

ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NO. 40599-7-II

CLARK COUNTY SUPERIOR COURT

Case No. 09 2 00506 4

RALLA KLEPAK,

Plaintiff,

v.

THORSTEN LUNDSGAARDE,

Respondent/Appellant

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BY

RESPONSE BRIEF OF PLAINTIFF/ RESPONDENT ON APPEAL

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INTRODUCTION

Appellant Dr. Lundsgaarde seeks review of the Trial Court's decision which denied appellant fees for controverting two writs of garnishment. Appellant petitioned the court seeking to quash two writs, one ineffective writ issued in October 2009 which was not accepted by appellant's employer, and a subsequent December 2009 writ served upon appellant's employer in Washington which did attach to appellant's assets.

Appellant seeks review of the Trial Court's order denying him fees for controversion of the ineffective writ and declining to quash the subsequent effective writ.

STATEMENT OF THE CASE

Appellant Dr. Lundsgaarde filed for dissolution in Cook County, Illinois. Plaintiff/respondent on appeal, Klepak, was appointed as a child advocate for Dr. Lundsgaarde's minor daughter during the proceedings. Orders were entered in Cook County in 2006 and 2007 to provide payment to Ms. Klepak for her services as a child advocate. Appellant Dr. Lundsgaarde failed to pay either of these orders and they were entered as foreign judgments in Clark County Washington in February of 2009.

In August of 2009 the Trial Court in Washington held that the 2006 order was entitled to full faith and credit within the State of Washington. Appellant Dr. Lundsgaarde filed an appeal of the Trial Court's decision. That appeal is pending, Klepak v. Lundsgaarde, Appellate No. 39719-6-II.

Appellant works for Northwest Permanente at Southwest Washington Medical Center in Vancouver, Washington. In October of 2009 Plaintiff filed a writ of garnishment with appellant's employer, simultaneously sending writs to both the employer's purported registered service agent (RSA) in Mukiteo, Washington, and the employer's payroll processor in Portland, Oregon. (CP 68A). Service was not accepted by the purported RSA in Washington and the employer did not honor the writ as it

was successfully served only in Oregon and did not comply with format requirements for Oregon writs. Plaintiff Klepak did not controvert the employer's answer and the writ expired without attaching to any of appellant's assets.

On December 18, 2009 Plaintiff Klepak filed a second writ of garnishment and served appellant's employer in Washington at Southwest Washington Medical Center. The employer accepted service and began garnishing appellant's paychecks. Appellant petitioned the Trial Court to post a partial supersedeas bond to avoid further garnishment. A partial supersedeas bond of \$10,000.00 is being held by the Trial Court pending the outcome of this appeal.

In April of 2010 Appellant filed a motion seeking to quash both the ineffective October 2009 writ and the effective December 2009 writ. After hearing appellant's argument surrounding both writs the Court declined to award fees for the ineffective October writ and refused to quash the December writ. Plaintiff was awarded fees of \$960.00 for successful defense of the controversion. Appellant seeks review of the Trial Court's decision.

STANDARD OF REVIEW

The first question before the Appellate Court is whether fees for the ineffective writ were mandatory. The Trial Court made a factual determination that the first writ was ineffective. This factual determination made the request to quash moot and was the basis for denial of fees. This factual determination is entitled to review under the manifest abuse of discretion standard.

The second question before the Appellate Court is whether the Trial Court erred in denying appellant's request to quash the December 2009 writ. The Trial Court's determination that the writ was valid was based upon the factual circumstances surrounding appellant's service question and appellant's assertion that in hand service did not satisfy the mailing requirements regarding foreign judgments. The

service question is one of fact entitled to a review based upon manifest abuse of discretion. The question surrounding statutory interpretation is one of law entitled to a de novo review.

ISSUES BEFORE THE COURT

- 1) Did the Trial Court error in refusing to award fees for the October 6, 2009 ineffective writ?
 - a. Return of attempted Washington service;
 - b. Legislative intent of the garnishment statute;
 - c. Case law distinguished;
 - d. No mandatory award under 6.27;
 - e. Mootness of request to quash ineffective writ;

- 2) Did the Trial Court error in refusing to quash the December 18, 2009 writ?
 - a. Timeliness of service issue;
 - b. Effectiveness of in-hand service to give notice;
 - c. Standing to raise service issue of another entity;
 - d. Award of fees for prevailing party on controversy;

ARGUMENT

1) DID THE TRIAL COURT ERROR IN REFUSING TO AWARD FEES FOR THE INEFFECTIVE OCTOBER 6, 2009 WRIT?

ATTEMPTED SERVICE ON WASHINGTON REGISTERED SERVICE AGENT: Appellant Lundsgaarde writes in page two, paragraph three of appellant’s brief: “The sole method of service of this writ was delivery to the address in Portland, Oregon.” This is not accurate. Plaintiff sent the October 6, 2009 writ simultaneously to both the purported RSA for Northwest Permanente in Washington, and the Portland Oregon location where Northwest Permanente’s payments for work performed in Washington were processed. (CP No. 68A).

On October 21, 2009 CSC in Mukiteo Washington, the purported RSA for Northwest Permanente within the State of Washington, rejected service indicating they do not act as a RSO for this division of Kaiser Permanente. On November 6, 2009 the garnishee employer sent a letter to the parties indicating that the October 6, 2009 writ would not be honored because it was not formatted in accord with Oregon writ requirements. No further collection actions were taken pursuant to the October 6, 2009 writ. No attachment of assets occurred pursuant to the October 6, 2009 writ. Plaintiff Klepak did not controvert the decision of the garnishee employer regarding refusal of the October 6, 2009 writ.

Appellant argues that the Trial Court should have provided relief in the form of fees for the writ returned by the RSO and declined by the processor but provides no authority for the collection of funds by a debtor for an ineffective writ of garnishment. Such a conclusion would run counter to the legislative intent of the garnishment statute.

LEGISLATIVE INTENT OF THE GARNISHMENT STATUTE: RCW 6.27.005 reads in relevant part:

...the garnishment process is necessary for the enforcement of obligations debtors otherwise fail to honor, and that garnishment procedures benefit the state and the business community as creditors. The state should take whatever measures that are reasonably necessary to reduce or offset the administrative burden on the garnishee consistent with the goal of effectively enforcing the debtor's unpaid obligations.

If returned service to a creditor for an unexecuted writ were the basis for an award of fees to a debtor, the garnishment statute would become a profit center for the debtor attempting to avoid his or her obligation, an absurd result.

CASE LAW DISTINGUISHED: Appellant asserts fees for the declined writ were mandatory based upon Blair v Gim Corp., 88 Wn.App. 475 (1997) stating at page 6, paragraph two of his appellate brief that a

“similar argument was made by the creditor in Blair and rejected.” Appellant’s argument is not at all similar to the argument presented in Blair. In Blair the creditor argued that the debtor should not be awarded fees because he filed a motion to quash, not a controversion under RCW 6.27. In the present case the court did not contend that appellant was not entitled to fees based on choice of process, but that process was unnecessary because the writ was never effective. In appellant’s case the creditor would have been the one to controvert the employer’s decision, not the debtor. Appellant’s request that the court quash an ineffective, unexecuted, and returned writ was without effect for the debtor, an issue the Trial Court attempted to convey to the appellant as it tried to move the appellant past the ineffective October writ and into argument regarding the effective December writ.

NO MANDATORY AWARD OF FEES UNDER 6.27: Under Assignment of Error, pages four and five of appellant’s brief, appellant alleges that an award of fees is mandatory under RCW 6.27.230. Pertinent portions of RCW 6.27.210 and 230 read:

RCW 6.27.210 Answer of garnishee may be controverted by plaintiff or defendant. If the garnishee files an answer, either the plaintiff or the defendant, if not satisfied with the answer of the garnishee, may controvert within twenty days...

RCW 6.27.230 Where the answer is controverted, the costs of the proceeding, including a reasonable compensation for attorney’s fees, shall be awarded to the prevailing party...

