

STATE OF MICHIGAN
COURT OF APPEALS

EASTERN SAVINGS BANK,

Plaintiff-Appellee/Cross-Appellant,

v

CITIZENS BANK, FRANK J. DISANTO,
FRANK J. DISANTO REVOCABLE LIVING
TRUST DATED SEPTEMBER 28, 1995, FRANK
J. DISANTO, TRUSTEE, and LINDA L.
KENNEY, a/k/a LINDA L. DISANTO,

Defendants-Appellees,

and

SASIKALA VEMULAPALLI,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED
November 4, 2003

No. 240779
Lenawee Circuit Court
LC No. 01-000364-CH

Before: Fitzgerald, P.J., and Griffin and Saad, JJ.

PER CURIAM.

In this action to determine the issue of lien priority on certain real property located in Cambridge Township in Lenawee County, defendant-appellant Sasikala Vemulapalli appeals as of right the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff Eastern Savings Bank (Eastern) and denying defendant's counter-motion for summary disposition. Plaintiff cross appeals. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

I

Plaintiff Eastern initiated the present action challenging the validity and priority of a lien recorded by defendant Citizens Bank on real property located in Cambridge Township in Lenawee County.

On September 28, 1995, the Frank J. DiSanto Revocable Living Trust (the trust) was established. Frank J. DiSanto was identified as the settlor/trustee and beneficiary. A quit claim

deed from Frank J. DiSanto and Linda DiSanto, as husband and wife, dated September 28, 1995, and recorded in Lenawee County, conveyed real property in Cambridge Township (Cambridge property) to the trust.

Through a mortgage dated March 15, 2000, and issued to “Frank J. DiSanto, Trustee of the Frank J. DiSanto Revocable Living Trust,” plaintiff claimed a mortgage lien interest in the Cambridge property. When the mortgage was recorded on March 29, 2000, in Lenawee County, the trust remained the record owner of the property. At the closing of the mortgage, plaintiff dispersed approximately \$475,000 in mortgage proceeds to Frank J. DiSanto in his capacity as trustee of the revocable trust.

In an unrelated matter, on January 28, 2000, defendant Citizens Bank obtained a consent judgment in Genesee Circuit Court in the amount of \$1,570,161.56 against Frank J. DiSanto, *individually*, in a civil action stemming from DiSanto’s failure to pay obligations owed under certain promissory notes.¹ On March 8, 2000, Citizens Bank, the judgment creditor in that action, secured a writ of execution against “the property of Frank J. DiSanto.” Citizens Bank then prepared a notice of levy pertaining to the Cambridge property, dated March 20, 2000, and captioned “Citizens Bank, Plaintiff v Frank DiSanto, Defendant,” which was subsequently recorded on March 24, 2000, in Lenawee County.

In August 2000, Citizens Bank filed a motion in its Genesee circuit court suit, *Citizens Bank v Frank J. DiSanto, an Individual, supra*, requesting in pertinent part that the circuit court set aside the conveyance of the Cambridge property from Frank J. DiSanto to the trust as a fraudulent conveyance. Plaintiff alleges that it was never notified of these proceedings, even though it had a recorded mortgage interest. The circuit court granted the motion to avoid conveyance of property to the trust and, on August 21, 2000, entered an order setting aside the conveyance and authorizing a quit claim deed from a court-appointed receiver to Frank J. DiSanto, individually. After this quit claim deed was recorded in October 2000, Citizens Bank conducted an execution sale and a sheriff’s certificate was issued to Citizens Bank, as the highest bidder, on December 1, 2000. The present appellant, defendant Vemulapalli, thereafter purchased the sheriff’s certificate of execution sale for the sum of \$1 million based on an assignment agreement with Citizens Bank, and the assignment agreement was recorded in Lenawee County.

In March 2001, plaintiff instituted the present action in Lenawee circuit court challenging the validity and priority of the levy recorded on March 24, 2000, by Citizens Bank on the Cambridge property. In its motion for summary disposition brought pursuant to MCR 2.116(C)(10), plaintiff sought a determination that the levy recorded by Citizens Bank was either void or subordinate to plaintiff’s mortgage interest. Plaintiff argued that because the Cambridge property was owned by the trust, not Frank J. DiSanto individually, Citizens Bank’s levy was void because it was not properly executed against the “realty of the judgment debtor” (Frank J.

¹ *Citizens Bank v Frank J. DiSanto, an Individual*, Genesee Circuit Court (Docket No. 99-66137-CK).

DiSanto in his individual capacity) within the meaning of MCL 600.6004.² Rather, the levy was executed against the trust, a separate and distinct entity. Alternatively, plaintiff maintained that even if the levy was valid, it was not properly recorded in the chain of title of the property's owner, the trust, but rather against DiSanto in his individual capacity. Thus, because plaintiff recorded its mortgage first against the owner of record (the trust), it was a bona fide purchaser with priority under MCL 565.29, Michigan's race-notice statute.³

Citing MCL 600.6051,⁴ a statute regarding the validity of levy by execution, and the race-notice statute, *supra*, defendant Vemulapalli argued in her counter-motion for summary disposition that because plaintiff recorded its mortgage after the notice of levy, the notice of levy had priority where Citizens Bank had neither actual nor constructive notice of plaintiff's mortgage. Defendant further contended that when a grantor in a conveyance reserves to himself an unqualified power of revocation, as in the trust in the instant case, he is deemed the owner of the property being conveyed as far as it affects the rights of creditors and purchasers. See MCL

² MCL 600.6004 provides:

Executions against realty shall command the officer to whom they are directed to make execution against the realty of the judgment debtor only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered.

³ MCL 565.29 provides:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof.

⁴ MCL 600.6051(1) states in pertinent part:

Against bona fide conveyances made subsequent to such levy, until a notice thereof, containing the names of the parties to the execution, a description of the premises levied upon, and the date of such levy, is filed by the officer making the levy in the office of the register of deeds of the county where the premises are situated. Such levy is a lien thereon from the time when notice is deposited; and the lien thus obtained is, from the filing of such notice, valid against all prior grantees and mortgages of whose claims the party interested has neither actual nor constructive notice.

556.128;⁵ *In re Hertsberg Inter Vivos Trust*, 457 Mich 430, 433-434; 378 NW2d 289 (1998); *In re Johannes Trust*, 191 Mich App 514; 479 NW2d 25 (1991). Consequently, defendant Vemulapalli maintained that Frank J. DiSanto's creditors could reach assets purportedly held in trust, including the Cambridge property, under such circumstances.

Following oral argument on the parties' summary disposition motions, the circuit court held that the mortgage lien and all rights and interests pertaining to the mortgage given by plaintiff were superior and senior to any rights arising from the judgment levy made by Citizens Bank and assigned to defendant Vemulapalli, because Citizens Bank did not record the notice of levy under the name of the trust, but rather against Frank J. DiSanto, individually.

Defendant Vemulapalli now appeals the trial court's order granting summary disposition to plaintiff and plaintiff cross appeals.

II

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 120. In evaluating such a motion, the trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Here, plaintiff in its cross appeal contends that Citizens Bank's levy was ineffective and void because it arose out of a judgment against Frank J. DiSanto, individually, who was not the owner of record of the subject property. Plaintiff maintains that as is made clear by the statutory phrases "realty of the judgment debtor" and "personal property of the judgment debtor" set forth in MCL 600.6004, *supra*, execution may not proceed unless and until the target of that execution is the property of the judgment debtor. Thus, by implication, execution cannot proceed beyond the property of the judgment debtor, here Frank J. DiSanto in his individual capacity. Therefore, plaintiff argues that the judgment levy was ineffective regarding the subject property, which at that time was held by the Frank J. DiSanto Revocable Living Trust.

⁵ MCL 556.128 provides in pertinent part:

When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned. If the grantor dies without exercising such power, the executor or other legal representative of the grantor may reach the estate conveyed on behalf of any creditor whose claim has been filed and allowed in the grantor's probate estate but not paid because the assets of the probate estate are insufficient to satisfy his claim.

We agree with plaintiff that Citizens Bank's levy in the instant case was indeed ineffective and void. However, we do not find the parties' cited authorities, statutory and otherwise, to be determinative of the precise issue at hand. Such authorities do not address or answer the specific question posed herein – whether a judgment rendered only against a trustee (Frank J. DiSanto) in his individual and not in his official capacity can be executed by levy against real property, which is part of the trust estate. Instead, in this regard, the case of *Bankers' Trust Co of Muskegon v Forsyth*, 266 Mich 517; 254 NW 190 (1934), provides persuasive support for our conclusion that Citizens' levy arising from a judgment against Frank J. DiSanto, an individual, was never effective against the Cambridge property held in trust.

In *Bankers' Trust*, the plaintiff Bankers' Trust Company of Muskegon initiated an action to secure an accounting in and a termination of a trust incident to which plaintiff was serving as trustee. The defendants had unsatisfied judgments rendered against the plaintiff as trustee of the trust estate. Each of the defendants claimed that the trust company was "personally and individually liable" for payment of these judgments. The plaintiff disavowed such liability, contending that payment could be enforced against the body of the trust estate only. In the circuit court, the judgments were held in pertinent part to be personal or individual liabilities of the trustee, with the right on the part of the trustee to reimburse itself from the body of the trust estate for whatever it paid incident to satisfying the adjudicated liability. The plaintiff appealed from that portion of the judgment rendering it primarily liable for the payment of the judgments to the defendants. On appeal, the Supreme Court reversed the decree of the trial court, stating:

The major matter in controversy is whether plaintiff is personally liable for the payment of the judgments held by defendants Mueller and Teifer, respectively. . . . In each of these cases the pleadings, the process, the proofs taken in support of the claims of the respective plaintiffs and the final judgments all denominated the defendant as Bankers' Trust Company of Muskegon, trustee. In so far as defendants Mueller and Teifer are concerned, it might be sufficient to simply note that the adjudicated liability in each instance was liability of the trust company as trustee. We are not here concerned with whether the controversy which resulted in these respective adjudications was such that the trust company might have been held personally or individually liable. Such a claim was not asserted and of course such a liability was not adjudicated. . . . [T]he instant case . . . does not involve the construction of a contract or the question of possible liability thereon in one capacity or another. *Instead, we here have two claims each of which has been prosecuted to final judgment as being a liability of the plaintiff herein in its trust capacity only. Having been so adjudicated, the judgments entered in the respective suits cannot be changed in this equitable proceeding so as to render the trust company directly or individually liable thereon.*

"A suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by or against him as an individual, although the same identical issue is involved, and the decision in the first action was upon the merits." *Fisher v Johnson*, 90 Misc 46; 152 NYS 944, 947 [1915]. See, also, *Troxell v Delaware, L & W R Co*, 227 US 434; 33 S Ct 274; 57 L Ed

586 [1913]; *Gibson v Ledwitch*, 84 Kan 505; 114 P 851; 35 LRA (NS) 196 [1911].

The rights of respective parties having been previously so adjudicated, it must be held in the instant case that the Bankers' Trust Company is not individually liable on the Mueller or the Teifer judgments, but instead that it is liable only in its capacity as trustee. Its duty and obligation, as trustee, is to satisfy each of these adjudicated liabilities out of the assets of the trust estate. [*Id.* at 519-521 (emphasis added).]

Applying the rationale of *Bankers' Trust* to the case at hand, we conclude that Citizens Bank's levy executed against the Cambridge property owned by the trust was ineffective and void. The judgment which generated the levy of execution was taken in an action brought against Frank J. DiSanto, *an individual*. Moreover, the notice of levy was made in the context of that lawsuit brought against Mr. DiSanto, individually. The scope of the notice of levy, and the concomitant scope of execution, was therefore limited by the judgment to the property of Frank J. DiSanto in his individual capacity and could not be expanded to include the Cambridge property owned by the trust estate of which the judgment debtor, DiSanto, is the trustee. Consequently, because the judgment obtained by Citizens was against Frank J. DiSanto, individually, while title to the real property levied on by Citizens was held by the Frank J. DiSanto Revocable Living Trust, Citizens' levy was therefore ineffective regarding the Cambridge property.

Conversely, because it is undisputed that plaintiff properly recorded its mortgage lien interest in the Cambridge property under the name of the trust, we conclude that the trial court did not err in granting plaintiff's summary disposition motion and we affirm the trial court's order, though on different grounds than those articulated by the trial court.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard Allen Griffin
/s/ Henry William Saad