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IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHARON KNOTT Defendant below, Appellant, vs. LVNV FUNDING, LLC., Plaintiff below, Appellee.	No. 453, 2013

AMENDED REPLY BRIEF OF DEFENDANT BELOW, APPELLANT, SHARON KNOTT

On Appeal from the Order dated July 31, 2013, granting the Motion to Allow Execution on a Judgment of the Superior Court in and for New Castle County in C.A. No. SN04J-04-116 in that court, on appeal from a Commissioner's Order in that Court dated December 24, 2012.

Respectfully submitted,

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I. ARGUMENT

For the reasons provided in Ms. Knott's Opening Brief, and for the reasons that follow herein, the Trial Court Commissioner's Report and Recommendations, dated December 24, 2012 and the Trial Court's Order dated April 23, 2013 should be reversed, because 10 *Del. C.* §5072 requires a judgment creditor to refresh, revive, or execute on a judgment within five (5) years for the purposes of executing on assets other than real estate and further, because the ten (10) year duration of a judgment as a lien on real estate pronounced in 10 *Del. C.* §4711 only concerns a judgment as a lien on real estate, requiring a judgment creditor to refresh, revive, or execute on a judgment debtor's real estate within the ten (10) year time period pronounced in §4711.

The Trial Court erred in applying 10 *Del. C.* §4711 to the analysis in the instant matter because 10 *Del. C.* §4711 only concerns a judgment as a lien on real estate, and 10 *Del. C.* §5072 concerns execution on judgments. Sections 4711 and 5072 are clear and unambiguous, and the Trial Court may not look beyond the plain language of the statutes.

The purpose of statutory construction is to determine and give effect to the legislative intent.[1] When interpreting a statute, undefined words must be given

[1] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929,932 (Del. 2007).

their ordinary, common meaning.[2] Where the statutory language is clear on its face, the unambiguous text will be construed accordingly, unless the result is so absurd that it cannot be reasonably attributed to the legislature.[3] When reconciling the statutes at issue, specifically §4711 and §5072, the Court should make every effort to give full force and effect to both, as opposed to expanding the scope of §4711 beyond a judgment as lien on real estate, and disregarding the requirement in §5072 that a judgment creditor make some effort to execute on its judgment within five (5) years.[4] It is only where one statute contradicts another that the Court is obliged to choose one statute in favor of another. Such is not the case here.

Execution on real estate, however, is and should be different. Section §4711 provides a judgment creditor additional time (ten (10) years as opposed to five (5) years), because §4711 concerns a judgment as a lien on real estate, and it is all too common for a lender financing the purchase of the real estate to have a first position lien thereon, and the additional time is needed to reduce the lender's interest and increase the interest of the debtor so that the judgment becomes secured by the real estate as time passes.

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[2] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).
[3] *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011).
[4] LVNV appears to be troubled by a reading of §5072 that would preclude execution on real estate after five (5) years but within ten (10) years. Ms. Knott most respectfully suggests that §4711 permits execution after five (5) but within ten (10) years because real estate often involves a purchase money creditor/lender as a first position lien holder. Thus, the additional time is rightfully limited to real estate.

LVNV first directs this Honorable Court's attention to one of our most historic and respected legal icons, the Honorable Victor B. Wooley.[5] Ms. Knott agrees that when the legislature enacted 10 *Del. C.* §5072 it expanded the former common law requirement that a judgment creditor execute on its judgment within one (1) year, to a requirement that a judgment creditor so do within five (5) years.[6] Apparently, the former one (1) year period did not provide enough time to for a judgment creditor to execute on its judgment or for judgment debtors to repay increasingly more common installment judgment notes made in favor of lenders by debtors.[7]

LVNV next directs this Honorable Court's attention to the Superior Court's holding in *G. Murray Derrington PCF Management v. Wedin*.[8] In that case, the judgment appears to have concerned real estate.[9] The judgment creditor obtained its judgment on August 20, 1996 and made no effort to execute on its judgment

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[5] *Answering Brief of Plaintiff Below, Appellee* at P. 6 (*citing Victor B. Wooley, Practice in Civil Actions (1906)).*

[6] *See Victor B. Wooley, Practice in Civil Actions (1906)* at §955 and §956.

