NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 0613

PREMIER INFORMATION SYSTEMS, INC.
D/B/A CHECKCARE SYSTEMS OF NEW ORLEANS

VERSUS

JULIE H. SCHWANER

Judgment Rendered: MAY 26 2010

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Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Docket Number 98-10202

Honorable Patricia T. Hedges, Judge Presiding

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Gregory J. St. Angelo **August J. La Nasa** **Philip J. La Nasa** **New Orleans, LA**	**Counsel for Plaintiff/Appellant,** **Premier Information Systems, Inc. d/b/a** **Checkcare Systems of New Orleans**
Tammy M. Nick **Slidell, LA**	**Counsel for Third Party/Appellee,** **Randy Schwaner**

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BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

Hughes, J., concurs.

WHIPPLE, J.

This matter is before us on appeal from a judgment denying plaintiff's motion for garnishment filed in an attempt to collect on a previous judgment rendered against plaintiff's former wife.

A default judgment was rendered in this suit for payment of checks returned for nonsufficient funds against the original named defendant and drawer, Julie Schwaner, in March 1998. Ten years later, after reviving the judgment, the plaintiff, Premier Information Systems, Inc. d/b/a Checkcare Systems of New Orleans ("Premier") filed a motion to garnish the wages and property of Randy Schwaner, who was divorced from Julie in 1998, but after rendition of the original default judgment. The trial court denied the motion for garnishment, and Premier filed the instant devolutive appeal. For the following reasons, we amend and affirm.

FACTS AND PROCEDURAL HISTORY

On or about September 3, 1997, Randy and Julie Schwaner purchased a 1995 Ford Windstar van from LeBlanc Hyundai for the purchase price of $16,545.00, plus taxes, title and licensing fees. As a down payment for the vehicle, Julie wrote two checks on a checking account bearing her name only made payable to LeBlanc Hyundai in the amount of $1,421.86 apiece. Upon presentation of the checks for collection, however, they were returned for nonsufficient funds. Thereafter, pursuant to a check guarantee contract, Premier reimbursed LeBlanc Hyundai for the face value of the checks in exchange for subrogation of its rights, title, and interest in the returned checks.

On January 16, 1998, Premier filed suit against Julie alone, alleging that written demand for payment in accordance with LSA-R.S. 9:2782 had been made to no avail. Accordingly, Premier sought judgment for twice the face amount of each check or $100.00 per check, whichever sum was greater, plus interest and

attorney's fees as provided for by law. On March 23, 1998, Premier obtained a default judgment against Julie in the sum of $5,687.44 with judicial interest, plus costs and attorney's fees in the amount of 33 1/3% of the total judgment. Later that same year, Julie and Randy divorced[1]; Randy subsequently remarried.

Ten years later, Premier filed a motion to revive the March 23, 1998 judgment, which was granted by virtue of an order dated March 31, 2008. Thereafter, on August 8, 2008, Premier filed a motion seeking to garnish Randy's wages and property on the grounds that a community property regime existed between Julie and Randy at the time the original default judgment was rendered and the underlying debt was incurred. In the motion, Premier requested that the matter be set for hearing and that Randy appear and show cause why Premier should not be allowed to garnish his wages and/or property. Randy opposed the motion and filed exceptions of unauthorized use of summary proceeding, insufficiency of citation, improper cumulation of actions and/or improper joinder, and prescription. Following a hearing, the trial court denied the motion for garnishment, and a judgment to that effect was subsequently signed on October 9, 2008.

In written reasons, the trial court stated that Randy's name did not appear on any documents confected in connection with the purchase of the automobile nor was he named in the original lawsuit and the revival action. Thus, the court concluded that Premier could not pursue the separate assets of Randy to satisfy a debt incurred by his ex-wife.

On appeal, Premier argues that, contrary to the findings of the trial court, the judgment against Julie arose out of a community obligation incurred by **both**

[1] There is nothing in the record to show that their community property, if any, was ever partitioned or that Randy possessed any former community property.

spouses and, therefore, that the judgment could be satisfied from Randy's separate property pursuant to LSA-C.C. art. 2357.

DISCUSSION

Louisiana Civil Code article 2357 addresses the satisfaction of obligations after termination of the community regime and provides as follows:

> An obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime **from the property of the former community** and **from the separate property of the spouse who incurred the obligation**. The same rule applies to an obligation for attorney's fees and costs in an action for divorce incurred by a spouse between the date the petition for divorce was filed and the date of the judgment of divorce that terminates the community regime.
>
> If a spouse disposes of property of the former community for a purpose other than the satisfaction of community obligations, he is liable for all obligations incurred by the other spouse up to the value of that community property.
>
> A spouse may by written act assume responsibility for one-half of each community obligation incurred by the other spouse. In such case, the assuming spouse may dispose of community property without incurring further responsibility for the obligations incurred by the other spouse.

(Emphasis added).

Under the provisions of the above-cited article, each spouse is responsible for community obligations to the extent of the community property he or she received in the partition. M. Carbine Restoration, Ltd. v. Sutherlin, 544 So. 2d 455, 457 (La. App. 4th Cir.), writ denied, 547 So. 2d 355 (La. 1989). Spouses who individually incur community obligations are also liable from their separate property. Id.

Premier argues that it is entitled to enforce its judgment against Randy's separate property pursuant to Article 2357. In support, Premier notes that there is a presumption under the law that all obligations incurred by a spouse during the existence of a community property regime are community obligations, citing LSA-C.C. art. 2361. Although that presumption is rebuttable, Premier argues that

Randy has failed to present any evidence that the van purchased from LeBlanc Hyundai was not for the common interest of the spouses or that the vehicle was intended for Julie's sole use. Premier further notes that contrary to the assertion of the trial court in its written reasons, both Randy and Julie signed the **act of sale and financing documents** for the purchase of the van, which Premier contends was to be used as a family vehicle. Premier argues that since both parties purchased the van, the NSF checks were tendered, and the default judgment was rendered during the Schwaners' marital regime, Randy incurred the debt as well as Julie. Thus, Premier submits, the outstanding obligation may be satisfied from Randy's separate property.

In opposition to the appeal, Randy argues that in order to satisfy the debt from his separate property, Premier would have to either obtain a judgment against him personally or prove that he incurred the debt. Randy vehemently denies that he incurred the underlying debt at issue given that the two NSF checks were written by Julie on her checking account. Thus, Randy submits that, in the absence of a judgment against him, Premier cannot garnish his wages, which clearly are not former community property, nor can it seize his separate property.

At the outset, we note that, as suggested by Randy, the only obligation at issue herein which Premier attempts to collect upon is a judgment rendered against Julie alone based on the two NSF checks likewise drafted by Julie alone on her personal checking account. While Premier seeks to have this court look beyond the checks to the separate but related obligation to LeBlanc Hyundai arising from the purchase of the van and, thus, determine that the obligation at issue herein was "incurred" by both Julie and Randy, Premier has no right to enforce that related, but separate obligation. Rather, the only rights which Premier could assert in these proceedings were those rights it obtained from LeBlanc Hyundai by virtue of the check guaranty contract between Premier and LeBlanc Hyundai. Pursuant to the

contract, Premier agreed to reimburse LeBlanc Hyundai certain sums for checks presented but then returned to LeBlanc Hyundai for insufficient funds in exchange for the following rights: "By execution of this Agreement, [LeBlanc Hyundai] Assigns, Transfers, and Conveys to [Premier], acting as its Agent, **all right, title, and interest in all returned checks,** statutory service charges, and penalties." By this contractual language, the only right assigned was any right or interest in the NSF checks. Accordingly, the only obligations underlying the judgment rendered in Premier's favor against Julie, and thus the only underlying obligations at issue herein, are the two NSF checks drafted by Julie, and not any related but separate obligation owed to LeBlanc Hyundai resulting from the purchase of the vehicle. See Young v. Cistac, 157 La. 771, 103 So. 100, 101 (1925)(wherein the Louisiana Supreme Court stated that "[i]t is elementary that an assignee acquires his rights under the contract assigned to him only in accordance with the stipulations contained in said contract."); see also LSA-R.S. 9:2782 (when the drawer of a check dishonored for nonsufficient funds fails to pay the obligation created by the check, the **drawer** shall be liable to the payee or his assignee).

A review of the record indicates that the two checks, which form the contract assigned, were drafted by Julie alone and were drawn on her checking account. Thus, the resulting obligation was clearly "incurred," within the meaning of LSA-C.C. art. 2357, by Julie alone. Accordingly, it would be improper for this court to look beyond the obligation at issue that formed the basis of the judgment against Julie, i.e., the collection of two NSF checks drafted by Julie on her individual checking account, in a strained attempt to find that this obligation to honor or pay the checks was incurred by **both** Julie and Randy. Thus, under the

facts established by the record before us, the obligation underlying the judgment upon which Premier seeks to collect was incurred by Julie alone.[2]

In the prior decision of this court in Shel-Boze, Inc. v. Melton, 509 So. 2d 106, 107 (La. App. 1 Cir. 1987), the husband personally guaranteed payment of his corporation's open account with Shel-Boze, a supplier of building materials. Upon default, Shel-Boze sued the corporation and the husband individually. Following service, the husband failed to answer the suit and a default judgment was rendered against him. His wife was not a party to the suit and was not cast in judgment. Shel-Boze, 509 So. 2d at 107.

Thereafter, however, Shel-Boze filed a petition to garnish the wife's wages. The wife later moved to dissolve the garnishment after obtaining a judgment of separation from her husband. The city court ordered the return of all wages garnished after the date of termination of the community and awarded the wife general damages and attorney fees. Shel-Boze then appealed. Shel-Boze, 509 So. 2d at 108. On appeal, this court noted that the husband had obligated the community property by guaranteeing payment of the business loan and, thus, held that after termination of the community property regime, Shel-Boze had the right to execute against the property of the former community and against the husband's separate property. Shel-Boze, 509 So. 2d at 109. Clearly, because the debt was not incurred by the wife, the debt could not be satisfied, after termination of the community, from her separate property pursuant to LSA-C.C. art. 2357. Similarly, because Julie alone incurred the obligation to pay the debt created by the checks when she alone drafted the checks which were drawn on her checking account,

[2]Indeed, in so holding, this court has not concluded, nor do we suggest, that the obligation incurred by Julie in drafting the checks was not a community obligation. Rather, we simply observe that, for purposes of determining whether the obligation can be "satisfied" out of Randy's separate property pursuant to LSA-C.C. art. 2357, the obligation clearly was not "incurred" by Randy.

Premier has no right to attempt to satisfy this debt against Randy's separate property, whether or not that debt would be classified as community.[3]

Based on the foregoing, and pretermitting the very troubling issue of whether Premier would legally have been allowed to satisfy the revived judgment from Randy's separate property over ten years after the original default judgment was rendered when Randy was never named as a party defendant in the suit on the NSF checks and was never cast in judgment, had this court concluded that the underlying obligation was incurred by both Randy and Julie, we find no error in the trial court's denial of Premier's motion to garnish Randy's wages and separate property.[4]

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[3]Nor do we find any merit to Premier's contention that Randy assumed personal responsibility to pay the judgment against Julie such as to obligate him to satisfy the judgment from his separate property. In support of this contention, Premier notes that **prior to his divorce from Julie**, Randy attempted to set up a payment plan and tendered a partial payment on the judgment. However, nowhere in this correspondence does Randy "by written act assume responsibility for one-half of [the] community obligation incurred by [Julie]" as contemplated by LSA-C.C. art. 2357. Indeed, because the parties were still married at the time of this partial payment, Randy presumably would have been liable for the payment of the debt at that time at least from the community property, which would have included his wages. See LSA-C.C. art. 2345 and Shel-Boze, 509 So. 2d at 108.

[4]In Shel-Boze, when considering whether the award of damages and attorney's fees for wrongful issuance of a writ of fieri facias and garnishment was appropriate, this court addressed the issue of the failure to serve the wife individually with prior notice of either the original judgment or the garnishment proceedings. Shel-Boze, 509 So. 2d at 108. In support of her award of damages, the wife argued that the failure to serve her individually deprived her of the procedural due process rights guaranteed by the United States and Louisiana Constitutions. In rejecting the wife's constitutional arguments, this court noted that either the husband or the wife was the proper party defendant in the suit to enforce the obligation against community property pursuant to LSA-C.C.P. art. 735. Shel-Boze, 509 So. 2d at 109. Further, the court noted, pursuant to LSA-C.C. art. 2346, each spouse, acting alone, may generally manage, control, or dispose of community property, although the other may have an action for reimbursement of community funds used to pay a separate obligation or for bad faith management. Id. Thus, this court reasoned that the husband acted for the community in accepting service of notice of the original suit and, apparently, made a decision not to expose the community to the expense of defending it or the subsequent garnishment of the community income. Id. The court concluded that, although, if at all possible, both spouses should be made parties to any suit to enforce an obligation against community property, where the spouses reside together at the time, service of prior notice on one spouse alone does not offend the due process rights of the other with respect to the enforcement of an obligation **against community property**. Id. Of course, because the husband alone had incurred the liability and, thus, because the wife's separate property post termination of the community was not implicated, the court's due process analysis did not extend to consideration of a spouse's liability from his or her separate property for a judgment rendered against the other spouse alone.

Additionally, we note that it has been suggested that pre-2006 case law (including Shel-Boze) holding that no notice is required to be given to a non-party spouse regarding seizure of community property to satisfy a judgment against the other spouse, must be re-evaluated in light of recent federal and Louisiana Supreme Court cases. See Katherine S. Spaht and Richard D.

In reaching this conclusion, we note that Premier may still be entitled to pursue satisfaction of the judgment against any former community property still in Randy's possession. LSA-C.C. art. 2357. Although Premier's motion was entitled "Motion and Order for Garnishment of Spouse's Wages," Premier has not formally attempted to seize any former community property in Randy's possession. Thus, to the extent that the trial court's judgment dismissing Premier's motion denied Premier its right to proceed with satisfaction of the judgment against former community, the judgment will be amended. If desired, Premier must follow the procedure set forth in LSA-C.C.P. art. 2411, et seq., including the filing of a petition after the issuance of a writ of *fieri facias*, causing Randy to be cited as a garnishee and to declare under oath what former community property he has in his possession or under his control.[5]

Moreno, 16 La. Civ. L. Treatise, Matrimonial Regimes § 6.7 (3d ed.) (citing Jones v. Flowers, 126 S. Ct. 1708, 1721, 164 L. Ed. 2d 415 (2006), Lewis v. Succession of Johnson, 2005-1192, p. 21 (La. 4/4/06), 925 So.2d 1172, 1184, and Jackson v. Galan, 631 F. Supp. 409 (E.D. La. 1986)).

Moreover, regarding suit against either spouse during the community, as occurred herein, LSA-C.C.P. art. 735 provides, in pertinent part, that "[e]ither spouse is the proper defendant, during the existence of the marital community, in an action to enforce an obligation against ***community property***." (Emphasis added.) The article does not provide, however, that suit and resulting judgment against one spouse renders the other spouse personally liable, nor does it resolve obvious due process concerns. Indeed, in French Market Homestead, FSA v. Huddleston, 579 So. 2d 1079, 1081 (La. App. 5th Cir.), writ denied, 586 So. 2d 559 (La. 1991), the Fifth Circuit stated that in order for a spouse's separate property to be available to satisfy a community obligation, the creditor must proceed to judgment against that spouse.

Along those lines, Professor Lee Hargrave construes the LSA-C.C.P. art. 735 action as exposing only the community property of the non-party spouse to the satisfaction of a resulting judgment, stating that Article 735 is "overshadow[ed]" by due process requirements. Professor Hargrave suggests that if a *personal* judgment is desired against *both* spouses, they should both be sued. See Lee Hargrave, Louisiana Constitutional Law – Due Process—Executing Against Community Assets, 47 La. L. Rev. 333 (1986) (citing Shaw v. Phillips Crane & Rigging, Inc., 636 S.W.2d 186, 187 (Tx. 1982) (citing Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); and North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) (holding due process requirements for seizure of property are notice of and an opportunity to contest the seizure and sale)); Lee Hargrave, Community Property Considerations In Law Suits By And Against Spouses, 57 La. L. Rev. 439 (1997).

[5]Although not established in the record now before us, we note that Randy has denied having in his possession any former community property.

CONCLUSION

For the above reasons, the October 9, 2008 judgment of the trial court is hereby amended to specifically provide that Premier's Motion for Garnishment of Spouse's Wages and Property is denied solely to the extent that Premier seeks to garnish Randy Schwaner's current wages or any other separate property belonging to Randy Schwaner. As amended, the judgment is affirmed. Costs of this appeal are assessed against Premier Information Systems, Inc.

AMENDED AND, AS AMENDED, AFFIRMED.