STATE OF MICHIGAN

COURT OF APPEALS

JOHN R. HOWELL,

Plaintiff,

v

JOHN R. HOWELL, INC.,

Defendant-Appellee,

and

AUTO OWNERS INSURANCE COMPANY, CAPITAL CITY INTERNATIONAL TRUCKS, INC., EASTLAND CONCRETE CONSTRUCTION, INC., HALI-BRITE, INC., J.P. MORGAN CHASE BANK, MICHIGAN ELECTRICAL EMPLOYEES PENSION FUND, and SPARTAN BARRICADING, INC.,

Defendants,

and

DAN'S EXCAVATING, INC.,

Appellant,

and

THOMAS E. WOODS, Receiver, and STANDARD ELECTRIC COMPANY,

Appellees.

UNPUBLISHED
February 9, 2010

No. 288058
Ingham Circuit Court
LC No. 05-000130-CK

Before: K. F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

In this corporate dissolution case, appellant Dan's Excavating, Inc. (Dan's Excavating) appeals by right the trial court's order requiring it to turn over certain funds to appellee Thomas Woods, the court-appointed receiver for insolvent corporation John R. Howell, Inc. (the corporation). We affirm.

I. Jurisdiction

Dan's Excavating first argues that the trial court lacked personal jurisdiction over it because it was not a party to the original action for dissolution. We disagree. A trial court's ruling regarding jurisdiction is reviewed de novo. *Electrolines, Inc v Prudential Assurance Co*, 260 Mich App 144, 152; 677 NW2d 874 (2003). Questions of statutory interpretation are also reviewed de novo as questions of law. *Id.* Personal jurisdiction deals with the authority of the court to bind the parties to the action. *Omne Financial v Shacks, Inc*, 226 Mich App 397, 402; 573 NW2d 641 (1997).

Relying on *Stowe v Wolverine Metals Specialties Co*, 242 Mich 624; 219 NW 714 (1928), Dan's Excavating asserts that initiation of a plenary action was the only proper method of obtaining personal jurisdiction. *Stowe* states the general rule with respect to an action by a receiver in summary proceedings:

> We recognize the rule contended for by appellant's counsel that the receiver may not ordinarily, through a summary proceeding in the receivership case, and without a plenary suit, take into his possession property in the possession when the receivership proceedings are instituted of one not a party to the suit, a stranger to the record, and who claims adversely to the party for whom the receiver is appointed. Where one in possession of property in good faith denies the right of the one for whom a receiver is appointed, and he is neither agent or in privity with such one, and is not made a party, he is a stranger to the record, and a plenary suit is the appropriate remedy to settle his rights and those of the receiver. [*Id*. at 627-628 (citations omitted).]

However, this rule is not applicable to Dan's Excavating because it was made a party to this action as a creditor when the trial court entered its order of February 2, 2005, appointing Woods as the temporary receiver and directing the parties to show cause why the corporation should not go into receivership. Moreover, notice of the March 7, 2005, hearing was sent to the attorney for Dan's Excavating—at the time, Bruce Lazaar. MCR 3.611(C).[1]

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[1] MCR 3.611(C) governs notice in corporate dissolution actions, and provides that "[p]rocess may be served as in other actions, or, on the filing of the complaint, the court may order all persons interested in the corporation to show cause why the corporation should not be dissolved, at a time and place to be specified in the order, but at least 28 days after the date of the order. Notice of the contents of the order must be served by mail on all creditors and stockholders at least 28 days before the hearing date, and must be published once each week for 3 successive weeks in a newspaper designated by the court."

Furthermore, in the receivership order, the trial court directed the receiver to collect funds due to the corporation. Pursuant to the order, the receiver sent Dan's Excavating a letter requesting payment for three completed contracts. Dan's Excavating does not dispute that it received the letter in which it was also informed of the receivership order. Notice of the receivership order was sufficient to require compliance with it. *In re Contempt of Cornbelt Beef Corp*, 164 Mich App 114, 120; 416 NW2d 696 (1987). In addition, MCR 2.105(D), which sets forth the methods of service of process of a complaint and summons on a private corporation, need not be followed regarding notice of a receivership order. *Cornbelt Beef Corp*, 164 Mich App at 120. Lastly, Dan's Excavating also received actual notice of the receivership when the "Notice to Creditors" was mailed to its registered office. Thus, there is no merit to the argument that the trial court did not acquire personal jurisdiction because Dan's Excavating was not properly served with process. Dan's Excavating was properly subjected to the jurisdiction of the court.

Contrary to the argument of Dan's Excavating, MCR 3.611(E) does not compel a different result. The rule provides that a separate and independent action "*may* be brought by the receiver." (Emphasis added.) The term "may" denotes a discretionary action. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Thus, the court rule allows a receiver to attempt to collect funds by filing a plenary action, but does not require it.

II. Set-Off

Dan's Excavating also argues that the trial court erred by finding that it had no right to assert set-off as a defense to the receiver's claim of payment. It asserts that it had a contractual, statutory, and common-law right to a set-off. Whether Dan's Excavating had a right to assert a set-off is a question of law. We review de novo questions of law. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

This action is governed by chapter 8 of the Business Corporation Act (BCA), MCL 450.1801 *et seq*. (dissolution), chapter 35 of the Revised Judicature Act (RJA), MCL 600.3501 *et seq*. (voluntary dissolution and winding up of corporations), and MCR 3.611.[2] "The receiver derives his authority from statutes and court rules and from the order of appointment and specific orders which the appointing court may thereafter make." *Band v Livonia Assoc*, 176 Mich App 95, 108; 439 NW2d 285 (1989).

Absent statutory authority, set-off is a matter of equity. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). At common law, set-off was allowed against a receivership. See, e.g., *Ellis v Phillips*, 363 Mich 587; 110 NW2d 772 (1961); *Reichert v Fidelity Bank & Trust Co*, 257 Mich 535; 242 NW 236 (1932). This was because the receiver took title to all asserts of the corporation subject to existing rights and equities of the creditors, including set-off. See, e.g., *Gray v Lincoln Housing Trust*, 229 Mich 441, 446-448; 201 NW 489

[2] The dissolution provisions of the BCA are in addition to those provided in chapter 35 of the RJA. *In re Dissolution of Esquire Products Int'l, Inc (On Remand)*, 145 Mich App 106, 109; 377 NW2d 356 (1985).

(1924); *In re Farmers' & Merchants' Bank of Lawrence*, 194 Mich 200, 207; 160 NW 601 (1916).

However, we conclude that the BCA has superseded the common law with respect to the issue of set-off. As this Court stated in *Walters v Leech*, 279 Mich App 707, 709; 761 NW2d 143 (2008), quoting *USAA Ins Co v Houston Gen Ins Co*, 220 Mich App 386, 389-390; 559 NW2d 98 (1996):

> "The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature in enacting a provision. Statutory language should be construed reasonably, keeping in mind the purpose of the statute. The first criterion in determining intent is the specific language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written."

In construing a statute, the Legislature is deemed to have acted with an understanding of the common law in existence before the legislation was enacted. The common law remains in force until amended or repealed, and whether a statutory scheme preempts or amends the common law is a question of legislative intent. Legislative amendment of the common law is not lightly presumed. *Walters*, 279 Mich App at 710. When a comprehensive statute prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will generally be found to have intended that the statute supersede and replace the common law dealing with the subject. *Id*. at 711.

MCL 450.1841a(3) provides:

> A claim against the dissolved corporation is barred if either of the following applies:
>
> (a) If a claimant who was given written notice under subsection (1) does not deliver the claim to the dissolved corporation by the deadline.
>
> (b) If a claimant whose claim was rejected by a written notice of rejection by the dissolved corporation does not commence a proceeding to enforce the claim within 90 days from the effective date of the written notice of rejection.

The only exception to the deadline is for good cause upon petition to the court. MCL 450.1851(2). Only existing claims against the dissolved corporation may be filed. For purposes of MCL 450.1841a, "'existing claim' means any claim or right against the corporation, liquidated or unliquidated. It does not mean a contingent liability or a claim based on an event occurring after the effective date of dissolution." MCL 450.1841a(4). Chapter 8 of the BCA does not provide for set-off. Moreover, such a provision would be contrary to the purpose of the statutory scheme, which is to use the dissolving corporation's assets for the benefit of all creditors without preferential treatment. See *In re Dissolution of Esquire Products Int'l, Inc (On Remand)*, 145 Mich App 106, 112; 377 NW2d 356 (1985) (noting that the "primary purpose of the provisions relating to dissolution is to protect the rights of all creditors by providing for the payment of debts 'ratably', and to prevent individual creditors from procuring a preferment by

pursuing independent action to the detriment of other creditors"). Allowing a set-off would give one creditor an opportunity to recover a greater portion of his claim than other creditors.

