UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2278

September Term, 2015

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ELIZABETHEAN COURT ASSOCIATES IV LIMITED PARTNERSHIP

v.

RONALD COHEN INVESTMENTS, INC., ET AL.

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Graeff,
Berger,
Shaw Geter,

JJ.

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Opinion by Berger, J.

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Filed: January 9, 2017

This appeal arises from the circuit court's decision to deny a motion for ancillary relief under Md. Rule 2-651. In 2002, appellant, Elizabethean Court Associates IV, L.P. ("ECA") was awarded a judgment in the amount of $72,626.93 against appellee, Ronald Cohen Investments, Inc. ("RCI"), for unpaid rent. Despite its best efforts, ECA was unable to collect the judgment, which, at the time of this appeal totaled approximately $155,639.51, including interest. ECA filed the motion for ancillary relief against RCI after it discovered that RCI and its co-defendant in a separate case, Ronald Cohen Management ("RCM"), posted a $12,000,000 cash deposit into the circuit court registry to serve as a supersedeas bond. ECA's motion for ancillary relief requested that the court prevent the clerk from releasing any part of the $12,000,000 cash deposit from the circuit court registry, even after the conclusion of the case for which it was posted, until ECA's judgment was fully satisfied. The trial court denied ECA's motion. ECA timely appealed.

On appeal, ECA presents one issue for our review,[1] which we rephrase as follows:

> Whether the circuit court erred when it denied a judgment creditor's motion for ancillary relief under Md. Rule 2-651, which requested an order, directed to the circuit court clerk, to hold in the circuit court registry a cash deposit of $12,000,000

[1] ECA presented the issue in this case as follows:

> ECA asked the Circuit Court to order the Circuit Court Clerk not to return to the Tower Oaks Defendants any portion of the Deposit remaining after satisfaction of the Tower Oaks judgment unless (i) ECA had filed a praecipe that the ECA Judgment had been paid; or, (ii) the Circuit Court entered an order permitting the Deposit's return. Did the Circuit Court err in refusing to grant the requested relief?

> that a debtor borrowed from a third party and posted as security pending appeal in a separate case.

For the reasons discussed below, we shall affirm the judgment of the Circuit Court for Montgomery County.

## FACTUAL AND PROCEDURAL BACKGROUND

In 2002, appellees, RCI, leased an office building in Bethesda, Maryland from appellant, ECA. Ultimately, RCI failed to pay its rent to ECA, and ECA obtained a judgment against RCI and RCM on September 18, 2002 in the District Court for Montgomery County for the unpaid rent and other charges due under the lease in the amount of $72,626.93. There are no credits against the balance of ECA's judgment, which, as of April 24, 2014, totaled $155,639.51, including interest.[2]

On September 10, 2012, Tower Oaks Boulevard, LLC ("Tower Oaks") and other related plaintiffs filed an action against RCI and RCM in a separate case ("Tower Oaks Case").[3] The appellants in the Tower Oaks Case deposited $12,000,000 cash into the court registry in lieu of a supersedeas bond. On May 23, 2014, the circuit court in the Tower Oaks Case granted a judgment in favor of plaintiffs, Tower Oaks Blvd. et al., for $5,256,590.30 in compensatory damages and $1,500,000 in punitive damage individually for a total judgment of $8,256,590.30. Ultimately, the defendants, RCI and RCM, were

[2] ECA renewed and recorded the judgment in the Circuit Court for Montgomery County on April 24, 2014.

[3] *Tower Oaks Blvd., LLC, et al. v. Ronald Cohen Investments, Inc., et al.*, Case No. 368256-V.

required to deposit $12,000,000 into the court registry in order to stay the execution of the judgment in the Tower Oaks Case against the real property and lease rents of the following entities: Third Persons 121 Associates Limited Partnership, 1570 Associates Limited Partnership, and Congressional Village Associates, LLC ("Property Owners"). Rather than paying the fees and other expenses associated with a supersedeas bond, and because RCM and RCI had no assets and could not borrow the money directly, the Property Owners borrowed the $12,000,000 and loaned it to RCI and RCM for the purpose of using it as a cash deposit pending their appeal in the Tower Oaks Case. RCI and RCM deposited the funds into the court registry on June 17, 2015.

