UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1165

September Term, 2015

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EDWIN E. BELL JR., et ux.

v.

DYCK-O'NEAL, INC.

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Eyler, Deborah S.,
Berger,
Arthur,

JJ.

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Opinion by Arthur, J.

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Filed: May 17, 2016

Appellee Dyck-O'Neal, Inc. ("Dyck"), obtained a money judgment against appellants Edwin and Miranda Bell in the Circuit Court for Carroll County. In executing on the judgment, Dyck obtained a judgment on a writ of garnishment of property other than wages. In addition, at Dyck's request, the court clerk issued a writ of execution on the Bells' real property near Taneytown. Following unsuccessful requests to "quash" or vacate these enforcement actions, the Bells appealed to this Court.

## QUESTIONS PRESENTED

On appeal, the Bells raise several questions, which we rephrase and consolidate below.

I. Did the trial court err in denying the Bells' motion to quash writs of execution for real property, on the ground that (1) the court lacked subject matter jurisdiction to enforce the underlying judgment, or (2) the court failed to provide the Bells with a hearing, as required by Md. Rule 2-311(f) and Md. Rule 2-643(f)?

II. Did the trial court abuse its discretion in denying the Bells' motion to vacate the court's judgment on writs of garnishment, on the basis of jurisdictional mistake, under Md. Rule 2-535(b)?[1]

For reasons set forth below, we shall affirm.

## FACTUAL AND PROCEDURAL HISTORY

Dyck commenced this action by filing a one-count complaint against the Bells in the Circuit Court for Carroll County. On December 18, 2014, the court granted Dyck's summary judgment motion and directed the entry of judgment in the amount of $84,352.59. The clerk indexed the judgment on that same day, and it became a lien on

[1] We append the questions in full at the end of this opinion.

the Bells' property near Taneytown. *See* Md. Code (1974, 2013 Repl. Vol.), § 11-402(b) of the Courts and Judicial Proceedings Article ("CJP"); Md. Rule 2-621(a).

On December 29, 2015, the Bells appealed from the entry of summary judgment. That appeal is not before us in this case.

The Bells did not post a supersedeas bond, which would have stayed the enforcement of the judgment pending appeal. *See* Md. Rules 8-422 and 8-423. They nevertheless filed several motions requesting a stay of enforcement of the judgment, a waiver of the bond requirement, or permission to post "alternate bond." The court denied each motion. In denying the last of the motions, the court "barred" the Bells "from filing . . . any further motions seeking a stay of the enforcement of the judgment and waiver of the bond[.]" The Bells appealed from that order as well, but it too is not before us in this case.

Dyck meanwhile sought to enforce its judgment. On January 16, 2015, at Dyck's request, the circuit court issued writs of garnishment of property other than wages, *see* Md. Rule 2-645, and directed the writs to Bank of America, N.A. In response to the bank's confession that it held $1,471.71 in assets belonging to the Bells, Dyck moved for judgment on the writs of garnishment. The court granted the motion on March 9, 2015, and entered a judgment awarding Dyck $1,471.71, plus any additional amounts that may have come into the bank's possession after the date when it was served with the writ. The Bells did not appeal from that judgment.

Separately, on April 17, 2015, Dyck requested a writ of execution for real property – specifically, the Bells' property near Taneytown. The court clerk, in accordance with

Rule 2-641, issued a writ of execution, and the sheriff levied on the property on May 14, 2015. The Bells responded by filing what they labeled a "joint motion to quash the writs of execution for real property," which the circuit court denied in an order entered on June 17, 2015. The Bells moved to alter or amend that order, and the court denied that motion on July 14, 2015. The Bells appealed from that decision on July 23, 2015. That appeal is before us in this case.

While the Bells were awaiting a ruling on their motion to alter or amend the order denying their motion to quash the writ of execution, they moved, pursuant to Rule 2-535, to "vacate" the enrolled judgment on the writs of garnishment, which the court had entered four months earlier, in March 2015. The circuit court denied the motion to vacate in an order entered on August 5, 2015, and the Bells noted an appeal from that decision on August 12, 2015. That appeal is before us as well.

## DISCUSSION

### I. Writs of Execution for Real Property[2]

#### *A. Mootness*

Before addressing whether the court erred in denying the motion to quash the writ of execution, we first must resolve Dyck's claim that the question has become moot because, Dyck says, the writ has expired.

[2] Although neither party raised the issue of how we might have appellate jurisdiction over an order denying a motion to quash a writ of execution, we have the right and duty to raise that issue on our motion. *See Miller and Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 240 (2010). The order denying the motion to quash is certainly not an appealable final judgment under CJP § 12-301, because it does not put (continued…)

"'A question is [rendered] moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide.'" *Alston v. State*, 433 Md. 275, 285 (2013) (citation omitted); *see Prince George's Cnty. v. Columcille Bldg. Corp.*, 219 Md. App. 19, 26 (2014).

> While there is no constitutional impediment to an appellate court expressing its views on the merits of a case which becomes moot during appellate proceedings, . . . [o]rdinarily, courts will not decide moot or abstract questions, or render advisory opinions. On the rare occasions when the court exercises the authority to decide moot cases, it does so because there is an imperative and manifest urgency to establish a rule of future conduct in matters of important public concern, and it is convinced that the case presents unresolved issues in matters of important public concern that, if decided, will establish a rule for future conduct.

*Alston*, 433 Md. at 285-86 (internal citations and quotation marks omitted).

Dyck insists that the challenge to the court's denial of the motion to quash the writs of execution is now moot and that this Court can grant the Bells no remedy. Dyck

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the parties out of court or deny them the means of prosecuting their claims or defenses. *See Houghton v. Cnty. Comm'rs of Kent Cnty.*, 307 Md. 216, 221 (1986). It does not appear to be an appealable interlocutory order denying a "motion to quash a writ of attachment" under CJP § 12-303(2), because that statute seems to apply to attachments before judgment. *See Phyllis J. Outlaw & Assocs. v. Graham*, 172 Md. App. 16 (2006). Nor, strictly speaking, is it an appealable interlocutory order "[f]or the sale . . . of real . . . property" under CJP § 12-303(3)(v), because it does not require a sale, but merely allows a sale to proceed if the creditor chooses to pursue one. Nonetheless, because the denial of the motion to quash had the effect of allowing the sale to proceed, we shall treat it as if it were analogous to an interlocutory order denying a motion to stay a foreclosure proceeding. Such an order is immediately appealable under CJP § 12-303(3)(ii) on the theory that it is equivalent to the refusal to grant an injunction. *Fishman v. Murphy*, 433 Md. 534, 540 n.2 (2013).

cites Md. Rule 2-643(c)(6), which permits a judgment-debtor to move to release property from a levy if the levy has existed for 120 days without sale of the property, unless the court for good cause extends the time.[3] On the basis of that rule, Dyck asserts that it was required to sell the Taneytown property within 120 days after the writ was served. Because Dyck declined to exercise its right to sell, and because more than 120 days has passed since the writ was served, Dyck argues that the writ has "expired" and has become unenforceable. Because the writ is no longer enforceable, Dyck reasons, there is no longer any levy upon the property, any controversy over the writ's validity has been rendered moot, and this Court should not decide the issue.

We are not persuaded. Contrary to Dyck's contention, this Court has specifically rejected the proposition that a writ of execution automatically expires after 120 days if the property has not been sold: In *W.D. Curran & Assocs., Inc. v. Cheng-Shum Enterprises, Inc.*, 107 Md. App. 373, 386 (1995), this Court held, "it is clear that upon the expiration of the 120-day period the levy does not automatically lapse or expire." Nor does the levy self-destruct on the one hundred twenty-first day. *See id*. "Rather, the passing of 120 days without the property being sold merely gives the judgment debtor the right to request the circuit court to terminate the levy" (*id.*) under Rule 2-643(c)(6). While "a judgment-creditor has a duty to sell property that is subject to a levy within 120 days" (*W.D. Curran*, 107 Md. App. at 386; *see Joshi v. Kaplan, Freeland, Schwartz &*

[3] Rule 2-643(c)(6) states that, "[u]pon motion of the judgment debtor, the court may release some or all of the property from a levy if it finds that . . . (6) the levy has existed for 120 days without sale of the property, unless the court for cause extends the time."

