STATE OF MICHIGAN

COURT OF APPEALS

RAINBOW CONSTRUCTION COMPANY, INC.,

Plaintiff/Counterdefendant-Appellant,

v

TOWNSHIP OF HOWELL,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
December 21, 2021

No. 354213
Livingston Circuit Court
LC No. 12-026975-CK

Before: STEPHENS, P.J., and BORRELLO and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order on remand following earlier appeals in *Rainbow Constr, Inc v Howell Twp*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2017 (Docket Nos. 332621, 333336, 335140, & 335142) (*Rainbow Constr I*), requiring defendant to reimburse plaintiff for sanctions previously collected but erroneously awarded, and declining to reach certain other issues. We affirm.

This litigation arose "from a construction contract dispute between defendant, the Township of Howell, and plaintiff, Rainbow Construction, Inc., who was awarded a contract to extend sewer services and install drain culverts and related structures." *Id.*, p 1. As relevant to this appeal, the trial court awarded defendant attorney fees and costs as both case-evaluation sanctions and sanctions for frivolous pleadings, and this Court affirmed in part but reversed "the trial court's findings that Rainbow Construction made frivolous filings," vacated "the attendant awards of sanctions," and remanded the case to the trial court for further proceedings. *Id.*, p 13.

On remand, plaintiff interpreted this Court's remand order as calling for continued litigation of issues stemming from proceedings that predated the earlier appeals, including whether defendant and its attorney used garnishment procedures improperly while endeavoring to collect defendant's judgment. Plaintiff maintained that the remedy for the alleged abuses of garnishment procedures required defendant to return all garnished funds—not just those later determined to have been erroneously awarded—and have defendant begin collection procedures anew. The trial court took a narrower view of the scope of its obligations on remand, and confined itself to adjusting the judgment in accordance with this Court's earlier opinion. This appeal followed.

I. SCOPE OF REMAND

Plaintiff argues that the trial court failed to comply with this Court's remand order by limiting proceedings to allocating the funds defendant was ordered to return to plaintiff, and otherwise declining to entertain issues relating to defendant's 2016 collection efforts. We disagree.

Proceedings on remand to circuit court are limited by the scope of the remand. *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 115 Mich App 356, 365; 320 NW2d 376 (1982). The rule of mandate provides that any court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it, but may decide anything not foreclosed by the mandate. *Int'l Business Machines Corp v Dep't of Treasury*, 316 Mich App 346, 352; 891 NW2d 880 (2016). "Whether the lower court properly followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 406; 952 NW2d 586 (2020) (quotation marks and citation omitted).

The trial court issued two orders on September 13, 2016, which were among the four orders engendering the consolidated appeals that this Court decided in *Rainbow Constr I*. One of those orders denied objections to garnishment, which underlay Docket No. 335142, and over which this Court noted that plaintiff failed to properly raise issues regarding execution. The other September 13, 2016 order sanctioned plaintiff for raising frivolous objections to garnishment, which this Court reversed in Docket No. 335140. In doing so, this Court noted that plaintiff's sole appellate objection to the trial court's September 13, 2016 orders concerned whether " 'the lower court properly award[ed] sanctions in accord with accepted standards,' " and that the "only award of sanctions embodied in the two September 13, 2016 orders . . . was the one ordering plaintiff to pay $1,365 to [defendant] for having filed frivolous objections to garnishment." *Rainbow Constr I*, unpub op at 11. This Court then reiterated that it "need not address issues not set forth in the statement of questions." *Id.*, citing MCR 7.212(C)(5). In a footnote, this Court stated that plaintiff "asserts that [defendant] recovered the funds subject to garnishment in violation of the 21-day automatic stay on execution of judgments," but that this argument "concern[ed] enforcement of sanctions orders, not the propriety of the award of sanctions which is the issue raised on appeal." *Rainbow Constr I*, unpub op at 12 n 5. This Court followed that footnote with another one noting that "[t]he stipulated order awarding [defendant] attorney fees and costs included case evaluation sanctions under MCR 2.403(O)," and that, "[b]ecause [plaintiff] has not challenged that part of the award, our determination that no sanctions should have been awarded over frivolous pleading does not render moot issues relating to how [defendant] will collect fees and costs awarded as case evaluation sanctions." *Rainbow Constr I*, unpub op at 13 n 6. Plaintiff asserts that, with the latter statement, this Court indicated that such issues were subject to litigation on remand.

