

NO. 40599-7-II

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

RALLA KLEPAK,

Plaintiff/Respondent,

v.

THORSTEN LUNDSGAARDE,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT

THE HONORABLE JOHN P. WULLE

REPLY BRIEF

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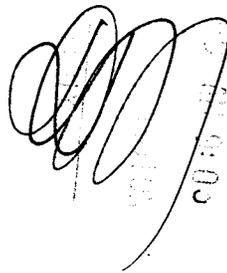

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I. Fees Should Have Been Awarded In Quashing the First Writ.

a. Lundsgaarde Had a Right to Contest the First Writ.

Klepak argues that no fees should be awarded to Dr. Lundsgaarde on the first writ, since it was “unexecuted.” Presumably, Klepak is referring to the fact that NW Permanente, the employer, elected not to honor the writ.

What Klepak overlooks, however, is that immediately after she filed and served it on the debtor, the debtor filed a motion to quash. One basis of the motion was the Washington court’s ability to seize out-of-state funds, the paycheck processed in Oregon. (CP 14) The other basis was due to its violation of the service requirements concerning notices of filing foreign judgments.

The timing is significant. Klepak issued the writ on October 6, 2009. (CP 7) Lundsgaarde objected on October 13, 2009. (CP 12-15) On November 6, 2009, agreeing with Lundsgaarde’s position that Oregon, not Washington procedure would need to be followed, NW Permanente refused to comply with the writ. In other words, NW Permanente’s decision to refuse honoring the writ did not occur until after Lundsgaarde filed his objection. (CP 35)

Klepak contends that fees under RCW 6.27.230 should not be awardable, even though the court quashed the first writ, since no money was actually withheld.

Of course, at the time that the debtor received the writ, he did not know if the employer would or would not honor it. The teaching of *Blair v. GIM*, 88 Wn.App 475, 945 P.2d 1149 (1997), and *Caplan v. Sullivan*, 37 Wn.App. 289, 679 P.2d 949 (1984) are that the controversion statutes are to be liberally construed to assist parties injured by wrongful writs of garnishment. Indeed, in *Blair v. GIM, supra*, the debtor filed no controversion; simply a motion to quash. Since his motion was granted, he was entitled to fees.

Here the trial court did, eventually, enter an ordering quashing the writ. Denial of fees was error.

b. The Fee Request Was Not Moot.

Klepak argues that the matter of the quashing the first writ was moot by the time of the April, 2010 hearing, since NW Permanente did not honor the writ months earlier. Klepak misses the point. On October 6, 2009 Lundsgaarde was faced with a writ of garnishment, threatening to garnish his wages issued by the court clerk at the request of Klepak. It was his position that the garnishment was invalid. In order to

raise those issues as to its invalidity, he filed a motion to quash the writ. At the time he filed the motion, the issue was certainly not moot.¹

At the time of receiving the October 13, 2009 motion, Klepak could have voluntarily withdrawn the writ. She did not. Indeed, she went to quite some length to defend the validity of the writ and the service of the writ. (CP 136-143; CP 129-132)

It would appear that Klepak is claiming that the first writ was properly delivered in Washington. (Brief p. 6) In that regard, it should be noted that the employer does not have a registered agent in this State. (CP 16-19) While Klepak may have thought it did have such a registered agent, she makes no showing to support that claim, other than to claim that Kaiser Permanente has one. The garnishee is NW Permanente, not Kaiser Permanente, however.

The writ itself indicated delivery to an address in Portland, Oregon. (CP 7)

Out of state enforcement of a garnishment was analyzed in *American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc.*, 368 F.Supp. 219 S.D.N.Y. (1974). In that case, a writ of garnishment issued out of Washington to a New York insurer to deliver funds. The funds were from

¹ On page 10 of her Brief, Klepak makes various references to the record however no report of proceedings was requested.

a certificate of deposit issued by a Florida bank. It was held that the Washington court did not have jurisdiction. The court stated:

The purported garnishment in Washington herein was, conceptually at least, *quasi in rem*. Accordingly, the character of the item sought to be garnished—the certificate of deposit—becomes determinative. Prior to its conversion into cash, the certificate of deposit could be viewed as either an item of tangible personal property, or as evidence of a sum of money on deposit in a bank. Viewed as tangible personalty, only a Court sitting in New York, the jurisdiction in which the certificate was located, would have sufficient jurisdiction *quasi in rem* to affect rights therein. *Clark v. Williard*, 294 U.S. 211, 55 S.Ct. 356, 79 L.Ed. 865 (1935); *Bank of Jasper v. First National Bank*, 258 U.S. 112, 42 S.Ct. 202, 66 L.Ed. 490 (1922); *Green v. Van Buskirk*, 72 U.S. (5 Wall.) 307, 18 L.Ed. 599 (1866); 74 U.S. (7 Wall.) 139, 19 L.Ed. 109 (1868); *Heydemann v. Westinghouse Electric Mfg. Co.*, 80 F.2d 837 (2d Cir. 1936); *Restatement (Second) of Conflicts of Laws* §§ 60-63 (1969). Washington never had the requisite jurisdictional predicate to enter an order purporting to affect tangible personalty. If the certificate were viewed as evidence of money in a bank deposit, only a Court sitting in Florida, the jurisdiction in which the funds were deposited, would have the requisite jurisdiction. *See Bank of Jasper v. First National Bank*, *supra*; *cf.* RCW § 7.33.140. Thus, Washington had no jurisdiction under either view.

American Fidelity Fire Ins. Co. v. Paste-Ups Unlimited, Inc., *supra*.

Here, it would appear that NW Permanente, located in Oregon, potentially held a *res* of the debtor (his paycheck). Any such

garnishment during the time the *res* was present in Oregon should have been issued by the courts of Oregon, not Washington.

The fact that NW Permanente agreed with the Lundsgaarde's analysis as to the writ's validity should not affect his entitlement to fees. For example, assume that Lundsgaarde had done nothing, that NW Permanente had filed its Answer to the writ and withheld wages. At that point, he could have filed a motion to quash or a controversion—and a hearing would have occurred to declaring the writ invalid. The only difference between those facts and the ones in this case is that the motion was filed before, not after, the Answer. That is a meaningless distinction to deprive a debtor of fees under *Blair v. GIM, supra*. Quashing the first writ, but refusing to award fees was error by the trial court and should be reversed.

II. The Second Writ Was Invalid.

a. Failure to Comply With RCW 6.36 Service Requirement.

Klepak does not contest that she failed to follow the technical requirements of RCW 6.36.035. She first argues that somehow the argument was waived since not raised in initial pleadings. She cites a 59 page Answer, which she refers as CP 7 (Brief p. 11) This document is the first page of the first writ of garnishment. Even so, her cite to CR

12(b) is misleading. That court rule provides that a defense of insufficient service of process is waived if not made in an initial answer or motion. The issue in this case has nothing to do with service of process. It is simply whether execution of the foreign judgment was proper.

Klepak suggests that RCW 6.36 does not apply to this case, or at least, after the trial court elected to give the Illinois order full faith and credit in August, 2009. She misconstrues our statutes. Registering a foreign judgment in Washington does not convert the foreign judgment to a Washington judgment. It simply means that it can be executed here, provided the creditor serves the necessary notice and files it. RCW 6.36.035(3)(a).

Understandably, Klepak argues that she did, indeed, have the affidavit of foreign judgment personally served on the debtor, therefore the purpose of the statute was met. In other words, she substantially complied. (Brief pps. 12-13) However, in the area of execution and garnishment, substantial compliance is not the standard. *Boundary Dam Constructors v. Lawco*, 9 Wn.App. 21, 510 P.2d 1176 (1973), *Watkins v. Peterson Enterprises, Inc.* 137 Wn.2d 632, 973 P.2d 1037 (1999).

///

b. Notice of Filing Foreign Judgment Not Filed In Violation of RCW 6.36.

Klepak did not reply at all to the argument that she failed to serve the required Notice, and presumably does not dispute that contention. For that additional reason, execution was invalid as being premature.

For the above reasons, the trial court erred in not quashing the second writ.

c. Invalidity of Service of Second Writ.

Even if this court determines that the second writ did not violate RCW 6.36, the service was invalid.

Klepak does not appear to contest that service of the second writ did not comply with the requirements of RCW 6.27.010. She does not dispute that the writ was simply mailed to a floor of a hospital, which is not the employer, that no registered agent, secretary to the president or other head of NW Permanente PC was served or that alternative service means for non-registered foreign corporations were employed.

She essentially argues that Lundsgaarde has not standing to object. (Brief at 13-14). A litigant's standing simply refers to whether the person has a protectable interest that he claims to have been violated. *See e.g. Hoskins v. Kirkland*, 7 Wn.App. 957, 503 P.2d 1117 (1972). It is hard

to imagine many more examples than a paycheck to which a litigant may have a protectable interest. Klepak's claim of lack of standing to is meritless. She states that Lundsgaarde has cited no authority that he can raise the service defense of the employer, apparently overlooking his citation to *Blair v. GIM*, supra, and *Caplan v. Sullivan*, supra, which generally give the debtor the right to contest any wrongful writ. Indeed, Klepak cites no authority for the proposition that only the employer may raise a service defense.

Under Klepak's position, if a debtor has no right to contest an invalidly served writ, it is not clear when a debtor would have a right to contest one. If a judgment had expired or been satisfied, but a creditor garnished nonetheless, would a debtor be able to object? The lack of standing argument is meritless.

Klepak argues that "service issues are waived if not raised prior to answer." (Brief at p. 14) Apparently she makes the same mistake in that regard as she made on P. 11 of her brief in reference to CR 12(b) motions. The Answer to a Writ of garnishment under RCW 6.36 is not an Answer to a Complaint.

Regardless, this issue was most definitely preserved in the trial court, however. The second writ was issued December 18, 2009. (CP 26) Lundsgaarde's objection was filed December 23, 2009 (CP 31-36)

The Answer was filed January 12, 2010 (CP 37-39) The following day, Dr. Lundsgaarde filed a Controversion. (CP 40-41) Her argument that Dr. Lundsgaarde waived this defense of invalid service is meritless.

III. Conclusion.

The trial court erred in failing to award Dr. Lundsgaarde his reasonable attorney fees and costs regarding contesting the first writ. In quashing it, but not awarding those fees, the trial court ran afoul of settled case law.

Additionally, the court erred in upholding the second writ both on grounds of the creditor's failure to comply with the Foreign Judgment Enforcement Act and the failure to serve the employer by a permissible method. The court should have quashed that writ and awarded award Dr. Lundsgaarde his reasonable attorney fees and costs.

The amounts collected on the second writ should also be disgorged.

RESPECTFULLY SUBMITTED this 5th day of August, 2010.



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CERTIFICATE OF SERVICE

I hereby certify that I served the Reply Brief of Appellant/Respondent on the following named person(s) mailing with postage prepaid; to said person(s) a true copy thereof, contained in a sealed envelope, addressed to said person(s) at their last-known address(es) indicated below:

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Dated this 5th day of August, 2010



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