*Bloomberg, P.C.*, 72 Md. App. 694, 697 (1987)), the remedy for a breach of that duty is a Rule 2-643(c)(6) motion to release the property from levy. Until a court grants such a motion, the levy remains in place. *See W.D. Curran*, 107 Md. App. at 386.

In short, until the Bells petition the court to release the property on the ground that 120 days have passed without a sale, *and* the court finds no "good cause" to grant Dyck an extension, the levy remains in place and has suffered no demise. The dispute on this issue therefore remains alive and has not been rendered moot.

***B. Analysis***

On the merits, the Bells principally claim that because of their earlier appeal from the entry of a final judgment on Dyck's claim for damages, the circuit court "lacked the subject matter jurisdiction to proceed on the Writs of Execution" at all. In a language that puts a premium on understatement, one would call their argument unmeritorious.

As even the Bells recognize, "a circuit court is not divested of fundamental jurisdiction to take post-judgment action in a case merely because an appeal is pending from the judgment." *Jackson v. State*, 358 Md. 612, 620 (2000) (citation omitted). Instead, the appeal simply prohibits the circuit court "from re-examining the decision or order upon which the appeal was based." *Pulley v. State*, 287 Md. 406, 417 (1980). In other words, the appeal prohibits the circuit court from interfering with the appellate court's ability to review the order on appeal by, for example, reversing or revising that order before the appellate court can act. *See Jackson*, 358 Md. at 620 ("[w]hat the court may *not* do is to *exercise* that [fundamental] jurisdiction in a manner that affects either the subject matter of the appeal or the appellate proceeding itself – that, in effect,

precludes or hampers the appellate court from acting on the matter before it") (emphasis in original); *In re Emileigh F.*, 355 Md. 198, 202-03 (1999) ("[p]ost-appeal orders which affect the subject matter of the appeal are prohibited").

Even when a circuit court interferes with an appellate court's ability to review a matter that is already on appeal, the circuit court's ruling "is not void *ab* initio for lack of jurisdiction to enter it." *Jackson*, 358 Md. at 620. Rather, the ruling is "subject to reversal on appeal." *Id.*

Thus, for example, a circuit court retained fundamental jurisdiction to conduct a full criminal trial and to enter judgments of conviction even though the defendant had taken a proper, interlocutory appeal of a ruling denying his motion to dismiss the indictment on grounds of double jeopardy. *See Pulley*, 287 Md. at 414. Similarly, a circuit court retained fundamental jurisdiction to deny a criminal defendant's motion for a new trial despite the pendency of an appeal. *See Jackson*, 358 Md. at 621. By contrast, in a child in need of assistance ("CINA") case in which the mother had appealed an order depriving her of custody over her child, the court committed reversible error when it frustrated the appellate court's ability to review that ruling by declaring that the child was no longer a CINA and closing the CINA case before the appellate court had ruled. *In re Emileigh F.*, 355 Md. at 204.

In this case, the appeal itself had no effect whatsoever on the court's fundamental jurisdiction – i.e., on the court's power to issue the writ. *Pulley*, 287 Md. at 414. Furthermore, the circuit court was not required to re-examine the decision on which the earlier appeal was based when its clerk committed the ministerial act of issuing a writ of

execution upon Dyck's request. In issuing the writ, therefore, the court therefore did not err in the exercise of its fundamental jurisdiction.

The court's fundamental jurisdiction might have been interrupted by a statute or rule, the posting of an appeal bond, or a stay granted by the trial or appellate court. *Id*. at 417. The Bells, however, point to no statute or rule that deprived the court of its power to proceed during the pendency of their appeal. Nor did they either post a bond or obtain a stay. To the contrary, it appears from the docket that both this Court and the Court of Appeals denied their requests for a stay. It also appears that both the circuit court and this Court denied their requests for a waiver of the bond requirement. In these circumstances, the Bells have no credible basis to assert that the appeal deprived the circuit court of jurisdiction to issue the writ.

