SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0115-22

O. BERK COMPANY, L.L.C.,

Plaintiff-Respondent,

v.

GLAMSQUAD, INC.,

Defendant-Respondent.

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VALLEY NATIONAL BANK,

Appellant.

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Argued September 27, 2023 – Decided October 13, 2023

Before Judges Smith and Perez Friscia.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1165-21.

Patrick J. Spina argued the cause for appellant.

Russell T. Brown argued the cause for respondent O. Berk Company, LLC (Ferro Labella & Weiss LLC, attorneys; Christopher L. Weiss and Russell T. Brown, of counsel and on the brief; Bonnie C. Park, on the brief).

PER CURIAM

Valley National Bank (Valley), a non-party,[1] appeals from the August 29, 2022 Law Division order granting plaintiff O. Berk Company, L.L.C.'s (O. Berk) motion to turnover funds. O. Berk had sought to turnover funds after seeking to levy against defendant Glamsquad, Inc.'s Valley accounts. We reverse and remand for a plenary hearing as genuine issues of material fact exist as to ownership of the account subject to levy.

On May 19, 2021, O. Berk obtained final judgment by default against Glamsquad for $30,406.94 plus attorneys' fees, costs, and post-judgment interest. On the same day, O. Berk sought a writ of execution against Glamsquad, which the clerk of the court entered on September 29, 2021, for $30,696.94. O. Berk thereafter requested the Union County Sheriff's Office levy against Glamsquad's accounts. On October 26, 2021, the Sheriff's Office served a levy against an account at Valley in Glamsquad's name. Because Valley did not levy against the funds and O. Berk believed Valley admitted the debt, O. Berk pursued the turnover of funds.

[1] Valley, a non-party aggrieved by the August 29, 2022 order, filed the notice of appeal. See Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207-08 (App. Div. 2009) (noting an aggrieved non-party has standing to appeal).

We limit our recitation of the procedural history and facts to the pertinent issues raised on appeal. In March of 2021, Glamsquad and its successor, JMB Glamsquad, Inc., contacted Valley regarding an Asset Purchase Agreement (APA), entered on March 12, 2021. The APA initiated JMB Glamsquad's purchase of Glamsquad's assets. As of the date of the APA, Glamsquad was indebted to Valley, an approved Small Business Administration (SBA) lender, for two Paycheck Protection Program (PPP) loans. Each loan issued was in the sum of $1,318,807.

The APA set forth the terms of the sale as follows:

> **Section 1.01 Purchase and Sale of Assets.** Subject to the terms and subject to the conditions set forth herein, at the [c]losing, [s]eller [Glamsquad] shall sell, assign, transfer, convey and deliver to [b]uyer, and [b]uyer shall purchase from [s]eller, free and clear of all [l]iabilities and [l]iens (other than [l]iens created by [b]uyer and the [p]ermitted [l]iens), all of the [s]eller's right, title and interest in all of the Purchase Assets. The "Purchased Assets" shall mean . . .
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> . . . .
>
> (d) Seller's [Glamsquad's] cash and cash equivalents as of the [c]losing.

Under the APA, "Article 2 Closing," the closing of the asset purchase was scheduled to take place "remotely via the exchange of documents and signatures on the first [b]usiness [d]ay after the [c]ompany receive[d]

forgiveness of the [first] PPP [l]oan." It is unclear whether the closing occurred. It is undisputed the SBA forgave the entirety of the first PPP loan on May 20, 2021, and the second PPP loan remained under review.

Valley alleges that pursuant to the SBA's PPP loan guidelines, the SBA would only permit the sale of Glamsquad to JMB Glamsquad on the condition that any outstanding PPP loans were paid in full or protected by an escrow agreement entered by Glamsquad, JMB Glamsquad, and Valley.

