

STATE OF MICHIGAN
COURT OF APPEALS

MARK R. COOPER,

Plaintiff-Appellee,

v

MOURER-FOSTER, INC.,

Defendant-Appellant.

UNPUBLISHED

August 23, 2005

No. 253304

Ingham Circuit Court

LC No. 03-001681-CK

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this interlocutory appeal, defendant challenges the trial court's order requiring it to pay plaintiff \$50,000, and to put \$150,000 into escrow, pending final resolution of this case. We reverse, lift a stay previously imposed, and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is an insurance agency. Plaintiff came to work for defendant, bringing several accounts with him. The parties' employment agreement provided that upon termination of the employment relationship, defendant would purchase those accounts, or "book of business," from plaintiff, for an amount based on plaintiff's recent history of sales commissions earned. The parties ended their employment relationship, and defendant retained plaintiff's accounts but tendered no payment. Plaintiff filed suit for contract damages, demanding \$402,930.10, which figure resulted solely from his own calculations.

Defendant responded that it had discovered evidence of misconduct on plaintiff's part that had to be investigated and resolved before amounts due plaintiff could be determined. Defendant additionally set forth affirmative defenses, including that plaintiff had himself breached the contract, that plaintiff engaged in unlawful insurance practices to the detriment of defendant and its clients, and that plaintiff's claim was barred by the doctrines of waiver, estoppel, and laches.

Prior to discovery, plaintiff moved the trial court for partial distribution of amounts owed, or escrow of the proceeds from his accounts now retained by defendant. The trial court granted the motion, explaining, "Plaintiff is owed something. I'm not exactly sure of the exact amount, and, as a result, . . . I'm ordering that \$150,000 be paid by Defendant into an escrow account with the Court and \$50,000 be paid to Plaintiff"

The trial court denied defendant's request for a stay of the order, but granted defendant leave to file a counterclaim. We granted leave to appeal, and ordered a stay of proceedings.

Defendant argues that the trial court lacked authority to order such prejudgment relief. We agree. The scope of a trial court's powers is a question of law, calling for review de novo. *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998). Neither the court rules, nor the Revised Judicature Act,¹ authorize a trial court to presume that a judgment will be forthcoming, and to order payment in advance of final resolution of the case of some portion thereof.

Prejudgment garnishment is permitted only where a debt has been established by a foreign judgment and the defendant is not subject to the court's jurisdiction, or where the plaintiff cannot serve the defendant with process. MCR 3.102(A)(3)(b)(i) and (B)(3). The same constraints govern writs of attachment. MCR 3.103(B)(1)(c) and (3)(b).

The concern that plaintiff appears likely to collect some amount from defendant, but is at a disadvantage for want of having the money in hand pending final resolution of the controversy, does not justify replacing any part of final adjudication on the merits with a bare presumption of defendant's liability. Any judgment ultimately awarded would be subject to interest, which serves the purpose of compensating the prevailing party for having had to wait for his or her money. *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 623; 552 NW2d 657 (1996).

Nor can the decision below be justified by recourse to the trial court's equitable powers. Equity is "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law." Black's Law Dictionary (6th ed, 1990), p 540. The trial court ordered defendant to pay plaintiff in anticipation of an eventual award of contract damages. The nature of the action, and the remedy of damages, are ordinary common-law matters that do not invoke principles of equity. Further, equitable remedies are not appropriate where an adequate remedy at law is available. *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992).

For these reasons, we conclude that the trial court erred in ordering defendant to surrender \$200,000 against an anticipated, but not yet established, final judgment in plaintiff's favor. We hereby reverse the trial court's order in that regard, lift the stay of proceedings, and remand this case for further proceedings consistent with this opinion.

Reversed, stay lifted, and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

¹ MCL 600.101 *et seq.*