Either the plaintiff or defendant, if not satisfied, may file a controversion. Here the appellant was presumably satisfied as the garnishee employer declined the garnishment. If either party were to controvert the decision it would have been the plaintiff. Nothing within the statute or case law allows a debtor to controvert a decision in his favor and collect fees for this moot request. Appellant cites

Snyder v. Cox, 1 Wash.App. 457, 462, P.2d 573 (1969), review denied, 77 Wash.2d 962 (1970) to support

his position, however, even appellant's own citation at page five of his appellate brief quotes "The word "shall" is not directory...when considering the issue of attorney fees for a successfully prevailing controverting party in a contested garnishment proceeding." Appellant was not a "successfully prevailing controverting party" and the garnishment proceedings pertaining to the declined and returned October 2009 writ were not contested, therefore appellant's contention that fees are required is not correct and the Trial Court did not error in refusing to award fees for the unexecuted and uncontested refused writ.

Defendant's April motion seeking to quash an already expired writ was without impact. Defendant may argue that he had a separate right of action to quash the October writ irrespective of his employer's answer, but no support for this conclusion is found. Appellant seeks fees associated with quashing the October writ based solely upon the statute which allows fees for quashing a writ, but here the writ was not quashed due to the actions of the appellant, it was ineffective due to return of service and associated decline to honor by the employer. Appellant's request to quash was without effect and appellant provides no authority which allows fees, mandatory or permissive, for an ineffective writ.

Appellant may argue that he sought to controvert the writ before the employer declined to honor in November. Neither the decision by the employer not to withhold based on the format of the forms, nor the decision of the Trial Court upon entry of the April 9, 2010 Order supports defendant's position that lack of enforcement was based upon the substance of any of defendant's arguments. Defendant does not get a mandatory award pursuant to statute or *Blair, supra*, merely because the purported RSA for appellant's Washington employer did not accept service.

The statutory protections of RCW 6.27 flow in both directions. Plaintiff is entitled to enforce payment of a debt adjudged by a Court in the State of Washington to be due and owing. Rejection of service or failure to honor based upon format issues, as rightly or wrongly interpreted by an employer,

should not be held against a creditor. To do so would thwart the intent of RCW 6.27 which affords a means for creditors to recover against debtors reluctant to pay their obligations.

MOOTNESS OF REQUEST TO QUASH: Appellant writes at page one, paragraph four of his brief; “Once it is determined that a writ of garnishment is invalid as outside the territorial jurisdiction of the State of Washington,....” , but no such determination was ever made by the Trial Court.

Appellant contends that the Trial Court “summarily determined that the first writ of garnishment was unenforceable” (appellant brief page one, paragraph two of introduction), but the record indicates at 9:27 of appellant’s argument that the RSO in Washington returned the October 6, 2009 writ, at 9:39 the Judge clarified the first writ had never been honored, and at 9:41 the Trial Court indicated it was not concerned about the first unexecuted writ and would like to speed counsel along to a discussion of the executed December 18, 2009 writ. The Order entered on April 9, 2010 indicates that the October 6, 2009 writ was not honored by the employer garnishee and that plaintiff Klepak did not controvert the decision of the employer to not honor the October writ. Given these facts appellant’s request to quash the ineffective writ in April of 2010 was moot.

An issue is moot if a court can no longer provide effective relief. State v Turner, 98 Wn.2d 731,658 P.2d 658 (1983). At the point that appellant sought relief it was established that the attempted Washington service of the October writ had been returned unexecuted. Appellant’s attempt to quash an ineffective and expired writ was moot as there was no effective relief for the Trial Court to provide. The Court did not summarily dismiss appellant’s request for fees as alleged, but fully heard appellant’s argument, verified the facts surrounding the writ, and attempted to refocus counsel’s argument away from the moot issue regarding his controversion of a writ answered in his favor and unexecuted, and onto his controversion of the successful December 2009 writ.

Under the mootness doctrine American courts will not decide a moot case, that is a case in which there is no longer any actual controversy. Here appellant's controversy was settled in regards to the October writ on November 6, 2009 when the garnishee employer declined to garnish appellant's wages, and the creditor declined to controvert that decision. At that point no controversy existed from the appellant's perspective.

2) DID THE TRIAL COURT ERROR IN REFUSING TO QUASH THE DECEMBER 18, 2009 EFFECTIVE WRIT?

TIMELINESS OF SERVICE ISSUE: In-hand service was received by appellant on February 10, 2009 notifying him that a foreign judgment was being entered against him within the State of Washington. Twenty one days later appellant filed a 59 page response, inclusive of exhibits, clearly indicating appellant was aware of the proceeding against him, (CP 7). Nothing within appellant's March 2009 answer objected to form of service being in hand versus by mail. It is apparent given the lengthy response by appellant that the in-hand service was effective to actually provide notice to him, and that appellant was not prejudiced by receipt of documents in-hand versus by mail. Any objection to form of service was waived by appellant when he failed to raise this defense in his answer. A service defense is waived if it is not asserted in a responsive pleading or CR 12(b) motion on original answer. French v. Gabnel, 116 Wn.2d 584, 588, 806 P.2d 1234 (1991). After notice was served and proof of notice was entered appellant has appeared, filed motions, and actively litigated to avoid this Illinois obligation. Appellant's assertion that a foreign judgment cannot be enforced in Washington without mailing, and that the in-hand service is not ineffective, is not timely.

Appellant argued numerous issues surrounding entry of the foreign judgment before the Trial Court prior to entry by the Superior Court of Washington validating the 2006 foreign judgment and authorizing enforcement in Washington. Nothing within the findings of fact, conclusions of law, or

judgment itself addresses appellant's issue regarding in hand service not being sufficient to provide notice to appellant of the action against him.

Appellant Lundsgaarde appealed the decision of the Trial Court which found the 2006 Illinois agreed order to be entitled to full faith and credit within the sister state of Washington. Neither appellant's brief appealing the Trial Court's decision surrounding full faith and credit, nor his response brief, raised the issue of order entry and notice under RCW 6.36. Klepak v. Lundsgaarde No. 39719-6-II. Once the Order was entered in Washington the statute governing collection of the post judgment order is 6.37, not 6.36. Defendant's argument attacking the validity of the process used to file the foreign judgment in Washington is untimely and did not prejudice the appellant.

EFFECTIVENESS OF IN-HAND SERVICE TO GIVE NOTICE: RCW 6.36.900 Construction indicates the statute shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. RCW 6.36.035 provides:

(2) Promptly upon the filing of the foreign judgment and the affidavit, the judgment creditor shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer if any in this state. In addition, the judgment creditor shall file proof of mailing with the clerk.

The purpose behind the notice requirement of RCW 6.36.035 is to cause a debtor to be notified that a foreign creditor seeks to enforce a judgment against him within the State of Washington. The statute allows for mailing to the debtors last known address and the filing of proof so that the court may know that the debtor was given notice. That the creditor in the present case chose to personally deliver notice to the debtor and file this notice with the court is inconsequential to the position of the debtor.

The statute required notification and the creditor exceeded the statutory requirements. The Court

construes statutes to effect their purpose and to avoid unlikely or absurd results. State v. Neheer, 112, Wn.2d 347 (1989). In-hand service is the gold standard of notice and the method most likely to actually provide notice to the intended party that an action has commenced against him. The court in State v. Vahl, 56 Wn.App 603 (1990) quoting Mullane v. Central Hanover Bank 339 US 306 (1950) held that:

Personal service of written notice within the jurisdiction is the classic form of notice ***always adequate*** in any type of proceeding. (Emphasis added).

The legislature would not have intended such an absurd result as to permit service by mail and prohibit service in-hand. To presume so would allow for gamesmanship to the detriment of the person's the statute is meant to protect. Appellant received notice of the entry and suffered no prejudice by receipt in hand.

STANDING TO RAISE THE SERVICE ISSUE OF ANOTHER ENTITY: Appellant works in Washington, lives in Washington, and receives payment for the work he performs in Washington. Service was made in Washington at the administrative office of Northwest Permanente within the Southwest Washington Hospital appellant works at. The employer accepted service which complied with RCW 6.27.110:

Service of writ generally. (2) ...the writ of garnishment shall be mailed to the garnishee by certified mail, return receipt requested, addressed in the same manner as a summons in a civil action, and will be binding upon the garnishee on the day set forth on the return receipt.

Service was made to the Washington garnishee employer with return receipt requested and was accepted by the Washington garnishee employer. If a service issue existed under the statute, that issue would be brought by the entity itself. A garnishment is an adversarial action ancillary to the principal suit between a creditor and a debtor. Morris & Co. v. Canadian Bank of Commerce, 95 Wn. 418, 163 P.

