

STATE OF MICHIGAN
COURT OF APPEALS

SYSTEMS & SERVICES TECH, INC.,

Plaintiff-Appellant,

v

GUSTAV M. DABRINGHAUS,

Defendant-Appellee.

UNPUBLISHED

April 24, 2012

No. 303320

Livingston Circuit Court

LC No. 08-023874-PD

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

In this case involving an action for claim and delivery and garnishment, plaintiff, Systems & Services Technologies, Inc., appeals as of right the trial court's order reducing the deficiency of defendant, Gustav M. Dabringhaus. Because we conclude that the trial court's reduction of the deficiency was contrary to MCR 3.101(K)(1), we reverse.

Plaintiff filed a complaint for claim and delivery asserting it was entitled to possession of a 1999 Winnebago. A default judgment was entered against defendant in the amount of \$140,934.53. Plaintiff subsequently obtained and sold the Winnebago, and the judgment balance was reduced by the sale price. Request and writ for garnishments entered January 14, 2011 to Fifth Third Bank and Comerica Bank show that the amount of the unsatisfied judgment was \$128,906.75. Fifth Third Bank responded to the request, and indicated that defendant had no accounts with it. Comerica Bank responded, and indicated that defendant had a checking account with it and that \$104 would be withheld.

Defendant filed an objection to garnishment asserting that "the garnishment was not properly issued or is otherwise invalid for the following reason(s): collateral not sold for fair market value." A hearing on defendant's objection was noticed for March 10, 2011. A garnishment release was entered March 16, 2011, indicating it was approved by plaintiff on March 9, 2011. This released the only existing garnishment in the case.

Plaintiff did not appear at the hearing on defendant's objection to garnishment. At the hearing, defendant argued that the sale of the Winnebago was not commercially reasonable. Defendant testified that he was informed the Winnebago was sold for \$30,000, that the blue book price for similar vehicles was higher, and that a similar vehicle for sale in the area was priced higher. Based on defendant's testimony, the trial court ordered that \$106,000 be applied to the account and that the deficiency be reduced accordingly.

On appeal, plaintiff argues the trial court's order reducing the judgment violated MCR 3.101(K). Defendant does not disagree that the trial court's action was contrary to the court rule, but argues that plaintiff waived the issues raised on appeal because it was aware of the substance of defendant's objection, it was served with the objection and notice of hearing, and plaintiff failed to appear at the hearing.

The interpretation of the court rules is a question of law that we review de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). "Court rules are subject to the same rules of construction as statutes." *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 311; 725 NW2d 364 (2006) (citation omitted). When the plain language of a court rule "is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.* (quotation omitted).

Garnishment is authorized by statute, but court rules govern the procedural aspects of the process. *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Servs*, 201 Mich App 301, 305; 506 NW2d 279 (1993). MCR 3.101(K)(1) addresses objections to garnishment and provides, "[o]bjections may only be based on defects in or the invalidity of the garnishment proceeding itself, and may not be used to challenge the validity of the judgment previously entered." MCR 3.101(K)(2) provides that objections "shall" be based on certain enumerated grounds.

We conclude that defendant's objection based on the sale price violated MCR 3.101(K)(1) because it did not follow the plain language of the rule and instead challenged the validity of the judgment contrary to the plain language of the rule. *Valeo*, 272 Mich App at 311. Further, MCR 3.101(K)(2) states that objections *shall* be based on certain grounds. The word "shall" requires mandatory action. *Macomb Co Rd Comm v Fisher*, 170 Mich App 697, 700; 428 NW2d 744 (1988). Defendant's objection violated the plain language of MCR 3.101(K)(2) because it was not based on any of the listed grounds. *Valeo*, 272 Mich App at 311. Because defendant's objection to garnishment violated the plain language of MCR 3.101(K), the trial court erred in granting the objection and reducing the amount of the unsatisfied judgment.

Further, we reject defendant's argument that plaintiff waived its right to challenge the trial court's reduction of the judgment by failing to appear at the garnishment hearing. Waiver is an "intentional and voluntary relinquishment of a known right." *Walters v Nadell*, 481 Mich 377, 384 n 14; 751 NW2d 431 (2008) (quotation omitted). We conclude that plaintiff's failure to appear at the hearing regarding defendant's objection to garnishment after releasing the only existing garnishment is not an expression of an intent to relinquish a known right.¹

¹ We further note that during the hearing on March 10, 2011, regarding defendant's objection to the garnishment, defendant informed the trial court that he received notice from plaintiff that it would not be attending the hearing because it released the garnishment to which defendant was objecting. The communication sent to defendant also indicates that the trial court clerk was notified by plaintiff that it would not be attending the hearing and plaintiff attached the garnishment release approved March 9, 2011. The release was later entered on March 16, 2011.

In light of our determination that reversal is proper on the basis of MCR 3.101(K), we need not address plaintiff's second argument regarding whether the sale of the Winnebago was commercially reasonable.

Reversed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad