THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
Honorable Curtis G. Clark, Master-in-Equity

Appellate Case No. 2016-001972

First Citizens Bank and Trust Company, Inc. . . . . Appellant,

v.

Dorn Properties, Inc. and Henry A. Dorn . . . . Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUE ON APPEAL

WHETHER POST-JUDGMENT CONTRIBUTIONS TO AN INDIVIDUAL RETIREMENT ACCOUNT BY A JUDGMENT DEBTOR ARE FRAUDULENT CONVEYANCES AND, THEREFORE, SUBJECT TO ATTACHMENT BY JUDGMENT CREDITORS.

STATEMENT OF THE CASE

On September 2, 2009, Appellant filed a mortgage foreclosure action against Respondents and others in connection with real estate owned by Respondent Dorn Properties, Inc. in Greenwood County. Respondents filed an Answer to the foreclosure complaint, but did not contest the foreclosure action. Following the sale of the property, on March 29, 2010, a deficiency judgment in the amount of $149,665.92 was entered against Respondents.

Appellant subsequently initiated supplemental proceedings against Respondents in connection with the deficiency judgment. Respondents provided tax returns, financial statements, and other information to Appellant. This information showed that Respondents had no equity in any assets that were subject to execution and that there were a number of other judgments against Respondents that were filed prior to Appellant's judgment. After receiving this information, Appellant elected to go forward with supplemental proceedings, and a hearing was held on March 24, 2015. At the conclusion of the hearing, Appellant sought to execute on the Individual Retirement Account of Respondent Henry Dorn. The Master in Equity declined to allow the attachment of the IRA at that time.

On June 2, 2016, Appellant filed a Motion to Set Aside and Execute on Post-Judgment Contributions, along with a supporting memorandum. Respondents then filed a memorandum in opposition to the Motion, along with the Affidavit of Henry Dorn. A hearing was held on Appellant's Motion on July 19, 2016. After hearing the arguments of counsel, the Master in Equity denied the Motion. The Order denying the Motion was entered on September 9, 2016.

Appellant filed this appeal on September 21, 2016.

STATEMENT OF FACTS

Henry Dorn is an employee of Dorn, Dempsey & Associates, Inc., an accounting firm in Greenwood, South Carolina. He has been employed by the firm since it was formed on June 1, 2010. Prior to joining Dorn, Dempsey & Associates, Inc., Dorn was employed by the accounting firm of Green and Company for 29 years. (R.p. 160, Dorn Affidavit, ¶2).

Dorn, Dempsey & Associates, Inc. provides to its employees an employer-sponsored retirement plan, often referred to as a SIMPLE IRA. "SIMPLE" is an acronym for Savings Incentive Match Plans for Employees. These are employer-sponsored retirement plans that allow employees of small businesses to make contributions via salary deferrals. SIMPLE plans are covered by the Employee Retirement Investment Security Act (ERISA), which details the requirements for structure and administration of employer retirement plans. ERISA mandates that employers of SIMPLE IRAs are required by law to match employee contributions. The funds contributed by an employee to a SIMPLE IRA are never actually received by the employee, but are withheld from his paycheck. Employers are required to deposit employee salary deferral contributions for SIMPLE IRAs into the employee's account by the end of the month following the month in which the funds were withheld from the employee's paycheck. (R.p. 48, Memorandum in Opposition to Motion to Set Aside and Execute on Post-Judgment Contributions).

ERISA and the federal government limit the amount an employee may contribute to the SIMPLE IRA each year. The amount an employee contributes from his salary to a SIMPLE IRA cannot exceed $12,500 in 2015 and 2016. Employees over the age of 50 are allowed an additional "catch-up" contribution of $3,000.00 per year. Also, amounts contributed to SIMPLE

IRAs are not allowed to be withdrawn before the employee turns age 59½ without a penalty of 10% and are subject to income tax at prevailing rates both federal and state. (R.p. 48, Memorandum in Opposition to Motion to Set Aside and Execute on Post-Judgment Contributions).

During his employment at Dorn, Dempsey & Associates, Inc., Dorn has made the following contributions to his SIMPLE IRA:

Year 2010 - $3,233.00

Year 2011 - $13,083.00

Year 2012 - $14,000.00

Year 2013 - $14,500.00

Year 2014 - $14,500.00

Year 2015 - $2,417.00

(R.p. 160, Dorn Affidavit, ¶3). Dorn's contributions have never exceeded the amount allowed by law. While he was employed at Green and Company, Dorn made regular contributions to the SIMPLE IRA provided to its employees (R.p. 161, Dorn Affidavit, ¶6).

