SUMMARY
April 8, 2021

2021COA46

No. 19CA2307, *AA Wholesale Storage, LLC v. Michael Swinyard* — Civil Procedure — Execution and Proceedings Subsequent to Judgment — Order to Apply Property on Judgment — Choses in Action

A division of the court of appeals holds that a district court has discretion to grant or deny a motion for turnover of property under C.R.C.P. 69(g). The division concludes that the district court properly exercised its discretion in denying plaintiff's turnover motion. The division therefore affirms the district court's order.

COLORADO COURT OF APPEALS **2021COA46**

Court of Appeals No. 19CA2307
City and County of Denver District Court No. 17CV31409
Honorable David H. Goldberg, Judge

AA Wholesale Storage, LLC,

Plaintiff-Appellant,

v.

Michael Swinyard,

Defendant-Appellee.

ORDER AFFIRMED

Division A
Opinion by JUDGE BERGER
Dailey and Navarro, JJ., concur

Announced April 8, 2021

Brown Dunning Walker Fein PC, Neal K. Dunning, Denver, Colorado, for Plaintiff-Appellant

Van Remortel LLC, Fred Van Remortel, Littleton, Colorado, for Defendant-Appellee

¶ 1 AA Wholesale Storage, LLC (AA) has been unsuccessful in collecting its judgment against Michael Swinyard. During this process, AA learned that Swinyard was in the early stages of litigation against third parties in an unrelated civil action. AA moved under C.R.C.P. 69(g) for a turnover of Swinyard's claims in the hope of applying the proceeds of that litigation to satisfy its judgment. The district court denied the motion, and AA appeals.

¶ 2 We first conclude that we have before us a final, appealable order, conferring appellate jurisdiction. We then conclude that the district court properly exercised its discretion in denying AA's postjudgment motion. We therefore affirm the order.

I. Background

¶ 3 In July 2017, the court entered default judgment against Swinyard in the amount of $49,091.13 (plus interest) for the nonpayment of a debt on a commercial lease. Since then, AA has made multiple unsuccessful attempts to collect the judgment, including garnishment of Swinyard's wages.

¶ 4 At some point, AA discovered that Swinyard was prosecuting a civil action against unrelated third parties for breach of contract,

unjust enrichment, and foreclosure of a mechanic's lien. AA moved under C.R.C.P. 69(g) for an order requiring Swinyard to turn over his claims — that is, his choses in action. A chose in action is a "right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action." *Ford v. Summertree Lane Ltd. Liab. Co.*, 56 P.3d 1206, 1209 (Colo. App. 2002) (quoting *City & Cnty. of Denver v. Jones*, 85 Colo. 212, 214, 274 P. 924, 924 (1929)). AA sought to litigate Swinyard's claims itself and apply any proceeds from the litigation to pay its judgment.

¶ 5 The court held a hearing in October 2019, at which it orally denied AA's motion. The court reasoned:

> The mechanic's lien, like malpractice, are claims that are individual or that you are going to need to prove up the value of the services rendered. We no longer allow indentured servitude or can require somebody to prosecute something that they don't want to if in fact that is how it turns out. Obviously, I can enter an order, if properly postured before me, such that net proceeds realized from any collection activities, net of any attorneys fees and out of pocket costs, be turned over to [AA] in [Swinyard's other] case. But because it is a mechanic's lien action and it is personal and

> the counterclaims against him are such that that is really the only thing I can do.
>
> . . . .
>
> [B]ased on the fact that it gets into the quality and nature and extent of the work performed and it's clearly dependent upon [Swinyard's] testimony as well as defending the counterclaims, it's not something that this Court can see assigning or granting the motion that is properly before the Court right now.
>
> . . . .
>
> [I]f it's still a mechanic's lien claim, it's still the contract with counterclaims it's going to be very fact specific. And I assume you want somebody who wants to work with you.

AA appealed.[1]

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[1] This court ordered AA to show cause as to why the appeal should not be dismissed for lack of a written, signed, and dated order. AA requested that the district court reissue and sign the October minute order. The district court issued the requested signed, written order, which stated that "[t]his order shall be a final appealable order as provided by C.R.C.P. 54(b)." On certification of the order, the clerk's office, by delegated authority, discharged the order to show cause. This merits division is not bound by such an administrative order. *Chavez v. Chavez*, 2020 COA 70, ¶ 38.

II. Analysis

A. Jurisdiction

¶ 6 First, we must address the threshold issue of whether we have appellate jurisdiction. Swinyard argues that we do not because the district court's order was not a final judgment.

¶ 7 We review jurisdictional questions de novo. *People v. Vargas-Reyes*, 2018 COA 181, ¶ 9.

¶ 8 Generally, our jurisdiction is limited to the review of final judgments. C.A.R. 1(a); *State ex rel. Suthers v. CB Servs. Corp.*, 252 P.3d 7, 10 (Colo. App. 2010) (final judgment requirement is jurisdictional). "Without a final judgment, we must dismiss the appeal." *CB Servs. Corp.*, 252 P.3d at 10.

¶ 9 "A final judgment is 'one that ends the particular action in which it is entered, leaving nothing further for the court pronouncing it to do in order to completely determine the rights of the parties involved in the proceedings.'" *Id.* (quoting *People v. Guatney*, 214 P.3d 1049, 1051 (Colo. 2009)).

¶ 10 However, a division of this court has recognized that the final judgment rule has distinct contours in the context of postjudgment

proceedings. *Luster v. Brinkman*, 250 P.3d 664, 666-67 (Colo. App. 2010).

¶ 11 In *Luster*, the plaintiff tried to serve C.R.C.P. 69 interrogatories on the defendant but was unsuccessful. *Id.* at 666. The plaintiff moved for substitute service on the defendant's counsel. *Id.* The trial court denied the motion, and the plaintiff appealed. *Id.*

¶ 12 The *Luster* division reasoned that, "in postjudgment collection situations, the underlying 'action' has already been concluded, by definition, with the entry of a judgment. Nevertheless, part of the action may still be 'live,' as when the final underlying judgment has not been satisfied and the judgment creditor seeks court assistance to obtain payment." *Id.* at 667. The division employed a two-part test for determining finality in the context of postjudgment collection.

¶ 13 First, "[t]he order must end the particular part of the action in which it is entered" and "leave nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that part of the proceeding." *Id.* Under this element, the *Luster* division remanded to the trial court to

"determine whether its substituted service order effectively end[ed] [the plaintiff's] collection efforts." *Id.* at 668.

¶ 14 *Luster* is unclear in one respect: Is a postjudgment order final only when there are no other possible avenues of judgment collection, or is a postjudgment order final when one authorized avenue of judgment collection is at an end?

¶ 15 There are multiple tools available to a judgment creditor to collect a judgment, and the ability to collect a judgment using particular tools may change over time. *See, e.g.*, *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 569 (Colo. App. 2010) (addressing the "fortuitous occurrence" of the judgment debtor's "decision to 'sell his property for a price . . . large enough to satisfy'" the judgment, including years of accumulated interest). Therefore, we read *Luster* to require that the particular, legally authorized method of collecting a judgment has ended, not that judgment collection efforts, of any type, have forever ceased.

¶ 16 *Luster*'s second element is that the order must "be more than a ministerial or administrative determination." *Luster*, 250 P.3d at

667. That is, the order must "affect[] rights or create[] liabilities not previously resolved by the adjudication of the merits." *Id.*

¶ 17 We begin our analysis by rejecting the contention, to the extent it is made by either party, that C.R.C.P. 54(b) is the proper lens through which to analyze the finality of the court's order. *See Ferla v. Infinity Dev. Assocs., LLC*, 107 P.3d 1006, 1008 (Colo. App. 2004) (outlining C.R.C.P. 54(b)'s finality test). True, the court, at AA's request, stated that its written order was final and appealable under C.R.C.P. 54(b). But this court is not bound by a trial court's C.R.C.P. 54(b) certification. *See Carothers v. Archuleta Cnty. Sheriff*, 159 P.3d 647, 651 (Colo. App. 2006). C.R.C.P. 54(b) contemplates appeals of fewer than all claims under the circumstances specified in that rule and the cases construing it. None of those circumstances exists here.[2]

¶ 18 As discussed, a final judgment, resolving the totality of AA's claims against Swinyard, was already entered. This case does not address a situation in which there are multiple claims or parties; it

[2] We also do not address whether the purported C.R.C.P. 54(b) order complied with the express requirements of that rule.

addresses a postjudgment order. The parties have not cited a case, and we have found none, applying C.R.C.P. 54(b) to postjudgment orders. While we do not exclude the possibility that under some circumstances, C.R.C.P. 54(b) might be applicable to postjudgment proceedings, this is not one of those circumstances. Instead, we apply *Luster*.

¶ 19 Turning to *Luster*'s first element, we conclude that the district court's order ended the particular part of the action in which it was entered. AA requested the turnover of Swinyard's choses in action; the court definitively denied that request. There was nothing left for the district court to do as to this particular collection tool.

¶ 20 Swinyard argues that additional claims for relief were still pending before the district court, so the court's order could not have definitely resolved any part of the action. The record refutes this contention. While the court said that it *would consider* a motion for a lien on the proceeds of Swinyard's litigation, no such motion was filed. A postjudgment order is final if there are no other pending motions relating to "the particular part of the action in

which it [was] entered." *Sidman v. Sidman*, 2016 COA 44, ¶¶ 8-10 (alteration in original) (quoting *Luster*, 250 P.3d at 667).

¶ 21 Further, AA was under no legal compulsion to move for the relief that the district court invited. Turnover of a chose in action is materially different from a lien on any potential proceeds from the litigation, and AA, as judgment creditor, had a right to seek one but not the other.

¶ 22 Next, addressing *Luster*'s second element, we conclude that the court's order was more than ministerial or administrative. *See Luster*, 250 P.3d at 667. Like the order in *Luster*, the district court's order "affect[ed] collection rights, which were not previously resolved by the adjudication of the merits." *Id.* at 668.

¶ 23 We therefore hold that the order was final and appealable. We turn to the merits.

B. C.R.C.P. 69(g) Order

¶ 24 "We review a district court's interpretation of the Colorado Rules of Civil Procedure de novo." *Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 32. "We interpret the rules by applying settled principles of statutory construction." *Id.*

¶ 25 This means that we interpret the rules' words "according to their commonly understood and accepted meanings" and give consistent, harmonious, and sensible effect to all parts of the rules. *Id.* The rules "shall be liberally construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1(a).

¶ 26 C.R.C.P. 69(g) states,

> The court, master, or referee *may* order any party or other person over whom the court has jurisdiction, to apply any property other than real property, not exempt from execution, whether in the possession of such party or other person, or owed the judgment debtor, towards satisfaction of the judgment.

(Emphasis added.)

C. An Abuse of Discretion Standard Applies

¶ 27 The parties appear to agree that a court has discretion to grant or deny a motion for turnover of property under C.R.C.P. 69(g).[3] We agree.

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[3] The only exceptions to a court's discretion, by the express language of C.R.C.P. 69(g), are that the court may not order the transfer of real property or exempt property.

¶ 28 The absence of "mandatory language directed at the court, such as 'must,' 'shall,' or 'is required to,'" is a strong indicator that a court has discretion to choose from a range of permissible options under the rule. *Sidman*, ¶¶ 19, 22-23. If the supreme court, in its rulemaking authority, intended to require trial courts to automatically grant C.R.C.P. 69(g) motions, or to always grant them in certain defined situations, "it would have used mandatory language to accomplish that goal."[4] *Id.* at ¶ 22.

¶ 29 Instead, C.R.C.P. 69(g) says that the court "may" order a party to use non-exempt property to satisfy an outstanding judgment. The word may "is generally indicative of a grant of discretion or choice among alternatives." *A.S. v. People*, 2013 CO 63, ¶ 21; *see also People v. Valadez*, 2016 COA 62, ¶ 17. We interpret "may" as "shall" only when the purposes underlying the rule are "not fulfilled by a permissive construction." *Valadez*, ¶ 17 (quoting *Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1113 (Colo. 1990)).