[7] *Answering Brief of Plaintiff Below, Appellee* at P. 7 (*citing Victor B. Wooley, Practice in Civil Actions (1906)).* Sections 955 and 956 of *Wooley's* discuss the expansion from one (1) year to five (5) years, but §955 notes that the requirement for prompt execution was predicated upon the notion that the sole purpose of judgments and executions was the recovery of the debt due. This is not a case of an Installment Judgment Note calling for payment over time. Further, it is clear that like the Court today, unnecessary delay was frowned upon in the context of opposition to the use of the *v.c.* and the view of it as a "usurer's trick." The procedure utilized by LVNV here furthers usury as forewarned by Lord Holt and Judge Wooley in §955 of *Wooley's*, and serves as an incubator for the problems the courts today must resolve. *See G. Murray Derrington PCF Management* and *Gamles.*

[8] *Answering Brief of Plaintiff Below, Appellee* at P. 10 (*citing G. Murray Derrington PCF Management v. Wedin,* 2010 WL 774177 (Del.Super)). Unreported opinion attached hereto.

[9] The plaintiff in that case appears to be a property management company, and the fact that the plaintiff had thirteen (13) judgments against the defendants suggests that the judgments were based upon the Defendants' failure to pay fees and assessments on the property being managed by the Plaintiff. *See G. Murray Derrington PCF Management v. Wedin,* 2010 WL 774177 at *1 (Del.Super).

until June 6, 2009,[10] not only beyond the five (5) year execution period provided for in §5072, but beyond the ten (10) year lien period provided for in§4711. The Superior Court relied upon this Honorable Court's decision in *Gamles Corp. v. Gibson*, when holding that the underlying judgment did not expire even though it was not renewed within the ten (10) year lien period pronounced in §4711.[11]

In *Gamles*, however, the judgment creditor obtained its judgment on January 14, 1994,[12] and first attempted to execute on that judgment on October 21, 1996, within three (3) years of obtaining its judgment and well within the five (5) years pronounced in §5072.[13] Additionally, the judgment in *Gamles* arose from the judgment debtor's default on a note for the purchase of real estate,[14] and §4711 is relevant to judgments in as much as judgments are a lien on real estate.[15] The record in *Gamles* was not sufficient for this Honorable Court or the Superior Court below to determine the balance remaining due on the judgment, whether the judgment creditor should be permitted to enjoy the benefit of post-judgment interest, and if so, the time period for which post-judgment interest accrued.[16]

From *Gamles* and *G. Murray Derrington PCF Management* we learn that the Superior Court and this Honorable Court are troubled with having to figure out

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[10] *G. Murray Derrington PCF Management v. Wedin*, 2010 WL 774177 at *2 (Del.Super)
[11] *Id.* at *1 (Del.Super) (*citing, Gamles Corp. v. Gibson*, 939 A.2d. 1269, 1272 (Del. 2007).
[12] *Gamles v. Gibson*, 939 A.2d 1269, 1270 (Del. 2007).
[13] *Id.*
[14] *Id.*
[15] Ms. Knott respectfully suggests that §4711 only concerns a judgment as a lien on real estate, and has nothing to do with a judgment creditor's rights with respect to execution on assets other than real estate. *See* Ms. Knott's Opening Brief at P. 11.
[16] *Gamles v. Gibson*, 939 A.2d 1269, 1275 (Del. 2007).

(after the fact) the balance remaining due and owing on a judgment, and the period, if any, during which a judgment creditor is entitled to enjoy post-judgment interest.[17] Though the Superior Court in *G. Murray Derrington PCF Management* addressed the interplay between §4711 and §5073, the Superior Court and this Honorable Court has yet to consider the proper application of §5072 where a judgment creditor has done nothing within five (5) years of obtaining a judgment, as in the case *sub judice.*

To be sure, the failure of a judgment creditor to promptly and diligently pursue its rights under its judgment breeds confusion over the balance remaining due on the judgment, and frustrates the Court's ability to determine the same.[18] Following §5072 eliminates the problems observed in *G. Murray Derrington PCF Management* and *Gamles.* In fact, not only should the a judgment creditor, per §5072, be precluded from proceeding after failing to do anything within the five (5) year period in §5072, a judgment creditor should have be required to provide an abstract of judgment when seeking to refresh, renew, or execute on its judgment within that five (5) year period so the judgment creditor, the Trial Court, and this Honorable Court are not left frustrated with an inadequate record.

[17] *Id. G. Murray Derrington PCF Management,* at *2 (*citing E.M. Fleischmann Lumber Corp. v. Resources Corp. Intern.,* 114 F. Supp 843, 845 (D.Del. 1953), *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del. 1996), *and Cede & Co. v. Technicolor, Inc.,* 2003 WL 23700218, at *46 (Del. Ch. 2003)).
[18] *See G. Murray Derrington PCF Management* at *2. *See also Gamles* at P. 1275

Here, though LVNV states that Ms. Knott was personally served on December 9, 2002,[19] it is undisputed that LVNV did nothing to execute on the judgment until LVNV filed its Motion to Allow Execution on the Judgment.[20] When the Superior Court inquired as to what happened with the judgment, and whether LVNV had any explanation for its failure to act, LVNV merely alluded to the preferred way of executing on a judgment by attaching wages, without answering the Court's inquiry.[21] In short, LVNV failed to do anything within the time period in §5072 and has failed to show cause for its failure to act.

However, if this Honorable Court were to permit a judgment creditor to proceed after doing nothing for five (5) years, not only should the judgment creditor be precluded from enjoying post-judgment interest, the balance remaining due on the judgment should be reduced by the attorney's fees and costs incurred by the judgment debtor to determine the amount due and otherwise resolve the problems caused by the unnecessary delay and lack of documentation on the part of the judgment creditor.

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[19] Ms. Knott finds nothing in the record to support this fact, and there is nothing in the record to support or rebut whether Ms. Knott first learned about the judgment in the context of LVNV's Motion to Allow Execution on a Judgment.

[20] *See Amended Appendix to Opening Brief of Defendant Below, Appellant* at A-000011where the Superior Court asks LVNV what happened to the judgment and whether there is any explanation for LVNV's failure to act and no explanation was provided.

[21] *Id.* It should be noted that Ms. Knott does not dispute that a judgment creditor can attach a judgment debtor's wages and so doing would be "preferred" by a judgment creditor. Rather, Ms. Knott disputes that LVNV may so do after doing nothing for five (5) years because under Delaware law it is unclear whether a judgment creditor may execute after failing to act on a judgment in anyway whatsoever within the five (5) year period of §5072. Further, though LVNV's response to the Superior Court suggests that LVNV's delay may have been a result of the process of finding and attaching Ms. Knott's wages, it is unclear from the record whether Ms. Knott is a member of UFCW Local Union 27, the union that the undersigned has been serving since 2003, and whether Ms. Knott was employed by the same employer at the same store since February of 1983.

It appears that motions such as LVNV's Motion in the instant case are common, routine, unopposed, and lacking that which the Trial Court and this Honorable Court need to evaluate the rights of the judgment creditor.[22] Further, though one can only surmise that the judgments LVNV acquires are acquired at some cents on a dollar,[23] it is clear that LVNV's judgments do enjoy the benefit of a post-judgment interest rate well in excess of the rate of return from other investment vehicles.[24]

Finally, such proceedings on judgments often concern employed Delawareans on the margins of existence, working from today to tomorrow, to pay yesterday's bills.[25] To permit a judgment creditor to proceed whenever they so desire, with little to no evidence of the amount of the judgment at the time the judgment creditor decides to so proceed violates §5072, takes unfair advantage of judgment debtors,[26] and frustrates the Court when the judgment debtor raises the

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[22] *See Amended Appendix to Opening Brief of Defendant Below, Appellant, Sharron Knott* at A-000012 (where the Trial Court inquires of the amount and LVNV provides no abstract of the judgment), at A-000013 (where the Trial Court refers to the process as a routine motion), at A-000015 where the Trial Court stays several other similar cases on the calendar), and at A-000016 where respondents did not appear).