STANDARD OF REVIEW

"Supplementary proceedings are equitable in nature." *Ag-Chem Equip. Co. v. Daggerhart,* 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct.App.1984). In an equitable matter referred to a master in equity, the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence. *Friarsgate, Inc., v. First Fed. Sav. & Loan Ass'n,* 317 S.C. 452, 456, 454 S.E.2d 901, 904 (Ct.App.1995). However, the appellate court is not required to disregard the findings of the master. *Fast Photo Exp. v. 1st Nat. Bank of Chicago*, 369 S.C. 80, 630 S.E.2d 285 (Ct. App. 2006).

ARGUMENTS

I. THE SOUTH CAROLINA EXEMPTION STATUTE PROTECTS BOTH PRE-JUDGMENT AND POST-JUDGMENT ASSETS FROM ATTACHMENT OR EXECUTION BY JUDGMENT CREDITORS.

A. Section 15-41-30(A)(13) of the South Carolina Code exempts both pre-judgment and post-judgment contributions to an IRA from execution or attachment, and this exemption is recognized by and consistent with United States bankruptcy law.

Appellant first argues that the language of Section 15-41-30(A)(13) which provides that "the interest of an individual under a retirement plan shall be exempt from creditor process to the same extent permitted in Section 522(d) under federal bankruptcy law" should be interpreted to preclude protection for post-judgment contributions to an IRA. However, this argument ignores the plain language of Section 522(d) of the Bankruptcy Code and misstates the operation of bankruptcy law regarding exemptions.

Appellant suggests that, under bankruptcy law, assets acquired by a judgment debtor after filing bankruptcy are not protected by exemption statutes. However, established law is to the contrary. As recently explained in a unanimous decision of the United States Supreme Court in *Harris v. Viegelahn*, 575 U.S. __ (2015), bankruptcy allows an individual to make a clean break from his financial past. When a debtor files bankruptcy, his non-exempt assets form a bankruptcy estate, which are liquidated and distributed to creditors. Crucially, however, the estate "does not include the wages a debtor earns or assets he acquires *after* the bankruptcy filing....he is able to make a 'fresh start' by shielding from creditors his postpetition earnings and acquisitions." 575 U.S. at ____ (emphasis in opinion). Thus, under bankruptcy law, the assets acquired by a judgment debtor after bankruptcy are not subject to the claims of creditors.

With regard to the specific language of Section 522(d) of the Bankruptcy Code, the

subsection applicable to retirement accounts states that retirement funds are exempt "to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. Section 522(d)(3). The inclusion of the reference to Section 522(d) in the South Carolina statute is to make it clear that the exemption for retirement accounts is not limited to the IRA accounts described in the first three sentences of subsection (13). The exemption also extends to other tax exempt retirement accounts recognized under federal law, such as 401(k) plans.

Finally, Appellant's argument that bankruptcy law prohibits the application of the exemption statute to post-judgment assets was not raised in the lower court. It was not mentioned in either Appellant's Motion to Set Aside and Execute on Post-Judgment Contributions or in its Memorandum in Support of Motion to Set Aside and Execute on Post-Judgment Contributions. The only argument presented to the Master in Equity was that post-judgment contributions to an IRA are fraudulent conveyances. It is well-established that an argument raised on appeal that is based on different grounds from the argument presented to the lower court is not preserved for appeal. *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (issue not preserved because the trial judge never ruled on the grounds the [plaintiffs] raise on appeal).

The reference to Section 522(d) of the Bankruptcy Code in Section 15-41-30(A)(13) in no way limits the protection of an IRA from execution by judgment creditors. Moreover, this argument was not presented to the Master in Equity.

B. The Master in Equity correctly determined that post-judgment contributions to an IRA are not fraudulent conveyances.

Appellant's next argument is that all post-judgment contributions by a judgment debtor to

an IRA are fraudulent conveyances and subject to execution by a judgment creditor. However, this argument ignores both the established law regarding what constitutes a fraudulent conveyance and the legislative history of the statute that exempts an IRA from execution.

The only limitation on the exemption for an IRA is that the exemption "may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account..." S.C. Code Section 15-41-30(A)(13) (Supp. 2015). Although no South Carolina appellate courts have addressed what constitutes a fraudulent conveyance into an IRA, it seems that this limitation would likely apply in two circumstances. The first circumstance would arise if the debtor made contributions to his IRA that exceeded the amount allowed under federal law. The second circumstance could arise where a debtor contributed a non-exempt asset into an IRA in order to protect it from attachment. With regard to exempt assets, the South Carolina Supreme has previously held that transfer of an exempt asset, even for no consideration, is not a fraudulent conveyance. *See McNair v. Morton*, 64 S.C. 82, 41 S.E. 829 (1902).

