IN THE SUPREME COURT OF THE STATE OF DELAWARE

Sharon Knott	*	
	*	
Defendant Below,	*	
Appellant,	*	No. 453, 2013
vs.	*	
	*	
LVNV Funding LLC	*	
	*	
Plaintiff Below,	*	
Appellee.	*	

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PLAINTIFF BELOW/APPELLEE'S CORRECTED ANSWERING BRIEF

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DATED: November 20, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

On October 23, 2002, Plaintiff, Sears, Roebuck and Company filed suit against Defendant, Sharon Knott, after she defaulted on her Sears' credit card. Defendant was personally served on December 9, 2002 and did not file an Answer to the Complaint. On February 4, 2003, a default judgment for $3,360.30 was filed in the Court of Common Pleas in and for New Castle County. On January 9, 2004, the Judgment was assigned to Sherman Acquisitions LP and the Judgment was transferred to New Castle County Superior Court on April 5, 2004.

On June 19, 2012, a Substitution of Counsel was filed replacing Patrick Scanlon for Neal Levitsky as the attorney of record. On September 19, 2012, Patrick Scanlon, as attorney for the Plaintiff, filed a Motion to Allow Execution on the Judgment scheduled to be heard on October 12, 2012. The Defendant filed her Answer to the Motion on October 5, 2012 and Plaintiff filed a response to Defendant's Answer on October 10, 2012. Commissioner Mark Stephen Vavala heard oral arguments on October 12, 2012 and reserved decision. On December 24, 2012, Commissioner Vavala issued his Report and Recommendation that Plaintiff's Motion should be granted. The Defendant filed her Appeal of the Commissioner's Report on January 7, 2013, to which the Plaintiff filed an Answer on January 16, 2013 and the Defendant filed a Reply to Plaintiff's Answer on

January 24, 2013. Judge Charles E. Butler issued his ruling granting Plaintiff's Motion to Allow Execution on the Judgment on April 23, 2013 and on April 29, 2013, the Plaintiff executed upon the Judgment by filing a Wage Attachment.

On April 30, 2013, the Defendant filed a Motion for Reargument to which the Plaintiff filed a Response on May 8, 2013. The Defendant's Motion for Reargument was denied on July 31, 2013 and on August 29, 2013, the Defendant appealed Judge Butler's decision to the Delaware Supreme Court. The Defendant filed her Opening Brief on October 14, 2013 to which the Plaintiff responded by filing a Motion to Affirm on October 21, 2013. Plaintiff's Motion to Affirm was denied on October 23, 2013. This is Plaintiff Below/Appellee's Answering Brief.

SUMMARY OF ARGUMENT

1. Plaintiff Below/Appellee denies that the Superior Court erred in allowing execution on the judgment more than five years after obtaining judgment, rather Plaintiff takes the position that there is no statute of limitations on the enforcement of judgments in the State of Delaware but rather the purpose of 10 Del. C. §5072 and its companion §5073 is to extend from a year and a day to five years the time within a party could seek to execute on a judgment without seeking approval of the Court.

COUNTERSTATEMENT OF FACTS

Plaintiff Sears, Roebuck and Company filed suit against Defendant Sharon Knott on October 23, 2002 in the New Castle County Court of Common Pleas for a defaulted credit card. (B-1) The defendant was personally served on December 9, 2002 and default judgment was entered on February 4, 2003 for $3,360.30 when no answer was filed. (B-1) On January 9, 2004 the judgment was assigned to Sherman Acquisitions LP and thereafter the judgment was transferred to the New Castle County Superior Court on April 5, 2004. (B-1)

The Defendant did not make any payments on the judgment and no attempt to execute upon the judgment was made until September 19, 2012 when the Plaintiff filed a Motion to Allow Execution on the Judgment. (B-4) On September 18, 2012, Plaintiff sent notice of said Motion to Defendant which was to be heard by the Court on October 12, 2012. (B-6).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DECIDED THAT 10 DEL. C. §5072 IS NOT A STATUTE OF LIMITATIONS PROHIBITING A JUDGMENT CREDITOR FROM EXECUTING UPON A JUDGMENT IF IT HAS NOT EXECUTED UPON THE JUDGMENT WITHIN THE FIRST FIVE YEARS.

a. QUESTION PRESENTED

Is 10 DEL. C. §5072 a statute of limitations on the enforcement of judgments?

b. SCOPE OF REVIEW

Whether 10 DEL. C. §5072 renders judgments unenforceable if the judgment has not been executed upon by the plaintiff within the first five years after the entry of judgment is a question of statutory interpretation that the Court reviews *de novo.* Dambro v. Meyer, 974 A.2d 121, 129 (Del. 2009). "This Court must determine 'whether the Superior Court erred as a matter of law in formulating or applying legal principles.' When deciding questions of statutory construction, this Court must 'ascertain and give effect to the intent of the legislature.'" Id.

c. MERITS OF ARGUMENT

At issue is whether Delaware Courts have been misinterpreting 10 Del. C.

