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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001462-MR

INSTANT AUTO CREDIT, INC. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 98-CI-000858

MATTHEW R. SULLIVAN, TAMARA L. SULLIVAN AND ROCKY CISNEY, D/B/A DIRECT EXPRESS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: Instant Auto Credit, Inc., appeals from a Jefferson Circuit Court order which denied its motion to set aside a previous order which

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

granted in part a Kentucky Rules of Civil Procedure (CR) 60.02 motion brought by Rocky Cisney d/b/a Direct Express. The circuit court upheld an earlier ruling which found Direct Express to be in contempt of court for failing to participate in garnishment proceedings, but reduced the amount of the penalty on the ground that it was excessive. We affirm.

On June 2, 1998, a default judgment was entered in Jefferson Circuit Court against Matthew and Tamara Sullivan in the amount of $9,311.83, plus interest at 25.75% per annum and costs, in a collection action filed by Instant Auto Credit. Four months later, Instant Auto served a wage garnishment order on Direct Express, Tamara's former employer. Direct Express is a sole proprietorship owned and operated by Rocky Cisney. Cisney signed the order, but took no further action in the matter, asserting that he never received the necessary forms to make a proper return to the court. Consequently, Instant Auto filed a motion for contempt against Direct Express. On March 1, 1999, following a hearing on the motion, at which Cisney was not present (he maintains that he never received notice of the contempt proceedings), the circuit court entered an order finding Direct Express to be in contempt of court for failing to answer the order of wage garnishment. As a penalty, the court entered judgment against Direct Express for the entire amount of the debt, making the judgment joint and several with the original judgment entered against the Sullivans on June 2, 1998.

Instant Auto took no action to enforce this judgment for seven years, until January 2006, when it filed orders of garnishment against Direct Express for

$59,380.58 (the amount of the original judgment plus the accrued interest) with several banks. It succeeded in locating a bank account containing approximately $400. Direct Express filed a challenge to the garnishment of the account on February 15, 2006, asserting that the funds therein were the proceeds of Cisney's VA disability checks and therefore exempt from garnishment. A hearing on the matter was held before the Master Commissioner on March 1, 2006. On March 7, 2006, the Commissioner filed a report recommending that the garnishment challenge be denied since the evidence established that Cisney's disability funds had lost their exempt status as a consequence of being comingled with other funds in the account. On March 17, 2006, the circuit court ordered that the proceeds from the garnishment order be kept in the escrow account of Instant Auto's counsel until the issue had been determined by the court.

Direct Express also filed a motion to set aside the contempt judgment pursuant to CR 60.02. A hearing on the motion was held on May 8, 2006. On March 14, 2007, the circuit court entered an opinion and order[2] which did not set aside the contempt finding, but found that the sanction imposed was excessive. It therefore limited the penalty to "the amount that Instant Auto would have been entitled to had Direct Express complied with the order of wage garnishment against Ms. Sullivan, with interest at 12% per annum."

[2] The considerable delay between the date of the hearing and the entry of the order was due to the fact that the judge presiding at the hearing was defeated in an election in the fall of 2006. The case was resubmitted to his successor on February 12, 2007.

Instant Auto filed a CR 59.05 motion to reconsider and set aside the order, arguing that the new sanction was unenforceable because Direct Express's business records containing information about Tamara Sullivan's employment had been destroyed by water damage. It further argued that Direct Express had unclean hands in that it had not responded to the original garnishment order. Direct Express responded by arguing that Instant Auto was the party with unclean hands since it had waited for several years to execute the judgment and had thus allowed the underlying debt to increase exponentially. Direct Express also raised the defense of laches, and argued that it had been prejudiced by Instant Auto's unexplained delay in seeking to enforce the judgment, and its failure to pursue the original debtors, the Sullivans.

The trial court denied Instant Auto's motion, agreeing with Direct Express's contention that laches barred Instant Auto's recovery. The court noted that Instant Auto knew the precise location and address of Direct Express, yet chose to wait for more than seven years before attempting to enforce the order. The court determined that the lengthy delay coupled with the unusually high rate of interest specified in the original contract justified relief under CR 60.02(f).

Our standard when reviewing a trial court's grant of relief under CR 60.02 is whether the trial court abused its discretion. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal

principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky.App. 2000).

