

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

Duane J. Tillimon

Court of Appeals No. L-12-1018

Appellant

Trial Court No. CVG 10-04705

v.

Anthony Wheeler, et al.
and Fifth Third Bank

DECISION AND JUDGMENT

Appellee

Decided: December 7, 2012

* * * * *

Duane J. Tillimon, pro se.

Rachael L. Rodman and Joseph C. Krella, for appellee Fifth Third Bank.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals the judgment of the Toledo Municipal Court denying his motion to hold a responding financial institution in contempt for failing to render funds in a garnishment. Because we conclude that appellant failed to show that appellee bank responded improperly to a garnishment order, we affirm.

{¶ 2} Appellant, Duane J. Tillimon, is a creditor by virtue of a judgment against Anthony Wheeler and Andrew Wheeler. On July 7, 2011, appellant instituted a non-wage garnishment for funds of Andrew Wheeler in accounts held with appellee, Fifth Third Bank. The bank identified a checking account held jointly by Andrew Wheeler, Margaret S. Wheeler and Diane R. Harris.

{¶ 3} Pursuant to rules promulgated by the U.S. Treasury Department, on receipt of the garnishment notice appellee conducted an account review to determine whether the account was the recipient of funds exempt from garnishment by federal law. Appellee's review revealed that \$890 had been direct deposited into the account by the Social Security Administration for Margaret Wheeler. On July 18, 2011, appellee returned its answer to the garnishment order, accompanied by \$14.79.

{¶ 4} On August 17, 2011, appellant filed a "Motion for order for Fifth Third Bank to show cause why it should not be found in contempt of the court's garnishment order dated July, 7, 2011 and to find Fifth Third in contempt and grant judgment against Fifth Third Bank in the amount of the judgment against Andrew Wheeler with affidavit of Duane J. Tillimon and Praeipse for service of this motion on Fifth Third Bank." Appellee responded with a memorandum in opposition, maintaining that it had returned the proper amount and that the other funds in the account were exempt from execution by federal law.

{¶ 5} A hearing on appellant's motion was held before a magistrate on October 27, 2011. At the conclusion of the hearing, the magistrate found appellant's motion not

well-taken. On appellant's motion, the magistrate subsequently issued findings of fact and conclusions of law. Appellant's objections to this order were overruled. The trial court adopted the magistrate's order.

{¶ 6} Appellant now brings this appeal, setting forth the following single assignment of error:

The trial court committed reversible error in not enforcing the non-wage garnishment of the judgment debtor's joint bank account because the judgment debtor had unrestricted access to the account and therefore the money in the account was not exempt from garnishment.

{¶ 7} Appellant spends substantial energy arguing that the hearing on his motion for contempt was not a hearing on his motion, but a hearing on the garnishment exemption. The distinction is important because, in a hearing to establish a garnishment exemption, the burden of proof rests with the judgment debtor to prove the existence of an exemption. *E. Liverpool v. Buckeye Water Dist.*, 7th Dist. Nos. 11 CO 41, 11 CO 42, 2012-Ohio-2821, 972 N.E.2d 1090, ¶ 39.

{¶ 8} In a proceeding for civil contempt the burden of proof is with the movant to prove that the alleged contemnor violated a court order. *Reinhart v. Reinhart*, 87 Ohio App.3d 325, 328, 622 N.E.2d 359 (3d Dist.1993). Moreover, as appellant is aware, the decision concerning civil contempt rests within the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *Tillimon v. Harris*, 6th Dist. No.

L-11-1094, 2012-Ohio-1402, ¶ 10. An abuse of discretion is more than an error in judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 9} Appellant insists that the question was converted from contempt to garnishment at prior hearings before a different magistrate, but has provided no transcripts of those hearings. He also relies on scheduling orders that contain a reference to the subject matter as "garnishment." Neither of these assertions is persuasive. Appellant moved for contempt. At the beginning of the hearing the magistrate stated that the hearing was on appellant's motion for contempt and the magistrate's written findings and conclusions state the hearing was on the motion for contempt. On this, we must conclude that the hearing was, as stated, on appellant's motion for contempt. The burden, therefore, rests with appellant to come forth with evidence that appellee violated the court's garnishment order.

{¶ 10} As a matter of federal law certain federal benefit payments, including Social Security benefits, are protected from garnishment. 42 U.S.C. 407(a), *Daugherty v. Central Trust Co.*, 28 Ohio St.3d 441, 443, 504 N.E.2d 1100 (1986). In 2011, the Department of the Treasury promulgated certain rules to prevent encroachment on this exemption. *See* 31 C.F.R. 212, et seq. The rules require a financial institution served with a garnishment order to first examine the order to ascertain whether a notice of right to garnish federal benefits is attached. 31 C.F.R. 212.4. If such notice is not attached, the

financial institution is to conduct an account review for a two month lookback period, 31 C.F.R. 212.3, to determine whether during that time federal benefit payments have been deposited into the account. 31 C.F.R. 212.5(b). The account review is to be conducted irrespective of whether the account contains other funds or has a co-owner. 31 C.F.R. 212.5(d)(1)(2). If federal benefit payments have been deposited during the lookback period, the financial institution is directed to calculate the protected amount¹ and ensure that the account holder has full and customary access to those funds. 31 C.F.R. 212.6. These funds are to be “conclusively considered to be exempt from garnishment under law.” 31 C.F.R. 212.6(c). The remaining funds in the account shall be treated in conformity with the customary procedures for handling garnishment orders. 31 C.F.R. 212.6(d). A prescribed notice of the review is to be sent to the account holder. 31 C.F.R. 212.7. The rules are expressly intended to preempt conflicting state and local laws or regulations. 31 C.F.R. 212.9.

{¶ 11} At the hearing on contempt in this matter, the magistrate had before him the record of the account of Andrew and Margaret Wheeler. The bank records show direct deposits from the Social Security Administration in the amount of \$890 during the two-month period prior to service of the garnishment order. A notice of right to garnish federal benefits is not attached to the garnishment order. In such circumstances, the

¹ “Protected amount means the lesser of the sum of all benefit payments posted to an account between the close of business on the beginning date of the lookback period and the open of business on the ending date of the lookback period, or the balance in an account at the open of business on the date of account review.” 31 C.F.R. 212.3.

regulations conclusively exempt the \$890 from garnishment. Appellant offered no evidence of any circumstance which would alter this. Consequently, appellee acted in conformity with the law. Appellant's sole assignment of error is not well-taken.

{¶ 12} On consideration whereof, the judgment of the Toledo Municipal Court is affirmed. It is ordered that appellant pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

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

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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