

Court of Appeal No. 65401-2  
King County Superior Court No. 09-2-19684-2 SEA

**IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON  
DIVISION I, AT SEATTLE**

**UMPQUA BANK  
Plaintiff/Judgment Creditor**

v.

**BINGO INVESTMENTS, LLC., a Washington limited liability  
company; FRANCES P. GRAHAM and JOHN DOE GRAHAM,  
and the marital community composed thereof; DAVID S.  
BINGHAM and SHARON G. BINGHAM and the marital  
community composed thereof; SCOTT F. BINGHAM and  
KELLY BINGHAM and the marital community composed  
thereof; CHRISTOPHER G. BINGHAM and CHERISH  
BINGHAM and the marital community composed thereof;  
and BINGO DEVELOPMENT, LLC, a Washington limited  
liability company.**

**Defendants/Judgment Debtors.**

and

**RAYMOND JAMES FINANCIAL SERVICES INC.  
Garnishee Defendant.**

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STATE OF WASHINGTON  
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**UMPQUA BANK  
Respondent**

v.

**UNION BANK  
Appellant.**

**APPELLANT'S OPENING BRIEF**

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III. Assignments of Error

3.1 Whether the Trial Court erred as a matter of law in denying Appellant Union Bank’s motion to intervene.

3.2 Whether the Trial Court erred as a matter of law in denying Union Bank’s motion for reconsideration of the order denying its motion to intervene.

IV. Issues Relating to Assignments of Error

4.1 Whether Union Bank’s motion to intervene was timely.

4.2 Whether the Trial Court utilized the correct legal standard in determining the timeliness of the Bank’s motion to intervene.

4.3 Whether Union Bank's motion to intervene should have been allowed post judgment due to the defective nature of said judgment.

4.4 Whether the Trial Court should have conducted an evidentiary hearing prior to ruling on Union Bank's motion to intervene.

4.5 Whether Union Bank's prior perfected security interest can be affected by the garnishment proceeding.

#### V. Statement of the Case

5.1 On September 30, 2008, Scott F. Bingham, Kelly Bingham and Frances Graham executed a Promissory Note in favor of Frontier Bank in the original principal amount of \$2,979,400.00. See, Declaration of Gale Inman (CP Vol. 1 at 165); See also, Promissory Note (CP Vol. 1 at 172-73). As security for the above referenced Promissory Note, Sharon G.

Bingham and Scott F. Bingham executed Commercial Pledge and Security Agreements pledging accounts in their name held by Raymond James Financial Services, Inc. (“Raymond James”) to Union Bank. Id.; See also, Commercial Pledge and Security Agreements (CP Vol. 1 at 175-83). In order to perfect the pledge of the Raymond James Accounts to Frontier Bank, Raymond James executed Securities Account Control Agreements dated March 16, 2009 acknowledging that it would take instructions from Frontier Bank without further consent by Scott F. Bingham or Sharon G. Bingham with respect to the pledged accounts. Id.; See also, Control Agreements (CP Vol. 1 at 184-91). Further, Raymond James was precluded from distributing property from the accounts to Scott Bingham or Sharon Bingham. Id. Union Bank possessed a valid perfected security interest in the pledged accounts as of March 2009. The

loan secured by the pledged accounts is in default and Union Bank has commenced legal action against Scott F. Bingham and Sharon G. Bingham in Snohomish County Superior Court Cause No. 09-2-09274-3.

5.2 On May 19, 2009, Umpqua Bank filed a complaint for breach of contract, conversion and injunctive relief against various individuals and entities including Sharon G. Bingham and Scott F. Bingham (CP Vol. 1, pp 1-60). Thereafter, on June 19, 2009, a stipulated judgment was entered in favor of Umpqua Bank against Sharon G. Bingham and Scott F. Bingham (CP Vol. 1, pp 61-65).

5.3 Subsequent to entry of the stipulated judgment, Umpqua Bank initiated a garnishment proceeding against Raymond James. See, Affidavit of Garnishment ( CP Vol.1, pp 56-83). Raymond James advised Union Bank that it would answer the writs and take the position that the accounts it held for Scott

and Sharon Bingham had previously been pledged to Union Bank and could not be garnished. See, Reply Declaration of Steven Arrivey at 2 (CP Vol. 2 at 248). Raymond James answered Umpqua Bank's writs of garnishment (CP Vol. 1 at 84-89). In answering the writs, Raymond James identified that it held accounts with values of \$304,826.13 and \$105,545.43 in the names of Scott F. Bingham and Sharon G. Bingham respectively. Id. In its garnishment answer, Raymond James disclosed to Umpqua Bank and the Court that these accounts were "pledged accounts" subject to a third party lender's first priority perfected security interest. Id. Raymond James' answers placed Umpqua Bank on notice that although Raymond James held accounts in the Bingham's names they were controlled accounts and the assets were pledged and secured in favor of a third party.

5.4 In spite of the disclosure by Raymond James that the pledged accounts were controlled by Union Bank pursuant to a perfected security interest, Umpqua Bank did not controvert the garnishment answers filed by Raymond James pursuant to RCW 6.27.210. Instead, Umpqua Bank proceeded to attempt to obtain an ex parte default judgment against Raymond James without notice to any party. Initially, on January 26, 2010 Umpqua Bank attempted to obtain the garnishment judgment through an ex parte proceeding with a Court Commissioner without submitting the garnishment answers or bringing the existence of the third party security interest to the attention of the Court. See, Declaration of Dana A. Rognier in Support of Judgments and Order to Pay (CP Vol. 1 at 90-100). The Court Commissioner entered a minute order rejecting Umpqua Bank's request for a garnishment judgment against Raymond James.

See, Order Denying Motion (CP Vol. 1 at 127). Later the same day, Umpqua Bank filed a second Declaration of Dana A. Rognier seeking entry of a garnishment judgment against Raymond James. (CP Vol. 1 at 106-126). On January 27, 2010, the Court Commissioner again denied the request for entry of judgment. The Court Commissioner ruled that the request for judgment needed to be re-submitted after notice to the parties. See, Order Denying Motion (CP Vol. 1 at 128). The following day Umpqua Bank ignored the Court Commissioner's ruling and re-filed the two declarations of Dana A. Rognier without notice to Raymond James or any other party. The re-filed declarations did not advise the Court of the prior orders of the Court Commissioner in the Ex Parte department. A garnishment judgment against Raymond James was entered on January 28, 2010. See, Judgment Against

Garnishee Defendant (CP Vol. 1 at 129-31). Neither Raymond James nor Union Bank had any knowledge of the garnishment judgment until after the judgment had been entered. See, Declaration of Steven Arrivey (CP Vol. 2 at 247-49).

5.5 On February 24, 2010, Appellant Union Bank filed a motion to intervene in the garnishment action. (CP Vol . 2 at 159-160). In support of the motion Union Bank filed copies of loan documents establishing that it possessed a first position security interest in the garnished accounts. See, Declaration of Gale Inman and attachments thereto (CP Vol. 1 at 164-191). Frontier Bank also filed a Motion for Preliminary Injunction prohibiting Umpqua Bank from taking any action to collect the garnished accounts (CP Vol. 1 at 192-93). Umpqua Bank opposed the motion to intervene on the grounds that it was untimely due to the fact that judgment had already been entered

against Raymond James. See, Objection to Motion to Intervene, Vol. 2 CP at 207-246).

5.6 On March 8, 2010, the Court entered an order denying Union Bank's motion to intervene. See, Order Denying Motion to Intervene (CP Vol. 2 at 258-259). The Court's order indicates that the motion was denied on the grounds that it was not filed until after the entry of the garnishment judgment against Raymond James and was therefore untimely. Id.

5.7 On March 18, 2010, Union Bank filed a motion for reconsideration of the order denying its motion to intervene. See, Motion for Reconsideration (CP Vol. 2 at 260- 265). In the Motion for Reconsideration the Bank argued that it was entitled to an evidentiary hearing on the factual issues relating to the timeliness of the intervention motion. The Court entered an order denying the motion for reconsideration on March 30, 2010. See, Order Denying Motion for Reconsideration (CP Vol. 2 at 260-265).

5.8 On March 22, 2010, Raymond James filed a motion to vacate the garnishment judgment. A hearing was held on Raymond James' motion to vacate the garnishment judgment on April 9, 2010. At the conclusion of the hearing, the Court ruled that the garnishment judgment would be vacated. See, Transcript of Proceedings at 48-59. The Court thereafter entered a formal order vacating the garnishment judgment. See, Order Vacating Judgment (CP Vol. 4 at 872-74).

Umpqua Bank has now filed a Notice of Appeal with respect to the order vacating the garnishment judgment which is before this Court as Appeal No. 65706-2-1.

5.9 The funds in the garnished accounts are still in the possession of Raymond James and have not been turned over to Umpqua Bank. See, Umpqua Bank's Response to Motion to Intervene at 5 (CP Vo. 2 at 211). Raymond James has filed an

interpleader action under King County Superior Court Cause No. 10-2-25383-1<sup>1</sup>

## VI. Standard of Review

6.1 A Superior Court's decision to deny a motion to intervene is normally reviewed for abuse of discretion. *Kriedler v. Eichenbarry*, 111 Wn. 2d 828, 766 P.2d 438 (1989). However, the issues on appeal in the instant case concern the applicability of the legal standard utilized by the Court to determine the timeliness of the motion to intervene and the validity of the garnishment judgment relied upon by the Court in denying the intervention motion. These legal issues are reviewed de novo.

## VII. Legal Argument

### 7.1 *General Intervention Rules*

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1. If the vacation of the garnishment judgment is upheld in Appeal No. 65706-2-1, Union Bank will have the ability to assert its superior interest in the pledged accounts in the interpleader action irrespective of the outcome of the subject appeal.

Washington Civil Rule 24 provides in pertinent part as follows:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the appellant's interest is adequately represented by existing parties.

CR 24.

Washington Courts have recognized that a secured creditor is entitled to intervene in a garnishment proceeding as a matter of right to protect his rights in the property subject to garnishment. See, *Zesbaugh Inc. v. General Steel Fabricating Inc.*, 95 Wn. 2d 600, 627 P.2d 1321 (1981). Accordingly, the only issue is whether the Bank's motion to intervene was timely.

7.2 *Union Bank's Motion to Intervene Was Not Untimely.*

The Trial Court ruled that Union Bank's Motion to Intervene was untimely due to the fact that it was filed subsequent to the entry of the garnishment judgment against Raymond James. As demonstrated below, this ruling was erroneous.

The Washington Courts have not specifically addressed the issue as to when a motion to intervene in a garnishment proceeding must be filed to be considered timely. However, the Courts of other jurisdictions have held that an intervention motion is timely so long as it is filed before the garnished funds are actually paid over to the garnishor.

In *Daley v. Walden*, 648 P.2d 258 (Kansas 1982), the Court held that a motion to intervene was timely filed in a garnishment proceeding where the garnished funds had not been paid over to plaintiff in satisfaction of his garnishment

request until after the motion had been made. The Court recognized that intervention must be timely sought. *Daley v. Walden, supra*, at 261. The Court went on to rule that because the garnishment statute did not embody any time requirements for intervention motions, a motion to intervene would be timely if made before the garnishment was satisfied:

However, intervention must be timely sought. Generally, where there are no time provisions in the statute the application must be made before the garnishment is satisfied. (*Citation Omitted*).

*Daley v. Walden, supra* at 261. The Court went on to rule that the intervention motion with respect to two of the garnishments before it was untimely because the funds had already been paid over to the plaintiffs in satisfaction of the garnishment request. However, the Court concluded that the intervention motion was timely with respect to the third garnishment where the funds had not already been paid over:

Considering the circumstances in this case, it appears the trial court was correct in denying the motion for the return of the garnished funds of March and April...because the intervenor did not timely file the motion, as the funds had already been paid over to the Plaintiffs in satisfaction of the order...The May garnishment intervention was timely, however, because the money was not paid over until after the motion was made.

Id at 262.

In the present case, the garnished accounts have not been paid over to Umpqua Bank. Accordingly, under the legal principles enunciated in the above referenced case, Appellant Union Bank's motion to intervene was timely and should have been granted.

*7.3 Post Judgment Intervention Should Have Been Allowed Due to Defects in Garnishment Judgment.*

In contexts other than garnishment proceedings the Washington Courts have required a party seeking to intervene

post judgment to make a strong showing as to why intervention was not sought prior to entry of judgment. See, Kreidler v Eikenberry, 111 Wn. 2d 828, 832-33 (1989); Martin v. Pickering, 85 Wn. 2d, 241, (1975).<sup>2</sup> However, these cases involved legitimate unchallenged judgments. In the instant case, the judgment entered against Raymond James was defective in several respects and ultimately vacated by the Trial Court.

Initially, the judgment was defective due to Umpqua Bank's failure to comply with the rules governing garnishments. It is undisputed that the Answers to the Writs of Garnishment filed by Raymond James expressly stated that although it held accounts in the name of Scott Bingham and

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<sup>2</sup>As indicated above, the post-judgment timeliness standard set forth in these cases is not applicable in a garnishment proceeding. In a garnishment proceeding a motion to intervene is timely so long as it is filed before the garnished funds are paid over to the garnishor. Even if the post-judgment timeliness standard were generally applicable in garnishment proceedings, it would not be applicable in the present case due to the defective nature of the judgment against Raymond James.

Sharon Bingham the assets in the accounts were subject to a perfected security interest in favor of a third party lender (Union Bank). If Umpqua Bank wished to challenge this allegation, it should have controverted the Answer. RCW 6.27.210.

Instead of controverting the answers, Umpqua attempted to take a default judgment against Raymond James without submitting the garnishment answers or bringing the existence of the third party security interest to the attention of the Court. See, Declaration of Dana A. Rognier in Support of Judgments and Order to Pay (CP Vol. 1 at 90-100). The Court Commissioner initially entered a minute order rejecting Appellee Umpqua Bank's request for a garnishment judgment against Raymond James. See, Order Denying Motion (CP Vol. 1 at 127). Umpqua Bank thereafter filed a second Declaration of Dana A. Rognier seeking entry of a garnishment judgment

against Raymond James (CP Vol. 1 at 101-126). The Court Commissioner again denied the request for entry of judgment. The Court Commissioner ruled that the request for judgment needed to be resubmitted after notice to the parties. See, Order Denying Motion (CP Vol. 1 at 128). Umpqua Bank ignored the Commissioner's ruling and re-filed the Declarations of Dana Rognier the following day without notice to any party and without advising the Court of the prior rulings by the Court Commissioner. The garnishment judgment was entered by the Court as a result of the re-filing of the Rognier Declarations on January 28, 2010. See, Judgment Against Garnishee Defendant (CP Vol. 1 at 129-31).

In view of the foregoing, the judgment against Raymond James was clearly defective. Indeed, the garnishment judgment was eventually vacated by the lower court.<sup>3</sup> See, Order

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3. It is well settled that where a judgment is reversed or vacated, applications to intervene are to be determined by the same rules as if no judgment had been entered. See, Am. Jur. Parties §228. Accordingly, Union Bank's Motion to Intervene would need to be considered under the less stringent standard relating to pre-judgment motions to intervene.

Vacating Judgment (CP Vol. 5 at 872-74). The defects relating to the garnishment judgment precluded utilization of that judgment as the basis for the denial of Union Bank's Motion to Intervene.

7.4 *Union Bank Was At Least Entitled to an Evidentiary Hearing.*

The Trial Court committed reversible error even if the post judgment timeliness standard were determined to be applicable. In ruling on the timeliness of Union Bank's Judgment Motion to Intervene, the Court needed to consider all the factual circumstances surrounding the motion, including prior notice, prejudice to other parties and reasons for the length of the delay. *Kriedler v. Eikenberry*, 11 Wn. 2d 828, 832-33 (1989). Union Bank and Umpqua Bank submitted conflicting affidavits on these issues. See, Reply Declaration of Steven

Arrivey (CP Vol. 2 at 247-49). The Trial Court resolved these factual issues in favor of Umpqua Bank. The Trial Court made these determinations solely on the basis of affidavits submitted by the parties without any type of evidentiary hearing. This was clearly improper. Disputed questions should not be resolved on the basis of conflicting affidavits, but rather these questions should be resolved by trial. *See, Meadows v. Grants Auto Brokers Inc.*, 71 Wn. 2d. 874 (1967). The Trial Court's resolution of the factual issues in the case at bar without an evidentiary hearing was improper.

*7.5 Union Bank Retains a First Position Security Interest in the Pledged Accounts*

In its pleadings before the Trial Court, Umpqua Bank appeared to take the position that denial of Union Bank's motion to intervene somehow extinguished Umpqua Bank's

right to the garnished accounts. This contention is without merit. The law is clear that where a third party assignee of property subject to a garnishment proceeding is not a party to those proceedings the third party rights in the subject matter of the garnishment cannot be determined in that proceeding. See, *Portland Association of Credit Men v. Earley*, 42 Wn. 2d, 273, 254 P. 2d 758 (1963). Union Bank is a third party assignee of the pledged accounts by virtue of its perfected security interest in those accounts. Union Bank has never been made a party to the garnishment proceeding and its right to the pledged accounts cannot be determined in that proceeding.

It is also well established that the garnishment of a debtor's right to collateral by a judgment creditor does not extinguish a prior security interest or give the judgment creditor priority. See, *In Re: Bank of Hawaii and DeYoung*, 992 P. 2d

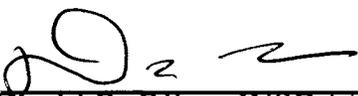
42 (2000). Such a transfer remains subject to a prior perfected security interest. Id. In the present case, the record unequivocally establishes that Union Bank held a prior perfected security interest in the garnished accounts by virtue of the Commercial Pledge Agreements and Control Agreements. This prior perfected security interest can not be effected by any ruling in the garnishment proceeding.

#### VII. Conclusion

For the above stated reasons, the Trial Court's Order Denying Intervention should be reversed and an order should be entered allowing Union Bank to intervene in the garnishment proceeding.

Respectfully Submitted, this 5<sup>th</sup> day of October 2010

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IX. CERTIFICATE OF SERVICE

The undersigned certifies that on October 8, 2010, a copy of Appellant's Opening Brief (revised as to format only) was sent via first class U.S. mail, post pre-paid to the following:

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