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DISTRICT II

July 9, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1755

Capital One Bank v. Dennis C. Gabriel (L.C. #2008CV1108)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

The circuit court ordered the garnishee defendant, M&I Bank—BMO Harris (BMO Harris) to immediately release \$12,078.72 from Dennis Gabriel's account to Capital One Bank, his credit card issuer. Gabriel appeals the order, arguing that \$11,146.00 of the released amount is exempt Social Security disability benefits. We affirm the order insofar as Capital One proved that refunds Gabriel received from point-of-sale (POS) returns of merchandise purchases were non-exempt cash proceeds. We also agree that there was a failure of proof as to whether the \$11,146.00 comprised exempt Social Security monies, but we depart from the circuit court's ruling to the extent it assigned Gabriel the burden of proof. We therefore affirm in part and reverse in part and remand for additional fact-finding solely to trace the \$11,146.00, with a

reallocated burden of proof. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21(2011-12).¹

Capital One commenced a debt-collection action to recover the balance Gabriel owed on his credit card. Gabriel failed to answer and judgment was entered against him. Capital One filed a non-earnings garnishment action. BMO Harris's garnishee answer stated that Gabriel had \$24,773.86 available for garnishment in a checking account. It did not indicate that any of the monies were exempt. *See* WIS. STAT. § 812.11(4) (a garnishee "may state any claim of exemption on the part of the defendant" of which it is aware). Gabriel responded that his Social Security disability benefits, purportedly his sole source of income, are exempt from execution or garnishment. *See* WIS. STAT. § 815.18(3)(ds); *see also* 42 USC § 407(a) (2012). BMO Harris was ordered to release \$19,773.86 to Capital One from Gabriel's account. Gabriel objected and sought return of the funds and dismissal of the garnishment action.

An evidentiary hearing finally was held after some false starts due to Gabriel's early failure to produce bank records, claimed inability to retain a lawyer, and disinclination, then ultimate decision, to proceed pro se. Capital One asserted that \$17,078.72 comprised POS return refunds and thus were non-exempt cash proceeds. *See* WIS. STAT. § 815.18(4). Gabriel argued that \$11,146.00 of it was simply a transfer of Social Security income from one account to another and the remainder was from transactions using exempt Social Security sums, the redeposit of which as POS refunds should not affect their exempt character. The court denied Gabriel's objection, concluding that there had not been sufficient evidence presented to enable it

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to determine that any of the monies were exempt. It did *not* find, however, that the disputed \$11,146.00 was *non-exempt*. Gabriel appeals.²

We are asked to apply to the facts WIS. STAT. § 815.18(3)(ds), making *exempt* a debtor's interest in or right to receive federal disability insurance benefits, and § 815.18(4), making *not* exempt property in the form of cash proceeds, although traceable to once-exempt property. Findings of fact shall not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). The application of a statute to undisputed or found facts presents a question of law we decide *de novo*. *Olen v. Phelps*, 200 Wis. 2d 155, 160, 546 N.W.2d 176 (Ct. App. 1996).

The circuit court cautioned Gabriel several times that the burden was his to prove that the deposits were exempt. In a garnishment action, however, it is the plaintiff who bears the burden to establish by a preponderance of the evidence the essential facts entitling him or her to recover. *Maxcy v. Peavey Publ'g Co.*, 178 Wis. 401, 405, 190 N.W. 84 (1922). Once Capital One made a *prima facie* case that the disputed amount was non-exempt, the burden of production would shift to Gabriel, but the burden of proof always was Capital One's. *See Reinke v. Personnel Bd.*, 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971).

Whether a party has met its burden of proof is a question of law we examine without deference to the circuit court's conclusions. *Becker v. State Farm Mut. Auto. Ins. Co.*, 141 Wis. 2d 804, 811, 416 N.W.2d 906 (Ct. App. 1987). We agree that Capital One met its burden to show that POS transactions rendered twenty-one deposits non-exempt, but not as to the

² On reconsideration, the court modified the order, directing BMO Harris to surrender \$12,078.72 because the \$5,000.00 living-expenses exemption had not been factored in in the original order. *See* WIS. STAT. § 815.18(3)(k). It is from the modified order that Gabriel appeals.

\$11,146.00 deposit. One of Gabriel's bank statements shows an \$11,000.00 withdrawal from one account and, on the same day, an \$11,146.00 deposit to another—a mere transfer of exempt Social Security funds, according to Gabriel. Capital One contended the sum is non-exempt but it produced nothing from which we could determine one way or the other; its own assertions are not evidence. Gabriel's bank records go back only to 2011, which, he indicated, is all Capital One requested. Capital One does not say what, if any, additional discovery it undertook to trace the source or character of the \$11,146.00. It does not state, and we cannot tell, if the fact that the garnishee answer made no mention of exempted funds means that BMO Harris was unaware of Gabriel's claim of exemption, was unaware of WIS. STAT. § 812.11(4),³ or was aware of both but either chose not to object on Gabriel's behalf or the disputed amount in fact was not exempt.

The circuit court concluded that Gabriel had not met his burden, but it was not his burden to meet. We cannot say whether Capital One could have made a prima facie case in regard to tracing the \$11,146.00 deposit because it was not asked to do so. We therefore remand for the development of a factual record on that matter, with the burden properly placed on Capital One.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed in part and reversed in part, and the cause is remanded with directions, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

³ Capital One indicated that BMO Harris continues to freeze Gabriel's WIS. STAT. § 815.18(3)(k) living-expense exemption, as the bank is located in Illinois "where they don't recognize [it.]"