

IN THE SUPREME COURT OF OHIO

MITCHELL SPERO, TRUSTEE OF THE	)	CASE NO. 2015-0909
MANNY AND SYDELLE SPERO	)	
DYNASTY TRUST, et al.	)	On Appeal from the Summit
	)	County Court of Appeals,
Appellees,	)	Ninth Appellate District
	)	
v.	)	
	)	Court of Appeals
	)	Case No. 27569
MARTHA AVNY, et al.	)	
	)	
Appellants.	)	

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JOINT MEMORANDUM OF APPELLEES  
IN RESPONSE TO MEMORANDUM OF APPELLANTS  
MARTHA AVNY, SAM AVNY, PROJECT LIGHT, INC.,  
PROJECT LIGHT, LLC AND DESIGN LIGHT, INC.  
IN SUPPORT OF JURISDICTION

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***EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR  
GREAT GENERAL INTEREST NOR DOES IT  
INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION***

After entry of a money judgment, a judgment creditor may commence collection efforts. Even if the judgment is appealed and a motion for stay of execution conditioned upon posting a supersedeas bond is granted, if the appellant fails to post the bond the judgment creditor may continue collection efforts. If, in the process of executing on the judgment, the judgment creditor successfully garnishes a bank account with sufficient funds to satisfy the judgment, a satisfaction of judgment would properly be filed. Once the judgment creditor files a satisfaction of judgment, the appeal is moot as a matter of law, at which point the appeal is properly dismissed by the court of appeals.

The above paragraph summarizes the essence of this case. It is not one of public or great general interest nor have appellants offered any argument in support of the assertion that it involves a substantial constitutional question. In asking this Court to exercise jurisdiction over this case, appellants misrepresent the law by suggesting that in this case “for the first time,” a court of appeals has added an additional requirement that a stay actually be obtained to characterize funds collected and applied towards satisfaction of a judgment as voluntarily paid.

In this case, appellants appealed a joint and several money judgment entered by the Summit County Court of Common Pleas. The Ninth District Court of Appeals granted appellants’ motion for a stay conditioned upon posting of a bond in the amount of the judgment on appeal. Appellants chose not to post the bond to obtain a stay and appellees, through their collection efforts, proceeded to garnish a bank account in the name of one of the judgment debtors. The bank account had sufficient funds to satisfy the judgment. Promptly after the garnished funds were paid out, appellees filed a satisfaction of judgment followed by a motion to

dismiss the appeal as moot. The court of appeals properly ruled that the appeal was moot and dismissed the appeal.

Without any legal authority remotely on point, appellants attempt to distinguish this case from a long line of cases by asserting that having obtained an order from a court granting a stay conditioned upon posting of a bond, they were free *not* to post the bond and to do nothing to stop appellees' collection efforts and that, as a consequence, the garnished funds which satisfied the judgment cannot be deemed voluntarily paid. Further, appellants misrepresent to this Court, without any support in the record, that they "took all measures that they could to seek to stay the collections on the judgment and to avoid the appeal from becoming moot." As a matter of fact, appellants failed to take the most important measure they could have, and should have, taken to stay collection, to wit: posting the bond set by the court. It is now clear that appellants had the means to post the bond in cash and chose not to do so. Rather they voluntarily left their funds exposed to proper collection efforts.

In *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 245, 551 N.E.2d 1249 (1990), this Court, following the well-established principle of law, held that a satisfaction of judgment renders an appeal from that judgment moot. As this Court explained:

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.

*Id.* at 245, quoting *Lynch v. Lakewood City School Dist. Bd. of Edn.*, 116 Ohio St. 361, 156 N.E. 188 (1927) paragraph three of the syllabus. The Ninth District Court of Appeals held in *Clark v. Baer*, 9th Dist. Summit No. 24223, 2009-Ohio-838, ¶5, quoting from *Blodgett*, that a satisfaction of judgment renders an appeal moot and went on to state that "[t]his is true even if the

satisfaction resulted from the prevailing party executing on the judgment. ‘[A] creditor is entitled to enforce its judgment and \* \* \* such action to enforce judgment does not render subsequent payment involuntary.’ ” (further citations omitted).