The trial court, however, thought otherwise. The court acknowledged that this Court had stated that the issue of how defendant would collect fees and costs arising from case-evaluation sanctions was not rendered moot by this Court's decision disapproving the awards of fees and costs arising from findings of frivolousness, but reasoned that "the issue is rendered moot for another reason," explaining:

> Defendant had already collected the award, and this Court rejected Plaintiff's challenges to the collection on October 4, 2016. Plaintiff never appealed the issue

> of the collection, nor timely filed a motion for reconsideration on that issue. Defendant's collection of the fees and costs awarded as case evaluation sanctions has already occurred and is valid. Additionally, nowhere did the Court of Appeals opinion state that this Court was to address the issue of collection on remand—only that the Court of Appeals itself did not address the issue. There are no issue[s] remaining on remand for the Court to address.

We agree with the trial court that this Court, with its observations in a footnote, only acknowledged that, because proceedings on remand would require adjustments in the parties' relative financial positions, some of plaintiff's objections concerning defendant's alleged collection improprieties, over which this Court expressed no opinion, might remain in play. Indeed, by stating that its resolution of the earlier appeal "does not render moot issues relating to how [defendant] *will* collect fees and costs awarded as case evaluation sanctions," *Rainbow Constr I*, unpub op at 13 n 6 (emphasis added), this Court signaled that it only envisioned potential litigation of collection issues that might arise from post-remand activities. Plaintiff's suggestion that the trial court failed to respond to this Court's remand order when it determined that issues over collection efforts dating from 2016 were no longer actionable is therefore inapt.

For these reasons, we will not give plaintiff a second opportunity to present issues relating to defendant's 2016 collection efforts that plaintiff argued, but failed to properly present for consideration, in the earlier consolidated appeals in this case. We accordingly decline to consider plaintiff's issues concerning whether defendant or its attorney violated a stay of proceedings in that regard. Further, we will consider plaintiff's issues relating to whether opposing counsel committed contempt of court, and whether plaintiff was entitled to an accounting, only insofar as those issues are premised on post-remand activities.

II. CONTEMPT

During the initial proceedings on remand, plaintiff expressly declined to ask the trial court to find defendant's attorney in contempt, but finally did so in its motion for reconsideration by asking the trial court to hold a hearing on the issue. An issue first presented in a motion for reconsideration is not properly preserved. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We therefore decline to afford plenary consideration to plaintiff's protestations regarding contempt. In any event, we find them unpersuasive.

Plaintiff frames this issue only as asking whether defense counsel's "actions . . . in attempting execution on plaintiff's bank account [were] contemptuous," as if asking this Court to make its own determination of contempt. Plaintiff also reminds this Court that "[a]ll Michigan courts of record, *including the Court of Appeals*, . . . have the power to address contempt and respond within the limits of the applicable statute, MCL 600.1701, which codifies the inherent powers of the court." To the extent that plaintiff is asking this Court to find defense counsel in contempt, the request is inapt because plaintiff accuses opposing counsel of no misconduct in connection with the proceedings before this Court, and because, for purposes of practice before this Court, "[a] party's request for . . . disciplinary action . . . must be contained in a motion filed under" MCR 7.211(C)(8), and such "[a] request that is contained in any other pleading, including a brief . . . , will not constitute a motion under this rule." MCR 7.211(C)(8).

However, by pointing out that it raised this issue as part of its motion for reconsideration below, plaintiff seems to clarify that its appellate objection is that the trial court declined to hold a hearing for the purpose of determining whether defendant's attorney was in contempt of court. In arguing this issue on appeal, however, plaintiff points out only that there are processes set forth in "the rules and statutes governing the enforcement of judgments by execution and garnishment, designed in the final analysis to afford due process to the parties involved," and asserts that "[c]ounsel for the defendant simply disregarded the process from beginning to end," without specifying the activity allegedly constituting contempt. However, in both its motion for reconsideration and at oral arguments below, plaintiff made issue of actions by defense counsel that took place in connection with only the 2016 collection efforts.

The trial court's post-remand order denying reconsideration addressed those allegedly improper actions in the following:

> Plaintiff is asking . . . for a hearing for sanctions against Defendant and Defendant's counsel for alleged violations of two Court Orders, one dated June 3, 2016, the other dated September 13, 2016. . . . Plaintiff lacks standing to request that the Court sanction Defendant or [defense counsel]. Plaintiff did not suffer any additional harm as the result of [defense counsel's] being the recipient of the check from PNC Bank. Additionally, Plaintiff does not explain how Defendant has violated the June 3, 2016 Order or even which provision(s) were violated. Plaintiff argues that counsel for Defendant violated the September 13, 2016 Order by garnishing funds from Plaintiffs PNC Bank account on August 15, 2016, but this Court rejects the argument that such action, taken before entry of the Order it purportedly violates, is a sanctionable offense. If anything, the Order, which denied Plaintiff's objections to the garnishment, served to endorse the garnishment which had occurred the month before.

The trial court further addressed concerns about the possible mishandling of client funds at a hearing following plaintiff's motion for reconsideration. At that hearing, defendant's attorney explained as follows:

> [T]he amount that . . . the Court ordered to be returned back to [plaintiff], that check was cut, [defendant's treasurer] signed that as the treasurer, that check was negotiated, despite the fact that . . . [plaintiff] took advantage (indiscernible) and also because the amount that we retained was the exact amount that they (indiscernible) appropriate for case evaluation sanctions, which they did not appeal, so . . . I honestly don't know what this about, it has something to do with the garnishment that happened, but as far as I understand it, this case should be over.

The court then put defendant's treasurer under oath, who testified that a check for $40,652.79 from defendant to plaintiff, or the latter's attorney, was cashed and cleared defendant's bank. Afterwards, the trial court stated that it was "satisfied based upon the representation by [defense counsel] and [defendant's treasurer] that . . . that check was cashed for $40,652.79." The trial court further explained:

> Since the . . . funds initially garnished by [defendant] totaled $121,104.79, less the $80,452.00 for case evaluation sanctions that were awarded to [defendant]. [Defendant] was required to refund the frivolous award sanctions in the amount of $40,652.79 to plaintiff. Counsel for [defendant] indicated that the . . . treasurer indicated that a check was issued and the funds in the amount of $40,652.79 had been transferred to plaintiff through plaintiff's attorney . . . .

On appeal, plaintiff does not offer argument or record citations to show that the trial court erred by concluding that the matter of defendant's repaying certain funds it had collected to plaintiff was satisfactorily concluded. "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). See also *Denhof v Challa*, 311 Mich App 499, 521; 876 NW2d 266 (2015) ("When an appellant fails to dispute the basis of a lower court's ruling, we need not even consider granting the relief being sought by the appellant.").

For these reasons, we reject plaintiff's arguments concerning behavior on the part of opposing counsel allegedly constituting contempt of court.

III. ACCOUNTING

Plaintiff argues that the trial court erred when it denied plaintiff's request for a formal accounting in connection with defendant's collection efforts. We disagree.

A trial court's decision whether to order an accounting is reviewed for an abuse of discretion. See *Birney v Ready*, 216 Mich 7, 16; 184 NW 462 (1921) (concluding that "it was within the discretion of the court to order an accounting if asked reserving judgment thereon until the same was had").

We summarized in Part II the courtroom exchanges relating to how defendant collected the original judgment in its favor, then satisfied its post-remand obligation to repay certain funds to plaintiff. At the conclusion of the April 16, 2020 proceeding on remand, the trial court stated:

> An accounting must be made following the delivery of a garnished property . . . . Defendant attaches with their motion a photocopy of a check . . . dated September 28, 2016, and payable to [defendant]. However . . . in the court file, the only check found is an exhibit in an earlier brief by Defendant, and that check is dated August 15, 2016, and is payable to [defendant's attorney].
>
> A garnishee disclosure was also filed as part of the same exhibit. The disclosures state both that the garnishee mailed or delivered a copy of the writ of garnishment to the Defendant on 8/15 of 2016, and that the garnishee was unable to mail or deliver a copy of the writ of garnishment to the Defendant, which would have been the Plaintiff in this matter.
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> * * *
>
> What appears to have happened is . . . that on August 15th, 2016, PNC Bank, which was Plaintiff's bank, wrote a check for $121,104.79 to [defendant's attorney]. Then

> on September 28th, 2016 . . . the bank for [defense counsel's] firm, his IOLTA trust fund account, transferred the same amount to [defendant].
>
> However the existence of the []checks should be sufficient . . . to proof [sic] an accounting of the disposition of these funds. . . . The matter can be cleared up, and it has been by [defense counsel's] own information to the Court.

Thereafter, in its order denying reconsideration, the trial court acknowledged that plaintiff requested "an accounting of funds garnished from Plaintiff's PNC Bank account," and disposed of the issue by stating that "[t]he accounting was already provided by . . . Counsel for Defendant, on the record at the April 16, 2020 hearing."

As noted, at a later hearing the trial court noted that defendant "was required to refund the frivolous award sanctions . . . to plaintiff," and that defendant's treasurer "indicated that a check was issued and the funds . . . had been transferred to plaintiff through plaintiff's attorney."

In arguing that it was entitled to a formal accounting, and implying that the proceedings on the record did not satisfy that requirement, plaintiff cites MCR 3.101(O)(3) for the proposition that garnishment proceedings involving a bank account require "employing the services of an officer to seize, apply the funds to the debt, and report or account." The subrule cited states as follows:

> If the garnishee is chargeable for specific property that the garnishee holds for or is bound to deliver to the defendant,[1] judgment may be entered and execution issued against the interest of the defendant in the property for no more than is necessary to satisfy the judgment against the defendant. The garnishee must deliver the property to the officer serving the execution, who shall see, apply, and account as in other executions. [MCR 3.101(O)(3).]

However, that subrule is not applicable because it concerns "specific property" subject to delivery, as opposed to money, which is fungible. See *Lewis Estate v Rosebrook*, 329 Mich App 85, 104; 941 NW2d 74 (2019) (stating that "the funds that make up the corpus are, as all legal tender is, wholly fungible, thereby defeating any action to return the precise property taken"); 10A Michigan Pleading & Practice (2d ed), § 75:116, pp 820-822 (distinguishing situations involving a "garnishee . . . chargeable for specific property" from those involving a "money judgment against the garnishee," which "is simply an ordinary money judgment and as such is enforceable by execution or such other process as would be available in connection with an ordinary personal judgment for money").

Plaintiff also asserts that the trial court's statement "that defendant and counsel furnished an accounting at the hearing on April 16, 2020, is an acknowledgment that they were obligated to account and didn't do so in timely fashion." But this objection concerns the timing of the accounting, and the issue before this Court is whether plaintiff was entitled to one in the first

[1] The garnishee-defendant in this unusual circumstance is plaintiff.

instance.[2] Plaintiff further argues that the April 16, 2020 oral accounting was "deficient for not having acknowledged and explained the numerous failures to collect as the rules and statutes required." This argument, however, relates to defendant's 2016 collection efforts, which, for the reasons discussed earlier, will not be considered for purposes of this appeal, and plaintiff does not otherwise cite any post-remand actions as having bearing on its continued demand for an accounting. Accordingly, we affirm the trial court's decision not to order an additional accounting.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Cynthia Diane Stephens
/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien

[2] As this Court noted in its earlier opinion in this case, "This Court need not address issues not set forth in the statement of questions presented." *Rainbow Constr I*, unpub op at 11, citing *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1996); MCR 7.212(C)(5).