On June 1, 2021, Glamsquad, JMB Glamsquad, and Valley entered into an escrow agreement to allegedly secure the PPP loan funds. Notably, the escrow agreement sets forth, "the [l]oan [p]roceeds upon the consummation of the sale shall be held in an interest[-]bearing deposit account in the name of the PPP [b]orrower/[s]eller [Glamsquad] by the [e]scrow [a]gent [Valley]." In conformity with the agreement, Glamsquad deposited in escrow with Valley $575,003.27.

The escrow agreement directed any remainder be paid "to the [p]arty set forth in the purchase and sale agreement designated to [sic] receive the funds." Valley maintains while it was bound to the escrow agreement to protect the PPP loan funds and to transfer the account monies to an escrow account, it made a clerical error and did not immediately transfer the funds.

On October 26, 2021, the Sheriff's Office served O. Berk's levy on a Valley branch. Bank teller Stephanie Goncalves accepted service. While O. Berk avers Goncalves accepted service as an agent of Valley, Valley disputes service was perfected. The Valley branch did not retain a copy of the levy and the Valley Deposit Support Department did not record receipt of the levy. Further, it is disputed by O. Berk and Valley whether the Sheriff filed a return of service or notice to the debtor as required by Rule 4:59-1(h).[2]

On November 4, 2021, a principal of Glamsquad alerted Valley by email that it had not transferred the account in accordance with the escrow agreement. On the same date, Valley retitled the account and transferred the funds. As of November of 2021, an account was created and Glamsquad's funds were transferred to a new account, titled "VNB/CLD RE GLAMSQUAD INC."

On January 13, 2022, an additional $244,373.18 was transferred into the escrow account. Five days later, the SBA notified Valley that it forgave $798,297.29 of the second PPP loan. It is unclear whether Glamsquad or JMB

[2] Under Rule 4:59-1(h), on the day the levy was made, the Sheriff was required to "mail a notice to the last known address of the person or business entity whose assets are to be levied." Thereafter, "copies thereof shall be promptly filed by the levying officer with the clerk of the court and mailed to the person who requested the levy." Ibid.

Glamsquad was entitled to the money released from escrow, but Valley paid the escrowed funds of $520,509.71 to the SBA and transferred the remaining $293,398.59 to a JMB Glamsquad account. On February 1, 2022, JMB Glamsquad withdrew and transferred the funds by wire to First Republic Bank.

On February 14, 2022, Valley's Deposit Support Department received the second levy. Valley reviewed accounts and found no account in Glamsquad's name as the funds had been transferred. On February 15, 2022, by way of letter, Valley informed the Sheriff's Office that "there [were] no accounts for levy in the name of [Glamsquad]."

On April 29, 2022, O. Berk subpoenaed Valley for: "the person most knowledgeable about the following . . . : (1) the [b]ank [l]evy, (2) the [b]ank [l]evy-[seco]nd [n]otice, (3) Glamsquad, and (4) Glamsquad [a]ccounts." The subpoena additionally sought documents and communications relating to the levies and accounts. On June 6, 2022, after various adjournments and discovery motions, Valley provided documents responsive to the subpoena.

On July 20, 2022, O. Berk moved to turnover funds, arguing Valley erred in: (1) "failing to properly restrain the funds in the Glamsquad [a]ccount"; (2) "permitting a change in the titling of the Glamsquad [a]ccount . . . to JMB Glamsquad"; (3) "permitting the funds in the Glamsquad [a]ccount

to be transferred to the [n]ew [a]ccount"; and (4) "permitting those funds to be withdrawn from the [n]ew [a]ccount." O. Berk argued Valley was therefore responsible to pay to the Sheriff's Office the outstanding sum of $32,201.68 on the levy. Valley opposed, arguing the motion was procedurally deficient under Rule 4:59-1(h) because the Sheriff's office "never returned any notice to the [c]ourt, to [O. Berk] or to the [j]udgment [d]ebtor (Glamsquad) that the Sheriff actually levied on any 'funds of the debtor' at Valley." Valley additionally argued it did not "admit the debt" as required by N.J.S.A. 2A:17-63.

