UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2659

September Term, 2014

DIAMOND TOOL & FASTENERS, INC.

v.

JAMES FITZGERALD, et al.

Woodward,
Friedman,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: January 8, 2016

The instant appeal arises out of two lawsuits, in one of which appellant, Diamond Tool & Fasteners, Inc., sought amercement against appellee, James Fitzgerald, Sheriff of Howard County ("Howard County Sheriff"), in the Circuit Court for Howard County and in the other, appellant sought amercement against appellee, Ronald Bateman, Sheriff of Anne Arundel County ("Anne Arundel County Sheriff"), in the Circuit Court for Anne Arundel County. In both cases, appellant alleged that appellees failed to sufficiently comply with their statutory duties of levying on the personal property of the judgment debtors pursuant to writs of execution. The cases were transferred to the Circuit Court for Carroll County and consolidated, followed by the filing of motions to dismiss or for summary judgment by appellees. The circuit court granted the motions on the basis that appellant failed to state a claim upon which relief could be granted.

On appeal, appellant presents two questions for our review, which we have rephrased[1]:

[1] Appellant's questions presented, verbatim from its brief, are:

> 1. Did the Circuit Court err in ruling that Plaintiff failed to state a claim for amercement when the Howard County Sheriff filed a return stating that the judgment debtor "called Dep. Smith and stated that he is now and has been out of town on extended business and is unable to be home to facilitate a levy," and put forth no other efforts to execute the writ?
>
> 2. Did the Circuit Court err in ruling that Plaintiff failed to state a claim for amercement when the Anne Arundel County Sheriff filed a return stating "Un-served Non Bona" "two

(continued...)

1. Did the circuit court err in granting the motion to dismiss or for summary judgment in favor of the Howard County Sheriff?

2. Did the circuit court err in granting the motion to dismiss or for summary judgment in favor of the Anne Arundel County Sheriff?

We answer both questions in the negative and, accordingly, affirm the judgments of the circuit court.

BACKGROUND

On September 21, 2010, appellant obtained a judgment in the Circuit Court for Howard County against John Hildreth and his company, EFS Global, LLC ("EFS"), in the amount of $110,346.89. Appellant filed a request for Writ of Execution against the personal property of Hildreth at his residence in Howard County. On or about November 30, 2012, the Circuit Court for Howard County issued a Writ of Execution against the personal property of Hildreth and transmitted it to the Sheriff of Howard County. Appellant also filed a request for a Writ of Execution against the personal property of EFS at EFS's business address in Anne Arundel County. On or about December 5, 2012, the Circuit Court for Anne Arundel County issued the Writ of Execution against the personal property of EFS and transmitted it to the Sheriff of Anne Arundel County.

[1](...continued)

desks and two computers," and put forth no other efforts to execute the writ?

On January 1, 2013, Howard County Deputy Sheriff Frank Smith filed a return with the court stating that the Writ of Execution was unserved, because "Hildreth is out of town on extended business and unable to facilitate a levy." On January 12, 2013, Anne Arundel County Deputy Sheriff Fred Charles filed a return with the court stating that the Writ of Execution was unserved "Non Bona – 2 desk/2 computers 12 yrs. old."

On July 21, 2014, appellant filed a complaint for amercement against the Howard County Sheriff in the Circuit Court for Howard County. On the same day, appellant filed a complaint for amercement against the Anne Arundel County Sheriff in the Circuit Court for Anne Arundel County. On July 25, 2014, the Howard County case was transferred to Anne Arundel County. Both cases were subsequently transferred to the Circuit Court for Carroll County and consolidated. On October 6, 2014, appellant filed amended complaints for amercement against both Sheriffs.

Each Sheriff responded by filing a motion to dismiss or for summary judgment. Attached to the motion of the Howard County Sheriff was the affidavit of Deputy Smith, which read in relevant part:

> 2. I made several attempts to serve the Writ of Execution against judgment debtor John Hildreth.
>
> 3. On January 9, 2013 at 12:30 p.m., I responded to Mr. Hildreth's residence at 7811 Fieldstone Court, Ellicott City, Maryland. There was no response at the front door.

4. On January 15, 2013 at 1:30 p.m., I spoke with Mr. Hildreth's wife, Noelle who told me that Mr. Hildreth was out of town. I left her my business card with my contact information and requested that she ask Mr. Hildreth to call me.

5. On January 28, 2013 at 2:00 p.m., I spoke with Mr. Hildreth's attorney. He would not authorize me to enter the residence to levy on Mr. Hildreth's property.

6. On January 29, 2013 at 4:00 p.m., Mr. Hildreth called me and left a voicemail message stating that he was out of town and could not be home for the levy.

7. After Mr. Hildreth's voicemail on January 29th, I did not have additional time to attempt to serve the Writ since it was limited to sixty (60) days after its issuance.

Attached to the motion of the Anne Arundel County Sheriff was the affidavit of Deputy Charles, which stated in relevant part:

2. On December 12, 2012, I responded to 790 Elkridge Landing Road, Linthicum Heights, Maryland to serve a Writ of Execution against EFS Global, LLC.

3. When I arrived at that address I discovered an office space that contained two desks (or tables) and two computers. The items appeared to be very old and in poor condition. It was my understanding that the judgment debtor had previously been evicted from that location. Present were two, non-English speaking males who did not appear to be affiliated with the judgment debtor. They were seated at two tables with two Dell computers.

4. Upon inspecting the items, I determined that the desks/tables and computers were approximately twelve (12) years old, if not older, and appeared to have no value. It was also unclear as to whether they even

belonged to the judgment debtor. As a result, I did not seize the items.

5. I filed a Return of Service on December 13, 2012, indicating that the Writ could not be served because there was no property of any value at the judgment debtor's address.

Appellant filed an opposition to the motions. No affidavits were attached to appellant's opposition to counter those filed in support of appellees' motions. Appellant's opposition also did not dispute the facts alleged in appellees' affidavits.

On December 22, 2014, a hearing was held on appellees' motions in the circuit court. The court took the matter under advisement and issued an opinion on January 15, 2015. In its opinion, the court granted the motions on the ground that appellant failed to state a claim upon which relief can be granted because, among other things, the Sheriffs complied with their statutory obligations by attempting to serve the writs and then filing returns with the court. This timely appeal followed.

STANDARD OF REVIEW

Maryland Rule 2-322(c) provides, in relevant part:

> (c) **Disposition**. . . . If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 2-501.

"[W]hen a trial judge is presented with factual allegations beyond those contained in the complaint to support or oppose a motion to dismiss and the trial judge does not exclude such matters, then the motion shall be treated as one for summary judgment." *Okwa v. Harper*, 360 Md. 161, 177 (2000). "Generally the introduction of affidavits of fact will operate to convert a motion to dismiss into a motion for summary judgment." *Worsham v. Ehrlich*, 181 Md. App. 711, 723 (2008). Attached to appellees' motions to dismiss were affidavits from the deputy sheriffs detailing their efforts taken to effectuate service of the writs of execution. In *Worsham*, this Court stated: "There is no indication on the record that the court excluded the facts submitted to it through the exhibit in ruling on the motions to dismiss; thus, we must assume that they were considered." *Id.* In this case, the affidavits were referenced by counsel on both sides during the hearing on the motions to dismiss. The court's order granting the motions to dismiss did not make any explicit reference to the affidavits, but neither was there any indication that the trial court excluded the affidavits or the facts contained therein. Furthermore, "[w]hen the circuit court considers matters outside the pleadings . . . the legal effect of the ruling in favor of the moving party is to grant a motion for summary judgment, notwithstanding the court's designation of the ruling as a motion to dismiss." *Boyd v. Hickman*, 114 Md. App. 108, 117-18 (1997). Accordingly, we shall treat the court's ruling on the motions as grants of summary judgment.

The Court of Appeals has summarized the applicable standard of review for a grant of summary judgment:

> A trial court may grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court is to consider the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party. Accordingly, because the trial court's decision turns on a question of law, not a dispute of fact, an appellate court is to review whether the trial court was legally correct.

Ross v. Hous. Auth. of Balt. City, 430 Md. 648, 666-67 (2013) (internal citations omitted).

DISCUSSION

Appellant argues that appellees failed to adhere to the requirements of the amercement statute, which guarantees that sheriffs actually do their job. Specifically, appellant claims that the Howard County Deputy Sheriff "did not attempt to execute the writ at all, relying only on a phone conversation with [the judgment debtor] that he could not facilitate the levy." Appellant argues that the Anne Arundel County Deputy Sheriff refused to levy on the property plainly in front of him, which "is the opposite of an attempt." According to appellant, because their attempts to serve the writs were insufficient, the returns filed by the sheriffs did not satisfy the statute. Appellant further claims that "[f]ailure to file a return includes the false filing of a return when no legitimate attempt to serve the writ was made." Appellant concludes that the statute provides that, when a sheriff is provided with a writ, he must execute its demand, which the sheriffs in this case did not do.

Appellees argue that the circuit court correctly dismissed the suit because a plain reading of the statute shows that the deputy sheriffs complied with their duty by attempting to serve the writs and filing returns with the court. Contrary to appellant's contention,

appellees claim that the statute does not require a certain amount of diligence in serving the writ. In appellees' view, the circuit court was correct when it determined that the statute only requires an attempt to serve the writ, not successful service. Appellees further point out that there is no support for appellant's assertion that they filed false returns when they unsuccessfully attempted to serve the writs. According to appellees, appellant seeks an interpretation of the statute that "would allow creditors throughout the State to challenge the Sheriffs' efforts to serve writs with the expectation that the Sheriffs would effectively become the guarantors of their judgments."[2]

Subtitle 3 of Title 2 of the Courts and Judicial Proceedings Article sets forth the duties of sheriffs in Maryland. Section 2-301, entitled "Service of writs," states, in pertinent part, that "the sheriff shall serve all papers directed to him according to their instructions, within the time set by the court." Md. Code (2006, 2013 Repl. Vol.), § 2-301(a) of the Courts and Judicial Proceedings Article ("CJP"). Section 2-303 provides that, "*[w]hen a sheriff* serves

[2] Appellees also argued that the circuit court correctly dismissed the lawsuit, because the Sheriffs are entitled to State personnel immunity. Specifically, appellees contend that the Maryland Tort Claims Act grants immunity to state personnel for tortious acts committed in the scope of their public duties without gross negligence. Appellees argue that the circuit court was right when it found that "[t]here has been no showing that [appellees] were negligent in any way." Moreover, appellees assert that "Maryland courts have repeatedly held that a bare allegation of malice or gross negligence is insufficient to defeat an immunity defense." This Court need not address the issue of negligence or gross negligence on the part of the Sheriffs. The instant case is not an action in tort. Instead, it is an action for the violation of a statutory duty, namely, the Sheriffs' statutory duty to serve or attempt to serve the writs of execution and file returns with the court. *See* Md. Code (1974, 2013 Repl. Vol.), § 2-303 of the Courts & Judicial Proceedings Article ("CJP").

or *attempts to serve a paper he shall file a return with the clerk of the court* that issued the paper stating whether or not the paper was served, and other information required by rule or law." CJP § 2-303 (emphasis added). Writs of execution are included in this category of papers served by sheriffs, and "[i]f a sheriff fails to file a return on a writ of execution or attachment within the time set by the court, the court may amerce the sheriff, for the benefit of the plaintiff, in the amount of the judgment stated in the writ." CJP § 2-304(d). Amercement is "the imposition of a discretionary fine or penalty by a court, esp. on an official for misconduct." BLACK'S LAW DICTIONARY (10th ed. 2014). If a sheriff is amerced by the court and ordered to pay a plaintiff, "he is entitled to the full benefit of the cause of action or judgment and may proceed against the defendant in any manner the plaintiff might have proceeded." CJP § 2-306.

The statutory law of Maryland thus provides plaintiffs with the remedy of amercement against sheriffs who fail to fulfill their statutory duty of filing a return on a writ of execution. *See* CJP § 2-304(d). Implicit in that duty to file a return is the predicate duty to serve or attempt to serve the writ of execution. *See* CJP § 2-303.

Appellant concedes that appellees did file returns with the trial court, but argues that "[f]ailure to file a return includes the false filing of a return when no legitimate attempt to serve the writ was made." According to appellant, a false return is one that is filed with the court after no attempt to serve the writ was made, or the attempt at service was insufficient to the extent that there was no genuine attempt at service. As the circuit court explained in

its opinion, appellant "insists that, by somehow failing to put forth enough effort in serving the writs of execution, the sheriffs effectively filed false returns[.]"

There is nothing in the language of CJP § 2-303 that supports appellant's contention that a sheriff must put forth some unspecified level of effort to serve a writ of execution in order to satisfy the statutory requirement of an "attempt[] to serve a paper." *See* CJP § 2-303. The question is a simple either/or proposition: Did or did not the sheriff attempt to serve the writ of execution? Based on the undisputed facts in the instant case, we hold that the Sheriffs did attempt to serve the writs of execution and, thus, their filing of returns to that effect satisfied their statutory obligations. We shall explain.

In Howard County, Deputy Smith sought to serve the writ of execution on the personal property of Hildreth located in his personal residence. As noted previously, on January 9, 2013, Deputy Smith went to Hildreth's address, but there was no response at his front door. On January 15, 2013, he spoke with Hildreth's wife, who told him that Hildreth was out of town. Deputy Smith gave her his contact information and requested that she ask Hildreth to call him. On January 28, 2013, he spoke to Hildreth's attorney, who did not authorize him to enter the residence to levy on the property. On January 29, 2013, Hildreth left Deputy Smith a voicemail stating that he was out of town and not able to accept service. The sixty day time period for filing the return on the writ was expiring soon, and Deputy Smith filed his return with the court, as required by CJP § 2-303. Deputy Smith's return stated: "Hildreth is out of town on extended business and unable to facilitate a levy." These

actions clearly constitute an attempt to serve the writ of execution and, thus, satisfied the requirements of the statute. *See* CJP § 2-303 (stating that the sheriff must attempt to serve the writ and then file a return stating whether or not it was served).

At oral argument before this Court, however, appellant claimed that the Maryland Rules required the sheriff to levy on the judgment debtor's interest in personal property. Under the circumstances of the instant case, we disagree. Rule 2-642(b) provides, in part, that "the sheriff *shall* levy upon a judgment debtor's interest in personal property pursuant to a writ of execution *by obtaining actual view of the property*[.]" (Emphasis added). Although the rule does use the term "shall," a sheriff must first obtain "actual view of the property" before he or she can levy upon it. *See id.* Deputy Smith never obtained actual view of Hildreth's personal property, because he never gained access to the residence. Therefore, the above mandatory language of the rule is inapplicable.

Appellant further argued that the sheriff should have used force in order to gain access to the judgment debtor's residence. Again, we disagree. Appellant provides no case law in its brief to support its contention that the use of force is permissible, nor did appellant provide any at oral argument. On the other hand, appellees cite to the case of *Gusdorff v. Duncan*, 94 Md. 160 (1901) as support for the principle that a writ of execution "must be served peacefully absent a court order authorizing force." In *Gusdorff,* the Court of Appeals stated that "[a]n officer armed with a civil writ . . . may peaceably enter upon the defendant's dwelling[.]" *Id.* at 169. The Court added that "the law especially protects one's dwelling

house from invasion or disturbance," and cited to the case of *Kelley v. Schuyler*, 39 A. 893 (R.I. 1898). *Id.* In *Kelley*, the Supreme Court of Rhode Island held:

> [I]t is almost universally conceded that the officer who breaks and enters a dwelling house for the purpose of serving any civil process therein . . . is a trespasser; this position being based on the ground that the law will not permit the sanctity of one's dwelling house, which from very ancient times has been regarded as his castle, to be violated in this way. **In short, the law provides, and wisely, too, we think, that the means of obtaining possession of personal property in civil process must be in subordination to the common-law rights of the defendant.**

Id. at 894 (emphasis added). Thus, under Maryland law, a writ of execution does not give the sheriff the right to use force to enter the residence of a judgment debtor.[3]

In Anne Arundel County, Deputy Charles was able to gain entry into the premises of EFS, but concluded that no personal property of EFS was there upon which to levy. Appellant claims that Deputy Charles failed to "attempt" to serve the writ of execution because, according to Deputy Charles's return, there were "2 desks/2 computers" on the premises, and Deputy Charles did not levy on that property. We are not persuaded.