ECA, who still had not received any payment toward the balance of the 2002 judgment against RCI, discovered that RCI and RCM had posted a $12,000,000 cash deposit in the court registry as security in the Tower Oaks Case. On July 28, 2015, ECA filed a motion for ancillary relief under Md. Rule 2-651 seeking an order from the Circuit Court for Montgomery County prohibiting the circuit court clerk from releasing any portion of the $12,000,000 deposit back to RCI or RCM without further order of the court, until the balance of the judgment against RCI was paid.

On November 12, 2015, the court held a hearing on ECA's motion for ancillary relief. The trial judge, who also presided over the Tower Oaks Case, expressed concerns about exposing a cash deposit -- which was borrowed from a third-party and posted for the purpose of security pending an appeal -- to the collection efforts of third-parties unrelated to the case for which it was posted. The primary concern expressed by the trial judge

concerned the policy implications that granting the order could have in the future on litigants' ability to pursue appellate review. The trial judge explained:

> [W]hat you're saying is citizens should be reluctant to help others bond judgments so that there can be appellate review -- careful appellate review in a non-rush fashion. Because if you do that and that person has anybody else out there, you're making a different kind [of] a loan than you would have made. [ . . . ]
>
> I think I would be hard pressed in this case to say without that bond there could have been orderly appellate review [ . . . ]

The court next addressed several various concerns with the motion including whether the cash deposit was RCI's property at all, the lender's specific purpose in lending the money for use as security pending appeal, and the expectations of the lender regarding its rights to the return of the funds once the case is over.

> [M]y worry is that if this is borrowed money where collateral has been pledged and there's an understanding that some or all will be returned if there is success on appeal[ ], so that all or part of the collateral can be released, and it was not contemplated. . . . And if it's not contemplated that there be some other unknown triggering event, the loan never would have been made.

The court further pointed out that the lender of the money to the litigant to make the cash deposit may "have made a judgment based on the merit or lack of merit of the" particular party's case on appeal. More specifically, the court stated:

> [S]omebody, when they decided to do this, made a calculation based on the results in this case and not on some other case. And may not have . . . . [m]ay not have put that kind of cash at risk if they knew or believed that some other creditor of Ronald Cohen Inc. could come in and grab it like an eagle. But I'll think about it. But I'm concerned, folks.

On November 23, 2015, the Circuit Court for Montgomery County denied ECA's motion for ancillary relief pursuant to Rule 2-651. This appeal followed.

## DISCUSSION

### I. Standard of Review

Both ECA and RCI agree that the standard of review is abuse of discretion. An "abuse of discretion" exists where

> a decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *King v. State*, 407 Md. 682, 711, 967 A.2d 790, 807 (2009) (internal quotation marks and citation omitted). Thus, "a ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *Id.* (internal quotation marks and citation omitted). "Whether there has been an abuse of discretion depends on the particular circumstances of each individual case." *Pantazes v. State*, 376 Md. 661, 681, 831 A.2d 432, 444 (2003).

*Consolidated Waste Industries, Inc. v. Standard Equipment Co.*, 421 Md. 210, 219 (2011).

Critically, Maryland Rule 2-651 provides an alternative route for recovering a judgment when other tools of recovery under the rules are inappropriate for the circumstances. Maryland Rule 2-651 provides in pertinent part:

> Upon motion and proof of service, a court in which a judgment has been entered or recorded *may order such relief regarding property subject to enforcement of the judgment as may be deemed necessary and appropriate to aid enforcement of the judgment* pursuant to these rules, including an order (a) to any person enjoining the destruction, alteration, transfer, removal,

> conveyance, assignment, or other disposition of such property . . .

Md. Rule 2-651 (emphasis added).

At a minimum, the judgment creditor seeking ancillary relief under Md. Rule 2-651 must make a "reasonable, *prima facie* showing that the property is or may be subject to the judgment." *McKinney v. State Deposit Ins. Fund Corp.*, 99 Md. 124, 137-138 (1994). If so, and the judgment debtor opposing the ancillary relief fails to show that the property is exempt from execution, the court may provide the relief; that relief, however, must be "limited to that 'necessary and appropriate to aid enforcement of the judgment[.]'" *Id.* at 138.