Consistent with the above, the Ninth District Court of Appeals later held in *Akron Dev. Fund I, Ltd. v. Advanced Coatings Int’l, Inc.*, 9th Dist. Summit No. 25375, 2011-Ohio-3277, ¶ 21, that “[o]nce the rights and obligations of the parties have been extinguished through satisfaction of the judgment, a judgment on appeal cannot have any practical effect upon the issues raised by the pleadings. It is well established ‘that a satisfaction of judgment renders an appeal from that judgment moot.’ ” *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, at ¶ 8, quoting *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 245, 551 N.E.2d 1249 (1990). The fact that the appellees obtained the funds to satisfy the judgment via a garnishment does not alter the conclusion that the appeal was, as a result, moot. *Spencer v. Kiowa Developing Co., Inc.*, 9th Dist. Summit Nos. 1524, 19532, 2000 Ohio App. LEXIS 2, \*3 (Jan. 5, 2000) (“[s]atisfaction of judgment upon garnishment of funds may be considered a voluntary payment.”); *see also LaFarciola v. Elbert*, 9th Dist. Lorain No. 98CA007134, 1999 Ohio App. LEXIS 5833 (Dec. 8, 1999).

Likewise, in *Francis David Corp. v. Mac Auto Mart, Inc.*, 8th Dist. Cuyahoga No. 93951, 2010-Ohio-1215, another court of appeals dismissed an appeal as moot because the underlying judgment was satisfied. In *Francis David*, the plaintiff filed an affidavit of garnishment and, as a result, one of the garnishees deposited the entire amount of judgment, including interest, with the court. The defendants requested a hearing on the garnishment and raised numerous issues, including the court’s alleged lack of jurisdiction. The plaintiff argued that the appeal was moot because the underlying judgment was satisfied. The court of appeals agreed and held that “[i]n

order to have avoided execution on the judgment, defendants *should have followed the procedures for obtaining a stay of execution and for obtaining a supersedeas bond.*” *Id.* at ¶ 11 (emphasis added). Further, the court held that a “pending garnishment does not render payment involuntary, because defendants were entitled to a stay \* \* \* upon giving adequate bond.” *Id.* at ¶ 12 (citations omitted).

In this case, appellants appealed the judgment; however, despite the court of appeals setting a bond amount equal to the amount of the judgment and providing more than adequate time to post the bond, appellants chose to sit idly back while the appellees exercised their rights to execute on the judgment. Appellants failed to obtain a stay of execution. The appellees successfully garnished a bank account with sufficient funds to satisfy the judgment. Accordingly and consistent with the clear case law, the appeal became moot and was properly dismissed.

Although appellants assert that this case involves a substantial constitutional question, they cite to no section of the Ohio Constitution. For that reason, appellees offer no response to this assertion.

#### **STATEMENT OF THE CASE AND FACTS**

This case arises from a business dispute between the owners of three once jointly owned Ohio limited liability companies engaged in the architectural lighting industry then located in Portage County. The companies: Project Lighting, LLC, Prospetto Light, LLC and Prospetto Lighting, LLC, were owned fifty percent by Mitchell Spero, Trustee of the Manny and Sydelle Spero Dynasty Trust and Sydelle Spero, Trustee of the Manny Spero Trust fbo Mitchell Spero and of the Manny Spero Trust (hereinafter collectively referred to as the “Spero Appellees”) and fifty percent by appellant Sam Avny. Due to a falling out, Avny orchestrated a secret exodus in September 2008 and took with him to a location in Summit County certain key employees

including financial controller and appellee Anthony DeAngelis. Avny proceeded to divert the bulk of the business of the jointly owned companies to his solely owned Ohio limited liability company known as Project Light, LLC.

The Spero Appellees filed their complaint in the Portage County Court of Common Pleas (Case No. 2008CV01749) on October 28, 2008 wherein they asserted claims for breach of fiduciary duty, conversion and for a judicial dissolution of the jointly owned companies. That case was later settled, which resulted in a December 17, 2010 Consent Judgment in the amount of \$1,000,000 being entered, jointly and severally, in favor of the Spero Appellees and against Sam Avny, Project Light, LLC, DeAngelis and the jointly owned companies. As part of the settlement which resulted in the Consent Judgment, Avny took sole ownership of the jointly owned companies. However, on the very day the Consent Judgment was entered, Sam Avny's wife Martha Avny formed a Florida corporation known as Project Light, Inc. In the days before the end of 2010, all assets, including cash, receivables, equipment and inventory, of Project Light, LLC were transferred to Project Light, Inc., all employees formerly of Project Light, LLC became employees of Project Light, Inc. operating out of the same location as before and all business opportunities and work in process were transferred as well.

