THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE KERSHAW COUNTY
Court of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

CIVIL ACTION NO.: 2006-CP-28-0433

Palmetto Residential Builders, LLC . . . . . Appellant,

Michael Cox and Elizabeth Cox . . . . . Respondents.

FINAL BRIEF OF RESPONDENTS

March 31, 2015

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Master-in-Equity correctly ruled that the contributions from wages Respondent Michael Cox conveyed through his employer pursuant to and in compliance with an Employment Retirement Income Security Act of 1974 (hereinafter "ERISA" covered 401(k) pension plan are exempt from attachment or levy by a judgment creditor pursuant to ERISA, the Homestead exemption, S.C. Code Ann. §15-41-30(A)(13) (Supp. 2014), and S.C. Code Ann. § 27-23-10 (A) (2007), known as the "Statute of Elizabeth."

STATEMENT OF THE CASE

This is an appeal from a motion hearing in Supplemental Proceedings in which the Appellant sought, *inter alia*, to set aside the voluntary contributions, deducted from the paycheck of Respondent Michael Cox through his employer's ERISA covered 401(k) pension plan. 401(k) is the section in the Internal Revenue Code that allows for the employer-provided, pension plan.

Appellants won a jury trial judgment in the amount of $119,430.93 on February 13, 2008. Appellants commenced supplemental proceedings in September of 2008 in the Kershaw County Master-in Equity Court to collect on the judgment.

Within one (1) week after the jury verdict was rendered, Mr. Cox sold $44,487.89 worth of stock and deposited it into his 401(k) retirement account along with $7,000.00 from a savings account. In separate Orders, the Master-in-Equity set both these conveyances aside as fraudulent. The $44,487.89 by Order was filed on September 18, 2008 (R. pp. 36–42) and the $7,000.00 by Order was filed November 7, 2008. (R. pp. 26–35).

At a subsequent hearing in January of 2009, the Master-in-Equity ordered the 401(k) plan administrator, J.P. Morgan Chase, to pay the funds mentioned above directly to the Appellant. (R. pp. 22-25). The case was dormant until June of 2013 when Appellants filed a Rule to Show Cause.

On May 20, 2014, Appellant moved to attach the wage contributions from Mr. Cox's paycheck into to his employer-sponsored 401(k) plan, arguing that the contributions were

fraudulent conveyances under South Carolina's Statute of Elizabeth, S.C. Code Ann. § 27-23-10 et seq. (R. pp. 132-145). Further, they argued that the applicable homestead exemption, S.C. Code Ann. 15-41-30(A)(13) did not apply, nor did ERISA or the Internal Revenue Code because the conveyances were fraudulent.

The hearing was held on June 25, 2014. Although Appellant was the moving party, they did not procure a Court Reporter to make a transcript of the hearing. The hearing lasted over one (1) hour. Each lawyer had ample time to argue their position and was questioned thoroughly by Judge Tzerman.

By Order filed on September 15, 2014, the Master-in-Equity denied the Appellant's motion to set aside the conveyances. (R. pp. 3-7). He ruled that the conveyances were not fraudulent, were not made with intent to defraud the creditor were made for valuable consideration. The Judge ruled the contributions at issue were taken directly from Mr. Cox's paycheck, the plan was an employee pension plan covered under ERISA and that the contributions were made in accordance with the plan and thus, exempt from attachment or levy. Judge Tzerman also ruled that the contributions were not income for tax purposes.

Appellants filed a Motion to Alter or Amend Judgment which was denied without a hearing by Order dated October 13, 2014. (R. pp. 132-145). This appeal followed.

STATEMENT OF THE FACTS

Respondent Michael Cox recently retired from International Paper Company where he worked for 30 years. International Paper Company set up this employee pension plan to comply with ERISA.

Mr. Cox has made voluntary contributions, deducted from his paycheck into his pension

account since 1985. Mr. Cox made voluntary contributions under the ERISA covered plan since it was available to International Paper employees on July 1, 1992. It is called the "Salaried Savings Plan." The plan is a "Qualified Employer Plan" under 26 U.S.C. § 401 (a).

In 2008, a jury rendered judgment against the Respondents in the amount of $119,430.93. (R. pp. 46-47). Within a week or so of this judgment, Mr. Cox sold non-exempt stock, withdrew $7,000.00 from a savings account and deposited these funds into his 401(k) pension account. These fraudulent conveyances were properly set aside by the Master-in-Equity. The Appellants now seek to attach contributions deducted from wages Mr. Cox paid into the plan since judgment was rendered against him and his wife.

ARGUMENT

The Appellant conflates Respondent Michael Cox's previous sale or transfer of non-exempt assets into his pension account with transfers deducted from wages into his pension account. The only issue in this appeal is whether the wage-withholding contributions from the paycheck of Mr. Cox made in compliance with an ERISA covered 401(k) plan are fraudulent conveyances or are otherwise subject to attachment by a judgment creditor.

