[1]Douglas Brown is appellant's brother, and, with appellant, co-executor of Shirley Brown's estate.

[2]A "hypothecation" is the right of a creditor over a thing belonging to another, consisting of a power to cause it to be sold so that the creditor's claim may be paid from the proceeds. *Dueber Watch-Case Mfg Co. v. Daugherty* (1900), 62 Ohio St. 589, 593.

{¶ 4} In May 2003, Boulder Ridge filed for Chapter 12 bankruptcy. In July 2003, appellee filed a proof of claim in the bankruptcy proceeding as to the outstanding amount of the Boulder Ridge loans. In October 2003, Boulder Ridge executed a reorganization plan which included terms for a repayment plan to appellee. The plan was approved by the bankruptcy court in February 2004.

{¶ 5} On November 3, 2002, Shirley Brown died. In June 2003, appellant and his brother applied to probate Shirley Brown's will. Douglas Brown and appellant were appointed as co-executors of the estate. On August 7, 2003, the Home Savings certificate of deposit was closed and a check was issued to the estate for the balance. On August 29, 2003, appellant and Douglas Brown filed an inventory without appraisal with the probate court listing the CDs as assets of Shirley Brown. In November 2004, the final and distributive account was filed and approved.

{¶ 6} In early 2004, appellee sought to dispose of the CDs to apply the proceeds against the outstanding debts of Douglas and Rose Brown. In April 2004, appellee received $7,387.54 from Home Savings and $21,256.17 from Citizens, satisfying the Browns' personal note, in full. The remainder was applied to the Boulder Ridge loans. This reduced the outstanding debt of over $850,000 owed to appellee by Douglas and Rose Brown by $28,643.71. In May 2004, Douglas and Rose Brown executed a forbearance agreement acknowledging the remaining obligation to appellee on the Boulder Ridge loans, their prior defaults on these obligations, and containing a promise for payment.

{¶ 7} On July 9, 2009, appellant filed a complaint to recover the proceeds of the CDs. On March 2, 2010, appellee filed a motion for summary judgment with the Huron County Court of Common Pleas. On April 4, 2010, the court granted the motion and ordered appellant's claims dismissed with prejudice. This appeal followed.

{¶ 8} Appellant sets forth the following three assignments of error:

{¶ 9} "I. The trial court erred in granting summary judgment where it considered evidentiary materials outside of those permitted by Civ.R. 56.

{¶ 10} "II. The trial court erred in granting summary judgment where the defendant failed to file a claim against the estate.

{¶ 11} "III. The trial court erred in finding that the hypothecation agreement gave actual possession of the certificates of deposit."

{¶ 12} On review, appellate courts employ the same standard for summary judgment as trial courts. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. The motion may be granted only when it is demonstrated:

{¶ 13} "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 67, Civ.R. 56(C).

I. Civ.R. 56(C)

{¶ 14} In his first assignment of error, appellant claims that the trial court erred in granting summary judgment where it considered evidentiary materials outside of those permitted under Civ.R. 56.

{¶ 15} "The proper procedure for the introduction of evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate the material by reference into a properly framed affidavit." *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220. However, "where the opposing party fails to object to the admissibility of the evidence under Civ.R.56, the court may, but need not, consider such evidence when it determines whether summary judgment is appropriate." *Bowmer v. Dettelbach* (1996), 109 Ohio App.3d 680, 684. (Citations omitted.)

{¶ 16} The evidence appellant alleges to be inadmissible under Civ.R. 56 is two exhibits included in appellee's reply brief in support of its motion for summary judgment. One exhibit is a copy of the probate docket for Shirley Brown's estate, and the other is a copy of the Fiduciary's Account filed in the Probate Court of Huron County by appellant and Douglas Brown. We need not consider whether the evidence in question was properly admissible under Civ.R. 56 because of appellant's failure to object to it. Appellant suggests in a footnote to his brief that his inclusion of a quote regarding the evidentiary standard for summary judgment in his memorandum in response was sufficient to raise the issue to the trial court of what evidentiary materials could properly be considered. The quote included in the memorandum states:

{¶ 17} "That is, the moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. The evidentiary materials listed in 56(C) include 'the pleading[s], depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any.' These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. While the movant is not necessarily obligated to place any of these evidentiary materials in the record, the evidence must be in the record or the motion cannot succeed. In this regard, *Celotex* [*v. Catreti* (1986), 477 U.S. 317] makes clear, especially in light of Justice White's concurring opinion in that case, that a moving party does not discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. The assertion must be backed by some evidence of the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Dresher v. Burt* (1996), 75 Ohio St.3d 280."

{¶ 18} Error cannot be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and a timely objection or motion to strike

appears of record stating the specific ground of the objection if it is not apparent from the context. Evid.R. 103(A). In his memorandum in response, appellant merely stated the evidentiary burden that a moving party must meet in order to be granted summary judgment. This did not include any objections, and even if it raised the issue as appellant now argues, it did not set forth specific grounds for any objection, or even what evidence was being objected to, in order to be considered a proper objection. Appellant had the option of filing a motion challenging the admissibility of the evidence and did not do so.

