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2014 IL App (3d) 130332-U

Order filed June 4, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

COAL CITY REDI-MIX COMPANY,)	Appeal from the Circuit Court
)	of the 13th Judicial Circuit,
Plaintiff-Appellee,)	Grundy County, Illinois.
)	
v.)	
)	
JUSTIN KAVANAUGH)	
)	Appeal No. 3-13-0332
Defendant,)	Circuit No. 12-LM-21
)	
v.)	
)	
PONTIAC EXCHANGE, INC.,)	
)	Honorable Sheldon R. Sobol,
Citation Respondent-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.

Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred when finding the citation creditor's lien took priority over the interests of the citation respondent which was a lender without notice.

¶ 2 Plaintiff, Coal City Redi-Mix Company (Coal City), obtained a judgment against Justin Kavanaugh. Coal City served Kavanaugh with a citation to discover assets. Kavanaugh then

pawned his motorcycle to the citation respondent-appellant, Pontiac Exchange, Inc., a licensed pawnbroker. A few weeks later, Coal City served a third party citation on Pontiac. A dispute arose over priority of liens. The trial court ruled that Coal City's citation lien took priority over the pawn shop's interest in the motorcycle. Pontiac appeals, claiming, *inter alia*: (1) the trial court erred when finding it is not a *bona fide* purchaser of the motorcycle; and (2) the trial court erred in finding it did qualify as a lender pursuant to section 2-1402 of the Code of Civil Procedure (735 ILCS 5/2-1402 (West 2010)). We reverse.

¶ 3

BACKGROUND

¶ 4

The facts of this case are straightforward and undisputed. Coal City obtained a judgment against Kavanaugh on February 22, 2012. It served a citation to discover assets on him on April 12, 2012. The original hearing on the citation was set for May 9, 2012. On July 23, 2013, Coal City filed a petition for indirect civil contempt against Kavanaugh; on August 1, 2012, a rule to show cause issued requiring him to appear on September 6, 2012. When he failed to appear, the trial court issued a body attachment order on September 14, 2012.

¶ 5

Thereafter, while the litigation progressed, on September 17, 2012, Kavanaugh pawned his 1998 Harley Davidson Fat Boy motorcycle to Pontiac. The terms of the "contract for pawn" stated that Kavanaugh was to give possession of his motorcycle to Pontiac on September 17, 2012, in exchange for \$3,500. The contract provided that Kavanaugh would then pay \$4,200 by October 17, 2012, which equates to an annual percentage rate of interest of 240%. The contract stated that Pontiac may possess the property until the amount financed was paid in full. Pontiac agreed to keep possession of the motorcycle for a 30-day "grace period" beyond October 17, 2012, in the event Kavanaugh paid the full amount owed by then. Kavanaugh did not sign over his motorcycle title to the pawn shop upon receiving the \$3,500, but did sign a power of attorney

allowing Pontiac to transfer title. Kavanaugh did not advise Pontiac that he had been served with a citation to discover assets some five months prior to pawning the motorcycle.

¶ 6 Three days after Kavanaugh pawned the motorcycle, the trial court issued a turn-over order directing him to turn over the motorcycle to the sheriff of Grundy County. On September 21, 2012, the court issued an order directing the sheriff to enter the property of Kavanaugh and take possession of various described personal property, including the motorcycle.

¶ 7 On October 5, 2012, Coal City served a citation to discover assets on Pontiac. The trial court held a hearing on the citation on November 7, 2012, to determine the priority of liens against the motorcycle in question. The trial court ruled that Coal City's lien was superior to that of Pontiac's. Pontiac filed a timely motion for rehearing, which the trial court denied. Pontiac appeals.

¶ 8 ANALYSIS

¶ 9 Pontiac raises a number of theories to support its claim that the trial court erred in prioritizing its lien. Initially, Pontiac argues it was a *bona fide* purchaser and, therefore, entitled to priority. Next, Pontiac argues it is a lender without notice and, therefore, entitled to priority over a judgment creditor. Third, it argues that service of the citation upon Kavanaugh did not impair his ability to convey title of his motorcycle to Pontiac. Finally, Pontiac claims the trial court erred in its interpretation of section 2-1402 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1402 (West 2012)) when ruling that the citation lien of Coal City took priority over Pontiac's interest in the motorcycle. As Pontiac references section 2-1402 in many of its arguments, we begin with the Code.

¶ 10 I. Section 2-1402

¶ 11 Section 2-1402 of the Code, states in pertinent part:

“(a) A judgment creditor, or his or her successor in interest when that interest is made to appear of record, is entitled to prosecute supplementary proceedings for the purposes of examining the judgment debtor or any other person to discover assets or income of the debtor not exempt from the enforcement of the judgment, a deduction order or garnishment, and of compelling the application of non-exempt assets or income discovered toward the payment of the amount due under the judgment. A supplementary proceeding shall be commenced by the service of a citation issued by the clerk. The procedure for conducting supplementary proceedings shall be prescribed by rules. It is not a prerequisite to the commencement of a supplementary proceeding that a certified copy of the judgment has been returned wholly or partly unsatisfied. All citations issued by the clerk shall have the following language, or language substantially similar thereto, stated prominently on the front, in capital letters: 'IF YOU FAIL TO APPEAR IN COURT AS DIRECTED IN THIS NOTICE, YOU MAY BE ARRESTED AND BROUGHT BEFORE THE COURT TO ANSWER TO A CHARGE OF CONTEMPT OF COURT, WHICH MAY BE PUNISHABLE BY IMPRISONMENT IN THE COUNTY JAIL.' The court shall not grant a continuance of the supplementary proceeding except upon good cause shown.