Appellant cites In re Goldshein, 21 B.R. 370 (Bkrtcy. D.Md. 1999) (App. Br. p. 2) and Gilchinisky v. National Westminster Bank N.J., 159 N.J. 463, 732 A.2d 482 (1999) (App. Br. at 8) to support the proposition that the anti-alienation provision of ERISA does not allow fraudulent conveyances to be made into an otherwise exempt pension plan. Stated differently, non-exempt funds may not be transferred into a 401(k) plan or any type of pension fund. Appellant also states that it is the "law of the case" that the anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers. (App.'s Br. at 9).

The Respondents agree. No fraudulent conveyance may be made into a pension account; even a pension account covered by ERISA.

The Appellants thoroughly document the past wrongful conveyances made by Mr. Cox into his pension account. Now, they ask this Court to rule that wages; specifically wages deducted from Mr. Cox's paycheck in compliance with the pension plan are also fraudulent conveyances.

The relevant law before this Court is as follows:

South Carolina's "Statute of Elizabeth," S.C. Code Ann. § 27-23-10 reads:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit judgment and execution which may be had or made to or for any intent or defraud creditors and other of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, conivous, or fraudulent devised and practices are, must or might be in the any ways disturbed, hindered, delayed or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

(emphasis added).

Thus, The Statute of Elizabeth focuses on the *intent* of the debtor.

The exemption under which the Respondents claim the 401(k) contributions are exempt from creditors is S.C. Code Ann. § 15-41-30(A)(13), which reads:

> The debtor's right to receive individual retirement accounts as described in **Sections 408(a)** and 408(A) of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code and accounts established as part of a trust described in Section 408 (c) of the Internal Revenue Code, A claimed exemption may be reduced or

eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan. For purposes of this term, "Internal Revenue Code" has meaning provided In Section 12-6-40(A) (emphasis added).

Section 408(a) of the Internal Revenue Code reads:

> For purposes of this section, the term "individual retirement account" Means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:
>
> (1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c), 403(a)(4), 403(b)(8) or 457(e)(16), no **contribution** will be accepted unless it is in cash and **contributions** will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section **219(b)(1)(a)** (emphasis added).
>
> (2) The trustee is a bank (as defined in subsection (n) or such other Person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirement of this section.
>
> (3) No part of the trust funds will be invested in life insurance contracts.
>
> (4) The interest of an individual in the balance in his account in non-feitable.
>
> (5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.
>
> (6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(emphasis added).

Thus, Section 408(a), which is referenced in the applicable *exemption*, twice refers to *contributions* into the plan.

Section 219(b)(1)(a) reads:

> (b) Maximum amount of deduction: (1) In general: The amount allowable as a deduction **under subsection (a)** to any individual for any taxable year shall not exceed the lesser of- (A) the deductible amount, or (B) an amount equal to the compensation includable in the individual's gross income for such taxable year (emphasis added).

Subsection (a) reads: "In the case of an individual, there shall be allowed as a deduction an amount equal to the qualified retirement contributions of the individual for the taxable year."

The 401(k) plan Mr. Cox has is an individual retirement account under 408(a) of the Internal Revenue Code and it provides the required contractual "anti-alienation" provision (See 29 U.S.C. § 1057(d)(1)).

An outline of the plan was presented at the motion hearing for the Master-in-Equity's review. No evidence was presented at the hearing that Mr. Cox made contributions in violation of the plan.

The 2014 tax-year rules allow Mr. Cox was allowed to contribute up to $23,000.00 into his 401(k) under the current rule of the Internal Revenue Service. All who contribute to 401(k) accounts are allowed to contribute up to $17,500.00 in 2014 pre-tax money into their retirement account. Mr. Cox at age 59, is allowed an additional $5,500.00 pre-tax contribution into his pension plan pursuant to 26 U.S. Code § 219 (5)(B) which is called the "catch up" contribution. Only those who are 50 and over may take advantage of this provision.

Appellant wrongly classifies the contributions into the 401(k) as "non-exempt" (App. Br. at 5) and argues that allowing these contributions into the pension plan is against "public policy" (App. Br. at 6) and that Mr. Cox is using the 401(k) to "hide non-exempt assets from the creditor." (App. Br. at 6).

Mr. Cox's previous conversions of non-exempt property into the pension account were

properly voided. However, those conveyances are entirely irrelevant and different in kind to the issue before this Court.

The wage-withholding contributions are not taxed because the I.R.S. does not consider them as income. Further, as South Carolina's Wage Payment Act states, "Funds placed in pension plans or profit plans are not wages subject to this chapter." See S.C. Code Ann. § 41-10-10(2) (1986). Thus, the Appellants ask this Court to order the attachment of non-wages and/or non-income.

Even if the contributions at issue were considered to be wages or income, they would not be subject to attachment by a judgment creditor because wages and income and are not subject to attach by judgment creditors in South Carolina. First, these conveyances are exempt under S.C. § 15-41-30(A)(13). Second, the asset at issue is wages, which were deducted from Mr. Cox's paycheck.

South Carolina does not allow the garnishment of wages except under certain circumstances such as wages that may be garnished in this State for the payment of overdue taxes, under a Chapter 13 Bankruptcy Plan or for the payment of child or spousal support. See Ashley P. Cuttino, Glenn M. Spitler, III: An Employer's Guide to Navigating the Payment of Wages and Garnishments, S.C. Law., March 2014, at 27-28. See also 15 U.S.C. § 1671 et seq. (2012); 1420 (2013). But wages may not be garnished in South Carolina to satisfy the judgment of an unsecured, non-priority creditor as is the Appellant and there is no authority which states so.

Title I of ERISA requires that benefits under the plan may not be assigned or alienated. For the anti-alienation clause to be effective, the underlying plan must constitute a "pension plan" under ERISA which is defined as "any plan, fund or program . . . which provides retirement

income to employees." See ERISA § 3(2)(A).

Further, ERISA § 514 (a) provides that ERISA supersedes state laws to the extent that they state laws relate to employee benefit plans, also known as the "preemption" provision". The anti-alienation and preemption provisions both make state attachment and garnishment laws inapplicable or without force or effect with relation to ERISA covered plans. Although, as stated *supra*, this State does not even allow for the garnishment of an unsecured, non-priority creditor but even if it did, it would be preempted by ERISA.

There are federal exceptions to the anti-alienation and preemption provisions which mirror South Carolina's. For example, Qualified Domestic Relations Orders (QDRO's) for child support may be exempted. I.R.C. § 401 (a)(13)(B); ERISA § 206(d)(3). In a marriage and subsequent divorce, the retirement plan is a marital asset subject to a Family Court's equitable division authority. Federal tax judgments and levies are also exempt. See Treas. Reg. §1.401(a)-13(e). Criminal judgments may also be exempt. See U.S. v. Novak, 476 F.3d 1041 (9th Cir. 2007).

The most applicable exception to the case at bar is that civil (or criminal) judgments, settlement agreements and the like may be offset by a participant's fiduciary violation or crime committed by the contributor against the plan, i.e., doing something disallowed by the rules of the plan itself. For instance, if Mr. Cox would have contributed more than the prescribed amount for any tax year, those funds would not be protected by ERISA. None of the exceptions to the anti-alienation or preemption provisions are applicable in this case and no evidence was presented demonstrating more was paid into the plan than the plan allows.

Appellant notes that Respondents offered no testimony or entered documents into evidence

to support claims that Mr. Cox has complied with the provisions of the plan. (App. Br. at 17). While that is true, there is also no evidence to rebut the claims. The moving party, the Appellants herein, had the burden of proof at the motion hearing. The hearing, of which no transcript was made, dealt almost entirely with whether an ERISA covered payroll deductions deposited into a 401(k) pension account after a judgment has been rendered against the individual, is a fraudulent conveyance.

As Oskin v. Johnson, holds, in referring to the Statute of Elizabeth; "In interpreting this statute, this Court has held conveyances shall be set aside under two conditions; First, where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud; and, second, where a transfer is made without actual intent to defraud but without valuable consideration. 400 S.C. 390, 735 S.E.2d 459 (S.C. 2012).

The consideration Mr. Cox receives from his 401(k) contributions are that his employer will match his contribution and these contributions and employer matching contributions will be paid out over time after Mr. Cox retires. Therefore, under Oskin, the only way this Court may set aside the contributions into the 401(k) are if they are found to be made with the actual intent of defrauding the creditor. As stated previously, Mr. Cox has made contributions into this 401(k) plan for many years prior to the judgment being entered against him and he is contributing less than he is allowed by applicable law.

CONCLUSION

Mr. Cox's previous conversions of non-exempt property into his pension account were properly set aside. However, those conveyances are entirely irrelevant to the issue before this Court. Under ERISA and South Carolina's exemption laws, the contributions Mr. Cox made into

his 401(k) since judgment was rendered against him are not fraudulent conveyances. The conveyances were made with the intent to provide for his family after he retires not to defraud the creditor and they were made for the valuable consideration of matching employer contributions and protection of these assets from creditors. The wage contributions were exempt, not considered income by the Internal Revenue Service and they would be exempt even if they were considered to be income under ERISA and our Statue of Elizabeth. Further, the moving party has the burden of proof. Appellants presented no evidence before the motion hearing, at the motion hearing or after the motion hearing that show Mr. Cox made contributions made to his plan that exceed the plan's guidelines. Accordingly, the Master ruled in accordance with the law and the facts and should be upheld on appeal.

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PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Final Brief by depositing a copy of them in the United States Mail, postage prepaid, on Monday, March 31, 2015, addressed to Appellant's attorney Benjamin C. Bruner, Esquire by depositing same in the United States Mail with sufficient postage affixed and addressed it to their attorney of record Benjamin C. Bruner, at P.O. Box 61110, Columbia, South Carolina 29260.

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