

N.D.A.G. Letter to Reierson (June 18, 19886)

June 18, 1986

Mr. Kent A. Reierson
Williams County State's Attorney
P. O. Box 1246
Williston, North Dakota 58802

Dear Mr. Reierson:

Thank you for your letter of April 29, 1986, concerning partial payments on an execution.

Your first question is whether a sheriff may accept payments on an execution in place of executing on the judgment, if the sheriff has the approval of the judgment creditor or the creditor's attorney. N.D.C.C. Ch. 28-21 concerns executions on judgments. There is no statute in that chapter which specifically prohibits a sheriff from accepting, or specifically allows a sheriff to accept, partial payments on a judgment with the consent of the judgment creditor. Except where otherwise provided by law, a judgment creditor is entitled to exercise a considerable degree of control over the officer making the levy. Smith v. Hanson, 293 N.W. 551 (N.D. 1940). A sheriff could, pursuant to the judgment creditor's direction, accept partial payments on a judgment. I would suggest that even if the sheriff has the consent of the creditor's lawyer, the sheriff should obtain the consent of the judgment creditor as well. The consents should be in writing and should direct that the sheriff not levy on personal or real property to protect the sheriff against amercement.

Your second question concerns whether a sheriff may hold an execution with the approval of the creditor or creditor's attorney or whether he must return the execution within the statutory time. In addition, if the execution is returned, what comments should be made upon it? N.D.C.C. §28-21-10 specifies what the sheriff must do upon receipt of an execution.

28-21-10. OFFICER'S PROCEEDINGS ON EXECUTION. When an execution is delivered to any officer, he must endorse thereon the day and hour when he received it and must proceed to execute the same with diligence. If executed, an exact description of the property sold at length with the date of the levy, sale, or other act done by virtue thereof including all costs incurred must be endorsed upon or appended to the execution. If the writ was not executed, it shall be returned wholly unsatisfied with all costs incurred endorsed upon or appended to the execution. If the writ was executed in part only, the reason along with all costs in such case must be stated in the return.

N.D.C.C. §28-21-07 specifies when an execution shall be returnable.

28-21-07. TIME OF RETURN. The execution shall be returnable to the clerk with whom the record of the judgment is filed within sixty days after its receipt by the officer; except in the case when a sheriff's levy has been made within the sixty days, in which case the execution must be returnable to the clerk within a reasonable time following the completion of the sale of the property or ninety days after its receipt by the officer.

N.D.C.C. §28-21-07 imposes a mandatory requirement on the sheriff to return the execution and N.D.C.C. §28-21-10 specifies what type of information must be included on the returned execution. Further, "a writ of execution which does not direct the foreclosure of a lien on specific property and under which property has not been taken into possession of the sheriff within the sixty-day period no longer is valid." Bond v. Busch, 313 N.W.2d 704, 706 (N.D. 1981).

A sheriff must return an execution within the statutory period even if the debtor is making payments on the execution with the consent of the judgment creditor. If there is compliance with the other applicable provisions of N.D.C.C. Ch. 28-21, the payments could be considered a partial execution upon money.

In the scenario which you describe, it could be argued that the sheriff is levying upon money in the possession of the judgment creditor and, therefore, at the end of the 60-day period the execution should be returned partially satisfied, indicating the total amount of payments received (adjusted for the sheriff's costs). If the pending execution is the contributing factor in prompting the judgment debtor to make these payments, then the judgment creditor could have another execution issued to continue the process. I do not believe that the sheriff has discretion under N.D.C.C. §28-21-07 to neglect to return the execution.

Sincerely,

Nicholas J. Spaeth

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