

LETTER OPINION
94-L-10

January 20, 1994

Mr. Peter H. Furuseth
Williams County State's Attorney
P.O. Box 2047
Williston, ND 58802-2047

Dear Mr. Furuseth:

Thank you for your December 1, 1993, letter regarding the sheriff's responsibilities on levy and execution of civil judgments in light of legislation passed at the 1993 legislative session. You specifically asked three questions: whether the sheriff's responsibilities on the property search of judgment debtors' assets is limited to "of record" assets only (i.e., assets such as motor vehicles, chattels, and real property); whether a request for a levy on personal property must be specific or whether it may be general; and whether all instructions given to the sheriff by the judgment creditor regarding requests for levies must be in writing.

A sheriff is required to execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceeding upon which they were issued. N.D.C.C. ? 11-15-04. Two kinds of execution exist, one against the property of the judgment debtor, and the other for the delivery of the possession of real or personal property. N.D.C.C. ? 28-21-03. Upon receipt of an execution, the sheriff shall:

1. If the execution is against the property of the judgment debtor, satisfy the judgment with interest and accruing costs, which include sheriff and county costs, out of the personal property of the debtor, and, if sufficient personal property cannot be found, out of the real property belonging to the debtor on the day when the judgment was docketed in the county or at any time thereafter. If real or personal property of the debtor is in the hands of a personal representative, heir, devisee, legatee, tenant of real property, or trustee, the sheriff may satisfy the judgment out of that property; or

2. If the execution is for the delivery of the possession of real or personal property, deliver the possession of the property to the party entitled thereto, and satisfy any costs, damages, or rents or profits recovered by the same judgment out of the personal property of the party against whom it was rendered and, if sufficient

personal property cannot be found, out of the real property belonging to the party on the day when the judgment was docketed in the county or at any time thereafter. If delivery of the property cannot be had, the sheriff may satisfy the judgment in the amount of the value of the property out of the real and personal property of the party as if an execution against the property of the party had been issued.

N.D.C.C. ? 28-21-06. It is therefore the duty of the sheriff to satisfy a judgment out of the personal or real property of the debtor.

The property subject to levy and the manner under which the sheriff must make the levy are also defined by law.

Property subject to levy - Manner of levy. All goods, chattels, moneys, and other property, both real and personal, or any interest therein, of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action are subject to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, and any interest in real or personal property, and all other property not capable of manual delivery, may be taken on execution and sold as provided in this chapter. The levy under an execution must be made as follows:

1. Upon real property, the sheriff shall file with the register of deeds of the county in which the property is located, a notice of levy that has been signed by the sheriff and that states the names of the parties to the action and a description of the property.
2. On personal property capable of manual delivery, the sheriff shall take the property into custody. When taking the property, the sheriff shall deliver a copy of the execution and notice of levy to the person from whom the property was taken.
3. Upon money, judgments, drafts, promissory notes, or other papers of like character, by serving a copy of the execution and levy to the person who has custody of such property, except as may be provided for in chapter 32-09.1.
4. On other personal property, the sheriff shall leave a copy of the execution and a notice of levy under an execution with the person holding the property or:
 - a. If the property consists of a right or share in the stock of a corporation or interest or profits thereon, with the president or other head of the corporation, or the secretary, cashier, or managing agent thereof.
 - b. If the property consists of membership interests in a limited liability company or interest or profits thereon, with the president or other head of the limited

liability company or the secretary, treasurer, or managing agent thereof.

The sheriff may elect not to seize property during the time period the debtor has to claim exemptions under chapter 28-22 or in the case of property which by reason of its bulk or other cause cannot be removed immediately and upon service of the notice of levy in accordance with this section and section 28-21-12, the levy is as valid and effectual as if the property had been seized and the possession and control thereof retained by the officer. The lien of the writ of execution is effectual from the time the actual levy is made in accordance with this section and section 28-21-12.

N.D.C.C. ? 28-21-08. Therefore, it is my opinion that all forms of real and personal property not exempt by law are subject to execution without regard to whether the ownership interest in the property is required to be recorded as a matter of law.

Under limited circumstances, the sheriff can become liable to the judgment creditor for failure to levy upon the debtor's property:

Except as otherwise provided by law or order of the court, if the sheriff to whom a writ of execution or attachment is delivered neglects or refuses to levy upon or sell any property of the party charged in the writ which is liable to be levied upon or sold, which has been made known to the sheriff by the judgment creditor or the creditor's attorney, the sheriff is liable to the creditor for all damages sustained by the creditor. The sheriff is not liable if the sheriff has not levied upon or sold property, when the sheriff's failure to act was the result of following the directions or orders of the creditor or the creditor's agent or attorney.

N.D.C.C. ? 11-15-17. This section was amended in the 1993 legislative session. 1993 N.D. Sess. Laws ch. 103, ? 2. The former N.D.C.C. ? 11-15-17 did not qualify the sheriff's liability to the judgment creditor by requiring the judgment creditor to make known to the sheriff the property to be levied upon or sold. Id. Although the Legislature limited the liability of a sheriff for failure to levy and execute on a judgment to those instances where property was made known to the sheriff by the judgment creditor, the Legislature did not amend N.D.C.C. ?? 28-21-06 and 28-21-08 which require the sheriff to satisfy a judgment out of all forms of personal and real property of the debtor upon receipt of an execution. Based on N.D.C.C. ?? 28-21-06, 28-21-08, and 11-15-17, it is my opinion that a request for a levy on personal property may be either general or specific.

The supreme court or district courts may issue a writ of mandamus to compel the performance of an act which the law specially enjoins as a duty of a person's office. N.D.C.C. ? 32-34-01. "The writ of mandamus will issue when there is no

other plain, speedy, and adequate remedy in the ordinary course of the law and the party applying for the writ has shown a clear legal right to the performance of the particular act sought to be compelled by the writ." Abrahamson v. Amos, 245 N.W.2d 888, 891 (N.D. 1976). "The functions of sheriffs . . . with reference to the execution of process are generally of a purely ministerial[, as opposed to discretionary,] character." 52 Am. Jur.2d Mandamus ? 252 (1970). See also State ex rel. Mather v. Carnes, 551 S.W.2d 272, 285 (Mo. App. 1977). Mandamus will issue to compel a sheriff to execute a judgment by levy and sale except where there is another remedy for the judgment creditor such as a direct action against the defaulting officer or an action upon the officer's bond. 52 Am. Jur.2d Mandamus ? 252 (1970). See also 55 C.J.S. Mandamus ? 97(c)(2) (1948).

"The law seems to be well established that the writ of mandamus cannot be employed to supersede legal remedies, but is intended to furnish a remedy where no adequate legal remedy is provided." Bismarck Tribune v. Wolf, 255 N.W. 569, 572 (N.D. 1934), quoting Struss v. Costello, 150 N.W. 874, 875 (N.D. 1915). A sheriff's liability for failure to execute process ordinarily is limited to the injury actually sustained. Renner v. Gruman Steel Co., 147 N.W.2d 663, 672 (N.D. 1967). Although a sheriff is liable to a judgment creditor for the damages sustained by the creditor by the sheriff's failure to execute and levy, if the judgment creditor fails to produce evidence of the damages sustained by creditor may, in fact, recover nothing. See Dorau v. Sheriff of Orange County, 420 N.Y.S.2d 768 (Sup.Ct., App Div. 1979) (Plaintiff failed to introduce evidence of damages and trial court was justified in awarding damages in the amount shown by the defendant's evidence).

To establish damages under N.D.C.C. ? 11-15-17, the judgment creditor must have made property subject to levy and execution known to the sheriff. For this purpose, the judgment creditor may obtain discovery from any person, including the judgment debtor, in the manner provided by the Rules of Civil Procedure. Rule 69, N.D.R. Civ. P. The judgment creditor then must make this property known to the sheriff to establish liability. N.D.C.C. ? 11-15-17. If a person fails to pursue a statutory remedy, or has placed him or herself in a position where that remedy may no longer avail, that person is not entitled to obtain a writ of mandamus. Bismarck Tribune v. Wolf, 255 N.W.2d at 571-572. Therefore, in the case of a judgment creditor who has not made property subject to levy and execution known to the sheriff, that judgment creditor will not be able to obtain a writ of mandamus to compel the sheriff to seek out the judgment debtor's property unless the judgment creditor has pursued the remedy offered by N.D.C.C. ? 11-15-17 and Rule 69, N.D.R. Civ. P. or can show that to pursue such remedy would be a useless act. However, if the judgment creditor can show this legal remedy is not plain, speedy, and adequate, for example, where the judgment debtor is unavailable, is hiding assets, or otherwise renders the

judgment creditor's discovery ineffective, a court could issue a writ of mandamus to compel the sheriff to satisfy the judgment out of property of the debtor.

Although a judgment creditor may request a levy on personal property by making a general request or by making a specific request, it is only if property that is subject to execution or attachment and which may be levied upon or sold "has been made known to the sheriff" that the sheriff is liable to the creditor for the damages sustained by the creditor should the sheriff neglect or refuse to levy upon or sell the property. See N.D.C.C. ? 11-15-17. A request for levy which simply states that the sheriff should execute upon any bank accounts or personal property belonging to the judgment debtor does not make the actual bank accounts or actual personal property of the debtor known to the sheriff. Such a request would require the sheriff to investigate the existence or whereabouts of the bank accounts or personal property. In order for the sheriff to be liable to the judgment creditor for neglecting or refusing to levy upon property of the judgment debtor under N.D.C.C. ? 11-15-17, the property must be identified in such manner that the sheriff may locate the property.

There is no requirement that the judgment creditor only communicate in writing when informing the sheriff of property of the debtor. However, the sheriff is liable in damages for neglecting or refusing to levy upon property of the judgment debtor which has been made known to the sheriff by the judgment creditor or the creditor's attorney, and the sheriff will not be liable if the sheriff's failure to act was a result of following the directions or orders of the creditor. N.D.C.C. ? 11-15-17. Therefore, it would be prudent for the sheriff to request all instructions regarding a levy or execution be in writing in order to preserve evidence of the instructions. When the creditor provides information about the debtor's property orally, the sheriff may wish to make a written record of the information obtained.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

eee/pg