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NO. 53392-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

GEORGE CHRISTENSEN,

Respondent,

v.

T&L COMMUNICATIONS, INC., et. al,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

BRIEF OF RESPONDENT

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A. ISSUES

1. A debtor corporation must attend a supplemental examination by and answer under the oath of an officer thereof.¹ A person may be punished by contempt for violations of provisions of the supplemental proceedings chapter.² The Court may impose a remedial contempt sanction in the proceeding to which the contempt is related after notice and a hearing.³ During a supplemental examination of the defendant corporation which was attended and answered under oath by the corporation's president, shareholder, and registered agent Larry Bushaw (hereinafter "Appellant"), Appellant concealed his corporation's assets. George Christensen therefore moved the Court to find Appellant in contempt and to impose remedial sanctions to include personal joint liability in the proceeding to which the contempt was related, and gave appropriate notice to the corporation's attorney. Did the Court properly enter an order of contempt and findings against Appellant, who had given false testimony in supplemental proceedings in his capacity as a corporate officer of defendant corporation, when notice of such false testimony and Mr. Christensen's motion was served on corporation's attorney in the proceeding to which the contempt was related?

¹ RCW 6.32.050.

² RCW 6.32.180.

³ RCW 7.21.030.

2. Were the Court's order and its findings regarding Appellant's contempt and subsequent sanctions to include personal joint liability properly entered, even though Appellant was not a named party in the underlying case against the corporation?

B. STATEMENT OF THE CASE

1. UNDERLYING JUDGMENTS

In 2018, a jury awarded judgment to Mr. Christensen for unpaid wages, emotional distress, humiliation, mental anguish, inconvenience, damage to reputation, and attorneys' fees against Appellant's closely-held company T&L Communications, Inc. (hereinafter "T&L"). CP 28; 66; 78; 170. Appellant and his wife, Catherine Bushaw, were sole shareholders of T&L. CP 170. As of October 12, 2018, Appellant was also president and registered agent of T&L. CP 170.

2. SUPPLEMENTAL PROCEEDINGS

On September 21, 2018, the Honorable Judge Robert A. Lewis signed an order for examination in supplemental proceedings ordering Appellant or Catherine Bushaw to appear in Court and testify as to T&L's assets. CP 115-17. Judge Lewis specifically ordered Mr. or Mrs. Bushaw to bring "[a]ll records of any savings or checking accounts . . . maintained by the Defendant that have not already been provided to Plaintiff." CP 116. Judge Lewis also ordered that Mr. or Mrs. Bushaw bring "[a] list of

assets transferred since the time judgments in this matter were entered and to whom transfer was made.” CP 116.

The examination was held on October 12, 2018. Appellant was sworn in by the Court and completed and signed a written Record of Supplemental Proceeding of T&L. CP 167-7; RCW 6.32.050. Under “II. Banking Information,” when prompted to “[s]tate the name and addresses of all banks in which the corporation has a checking account and the name and address of all banks in which the corporation has a savings account, including all account numbers,” Appellant while under oath simply entered: “Columbia CU.” CP 167.

On December 11, 2018, Mr. Christensen’s attorney was provided with bank account statements for T&L’s Hapo Credit Union bank accounts via email. CP 88. Those statements showed that as of October 1, 2018, before the supplemental examination occurred, T&L also had checking and savings accounts open with Hapo Credit Union (hereinafter “Hapo”). CP 184-91. These accounts were not disclosed at the supplemental examination and showed that, between October 1, 2018 and October 31, 2018, over \$108,000 had been deposited. CP 184-91. In the days leading up to the October 12, 2018 hearing, the statements showed that over \$62,000 had been deposited in these undisclosed accounts. CP 184-91.

3. CONTEMPT NOTICE AND HEARING

Due to Appellant's false testimony regarding his corporation's assets, Mr. Christensen moved the Court to impose a contempt finding against T&L and Appellant as its officer pursuant to its authority under Chapters 6.32 and 7.21. CP 90-225. In its brief, Mr. Christensen moved the Court to hold Appellant personally jointly liable to Mr. Christensen for compensatory and coercive remedial sanctions based on his false testimony in his capacity as a corporate officer of T&L. CP 90-101.

Mr. Christensen's briefing, along with a note for motion docket and proposed order, was mailed on February 21, 2019 to T&L's attorney Timothy Dack. CP 84; 241. On April 12, 2019, T&L through its attorney filed an objection to Mr. Christensen's motion in relevant part because Mr. and Mrs. Bushaw were not parties to the underlying action and were not served with plaintiff's motion personally. CP 245-46.

The contempt hearing was held on April 19, 2019. RP 1-23. At that hearing T&L, through Mr. Dack, did not deny its failure to disclose assets:

[D]idn't disclose one bank account, Your Honor.

Okay. But to now turn around and say we want to impose personal liability on Mr. Bushaw, there's no evidence before this Court other than the failure to disclose this one bank account that T&L has done anything to hide its assets. . . .

We're talking about one bank account. We're talking about a floundering business. . . [Y]es, we say we didn't disclose this bank account. That's one bank account, Your Honor. . . . I'm not going to run away from that. I can't run away from that."

RP 5, 10.

When Mr. Christensen pointed out that there were actually two bank accounts not disclosed, Appellant responded: "So, yeah, there are two . . . accounts. . . . [T]o say, gee, golly whiz, he omitted this thing once, he's going to omit everything else for the rest of the— that's a conclusion that I don't think this Court can come to." RP 9-10. The Court responded, "[Mr. Bushaw] failed to disclose assets of the corporation that were held in another bank during a debtor's examination." RP 17. T&L's attorney responded, "Agreed." RP 17. T&L's attorney noted for the record that he represents T&L and that Appellant was not his client. RP 21. He noted further that Appellant was never personally served with Mr. Christensen's contempt motion. RP 23.

Based on evidence of T&L's officer's asset concealment and spending and dissipation of T&L's assets, Judge Fairgrieve found the Appellant to be in contempt of Court. CP 262-70. Because of the Appellant's actions and considering the circumstances and history of this particular case, the Court in its discretion found that the only available

remedy to force compliance with the existing judgments against T&L was to impose personal liability against the Appellant for the full amount of the judgments entered against T&L. CP 266-67.

Mr. Bushaw appeals. CP 268.

C. ARGUMENT

While Appellant notes a single issue relating to its assignments of error, it appears that he is raising two issues with regard to the Court's authority: first, whether the Court's order and findings were properly entered when Appellant was not himself personally served; and second, whether the orders and findings were properly entered even when Appellant is not a named party to the underlying suit. Br. of Appellant, 3-8. Mr. Christensen addresses each argument in turn.

1. THE SUPERIOR COURT DID NOT ERR IN ENTERING ITS ORDER OR FINDINGS AFTER APPELLANT HAD DUE NOTICE AND OPPORTUNITY TO BE HEARD

Mr. Christensen's method of service of his contempt motion, proposed order, proposed findings of fact and conclusions of law, and note for motion docket on T&L's attorney in the proceeding to which the contempt was related was reasonably calculated to apprise the corporation and the Appellant of the nature of the action and afford all an opportunity to be heard. CP 84; 86; 241. Though Mr. Christensen argued and the Court ordered that an appropriate remedial sanction would be to impose joint

personal liability on the Appellant due to his disobedience as a representative of T&L, the actions which formed the basis for the contempt motion itself occurred while Appellant was acting in his capacity as a corporate officer of T&L. CP 92-97; 258-60; 265-67. A proceeding to impose a remedial sanction must be initiated in the proceeding to which the contempt is related. RCW 7.21.030(1).

The scope of the Court's review on appeal of a contempt order is whether the order itself was properly entered. Griffin v. Draper, 32 Wn. App. 611, 614, 649 P.2d 123 (1982). After notice and a hearing, a Court may impose a remedial sanction on the motion of a person aggrieved by a contempt of Court in the proceeding to which the contempt is related. RCW 7.21.030. Traditionally, minimal notice has satisfied due process requirements for a valid judgment of contempt of Court. Burlingame v. Consol. Mines & Smelting Co., 106 Wn.2d 328, 332, 722 P.2d 67 (1986). Notice is that which is reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. State v. Nelson, 158 Wn.2d 699, 703, 147 P.3d 553 (2006).

Notice is reasonably calculated if the means employed are "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." Jones v. Flowers, 547 U.S. 220, 229, 126 S.Ct. 1708, 164

L. Ed. 2d 415 (2006). The notice requirement of a valid contempt order is important only because it protects an individual's right to be heard. In re of Rapid Settlements, Ltd's, 189 Wn. App. 584, 598, 359 P.3d 823 (2015).

The method of notice employed here was "reasonably calculated under all the circumstances to apprise" interested parties, T&L and Appellant, of the pendency action and afford them an opportunity to present any objection under Nelson because the Appellant was acting as a representative of T&L when the contemptible conduct occurred. 158 Wn.2d at 703; CP 170. A corporation's obligations at a debtor's examination extend to its testifying officer. RCW 6.32.050. A corporation itself cannot walk through the door of a debtor's examination and testify. If Appellant prevented compliance or failed to take appropriate action within his power for the performance of corporate duty, he, no less than the corporation itself, is guilty of disobedience and may be punished for contempt. Wilson v. U.S., 221 U.S. 361, 376, 31 S. Ct. 538, 55 L. Ed. 771 (1911). A contempt motion regarding a corporate officer's false testimony does not require a new action against the corporate officer; in fact, the law *requires* the motion be initiated in the proceeding to which the contempt is related. RCW 7.21030 (emphasis added).

