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ARCAP 28(c); Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 12/15/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

ACE AMERICAN INSURANCE COMPANY, a
Pennsylvania corporation,

Plaintiff/Judgment Creditor/
Appellee,

v.

LUMEA INC.,

Garnishee/Appellant.

1 CA-CV 10-0619

DEPARTMENT A

MEMORANDUM DECISION

(Not for Publication -
Rule 28, Arizona Rules
of Civil Appellate
Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-030709

The Honorable Jay Davis, Commissioner

AFFIRMED

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I R V I N E, Judge

¶1 Garnishee Lumea, Inc. ("Lumea") appeals from a

garnishment judgment in favor of ACE American Insurance Company ("ACE") and the denial of a motion for new trial. The judgment was based on Lumea's admissions in its answer to the writ of garnishment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 ACE filed a complaint against Excel Staffing Services, Inc. and Easy Staffing Services, Inc. (collectively, "Easy") for unpaid workers' compensation insurance premiums. Prior to filing the lawsuit, ACE had billed both Easy and Lumea's parent company, Green Planet Group, Inc. ("Green Planet"), for the unpaid amounts. Green Planet responded that it was not liable for Easy's debt. The complaint alleged, in part, that Lumea was "created for the purpose of acquiring the assets and business of Easy" and that Easy fraudulently transferred "substantially all of [its] assets" to Lumea for two promissory notes worth \$8.75 million and fifteen million shares of Lumea company stock (the "purchase agreement"). According to Green Planet, Easy never received the shares, but Easy's shareholders did.

¶3 ACE obtained default judgment against Easy for approximately \$4.75 million. ACE then filed an application for writ of garnishment ("writ") against Green Planet in the amount of \$5.16 million. The writ alleged that Lumea was holding nonexempt monies or property belonging to Easy. The writ and answer of garnishee forms were served on both Green Planet and

Lumea. In its answer, Green Planet denied liability, but asserted that Lumea was indebted to Easy or in possession of Easy's personal property.

¶4 Lumea answered the writ, attesting that it owed \$4,692,303.71 in debt or monies belonging to Easy, but that it was withholding \$100,000 pursuant to the writ, and "\$4,592,303.71" was "not withheld" because it was "NOT YET DUE." An accounting of payments made to Easy showed that \$4,692,303.71 was the amount of debt remaining on the larger promissory note. Based on Lumea's answer, ACE filed an application for judgment against Lumea and attached a proposed form of judgment ("first proposed judgment").

¶5 Lumea objected to the form of judgment arguing (1) it exposed Lumea to competing claims for the \$100,000 it withheld; (2) ACE was not entitled to judgment for future payments under the promissory note because Easy had defaulted on the underlying transaction; and (3) it effectively made ACE the "owner" of the promissory note. Lumea concluded that "because Lumea does not now owe Easy any further funds, if ACE were to now serve Lumea with a writ, Lumea would answer that no debt is due. ACE cannot force Lumea to pay ACE funds to which Easy is not entitled." (Emphasis added.) Lumea did not, however, move to amend its answer to the writ or request an evidentiary hearing to contest the amount of debt.

¶6 ACE responded that the allegation of Easy's default was specious because (1) it was raised after the writ and the answer; (2) there was no basis for a breach of contract claim; and (3) Easy's president at the time of the purchase agreement has become the president of Lumea, and thus, sits on both sides of the alleged default. ACE submitted an amended form of judgment to address the double liability issues by adding language ordering Lumea discharged for payments made to ACE under the promissory note.

¶7 The superior court entered the first proposed judgment unaware of Lumea's objections. After considering the objections, the court entered the amended form of judgment awarding ACE \$4,692,303.71 with interest, ordering Lumea to pay ACE according to the terms of the promissory note, and granting ACE all the rights and remedies of Easy under the note, including the right to accelerate payment of the debt.

¶8 Lumea filed a motion for new trial before it received the amended judgment. Lumea challenged both forms of judgment to the extent they "purport[] to place ACE as the owner of a certain promissory note." Lumea also asserted that the contract has since been rescinded as a result of Easy's material breach.

¶9 The trial court denied Lumea's motion for new trial. Lumea timely appeals.

DISCUSSION

¶10 We review the trial court's garnishment judgment for an abuse of discretion. See *Cota v. S. Ariz. Bk. & Trust Co.*, 17 Ariz. App. 326, 327, 497 P.2d 833, 834 (1972) (reviewing the trial court's refusal to quash writs of garnishment for abuse of discretion). We view all facts in the light most favorable to sustaining the judgment, but consider de novo questions of law. *Inch v. McPherson*, 176 Ariz. 132, 136, 859 P.2d 755, 759 (App. 1992).

¶11 On appeal, Lumea does not dispute that Arizona Revised Statutes ("A.R.S.") section 12-1584(A) (2003) permits ACE to garnish any amount that Lumea showed was "owed" to Easy at the time the writ was served. Because ACE sought relief based on the amount stated in Lumea's answer, ACE is entitled to judgment for the amount shown.

¶12 Lumea contends that its answer "did not state that Lumea owed \$4,692,303.71 to Easy at the time of the writ." We disagree. Lumea's answer states, in pertinent part:

2. Was Garnishee indebted to or otherwise in possession of monies of either of the Judgment debtors at the time the Writ was served?

YES No

3. What is the total amount of indebtedness or monies of either of the Judgment Debtors in the possession of the Garnishee at the time the Writ was served?

\$4,692,303.71

4. What is the total amount of indebtedness or monies of either of the Judgment Debtors withheld by the Garnishee pursuant to the Writ?

\$100,000.00

5. What is the amount of indebtedness or monies of either of the Judgment Debtors not withheld by the Garnishee, and the reason for not withholding?

A. Amount of Indebtedness

\$0 (\$4,592,303.71)

B. Reason for not withholding: NOT YET

DUE by [illegible signature]

¶13 A plain reading of the answer belies Lumea's claim that it admitted only \$100,000 was subject to the writ. In Question 3, Lumea asserted it owed Easy \$4,692,303.71. Of this amount, Lumea said it was withholding \$100,000 (Question #4). As for debt "not withheld," Lumea stated that the remaining balance of "\$4,592,303.71" was "NOT YET DUE" (Question 5). Although, Lumea now argues that "NOT YET DUE" meant "did not owe" and "may never owe," such an interpretation is directly contradicted by the answer to Question 3. Lumea has never argued that the amount stated in Question 3 was incorrect; nor did it seek to amend its answer to reflect a different amount.

¶14 Moreover, Lumea's answer should be read in the context of the promissory note that created the garnishment debt. The promissory note expressly provides that Lumea shall pay Easy in

\$100,000 installments before the fifth of each month until the note matures in March 2014. This explains why Lumea withheld exactly \$100,000. It also supports ACE's contention that Lumea's response that the remaining debt was "NOT YET DUE" meant that the installments had not yet matured under the payment schedule, not that Lumea was contesting the remaining debt.

¶15 Lumea argues that Easy's subsequent breach of the underlying purchase agreement prevents ACE from reaching the garnishment debt because ACE cannot gain superior rights than Easy to the judgment debt. Lumea's reliance on *Valley Nat'l Bk. v. Hasper*, 6 Ariz. App. 376, 432 P.2d 924 (1967), is misplaced.

¶16 In that case, Hasper sued the judgment debtor on a promissory note and simultaneously filed a writ of garnishment against the debtor's bank. *Id.* at 377, 432 P.2d at 925. The bank answered the writ, asserting set-offs for monies that the debtor owed to the bank. *Id.* Specifically, the bank answered that the debtor defaulted on one loan, and because he closed his business and left town, the bank deemed itself insecure. *Id.* at 377-78, 432 P.2d at 925-26. It further answered that the debtor owed it monthly payments under a separate conditional sales contract, even though he had not yet defaulted at the time the writ was served. *Id.* at 378, 432 P.2d at 926.

¶17 Hasper stipulated to the set-off for the loan but contested the set-off for breach of the sales contract, arguing

the payments had not matured at the time the writ was served. *Id.* In finding for the bank, this Court held that, although a garnishee acquires only the rights of the garnishee, the set-off was valid because the terms of the contract permitted the bank to accelerate the debt, and the writ of garnishment did not affect that right. *Id.* at 379-80, 432 P.2d at 927-28.

¶18 In determining that the bank's set-off existed at the time the writ was served, *Hasper* was thus consistent with the garnishment statutes. See *Weir v. Galbraith*, 92 Ariz. 279, 286, 376 P.2d 396, 400 (1962) ("Garnishment is a creature of statute and governed by the terms of the statute."). Section § 12-1584(A) provides:

In a garnishment of monies or indebtedness, if the answer shows that the garnishee was indebted to the judgment debtor *at the time of service of the writ*, and no objection to the writ or answer is timely filed, on application by the judgment creditor the court shall enter judgment on the writ against the garnishee for the amount of nonexempt monies of the judgment debtor owed *or held by the garnishee at the time of the service of the writ*.

(Emphasis added.)

¶19 Unlike *Hasper*, *Lumea* failed in its answer to assert any set-offs to the garnishment debt. As we read it, the promissory note does not permit Easy to accelerate payments or otherwise declare a default against Easy. Nor does *Lumea* point

to any action by Easy after the answer that would have triggered a default.

¶20 The record shows that Lumea's debt to Easy existed at the time the writ was served. Lumea admitted in its answer that it owed Easy \$4,692,303.71, and accounting documents confirm this amount. Lumea has not argued that the amount stated in the answer was wrong, and Lumea's parent company answered that Lumea owes the debt. Indeed, at the time the writ was served, it appears Lumea was in possession of substantially all of Easy's assets obtained in the purchase agreement.

¶21 Furthermore, Lumea did not declare a default against Easy until several weeks later. Lumea then waited another four weeks before attempting to raise the issue and did so only by objecting to the form of judgment. In that objection, Lumea stated, "[I]f ACE were to now serve Lumea with a garnishment, Lumea would answer that no debt is due." (Emphasis added.) This implies that the garnishment debt existed at the time the writ was served. Because Easy did not object to the writ, the debt was subject to garnishment under A.R.S. § 12-1584(A).

¶22 We do not hold in every case, however, that a garnishee's liability is absolute once a writ of garnishment has been served or an answer to the writ has been filed. Where circumstances change in a manner affecting the validity or amount of debt asserted in an answer, a garnishee should amend

the pleadings and/or request an evidentiary hearing to assert any defenses or set-offs. See *Able Distrib. Co. v. James Lampe, Gen. Contr.*, 160 Ariz. 399, 409, 773 P.2d 504, 514 (App. 1989) (holding that the trial court should consider, at an evidentiary hearing on the amount of debt, set-offs discovered after the writ was served).

¶23 After admitting to the debt in an answer that asserted no set-offs or defenses, Lumea did not attempt to amend the pleadings or request an evidentiary hearing on the amount of debt. Lumea did nothing to bring the dispute before the trial court until ACE proposed a form of judgment. It was improper for Lumea to object to the form of judgment while raising a cross-claim against Easy as an affirmative defense. Even after judgment was entered, Lumea made no effort to file a motion for post-judgment relief. In sum, Lumea failed to avail itself of the procedural remedies for contesting the merits of its claims. Therefore, the trial court did not err in entering judgment on the pleadings.

¶24 Lumea contends on appeal that it is entitled to set-offs against the garnishment debt. "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*,

179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). Because Lumea has not presented any extraordinary circumstances warranting consideration of this issue for the first time on appeal, the issue is waived.

¶25 Lumea next argues that ACE could not garnish any future installments because Lumea's obligations under the promissory note were "not absolute," but "contingent" upon Easy's performance of the underlying purchase agreement. This issue is also raised for the first time on appeal and is therefore deemed waived. *Trantor*, 179 Ariz. at 301, 878 P.2d at 659. To the extent it has been preserved simply because Lumea argued that Easy materially breached the purchase agreement, we find no error.

¶26 Lumea incorrectly relies on *Reeb v. Interchange Res., Inc. of Phoenix*, 106 Ariz. 458, 478 P.2d 82 (1970). In *Reeb*, the garnishee received a check that bounced on the same day the writ of garnishment was served. *Id.* at 459, 478 P.2d at 83. Two days later, the garnishee received a replacement check that cleared. *Id.* at 460, 478 P.2d at 84. Noting that there was no "clear, ascertainable debt" created by the first check, our supreme court held that garnishment did not reach the later payment. *Id.* at 459-60, 478 P.2d at 483-84. In so holding, the court carefully distinguished the case from our supreme court's decision in *Weir*.