## II. The Circuit Court Did Not Abuse Its Discretion When It Denied Appellants' Motion for Ancillary Relief.

### A. Md. Rule 2-651 Is a Permissive Rule Thereby Affording the Trial Court's Discretion to Grant or Deny the Relief.

ECA argues that, to be "entitled to" the court's issuance of an order to the clerk to hold the funds until ECA's judgment is satisfied, ECA "only needed to show that it held a judgment against RCI and that the [d]eposit was subject to enforcement of that judgment." In support of that assertion, ECA cites to *McKinney*, *supra*, 99 Md. App. 124. In *McKinney*, we affirmed the decision of the circuit court to compel a defendant in a separate federal case to deposit $500,000 held by the federal court registry into the circuit court

registry upon its release to her.[4] The purpose of depositing the funds into the circuit court registry was to prevent the transfer of the money until the question of its rightful owner could be resolved. *Id.*

ECA's reliance on *McKinney* in support of its assertion that the circuit court abused its discretion is misplaced. The relevant issue in *McKinney* was whether the court was *permitted* to issue the order pursuant to Md. Rule 2-651. The Court there held that "so long as the judgment creditor makes a reasonable, *prima facie* showing that the property is or may be subject to the judgment, the court may afford what is essentially an interlocutory form of relief." *Id.* at 138. Pursuant to Md. Rule 2-651, the relief must be "limited to that which is 'necessary and appropriate to aid enforcement of the judgment.'" *Id.* (quoting Md. Rule 2-651). The scope of discretion the court has under Rule 2-651 "would include . . . an order to deposit liquid, mobile funds into the registry of the court" to prevent its transfer or disappearance as the court ordered in *McKinney*. *See id.*

In contrast, in the instant case we consider whether the circuit court was *required*, assuming ECA satisfied its burden of proof, to issue an order directing the clerk to hold the entire $12,000,000 cash deposit in the court registry until ECA's judgment against RCI

[4] The individual that the court in *McKinney* required to deposit funds into the circuit court registry was originally criminally charged with transferring funds that were subject to forfeiture under the Racketeer Influenced and Corrupt Organization Act (RICO), along with two others, for which she was acquitted. Because another of the defendants had transferred the $500,000 to her, and the moving party held a judgment against that other defendant, the purpose of requiring the cash deposit was to first to determine to whom the money belonged. *McKinney*, *supra*, 99 Md. App. at 133.

was satisfied. This distinction is significant because Md. Rule 2-651 is a permissive rule; it plainly states that "a court in which a judgment has been entered or recorded *may* order such relief . . . ." Whether and by what means the court finds a particular avenue of recovery to be "necessary and appropriate to aid enforcement of the judgment" is discretionary. Md. Rule 2-651.

As the circuit court pointed out at the November 12, 2015 hearing, this case is also factually distinct from *McKinney* in other material ways. First, the circuit court in *McKinney* issued its order to an individual to whom the federal registry was to release the funds, and directed her to deposit those funds into the circuit court registry to determine if the money actually belonged to an "associate" who owed money to the plaintiff. Here, ECA requested an order to the clerk of the circuit court to prevent the release of the entire $12,000,000 deposit or whatever remained in the circuit court registry until its own $155,639.51 judgment was satisfied, despite the termination of the purpose for which RCI and RCM voluntarily posted the cash deposit.

Even without these differences, the relevant holding of *McKinney* was that the trial court had the statutory authority, pursuant to Md. Rule 2-651, to order that the funds released from the federal registry be placed into the circuit court registry until the issue concerning which party was entitled to the entire $500,000 was resolved.