That the Court has the authority to find Appellant to be in contempt of court and impose sanctions when the underlying proceeding is

related only to the corporation is illustrated by the court's power to summarily impose a remedial or punitive sanction when contemptible conduct occurs in the courtroom. RCW 7.21.050. Here, had Appellant straightforwardly refused to answer questions regarding T&L's bank accounts during the supplemental examination rather than silently omitting such accounts, the Court would have had the authority to summarily impose remedial sanctions against Appellant directly, including imprisonment. RCW 7.21.050; Brief of Appellant at 6. That Appellant quietly concealed assets instead of openly refusing to provide such information in court does not separate the proceedings when his dishonesty related to that corporation is revealed, nor does it impose a "fundamental" burden of personal service upon Appellant in addition to service on his organization's attorney. Brief of Appellant at 7. Notice to T&L's attorney was reasonably calculated under the circumstances to apprise Appellant of the pendency of the action and his opportunity to be heard because sending notice to T&L's attorney of a contempt motion related to T&L's examination and assets was such as one desirous of actually informing the Appellant of the nature of the proceedings. Nelson, 158 Wn.2d at 703; Jones, 547 U.S. at 229.

And though Appellant argues generally that this form of notice resulted in a denial of his opportunity to be heard, it is not clear how. Brief

of Appellant 7. Appellant does not allege in his statement of facts that he was deprived of actual notice; he argues, rather, that he should have been personally served and was not.⁴ Brief of Appellant at 4-5. That T&L's attorney would not have given actual notice to Appellant, president, shareholder, and registered agent of T&L, to apprise him of a motion to impose a contempt finding against the attorney's client/Appellant's corporation and Appellant in his personal capacity related to Appellant's own false testimony while acting as an officer of T&L at a supplemental examination of T&L defies credulity. Such a failure on the part of T&L's attorney, for instance, would likely violate his duties of competence, diligence, and communication to his client T&L. See RPC 1.1, 1.3, 1.4

But due process does not require actual notice. Nelson, 158 Wn. 2d at 703. Due process requires notice reasonably calculated to apprise interested parties of the action and afford them an opportunity to be heard,

⁴ Mr. Christensen notes that personally serving Appellant with the contempt motion and proposed findings, as Appellant urges was required, would have constituted communication about the subject of representation with an organization the lawyer knows to be represented by another lawyer in the matter. See RPC 4.2. In the case of a represented organization, the Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter. RPC 4.2, comment 7.

While the *sanction* being sought for Appellant's contemptible conduct was personal liability against Appellant, the contemptible action occurred and was initiated "in the proceeding to which the contempt [was] related"—the case involving a represented organization, T&L, and its representative's false testimony regarding T&L's assets. RCW 7.21.030(1).

and even minimal notice has satisfied due process requirements for a valid judgment of contempt of Court. Id. at 702; Burlingame, 106 Wn.2d at 332.

While T&L's attorney was certainly under no obligation to represent Appellant in Appellant's personal capacity and Mr. Christensen concedes that nothing in the record reflects that T&L's attorney did represent Appellant in his personal capacity, Appellant received sufficient notice reasonably calculated to apprise him of the nature of the action and afford him an opportunity to be heard. Whether he retained counsel and noted his objection at the hearing was up to Appellant. Further, the record reflects that T&L's attorney did object to a finding of Appellant's personal liability at the April 19, 2019 hearing: he argued that such a sanction would be "extreme," that there was no legal basis for such a sanction, that the Court could not conclude that Appellant would continue to conceal assets based on past omission, and that it was not a judgment debtor's obligation to try to pay a judgment. RP 4, 6, 9-10.

Due process is not a technical conception with a fixed content unrelated to circumstances—it is flexible. Matter of Deming, 108 Wn. 2d 82, 97, 736 P.2d 639 (1987). Considering the unique circumstances at issue in this case—a debtor corporation's president, shareholder, and registered agent giving false testimony at a supplemental examination of the debtor corporation, and a creditor moving the Court to hold that

corporation's president, shareholder, and registered agent personally liable for his actions in that capacity—Mr. Christensen's method of service on the attorney who represented T&L in the proceeding to which the contempt was related was reasonably calculated to apprise the corporation and the Appellant of the nature of the action and afford all an opportunity to be heard. The order and findings of the Court was valid and should be affirmed.

2. IT WAS NOT NECESSARY TO THE COURT'S ENTRY OF ITS ORDER AND FINDINGS AGAINST APPELLANT IN CONTEMPT PROCEEDINGS THAT APPELLANT BE A NAMED PARTY

Appellant disputes the Court's jurisdiction to enter its order and findings when the Appellant was not a party to the underlying case. Brief of Appellant 3, 6, 8. The Court may require a judgment debtor to appear before the Court to answer regarding the debt. RCW 6.32.010(1). Because a corporation itself cannot answer regarding a debt, a corporation must attend by and answer under the oath of an officer thereof. RCW 6.32.050. A person who refuses or neglects to obey an order of a judge made pursuant to RCW 6.32 and duly served or an oral direction given directly to him by a judge in the Court of the proceeding may be punished by the Court as for contempt. RCW 6.32.180.

It is well established that a command to a corporation is in effect a command to those who are officially responsible for the conduct of its affairs. Wilson, 221 U.S. at 376. If they, apprised of the writ directed to a corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt. Id.; see also Fuji Photo Film Co., Ltd v. International Trade Com'n, 474 F.3d 1281, 1291-92, 29 Int'l Trade Rep. (BNA) 2001, 82 U.S.P.Q.2d 1495 (Fed. Cir. 2007) (ruling that corporate officer was properly held personally jointly liable with corporation for civil monetary penalties and had sufficient notice to satisfy due process because the order against the corporation clearly applied to the offending corporate officer).

Appellant, T&L's president, shareholder, and registered agent, appeared at a debtor's examination of T&L to answer under oath regarding T&L's assets and instead concealed such assets. RCW 6.32.010(1); RCW 6.32.050; RP 4, 9, 17. The Court therefore had authority to punish Appellant "as for contempt." RCW 6.32.180. He, no less than T&L, was "guilty of disobedience, and may be punished for contempt." Wilson, 221 U.S. at 376.

This outcome is not only consistent with state authority and controlling case law as noted above but it is consistent with the legislative

intent of supplemental proceedings: “The purpose of such proceedings is to make the judgment debtor answer concerning the extent and whereabouts of his or her property and, if possible, to enable the judgment creditor to locate nonexempt property belonging to the judgment debtor which may be applied on the debt.” Rainier Nat. Bank v. McCracken, 26 Wn. App. 498, 511, 615 P.2d 469 (1980). This legislative intent is even more significant where a wage theft judgment is at issue, as it is here: there is a strong legislative intent to assure payment to employees of wages they have earned. Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159, 961 P.2d 371 (1998); Durand v. HIMC Corp., 151 Wn. App. 818, 835, 214 P.3d 189 (2009).

The efficacy of RCW 6.32 depends wholly on a party’s honesty with the Court; if an officer of a corporation is permitted to appear for a supplemental examination and fails to disclose assets without consequence just because he is not a named party, RCW 6.32 would be rendered meaningless as to corporations. The Court properly entered its order and findings despite the fact that appellate was not a named party to the case.

3. MR. CHRISTENSEN AGREES THAT FINDING OF FACT IV.B IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, BUT THE ERRONEOUS FINDING OF FACT IS NOT NECESSARY TO SUPPORT THE COURT'S ORDER

Appellant's assignment of error 3 challenges finding of fact no. IV, B. Brief of Appellant 3. Mr. Christensen concedes that substantial evidence does not support the finding of fact IV, B. CP 264. The finding indicates in part that "Mr. Bushaw appeared as ordered with his attorney, Timothy Dack" at the October 12, 2018 supplemental examination. CP 264. In fact as Appellant points out, "Mr. Dack represented the defendant in the lawsuit, T&L Communications, Inc." Brief of Appellant 9. This is also supported by the record from the April 19, 2019 contempt hearing, where Mr. Dack noted: "Mr. Bushaw is not my client. T&L Communications is my client, Your Honor," which the Court acknowledged. RP 21. Mr. Christensen agrees that finding of fact IV, B should have read in relevant part "Mr. Bushaw appeared as ordered with T&L's attorney, Timothy Dack."

Erroneous findings of fact not necessary to support the judgment are not prejudicial to the Appellant, and the Court's order should be affirmed. Rummer v. Throop, 38 Wn.2d 624, 637, 231 P.2d 313 (1951).

D. CONCLUSION

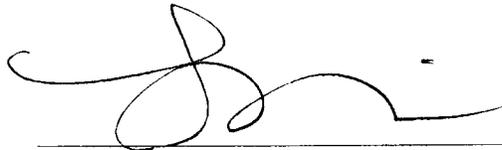
Appellant was afforded sufficient notice and opportunity to be heard such that the Court had authority to and properly entered its order and

findings. That Appellant was not a named party to the underlying case did not preclude the Court from entering its order and findings in regards to Appellant's contempt of Court and subsequent sanctions. The Court's order and findings of fact and conclusions of law should be affirmed, with the exception of finding of fact IV, B.

DATED this 26th day of April, 2020.

Respectfully submitted,

LUCIE R. BERNHEIM, ATTORNEY AT LAW

A handwritten signature in black ink, appearing to read 'Lucie R. Bernheim', written over a horizontal line.

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