

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-2437

Cir. Ct. No. 01-CV-251

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KAREN SANN AND JAMES B. CONNELL,

PLAINTIFFS-APPELLANTS,

v.

BADGER CARE-A-VANS, INC.,

DEFENDANT-RESPONDENT,

**WAUSAU AREA TRANSIT SYSTEM AND AMERICAN
COMMUNITY BANK,**

**GARNISHEES-DEFENDANTS-
RESPONDENTS.**

APPEAL from a judgment and an order of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Reversed and cause remanded with directions with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Karen Sann¹ appeals a judgment dismissing her garnishment action against Badger Care-A-Vans, Inc., and denying her motion to appoint a receiver. Sann seeks these supplemental remedies to satisfy a judgment entitling her to a worker's compensation award from Badger. Sann argues that she may garnish Badger's accounts receivable even though Badger has a security agreement with its bank. She also argues that she is entitled to the appointment of a receiver to aid in the collection of the judgment.

¶2 We conclude that the trial court did not have the discretion to deny Sann the right to file a garnishment action. Further, the court rested its decision not to appoint a receiver on an erroneous application of the law. We therefore reverse the judgment and remand with directions.

BACKGROUND

¶3 Badger operates a business providing transportation services for the elderly and disabled. It terminated Sann's employment as a driver after she was injured in the course of her employment.

¶4 Sann filed a claim for worker's compensation benefits and, after a hearing, an administrative law judge found that Sann's work-related injuries were a significant factor in the discharge decision and awarded \$13,877.29.²

¹ Sann's attorney, James Connell, also appeals the judgment and order. Because the judgment affirmed a worker's compensation award, Connell is entitled by statute to 20% of Sann's award. *See* WIS. STAT. § 102.26(2). We refer only to Sann as the appellant, but we note that Connell will receive his statutory percentage of Sann's award upon Badger's satisfaction of the judgment. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² As mandated by statute, the ALJ's order required payment of \$11,101.83 to Sann and \$2,775.46 to Connell.

¶5 Badger failed to pay the award, and the trial court entered judgment in Sann's favor. An execution of judgment was returned unsatisfied, and a supplementary hearing also failed to result in payment of the judgment.

¶6 Initially, Sann attempted to garnish Badger's bank accounts with American Community Bank. The Bank answered the garnishment action, asserting that it set off the balances in the account against debts Badger owed to it.

¶7 Next, Sann commenced a garnishment against Badger's accounts receivable from the Wausau Area Transit System (WATS), with whom Badger had a contract. The Bank intervened in the garnishment action. Sann moved for judgment on the pleadings and, alternatively, for the appointment of a receiver. The Bank moved to dismiss the action on the grounds that it had a security interest in Badger's accounts receivable to secure repayment of a lien to Badger.

¶8 The trial court speculated that the Bank could call the loan in default. It dismissed the garnishment action and denied the motion for the appointment of a receiver. Sann now appeals.

DISCUSSION

A. GARNISHMENT

¶9 Sann argues that she is entitled to maintain a garnishment action against Badger's accounts receivable even though Badger has a security agreement with the Bank. We conclude that the Bank cannot prevent Sann, a judgment creditor, from pursuing her collection action. The trial court postulated that it would be more efficient to deny Sann the right to file a garnishment action. However, a legitimate concern about efficiency does not invest the trial court with discretion to deny the statutory right to pursue a collection action. Further, the

court could only speculate that the bank would call the loan in default.³ Ultimately, Sann's right to pursue a remedy is not diminished by the Bank's ability to maintain an action against her for any money she might be able to garnish.

¶10 Garnishment is a statutory remedy. WIS. STAT. § 812.01. A judgment creditor "may proceed against any person who is indebted to or has any property in his or her possession or under his or her control belonging to such creditor's debtor" *Id.*

¶11 Here, the court dismissed Sann's garnishment action because Badger had given the Bank a security interest in its accounts receivable.⁴ Sann contends that the Bank's security interest in Badger's accounts does not alter her statutory right to garnishment.

¶12 The issue presented is one of statutory construction, a question of law we review de novo. *State v. Setagord*, 211 Wis. 2d 397, ¶10, 565 N.W.2d 506 (1997). The purpose of statutory interpretation is to discern the intent of the legislature. *Id.*

³ Both the business security agreement and the note between Badger and the Bank provide that the loan will be in default if in good faith the "Lender deems itself insecure" However, this is not an automatic event. The Bank must inform Badger that it is in default because the standard for default by insecurity is subjective. Sann's \$13,000 award would not necessarily jeopardize the Bank's position as the lender of over \$160,000 to a company with over \$500,000 in gross receipts. This is especially true if Badger continues to make its \$1,400 monthly payments to the Bank.

⁴ Badger's proceeds from its contract with WATS, payable to Badger's account with the Bank, are characterized as accounts receivable. The Bank does have a security interest in them.

¶13 A debtor may voluntarily or involuntarily transfer its rights in collateral property.⁵ WISCONSIN STAT. § 409.311 provides:

The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute default.⁶

The U.C.C. commentary to this section provides that “in all security interests the debtor’s interest in the collateral remains subject to claims of creditors” WIS. STAT. § 409.311 (West Supp. 2001-02). Two separate rights are involved. First, the debtor can transfer its interest in collateral property. Second, the collateral property remains subject to any security interest even after transfer. Sann’s interest is in having Badger transfer property to satisfy the judgment. The Bank’s is in maintaining its interest in the property after transfer.

¶14 In *First Nat’l Bank v. Sheriff of Milw. County*, 34 Wis. 2d 535, 539, 541, 149 N.W.2d 548 (1967), a secured creditor attempted to replevy from the sheriff property seized on an execution by a judgment creditor. Our supreme

⁵ WISCONSIN STAT. § 409.311 allows the transfer notwithstanding a provision in the security agreement that prohibits any transfer or deems the agreement in default upon transfer. Here, the respondents do not direct us to that portion of the security agreement that purportedly prohibits the transfer of collateral or mandates automatic default upon transfer of collateral. See *supra* note 3.

⁶ The legislature amended WIS. STAT. ch. 409, effective July 1, 2001. WISCONSIN STAT. § 409.401(2) (West Supp. 2001-02) replaced § 409.311, addressing third-party rights where there is a security agreement, and now provides: “An agreement between the debtor and secured party which prohibits a transfer of the debtor’s rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.”

This reinforces our conclusion that Sann is entitled to proceed with her garnishment action. While any award recovered may be subject to the Bank’s security interest, Sann nevertheless may recover from Badger.

court said “that until the occurrence of a default or any other event which would cause the plaintiff to deem itself insecure, the debtor, rather than the secured party, had the right to possession” *Id.* at 539. It noted that, under WIS. STAT. § 409.311, the debtor’s interest in collateral in his possession may be transferred. *Id.* at 540. Finally, the court concluded, “creditors without the right to possession of the goods are protected only by the fact that the execution sale is subject to their interest.” *Id.* at 541.

¶15 Badger retained possession of its “accounts receivable” even though payments on them were deposited into its account at the Bank. The Bank’s only protection from Sann’s garnishment action is the fact that she receives her award subject to the Bank’s security interest.

¶16 The trial court relied on *Production Credit Ass’n v. Nowatzski*, 90 Wis. 2d 344, 353, 280 N.W.2d 118 (1979), in dismissing the garnishment action. In *Production Credit*, our supreme court held that a debtor could transfer collateral property, but that the transferee took the property subject to the security interest. *Id.* It further held that a secured creditor could later maintain an action for conversion against the transferee. *Id.*

¶17 *Production Credit*’s only applicability to this case is its reaffirmation of the statute’s meaning and the Bank’s right to assert a claim against Sann after Badger satisfies her judgment. *See id.* The Bank’s security interest does not affect Sann’s statutory remedies. Nothing in the case precludes Sann from employing statutory remedies to satisfy her judgment.

¶18 The trial court considered whether Sann’s garnishment action was moot. Badger and the Bank argued that the garnishment would be an exercise in futility and a waste of judicial resources because a garnishment would trigger

default, and the Bank would then have an automatic right of possession. However, the respondents cite no law to support this argument, and the possible consequences do not dissolve Sann's statutory rights. In any event, as indicated, the respondents' brief does not make it clear and the security agreement does not make it certain that satisfaction of Sann's judgment against Badger would render it in default of its security agreement with the Bank. Whether Badger is in default is a factual issue.

¶19 Under WIS. STAT. § 409.311, the mere existence of a security agreement between Badger and the Bank does not prevent Sann, a judgment creditor, from pursuing supplemental remedies to achieve satisfaction.

B. RECEIVER

¶20 Sann argues that she is entitled to the appointment of a receiver to aid in the collection of the judgment. We conclude that the trial court erred when it denied Sann's motion to appoint a receiver because it equated a receiver under the statute with a federal bankruptcy trustee.

¶21 WIS. STAT. § 816.04 provides for the appointment of a receiver to aid in the execution of a judgment:

A receiver may be appointed but before appointing a receiver the court or judge shall ascertain, if practicable, whether any other supplementary proceedings are pending against the judgment debtor There shall be but one receivership at any time.

The purpose of a receiver is to preserve the debtor's property for the benefit of the specific judgment creditors whose claims the receiver represents. *Candee v. Egan*, 84 Wis. 2d 348, 360, 267 N.W.2d 890 (1978).

¶22 Whether to appoint a receiver is discretionary. *Tralmer Sales & Serv. v. Erickson*, 186 Wis. 2d 549, 572, 521 N.W.2d 182 (Ct. App. 1994). Our review of a trial court's discretionary decision is highly deferential. *Id.* “The record need only reflect the court's reasoned application of the appropriate legal standard to the relevant facts in the case.” *Id.* at 572-73 (citation omitted).

¶23 Here, the court improperly exercised its discretion because it relied upon an erroneous view of the law. It based its denial of Sann’s motion to appoint a receiver on its belief that a receiver was like a federal bankruptcy trustee and its opinion that the state court was not the appropriate place for bankruptcy-type proceedings. However, a receiver differs significantly from a federal bankruptcy trustee.

¶24 A receiver is appointed under WIS. STAT. § 816.04 to help a judgment creditor achieve satisfaction. The receiver acts as a collection agent for the specific judgment creditor he or she represents. “A receiver in aid of execution is authorized to collect those assets revealed by the examination of the debtor, take possession of them, apply them to the satisfaction of the judgment, and return the excess to the judgment debtor.” *Candee*, 84 Wis. 2d at 361.

¶25 A bankruptcy trustee’s powers are far broader. In bankruptcy, “[t]he trustee has the capacity to sue and be sued, and is invested with numerous specific powers, rights, and duties in connection with the administration of a case under the Bankruptcy Code. 9 AM. JUR. 2D *Bankruptcy* § 258 (1999) (footnotes omitted). The trustee is a fiduciary, a representative of the estate, and may operate the business of the debtor and employ professionals. *Id.* §§ 258-59.

CONCLUSION

¶26 Sann is entitled to maintain her garnishment action, and the trial court erroneously relied on a mistake of law in deciding whether to appoint a receiver. We therefore reverse the judgment and order and remand for the trial court to reinstate Sann's garnishment action and reconsider her motion to appoint a receiver, applying the proper factors.

By the Court.—Judgment and order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE § 809.23(1)(b)5.