¶27 In *Weir*, the garnishee purchased real property, issuing a note promising to pay the seller in monthly installments. *Id.* at 281-82, 376 P.2d at 397-98. Although certain installments had not matured when the writ of garnishment was served, our supreme court held they could be reached by garnishment because they were "definite, fixed and absolute" where the buyer's obligation to pay did not depend on a condition precedent. *Id.* at 287-88, 376 P.2d at 401-02.

¶28 *Weir* is on point. Lumea entered an agreement to purchase substantially all of Easy's assets and promised to pay monthly installments of \$100,000 until March 2014. Although most payments had not yet matured at the time the writ was served, the promissory note stated no condition precedent to Lumea's obligation to pay the purchase price. See *Valley Nat'l Bk. of Ariz. v. Cotton Growers Hail Ins., Inc.*, 155 Ariz. 526, 528, 747 P.2d 1225, 1227 (App. 1987) (holding "a contractual provision shall not be construed as a condition precedent unless the language of the provision plainly and unambiguously requires that construction"). Consequently, the debt was "definite, fixed and absolute" within the meaning of *Weir*.

¶29 Lumea also argues that ACE failed to meet its burden to prove, and the trial court did not find, that the garnishment debt was "definite, fixed and absolute." See *A.N.S. Props., Inc. v. Gough Indus., Inc.*, 102 Ariz. 180, 427 P.2d 131 (1967)

(holding that the judgment creditor has burden of proving garnishee's debt when challenging garnishee's denial of liability). Lumea identifies no authority that requires an express finding that ACE met its burden of proof, and Lumea requested none. See *Trantor*, 179 Ariz. at 301, 878 P.2d at 659. Such a finding was also unnecessary because, unlike the garnishee in *Gough* who denied liability altogether, Lumea admitted in its answer that it owed Easy \$4,692,303.71 in debt and/or assets. Accordingly, we find no error.

¶30 Finally, Lumea argues that the trial court erred in denying the motion for a new trial. We will not reverse the denial of a motion for new trial absent a showing that the trial court abused its discretion. *Wendling v. Sw. Sav. & Loan Ass'n*, 143 Ariz. 599, 602, 694 P.2d 1213, 1216 (App. 1984).

¶31 In its motion for new trial, Lumea argued:

[1] The contract upon which Lumea previously owed judgment debtor [Easy] has been rescinded for material breach of Easy. [2] The judgment against Lumea, as garnishee, as phrased, erroneously acts as an assignment of the underlying contract and promissory note to ACE. The Court can easily see the error in the judgment by asking the question: Should Lumea now sue ACE to void the contract and recover damages caused by the breach of contract by Easy? . . . The judgment (and perhaps the amended judgment) is an abuse of discretion and is contrary to law. Ariz.R.Civ.P. 59(a)(1)(8).

¶32 As discussed above, we find no error based on an

alleged default by Easy that occurred after the writ was served. When Lumea filed its answer, both Lumea and its parent company were fully aware of the nature of ACE's claims against Easy. Lumea also understood that ACE requested a garnishment award based solely on Lumea's answer. Lumea has offered no explanation for its failure to amend the pleadings or seek an evidentiary hearing to contest the debt.

¶33 The only other issue raised in the motion for new trial was whether the garnishment award effectively assigned the promissory note to ACE. We need not reach this issue, however, because Lumea has not raised it on appeal.

1. Attorneys' Fees on Appeal

¶34 Lumea requests attorneys' fees available to the successful garnishee on appeal pursuant to A.R.S. § 12-1591(C) (2003). Because Lumea has not prevailed, we deny its request.

2. Motion to Supplement the Record

¶35 Finally, ACE moves to supplement the record on appeal with pleadings and motions from a separate case between Lumea and Easy, in Maricopa County No. CV 2010-020938. Because Lumea has objected, and the documents do not seem necessary for the resolution of this case, we deny ACE's request.

