

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

MARTIN A. TYCKOSKI, as Personal Representative  
of the Estate of JAMES GLYNN, SR., and  
CITIZENS COMMERCIAL & SAVINGS BANK,

UNPUBLISHED  
September 24, 1996

Plaintiffs-Appellees,

v

No. 168017  
LC No. 91-136349

JAMES GLYNN, JR., and HAROLD A. DRAPER,  
JR.,

Defendants-Appellants.

---

Before: Gribbs, P.J., and Hoekstra and Charles H. Stark,\* JJ.

PER CURIAM.

Defendants appeal as of right from the order entered by the probate court granting plaintiffs' motion for summary disposition. We reverse.

Citizens Commercial & Savings Bank (Citizens) issued a Certificate of Deposit (CD) in 1983 to James Glynn, Sr., Stacia Glynn and James Glynn, Jr. The CD states on its face that it is "Non-Transferable, Non-Negotiable, Non-Assignable." Following the death of Glynn, Sr., Glynn, Jr. took possession of the CD certificate. After Stacia Glynn died, Glynn, Jr. hired Harold Draper to represent him in an action contesting the will of Stacia Glynn. As security for his payment of legal fees, Glynn, Jr. gave Draper the CD and signed an agreement indicating that he was granting Draper possession as collateral for payment of his legal fees. The probate court granted Citizens costs and attorneys fees. As a set-off to satisfy its judgment against Glynn, Jr., Citizens electronically transferred the amount of the judgment out of the CD and re-issued the CD for the balance. Draper contends that this set-off should not have been allowed because his interest was prior and superior to that of Citizens. The trial court agreed with Citizens and allowed the set-off. Defendants appeal this ruling.

---

\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendants initially argue that the probate court erred in concluding that the retaining attorney's lien could be impaired by the bank's subsequently arising right of set-off. We agree. Citizens did not contest the validity of Draper's retaining lien, but claimed that their rights to set-off were not affected by Draper's possession of the certificate or prior claim. Michigan case law does not support Citizens' argument. An attorney's lien is paramount to the rights of the client and the client's creditors, even a creditor in whose favor execution has been levied, or has acquired a lien in supplementary proceedings or in garnishment proceedings. *Kysor Industrial Corp v DM Liquidating Co*, 11 Mich App 438, 444-445; 161 NW2d 452 (1968) (quoting 7 CJS, Attorney and Client, § 229, pp 1176-1178). Here, Draper's lien was created prior to any claims by Citizens and is paramount to the rights of Glynn, Jr. and Citizens.

Defendants also argue that Draper's possession of the CD perfected a security interest in it, gave him priority, and prevented impairment of his interest by Citizens' subsequently arising right of setoff. Again, we agree.

Determination of Draper's interest in the CD requires categorizing the collateral and determining if it was properly attached and perfected, and subject to set-off. Article 9 of the UCC, in pertinent part, defines an instrument as follows:

“Instrument” means . . . any other writing which evidences a right to payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment. MCL 440.9105(1)(i); MSA 19.9105(1)(i).

Because Glynn, Jr. properly endorsed the CD, thus evidencing a right to payment of money that is not a security agreement or lease, and gave possession of it to Draper pursuant to a fee agreement that they had entered into, this collateral should be considered an instrument under MCL 440.9105(1)(i); MSA 19.9105(1)(i).

Next, Draper properly attached his interest in the CD collateral as required by MCL 440.9203(1)(a-c); MSA 19.9203 (1) (a-c), and MCL 440.9305; MSA 19.9305.

- (1) ...A security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:
  - (a) The collateral is in the possession of the secured party pursuant to an agreement or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned; and
  - (a) Value has been given; and
  - (b) The debtor has rights in the collateral.

MCL 440.9203 (1) (a-c); MSA 19.9203 (1) (a-c).

The record shows that Draper was given possession of the CD pursuant to a written agreement, which contained a description of the collateral. Value was given when Draper performed the legal services for Glynn, Jr., who possessed a one-third interest in the CD. Therefore, Draper's interest in the CD was properly attached.

Draper's interest in the CD was perfected pursuant to MCL 440.9305; MSA 19.9305, which states:

A security interest in letters of credit and advices of credit (section 5116(2)(a)); goods; instruments, other than certificated securities; money; negotiable documents; or chattel paper may be perfected by the secured party's taking possession of the collateral. . . . A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this article. The security interest may be otherwise perfected as provided in this article before or after the period of possession by the secured party. MCL 440.9305; MSA 19.9305.

Draper's continuous possession of the CD perfected his interest. He did not lose possession of the CD at any point, so his interest is perfected from the time possession was taken.

A bank's right of setoff is subordinate to a perfected security interest. *Southeastern Financial Corp v National Bank of Detroit*, 145 Mich App 717, 720-721; 377 NW2d 900 (1985). The court in *Southeastern* found that MCL 440.9104(i); MSA 19.9104(i) was not intended to remove commercial transactions or conflicts from the operation of the UCC whenever the priority of a setoff was involved; rather, it was intended only to provide relief to banks from having to complete the filing requirements of Article 9 of the UCC in order to create the right of setoff. *Id.* Because the Code does not define priorities in these circumstances, MCL 440.9201; MSA 19.9201, which gives a secured party priority over any other interest, is controlling. The bank, as an unsecured creditor, has its right of setoff subordinated to a perfected security interest asserted by a secured party. *Id.* at 721 n 2. Therefore, the probate court erred in granting Citizen's motion for summary disposition, where Draper's perfected security interest was superior to Citizen's right of setoff.

Reversed.

/s/ Roman S. Gribbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark