STATE OF MICHIGAN

COURT OF APPEALS

FRED HODGINS, JANICE HODGINS and HODGINS KENNELS, INC.,

Plaintiffs-Appellants,

v

GEORGE BURGESS,

Defendant-Appellee.

UNPUBLISHED
August 17, 1999

No. 205052
St. Clair Circuit Court
LC No. 96-003308 CZ

Before: Doctoroff, P.J., Markman and J.B.Sullivan*, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from an order denying reconsideration of an order denying their motion to increase wage assignment installment payments. We reverse.

In 1986, plaintiffs obtained a judgment in a defamation action filed against defendant and The Times Herald Company.[1] In 1990, in order to satisfy the judgment, plaintiffs obtained a wage assignment order against defendant in the amount of $100 a week. At the time of the entry of the wage assignment order, defendant owned certain real estate on which there existed a lien in favor of plaintiffs. Defendant allegedly engaged in a fraudulent transfer of the property, and plaintiffs were ultimately unable to obtain any funds from that property. Accordingly, pursuant to MCL 600.6221; MSA 27A.6221, plaintiffs moved in the trial court to increase the amount of the wage assignment to the maximum amount permitted by 15 USC § 1673. In denying plaintiffs' motion, the trial court found that, while defendant's allegedly fraudulent transfer was a change in circumstances arguably justifying modification of the order, plaintiffs should have applied for the increase in 1993, when the change occurred.

Plaintiffs contend that the trial court erred in finding that MCL 600.6221; MSA 27A.6221 requires that the motion be brought at the time the change in circumstances occurred. We agree. Issues of statutory interpretation are reviewed de novo on appeal as a question of law. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 344; 578 NW2d 274 (1998). The primary goal when interpreting statutes is to effectuate the intent of the Legislature. *Id.*, at 346. In determining legislative intent, the reviewing court first looks to the plain language of the statute. *Id.*, at 346. If the language is clear and unambiguous, the

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Meyer Jewelry v Johnson*, 229 Mich App 177, 180; 581 NW2d 734 (1998).

MCL 600.6201; MSA 27A.6201 provides that a judgment may be paid in installments. *Meyer Jewelry, supra,* at 179. Where such payments are ordered, MCL 600.6221; MSA 27A.6221 provides for modification of those installments as follows:

> The judge may, on motion of either party, following due notice to the other, alter the amounts and times of payment of the installments from time to time when he *may deem it advisable and fair* [emphasis added].

The plain language of MCL 600.6221; MSA 27A.6221 indicates that the court may alter existing judgments "from time to time" when it is deemed "advisable and fair." The intent of the Legislature, as expressed in the plain language of the statute, was to provide a continuing means to alter a wage assignment order when circumstances changed which shifted the equities for either debtors or creditors. The Legislature's intent is apparent from the plain language of the statute, and judicial interpretation is neither warranted nor permitted. *Meyer Jewelry, supra.*

In this case, the trial court found that, while the circumstances had changed, plaintiffs waited too long to seek modification of the wage assignment order. The court *in effect* denied plaintiffs the relief requested based on the defense of laches. Laches is viewed as the equitable counterpart to the statute of limitations defense available at law. *Eberhard v Harper-Grace Hospital,* 179 Mich App 24, 35; 445 NW2d 469 (1989). The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant. *City of Troy v Papadelis (On Rem),* 226 Mich App 90, 96-97; 572 NW2d 246 (1997). The defendant must prove a lack of due diligence on the part of the plaintiff resulting in some prejudice to the defendant. *Id.*, at 97. Proving a lack of due diligence alone is not sufficient; the defense of laches does not apply unless the delay of one party has resulted in prejudice to the other party. *Id.* In determining whether a party is guilty of laches, each case must be determined on its own particular facts. *Id.*. Laches is an affirmative defense which is waived if not raised in the party's responsive pleading. *Badon v General Motors Corp,* 188 Mich App 430, 436; 470 NW2d 436 (1991). This Court reviews equitable decisions de novo, and reviews for clear error the facts supporting those decisions. *Webb v Smith (Aft Second Rem),* 224 Mich App 203, 210; 568 NW2d 378 (1997).

In defendant's answer to plaintiff's complaint for renewal of the December 6, 1986, judgment against him and for increased wage assignment in the full amount provided by 15 USC §1673, defendant stated:

> 7. In answer to paragraph 7 [alleging that the $100 wage assignment was insufficient to meet the interest on the original judgment and that, as a result, the judgment amount was increasing], the balances due and owing on the Judgment at the time wage [sic] assignment order was entered were of such a nature that the court ordered $100.00 per week wage assignment was then insufficient [sic] and Plaintiff cannot now complain.

* * * *

> 11. [Wherein plaintiffs state that the $100 wage assignment should be increased so that defendant's debt will decrease rather than increase] Denied as same is untrue. The amount of the wage assignment is governed pursuant to the Order of this Court previously entered.

Defendant did not, however, plead laches as an affirmative defense. Therefore, the defense is waived. *Badon, supra.*

At the hearing on plaintiffs' motion to increase the wage assignment, defendant argued that plaintiffs had already received money from the Times Herald, and that the doctrines of res judicata and law of the case prevent any increase. The trial court was not persuaded by defendant's argument but ruled against plaintiffs nonetheless. In this Court, defendant neither filed an appeal brief nor appeared at oral argument. Since the defense was waived, the trial court erred in resurrecting it. *Webb, supra.*

However, even if defendant had pled laches as an affirmative defense, thereby preserving it, we conclude that the trial court erred. Defendant has not shown, nor does our review of the record reveal, any prejudice to him. Without such prejudice, the defense of laches cannot succeed. *City of Troy, supra*. To the contrary, our review of the record indicates that it is plaintiffs who have arguably been prejudiced, not only by defendant's allegedly fraudulent transfer of his twelve waterfront parcels of real estate on which plaintiffs had a lien, but also by defendant's continuing refusals to answer questions in depositions, by his admitted destruction of records, by his conviction for embezzlement in another action and the resulting restitution he now owes over and above the nearly $400,000 to which the original judgment of $200,000 has grown in this case, by attempting to discharge the debt in this case in bankruptcy and by providing less than candid information to the court in his 1990 motion for installment payments. Defendant, through all his evasive tactics, has put a considerable burden on plaintiffs in that they have had to be involved in almost nonstop litigation in various courts trying to collect their judgment. The doors of equity are closed to someone whose hands are as unclean as defendant's, and the trial court erred in failing to so find. See, *Mudge v Macomb County*, 458 Mich 87, 109 n 23; 580 NW2d 845 (1998).

Reversed and remanded for entry of a wage assignment order in the maximum amount provided by 15 USC § 1673. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan

[1] The facts surrounding this action are reported in this Court's opinion in *Hodgins v The Times Herald Co,* 169 Mich App 245; 425 NW2d 522 (1988).