

STATE OF MICHIGAN
COURT OF APPEALS

OLIVER HAYES, JR. and ELEANOR HAYES,

Plaintiffs-Appellants,

v

MUSKEGON COUNTY SHERIFF
DEPARTMENT, ROBERT L. CARTER and
DENNIS EDWARDS,

Defendants-Appellees.

UNPUBLISHED

April 8, 1997

No. 185511

Muskegon Circuit Court

LC No. 94-031755-AW

Before: Neff, P.J., and Smolenski and D. A. Roberson,* JJ.

PER CURIAM.

In this claim and delivery action, plaintiffs appeal as of right the circuit court's opinion and order granting defendants' motion for summary disposition. We affirm.

I

In April 1990, a search warrant was executed in the course of a criminal investigation of plaintiff Oliver Hayes, Jr. who was subsequently convicted of conspiracy to violate Michigan's gambling laws, MCL 750.157a(b); MSA 28.354(1)(b), and failure to file a single business tax return, MCL 208.1 *et seq*; MSA 7.558(1) *et seq* with intent to defraud or to evade the payment of that tax, MCL 205.27; MSA 7.657(27). Following his conviction, a civil action was filed which resulted in the forfeiture of cash and properties seized in the search. Various property was also turned over by defendants to the Michigan Department of Treasury, which had issued a warrant notice of levy.

II

Plaintiffs argue that summary disposition was improper because defendants wrongfully relinquished plaintiff Eleanor Hayes' property to the Department of Treasury pursuant to a tax lien which pertained solely to Oliver. We disagree.

* Recorder's Court judge, sitting on the Court of Appeals by assignment.

Because the property was seized pursuant to a tax lien issued by the Department of Treasury, plaintiffs may not maintain an action for claim and delivery regarding that property. MCL 600.2920(1)(a); MSA 27A.2920(1)(a). As the trial court correctly noted, plaintiff's remedy, if any, lies with the Department of Treasury.

III

Plaintiffs next argue that the trial court erred in granting summary disposition regarding their claim for money damages pursuant to MCL 600.2920(1); MSA 27A.2910(1). We disagree.

The seizure of the property at issue, pursuant to a valid search warrant, was a governmental function, and the individual defendants were acting within their authority in executing the search warrant. As noted by the trial court, plaintiffs' complaints failed to allege an exception to governmental immunity. *Summer v Detroit*, 206 Mich App 46, 48; 520 NW2d 356 (1994). Accordingly, defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) was properly granted.

IV

The circuit court granted summary disposition pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2) in favor of plaintiffs as to various items, which defendants agreed to return to plaintiffs. On appeal, plaintiffs argue that the trial court's order prevented them from seeking an award of money damages in lieu of the return of their property pursuant to MCR 3.105(H)(6), which provides:

The party adjudged entitled to possession of the property described may elect to take judgment for the value of the property instead of possession. The judgment value may not exceed the unpaid debt, if any, secured by such property.

This argument is entirely without merit. There was no ruling that plaintiffs were entitled to possession of any disputed property. To the contrary, defendants have always been willing to return these items to plaintiffs, but plaintiffs have not sought to retrieve them. Moreover, as noted above, defendants' are immune from any award of money damages.

V

Plaintiffs also argue that the trial court erred in granting summary disposition as to property, including a Mercedes Benz automobile, because it was co-owned by plaintiff Eleanor Hayes. The court properly granted summary disposition as to plaintiff Oliver Hayes' interest in the vehicle pursuant to MCR 2.116(C)(7), because the vehicle was the subject of a previous forfeiture action. Regarding Eleanor Hayes' claimed interest in the automobile, the court granted summary disposition pursuant to MCR 2.116(C)(10), but expressly allowed her to file a motion for reconsideration and submit evidence establishing facts that she was a bona fide co-owner of the automobile, which was titled solely in Oliver Hayes' name.

Plaintiffs failed to come forward with evidence to rebut defendants' affidavits. Accordingly, the trial court properly granted defendants' motion for summary disposition. MCR 2.116(G)(4); *York v 50th District Court*, 212 Mich App 345, 349; 536 NW2d 891 (1995); see also *Dawkins v Detroit Police Comm'r*, 375 Mich 336, 352; 134 NW2d 756 (1965) (right to replevin [now claim and delivery] is properly denied where the plaintiff has no legal title to the property sought, and fails to demonstrate any right to immediate possession thereof).

VI

Plaintiffs argue that this case was improperly reassigned to Circuit Judge James M. Graves, Jr. without notice or hearing. We disagree.

MCR 8.111(D) provides in relevant part:

(1) if one of two or more actions arising out of the same transaction or occurrence has been assigned to a judge, the other action or actions must be assigned to that judge;

(2) if an action arises out of the same transaction or occurrence as a civil action previously dismissed or transferred, the action must be assigned to the judge to whom the earlier action was assigned.

Judge Graves presided over two previous cases arising out of the same transaction: the criminal prosecution against plaintiff Oliver Hayes and the civil forfeiture action. It appears that this matter was erroneously assigned to Judge R. Max Daniels because of plaintiffs' failure to identify these previous actions in their complaint. MCR 8.111(D)(3).

Plaintiffs also assert that Judge Graves was biased in this matter. However, because they did not file a motion for his disqualification pursuant to MCR 2.003, they have waived this issue. *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Dalton A. Roberson