1139 (1917). Garnishment is an action by the defendant against the garnishee for the use of the plaintiff. Tatum v. Geist, 40 Wn. 575, 82 P. 902 (1905). A garnishee is accorded the same rights as any other party to assert defenses in response to either a creditor's writ of garnishment, or a debtor's subsequent controversion of its answer to the writ or other challenge. Watkins v. Peterson Enterprises, Inc., 137 Wn. 2d 632 (1999). The appellant can no more reject service on behalf of the employer than the employer can reject on behalf of appellant.

Appellant quotes a general civil statute regarding who within a corporation may accept service. Not only is this general statute less controlling over the notice issue than the more specific RCW 6.27.110, but appellant is without knowledge of who actually accepted service on behalf of Kaiser Permanente and Northwest Permanente. Service upon the administrative office may well have reached an agent cashier or secretary therein under the general civil statute cited by appellant. If it did not the garnishee defendant could raise this objection and plaintiff Klepak could accept or controvert the issue as provided by statute. Defendant has provided no authority which allows him to assert the rights of the garnishee employer as well as the rights of the debtor. He may argue that standing exists because it is his paycheck which could be garnished by the accepting employer garnishee. This argument must fail however as the logic of this argument would allow nearly any litigant to assert the rights of any other litigant in an action as most litigants have res at stake within a dispute. Such a circular argument would tax the system creating uncertainty in service any time more than two litigants were involved.

Additionally service issues are waived if not raised prior to answer. Here the garnishee employer accepted, responded, and executed on the writ. Since there was no timely objection to service by the garnishee employer this question was not properly before the Trial Court and should not be considered on appeal. Snyder v. Cox, supra Issues not raised in the trial court will not be considered for the first time on review by the Court of Appeals.

AWARD OF FEES TO PLAINTIFF FOR CONTROVERSION OF DECEMBER 2009 WRIT: RCW 6.27.230

Controversion-Costs and attorney's fees provides that where an answer is controverted, the costs of the proceeding, including a reasonable compensation for attorney fees, shall be awarded to the prevailing party.

The garnishee employer declined to honor the October 2009 writ. Plaintiff did not controvert the employer's decision and the ineffective writ expired as a matter of law. The garnishee employer did honor the December 2009 writ, the appellant controverted the answer of the garnishee as allowed under RCW 6.27.210 Answer of garnishee may be controverted by plaintiff or defendant:

If the garnishee files an answer, either the plaintiff or the defendant, if not satisfied with the answer of the garnishee, may controvert within twenty days after the filing of the answer, by filing an affidavit in writing signed by the controverting party or attorney or agent, stating that the affiant has good reason to believe and does believe that the answer of the garnishee is incorrect, stating in what particulars the affiant believes the same is incorrect.

Defendant relied upon his December 23, 2009 objection to writ of garnishment for his renewed filing in April 2010. This motion was based upon alleged invalid service upon the employer, and appellant's supposition that personal service was not effective pursuant to RCW 6.26. The Trial Court disagreed with appellant's suppositions on these two matters, determined the writ should not be quashed, and awarded attorney fees in the amount of \$960.00 for 4.8 hours of work by plaintiff to defend the controversion. As the December writ was effective in procuring revenue, and as appellant was controverting the answer of the garnishee employer who had honored the December writ, this award of fees was statutorily appropriate under RCW 6.27.210.

RESPONDENT REQUESTS ATTORNEY'S FEES UNDER RAP 18.1.

Respondent Klepak requests an award of reasonable attorney's fees on this appeal. Caplan v. Sullivan, 37 Wash.App. 289,295, 679, P.2d 949, 953 (1984).

CONCLUSION

The Trial Court did not error in failing to award fees for the October 6, 2009 writ. The refused writ was ineffective and not controverted by the creditor, thus appellant's request to quash was moot. Appellant did not prevail on any meritorious argument but benefited by plaintiff's failure to controvert.

The Trial Court did not error in failing to quash the December writ. The writ was served and accepted by appellant's Washington employer within the State of Washington. Fees awarded to plaintiff under the statute were proper as appellant controverted the December 2009 effective writ and did not prevail.

RESPECTFULLY SUBMITTED this 20th day of July, 2010.



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STATE OF WASHINGTON

BY



CERTIFICATE OF SERVICE

I hereby certify that I served Response Brief of Plaintiff/Respondent on Appeal on the following named person(s) on July 20, 2010 by 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 as indicated below:

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