On August 29, 2022, the motion judge granted O. Berk's motion for turnover of funds, ordering Valley to pay to the Sheriff's Office "the sum of $32,201.68 which has been levied upon." The judge rejected Valley's argument that the levy was not properly served and noticed to the debtor, finding O. Berk sufficiently demonstrated it mailed a "[n]otice to [d]ebtor" at its last known address on October 26, 2021, and that a bank teller had accepted service of the levy on behalf of Valley. The judge further found Valley's "categorical statement that it [did] not admit the debt [was] insufficient to avoid responsibility for not levying upon the funds as served by" the Sheriff's Office. The judge deemed the existence of the APA and escrow agreement irrelevant, reasoning at the time the levy was served, on October 26, 2021, a

Glamsquad account existed with sufficient funds for garnishment, and therefore "no matter the terms of any extraneous agreements between Glamsquad, JMB Glamsquad, or other parties, [O. Berk] has satisfied its burden under the present motion."

On appeal, Valley argues:

> I. AS A GARNISHEE BANK, VALLEY HAD A RIGHT TO CONTEST THE LEVY, AND THE MOTION JUDGE HAD NO LEGAL AUTHORITY TO DIRECT TURNOVER UNDER THAT CIRCUMSTANCE.
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> II. THE MOTION JUDGE, BY FAILING TO ADDRESS THE TRUE OWNERSHIP OF THE BANK ACCOUNT AT ISSUE AS OF THE DATE OF THE SHERIFF'S ATTEMPTED LEVY, COMMITTED REVERSABLE ERROR.
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> III. VALLEY HAD A RIGHT TO CORRECT THE MIS-TITLED BANK ACCOUNT IN ORDER TO REFLECT THE ASSET PURCHASE AGREEMENT AND THE ESCROW AGREEMENT.

"[W]e review de novo the trial judge's factual and legal conclusions reached after a summary proceeding." Serico v. Rothberg, 448 N.J. Super. 604, 613 (App. Div. 2017) (quoting Malick v. Seaview Lincoln, 398 N.J. Super. 182, 186 (App. Div. 2008)). Generally, "findings by the trial court are binding on appeal when supported by adequate, substantial credible evidence." Capparelli v. Lopatin, 459 N.J. Super. 584, 605 (App. Div. 2019) (quoting

Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)). "We 'should not disturb the factual findings and legal conclusions of the trial judge unless [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Cumberland Farms, Inc. v. N.J. Dep't of Env't Prot., 447 N.J. Super. 423, 437-38 (App. Div. 2016) (quoting Seidman, 205 N.J. at 169). However, we review a trial court's conclusions of law de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 379 (1995). "[The] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Id. at 378.

After a review of the record, we are constrained to reverse the judge's turnover order. The motion record demonstrates there are material issues of fact as to the ownership of the Valley account at the time of the levies, the transference of funds to escrow to secure the PPP loan, and the release of funds to JMB Glamsquad after the second PPP loan was forgiven. The summary entry of a turnover order is barred if the garnishee "categorically denie[s] the existence of any debt." Nat. Cash Register Co. v. 6016 Bergenline Ave. Corp., 140 N.J. Super. 454, 458 (App. Div. 1976). "[T]he relationship between a bank and a depositor is that of a debtor and creditor." All Am. Auto

Salvage v. Camp's Auto Wreckers, 146 N.J. 15, 24 (1996) (citing Pagano v. United Jersey Bank, 143 N.J. 220, 233 (1996)). When a depositor places funds into a general account, ownership of the funds transfers to the bank "and constitutes the depositor as the bank's creditor." Ibid. "When a levy is made on a bank account, 'the funds levied are technically no longer the bank's or [judgment-]debtor's to control.'" Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 385 (App. Div. 2015) (quoting Sylvan Equip. Rental Corp. v. C. Washington & Son, Inc., 292 N.J. Super. 568, 574 (Law Div. 1995)). "A bank levy is 'fixed in time as of the date the sheriff served the writ on [the bank.]'" Id. at 386 (alteration in original) (quoting T & C Leasing, Inc. v. Wachovia Bank, N.A., 421 N.J. Super. 221, 228 (App. Div. 2011)).

Pursuant to N.J.S.A. 2A:17-63,

> After a levy upon a debt due or accruing to the judgment debtor from a third person, herein called the garnishee, the court may upon notice to the garnishee and the judgment debtor, and if the garnishee admits the debt, direct the debt, to an amount not exceeding the sum sufficient to satisfy the execution, to be paid to the officer holding the execution or to the receiver appointed by the court, either in 1 payment or in installments as the court may deem just.
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> [(Emphasis added).]

"It is established law that where there is a levy upon a debt due or accruing to the judgment debtor, the admission of the debt by the garnishee is a jurisdictional sine qua non to an order requiring him to pay it to the judgment creditor." Nat. Cash Register Co., 140 N.J. Super. at 457-58 (citing Beninati v. Hinchliffe, 126 N.J. N.J.L. 587, 589 (E. & A. 1941)); see also Winchell v. Clayton, 133 N.J.L. 168, 171 (1945) ("[O]nly a debt admitted by the garnishee to be owing by it to the judgment debtor is reachable by this process.").

O. Berk's argument that its levy supersedes any required transfer of ownership of funds under the APA or escrow agreement is unavailing. We part ways with the judge's determination that the levy was appropriate simply because at the time of the levy "an account existed" under Glamsquad's name "with sufficient funds" which "[were] subject to garnishment" and that therefore Valley was "required to pay the . . . Sheriff the full amount of which was levied upon." Valley's requirement to move the funds to an escrow account to secure the PPP Loan prior to the levy is materially in dispute. If Valley made a clerical error in retitling the funds, which were to be safeguarded in escrow to secure the PPP loan, then the funds were not available to be levied. A mistake in timely transfer does not thwart ownership

and entitle O. Berk to the funds. O. Berk has failed to provide support for its proposition.

As there are material issues of fact in dispute as to the ownership of the funds at the time of the first and second levy notices, the judge should have denied the motion to turnover funds and conducted a plenary hearing to resolve the presented factual questions. The judge's decision failed to address the certification of John R. Watkins, II, Esq., Senior Vice President and Senior Attorney at Valley, which created material questions of fact as to the account ownership and whether the funds within the Glamsquad account were Glamsquad's own "certain existing debts" that were not too "uncertain and speculative to be subject to levy." See T & C Leasing, 421 N.J. Super. at 228 (quoting Cohen v. Cohen, 126 N.J.L. 605, 610 (Sup. Ct. 1941)). Watkins attested "the Glamsquad account should have been retitled in the name of JMB Glamsquad" at the time the escrow agreement was executed on June 1, 2021, and that all funds thereafter "should have been moved into an escrow account in the name of Valley, as the SBA approved lender and Escrow Agent under the [e]scrow [a]greement."

We also disagree with O. Berk's argument that the existence of the funds in Glamsquad's account at the time of the first levy notice on October 26,

2021, undisputedly equates to Valley's "admitting the debt." See Nat. Cash Register Co., 140 N.J. Super. at 457-58. Summary disposition was inappropriate under the present admissible, supported facts. See Bruno v. Gale, Wentworth & Dillon Realty, 371 N.J. Super. 69, 76-77 (App. Div. 2004) (reversing and remanding for a plenary hearing where trial judge reached a "decision based on certifications containing conflicting factual assertions").

We observe it is also unclear whether the available funds, after the partial forgiveness of the second PPP loan, were to be transferred to a titled account to Glamsquad or JMB Glamsquad. Additionally, the court is to determine whether Valley should have placed a hold on Glamsquad's escrowed funds. We conclude reversal is warranted as the judge did not consider the APA, escrow agreement, and Valley's certifications. We vacate the order under review and reverse for a plenary hearing.

Reversed and remanded. We do not retain jurisdiction.