STATE OF MICHIGAN

COURT OF APPEALS

BRUCE G. LYONS,

Garnishor Plaintiff-Appellee,

v

JIM MOCERI & SON, INC., and MARIANO MOCERI, JR., a/k/a MARIO MOCERI,

Defendants,

and

MOCERI PRODUCE, INC.,

Garnishee Defendant-Appellant.

UNPUBLISHED
March 16, 2006

No. 254575
Wayne Circuit Court
LC No. 98-817028-NO

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Garnishee defendant appeals as of right from an order granting plaintiff's motion for summary disposition and awarding plaintiff judgment against garnishee defendant in the amount of $25,015. We affirm.

Plaintiff formerly worked for defendant Jim Moceri & Son, Inc. After his employment was terminated, he filed a complaint alleging battery and violation of the Whistleblower's Protection Act, MCL 15.361 *et seq*., against defendants Jim Moceri & Son, Inc., and Mariano Moceri. The parties stipulated to binding arbitration, and the arbitrator awarded plaintiff joint and several damages of $80,000, plus attorney fees of $15,000, and $7,187.50 for the cost of arbitration. The trial court later entered a judgment confirming the arbitration award and awarding statutory interest.

Plaintiff subsequently filed three writs of garnishment on garnishee defendant, Moceri Produce, Inc.[1] On appeal, the parties reference three disclosure statements. Each disclosure indicates that garnishee defendant is obligated to make periodic payments to defendant Moceri

[1] Principal defendant Mariano Moceri is the president and sole shareholder of garnishee defendant. Principal defendant Jim Moceri & Son, Inc., is no longer in business.

that are subject to a higher priority writ or order for past due federal taxes. The calculation sheets show weekly earnings of $400, disposable earnings of $316.60, and amounts withheld for past due taxes of $7,800 on the first disclosure, $12,105 on the second, and $13,210.80 on the third. The amount subject to garnishment was listed as "0" on each calculation sheet.

Plaintiff deposed Mariano Moceri on September 3, 2003. In his deposition, Moceri acknowledged that garnishee defendant had not paid plaintiff any money in response to the writs. Moceri further acknowledged that no money had been withheld from his paychecks to satisfy a federal tax lien and that garnishee defendant had not yet paid any money toward that lien.

Plaintiff moved for summary disposition, arguing that garnishee defendant filed disclosures that were "patently false" and requesting judgment against garnishee defendant for the full amount of the underlying judgment. Following a hearing, the trial court awarded plaintiff a judgment for $25,015, the amount of the false statements in the three garnishment disclosures less a credit for monthly health insurance premiums paid by garnishee defendant on behalf of Moceri. Garnishee defendant now challenges this judgment.

This appeal concerns the interpretation of court rules and the trial court's grant of summary disposition. We review both issues de novo. *Nationsbanc Mortgage Corp v Luptak*, 243 Mich App 560, 563-564; 625 NW2d 385 (2000).

Garnishment actions are authorized by statute. MCL 600.4011(1). Courts may exercise the garnishment power "only in accordance with the Michigan court rules." MCL 600.4011(2); *Nationsbanc Mortgage Corp*, *supra* at 564. Pursuant to MCR 3.101(E), a writ of garnishment must be served upon the garnishee. Upon receipt of the writ, the garnishee must mail or deliver to the court, the plaintiff, and the defendant a verified disclosure within 14 days. MCR 3.101(H). Regarding periodic payments the garnishee is obligated to make to the defendant, the disclosure "shall indicate the nature and frequency of the garnishee's obligation," indicate "[i]f a writ or order with a higher priority is in effect" and, if a higher priority writ or order is in effect, "specify the court that issued the writ or order, the file number of the case in which it was issued, the date it was issued, and the date it was served." MCR 3.101(H)(2)(b) and (c). Within 14 days of being served with the disclosure, "the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee. The answers to the interrogatories or the deposition testimony becomes [sic] part of the disclosure." MCR 3.101(L)(1).

Garnishee defendant first makes several arguments regarding the timeliness of plaintiff's challenge to its disclosure statements. Garnishee defendant contends that plaintiff failed to challenge the first two disclosure statements within the 14-day period prescribed in the court rules and that plaintiff's discovery request was untimely with respect to all three disclosures. Therefore, garnishee defendant argues that the disclosures should be deemed as accepted by plaintiff and the facts contained within them must be accepted as true by the trial court.

The parties make conflicting claims on appeal regarding the timeliness of garnishee defendant's disclosure statements. It is undisputed that plaintiff filed the three writs of garnishment on January 23, 2003, May 2, 2003, and August 20, 2003. But garnishee defendant's claim that it timely filed disclosures to each of these writs is not supported by the record. The disclosures referenced by the parties in the motion for summary disposition and on appeal are dated May 3, 2003, August 1, 2003, and August 28, 2003. The first two disclosures contain a

certification that a copy was personally delivered or mailed to the court and to plaintiff or his attorney on the day the disclosure is dated. The signatures on the certifications for the first two disclosure statements appear to be that of garnishee defendant's attorney. The certification on the third disclosure indicates that a copy was faxed to plaintiff or his attorney on August 29, 2003, but does not indicate that a copy was mailed or delivered to the court, and is not signed. None of these disclosures are contained in the lower court record and they are not referenced in the lower court docket entries.

The record supports plaintiff's contention that the dates on the disclosure statements are not accurate. Plaintiff filed a default against garnishee defendant on June 16, 2003, stating that garnishee defendant failed to file disclosures in response to the writs issued January 23, 2003, and May 2, 2003. Plaintiff also moved for entry of a default judgment against garnishee defendant on June 19, 2003. Both plaintiff's default and motion for default judgment are contained in the lower court record and are referenced in the lower court docket entries.[2] The motion for default judgment went unanswered by garnishee defendant. Although the motion was noticed for hearing three times, the first two hearings were adjourned for reasons not apparent from the record and the motion was dismissed after the third hearing on August 14, 2003.[3]

Reviewing the issue de novo, we conclude that the record supports that plaintiff timely challenged the disclosures. It appears that the disclosures in response to the first two writs were given to plaintiff's attorney sometime after the August 14, 2003, hearing on plaintiff's motion for entry of a default judgment. The date when the third disclosure was delivered to plaintiff's attorney is not clear; however, we accept plaintiff's explanation that it was given to plaintiff's attorney on September 3, 2003, at the deposition. Although the certification on the third disclosure indicates that it was faxed to plaintiff or his attorney on August 29, this certification is not signed either by garnishee defendant or its attorney, and the disclosure form indicates that it must be either personally delivered or mailed to the plaintiff or his attorney.

After receipt of the disclosures, plaintiff had 14 days to contest the facts in the disclosure by either serving garnishee defendant with written interrogatories or noticing a deposition pursuant to MCR 3.101(L). Plaintiff noticed the deposition of Mariano Moceri on August 19, 2003. Therefore, plaintiff timely challenged the first two disclosures. Plaintiff arguably did not challenge the third disclosure in a timely fashion. However, plaintiff's attorney deposed garnishee defendant's president on the same day that he received the disclosure. It would have been pointless to notice another deposition within 14 days, especially since the third disclosure contains the same false statement as the first two.

Garnishee defendant also argues that, pursuant to MCR 3.101(M)(1) and (2), the trial court erred in granting summary disposition because there was a valid issue regarding its liability

---

[2] Garnishee defendant implies in its brief that plaintiff did not issue a default. While it is true that a default judgment against garnishee defendant was not entered, this was a matter of the trial court's discretion, *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 527; 672 NW2d 181 (2003), and was not caused by plaintiff's inaction.

[3] Plaintiff maintains that the motion for default was dismissed after garnishee defendant's attorney agreed to file the disclosures that are at issue in this appeal.

to plaintiff and the matter should have proceeded to trial rather than be decided by summary disposition. Citing MCR 3.101(M)(3), garnishee defendant also argues that the court erred in entering a judgment that was more than the amount of liability admitted in its disclosures.

MCR 3.101(M)(1) provides that the issue of garnishee defendant's liability to plaintiff is to be tried in the same manner as other civil actions. MCR 2.116(B)(1) allows a party to move for judgment on all or part of its claim and to move for summary disposition of a defense asserted against a party. Plaintiff sought summary disposition against garnishee defendant. The trial court did not indicate under which subrule it granted the motion, but it appears that MCR 2.116(C)(9) is the appropriate subrule to apply, because garnishee defendant's disclosure statements failed to state a valid defense to plaintiff's claims in the verified statements of the writs. A trial court may grant summary disposition under a subrule not raised by the moving party if neither party is misled. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). Further, this Court reviews summary disposition decisions de novo and may review a grant of summary disposition under the correct subrule. *Id*. at 313. In considering a motion under MCR 2.116(C)(9), a court considers "whether the garnishee defendant's defenses are 'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery.'" *Blue Water Fabricators, Inc v New Apex Co, Inc*, 205 Mich App 295, 299; 517 NW2d 319 (1994), quoting *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991).

In our de novo review, we conclude that the trial court did not err in granting plaintiff summary disposition or in its determination of the amount of the judgment. The verified statements in the three writs indicated that plaintiff had received a judgment against defendant Moceri for $102,187. Including interests and costs, the amount of the unsatisfied judgment was $155,995 as of December 31, 2002. These verified statements act as plaintiff's complaint against garnishee defendant. MCR 3.101(M)(2). In its three disclosures, garnishee defendant stated that it had paid the following amounts from Moceri's earnings in satisfaction of a higher priority order for past due federal or state taxes: $7,800, $12,105, and $13,210.80. Through the deposition testimony of Mariano Moceri, however, garnishee defendant admitted that it had not withheld any amounts from Moceri's paychecks to satisfy the past due tax bill and had not paid any amounts to the Internal Revenue Service in payment of the alleged lien. Indeed, it is not clear from the record that there was an actual tax lien or order in existence against garnishee defendant or Moceri personally. The disclosures do not specify the name of any court issuing a tax lien or order, the file number of a case in which a lien was issued, the date it was issued, and the date it was served, as required by MCR 3.101(H)(2)(c). The disclosure statements and Moceri's deposition testimony serve as the answer to plaintiff's complaint against garnishee defendant. MCR 3.101(L)(1) and (M)(2). Pursuant to MCR 3.101(0), the trial court could enter judgment against the garnishee defendant "as the facts warrant" in an amount not greater than the amount of the "unpaid judgment, interest, and costs as stated in the verified statement requesting the writ of garnishment."

In sum, the principal defendant Moceri avoided personal payment on the judgment against him, which led to plaintiff's attempts to collect through garnishee defendant, of which Moceri is both the president and sole shareholder. The garnishee defendant avoided answering the garnishment writs in a timely manner, forcing plaintiff to take a default against it. When disclosures finally were given to plaintiff, they were not filed with the trial court and contained

false statements regarding garnishee defendant's liability. The trial court entered a judgment against garnishee defendant for the amount of the false disclosures less an allowance for insurance premiums paid by garnishee defendant on behalf of the principal defendant Moceri and his family.

In light of the foregoing, we affirm the trial court's grant of summary disposition for plaintiff and the amount of the judgment.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot