

State of Minnesota
In Court of Appeals

Fannie Mae,

Respondent,

v.

Andrew C. Grossman,

Appellant,

Heather Apartments Limited Partnership
d/b/a Vantage Lakes Apartments, Andrew C. Grossman,
The Home Depot Supply, Inc., Complete Pest Control, Inc.,
A Touch of Class Painting and Remodeling Company, LLC,
Sotelo Co., LLC, Wilmar Industries, a Division of Interline
Brands, Inc., K & K Quality Roofing & Construction,
and Sonshine Services, L.L.C.,

Defendants.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

I. Did the District Court Err in Applying to the Judgment any Property that may be distributed to Andrew Grossman from a Trust Containing a Spendthrift Clause?

Respondent Fannie Mae requested that the district court apply to its judgment any interest Respondent Andrew Grossman has in a trust created by his late father. Mr. Grossman opposed this request on the ground that the trust in question contains a spendthrift clause, which provides that neither the principal nor income of the trust shall be liable for the debts of any beneficiary prior to actual distribution in fact by the trustee. (App. 4.) The district court held that the trust's spendthrift clause did not prevent the court from applying Mr. Grossman's interest in the trust to Respondent's judgment.

Apposite Authorities:

In re Trust Created Under Agreement with McLaughlin, 361 N.W.2d 43 (1985)
Erickson v. Erickson, 197 Minn. 71, 266 N.W. 161 (1936)

II. Did the District Court Err in Ordering the Application to the Judgment of any Property that Might be Distributed to Andrew Grossman from the N. Bud Grossman Trust ?

Respondent requested that the district court apply to the judgment any inheritance proceeds Appellant is to receive as a result of the death of his father, as they become due. Appellant opposed this request on the ground that any undistributed inheritance proceeds are not yet property in his hand or due to him as is required by Minnesota Statutes Section 575.05 before property can be applied to satisfy a judgment. (App. 8-11.) The district court ordered the inheritance proceeds applied to satisfy the judgment.

Apposite Authorities:

Johnson v. Brajkovich, 229 Minn. 529, 40 N.W.2d 273 (1949)
Northern Nat. Bank of Duluth v. McLaughlin, 203 Minn. 253, 380 N.W.2d 852 (1938)
Olson v. Gilbertson, 300 N.W. 918 (Wis. 1941)

III. Did the District Court err in Entering a Temporary Injunction Over any Property that Might be Distributed to Andrew Grossman from the N. Bud Grossman Trust?

The district court entered an injunction prohibiting Andrew Grossman from transferring or otherwise disposing of any assets he may receive as an inheritance

from his father's estate, which remains undistributed. The Court relied on Minnesota Statutes Section 575.05, which allows an injunction prohibiting the transfer of property due to the judgment debtor. Appellant Grossman opposed the injunction on the grounds that Fannie Mae did not have a substantial chance of success on the merits and that there was no immediate harm to be prevented. (App. 7-13.)

Apposite Authorities:

Minn. Stat. § 575.05 (App. 23)

Johnson v. Brajkovich, 229 Minn. 529, 40 N.W.2d 273 (1949)

Mpls. Fed. of Teachers v. Mpls. Public Schools, 572 N.W.2d 107 (Minn. App. 1994)

STATEMENT OF THE CASE AND FACTS

Respondent Fannie Mae brought this action in Hennepin County District Court in order to collect on a judgment it obtained against Appellant Andrew Grossman in district court in the State of Oklahoma. As part of its efforts to collect the judgment, Fannie Mae sought an ex parte temporary restraining order forbidding Andrew Grossman from transferring or disposing of any interest in money, property, or other assets that he has received, is due to receive or will receive as a result of the death of his father, N. Bud Grossman, who died on January 11, 2010. (Fannie Mae's Mot. for TRO, filed Feb 10, 2010.) In support of the motion, Fannie Mae relied on Minnesota Statutes Section 575.05 which allows a judge to forbid a transfer or other disposition of the judgment debtor's property "in the hands of the judgment debtor or of any other person, or due to the judgment debtor." (Mem. in Supp. of Mot. for TRO.) The district court, Honorable Cara Lee Neville presiding, granted the motion and entered the TRO. (App. 5.) The court set a hearing to determine whether the TRO should be converted into a temporary injunction. (App. 6).