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[4] The Colorado Supreme Court promulgates the Colorado Rules of Civil Procedure. Colo. Const. art. VI, § 21.

¶ 30 True, "C.R.C.P. 69 has been interpreted liberally to assist judgment creditors in enforcing final money judgments." *Isis Litig., L.L.C. v. Svensk Filmindustri*, 170 P.3d 742, 746 (Colo. App. 2007). This general policy, however, does not require a trial court to grant every C.R.C.P. 69(g) motion. The judgment creditor's requested relief might not always lead to a just, speedy, and inexpensive resolution of the postjudgment proceeding, as contemplated by C.R.C.P. 1(a). Such is the case here. It is far from clear that transferring Swinyard's choses in action to AA would lead to a just, speedy, or inexpensive result. Thus, the purposes underlying the rule are not defeated by applying the plain, permissive language of the rule.

¶ 31 Our conclusion is buttressed by the fact that other subsections of C.R.C.P. 69 use the restrictive "shall" to define the court's role in enforcing a judgment. *See* C.R.C.P. 69(a) (The "process to enforce a final money judgment shall be by writ of execution."). "Where both mandatory and directory verbs are used in the same statute . . . the verbs should carry with them their ordinary meanings." *A.S.*, ¶ 21 (quoting 3 Norman J. Singer & J.D.

Shambie Singer, *Sutherland Statutory Construction* § 57:11 (7th ed.)).

¶ 32 We therefore review the court's order denying AA's C.R.C.P. 69(g) motion for an abuse of discretion. A court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if it misapplies the law. *Freedom Colo. Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008).

D. The Court Did Not Abuse Its Discretion

¶ 33 AA argues that the court abused its discretion when it denied AA's C.R.C.P. 69(g) motion because the court committed legal error. Specifically, AA argues that the court erroneously denied the turnover motion because it ruled that mechanic's lien claims are *never* subject to a court's C.R.C.P. 69(g) order, and that this legal error fatally infected the order. The record refutes AA's argument.

¶ 34 We need not determine whether mechanic's lien claims are ever subject to turnover under C.R.C.P. 69(g) because the district court did not base its decision on that legal determination.[5]

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[5] We note that while C.R.C.P. 69 prohibits the turnover of real property or exempt property, a chose in action is neither. *See* § 13-

¶ 35 Instead, in exercising its discretion, the court recognized a host of practical problems associated with the turnover of Swinyard's claims to AA. The court reasoned that AA would have to "prove up the value of the services rendered," which would require Swinyard's participation in the case. The court properly considered Swinyard's concession that "if [Swinyard] knows at the end of the day that the money is going to AA Wholesale, he is probably less motivated to pursue the case."

¶ 36 The court also considered the pending counterclaims against Swinyard in the other case, that those claims would be fact specific, and that divorcing Swinyard's right to pursue his claims from his ability to defend on the counterclaims was problematic. All of these considerations were proper in the exercise of the court's discretion.

54-102, C.R.S. 2020 (listing exempt property); *Ford v. Summertree Lane Ltd. Liab. Co.*, 56 P.3d 1206, 1209 (Colo. App. 2002) (choses in action are personal property). And while the supreme court has held that some types of claims are non-assignable, we are unaware of any statutory or case law holding mechanic's lien claims to be nontransferable. *See People v. Adams*, 243 P.3d 256, 262-63 (Colo. 2010) (establishing the test for whether a statutory claim is assignable). In fact, the mechanic's lien statute expressly states that such claims are assignable. § 38-22-117, C.R.S. 2020.

¶ 37 Moreover, it is apparent that the court carefully exercised its discretion because it invited AA to request a similar, alternative form of relief: a lien on the proceeds of Swinyard's litigation.

¶ 38 For all these reasons, the district court acted well within its discretion by denying the turnover motion.

III. Conclusion

¶ 39 The order is affirmed.

JUDGE DAILEY and JUDGE NAVARRO concur.