Supreme Court of Ohio Clerk of Court - Filed June 02, 2015 - Case No. 2015-0909

IN THE SUPREME COURT OF OHIO

MITCHELL SPERO, TRUSTEE OF THE MANNY AND SYDELLE SPERO DYNASTY TRUST, et al.	)	**On Appeal from the Summit County Court of Appeals, Ninth Appellate District**
Plaintiffs-APPELLEES	)	
vs	)	**Court of Appeals Case No. 27569**
MARTHA AVNY, et al.	)	
Defendants-APPELLANTS	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves serious issues with respect to when a judgment becomes moot.

In the past, the Ninth District Court of Appeals has consistently held that an appeal does not become moot so long as the appellant seeks a stay of said judgment. There has never been a requirement of actually obtaining said stay of the collections of such judgment.

Now, for the first time, that court of appeals has added an additional requirement that the stay actually be obtained. Otherwise, any "payment" made is deemed voluntary.

In regards to when a matter becomes moot, this Court has stated:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence."

Miner v. Witt, 82 Ohio St. 237, 238 (1910), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895).

It has long been established that a satisfaction of judgment is enough to render an appeal arising from the judgment moot. "Where the court rendering judgment has jurisdiction of the subject matter of the action and of the parties, and fraud has not intervened, and the judgment is **voluntarily paid** and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal or prosecute error or even to move for vacation of judgment." (Bold added.) *Rauch v. Noble*, 169 Ohio St. 314, 316 (1959), quoting *Lynch v. Bd. of Edn. of City School Dist. of City of Lakewood,* 116 Ohio St. 361 (1927), syllabus.

In *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 246, 551 N.E.2d 1249, 1251-1252, this Court previously held that payment of a final judgment while purportedly under economic duress was involuntary only if the duress was the result of coercion by the other party.

It is time for this Court to define when a judgment is voluntarily (involuntarily) made—what constitutes coercion?

In the instant matter, the payment was made under duress, and, equally important, the Appellants took all measures that they could to seek to stay the collections on the judgment and to avoid the appeal from becoming moot.

Appellants should be afforded the opportunity to have their appeals heard on the merits, so long as they take action to avoid payment. That is, a payment should not be deemed voluntary wherein the Appellant has clearly demonstrated that he/she/it has not abandoned their appeal. Under such circumstances, the appeal should not be deemed to be moot.

STATEMENT OF THE CASE AND FACTS

On June 19, 2012, Plaintiffs filed their three-count Complaint against Martha Avny, Anthony DeAngelis, Project Light, Inc., Project Lighting, LLC, Prospetto Light, LLC, Project Light, LLC, and Jane DOES 1 through 10. On August 27, 2012, Plaintiffs sought and were granted leave to file their First Amended Complaint, *instanter* to include claims against New-Party Defendant Design Light, Inc. The matter was quite contentious. A jury trial was commenced on February 24, 2014 in the instant matter.

At the time of trial, the parties who remained in this lawsuit were as follows:

Plaintiffs:

1. Mitchell Spero, Trustee of the Manny and Sydelle Spero Dynasty Trust,

2. Sydelle Spero, Trustee of the Manny Spero Trust FBO Mitchell Spero, and

3. Sydelle Spero, Trustee of the Manny Spero Trust.

Defendants:

1. Martha Avny,
2. Sam Avny,
3. Project Light, LLC,
4. Project Light, Inc.,
5. Design Light, Inc.,
6. Project Lighting, LLC,
7. Prospetto Light, LLC,
8. Prospetto Lighting, LLC, and
9. Jane Does 1 through 10.

Cross-Claimant Plaintiff:

1. Anthony DeAngelis

Cross-Claimant Defendants

1. Sam Avny,
2. Martha Avny,
3. Project Light, LLC,
4. Project Light, Inc.,
5. Design Light, Inc.,
6. Prospetto Lighting, LLC, and

7. Prospetto Light, LLC.

Prior to trial, on September 9, 2013, DeAngelis filed his motion seeking summary judgment against Appellants on his cross-claims against them. Just 14 days later, the Appellants opposed said motion, arguing that the amounts claimed to be owed were not supported by the evidentiary materials.

A jury trial was commenced on February 24, 2014 in the instant matter. Although Defendants 6 through 9 above remained parties during the time of the trial, and although many of these Defendants were mentioned and referenced in testimony and other evidence, and although some of these Defendants were referenced by this Court in the instructions to the jury (referred to as the LLC companies), Plaintiffs and Cross-claimant did not pursue verdicts against them. *In camera,* the Plaintiffs indicated their intention not to pursue a judgment against Defendants 6 through 9. After trial, Plaintiffs and Cross-claimant Plaintiff (as to Cross-Claimant Defendants 3, 5, and 6) filed their motion to dismiss all claims against the LLC company Defendants.

Following trial, the trial judge gave initial charges to the jury and then after the closing arguments of the parties, continued with such charges, then reading the verdict forms to the jury. During the initial charge, the trial judge charged the jury that punitive damages are to be awarded individually:

> If you find that the plaintiffs and cross-claimant proved each part of its claims by a preponderance of the evidence against some or all of the defendants, then your verdict must be for the plaintiffs and the cross-claimant against that defendant or those defendants whose conduct caused the plaintiffs' and cross-claimant's damage.
>
> You must then decide the amount of damages caused by the conduct of that defendant of those defendants. Even if you find that the plaintiffs and the cross-claimant proved each part of its claim by a preponderance of the evidence against one or some of the defendants, if you find that the plaintiffs and cross-claimant failed to prove each part of its claim by a

preponderance of the evidence against any other defendant, then your verdict must be for that defendant or those defendants.

Thereafter, the trial judge read certain verdict forms to the jury. Later, after already having read these proposed verdict forms, the trial judge decided that they were all wrong. The trial judge then read new forms to the jurors.

Ultimately, the jury returned its "verdicts" in favor of the Plaintiffs and DeAngelis, decided how much punitive damages to award ($2,000,000.00 total), but did NOT award such against any of the Defendants. No one asked them to do so.

That is, the jury awarded a large judgment against the Defendants/Appellants—but did not specify which of the Defendants owed said judgment, or even to which Plaintiffs/Appellees said judgment was owed. Despite extensive briefing on the issue, as well as a Motion JNOV, the trial court journalized its own judgment determining that all of the Defendants owed the judgment and that the entire judgment was owed to all of the Plaintiffs. The gist of the briefing and the JNOV Motion (before the trial court) was that the trial court should journalize the *jury's* verdict—not its own rendition of the verdict as it did in the October 29, 2014 judgment entry. The jury did not decide who specifically owed the judgment. And, the jury did not specifically decide to whom the judgment was owed. The trial judge should not have then done so. In essence, the trial judge altered the jury's verdict. That is, she entered her own judgment not withstanding the verdict—without any motion for same from the Plaintiffs.

The trial court never decided Appellants' JNOV Motion. The court of appeals never reached the merits of the appeal, instead, it dismissed the appeal once the Appellees were able to obtain payment through a bank attachment. It is this dismissal that is now on appeal before this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: A judgment is not paid voluntarily wherein payment is made via a bank garnishment where the appellant has sought a stay of that judgment.

What is a voluntary payment? Courts of appeals have, nearly unanimously, decided that a judgment is voluntarily satisfied where payment on that judgment was made due to valid, legal collections efforts. That is, a judgment is deemed to be voluntarily made even where the judgment was not actually "voluntarily" made—as in the instance of a wage or bank garnishment.

As set forth above, this Court has previously held that a judgment is involuntarily made where there is coercion. This Court did not go on to define "coercion."

In the past, the Ninth Appellate District (and many others districts) has defined a payment as being involuntarily made wherein the payment was made after the appellant has sought to obtain a stay of the collection of said judgment.

> "In decisions after *Blodgett*, our sister courts have consistently determined that parties acted voluntarily in satisfying a judgment where the party **fails to seek a stay** prior to the satisfaction of the judgment. See *Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710 (relying on *Blodgett* and holding that "satisfaction of a judgment renders an appeal moot where an appellant may preserve her appeal rights **by seeking a stay** of execution pending appeal"); *Slovak v. Univ. Off-Campus Housing* (May 19, 2000), 4th Dist. No. 99CA50 (relying upon Blodgett and finding that the appellant could have preserved her appeal rights **by seeking a stay** of execution pending appeal); *Hagood v. Gail* (1995), 105 Ohio App.3d 780, 790-91 (Eleventh District Court of Appeals' decision discussing and relying on Blodgett and finding that property owner's **failure to seek a valid stay order before fully satisfying judgment** rendered the appeal of a judgment ordering sale of land moot); Civ.R. 62(B).
>
> "Although the Tenth District has not expressly overruled its decision in *Favret,* the Tenth District no longer follows this decision. In *Bank One Trust Co., N.A., v. Scherer*, 10th q Dist. No. 06AP-70, 06AP-71, 2006-Ohio-5097, the Tenth District Court of Appeals held that a satisfaction of a judgment is voluntary **where a party could have moved for a stay** of execution of judgment but did not. The court further explained that it had relied on reasoning similar to the reasoning of the Fourth District Court of Appeals in *Atlantic Veneer Corp.*, "deeming a satisfaction of judgment voluntary, **where a party could have moved for a *stay of execution of judgment, but failed to do so.*"** *Id. at ¶11, citing* Grove

City v. Clark, 10th Dist. No. 01AP-1369, 2002-Ohio-4549, at ¶16; *Harbourtown Properties, Inc. v. Citizens Fed. Bank* (Nov. 10, 1997), 10th Dist. No. 97APE03-328.

"We find that the facts before us do not establish that Appellee paid the remaining portion of Appellant's judgment as a result of economic duress. Moreover, **Appellee could have moved for a stay of execution of judgment but did not**. Accordingly, Appellee's payment concluded the matter in its entirety and Appellee's motion should have been overruled because the issues were rendered moot. (Bold added.)

Communicare Health Services Inc. v. Murvine, 2007-Ohio-4651, 23557

Other courts have more liberally interpreted this Court's *Blodgett* test.

"One can easily presume several reasons why a defendant may prefer to pay a judgment rather than seek a stay or await execution. Commercial interest might be cheaper than legal interest. A judgment lien filed in a county attaches to all real property in that county and makes all of it unmarketable, or at least not mortgageable. In these days of the credit crunch, a defendant may prefer to pay a judgment rather than have to answer 'yes' to the standard credit and employment application form question: Do you have outstanding judgments against you? * * *

"* * *

"To be sure, payment of a judgment may constitute proof of mootness or abandonment of the appeal and may be grounds for a motion to dismiss. The motion to dismiss in this case, however, is based on the ground that payment alone results in an automatic dismissal as a matter of law. We hold that it does not, without other proof that payment constitutes a voluntary abandonment, or that payment makes the issue moot."

Fed. Land Bank of Louisville v. Wilcox (1991), 74 Ohio App.3d 474, 477-478, 599 N.E.2d 348, 349-350.

As to the instant matter, judgment was rendered on October 29, 2014. Appellants sought a stay on:

1. October 31, 2014,
2. November 6, 2014, and
3. November 12, 2014:

from the Court of Appeals and the Court of Common Pleas.

The trial court initially set the bond at $2.5 million. Thereafter, the court of appeals lowered said bond to $2,000,000.00. Appellants did not post a bond, lacking the ability to do so, and to run their businesses, concurrently.

Thereafter, after numerous bank garnishments, money was taken from the Appellants. The Appellees then filed a satisfaction of the judgment.

In its numerous prior decisions, including those cited by that Court in its decision dismissing the appeal here, the Ninth District Court of Appeals did not indicate that a party must obtain said stay in order to deem any payment involuntary. That Court clearly, unequivocally, and consistently, has held that any payment on a judgment is not deemed voluntary so long as the Appellants have *sought* a stay of the judgment.

Here, the Appellants repeatedly sought a stay of execution on the judgment. The bank garnishment of Appellants' funds was not a voluntary payment of the judgment.

Now that the Ninth District actually mandates that a party obtain the stay by posting a bond, this issue is ripe for adjudication. That is, this Court should clarify what it intended in its decision in *Blodgett*, when this Court held that payment of a final judgment while purportedly under economic duress was involuntary only if the duress was the result of coercion by the other party.

Many courts across this state have tried their hand at explaining *Blodgett*.