Having learned of the above transfers through post-judgment discovery proceedings, as part of their efforts to collect the Consent Judgment, the Spero Appellees filed a fraudulent transfer/successor liability lawsuit in the Summit County Court of Common Pleas (Case No. CV-2012-06-3623) on June 12, 2012 against the Consent Judgment debtors (including appellee DeAngelis) as well as Martha Avny, Project Light, Inc. and another company she formed in December 2010 known as Design Light, Inc. and "Jane Does 1 through 10." As of the date of the filing of the Summit County lawsuit, in excess of \$750,000 remained uncollected on the

underlying Consent Judgment. Appellee DeAngelis filed a cross-claim against his co-defendants arising out of a contractual indemnification agreement he had with Sam Avny and Project Light, LLC, himself asserting claims sounding in fraudulent transfer and successor liability.

By April 2013 the Spero Appellees had managed, through their efforts, to collect all principal and interest due to them pursuant to the Consent Judgment. The Spero Appellees later settled their claims against appellee DeAngelis. As a result, the Spero Appellees claims during trial of the fraudulent transfer case dealt solely with whether punitive damages should be awarded based on appellants' fraudulent transfers and, if so, the amount to be awarded. Appellee DeAngelis proceeded with his claim for compensatory damages based on breach of the indemnification agreement as well as for punitive damages based on his fraudulent transfer claim.

At no time during trial did any of the appellants raise any objection to the jury instructions or jury verdict forms. As a result of the jury verdict, the Summit County Court of Common Pleas entered judgment on October 29, 2014 awarding punitive damages in favor of the Spero Appellees and against the Avnys, Project Light, LLC, Project Light, Inc. and Design Light, Inc., jointly and severally, in the amount of \$1,500,000 and in favor of DeAngelis, against the same parties jointly and severally, in the amount of \$500,000.<sup>1</sup>

Appellants filed several motions to stay in the court of appeals wherein they sought a "zero bond" based, in part, on the misrepresentation that appellees' collection efforts would cause them "ruin," that collection would "destroy their businesses" and result in the "loss of

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<sup>1</sup> Appellee DeAngelis was also awarded compensatory damages in the amount of \$253,954.56. That judgment was separately appealed and is pending in the Ninth District Court of Appeals as that court's Case No. CA-27272. In that case, appellants posted a bond in the amount set by the court thereby staying execution. That appeal is not relevant to the matter presently before this Court.

some 20 to 25 local jobs \* \* \*<sup>2</sup> On November 14, 2014, the court of appeals granted a stay conditioned upon posting a bond in the amount of \$2,000,000, which was a reduction from the bond amount set previously by the trial court. Appellants, however, voluntarily chose not to post a bond to stay the execution of the judgment. As stated above, appellees proceeded with collection efforts and were successful in garnishing sufficient funds in a bank account to satisfy the judgments in their favor.

Having collected sufficient funds to satisfy the October 29, 2014 judgment, appellees filed a joint satisfaction of judgment with the Summit County Court of Common Pleas. They then filed their motion to dismiss the appeal on the grounds that the appeal was rendered moot as a result of the satisfaction of the judgment. The court of appeals agreed and dismissed the appeal. Appellants' motion for reconsideration was denied.

**ARGUMENT IN RESPONSE TO APPELLANTS'  
ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

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

Appellants begin their argument by questioning the meaning of "voluntary payment." As shown above, that issue has been addressed and answered by Ohio's courts. A judgment debtor need not approach the creditor and offer payment for a judgment to be considered voluntarily paid. Instead, as a matter of well-settled law, a payment is deemed voluntary for purposes of satisfying a judgment and mooting an appeal when the funds are garnished from the judgment debtor's bank account.

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<sup>2</sup> Appellants' companies operating out of their location in Stow, Ohio continue in business notwithstanding appellees' collection of the amount due pursuant to the money judgment.

Appellee DeAngelis filed a cross-claim against his co-defendants arising out of a contractual indemnification agreement (related to the \$1,000,000.00 Consent Judgment) he had with Sam Avny. Notwithstanding a discussion of the meaning of “coercion” and “duress” in the context of payment and satisfaction of a judgment in *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 551 N.E.2d 1249 (1990), appellants assert that this Court should once again address the issue of coercion. In presenting this argument, appellants ignore the fact that under no definition of the word “coerce” or “duress” can they prevail. The Avnys and their entities, while on the one hand misrepresenting to the court of appeals their and their companies’ financial condition, are now suggesting that they were under duress and thereby coerced into making payment. The court of appeals rejected this argument in dismissing the appeal and later in denying appellants’ request for reconsideration.

In determining whether a party's satisfaction of judgment was voluntary, this Court in *Blodgett* looked to the factor of economic duress and explained that

[a] person who claims to have been a victim of economic duress must show that he or she was subjected to “\* \* \* a wrongful or unlawful act or threat, \* \* \*” and that it “\* \* \* deprive[d] the victim of his unfettered will.” 13 Williston on Contracts (3 Ed. 1970) 704, Section 1617. Further, “\* \* \* [m]erely taking advantage of another's financial difficulty is not duress. Rather the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion.” *Id.* at 708.

*Blodgett* at 246. Moreover, a creditor is entitled to enforce its judgment and such action to enforce judgment does not render subsequent payment involuntary. See *Poppa Builders, Inc. v. Campbell*, 118 Ohio App.3d 251, 254, 692 N.E.2d 647 (2nd Dist.1997), quoting *Hagood v. Gail*, 105 Ohio App.3d 780, 789-90, 664 N.E.2d 1373 (11th Dist.1995) (“the wording of the opinion [in *Blodgett*] supports the inference that a finding of involuntariness cannot be based upon the initiation of enforcement proceedings by the nonappealing party, *i.e.*, as used in this

context, duress cannot be caused by the enforcement of a legal right"). *Accord, Communicare Health Serv., Inc. v. Murvine*, 9th Dist. Summit No. 23557, 2007-Ohio-4651 and *Premier Bank & Trust n/k/a First Merit Bank, N.A. v. A-2-Z Services, Inc.*, 10th Dist. Franklin No. 02AP-226, 2002-Ohio-4897.

Appellants argue, with no supporting case law, that simply by moving for a stay and obtaining a court order granting a stay conditioned upon posting a supersedeas bond, they need do nothing else and they need post no bond to avoid the universal rationale of Ohio's courts. Instead, appellants appear to argue illogically that the posting of a bond, which can result in a stay of execution, is an option and that although continued execution and eventual collection of the judgment amount may result in satisfaction of the judgment, the appeal is somehow not moot as a result.

Appellants correctly assert that the funds to satisfy the judgment were obtained by appellees after numerous bank garnishments and after appellants were afforded an opportunity to post a bond so as to stay execution. Had appellants posted a bond, appellees could not have obtained the payment and the appeal would have remained pending. Appellants point out also that "in numerous prior decisions \* \* \* the Ninth District Court of Appeals did not indicate that a party must obtain said stay in order to deem any payment involuntary." Appellees would note that no Ohio court of appeals to their knowledge has ever stated in an order granting a motion to stay that a bond must be posted in order to avoid any subsequent collection of funds sufficient to satisfy the judgment from being deemed voluntary and mooting an appeal.

Again, had appellants posted the bond they had the means to post such that execution on the judgment was stayed, appellees would have been unable to execute on the judgment and no payment would have been made – and this appeal would not have been moot and it would not

have been dismissed. Although appellants would prefer otherwise, they are expected to know the law and it is not incumbent on a court of appeals to inform them, in a judgment entry, of the implications of their future conduct.

In this case, appellants chose not to post a bond and instead to sit back while appellees exercised their rights to execute on the judgment. The appellees successfully garnished funds from an appellants' bank account and filed a satisfaction of judgment. Accordingly, their appeal became moot and was properly dismissed by the court of appeals.

### **CONCLUSION**

For the reasons discussed above, this case does not involve a matter of public or great general interest or any substantial constitutional question. The Spero Appellees and appellee Anthony DeAngelis request that this Court not accept jurisdiction in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Joint Memorandum of Appellees was sent via ordinary U.S. Mail this 29th day of June, 2015 to: Thomas C. Loepp, Esq., Attorney for Defendants-Appellants, Thomas C. Loepp, Law Offices, Co., LPA, 1865 Arndale Road, Suite B, Stow, Ohio 44224; and Mitchell A. Stanley, Esq., 14545 Shire Court, Russell, Ohio 44072.

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