* * *

(m) The judgment or balance due on the judgment becomes a lien when a citation is served in accordance with subsection (a) of this Section. The lien binds nonexempt personal property, including money, choses

in action, and effects of the judgment debtor as follows:

(1) When the citation is directed against the judgment debtor, upon all personal property belonging to the judgment debtor in the possession or control of the judgment debtor or which may thereafter be acquired or come due to the judgment debtor to the time of the disposition of the citation.

(2) When the citation is directed against a third party, upon all personal property belonging to the judgment debtor in the possession or control of the third party or which thereafter may be acquired or come due the judgment debtor and comes into the possession or control of the third party to the time of the disposition of the citation.

The lien established under this Section does not affect the rights of citation respondents in property prior to the service of the citation upon them and does not affect the rights of bona fide purchasers or lenders without notice of the citation. The lien is effective for the period specified by Supreme Court Rule." 735 ILCS 5/2-1402 (West 2012).

¶ 12 The parties acknowledge that Coal City properly served a citation upon Kavanaugh on February 22, 2012, in accordance with section 2-1402(a). Illinois law is clear that “a lien is created upon service of the citation to discover assets.” *Pontikes v. Perazic*, 295 Ill. App. 3d 478, 484 (1998) (citing 735 ILCS 5/2-1402 (West 1993)); *Bloink v. Olson*, 265 Ill. App. 3d 711, 714

(1994). As such, on February 22, 2012, Coal City possessed a citation lien against Kavanaugh's personal property.

¶ 13 The question we must answer, of course, is did the lien take priority over Pontiac's interest in the motorcycle? Again, we turn our attention to section 2-1402, which states that the "lien established under this Section does not affect the rights of citation respondents in property prior to the service of the citation upon them and does not affect the rights of bona fide purchasers or lenders without notice of the citation." 735 ILCS 5/2-1402(m) (West 2012). Pontiac claims to be both a *bona fide* purchaser and lender without notice as defined by the statute and, therefore, claims the citation lien created on February 22, 2012, cannot take priority.

¶ 14 II. *Bona Fide* Purchaser

¶ 15 Pontiac argues that a *bona fide* purchaser is one who takes without notice of a prior claim or encumbrance. However, Coal City notes that Pontiac's definition is incomplete. In *Daniels v. Anderson*, 162 Ill. 2d 47 (1994), our supreme court stated that a *bona fide* purchaser "is a person who takes title *** in good faith for value without notice of outstanding rights or interests of others." *Id.* at 57. Coal City claims a key component used to define a *bona fide* purchaser encompasses the "taking" of "title." It continues that Pontiac never actually took title, as the title to the motorcycle is still registered to Kavanaugh with the Illinois Secretary of the State. Pontiac disagrees, noting that Kavanaugh executed a power of attorney that allowed Pontiac to transfer title to the motorcycle to it at any point necessary.

¶ 16 Only two reported Illinois decisions mention the terms *bona fide* purchaser and the pawn shop business. *Schwartz v. Clark*, 136 Ill. App. 150 (1907); *Bauman Loan Co. v. Hatowsky*, 107 Ill. App. 181 (1903). Unfortunately, neither discusses whether a pawn broker becomes a *bona*

fide purchaser when they engage in a transaction akin to the traditional pawn agreement seen here.

¶ 17 A trial court's determination of whether the parties intended to transfer ownership of the vehicles is a factual question and will not be overturned unless it is contrary to the manifest weight of the evidence. *Libertyville Toyota v. U.S. Bank*, 371 Ill. App. 3d 1009, 1013 (2007). "Under established law in Illinois, it is clear that although the Illinois Vehicle Code requires a transfer of certificate of title to effectuate the sale of a vehicle [citation], it is not necessarily determinative of the passage of ownership. [Citation.] It is the intent of the parties involved, and not such statutory prerequisites which determine [*sic*] ownership. [Citations.] Consequently, it is possible that one can own an automobile even though the certificate of title is in the name of another." *Dan Pilson Auto Center, Inc. v. DeMarco*, 156 Ill. App. 3d 617, 620-21 (1987).

¶ 18 The trial court found that the transaction here did not evince a sale or transfer of ownership. We cannot say that finding is against the manifest weight of the evidence. Initially, Pontiac had only a possessory lien on the motorcycle. It had no other right of ownership of the motorcycle until November 17, 2012: given the 30-day "grace period" in the contract. It was on that day that Pontiac could officially take title. Pontiac became aware of the citation lien on the motorcycle on October 5, 2012.