> "[A] satisfaction of judgment renders an appeal from that judgment moot. `Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, and fraud has not intervened, and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal[.]'" (Citations omitted.) *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 245. This Court has recently determined that the satisfaction of a judgment upon garnishment of funds **may be considered a voluntary payment** where the defendant has failed to timely

> avail itself of the legal remedy of a stay of execution pending appeal. See *LaFarciola v. Elbert* (Dec. 8, 1999), Lorain App. No. 98CA007134, unreported. (Bold added.)
>
> In the instant case, satisfaction of the judgment occurred prior to defendant's request for a stay of execution. Consequently, the trial court's issue of the stay of execution was not valid. See *Hagood v. Gail* (1995), 105 Ohio App.3d 780,790-791.
>
> Consequently, the appeal to this court has been rendered moot by the satisfaction of the judgment and this Court must dismiss this appeal.
>
> *Spencer v. Kiowa Developing Co., Inc.*, C.A. Nos. 19524, 19532, Court of Appeals, Ninth District, Summit County, January 5, 2000.

In the instant matter, the Ninth District decided that this appeal had become moot because the Appellants had failed to post a bond. Such decision is in conflict with the Ninth District's earlier pronouncements that payment is not voluntary where the appellant seeks a stay.

As more fully set forth herein, the Appellants complied with the requirements previously established by the court appeals. The Appellants sought a stay—on more than one occasion. Such has sufficed in the past.

Now, the court of appeals is stating that unless a bond is posted, any payment—through garnishment of a bank account is deemed to be voluntary. This is a new requirement set by the court of appeals, and not mandated by this Court's decision in *Blodgett*. The Appellants were unable to bond the judgment. As such, they could not protect themselves from payment of same. This is not tantamount to a voluntary payment.

Appellants—in fact, all litigants, should know when they run the risk of an appeal becoming moot. This Court should define what it meant in *Blodgett*. For the foregoing reasons, this Court should accept jurisdiction and determine that a judgment is not voluntarily made wherein an appellant has sought a stay of collections on that judgment, but not obtained said stay.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and substantial constitutional questions. The Appellant hereby requests that this Court grant jurisdiction and allow this case so that these important issues presented in this case will be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent, via Regular United States Mail, postage pre-paid on June 2, 2015:

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STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HORRIGAN
2015 APR 2 AM 10: 14
SUMMIT COUNTY
CLERK OF COURTS

MITCHELL SPERO, TRUSTEE, ET AL.

Appellees

v.

MARTHA AVNY, ET AL.

Appellants

C.A. No. 27569

JOURNAL ENTRY

Appellees have moved to dismiss this appeal as moot because the judgment has now been satisfied. Appellants have responded in opposition, arguing that the satisfaction was involuntary because the money was taken by garnishment and they sought a stay.

As a general rule, courts will not resolve issues that are moot. *Miner v. Witt*, 82 Ohio St. 237 (1910), syllabus. "It is a well-established principle of law that a satisfaction of judgment renders an appeal from that judgment moot. 'Where the court rendering judgment has jurisdiction of the subject-matter of the action and of the parties, * * * and the judgment is voluntarily paid and satisfied, such payment puts an end to the controversy, and takes away from the defendant the right to appeal[.]'" (Citations omitted.) *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 245 (1990).

A judgment is voluntarily satisfied when the appellant neglects to obtain a stay of that judgment pending appeal. *See Wiest v. Wiegele,* 170 Ohio App.3d 700, 2006–Ohio–5348. Furthermore, "[s]atisfaction of judgment upon garnishment of funds may be considered a voluntary payment * * *. *Spencer v. Kiowa Developing Co., Inc.* 9th Dist. Summit Nos. 19524, 19532, 2000 WL 15079 (Jan. 5, 2000).

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Here, appellants sought and were granted a stay conditioned upon the posting of a supersedeas bond. Appellants failed to post the bond, however, and their bank account was garnished. Because appellants neglected to obtain the stay, the judgment is considered to have been voluntarily satisfied, and the matter is now moot. The motion to dismiss the appeal is granted.

The attempted appeal is dismissed. Costs are taxed to appellant.

The clerk of courts is ordered to mail a notice of entry of this judgment to the parties and make a notation of the mailing in the docket, pursuant to App.R. 30 and to provide a certified copy of the order to the clerk of the trial court.

Judge

Concur:
Whitmore, J.
Moore, J.

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