[23] In the instant matter, Sears was the original judgment creditor, who sold the judgment to Sherman Acquisitions, who in turn sold it to LVNV. Surely, the marketability of the judgment was and is a function of the discount at which it is sold.

[24] *See* 6 *Del.C.* §2301

[25] *See Amended Appendix to Opening Brief of Defendant Below, Appellant, Sharron Knott* at A-000011 where LVNV states that it uses the "work number" and issues wage attachments. LVNV then files a Motion, as in the case *sub judice,* with no abstract of judgment.

[26] Such judgment creditors are commonly living on the margins of existence and cannot afford to hire an attorney to assert defenses such as the ones asserted here. Further, to require the judgment creditor to so do actually requires the judgment debtor to develop that which the judgment creditor should be required to do. After all, it is the judgment creditor who should have and present all the information necessary to establish the amount of the judgment and its right to collect thereon.

issues raised here.[27] In short, the problems being resolved by the Court in these matters would not exist if the Court enforced §5072. Further, if the Court required a judgment creditor to provide an abstract of judgment when seeking to refresh, renew, or execute on its judgment within the five (5) year period of §5072 where property other than real estate is concerned, or ten (10) years where real estate is concerned, it would eliminate a large majority of the litigation over these issues.

II. CONCLUSION

In light of the foregoing, this Honorable Court should reverse the Order of the Trial Court below that allowed LVNV to execute on any and all property of Ms. Knott.

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Date: April 14, 2014

[27] *See Wooley's* at §955 referring to criticism of the v.c. (a no longer utilized vehicle to accomplish what the plaintiff is accomplishing here) and Lord Holt considering such practice a "usurer's trick." *See also, G. Murray Derrington PCF Management* and *Gamles* where the Court evaluates the issue of precluding post-judgment interest where the delay is caused by the judgment creditor.

Not Reported in A.2d, 2010 WL 774177 (Del.Super.)
(Cite as: 2010 WL 774177 (Del.Super.))

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Only the Westlaw citation is currently available.

Superior Court of Delaware,
New Castle County.
G. **MURRAY DERRINGTON PCF** MANAGEMENT, Plaintiff,
v.
Linda A. **WEDIN** and Curtis A. **Wedin**, Defendants.

No. 97J-07-108 MMJ.
Submitted: Jan. 21, 2010.
Decided: Feb. 23, 2010.

On Defendant's Motion to Reconsider Execution of Judgment and Plaintiff's Motion for Execution of Judgment.
Michael P. Morton, Esquire, Wilmington, Delaware, Attorney for Plaintiff.

Linda A. **Wedin** and Curtis A. **Wedin**, Defendants, Pro Se.

ORDER

MARY M. JOHNSTON, Judge.

***1** On August 20, 1996, a judgment was entered in favor of plaintiff G. **Murray Derrington PCF** Management, and against defendants Linda A. **Wedin** and Curtis A. **Wedin**. The judgment was transferred to Superior Court on July 14, 1997. At that time, the judgment became a lien on defendants' real property for 10 years.

On June 6, 2009, plaintiff filed a Motion for Execution on Judgment. The Motion is a *scire facias* sur judgment authorizing a writ of execution. A Superior Court Commissioner presided over a hearing on the motion. The Commissioner issued an Order allowing renewal of the judgment. This Court vacated the Commissioner's Order to permit reconsideration of the renewal of judgment.

Defendants filed a Motion to Reconsider Execution on Judgment. 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 4711 provides that no judgment entered in Superior Court shall continue as a lien longer than 10 years, unless the lien is renewed by agreement or by writ of *scire facias* before the expiration of 10 years. 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.[FN1] The judgment may be enforced through a write of *scire facias,* even though 10 years have passed.

FN1. *Gamles Corp. v. Gibson,* 939 A.2d 1269, 1272 (Del.2007).

The burden is upon defendants to show cause why the judgment should not be enforced. The Court held an evidentiary hearing on January 12, 2010. Defendant Linda A. **Wedin** testified that the debt underlying the judgment had been paid. She stated that she recalled making periodic payments by money order. However, she had no documentation and could not recall the dates, amounts or number of payments. Another witness confirmed that defendants normally used money orders to pay obligations.

Plaintiff representative G. Murray Derrington testified that plaintiff had obtained 13 different judgments against defendants. Eleven of the 13 judgments have been satisfied. The remaining 2 are the subject of this action. One of the 2 remaining judgments was reduced by plaintiff when plaintiff reviewed its records. Plaintiff maintained detailed payment records but had no record of additional payments on the 2 judgments.

The Court finds that defendants have failed to show cause why the judgment should not be subject to execution. However, it appears to the Court that defendants had reason to believe that the 2 judgments had been satisfied. Defendants had been informed that there were no liens or judgments preventing their obtaining a mortgage in 2004. Defendants were unaware of any actions taken to execute the judgment until this action was filed on July 9, 2009.

Post-judgment interest is awarded as a matter of right, not as a matter of judicial discretion.[FN2] Generally, interest will accumulate from the date payment is due to adequately compensate a plaintiff for losses incurred due to the inability to use the money awarded.[FN3] Interest is the measure of compensation.[FN4] Delaware public policy encourages courts to provide full compensation to a prevailing plaintiff.[FN5]

FN2. *Moskowitz v. Mayor and Council of Wilmington*, 391 A.2d 209, 210 (Del.1978).

FN3. *Universal City Studios, Inc. v. Francis I. DuPont & Co.*, 334 A.2d 216, 222 (Del.1979).

FN4. *Id.*

FN5. *Moskowitz*, 391 A.2d at 210.

***2** In *E.M. Fleischmann Lumber Corp. v. Resources Corp. Intern.*, the United States District Court for the District of Delaware, while discussing pre-judgment interest, stated that the "allowance of interest as a measure of compensation must be made as a matter of fairness and to accomplish justice." [FN6] Where the plaintiff causes a large part of a delay upon which interest might be computed, the District Court found that "considerations of fairness and justice might require the elimination of such period." [FN7] The Delaware Supreme Court, citing *E.M. Fleishcmann Lumber Corp.*, also found that the general rule may be "affected by other considerations, such as long delay on the part of a plaintiff prosecuting his action...." [FN8] Discussing compensation due to a dissenting shareholder, the Court found that while pre-judgment interest "is often awarded at rates that a 'prudent investor' could expect to receive," post-judgment interest "merely ensures that the dissenting shareholder remains whole during any post judgment litigation." [FN9] Similarly, the Court of Chancery has held that the "goals of post-judgment interest are to ensure the petitioner remains whole during post-judgment litigation and prevent improper judicial machinations, either through frivolous appeal or willful delay of payment." [FN10]

FN6. 114 F.Supp. 843, 845 (D.Del.1953).

FN7. *Id.*

FN8. *Metropolitan Mut. Fire Ins. Co. v. Carmen Holding Co.*, 220 A.2d 778, 781-82 (Del.1966).

FN9. *Id.*

FN10. *Cede & Co. v. Technicolor, Inc.*, 2003 WL 23700218, at *46 (Del. Ch.2003) (reversed on other grounds).

In the instant case, plaintiff was awarded a judgment in 1996 and received a lien on the defend-

ants' real property for 10 years beginning in 1997. Plaintiff did not file the Motion for Execution on Judgment until 2009. Having heard the testimony of the witness as presented during the hearing in the rule to show cause, the Court finds that defendants carried their burden of proving that they reasonably believed that all judgments had been resolved.

It would be unfair and unjust, under the specific and peculiar facts of this case, to permit plaintiff to be awarded interest between August 20, 1998 (2 years following entry of the judgment) and June 6, 2009 (the date plaintiff filed a Motion for Execution of Judgment).

THEREFORE, defendants' Motion to Reconsider is hereby **DENIED IN PART.** Plaintiff's Motion for Execution of Judgment is hereby **GRANTED.** The Court hereby authorizes a writ of execution of the August 20, 1996 judgment, plus interest, except that the interest awarded shall not include any interest accrued between August 20, 1998 and June 6, 2009.

Del.Super.,2010.
G. Murray Derrington PCF Management v. Wedin
Not Reported in A.2d, 2010 WL 774177 (Del.Super.)

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