The Maryland Rules provide guidance for analyzing such a situation. Rule 2-641(a) provides that a creditor's request for a writ of execution

> shall be accompanied by instructions to the sheriff that shall specify (1) the judgment debtor's last known address, (2) the judgment and the amount owed under the judgment, (3) the property to be levied upon

[3] Consistent with Maryland law, Howard County's Operating Procedures for Writs of Execution provide that a sheriff should: "Attempt to get into the home by talking. **Do not force your way in WITHOUT a Court Order**." (Emphasis in original).

> and its location, and (4) whether the sheriff is to leave the levied property where found, or to exclude others from access to it or use of it, or to remove it from the premises. The judgment creditor may file additional instructions as necessary and appropriate and deliver a copy to the sheriff.

Furthermore, "[u]pon issuing a writ of execution or receiving one from the clerk of another county, the clerk shall deliver the writ and instructions to the sheriff." Md. Rule 2-641(c). Therefore, the creditor is tasked with providing the sheriff with instructions identifying the property upon which the levy should be made. Rule 2-642(b) also provides that "the sheriff shall levy upon a *judgment debtor's interest in personal property* pursuant to a writ of execution by obtaining actual view of the property[.]" (Emphasis added).

Thus there are two factors that must be taken into account when determining whether the sheriff satisfied the statutory duty to attempt to serve a writ of execution: (1) What instructions were provided by the creditor as to the identity of the property upon which to levy; and (2) Was there a nexus between such property found by the sheriff and the judgment debtor? In the instant case, appellant's amended complaint only stated that appellant "filed a request for Writ of Execution against the personal property at EFS Global, LLC's business address." There is nothing in the amended complaint or the record regarding any instructions as to what specific property should have been seized at EFS's business address. In other words, Deputy Charles was not instructed by appellant to levy upon "2 desks/2 computers" that belonged to EFS.

In addition, the property that Deputy Charles found at the business premises did not belong to EFS. Deputy Charles responded to the business address of EFS specified on the writ. At that address, he found

> an office space that contained two desks (or tables) and two computers. The items appeared to be very old and in poor condition**. It was [Deputy Charles's] understanding that the judgment debtor had previously been evicted from that location. Present were two, non-English speaking males who did not appear to be affiliated with the judgment debtor. They were seated at two tables with two Dell computers.**

(Emphasis added). It was unclear to Deputy Charles whether the computers belonged to EFS, and they appeared to be of no value. Therefore, he did not levy on them. He then filed a return with the trial court that stated: "Non Bona – 2 desk/2 computers 12 yrs. old."

Before the trial court, appellant did not dispute the eviction of EFS from its business address prior to Deputy Charles's entry onto the premises. Nor did appellant dispute the fact that the two, non-English speaking males, who were in possession of the "two desks (or tables) and two computers," did not appear to be affiliated with EFS. Thus there is no factual support in the record that the "2 desks/2 computers" were property of EFS subject to levy under the writ of execution. Accordingly, the actions of Deputy Charles in going to the business address of EFS, gaining entry onto such premises, and finding no property belonging to EFS constitute an "attempt" to serve the writ of execution in compliance with the Anne Arundel County Sheriff's duties under the statute.

In sum, both Sheriffs undertook to serve the writs of execution against the property of the judgment debtors. The actions of the deputy sheriffs ultimately proved to be unsuccessful, and they filed returns with the trial court stating that the writs were not served. Under Maryland law and the undisputed facts of this case, the actions of the deputy sheriffs constitute an "attempt" to serve the writs of execution and, thus, satisfied the Sheriffs' statutory duties under CJP § 2-303. We agree with the circuit court when it found no support in the language of the statute for appellant's contention that "by somehow failing to put forth enough effort in serving the writs of execution, the sheriffs effectively filed false returns." Accordingly, the trial court was correct when it granted appellees' motions to dismiss or for summary judgment.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; APPELLANT TO PAY COSTS.