Mr. Grossman opposed the temporary injunction on the ground that the inheritance he is to receive from his father is contained in a trust that has not yet been distributed, which contains a spendthrift clause.¹ (App. 7-13.) Mr. Grossman argued that the trust's spendthrift provision prevents its application to Fannie Mae's judgment and thus prevents it from being subject to the temporary injunction. (*Id.*) The spendthrift clause provides as follows:

Neither the principal nor the income of any trust created hereunder shall be liable for the debts of any beneficiary, and, except as otherwise expressly provided herein with respect to the power granted to a beneficiary to appoint the principal of a trust created hereunder, no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust created hereunder, or the income produced thereby, prior to the actual distribution in fact by the trustee to said beneficiary.

(Confid. App. 18-19.) Mr. Grossman also argued that because the inheritance has not been distributed, it did not meet the requirement of Minnesota Statutes section 575.05 that the property at issue be "in the hands of the judgment debtor" or "due to the judgment debtor." (*Id.*)

The district court converted the TRO into a temporary injunction. (Add. 1.) In its Order and Memorandum, the court held that Mr. Grossman had a present interest in the trust that satisfied section 575.05 and that the spendthrift provision did not prevent the court from ordering the injunction.

¹ N. Bud Grossman's estate is the subject of the N. Bud Grossman Revocable Trust Agreement (hereinafter "the Grossman trust." (Confid. App. 1-39.)

Fannie Mae then moved the district court for application of Mr. Grossman's nonexempt assets to the judgment, including "any interest in money, property, or other assets that [Mr. Grossman] has received, is due to receive, or will receive as a result of the death of his father, N. Bud Grossman (including, but not limited to, any interest in any trust established by N. Bud Grossman or any money or property distributed or to be distributed under any will of N. Bud Grossman)." (Fannie Mae's Notice of Mot. and Mot. for Application of Assets to J., filed March 4, 2010.) Mr. Grossman opposed the motion on the same grounds he had opposed the temporary injunction. (App. 20.) The district court granted the motion and ordered the appointment of a receiver to "take custody of and liquidate all inheritance proceeds of the N. Bud Grossman Trust which are eligible for distribution to Grossman, as they come due, and shall apply the proceeds thereof to satisfy Fannie Mae's judgment." (Add 6.)

INTRODUCTION AND STANDARD OF REVIEW

The district court erred in entering the temporary injunction and ordering the application to the judgment of any future inheritance proceeds.

The inheritance proceeds in question are contained in the Grossman Trust, which includes a spendthrift clause. A valid spendthrift clause prevents creditors of beneficiaries from reaching the income or principal of the trust until it is actually distributed. Minnesota courts uniformly uphold these provisions even as to trusts that have come to an end while the property remains undistributed. Thus the spendthrift clause prohibits any application of Mr. Grossman's interest in the trust to the judgment.

The district court's orders were in derogation of the spendthrift clause and Minnesota law strictly enforcing such clauses.

Moreover, Minnesota Statutes section 575.05, which Fannie Mae relied on both for the injunction and the application order, allows a district court to order "any of the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the judgment debtor" be applied to satisfy the judgment. To justify such an order, there must be clear and convincing proof that the property belongs to judgment debtor. The undistributed assets contained in the Grossman Trust are not the property of Mr. Grossman and are not now due to Mr. Grossman. The Grossman Trust remains undistributed and when, if and how the corpus of the trust will be distributed are unknowns at this time. Minnesota Statutes section 575.05 does not allow the court to order assets applied to the judgment that do not belong to the judgment debtor.

Finally, the injunction was in error not only because Fannie Mae's request failed on the merits, but also because there was no immediate, irreparable harm that justified the extraordinary remedy of injunctive relief. A prerequisite to the entry of such an injunction is a real (not hypothetical) controversy between the parties that will lead to a trial on the merits. Here, because there was no money or property yet due to Mr. Grossman, there was nothing to enjoin.

The proper application of the spendthrift clause is a legal question, subject to *de novo* review. See *Matter of Trust Created by Hill*, 499 N.W.2d 475, 482 (Minn. App. 1993). In reviewing a district court's order in a supplementary proceeding directing assets be applied to satisfy a judgment, the reviewing court must determine whether there

was clear and convincing proof that the property was in the judgment debtor's possession or due to the judgment debtor. *Johnson v. Brajkovich*, 229 Minn. 529, 531, 40 N.W.2d 273, 274 (1949). If clear and convincing proof was lacking, the order must be overturned. *Id.*

A district court's decision to grant a temporary injunction is reviewed for abuse of discretion. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993) (citation omitted). Under this standard, a decision should not be reversed on appeal unless the district court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law. *Transit Team v. Metropolitan Council*, 679 N.W.2d 390, 399 (Minn. App. 2004) (citing *Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701 (Minn. 1997)).

ARGUMENT

The district court erred in ordering any inheritance proceeds which may come to Mr. Grossman in the future be applied to satisfy the judgment. The Grossman Trust, which is the vehicle through which any inheritance would flow to Mr. Grossman, contains a spendthrift clause explicitly forbidding exactly what the district court did. Minnesota courts strictly uphold these provisions. Thus, while the potential inheritance remains in the trust, it is unreachable by creditors.

Moreover, before a district court can order property applied to satisfy a judgment, there must be clear and convincing proof that the property belongs to the judgment debtor or is due to the judgment debtor. Minn. Stat. § 575.05 (2010); *Johnson*, 229 Minn. at

531; 40 N.W.2d at 274. Here, Fannie Mae presented no evidence that there is any inheritance due to Mr. Grossman. Thus, the district court erred in granting the injunction and ordering any inheritance proceeds applied to the judgment.

I. THE GROSSMAN TRUST CONTAINS A SPENDTHRIFT PROVISION WHICH PROHIBITS ITS APPLICATION TO THE JUDGMENT.

The Grossman trust is a spendthrift trust. The law in Minnesota is clear that a spendthrift trust which has not yet been distributed is not subject to claims of creditors. *In re Trust Created Under Agreement with McLaughlin*, 361 N.W.2d 43 (1985); *Erickson v. Erickson*, 197 Minn. 71, 266 N.W. 161 (1936).

The spendthrift provision in the Grossman Trust provides:

Neither the principal nor the income of any trust created hereunder shall be liable for the debts of any beneficiary, and, except as otherwise expressly provided herein with respect to the power granted to a beneficiary to appoint the principal of a trust created hereunder, no beneficiary shall have any power to sell, assign, transfer, encumber or in any other manner to anticipate or dispose of his or her interest in any such trust created hereunder, or the income produced thereby, prior to the actual distribution in fact by the trustee to said beneficiary.

(Confid. App. at 18-19 (emphasis added).)

Provisions such as this are absolutely enforceable under Minnesota law and bar creditors from reaching the trust. *Morrison v. Doyle*, 582 N.W.2d 237 (Minn. 1999); *McLaughlin*, 361 N.W.2d 43; *In re Moulton's Estate*, 233 Minn. 286, 46 N.W.2d 667 (1951). The Minnesota Supreme Court enforces these provisions because "donors may dispose of their property as they see fit, including exempting their gifts from the claims of

donees' creditors." *McLaughlin*, 361 N.W.2d at 45 (citing *Erickson*, 197 Minn. 70, 266 N.W. 161).

In both *McLaughlin* and *Erickson*, the Minnesota Supreme Court held that spendthrift clauses prohibit creditors from making any claim on the income or residue of a trust (even one that has come to an end) until the funds are actually paid over to the beneficiary. *Erickson*, 197 Minn. at 77, 266 N.W. at 163; *McLaughlin*, 361 N.W.2d at 46. In other words, under the protection of a valid spendthrift clause, both trust income and principal are "protected in transmission" until actually paid to the beneficiary. *Id.* Thus, in *Erickson*, the Minnesota Supreme Court reversed an order that required judgments for alimony and support be paid out of trust created for the benefit of the debtor. The trust in question provided for the distribution of the debtor's father's estate (who was deceased at the time of the action) and contained a spendthrift clause. *Erickson*, 197 Minn. at 72, 266 N.W. at 161-162.

In *McLaughlin*, the Minnesota Supreme Court held that a spendthrift clause prevented an attempt to garnish a trustee even though the trust had terminated. 361 N.W.2d at 46. The *McLaughlin* court specifically rejected exactly the argument Fannie Mae made in the trial court here (App. 14-17), that because the trust proceeds vested at the time of Mr. Grossman's father death, the spendthrift provision is no longer applicable. *McLaughlin*, 361 N.W.2d at 46. The Court looked to the language of the trust instrument which shielded the trust proceeds "while undistributed in fact." *Id.* Here too, the language of the trust shields the proceeds "prior to actual distribution in fact." (Confid. App. 19.)

Rejecting the argument that the spendthrift clause no longer applied because the beneficiaries' interests were vested, the Court observed that the debtor in that case was "one of several beneficiaries whose interests have yet to be ascertained," and that "[a]lthough terminated, the trust continues for a reasonable time during which trustees have the power to perform acts necessary to wind up the trust." *Id.* (citing G. Bogert, *The Law of Trusts and Trustees* § 1010 (Rev. ed. 1983)). Finally the Court observed that not until a final accounting is made will the trust proceeds be distributed "in fact." *Id.*

The Minnesota Supreme Court's holdings are consistent with Bogert, *Trusts and Trustees*:

It would seem that to the extent spendthrift trusts are valid, their protection should extend to the right of the beneficiary to receive income or principal from the trustee until it is actually paid or delivered into the beneficiary's hands, but that trust income that is in the trustee's hands awaiting payment should be affected by the restraint, whether the time for its payment has or has not passed.

George Gleason Bogert et. al., *Trusts and Trustees* § 222 (3d ed.) Simply put, while the property is still in the hands of the trustee, it is not subject to Fannie Mae's judgment.

Fannie Mae attempts to skirt the spendthrift clause by moving against Mr. Grossman and not directly against the trustee. But regardless of to whom the court directs its order, the effect is the same: the property of the trust is now subject to the claim of Mr. Grossman's creditor. This is in direct contravention of the spendthrift clause and the Minnesota Supreme Court's previous holdings. Thus the district court's order applying future proceeds from the N. Bud Grossman trust to Fannie Mae's judgment should be reversed.

II. MINNESOTA STATUTES SECTION 575.05 DOES NOT ALLOW THE COURT TO ORDER UNDISTRIBUTED ASSETS CONTAINED IN AN ESTATE APPLIED TO A JUDGMENT.

Fannie Mae requested and the district court granted an order applying any inheritance proceeds Andrew Grossman may receive as a result of the death of his father applied to satisfy Fannie Mae's judgment. Fannie Mae and the court relied upon Minnesota Statutes section 575.05. Section 575.05 provides:

The judge may order any of the judgment debtor's property in the hands of the judgment debtor or of any other person, or due to the judgment debtor, not exempt from execution, to be applied toward the satisfaction of the judgment.

Section 575.05 does not allow the application of any interest Andrew Grossman may have in his father's estate to Fannie Mae's judgment. Andrew Grossman's interest in his father's estate remains inchoate until it is distributed, thus the estate property is not property in the hands of the debtor or due to the debtor as Section 575.05 requires.

For a court to order property applied to a judgment, there must be clear and convincing proof that the property is in the hands of the judgment debtor or due to the judgment debtor. *Johnson*, 229 Minn. at 531; 40 N.W.2d at 274. Significantly, the statute does not say anything about property that might come due to the judgment debtor at some unspecified future time. Rather it is explicitly limited to property in the hands of or due to the judgment debtor. And Minnesota courts require clear and convincing proof that the property actually is in the debtor's possession or under his control. *Id.* The property contained in the Grossman trust, by definition, is not in the hands of

Andrew Grossman. Moreover, because there has been no distribution, it is not yet due to Mr. Grossman. Thus, the trust cannot be applied to satisfy the judgment.

It is axiomatic that a creditor cannot reach property that does not yet belong to the debtor. *Northern Nat. Bank of Duluth v. McLaughlin*, 203 Minn. 253, 380 N.W.2d 852 (1938); *Hanson v. Daniel Hayes Co. of Idaho*, 161 Minn. 251, 201 N.W. 603 (1924). Following this reasoning are cases from other jurisdictions that disallow the garnishment of an administrator of an estate before a decree of distribution is issued. *Olson v. Gilbertson*, 300 N.W. 918 (Wis. 1941); *Russell v. Prospect Lodge No. 106*, 46 P.2d 478 (Okla. 1935). The reasoning underlying this result is that the creditor can have no greater right to the property than the judgment debtor. *Walden v. Crego's Estate*, 285 N.W. 457, 459-460 (Mich. 1939); *Island Pond Nat. Bank v. Chase*, 141 A. 474 (Vt. 1928). Until the debtor has a legal right to demand payment, the creditor has no claim to the assets. Allowing the attachment of assets before they are due depends on the contingency that they actually become due (i.e. there is a balance remaining in the estate after settlement of all debts and the devisee does not disclaim his or her interest). *See Woodbine Sav. Bank v. Yager*, 237 N.W. 761, 762 (S.D. 1931) (judgment cannot be rendered against a garnishee defendant until property is due "absolutely and without depending on any contingency.") Thus, unless and until Andrew Grossman has a legal right to demand payment of sum certain from his father's estate, he has no property subject to Minnesota Statutes Section 575.05.

III. THE INJUNCTION WAS IMPROPER BECAUSE FANNIE MAE SHOULD NOT HAVE SUCCEEDED ON THE MERITS AND BECAUSE THERE WAS NO IMMINENT HARM TO AVOID.

Injunctive relief is a “drastic and extraordinary remedy [which] is not to be routinely granted.” *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982). Rather, a preliminary injunction should be granted “with great caution and restraint.” *Allstate Sales & Leasing Co. v. Geis*, 412 N.W.2d 30, 33 (Minn. App. 1987).

In Minnesota, courts consider five factors in addressing a request for injunctive relief:

1. The probability of success on the merits;
2. The balance of harms to the parties;
3. The nature and background of the parties' relationship;
4. Public policy considerations; and
5. Administrative burdens in enforcing an injunction.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-5; 137 N.W.2d 314, 321-22 (1965).

While no one factor is determinative, likelihood of success on the merits is generally the touchstone inquiry. *See Mpls. Fed. of Teachers v. Mpls. Public Schools*, 572 N.W.2d 107, 110 (Minn. App. 1994) (“ . . . primary factor in determining whether to issue a temporary injunction is the proponent's probability of success in the underlying action” (citing *Dalco Corp. v. Dixon*, 338 N.W.2d 437, 440 (Minn.1983))). Thus, before granting a preliminary injunction, a court must be thoroughly satisfied that the movant is likely to succeed on the merits.

Here, Fannie Mae did not show it could succeed on the merits of its claim, and thus the district court erred in entering the temporary injunction. As discussed in detail above, Fannie Mae not only failed to present the court with clear and convincing proof that inheritance proceeds were due to Mr. Grossman, it failed to present any proof (other than the fact of N. Bud Grossman's death). Thus it did not show a substantial chance of success on the merits. Moreover, as discussed above, the Grossman Trust's spendthrift provision prevented the relief sought by Fannie Mae as a matter of law. The district court's decision to the contrary was based on an erroneous view of law regarding the application of assets to a judgment and the law regarding trusts and should be reversed.

Furthermore, Fannie Mae failed to show irreparable injury – a requirement for the entry of an injunction. *Miller*, 317 N.W.2d at 712. The injury that will be suffered absent the injunction must be “certain, substantial, and irreparable.” *Dahlberg*, 272 Minn. at 275 n. 12, 137 N.W. at 321 n. 12 (1965) (citation omitted). Fannie Mae's injury is not only not certain, it is entirely speculative. Fannie Mae speculates that Andrew Grossman will receive an inheritance and further speculates that he will transfer it. Fannie Mae's speculation of injury is not a sufficient ground on which to enter an injunction.

Andrew Grossman may never receive an inheritance. Any distribution to Andrew Grossman lies within the discretion of the trustee, particularly in light of the trust's spendthrift provision. Fannie's Mae's request presupposes that a distribution to Andrew Grossman is a certainty. It is not. The trustee could utilize its discretion not to distribute to Mr. Grossman. Or Mr. Grossman may choose to disclaim his interest in his

father's estate. Moreover, there is no way to easily predict when any distribution from the trust will occur. The Grossman estate could be enmeshed in probate for years, particularly with the present confusion surrounding the automatic repeal of the federal estate tax.² In short, today it is impossible to say when or if Andrew Grossman will receive any distribution from the trust his father created.

Finally, none of the remaining four *Dahlberg* factors weighed decisively in Fannie Mae's favor. Hence the injunction should have been denied. Fannie Mae has an adequate remedy at law. Fannie Mae can then renew its request for relief under Minnesota Statutes § 575.05 when property is actually distributed to Mr. Grossman.

CONCLUSION

The district court ordered all inheritance proceeds that Mr. Grossman might receive be applied to the judgment "once they come due." This order was in error. First, the inheritance is contained in a spendthrift trust. Thus, the inheritance is not subject to the claims of creditors until it is actually distributed to Mr. Grossman. Because the district court's order subjected the inheritance to Fannie Mae's claim prior to distribution in fact, it should be reversed. Second, the property in question is not yet in the hands of Mr. Grossman or due to Mr. Grossman, as section 575.05 requires. Thus, there was no legal basis upon which to order it applied to the judgment.

² The federal estate tax expired automatically at the end of 2009 due to Congress's failure to pass a measure to continue it. This has led to great uncertainty regarding the potential tax liability for the estates of those who have died in 2010. *See generally*, Paul Sullivan, *A Bizarre Year for the Estate Tax Will Require Extra Planning*, The New York Times (Jan. 8, 2010).

Because Fannie Mae's request for relief under Minnesota Statutes Section 575.05 fails, the injunction fails with it. Fannie Mae did not have a substantial chance of success on the merits, and there was no imminent harm to prevent. Thus, the district court should not have entered the injunction and it should be dissolved.

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