By way of example, if a debtor maintained an ordinary savings account at a bank and he transferred those funds into an IRA to avoid attachment by a judgment creditor, it could be argued that such transfer was a fraudulent conveyance. However, it should be noted that many courts have held that the conversion of non-exempt property to exempt property is not a fraudulent conveyance. *See, e.g., Wudrick v. Clements,* 451 F.2d 988 (9th Cir. 1971); *In re Thomas,* 2012 WL 2792348 (Idaho Bankr. 2012); *see also,* House Report of Bankruptcy Reform Act of 1978, H.R. REP. NO. 95–595, at 361 (1977) ("As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.").

Neither of the two circumstances described above applies in this case. First, Dorn's contributions to the SIMPLE IRA have never exceeded the maximum amount allowed by federal law. Second, an individual's earnings for his personal services are not subject to attachment or garnishment in South Carolina. *See* S.C. Code §15-39-410. Therefore, the funds that are being contributed to the SIMPLE IRA by Dorn are not subject to attachment by Appellant and thus the contribution is not a fraudulent conveyance.

Appellant cites several cases in support of its position that post-judgment contributions to an IRA are fraudulent conveyances. However, the facts in all of the cases cited by Appellant are distinguishable from those in the present case. First, all of those cases involved the conveyance of an asset to a third-party. In this case, there has been no transfer to a third-party. The IRA is in the name of and owned by Henry Dorn. Therefore, there has been no conveyance by Dorn.

Second, all of the cases cited by Appellant involved the transfer of assets that were subject to attachment by the judgment creditor. Here, the wages used by Dorn to fund the IRA were not subject to attachment by Appellant. As previously noted, the transfer of an exempt asset, even for no consideration, is not a fraudulent conveyance *See McNair v. Morton*, 64 S.C. 82, 41 S.E. 829 (1902). Thus, the cases relied on by Appellant in support of this argument are not applicable to the facts in this case.

Finally, if Appellant's argument is accepted, then all post-judgment contributions to an IRA by a judgment debtor would be treated as fraudulent conveyances. However, if that is what the South Carolina legislature intended, then it could have simply written that limitation into the statute. Instead, the legislative history of the statute and the recent amendment to it confirm the the legislature's intent to offer broad protection to Individual Retirement Accounts from the claims of judgment creditors, regardless of the size of the account.

Prior to 1999, the South Carolina exemption statute, Section 15-41-30 of the South Carolina Code, did not contain a specific exemption for an IRA. As a result, in 1987 the South Carolina Court of Appeals had held that Individual Retirement Accounts were not exempt from attachment by judgment creditors. *Rowland v. Strickland*, 294 S.C. 119, 362 S.E.2d 892 (Ct. App. 1987). However, bankruptcy judges in South Carolina at that time had held that the subsection in the statute that provided an exemption for pensions and other retirement plans also protected an IRA from attachment. But, the bankruptcy courts had limited the exemption to individuals over the age of 59½, who had a right to receive payments under their IRA. *See In re Outen*, 220 B.R. 26 (D.S.C. 1998). Then, in the *Outen* case, the United States Bankruptcy Court for the District of South Carolina issued an *en banc* opinion that reversed its prior decisions and held that an IRA was exempt from the claims of creditors, regardless of the age of the debtor. 220 B.R. at 31.

Apparently in an effort to confirm the *Outen* decision that an IRA is not subject to creditor's claims, the following year the South Carolina legislature revised the exemption statute to make it clear that such accounts are protected from attachment by adding the following exemption to Section 15-41-30:

> The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A 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, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. 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 item, 'Internal Revenue Code' has the meaning provided in Section 12-6-40(A).

1999 S.C. Act No. 60. Then, in 2012, the legislature made the exemption broader by eliminating the limitation that an IRA is only exempt "to the extent reasonably necessary for the support of

the debtor and any dependent of the debtor." 2012 S.C. Act No. 153. Based on the foregoing legislative history, it is clear that the South Carolina legislature intends to extend to IRAs broad protection from attachment by judgment creditors.

II. THE SOUTH CAROLINA EXEMPTION STATUTE IS TO BE CONSTRUED LIBERALLY IN FAVOR OF DEBTORS AND PROTECTS BOTH PRE-JUDGMENT AND POST-JUDGMENT CONTRIBUTIONS TO INDIVIDUAL RETIREMENT ACCOUNTS.

Appellant's final argument asserts that judicial interpretations and the intent of the legislature support the conclusion that post-judgment contributions to an IRA are not protected from attachment by Section 15-41-30(A)(13) of the South Carolina Code. This argument, however, ignores both applicable case law and the legislative history of the statute.