Separately, the Bells appear to argue that their appeal, combined with the judgment lien on the Taneytown property, "all prevented Dyck from [executing on the judgment] as a matter of fact and law[.]" Yet if the Bells believed that they already had the equivalent of a stay, it is unclear why they asked both this Court and the Court of Appeals for a stay or why they asked both this Court and the circuit court to waive the requirement that they post a bond to stay execution on the judgment.[4]

In any case, a judgment-creditor is not prohibited from executing on a judgment simply because he or she may have a statutory lien on the judgment-debtor's real

[4] At times, the Bells seem to assert that the money judgment against them somehow lacks finality. If that were true (which it is not), this Court would not have appellate jurisdiction to consider the separate appeal involving the Bells' substantive challenge to the entry of judgment against them.

property. The lien merely allows for the possibility that the judgment-creditor might be paid if and when the property is ever sold – and if the sale proceeds happen to be sufficient to discharge all senior liens as well as the costs of sale. Unless the creditor can levy on the property and force a sale, however, he or she will receive no satisfaction at least until the conclusion of the appeal, notwithstanding the absence of a bond (which is designed to compensate the creditor for having to wait for the appeal) and the absence of a court-ordered stay. Furthermore, unless the creditor can actually levy on the property during the appeal, he or she cannot attain the elevated status of a lien creditor (*see W.D. Curran*, 107 Md. App. at 382, 383), which is important in establishing priority with respect to other creditors.

Simply put, if the Bells were correct that a judgment lien plus an appeal prohibits a creditor from executing on a judgment, there would be no reason for the rules regarding an appeal bond, alternative security in place of an appeal bond, or a stay of execution pending appeal. It follows that the circuit court did not err in denying the Bells' motion to quash the writ of execution.[5]

[5] The Bells appear to argue that because Dyck had a statutory lien on the Taneytown property and because the assessed value of that property exceeded the amount of the judgment, Dyck had adequate security. The short answer to that contention is that it was better directed to the circuit court in a motion to accept alternative security, as indeed it may have been. In any event, the record contains nothing to show that the Bells own the property free and clear of all liens or that the fair market value of the property, minus any senior liens, exceeds the amount of the judgment, plus the costs of appeal and post-judgment interest at 10 percent per annum during the likely pendency of the appeal. In these circumstances, neither we nor the circuit court would have any basis to conclude that the lien on the property itself afforded adequate security.

Finally, the Bells argue that their motion to quash was really a motion for release of property from levy under Rule 2-643, that they requested a hearing on that motion, and that the court could not properly deny the motion without holding a hearing. The Bells are correct that under Rule 2-643(f) a court must hold a hearing on a motion for release of property from levy if one is requested. The Bells are also correct that their motion to quash cited Rule 2-643, as well as a number of other rules, including Rule 8-131(a), which concerns the scope of appellate review. In substance, however, the motion to quash was not a motion for release of property from levy under Rule 2-643.

The motion did not argue that the property should be released from levy for any of the reasons listed in Rule 2-643(c). In particular, the motion did not argue that the judgment had been vacated, had expired, or had been satisfied (Md. Rule 2-643(c)(1)); that the property was exempt from levy (Md. Rule 2-643(c)(2)); that Dyck had failed to comply with the rules or with an order of court regarding enforcement proceedings (Md. Rule 2-643(c)(3)); that property sufficient in value to satisfy the judgment would remain under levy after the release (Md. Rule 2-643(c)(4)); that the levy would cause undue hardship to the Bells and that they had made available alternative property sufficient in value to satisfy the judgment and enforcement costs (Md. Rule 2-643(c)(5)); or that the levy had existed for 120 days without a sale. Md. Rule 2-643(c)(6). Instead, the rambling, 37-paragraph motion and the accompanying nine-page memorandum principally advanced the fallacious argument that the appeal divested the court of jurisdiction to issue the writ, as well as an argument that the description of the property was inaccurate.

The circuit court did not err in interpreting this vague and confusing motion as something other than a motion to release property from levy under Rule 2-643. Consequently, the court did not err in denying the motion without holding a hearing. *See* Md. Rule 2-311(f) ("the court shall determine in each case whether a hearing will be held" unless "a rule expressly provides for a hearing" or a party requested a hearing on "a decision that is dispositive of a claim or defense").[6]

## II. Judgment on Writs of Garnishment

The Bells challenge the circuit court's order denying their motion to vacate the March 9, 2015, judgment on writs of garnishment. They argue that the court abused its discretion in failing to vacate that judgment, which they contend the court had improperly entered as a result of "jurisdictional mistake." The Bells also argue, as they did then, that the judgment on writs of garnishment should be reversed.

The Bells did not take a timely appeal from the final judgment in the garnishment proceeding. Instead, they moved to vacate the enrolled judgment more than four months after the court had ordered the release of the garnished funds. A "motion to vacate . . . filed more than 30 days after the judgment was entered . . . is . . . deemed to have been filed under Md. Rule 2-535(b)." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. 458, 475 (1997).

[6] It is true that, in denying the motion, the court referred to Rule 2-643 (as well as to CJP § 11-504, which concerns exemptions from execution). The court did so, however, not because the Bells premised their motion on any of the grounds for relief in Rule 2-643, but because Dyck reacted to the diffuse allegations in the motion by discussing that rule. The motion did not become a Rule 2-643 motion for release of property from levy merely because the Bells' adversary discussed the rule in its response.

"Under . . . [Rule 2-535(b)], a court may revise an enrolled judgment upon a finding of fraud, mistake, clerical mistake, or other irregularity if, in addition, the movant establishes that she acted in good faith and with ordinary diligence and that she has a meritorious defense." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. at 475. The denial of a motion to vacate filed under Rule 2-535(b) is "appealable, but the only issue before [this Court] is whether the trial court erred as a matter of law or abused its discretion in denying the motion." *In re Adoption/Guardianship No. 93321055/CAD*, 344 Md. at 475.

It requires little effort to conclude that the circuit court did not err or abuse its discretion in denying the Bells' motion to vacate the enrolled judgment on the writs of garnishment. Their principal argument, again, is that the court was required to vacate the judgment because it was entered as a result of "jurisdictional mistake" in light of the appeal of the monetary judgment and the judgment lien on their Taneytown property. This broad claim is as meritless as it was when we addressed it in the earlier pages of this opinion. The circuit court properly exercised its discretion in denying the Bells' motion asking it to vacate a properly enrolled judgment that was a result of no fraud, irregularity, or mistake of jurisdiction.

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

## APPENDIX

The Bells originally presented the following questions:

I. Pending resolution of the Summary Judgment Appeal consolidated with the Bond/Sanction Appeal, and with Dyck's judgment lien on the Appellants' real property pursuant to MD Rule §2-621 and MD Cts. And Jud. Proc. §11-402(b) as of December 18, 2014, did the trial court err when it denied Consumer Appellants' Motion to Quash Writs of Execution for Real Property?

II. Pending resolution of the Summary Judgment Appeal consolidated with the Bond/Sanction Appeal, and with Dyck's judgment lien on the Appellants' real property pursuant to MD Rule §2-621 [*sic*] and MD Cts. And Jud. Proc. §11-402(b) as of December 18, 2014, did the Trial Court err when it denied Consumer Appellants' Motion to Quash Writs of Execution for Real Property absent a hearing requested pursuant to MD Rule §2-311(f) and §2-643(f)?

III. Pending resolution of the Summary Judgment Appeal consolidated with the Bond/Sanction Appeal, and with Dyck's judgment lien on the Appellants' real property pursuant to MD Rule §2-621 and MD Cts. And Jud. Proc. §11-402(b) as of December 18, 2014, did the trial court err and abuse its discretion when it failed to vacate its judgment by writs of garnishment pursuant to MD Rule §2-535(b) due to jurisdictional mistake?

IV. Pending resolution of the Summary Judgment Appeal consolidated with the Bond/Sanction Appeal, and with Dyck's judgment lien on the Appellants' real property pursuant to MD Rule §2-621 and MD Cts. And Jud. Proc. §11-402(b) as of December 18, 2014, was the trial court clearly erroneous and abusing its discretion by failing to consider the Appellants' meritorious defense, good faith, and ordinary diligence pursuant to MD Rule §2-535(b)?