### B. No Statutory or Binding Authority Mandated the Order that Appellant Requested.

ECA contends that the mere fact that the $12,000,000 cash deposit was borrowed does not remove it from the scope of Md. Rule 2-651, because, in ECA's words,

"[b]orrowed funds belong, not to the lender, but to the borrower." Thus, ECA maintains that the $12,000,000 cash deposit is "property subject to enforcement of the judgment." Md. Rule 2-651. In support of this assertion, ECA points to cases in other jurisdictions in which the trial court allowed loan proceeds in a debtor's bank account to be garnished.[5] First, ECA cites to *Crider v. Crider*, an Indiana divorce and marital property case holding it to be within the lower court's discretion to include in the writ of attachment any money that the "debtor's" family-owned business might loan to him in the future. 15 N.E.3d 1042, 1072 (Ind. App. 2014). ECA also cites to *First Nat'l Bank in Dallas v. Banco Longoria, S.A.*, 356 S.W.2d 192 (Tex. Civ. App. 1992), in which the Texas court found that proceeds from a loan that were deposited into the judgment debtor's bank account were subject to garnishment, even though the debtor had borrowed the money to pay its employees and the judgment debtor had paid interest on the loan.

Nevertheless, ECA confuses the issue in the present case, which is whether the circuit court abused its discretion by refusing to grant the order requested, and not whether the court had the authority to grant the order. Notably, neither of these cases were controlling on the circuit court. Moreover, trial courts in both cases used their discretion to determine whether the loan proceeds in the debtor's bank account were the account

[5] ECA, however, claims that it does not seek to garnish or attach the cash deposit, but instead, relies on the methods allowed under Md. Rule 2-651.

holder's property and therefore subject to garnishment. *See Crider*, *supra*, 15 N.E.3d at 1072; *First Nat'l Bank in Dallas*, *supra*, 356 S.W.2d at 196.

To be sure, different courts may use different, case-specific factors to determine whether the garnishment of loan proceeds in a personal bank account is an appropriate method of recovering the debt. In some instances, courts have determined whether loan proceeds could be garnished based on whether the judgment debtor had control over the bank account and where to spend the loan proceeds, as well as whether the money in the account was loaned for a specific purpose. *See In re Southwestern Glass Co.*, 332 F.3d 513, 517 (8th Cir. 2003). The court in *Crider* considered "the history of questionable loaning of money between" the divorcee and his family-owned business in making this determination. *Crider*, *supra*, 15 N.E.3d at 1072. These cases, moreover, dealt with whether loan proceeds could be taken from a putative debtor's bank account, rather than a cash deposit from a court registry.

Most notably, in both *Crider* and *First Nat'l Bank in Dallas*, the relevant question was whether the lower court had the authority to attach or garnish loan proceeds held in the debtor's bank account, despite the account holder's claim that the money was borrowed. In both cases, the appellate courts affirmed the trial court's discretion to issue the order. *See Crider*, *supra*, 15 N.E.3d at 1072; *First Nat'l Bank in Dallas*, *supra*, 356 S.W.2d at 196. Here, however, our question is whether the circuit court was *required* to order the clerk to hold the entire cash deposit or whatever remained until ECA's judgment was satisfied in response to ECA's motion for ancillary relief. No statute or binding precedent

required the trial court to order the clerk of the circuit court to prevent the release of the entire remaining cash deposit in the manner ECA requested.

At oral argument, RCI maintained that ECA was not entitled -- as a matter of law -- to the relief it sought in its motion for ancillary relief. We disagree. Rule 2-651 vests the court with broad discretion to decide what is "necessary and appropriate to aid enforcement of the judgment." Md. Rule 2-651. We hold simply that it is left to the sound discretion of the trial judge to decide whether, under the facts and circumstances of the case, the party seeking ancillary relief is entitled to such relief. To be sure, ECA was within its rights to request this form of relief in order to attempt to recover on its judgment against RCI. Whether and to what extent to grant a particular form of relief falls within the discretion of the trial judge.

Critically, both the Tower Oaks case (for which RCI and RCM posted the $12,000,000 cash deposit) and ECA's motion for ancillary relief came before the same circuit court judge. As such, the judge was very familiar with the Tower Oaks case and the circumstances of the $12,000,000 cash deposit in the circuit court registry. At the hearing on the motion for ancillary relief, the judge expressed sincere reservations and concerns were he to grant the relief requested by ECA. Indeed, it was within the circuit court's sound discretion to determine whether the borrowed cash deposit was "subject to enforcement of the judgment as may be deemed necessary and appropriate to aid

enforcement of the judgment." Md. Rule 2-651. We, therefore, hold that the trial court did not abuse its discretion in denying ECA's motion for ancillary relief.

**JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.**