Homestead exemptions do not exist under the common law, but are a uniquely American institution, having their origins in the great debtor revolution of the era of "Jacksonian democracy." 40 C.J.S. Homesteads § 3 at 175-176 (1991). The exemptions depend entirely upon constitutional and statutory provisions. *Dorn v. Stidham*, 139 S.C. 66, 137 S.E. 331 (1927). The homestead provision of the South Carolina Constitution provides that the "General Assembly shall enact such laws as will exempt real and personal property of a debtor." S.C. Const. art. III, §28. The legislature carried out this constitutional mandate under the "Homestead and Other Exemptions" statute, S.C.Code Ann. §§ 15-41-10 to -35, which provide that certain "real and personal property of a debtor domiciled in this State is exempt from attachment, levy, and sale under any mesne or final process issued by any court or bankruptcy proceeding." S.C.Code Ann. § 15-41-30 (Supp. 2015). Furthermore, it is well-settled that the exemptions provided under the statute are to be construed liberally in favor of debtors. *In re Holt*, 497 B.R. 817 (Bankr. D.S.C. 2013); *Bonebrake v. Morrow*, 183 S.C. 170, 190 S.E. 506 (1937); *see also, e.g., Holden v. Cribb*,

349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002) (holding that a judgment debtor who is incarcerated is entitled to claim a homestead exemption).

As discussed above, the recent legislative history regarding the protection of IRAs evidences the legislature's intent to provide these accounts with broad protection. The most recent amendments in 2012 eliminated the limitation that an IRA is only exempt "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor" and clarified that the exemption extends to all tax exempt retirement accounts recognized under federal law. *See* 2012 S.C. Act No. 153.

Although South Carolina appellate courts have not considered the specific question of whether post-judgment contributions to an IRA are subject to attachment, the Court of Appeals has ruled on this issue in connection with other assets. In *Scholtec v. Estate of Reeves*, 327 S.C. 551, 490 S.E.2d 603 (Ct. App. 1997), a judgment had been obtained against the defendant in 1973. A number of years later, the judgment debtor/defendant agreed to a personal injury settlement in the amount of $125,000.00. Although the settlement proceeds would have been exempt from execution pursuant to Section 15-41-30, the judgment debtor/defendant died before the settlement was paid, so the proceeds were paid into his estate. The judgment creditor then filed a claim against the estate, and the question before the Court of Appeals was whether the exemptions provided in Section 15-41-30 continued after the death of the judgment debtor.

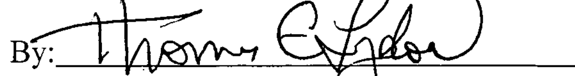
Although the Court of Appeals ultimately held that the exemption did not survive the death of the judgment debtor, in its analysis, the Court stated that prior to his death, the judgment debtor "was clearly entitled to the exemption." 490 S.E.2d at 605. Nothing in this opinion suggests that assets acquired post-judgment are not entitled to the protection of the exemption statute.

All of the cases from other jurisdictions cited in Appellant's brief in support of this argument are distinguishable from the facts of the case before this Court. In *Gilchinsky v. National Westminster Bank*, 732 A.2d 482, 159 N.J. 463 (N.J., 1999), the judgment creditor had a restraining order against all of the judgment debtor's assets in the State of New York. She then transferred the funds from her profit sharing account in New York to an IRA in New Jersey in an effort to circumvent the New York judgment and the restraining order. The New Jersey Supreme Court held that the transfer was a violation of the restraining order, and that such violation eliminated the IRA's protection from execution. Similarly, in *Dona Ana Savings and Loan v. Dofflemeyer*, 855 P.2d 1054, 115 N.M. 590 (N.M., 1993), the judgment debtor was attempting to convert nonexempt assets (a certificate of deposit and real estate) to exempt assets (annuities). Finally, *Webster v. Rodrick*, 64 Wn.2d 814, 394 P.2d 689 (Wash. 1964), involved a dishonest employee who used embezzled funds to purchase a home. The court had granted the employer an equitable lien against the home, but the dishonest employee asserted that the equitable lien was subordinate to her statutory homestead exemption. The Washington Supreme Court rejected that argument and held that the equitable lien was not subject to the homestead exemption.

CONCLUSION

Based on the foregoing, Appellant's arguments that post-judgment contributions to an IRA are not protected by the exemption statute are not supported by the legislative history of the statute or applicable case law. Furthermore, a contribution by a debtor of wages that are exempt from attachment into an IRA is not a fraudulent conveyance that renders the account subject to the claim of a judgment creditor. Therefore, the Order of the lower court should be affirmed.

McANGUS, GOUDELOCK & COURIE, LLC

By: 

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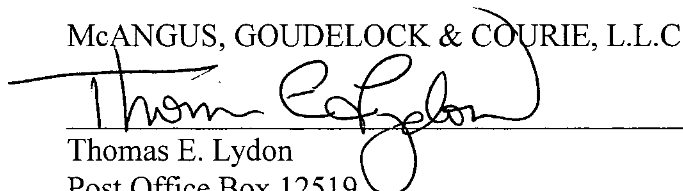
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

McANGUS, GOUDELOCK & COURIE, L.L.C.



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