Instant Auto's first argument is that the original contempt finding and order of March 1, 1999, holding Direct Express jointly and severally liable for the entire judgment against the Sullivans, was appropriate and authorized under Kentucky law and the facts of the case. Instant Auto contends that Direct Express's failure to respond to the contempt motion demonstrated an arrogant indifference to the authority of the court that warranted the sanction imposed. In support of this contention Instant Auto points out Rocky Cisney's statements indicating that he never read the wage garnishment order and would refuse to do so, his failure to respond to the contempt motion and his "relentless effort" to avoid the garnishment order and the contempt proceedings. Direct Express contends that the original order was an abuse of discretion because such a sanction is not authorized under Kentucky law.

The traditional rule in garnishment proceedings is that "[t]he creditor by garnishment is placed in no better position in relation to the garnishee than the debtor, and he can enforce only such rights as the debtor might enforce. *Metropolitan Life Insurance Co. v. Hightower*, 211 Ky. 36, 276 S. W. 1063, 44 A. L. R. 1158." *Bellamy v. Rogers*, 219 Ky. 590, 293 S.W. 1069, 1070 (1927). Instant Auto contends that Direct Express's failure to respond to the garnishment order in effect imposed strict liability on it for the entire judgment, relying on a statement found in an opinion from the federal Court of Appeals for the Sixth

Circuit: "Under Kentucky law, a violation of a garnishment order imposes liability in the amount of the judgment. *See Holbrook v. Fyffe*, 164 Ky. 435, 175 S.W. 977 (Ky.1915)." *McMahan & Co. v. Po Folks, Inc*., 206 F.3d 627, 632 (6th Cir. 2000). It is axiomatic that federal court decisions interpreting state law are not binding on state courts. *See Embs v. Pepsi-Cola Bottling Co. of Lexington, Ky., Inc.,* 528 S.W.2d 703, 705 (Ky. 1975); *Benningfield v. Pettit Environmental, Inc*., 183 S.W.3d 567, 571 (Ky.App. 2005). In *Holbrook v. Fyffe*, 164 Ky. 435, 175 S.W. 977 (1915), the case relied upon by the *McMahan* court, a bank had negligently allowed a debtor to withdraw funds that were to be garnished; the court ruled that the bank was nonetheless liable for the entire amount. This factual scenario is entirely distinguishable from the situation before us. Moreover, in *McMahan*, a case which involved a bank holding the assets of a debtor, it appears that the bank held sufficient assets of the judgment debtor to cover the entire debt. In the case before us, there is no suggestion that the wages Tamara Sullivan was earning at Direct Express equaled the amount owed by the Sullivans to Instant Auto. Furthermore, a factual issue existed in *McMahan* as to whether the bank assisted the judgment debtor in evading garnishment of its property. Finally, the *McMahan* court was not reviewing the equities of a contempt proceeding, but rather a summary judgment in an enforcement proceeding.

We do agree with Instant Auto that it is well within the trial court's discretion to make a garnishee liable for the entire amount of the underlying judgment. Instant Auto has relied on *Compton v. Instant Auto Credit, Inc*., 2005

WL 326973 (Ky.App. 2005) (2003-CA-001021-MR), where this proposition was clearly stated:

> As a result of Newton's failure to answer the garnishment order and failure to defend his inaction at the hearing, the trial court found him in contempt of court and sanctioned him the full amount of the judgment that had been entered against Joseph Compton. Contrary to Newton's characterization on appeal, the trial court did not enter a default judgment against him. It found him in contempt of court and sanctioned him for his failure to answer and respond to court orders. Such a sanction was entirely within the court's power. *See White v. Sullivan*, 667 S.W.2d 385, 387 (Ky.App. 1983) (holding that circumstances of the case and defendant's misconduct warranted a fine payable to the aggrieved party).

The availability of this sanction stems from the inherent discretionary power of the courts:

> The purpose of civil contempt authority is to provide courts with a means for enforcing their judgments and orders, and trial courts have almost unlimited discretion in applying this power.

Smith v. City of Loyall, 702 S.W.2d 838, 838-839 (Ky.App. 1986).

Such a sanction, while certainly available, is not mandatory. In the case before us, the trial court weighed the equities, balancing Direct Express's failure to respond to the garnishment order or the contempt motion, against Instant Auto's apparent inaction for over seven years, and concluded that the penalty, which included a rate of interest assessed at over 25%, was simply too harsh. The trial court's determination was neither arbitrary, unreasonable nor unfair, nor was the trial court bound by any legal principles to uphold the original sanction.

Instant Auto next argues that the relief granted by the trial court was not properly requested or authorized under the applicable civil rules. Instant Auto points out that in its CR 60.02 motion, Direct Express alleged fraud affecting the proceedings (but provided no evidence for this), that the judgment was void for insufficiency of service (which the trial court rejected) and finally, that the judgment was due to a palpable error resulting in manifest injustice. Although the trial court did not grant relief on any of these grounds, Instant Auto did file an amended motion on May 2, 2006, that requested relief under CR 60.02(f), and a supplemental memorandum filed on July 10, 2006, at the court's request following the hearing on the motion, which included an argument that the contempt sanction was excessive. It stated in pertinent part:

> The awarding of a full judgment as a contempt sanction against the non-answering garnishee where there were no monies due because the debtor was not employed by the garnishee is a shocking abuse of the trial court's discretion under KRS 425.511(2) and 526. It is totally out of proportion to the damages suffered by the plaintiff because they bear no reasonable relationship to the injuries or actual damages sustained by the plaintiff.

Although this allegation was raised only after the hearing, Instant Auto was given the opportunity to respond to the supplemental memorandum, which it did on July 20, 2006. The issue of the insufficient specificity of the pleadings was never raised by Instant Auto at that time. Moreover, in our view, the memorandum submitted by Direct Express after the hearing was sufficient to satisfy the particularity

requirements set forth in *Berry v. Cabinet for Families and Children ex rel. Howard*, 998 S.W.2d 464, 467 (Ky. 1999).

Instant Auto further contends that, regardless of whether they were raised or not, none of the grounds enumerated in CR 60.02 was properly available to Direct Express because a movant may only invoke such relief if the alleged errors "were unknown and could not have been known to the party by the exercise of reasonable diligence and in time to have been otherwise presented to the court." *Id.* Instant Auto points out that Cisney was responsible for ignoring the wage garnishment order and the contempt motion. Although the trial court found that Cisney was properly notified by mail of the contempt hearing, Cisney also testified that he never saw the notification and was unaware of the contempt proceedings. The court made no finding as to whether Cisney was at fault or had failed to be reasonably diligent so as to bar his right to seek CR 60.02 relief, nor did Instant Auto request such a specific finding.

Instant Auto also contends that the trial court, although it granted relief ostensibly pursuant to CR 60.02(f), actually applied CR 60.02(e), which permits a court to relieve a movant from a judgment when it is no longer equitable that the judgment should have prospective application. Citing *Alliant Hospitals v. Benham*, 105 S.W.3d 473 (Ky.App. 2003), Instant Auto argues that a fixed money judgment may not be altered by a court pursuant to this subsection, which may only be applied to "judgments, such as those granting an injunction, that involve the supervision of changing conduct or conditions and are thus provisional and

tentative." *Id.* at 478 (citations and internal quotations marks omitted). Instant Auto has not provided us with any citations to the record indicating that this argument was ever raised in the proceedings below. This argument is therefore unpreserved for appeal and cannot be considered because the "Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Thirdly, Instant Auto has invoked the "clean hands doctrine" (interchangeably termed the "unclean hands doctrine," *see Blacks Law Dictionary* 244 (7th Edition 1999) to argue that Direct Express was not entitled to equitable relief because the sole reason for the contempt sanction was its own intentional acts and omissions. The clean hands doctrine does not, however, act as an absolute bar to equitable relief.

> The unclean hands doctrine is a rule of equity that forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct but does not operate so as to "repel all sinners from courts of equity." *Dunscombe v. Amfot Oil Co.*, 201 Ky. 290, 256 S.W. 427, 429 (1923) . . . . And although the operation of the maxim is broad, it is not without limitation and will not apply to all misconduct or to "every act smacking of inequity or deceit" in relation to the matter in which the relief is sought. *Parris' Adm'r v. John W. Manning & Sons*, 284 Ky. 225, 144 S.W.2d 490, 492 (Ky. 1940).

Suter v. Mazyck, 226 S.W.3d 837, 843 (Ky.App. 2007).

In this case, while affirming that Direct Express had received sufficient legal notification of the contempt hearing, the trial court was troubled

both by the severity of the penalty and by Instant Auto's lack of diligence in pursuing enforcement of the order in a timely manner. The trial court did not abuse its discretion in determining that Direct Express was entitled to equitable relief.

Fourthly, Instant Auto argues that the trial court abused its discretion in approving the defense of laches raised by Direct Express. "[Laches] serves to bar claims in circumstances where a party engages in unreasonable delay to the prejudice of others rendering it inequitable to allow that party to reverse a previous course of action." *Plaza Condominium Ass'n, Inc. v. Wellington Corp*., 920 S.W.2d 51, 54 (Ky. 1996). Relying on *Barrowman Coal Corp. v. Kentland Coal & Coke Co.*, 302 Ky. 803, 196 S.W.2d 428 (1946), Instant Auto contends that laches is a defensive doctrine, and may not be used as an offensive device by a moving party. Although it is true that Direct Express initiated this action by filing the CR 60.02 motion, it was essentially a response to Instant Auto's efforts to collect the contempt penalty by garnishing a bank account. There was no error in the court's invocation of this doctrine.

Instant Auto further argues that laches was inapplicable because the money judgment against Direct Express remained valid and enforceable for fifteen years pursuant to Kentucky Revised Statutes (KRS) 413.090, and that this statute of limitations overrides the common law doctrine of laches; in other words, Instant Auto had fifteen years within which to enforce the judgment without laches being implicated. In the case cited by Instant Auto, *Karami v. Roberts*, 706 S.W.2d 843

(Ky.App. 1986), the appellate court refused to enforce the doctrine of laches against a woman who had been forced under duress by her Iranian ex-husband to sign over her share of the marital property to his father. The woman delayed in bringing the action because of threats made by her ex-husband against her and their daughter. The court narrowly held that "[i]n our opinion, a statutory period of limitations overrides the common law doctrine of laches **in that particular action**." *Id*. at 846 (emphasis supplied.) Moreover, the case relied upon by the *Karami* court states as follows:

> In respect to issues of which courts of equity have exclusive jurisdiction, where the enforcement of the claim depends upon the conscience of the chancellor, equity may refuse relief by applying the doctrine of laches, even though the claim be not barred by the statute of limitations.

Gover's Adm'r v. Dunagan, 299 Ky. 38, 40, 184 S.W.2d 225, 226 (1944).

In this case, the court was clearly acting in equity when it granted relief to Direct Express pursuant to CR 60.02. "CR 60.02 relief is available where a party has made a clear showing of extraordinary and compelling equities." *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002). The statute of limitations did not therefore bar the use of the doctrine of laches.

Instant Auto also contends that laches was inappropriately invoked against it because it remained passive and committed no affirmative acts that might have induced or encouraged Direct Express to believe that the contempt judgment

was no longer enforceable. Applying Kentucky law, the Court of Appeals for the Sixth Circuit stated

> [r]emaining passive does not ordinarily deprive one of his legal rights, unless in addition thereto he does some act to induce or encourage another to alter his condition, and by reason thereof it becomes unconscionable to award the claimed rights.

In re Cannonsburg Environmental Associates, Ltd. 72 F.3d 1260, 1268 (6th Cir. 1996) *citing Wisdom's Adm'r v. Sims*, 284 Ky. 258, 144 S.W.2d 232, 236 (1940). The court in *Wisdom's Adm'r v. Sims* also stated

> [l]aches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, **it matters little whether one presses a right promptly or slowly within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state**, if the rights be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

Wisdom's Adm'r, 144 S.W.2d at 235 -236 (emphasis supplied). In the case before us, Instant Auto's "passivity" resulted in interest accruing at a very high rate and eventually resulted in a penalty equal to approximately six times the amount of the original debt owed by the Sullivans. Although Instant Auto insists that it did not "sit on its rights," the trial court found otherwise. We will not disturb the trial

court's findings of fact unless they are clearly erroneous. CR 52.01. We find no such error in this case.

Finally, Instant Auto disputes various claims made by Direct Express in its CR 60.02 motion, contending that the actions and procedures it utilized against Direct Express were proper and in compliance with Kentucky law and the civil rules. But the trial court fully agreed with Instant Auto that Direct Express was properly found to be in contempt of court. It also found, however, that the sanction imposed in the contempt proceedings was excessive. Instant Auto has questioned the credibility of Rocky Cisney's testimony regarding various events in an attempt to show that he was more blameworthy for the delay than Instant Auto. Instant Auto asserts that his testimony confused the trial court and led it to an unconscionable conclusion. Pursuant to CR 52.01, when a matter is tried before the bench, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." "[W]here the facts are submitted to the court without the intervention of a jury, its findings thereon are entitled to the same weight as the verdict of a properly instructed jury and we will not disturb them unless they are flagrantly against the evidence." *Adkins v. Meade*, 246 S.W.2d 980, 980 (Ky. 1952). The trial court's findings that the sanction was excessive and that Instant Auto bore a greater share of the blame for failing to enforce the judgment in a timely manner were not flagrantly against the evidence. There are therefore insufficient grounds to reverse its ruling.

For the foregoing reasons, the orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Keith A. Stonecipher
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas B. Merrill
Middletown, Kentucky