¶ 19 We agree with the trial court and find that Pontiac was not a *bona fide* purchaser at the time it was served with notice of Coal City's lien. It never took title "without notice of outstanding rights or interests of others." See *Daniels*, 162 Ill. 2d at 57. At the point at which it could have taken title, it was well aware Coal City's citation lien.

¶ 20 III. Lender

¶ 21 Pontiac argues that even if we find it was not a *bona fide* purchaser under the statute, we must find the trial court erred when determining it was not entitled to protections of lenders under the statute. Again, section 2-1402 states that the “lien established under this Section does not affect the rights of citation respondents in property prior to the service of the citation upon them and does not affect the rights of bona fide purchasers or lenders without notice of the citation.” 735 ILCS 4/2-1402(m) (West 2012). The statute does not define the term lender.

¶ 22 Pontiac notes that the definition of pawnbroker as contained within the Pawnbroker Regulation Act (Pawnbroker Act) (205 ILCS 510/0.01(West 2010)) leads to the singular conclusion that it is a lender. We agree.

¶ 23 The Pawnbroker Act states,

"Every individual or business entity which *lends* money on the deposit or pledge of physically delivered personal property, other than property the ownership of which is subject to a legal dispute, securities, printed evidence of indebtedness or printed evidence of ownership of the personal property, or who deals in the purchase of such property on the condition of selling the property back again at a stipulated price, shall be held and is hereby declared and defined to be a pawnbroker. The business of a pawnbroker does not include the lending of money on deposit or pledge of title to property." (Emphasis added.) 205 ILCS 510/1(a) (West 2010).

¶ 24 The Pawnbroker Act further allows a pawnbroker to receive "a monthly finance charge including interest and fees not to exceed one-fifth of the loan amount" upon "money advanced."

205 ILCS 510/2 (West 2010). That is the exact amount charged to Kavanaugh by Pontiac, \$700 per month on a \$3,500 advance.

¶ 25 Coal City argues that our supreme court has described a pawnbroker not as a lender, but instead as a bailee. *Jacobs v. Grossman*, 310 Ill. 247, 249 (1923) ("A pawn is a species of bailment which arises when goods or chattels are delivered to another as a pawn for security to him on money borrowed of him by the bailor."). We have found no authority, and Coal City cites none, that holds an entity cannot be both a lender and a bailee. A pawn transaction is nothing more than a "super secured" loan transaction where the lender holds the property as security for a loan, as opposed to the normal loan where a lender retains a nonpossessory lien.

¶ 26 We hold the trial court erred when finding that Pontiac failed to qualify as a lender under section 2-1402 of the Code (735 ILCS 5/2-1402(m) (West 2012)). Pontiac loaned Kavanaugh money on September 17, 2012, accepting the motorcycle as security for the loan. It acquired notice of the citation on October 5, 2012. As a citation lien "does not affect the rights of *** lenders without notice of the citation" (735 ILCS 5/2-1402(m) (West 2012)), section 2-1402 of the Code does not give priority to the citation lien holder over Pontiac.

¶ 27 IV. Kavanaugh's Ability to Convey Title

¶ 28 Coal City claims that even if we find Pontiac qualifies as a lender without notice under section 2-1402, we should nevertheless affirm the trial court. Coal City argues that Kavanaugh was divested of certain rights in the motorcycle once it served him with the citation. Therefore, since "a purchaser of a motor vehicle cannot receive any greater title or interest in a motor vehicle than the seller had at the time of the sale" (*Nudi Auto RV & Boat Sales, Inc., v. John Deere Insurance Co.*, 328 Ill. App. 3d 523, 535 (2002) (citing *Dan Pilson Auto Center v. Demarco*, 156 Ill. App. 3d 617 (1987))), Coal City argues that any "rights transferred by Mr.

Kavanaugh to Pontiac are subject to the citation lien, imposed by statute upon service." Simply put, Coal City argues that Kavanaugh could not grant Pontiac a greater interest in the motorcycle than he possessed. Therefore, Coal City concludes that at the time he signed the contract for pawn with Pontiac, Kavanaugh's interest was subject to the citation lien and, as such, Pontiac's interest must also be subject to the citation lien. Coal City's argument ignores the statutory language. "The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. [Citation.] The best indication of legislative intent is the statutory language, which must be given its plain and ordinary meaning." *Home Star Bank & Financial Services v. Emergency Care & Health Organization, Ltd.*, 2014 IL 115526, ¶ 24.

¶ 29 The lien statute clearly provides that such a lien "does not affect the rights of citation respondents in property prior to the service of the citation upon them and does not affect the rights of bona fide purchasers or lenders without notice of the citation." 735 ILCS 5/2-1402(m) (West 2012).

¶ 30 By serving Kavanaugh with the citation to discover assets on April 12, 2012, Coal City undoubtedly created a citation lien against Kavanaugh's personal property pursuant to section 2-1402 of the Code. The lien created by the Code was also limited by the Code. The plain language of section 2-1402 evinces its intent not to extend the lien's reach (or at least its priority) to property of a judgment debtor which was later acquired by a *bona fide* purchaser or lender without notice.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Grundy County is reversed.