§§ 5072 and 5073 for the last 156 years by allowing executions upon judgments after 5 years when there was no execution upon the judgment within the first 5 years after its entry. The Defendant argues that 10 Del. C. §5072 acts as a five year limitation on the ability of a judgment creditor to execute upon its judgment. Defendant's Opening Brief at 6. The Defendant's argument does not comport with the historical context of the statute as explained by Judge Woolley, the long running practice of the courts, the current case law or common sense.

The Delaware legislature passed 10 Del. C. §5072 on March 4, 1857. Victor B. Woolley, Practice in Civil Actions, § 956 (1906). Judge Woolley explains that prior to this statute, common law required judgments to be executed upon within a year and a day of entry of judgment. Id. at § 955. If there was no attempt to execute upon the judgment by a year and a day, the judgment holder was required to renew the judgment by *scire facias* before executing upon the judgment. Id. To avoid this extra step, the common practice prior to 1857 was for the Prothonotary to issue the fictitious writ of *vices comes* on money judgments. Id. Filing a *vices comes* allowed the plaintiff to execute upon the judgment at any time within the life of the judgment without resorting to filing a *scire facias*. Id. "The effect of this act was not to abolish the fiction of the *v.c.*, but rather to extend the right of execution and lessen the necessity of the *v.c.*" Woolley § 956.

The Defendant claims in her Opening Brief that it is clear from the statutory language that when passing 10 Del.C. §5072 it was the legislature's intent to promote "the societal goal of diligent prosecution of claims and executions on judgments." Defendant's Opening brief at 12. The Defendant does not cite any authority for her proposition and her interpretation ignores the fact that the statute increases the time a judgment creditor can execute upon a judgment without resorting to a writ of *fiery facias* from a year and a day to five years. Additionally, her theory that the statute was intended to promote diligent prosecution of judgments is contrary to Judge Woolley's explanation. "With the increase and widening of commercial relations, a judgment and the right of execution upon it, were found to be a safe and convenient means of securing a debt due from the defendant. When judgments began to be used for the purpose of security as well as recovery, the necessity of issuing execution within a year and a day, and recovering thereon, was found awkward." Id. "This act was another step in the evolution of judgments and executions, and with the object of broadening their uses for commercial purposes." Woolley at § 956.

The Defendant "suggests that the above statutory language is clear and unambiguous, specifically that, §5072 requires execution upon a judgment within five (5) years from the date of entry of judgment." The statute reads as follows:

§ 5072. Execution on judgments in civil actions.

(a) An execution may be issued upon a judgment in a civil action at any time within 5 years from the time when such judgment was entered or rendered, or from the time when such judgment became due; or to collect any instalment of a judgment within 5 years from the time when such instalment fell due.

This section shall only apply to cases when no execution has been previously issued to collect such judgment or instalment, and to cases where 1 or more have been issued for such purpose, and it appears by the return of the officer that such judgment or instalment, as the case may be, has not been paid or satisfied. As to all other cases the law shall remain unaffected.

(b) No judgment shall be deemed to be paid or satisfied, in whole or in part, by a levy on execution process, unless it appears otherwise than by the fact of such levy that such payment or satisfaction has been made.

10 Del. C. §5072. The Defendant would have the Court believe that the phrase "[a]n execution may be issued upon a judgment in a civil action at any time within 5 years from the time when such judgment was entered or rendered" is a statute of limitations even though it takes a different form than other Delaware statutes of limitations. The statutes of limitations found in Chapter 81 of 10 Del. C. are all formed in the negative. They all start with "no action shall be brought… ." 10 Del. C. §8101 – 8107. Similarly, 10 Del. C. §4711, which puts an expiration date of ten years on judgment liens, is constructed in the negative. "No judgment for the recovery of money entered or recorded in the Superior Court . . . shall continue a

lien upon real estate for a longer term than 10 years next following the day of entry or recording of such judgment." 10 Del. C. §4711. The Defendant would have this Court interpret the word "may" to mean "may not." If the true intent of the legislature was to make judgments expire after five years, they would have crafted the statue similar to §4711.

Additionally, the Defendant's interpretation is different than the court's for the past 156 years since §5072 was passed. As Chief Deputy Prothonotary Myrtle Thomas explained to Commissioner Vavala, it has been the long standing practice for judgments to be refreshed by motion because Superior Court Civil Rule 64.1 replaced motion practices for Rules to Show Cause. (Tr. A-12 to A-13). If, as Defendant suggests, the statute is clear and unambiguous, why has the courts been misinterpreting it for 156 years?

Another flaw in the Defendant's interpretation that a judgment creditor must execute upon its judgment within the first five years of its entry or be forever barred from executing upon it is that it ignores the second paragraph of §5072(a). A careful reading of the statute indicates that this section applies equally "to cases where 1 or more have been issued for such purpose, and it appears by the return of the officer that such judgment or installment, as the case may be, has not been paid or satisfied." The Defendant's argument ignores this dichotomy.

In addition to 10 Del. C. §5072, 10 Del. C. §5073 expands by statute the common law time in which a judgment creditor was allowed to execute upon a judgment without resorting to filing a *fiery facias* from a year and a day to five years. The statute is as follows:

> § 5073. Execution on judgments of the Court of Common Pleas or justices of the peace.
> An execution may be issued upon a judgment recovered before the Court of Common Pleas or a justice of the peace, and of which a transcript has been filed and entered in the Superior Court, or on a judgment upon an appeal from the Court of Common Pleas or a justice of the peace, at any time within 5 years from entering the transcript, or giving the judgment on appeal, without scire facias, unless it is necessary to make a party defendant. A party plaintiff may be made by suggesting the facts and stating the proper party on the record, without scire facias, and the proceeding shall be in the name of the proper party so stated.

10 Del. C. §5073. Like its companion statute, §5073 is permissive and specifically addresses judgments originally entered in the Justice of the Peace or the Court of Common Pleas which have since been recorded in Superior Court.

Recently, the Superior Court has rejected a claim similar to the Defendant's claim that 10 Del. C. §5073 limited execution upon a judgment to five years. G. Murray Derrington PCF Mgmt. v. Wedin, 2010 Del. Super. Lexis 86 at 1-2 (Del. Super. Ct. 2010). "Defendants argue that pursuant to 10 Del. C. §§4711 and 5073, judgments cannot be executed upon more than five years from the time an

installment falls due... Section 5073 provides that a judgment can be executed upon at any time within 5 years, without the necessity of bringing a *scire facias* action. Although the lien expired because it was not renewed within the 10-year period, the underlying judgment did not expire. The judgment may be enforced through a write[sic] of *scire facias,* even though the 10 years have passed." Id.

While it is true there are not any published decisions interpreting 10 Del. C. §5072, there are multiple decisions stating that there is not an expiration date on judgments in Delaware. "Delaware has no statute of limitations governing judgments or actions on judgments. There is only a rebuttable common law presumption of payment after twenty years." Gamles Corp. v. Gibson, 939 A.2d 1269, 1272 (Del. 2007); Guayaquil & Q.R.Co. v. Suydam Holding Corp., 132 A.2d 60, 66 (Del. 1957); *see also* Cohen v. Tuff, 86 A. 833, 835 (Del. 1913) (In Cohen Judge Woolley explains that absent statutory language to the contrary, common law judgments are enforceable for up to twenty years after which there is a rebuttable presumption that they have been paid and satisfied).

CONCLUSION

The Defendant is requesting this Court to interpret 10 Del. C. §5072 so that it would be construed as a statute that makes judgments expire after five years if it was not previously executed upon within the first five years of its recording. This interpretation runs contrary to the courts' practices over the last 156 years and existing case law which clearly establish that there is no statute of limitations on judgments but only a rebuttable presumption that they have been satisfied after 20 years. In support of her proposition the Defendant's only argument is that its interpretation can be gleamed from the plain meaning of the statute. The Defendant obstinately neglects to address the explanation for the statute proffered by Judge Woolley, the case law which held there is not a statute of limitations on judgments and the inconsistencies which would exist by her interpretation and the statute as written. The Defendant's claim that 10 Del. C. §5072 prohibits a creditor from executing upon a judgment after five years is nothing more than wishful thinking.

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