{¶ 19} Appellant failed to object to the evidence, and thus it was at the trial court's discretion whether or not to consider any potentially improper evidence in determining whether to grant the motion for summary judgment. We perceive no abuse of that discretion. Accordingly, appellant's first assignment of error is found not well-taken.

II. Probate Claim/Hypothecation Agreement

{¶ 20} In his second assignment of error, appellant asserts that the trial court erred in granting summary judgment where appellee failed to file a claim against the estate. In his third assignment of error, appellant claims that the court erred in finding that the hypothecation agreement gave actual possession of the certificates of deposit to appellee. Because these two issues are closely related, we will address these assignments of error together.

{¶ 21} Appellant states that appellee's failure to file a claim against the estate under R.C. 2117.06 as a creditor should bar it from having any claim to the CDs. To reach this conclusion, however, appellant mischaracterizes appellee as a lien creditor.

Appellant defines a lien creditor as "a creditor who has acquired a lien on the property involved by attachment, levy or the like" and states that thus, by virtue of the hypothecation agreement, appellee is a creditor.

{¶ 22} Hypothecation is "the pledging of something as security without delivery of title or possession." Black's Law Dictionary, 9 Ed.2009. R.C. 1301.01(KK)(1) defines a security interest as "an interest in personal property or fixtures that secures payment or performance of an obligation." Appellant is incorrect in that the lien appellee had on the CDs was not acquired by attachment, levy, or the like. Rather, appellee's interest, in this instance, is contractual, created by the hypothecation agreement between appellee and Shirley Brown.[3]

{¶ 23} While R.C. 2117.06 requires creditors with claims to present those claims against the estate, appellee was a creditor not of Shirley Brown or her estate; rather, appellee was a creditor of Douglas and Rose Brown, and Boulder Ridge. Shirley Brown granted appellee a security interest in the CDs as collateral for any and all liabilities of Douglas and Rose Brown to them, but she was not liable beyond the interest in the pledged CDs. Thus, appellee would have no claim against the estate of Shirley Brown for any liabilities owed to them outside of their lien on the CDs.

[3]Appellee acquired a judgment against the lands of Douglas and Rose Brown and Boulder Ridge upon their default on the loans in April 2003. Appellee, however, did not obtain a judgment for a lien on the CDs; its lien existed solely by virtue of the hypothecation agreement granting them the power to have the assets sold and to be paid on the debt from the proceeds.

{¶ 24} A matter of significance is whether or not appellee's security interest was perfected. Under R.C. 1303.03(J), a certificate of deposit is "an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A 'certificate of deposit' is a note of the bank." Thus, a CD is generally treated as an instrument. R.C. 1309.102 (comment 12 to UCC 9-102.) An instrument "means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment." R.C. 1309.102(A)(47)(a).

{¶ 25} When a deposit account is not evidenced by a negotiable instrument or other writing granting a right to the payment of a monetary obligation, then a CD will be treated as a depository account, rather than an instrument. See R.C. 1309.102 (comment 12 to UCC 9-102). In this instance, there is no evidence that such a document exists or was in the possession of either party. The conduct of the parties in signing the hypothecation agreement suggests that there were no such documents; if they existed, Shirley Brown would have had to simply give the documents to appellee to evidence the agreement, rather than sign a hypothecation agreement and eight separate assignments of the savings deposit accounts. Further, on January 9, 2004, Citizens confirmed that appellee had a perfected security interest in the accounts based on the assignments of the deposit accounts. If it had originally given Shirley Brown documents evidencing its obligation to pay the monetary obligation due on the deposit accounts, Citizens would not

be able to acknowledge a perfected security interest by appellee without appellee having possession of such documents.

{¶ 26} Because the CDs are properly characterized as depository accounts, the issue is one of control, not possession. A secured party has control of a deposit account when "* * * (3) The secured party becomes the bank's customer with respect to the deposit account." R.C. 1309.104(A). Even where the debtor retains the right to direct the disposition of such funds, the secured party is still said to have control. R.C. 1309.104(B).

{¶ 27} The agreements that Shirley Brown signed assigning the deposit accounts as collateral state that she assigned appellee all the "right, title and interest" of the accounts including all deposits, making them a customer of the bank regarding the accounts. A security interest in a depository account may be perfected by control of the account, and remains perfected so long as the secured party remains in control of the account. R.C. 1309.314. Because it had control of the depository accounts, appellee had a perfected security interest in the CDs.

{¶ 28} When a creditor has a perfected security interest, it has certain rights when a debtor defaults on his or her obligation. R.C. 1309.601. In the present case, appellee acted on the collateral by liquidating the depository accounts and applying the balance of the proceeds to the outstanding debt. This is permitted under R.C. 1309.607(A)(5), which provides that, if a secured party holds a security interest in a depository account

perfected by control by virtue of R.C. 1309.104(A)(2) or (3), the party may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

{¶ 29} At this point, we must divide our analysis between the CDs at Citizens and the one at Home Savings. The depository accounts at Citizens remained open until appellee sought to exercise its statutory right to have the funds liquidated and paid to reduce the debt owed by Douglas and Rose Brown. The accounts remained in control of appellee, which retained a perfected security interest in them. Appellee was thus free to dispose of the collateral which remained in its control and in which it retained a perfected security interest.

{¶ 30} The CD at Home Savings, however, cannot be treated so simply as those at Citizens. The record clearly shows that on August 7, 2003, the depository account was closed and a check for the funds was issued to Shirley Brown's estate.[4]

{¶ 31} Appellee's interest in the depository account was extinguished when this account was closed, however, it maintained an interest in the proceeds of that account. R.C. 1309.102(A)(9) defines cash proceeds as "proceeds that are money, checks, deposit accounts, or the like." Subsection (A)(64)(a) defines proceeds in part as "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral." R.C.

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[4]There is nothing in the record to indicate what happened to the funds allegedly deposited in the estate account, or where the funds for the check issued to appellee came from if the deposit account was closed. We can only assume that the bank did not, through the generosity of its own heart, issue the funds to both parties and take the loss itself. We cannot, however, assume that payment was stopped for the check to the estate or that the estate was made to repay those funds, without any evidence to indicate such.

1309.315(A)(2) provides that a security interest attaches to any identifiable proceeds of the collateral. Under subsection (C), this interest in the proceeds is perfected so long as the security interest in the collateral was perfected.

{¶ 32} Proceeds that are commingled with other property are identifiable "to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than this chapter with respect to commingled property of the type involved." R.C. 1309.315(B). One of these equitable principles is the "lowest interim balance rule" which "presumes that proceeds can be identified once deposited into an account as long as the account balance is equal to or greater than the amount of the proceeds deposited, notwithstanding that other funds may be paid out of the account." *In re Parker Steele Co.* (1992), 149 B.R. 834, 21 U.C.C.Rep.Serv.2d 118 (Bkrtcy.N.D.Ohio) citing *In Re Chicago Lutheran Hosp. Ass'n.* (1988), 89 B.R. 719, 734 (Bkrtcy.N.D.Ill.). In this case, it is possible that appellee could have maintained a perfected security interest in the funds from the Home Savings deposit account if they were able to identify the proceeds under the lowest interim balance rule, however, there is not enough information in the record to show whether this was the case.

{¶ 33} Once the funds were deposited into the estate account, even if appellee had a continuing security interest in them as cash proceeds, it could not simply go and withdraw the money from the estate account. Where a security interest survives disposition of collateral, the secured party may repossess or claim the collateral or

proceeds from the transferee, or in certain cases may maintain an action for conversion. R.C. 1309.315 (comment 2 to UCC 9-315). There is no evidence in the record that appellee filed any action for conversion to recover the proceeds. Further, there is no evidence that appellee repossessed or claimed the proceeds from the estate.

{¶ 34} In the administration of an estate, a fiduciary should transfer funds into an estate account to be used solely to pay the present debts and expenses of the estate. 1 Baldwin's Oh.Prac. Merrick-Rippner Prob.L. (2009) Section 2:25. Under R.C. 2117.06, where appellee did not previously have a claim against the estate as it was not owed a debt by the estate, it now would have a claim against the estate for the proceeds of the CD which were deposited in the estate account. Claims against the estate can be decided by the executor of the estate, including rejection, allowance, requiring written proof, etc. R.C. 2117.06 through R.C. 2117.14. Pursuant to R.C. 2117.17, the probate court can also, on its own motion, assign all claims against the estate for hearing. These are the legal remedies for one seeking a claim or debt to be paid from an estate, and there is no evidence that appellee filed such a claim.

{¶ 35} With the state of the record as it is, a genuine issue of material fact exists as to the disposition of the proceeds of the Home Savings CD. The record clearly shows that a check for the proceeds of the account was issued to the estate on August 7, 2003. The record also shows that a check in the same amount was issued to appellee on March 25, 2004. We have no evidence as to the source of the funds for this second check, or what happened to the funds that were issued to the estate initially. It is therefore

impossible for us to determine whether appellee would have had to present a claim against the estate in order to recover on the lien against the Home Savings CD. We are also unable to determine whether or not appellee retained a perfected security interest in the CD via control over the depository account as granted by the hypothecation agreement and assignments of the deposit accounts, or whether they would have a perfected security interest in cash proceeds deposited in the estate account.

{¶ 36} With regards to the Citizens CDs, appellant's second and third assignments of error are not well-taken. Accordingly the decision of the Huron County Court of Common Pleas is affirmed with respect to those CDs.

{¶ 37} With respect to the Home Savings CD, the record is insufficient to conclude that appellee is entitled to judgment as a matter of law. Accordingly, appellant's second and third assignments of error with respect to the Home Savings CD are well-taken.

{¶ 38} On consideration whereof, the judgment of the Huron County Court of Common Pleas is affirmed, in part, and reversed, in part. This matter is remanded to said court for proceedings consistent with this decision. It is ordered that appellee pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE