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No. 65706-2-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

UMPQUA BANK,

Appellant/Cross-Respondent

v.

BINGO INVESTMENTS, LLC; *et al.*,

Judgment Debtors,

and

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Respondent/Cross-Appellant.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Joan E. Dubuque)

**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
RAYMOND JAMES FINANCIAL SERVICES, INC.**

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I. INTRODUCTION

At first blush, it might be hard to understand why Umpqua would even appeal. After all, the trial court's CR 60(b) order merely returned the parties to the status quo ante. If Umpqua was truly entitled to a judgment in the amount of the Judgment Debtors' two accounts with Raymond James, as it implies throughout its brief, then surely Umpqua will have no difficulty getting a judgment a second time around. Right? Obviously, Umpqua doesn't think so now, and didn't think so from the beginning—when it first learned from Raymond James' answers that the accounts were subject to a "first priority perfected security interest." That is why Umpqua was willing to ignore the garnishment statutes, the civil rules and the commissioner's ruling in its rush to obtain an *ex parte* judgment. Judgment never should have been entered in the first place and, certainly, it was not an abuse its discretion to vacate the judgment and require Umpqua to prove its entitlement to the accounts on the merits.

For all the same reasons, however, the trial court went too far when it conditioned its CR 60(b) order on Raymond James' payment of terms. Where, as here, the judgment is void from the outset, the rule is clear: a trial court must vacate the judgment without imposing terms. That rule applies here. Further, even if the decision to vacate was discretionary, as the trial court believed, imposing terms was unreasonable and inequitable.

The judgment was entered, and ultimately vacated, because of Umpqua’s misconduct, not Raymond James’. Had Umpqua disclosed the contents the commissioner’s ruling to the trial court, the trial court would not have entered judgment in the first place; that much the trial court made clear when it vacated the judgment on this basis. Every cent Umpqua spent to unsuccessfully defend the judgment after this point is traceable to that poor decision—which Umpqua admits was an “irregularity” in the proceeding. It was improper to penalize Raymond James for Umpqua’s own misconduct. The trial court’s award of terms should be reversed.

II. REPLY ON CROSS-APPEAL

A. **The Trial Court Had No Discretion To Award Terms Because The Judgment Was Void As A Matter Of Law.**

Umpqua does not dispute that if the judgment against Raymond James was void to begin with, then the trial court simply had no discretion to assess terms when it vacated the judgment. *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 403, 622 P.2d 1270 (1981). Thus, Umpqua’s primary argument against Raymond James’ cross-appeal comes down to this: “Raymond James never explains how the Judgment/Pay Order was void ‘as a matter of law’ and no authority for such a proposition is ever set forth in its appeal brief on this issue.” Umpqua Reply at 23. Umpqua’s argument can best be described as wishful thinking—for Raymond James’ opening brief was primarily devoted to that issue.

Discharge Under RCW 6.27.240. Raymond James first showed that the judgment was void because Raymond James was automatically discharged from liability under the garnishment statutes by operation of RCW 6.27.240. Raymond James Br. at 12-18. Raymond James' answers to the writs denied indebtedness and control over the investment accounts at issue. They stated, in unequivocal terms, that each accounts was a "pledged account[]" with a first priority perfected security interest granted to a lender." CP 25; CP 28. The import of this denial would be obvious to Umpqua. As a garnishing creditor, its rights were no greater than that of the Judgment Debtor. *Yakima Adjustment Serv., Inc. v. Durand*, 28 Wn. App. 180, 184, 622 P.2d 408 (1981). Umpqua concedes that such a security interest divested Raymond James of "control" over the accounts. Umpqua Reply at 14; RCW 62A.9A-314(a) & 62A.9A.106, cmt. 4. Thus, absent a determination that Frontier Bank's perfected security interest was invalid, Umpqua had no superior right to the funds in the accounts—and, certainly, no right to appropriate them through an *ex parte* judgment.

Because Raymond James did not admit indebtedness and control, "it became the obligation of [Umpqua] to controvert [the] answers if [it] wished to preserve the validity of [the] writs." *Mahomet v. Hartford Ins. Co.*, 3 Wn. App. 560, 565, 477 P.2d 191 (1970). When Umpqua didn't do that within the 20-day window, Raymond James was "discharged" with

“no further liability.” RCW 6.27.240; *Snyder v. Cox*, 1 Wn. App. 457, 459-62, 462 P.2d 573 (1970). The fact that Raymond James’ answers deviated from the statutory form did not negate the effect of Raymond James’ denial. As with all garnishment statutes, the answer statute must be liberally construed in the garnishee’s favor; strict compliance is not required. *Puget Sound Machinery Depot v. Pearson*, 99 Wash. 362, 365, 169 P. 847 (1918); 28 Rombauer, *Wash. Prac.: Creditors’ Remedies -- Debtors’ Relief* § 8.21 (2010) (“the statute requires only that the writs and answers be ‘substantially’ in the statutory form”).¹

Neither is there any merit in Umpqua’s suggestion that, beyond denying indebtedness and control, it was incumbent upon Raymond James to interplead the funds or Frontier Bank to intervene in the action. While both options were available, neither was required by the garnishment statutes, nor did Raymond James have any burden in this regard:

Provision [in the civil rules] is also made whereby the other joint claimant could intervene upon his own motion, or, in case there was a dispute as to the fund, provision is made for the payment of the same into the court by the garnishee.