Furthermore, the Legislature has the power to limit or eliminate parties' freedom to contract on certain matters. Specific statutory language and overriding public policy are bases to negate contractual language. See *Zahn v Kroger Co of Michigan*, 483 Mich 34, 39-40; 764 NW2d 207 (2009). By requiring all claims to be filed by a specified deadline or be forever barred, MCL 450.1841a evinces a legislative intent to negate any contractual language to the contrary. Indeed, this Court has held that the Legislature intended for all creditors to pursue their claims as provided in the BCA, and that failure to timely file a claim bars a creditor from pursuing it.[3] *Esquire Products*, 145 Mich App at 113-114. Therefore, contrary to the assertion of Dan's Excavating, this situation is controlled by the BCA—*not* by its contracts with the corporation.

No one disputes that upon the receiver's appointment, Dan's Excavating had a right to seek damages it incurred regarding the Michigan Avenue project. According to Dan's Excavating, the corporation's breach occurred before the receiver was appointed. Thus, it had an existing claim. The record shows that the notice to creditors containing the claim-filing deadline was mailed to Lazaar and the registered office of Dan's Excavating. Thus, Dan's Excavating is presumed to have received the notice. See *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). Dan's Excavating did not present any evidence to rebut this presumption. Accordingly, because Dan's Excavating failed to file a claim by September 15, 2005, it was barred from subsequently asserting a right to contractual damages.[4] MCL 450.1841a(3). Further, the BCA vests the trial court with discretion to enter any necessary orders and judgments with respect to the matter of corporate dissolution. MCL 450.1851. The trial court specifically stated in the receivership order that "set-off of any obligations owing to Howell, against any claim against Howell" would not be permitted.

We also reject Dan's Excavating's argument that it has a statutory right to set-off pursuant to MCL 600.5235, which provides:

> In all cases of mutual debts or mutual credits between the estate of an assignor and a creditor, the account shall be stated and 1 debt shall be set off against the other and the balance only shall be allowed or paid. A set-off or counter claim shall not be allowed in favor of any debtor of the assignor which is not provable against his estate, or which was purchased by or transferred to such debtor after the filing of the assignment or prior to the filing thereof with a view to such use and with knowledge or notice that such assignor was insolvent.

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[3] Although *Esquire Products* involved the predecessor provisions contained in the former MCL 450.1841 and MCL 450.1842, these statutory differences do not alter our conclusion.

[4] Dan's Excavating never asserted that it had good cause for failing to file a claim by the deadline.

MCL 600.3510(1), the general receiver statute, provides in part that a receiver "has all the powers, authority and remedies of an assignee for the benefit of the creditors under RJA chapter 52 . . . ." Furthermore, MCL 600.3510(2) provides that "[t]he provisions of law regulating common law assignments with reference to . . . the making of set-offs . . . apply and shall be followed," with certain exceptions not applicable here. Therefore, Dan's Excavating asserts that MCL 600.5235 applies in this case and affords it a statutory right to set-off. We disagree.

> Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. "Statutes relate to the same subject if they relate to the same person or thing or the same class of persons or things." The object of the *in pari materia* rule is to give effect to the legislative intent expressed in harmonious statutes. [*Walters*, 279 Mich App at 709-710 (citations omitted).]

When two provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific provision prevails. *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008). Also, a more recently enacted law prevails over an earlier one, especially if the statutes are in pari materia. *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). "This rule is particularly persuasive when one statute is both the more specific and the more recent." *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 280; 597 NW2d 235 (1999). MCL 600.5201 *et seq*. pertains to common-law assignments for the benefit of creditors, whereas chapter 8 of the BCA is both more specific and more recently enacted. Therefore, the provisions contained in chapter 8 of the BCA must prevail over the set-off provision in MCL 600.5235 in this context.

For these reasons, the trial court did not err by determining that Dan's Excavating had no right to a set-off in this case.

III. Sanctions

Lastly, in light of our conclusion that the trial court did not err by ordering Dan's Excavation to turn over to the receiver the funds it owed to the corporation, we find no merit in Dan's Excavating's claim that it was entitled to sanctions under MCR 2.114(F) because the receiver's show cause motion was frivolous.

To the extent that appellees argue that they were entitled to sanctions at the trial court level pursuant to MCL 600.1721, this issue is not properly before this Court because (1) appellees did not request sanctions pursuant to MCL 600.1721 below, and (2) appellees have not raised this issue in a cross appeal. See *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). Further, we deny appellees' request for appellate sanctions pursuant to MCR 7.216(C). A request for such sanctions must be made in a motion filed pursuant to MCR 7.211(C)(8), and a request in any other pleading, or in a brief, does not constitute a motion for purposes of that rule. MCR 7.211(C)(8); *Prentis Family Foundation*, 266 Mich App at 60.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra