

[Cite as *Dovi Interests, Ltd. v. Somerset Point Ltd. Partnership*,
2004-Ohio-636.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 82788

DOVI INTERESTS, LTD.

Plaintiff-appellee

vs.

SOMERSET POINT LIMITED
PARTNERSHIP

Defendant-appellant

JOURNAL ENTRY

AND

OPINION

DATE OF ANNOUNCEMENT
OF DECISION:

FEBRUARY 12, 2004

CHARACTER OF PROCEEDING:

Civil appeal from Shaker
Heights Municipal Court, Case
No. 03 CVJ 00203

JUDGMENT:

AFFIRMED IN PART, REVERSED IN
PART AND REMANDED.

DATE OF JOURNALIZATION:

APPEARANCES:

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KARPINSKI, J.

{¶1} Defendant, Somerset Point Limited Partnership ("Somerset"), appeals the Shaker Heights Municipal Court's order permitting Plaintiff-appellee, Dovi Interests ("Dovi"), to garnish bank accounts which Somerset claims are not the property of Somerset but rather of its resident/tenants. Somerset runs a retirement/nursing home. Dovi obtained a judgment against Somerset.¹ In execution on this judgment, Dovi obtained a court order and notice of garnishment in the Shaker Heights Municipal Court, in which jurisdiction Somerset is located. Dovi served this order of garnishment against three accounts Somerset had at National City Bank. The bank then placed these funds with the court in escrow pending the outcome of Somerset's suit.

{¶2} The three accounts in question were all in the name of Somerset Partnership Limited. Two of the accounts, however, according to Somerset, were the property of its residents. Medicaid law permits its recipients to keep a certain portion of its payments for their personal use. This personal money is kept by the facility where the resident-recipient lives and is made available to the resident-recipient as needed. One of the disputed

¹ *Dovi v. Somerset* (July 24, 2003), Cuyahoga App. No. 83507.

accounts which Dovi garnished was the resident fund. At the time it was garnished, this account contained less than \$16.²

{¶3} The second fund which is in dispute is a fund in which Somerset placed its residents' security deposits. Somerset claims that these funds are not rightfully its property, but rather are held in trust for the residents. The bank account is listed in Somerset's name, however, rather than being an escrow account or a trust.

{¶4} The third account is used for general operations. The parties agree that most of this account was proper for garnishment.

They disputed only those funds which Somerset had withdrawn from the security deposit account, in the amount of \$8,690, and put into the general operating account so that it could refund security deposits for former residents. Somerset claimed it was not the owner of this portion of the account.

{¶5} The matter was heard before a magistrate, who found that Dovi had a right to all the funds in the patient fund account, in the security deposit account, and in the general account except the \$8,690 transferred to refund former residents. The magistrate held: "[t]he return of the security deposit to the tenant is conditional. *** It is possible that an entire security deposit will be returned to the tenant, but it is also possible that none or only part of the security deposit will be returned to the tenant.

² Dovi's counsel wrote a personal check for the amount of this account in an effort to dispose of this issue because he noted that it was a waste of legal resources to pursue such a small amount.

Thus, the magistrate finds that the tenant owns the conditional right to have the deposit returned rather than the specific dollars themselves. Prior to the time the tenancy terminates, the funds being held by the landlord are available for the landlord's use." Magistrate's decision at 3.

{¶6} The magistrate further held, however, that the \$8,690 which had been transferred to the general operating fund was the property of those designated tenants who were to receive them as refunds, and that those tenants, and not Somerset, had a right to those funds. She therefore ordered that all the moneys except for that \$8,690 be paid to Dovi, the judgment creditor. She ordered the \$8,960 to be returned to Somerset.

{¶7} Somerset assigns four errors. The first two are related and will be addressed together:

"I. THE LOWER COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION THAT, AS A MATTER OF OHIO LAW, THE RESIDENTS' SECURITY DEPOSITS WERE THE PROPERTY OF SOMERSET POINT SUBJECT TO GARNISHMENT. (R.3 Journal Entry).

THE LOWER COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION THAT THE RESIDENTS' SECURITY DEPOSITS WERE SUBJECT TO GARNISHMENT WHEN THERE WAS NO FACTUAL BASIS FOR SUCH A DETERMINATION, AND WHERE ALL THE FACTS OF RECORD SUPPORTED THE CONCLUSION THAT SUCH FUNDS WERE RESIDENT SECURITY DEPOSITS AND NOT THE GENERAL FUNDS OF SOMERSET POINT. (R.3 Journal Entry)."

{¶8} Ordinarily the standard of review an appellate court employs in such matters is whether the trial court abused its discretion. That standard of review is not proper, however, if "a trial court's order is based on an erroneous standard or a

misconstruction of law." *Castlebrook v. Dayton Properties* (1992), 78 Ohio App.3d 340, 346. When reviewing a pure question of law, the reviewing court may substitute its judgment for the judgment of the trial court. *Id.*

{¶9} Somerset argues that the trial court erred in ruling both that the security deposit account was not the property of the residents and that Dovi had a right to it. The case presents, therefore, two issues: first, is a security deposit the property of the tenant or of the landlord, and, second, if the security deposits do belong to the tenants, and if the landlord fails to keep the security deposit money separate from its operating expenses, is it subject to garnishment if the landlord produces evidence to support what amount belongs to each tenant?

{¶10} The magistrate erred in holding that the residents' security deposits were the property of Somerset Point subject to garnishment. They are the property of the tenants. Nonetheless, the magistrate was correct in ruling that the accounts are attachable by Somerset's creditor. "[T]he Ohio courts have consistently held that non-ownership of attached property is not a valid defense to garnishment or attachment proceedings." *Middletown Paint and Glass, Inc. v. Donato Constr. Co.* (May 17, 1993), Butler App. No. CA92-09-177, 1993 Ohio App. LEXIS 2545, at *4.

{¶11} First, the magistrate erred concerning ownership of a security deposit. A security deposit, although it is in the possession and under the control of the landlord, is the property

of the tenant. According to statute, the security deposit is "held by the landlord" and "may be applied" to past due rent or damages.

R.C. 5321.36(B). Although the landlord maintains possession of the deposit, therefore, "the tenants possess title to the security deposits." *In Re Center Apartments* (2001), 277 B.R. 747, 749. Further, the deposits are not considered "'rent, issues, and profits' of the property ***." *Castlebrook*, supra, at 348. Instead, they are a personal obligation between the landlord and the tenant in the form of a pledge. If the property were to change hands, it would be the first landlord, not the successor landlord, who owed the return of the deposit to the tenant. *Id.* See also, *Tuteur v. P. & F. Enterprises* (1970), 21 Ohio App.2d 122, 133.

{¶12} Nonetheless, even though the deposits are legally the property of the tenants, it is the name on the account that determines whose creditor may attach the funds in the account. By following the procedures delineated in Chapter 2716 of the Revised Code, a judgment creditor may garnish the property of the judgment debtor, even if that property is in the possession of a third party, such as a bank. R.C. 2716.01(B). When a bank receives a garnishment notice, it looks to the name on the account to determine whether garnishment of that account is proper. "If the judgment debtor has a contractual right to demand payment of the funds, then those funds held for the benefit of the judgment debtor may be subject to garnishment." *Leman v. Fryman*, Hamilton App. No. C-010056, at ¶15. Thus in garnishment proceedings, the court is not concerned with who actually owns the property subject to

garnishment as it is with who possesses it. "A court will not ordinarily entertain favorably a motion to discharge an attachment on the claim that the attached property does not belong to the moving party, particularly where the authenticity of such claim is questionable." *Rice v. Wheeling Dollar Savings & Trust Co.* (1951), 155 Ohio St. 391, paragraph four of the syllabus. The *Rice* court noted that because the debtor does not own the property, he will not be injured by the seizure of it.

{¶13} The court will, however, receive evidence that the property the creditor is seeking to attach is not subject to garnishment in those proceedings. *Society Bank v. Lieber* (Oct. 13, 1994), Cuyahoga App. No. 66934. In the case at bar, Somerset did not present sufficient evidence of this claim. The evidence produced to support Somerset's claim consisted of the testimony of Richard Miltner, Somerset's controller and one of the signatories on the accounts, a list of resident's names and the amount of their deposit, and several unauthenticated bank documents. Miltner testified that the three accounts were kept separate and that the withdrawals from the security deposit account were made only to refund a security deposit when a resident left. He also produced unauthenticated documents from National City Bank. One of these documents is a bank statement which lists the owner of all three of the accounts as "Somerset Point Limited Partnership." This document gives the balance on all three of the accounts. Nothing on the paper indicates that anyone but Somerset is owner of the accounts.

{¶14} The other documents are signature cards for each of the allegedly separate accounts. One card lists the title as "Somerset Point Ltd Ptn Resident Fund"; the other card lists its title as "Somerset Point Ltd. Security Deposit Account." Nothing on these cards indicates that the bank has possession of copies of them or ever ratified them in any way. The other two alleged bank documents are "Deposit Account/Loan Resolution" papers. One document has the same title as the resident fund account and the other has the same title as the security deposit account. The final document is a computer generated list of resident's names and the amounts of their deposits. This list gives the total of the bank account as matching the total of the security deposits on the list.

{¶15} None of these documents proves that the money in the account in question is the property of the residents. Although Miltner's testimony supports this claim, the Twelfth District, in a similar case, held that similar testimony and evidence were insufficient to show that the money in the judgment debtor's account was the property of a customer rather than the debtor. "It is uncontroverted that the account is in appellee's name only, and no proof of a trust or escrow arrangement was produced." *Middletown Paint and Glass, Inc. v. Donato Construction Co.* (May 17, 1993), Butler App. No. CA92-09-177, 1993 Ohio App. LEXIS 2545, at *5. Similarly, here, Somerset concedes that none of the alleged resident funds was in a trust or an escrow account. This failure to protect the deposits by using a trust or escrow account defeats

Somerset's claims. Just claiming that the residents and not Somerset are the legal owners of the account is not adequate. "[T]he Ohio courts have consistently held that non-ownership of attached property is not a valid defense to garnishment or attachment proceedings." *Id.* at *4. See also, *Honess v. Ghali* (Aug. 7, 1997), Cuyahoga App. No. 71518; *Society Bank v. Lieber* (Oct. 13, 1994), Cuyahoga App. No. 66934, both citing *F.D.I.C. v. Wurstner* (1976), 50 Ohio App.2d 57.

{¶16} A judgment creditor may garnish the property of his judgment debtor pursuant to R.C. 2716.01 et seq. When the property being garnished is a bank account, as in the case at bar, "the property being garnished is, strictly speaking, not the funds themselves, but the debtor's contractual right to receive them." *Goralsky v. Taylor* (1991), 59 Ohio St.3d 197, 198. See, also, *Ingram v. Hocking Valley Bank* (1997), 125 Ohio App.3d 210, 218.

{¶17} Despite the fact that the trial court erred in holding that the security deposits were not the property of the residents, therefore, this error does not affect the outcome of the case. Dovi's garnishment of the money was legal because, first, nothing on the accounts shows that they were not Somerset's property, and, second, Somerset had possession of them. In fact, from the case law, we conclude that the magistrate erred in ordering that \$8,690 for security deposits be held out from the garnished money. Nothing in the general operating account indicates that this money is the property of the individual resident, as opposed to Somerset. Accordingly, this assignment of error is affirmed in part and

reversed in part. The full amounts of both the operating account and the security deposit account are subject to garnishment.

{¶18} For its third assignment of error, Somerset states:

"III. THE LOWER COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION THAT THE RESIDENTS' FUND ACCOUNT, WHICH HELD THE RESIDENTS' SPENDING MONEY, WAS SUBJECT TO GARNISHMENT, EVEN THOUGH NEITHER THE MAGISTRATE NOR THE LOWER COURT MADE ANY FACTUAL FINDINGS OR CONCLUSIONS OF LAW REGARDING SUCH ACCOUNT WHICH WOULD SUPPORT THE GARNISHMENT OF SUCH FUNDS.

(R.3 Journal Entry)."

{¶19} Somerset errs in stating that the court ruled that the funds from the resident's spending account were subject to garnishment. The magistrate's report, which the court adopted, first lists the three accounts by number and notes that Account 392 (the resident's fund) has a balance of \$15.43. The report then states that "only the \$8,690 from Account 276 [the operating account] and all of the funds from Account 368 [the security deposit funds] are in dispute." Magistrate's report at 2. The report later states that a witness "identified the two accounts with disputed funds ***." Id. Although the magistrate does not affirmatively state that the parties agree on the disposition of the resident's fund account, the report implicitly states that this fund is not part of the case. The magistrate's report sufficiently provides a finding that this fund is not at issue.

{¶20} Although in its objections to the magistrate's report Somerset disputed the alleged finding that the parties agree

concerning the resident's fund, Dovi states in its appellate brief that it has no interest in those funds. In fact, Dovi's counsel made a check to Somerset for the amount of the funds in the resident's account in order to free up those funds for the residents. Clearly, Dovi expressly has no interest in garnishing those funds. Because the trial court, finding no dispute, never ruled on garnishing the resident's fund, the question of whether this fund is subject to garnishment is moot. This assignment of error is overruled.

"IV. THE LOWER COURT ERRED IN ADOPTING THE MAGISTRATE'S DECISION DESPITE THE MAGISTRATE'S FAILURE TO PROVIDE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUESTED AND REQUIRED BY OHIO RULE OF CIVIL PROCEDURE 52. (R.3 Journal Entry)."

{¶21} The magistrate in this case issued a "MAGISTRATE'S DECISION." Somerset filed a request for findings of fact and conclusions of law. In response, the magistrate retitled her decision as "AMENDED MAGISTRATE'S DECISION with FINDINGS OF FACT AND CONCLUSIONS OF LAW." The content of this decision was identical to the first one. Civil Rule 52 states:

"When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ.R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and

conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41(B)(2)."

{¶22} The amended opinion did not contain specific headings labeled "findings of fact" or "conclusions of law." This absence of headings, however, is not dispositive of the issue. "There is no standard format which must be followed by a trial court when issuing findings of fact and conclusions of law. Instead, 'the findings and conclusions must articulate an adequate basis upon which a party can mount a challenge to, and the appellate court can make a determination as to the propriety of, resolved disputed issues of fact and the trial court's application of the law.'" *Dixon v. Brown* (May 16, 1996, Cuyahoga App. No. 66931, 1996 Ohio App. LEXIS 1999, at *46, citations omitted. If the appellate court, therefore, can determine the validity of the trial court's basis for its judgment, then the purpose of the rule is fulfilled.

{¶23} *Id.*, citing *In re Adoption of Gibson* ((1986), 23 Ohio St.3d 170.

{¶24} In the case at bar, the magistrate's decision, which the trial court adopted, can be broken down into nine findings of fact and five conclusions of law. The findings of fact precede the conclusions of law and are easily separated. The absence of titles separating the two is inconsequential.

{¶25} The magistrate found that Dovi received a judgment against Somerset; that Dovi transferred the judgment to the Shaker Municipal Court for collection; that Dovi filed garnishment against National City Bank; that the amount of money in dispute was

stipulated; that the security deposit account was a separate account not used for general business; that Somerset did not try to protect the security deposit funds from other uses; and that all the funds in the security deposit account were from security deposits only.

{¶26} These findings are followed by conclusions of law. The court concluded that the return of a security deposit is conditional; that the tenant does not own the security deposit but rather only a right to have the money returned; that before the security is returned, the landlord has use of the funds; that the funds transferred to the general operating fund from the security deposit funds were the property of the residents who were to receive them as a refund; and that \$119,988.35 should be turned over to Dovi and the remaining \$8,690 should be returned to Somerset.

{¶27} As the resolution of the first two assignments of error demonstrates, this court was sufficiently able to determine the trial court's reasons for its decision concerning the general operating fund and the security deposit fund. As noted in assignment of error III, the magistrate did make a finding but only to the extent that it held this account was not in dispute. The court did not, contrary to Somerset's assertion, conclude that the resident's fund account was subject to garnishment. Accordingly, this assignment of error is overruled.

{¶28} The trial court's judgment is affirmed in part and reversed and remanded in part for proceedings consistent with this

opinion: the \$8,690 reserved for resident security deposits shall be included in the total attached amount awarded to Dovi, along with the amounts already awarded by the trial court.

{¶29} This cause is affirmed in part, reversed in part and remanded.

ANNE L. KILBANE, J., CONCURS.

MICHAEL J. CORRIGAN, A.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE CONCURRING OPINION.

MICHAEL J. CORRIGAN, A.J., CONCURRING IN JUDGMENT ONLY.

{¶30} I concur in judgment only with the majority because I would affirm the trial court's order that the \$8,690, which constituted security deposits that were immediately due and owing the tenants whose tenancies had terminated, was not subject to garnishment. Thus, I would affirm the trial court's decision in its entirety.

It is, therefore, ordered that appellant and appellee split the costs herein taxed.

It is ordered that a special mandate be sent to said 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.

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).