¹ Indeed, if Umpqua was uncertain or unsatisfied with the form of Raymond James’ answer, Umpqua could not simply ignore it and proceed to judgment. “[T]he appellant would not have been entitled to the judgment on the pleading if the answer had neither been sworn to nor verified [as required by statute]. If the appellant was not satisfied with the answer, it was his privilege to move to strike it. Only in that manner could its sufficiency be tested.” *Hallock v. National Bank of Commerce of Seattle*, 110 Wash. 385, 388-89, 188 P. 479 (1920).

[W]hile either of the parties could have applied to the court to have the other joint claimants brought into the proceedings, it seems to us that the obligation rested upon the plaintiffs, as they were the moving parties. ... *While the defendants in the garnishment proceedings had this privilege, it was not incumbent on them to exercise it ...*

Moore v. Gilmore, 16 Wash. 123, 130-131, 47 P. 239 (1896) (emphasis added). In short, Raymond James' answers did not admit indebtedness and control; they stated that the funds were subject to a superior claim. If "not satisfied with the answer," Umpqua had to controvert it; it could not simply lie in wait. RCW 6.27.210. When Umpqua failed to do that, Raymond James was discharged as a matter of law. RCW 6.27.240. The judgment was therefore void all along, and the trial court simply had no discretion to condition vacation of the judgment on payment of terms.

Lack of Notice. Raymond James next showed that the judgment was void because it did not receive notice prior to entry of the *ex parte* judgment. Raymond James Br. at 19-23. Umpqua does not dispute the premise that a judgment is ordinarily void if entered without notice, but argues that Washington garnishment law did not require notice in this case. But Umpqua concedes that the garnishment statutes don't expressly permit a creditor to obtain a judgment against an answering garnishee without notice; the statutes are simply silent on the issue. When that is the case, it is well-settled that the civil rules fill in the gaps. *Zesbaugh, Inc. v.*

General Steel Fabricating, Inc., 95 Wn.2d 600, 603-04, 627 P.2d 1321 (1981). Not only did Raymond James timely answer the writs, as discussed above, it denied liability and put Umpqua on notice regarding another party's superior interest in the accounts. Under the civil rules, and basic due process, Raymond James' appearance and answer entitled it to notice before a judgment could be entered. RCW 4.28.210; CR 52(f)(2).

Watkins v. Peterson Enter., Inc., 137 Wn.2d 632, 973 P.2d 1037 (1999), makes this clear. In *Watkins*, the creditor obtained "pay orders" in lieu of judgments—even though the garnishment statutes did not expressly permit the practice. There, as here, the creditor, "urge[d] this court to read this statutory silence as not only permitting its collection practices, but also indicating the legislature's recognition that a creditor may choose" its method of collection. *Id.* at 641. There, as here, the creditor, "argue[d] that its collection method is more convenient," and obtaining a judgment would be "burdensome." *Id.* at 646. The Supreme Court rejected those arguments, and held that the "judgment" requirement in RCW 6.27.250 was intended to provide the garnishee with "procedural safeguards":

[T]he opportunity to defend is not burdensome. Rather, it is a procedural safeguard to protect the garnishee's interest against both a creditor and debtor. Obtaining a judgment or default judgment *provides the garnishee an opportunity to challenge the garnishment proceeding that a creditor has initiated*. ... This procedural safeguard is in keeping with our case law interpreting the garnishment process as akin to

a distinct suit, and it furtherance of the legislative intent to protect the garnishee's interest.

Id. at 646-47 (emphasis added). Like the “pay orders” at issue in *Watkins*, an *ex parte* judgment runs afoul of case law “interpreting the garnishment process as akin to a distinct suit” and the “legislature’s intent to protect the garnishee’s interest.” Indeed, the “procedural safeguard” inherent in a “judgment” depends on notice—for without it, as here, an answering garnishee has no “opportunity to challenge the garnishment proceeding.”²

Umpqua ignores all of this, and argues it is common practice for *ex parte* judgments to be entered against answering garnishees. But if that is the practice, it is so only where the garnishee’s answer unqualifiedly *admits* indebtedness and control; after all, even with notice, a court may enter judgment against a garnishee only if “it appears from the answer of the garnishee ... that the garnishee was indebted to the defendant.” RCW 6.27.250. Where the answer *denies* indebtedness or control, the court cannot enter judgment based on the answer alone. That is why the commissioner twice rejected Umpqua’s judgment here: the commissioner

² It is difficult to understand Umpqua’s objection to providing notice prior to obtaining a judgment. If, as Umpqua asserts, it is entitled to judgment on a garnishee’s answer alone, then notice would neither increase costs nor change the result. The only way notice would matter is where, as here, the creditor is not entitled to judgment based on the answer because the answer does not admit indebtedness and control.

denied Umpqua the first time because Umpqua didn't even submit a copy of Raymond James' answer; the commissioner denied Umpqua a second time because, after he saw the answer, he properly ordered Umpqua to "[r]esubmit only with notice to opposing parties." CP 86; CP 87. The commissioner got it right. Raymond James' answers denied indebtedness and control, and disclosed the existence of a superior security interest.³ Umpqua could not simply ignore these defenses, and proceed to judgment without notice. The judgment was void for this reason as well.

The Commissioner's Ruling Was Binding. Raymond James also showed that the judgment was void because it was entered in defiance of the commissioner's order that Umpqua provide Raymond James with pre-judgment notice. Raymond James Br. at 23-28. Umpqua readily concedes that its behavior constituted an "irregularity" in the proceedings, Umpqua Reply at 2, but it was far more than that. Washington law is clear that, absent a properly noticed motion for revision, a commissioner's ruling is final. RCW 2.24.050; *Robertson v. Robertson*, 113 Wn. App. 711, 714, 54 P.3d 708 (2002). At that point, a party's "only recourse for review [is]

³ Even if Raymond James' answers were deemed to somehow admit indebtedness and control, Umpqua's secondary sources confirm that judgment on its answer would still be improper: "Where the garnishee sets up valid matters of defense, although admitting indebtedness or possession of property, judgment cannot be entered on the answer. ... A similar result will ensue ... if the answer discloses ... that there is an adverse claim to the property." 38 C.J.S. Garnishment § 332 (2008).

with the Court of Appeals,” because “the superior court lack[s] statutory authority” reconsider the ruling. *Id.* So it is here. Because Umpqua did not move for revision, the trial court had no authority to reverse the commissioner’s order and enter judgment without notice. The trial court’s subsequent order vacating the judgment was not a matter of discretion and, as such, the court similarly lacked discretion to assess terms.

B. Even If The Order Vacating The Judgment Was A Matter Of Discretion, It Was An Abuse Of Discretion To Award Terms.

Even if this Court concluded that Umpqua could have obtained an *ex parte* judgment against Raymond James without notice, the trial court acted well within its discretion when it vacated the judgment. As the court recognized, even if the commissioner’s ruling was wrong, Umpqua could not simply ignore it and ask the judge to enter judgment without disclosing the substance of that ruling. RP (4/9/10) at 48. Certainly, it is not a manifest abuse of discretion for a trial court to insist that litigants follow established rules and procedures that go to the integrity of the judicial system. *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652, 774 P.2d 1267 (1989) (vacating judgment based on “irregularity” warranted where misconduct affects the “integrity of the proceedings”).

But the same discretion does not support the imposition of terms in this case. For sure, CR 60(b) terms may be warranted where the judgment would not have been entered but for the defendant’s own misconduct or

neglect. Since, in that case, the defendant is responsible for the judgment it seeks to have vacated, it is reasonable to require the defendant to pay to have the case returned to the pre-judgment status quo ante; otherwise, the plaintiff would be penalized even though it did nothing wrong. But where the defendant is without fault, the discretion ends. It is an abuse of discretion to make a defendant pay terms where the judgment was entered for reasons unrelated to the defendant's conduct. *Knapp v. Savidge*, 32 Wn. App. 754, 757, 649 P.2d 175 (1982). That is the case here.

Raymond James did nothing wrong; it followed the rules. Raymond James timely answered the writs and denied indebtedness and control; never heard further from Umpqua; believed it was discharged when Umpqua failed to controvert the answers; and was shocked when, months later, it learned by letter that judgment had been entered against it. Even if it is common (if not improper) practice for creditors to obtain *ex parte* judgments against garnishees who clearly admit indebtedness and control, this was never one of those cases. From the moment it saw Raymond James' answers, Umpqua knew the accounts were subject to a "first priority perfected security interest" and, despite (or because of) that knowledge, Umpqua stretched the rules beyond the breaking point to get a judgment without challenging the validity of that security interest—even

to the point of flouting the commissioner's ruling. In the end, Umpqua's gambit failed; it is unreasonable to force Raymond James to pay for it.

III. CONCLUSION

The trial court's order vacating the judgment against Raymond James should be affirmed. That portion of its order conditioning vacation on Raymond James' payment of terms, however, was an abuse of discretion and must be reversed.

RESPECTFULLY SUBMITTED this 31st day of January, 2011.

LANE POWELL PC

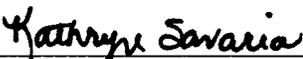
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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