IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 5, 2014 Session

ALFRED E. EMRICK, JR. v. GREGORY MOSELEY ET AL.

Appeal from the Circuit Court for Montgomery County
No. MCCCCVGS 12-2627 Ross H. Hicks, Judge

No. M2013-01829-COA-R3-CV - Filed July 30, 2014

The General Sessions Court of Montgomery County entered a final judgment against the garnishees for the full amount of the judgment debtor's debt, even though the garnishees had filed an answer and informed the court of the amount of their payments made to the judgment debtor. On appeal, the Circuit Court affirmed this final judgment, and the garnishees timely appealed to this Court. We vacate the final judgment for the full amount of the debt because (1) no conditional judgment was entered, (2) the garnishees were not provided with notice of a conditional judgment, and (3) the garnishees answered and properly informed the court regarding the amount of their payments made to the judgment debtor. We remand this action to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY and JOHN W. MCCLARTY, JJ., joined.

B. Lynn Morton and Nick T. Tooley, Clarksville, Tennessee, for the appellants, Jamie Sauers and Alan Crosslin d/b/a U Save Auto.

Gregory D. Smith, Clarksville, Tennessee, for the appellee, Alfred E. Emrick, Jr.

OPINION

I. Factual and Procedural Background

The plaintiff, Alfred E. Emrick, Jr., filed suit against co-defendant, Gregory Moseley d/b/a College Street Auto, in Montgomery County General Sessions Court in July 2009. Mr. Emrick was granted a default judgment in that action in the amount of $19,718.94. Apparently, Mr. Emrick did not collect funds to satisfy that judgment. Mr. Emrick later observed Mr. Moseley working at U Save Auto, a used car lot owned by co-defendants, Jamie Sauers and Alan Crosslin.

On August 12, 2011, Mr. Emrick filed a garnishment in General Sessions Court, directing Jamie Sauers and Alan Crosslin ("Garnishees") to pay into court any monies they owed to Mr. Moseley. Garnishees did not send any payments to the court, and the matter was placed on the court's docket for May 23, 2012. The parties are in disagreement regarding the events that transpired in court on May 23, 2012. Mr. Emrick contends that a conditional judgment was entered against Garnishees, pursuant to Tennessee Code Annotated §§ 26-2-209 and 29-7-114. Garnishees contend that their attorney appeared at the hearing on May 23, 2012, but that the hearing was continued without any action being taken.

Garnishees filed an answer to the garnishment on June 5, 2012. They asserted that Mr. Moseley was a consultant for their business, rather than an employee of the business. Garnishees stated that they paid Mr. Moseley $300.00 for each consultation and that they had paid him a total of $4,200.00 from September 6, 2011, through March 6, 2012.

Garnishees posit and Mr. Emrick acknowledges that on August 14, 2012, Garnishees deposited $2,100.00 with the clerk of the General Sessions Court. A subsequent hearing on the matter was held on August 15, 2012. Thereafter, the General Sessions Court entered a Final Judgment against Garnishees in the amount of $19,718.94. This Final Judgment states:

> The Plaintiff's Motion for Conditional Judgment against JAMIE SAUERS AND ALAN CROSSLIN (Employers) DBA U-SAVE AUTO was heard on May 23, 2012, at which an appearance was made on behalf of the Employers by their attorney Ms. Lynn Morton and testimony was offered in open court by the Defendant Greg Moseley. The Court then scheduled a hearing for final judgment on June 6, 2012. The matter was later continued to June 27, 2012 and then to August 15, 2012. At the hearing in open court on August 15, 2012, upon the testimony of the Plaintiff, the testimony of one of the Employers, the testimony of Deputy Sheila Ratliff, the Answer filed on behalf of the Employers, statements of counsel for Plaintiff and Employers and

> upon the entire record, the Court finds that a Final Judgment should be entered against the Employers, JAMIE SAUERS AND ALAN CROSSLIN DBA U-SAVE AUTO for the full amount of indebtedness owed by the Defendant to the Plaintiff to include interest which is in the amount of $19,718.94.
>
> Whereupon, IT IS ORDERED that a Final Judgment is hereby awarded in favor of the Plaintiff against JAMIE SAUERS AND ALAN CROSSLIN in the total amount of $19,718.94, plus costs in this cause for all of which execution may issue. Any payments made in this cause by the Employer to the court clerk shall be credited towards the Judgment.

Garnishees timely appealed the ruling of the General Sessions Court to the Circuit Court for a *de novo* hearing.

The Circuit Court conducted the hearing on February 28, 2013. At that hearing, Mr. Emrick testified that he saw Mr. Moseley working at U Save Auto whenever he drove by, which was two to three times per week for several months. Having secured a judgment against Mr. Moseley, Mr. Emrick filed a garnishment upon Garnishees to collect on that judgment. Mr. Emrick admitted that he had received a payment of $2,100.00, which Garnishees paid into court.

Mr. Sauers and Mr. Crosslin testified that they owned U Save Auto and that they had no previous experience operating a car lot. They requested Mr. Moseley to help them in starting the business. According to Garnishees, they paid Mr. Moseley as a consultant to assist them in learning how to purchase and sell cars. They denied that he was an employee of U Save Auto and stated that they had not deducted any taxes from the monies they paid to him. Mr. Sauers further explained that Mr. Moseley owned a car wash and auto repair business directly across the street from U Save Auto and that he also cleaned their cars. Mr. Moseley, Mr. Sauers, and Mr. Crosslin indicated that upon occasions when Mr. Moseley informed them he was owed money, they would in turn write him a check. He never provided any written invoices for his services. Mr. Sauers further explained that Mr. Moseley maintained no established hours and received no instructions from them regarding the performance of his work.

Mr. Sauers stated that when he was served with the garnishment in September 2011, he completed the attached paperwork and mailed it back to the court. Mr. Sauers and Mr. Crosslin testified that they compiled a list of all payments delivered to Mr. Moseley (which compilation was attached to their answer and introduced as an exhibit at trial). This list demonstrates that Garnishees paid Mr. Moseley $4,200.00 between September 6, 2011, and March 6, 2012. According to Mr. Sauers, Garnishees required Mr. Moseley's services less

at the time of trial, but he did occasionally continue to clean cars for them. Mr. Sauers affirmed that he was served with only notice of the garnishment and that he was unaware of the hearing held in General Sessions Court on August 15, 2012, until the "last minute."

Mr. Moseley confirmed that he had only been paid $4,200.00 by Garnishees from September 6, 2011, through March 6, 2012. As Mr. Moseley explained, he performed similar consulting services for ten to twenty different individuals with some of these other individuals also selling cars through U Save Auto. Mr. Moseley testified that he "hung out" at U Save Auto frequently but could come and go as he pleased. Mr. Moseley appeared at the hearing on May 23, 2012, to "clear the matter up." Mr. Sauers and Mr. Crosslin testified that Mr. Moseley assured them he would take care of the matter when they first received notice of the garnishment.

The Circuit Court commented at the conclusion of the hearing that: "I don't think the he's-not-an-employee-defense is relevant because you admit you owed him money. But to the extent that it is, the Court would find that it's, uh, by a preponderance of the evidence, that it appears to the Court that Mr. Moseley would be an employee." Following the hearing, the Circuit Court entered a judgment against Garnishees, which provides in relevant part:

> This matter came on to be heard on February 28, 2013, for trial De Novo upon an appeal from a Final Judgment entered against JAMIE SAUERS and ALAN CROSSLIN d/b/a U-SAVE AUTO in the General Sessions Court for Montgomery County, Tennessee, Court File Number MCGSCVCW 09-4034.
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> After the hearing, and upon the testimony of the parties, witnesses and evidence presented in open court, it appeared to the Court that the judgment entered in General Sessions Court on October 17, 2012, in the amount of $19,718.94 should be affirmed and judgment was awarded to the Plaintiff/Appellee, Alfred E. Emrick, Jr. against Jamie [Sauers] and Alan Crosslin d/b/a U-Save Auto in the amount of $19,718.94 together with any and all costs and interest at the judgment rate from and after October 17, 2012. That judgment was entered on March 27, 2013.
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> The matter came on to be heard again on the 16th day of May, 2013, upon the motion of Jamie [Sauers] and Alan Crosslin d/b/a U-Save Auto to set aside the prior judgment. It appearing to the Court that notice of entry of the judgment rendered on March 27, 2013, was not given to the Appellants Sauers, et al., in accordance with TRCP 58, the Court orders that such judgment be and is hereby set aside and the judgment rendered herein be substituted therefor.

> IT IS THEREFORE ORDERED, ADJUDGED and DECREED that final judgment is hereby awarded and entered to the Plaintiff/Appellee, Alfred E. Emrick, Jr. against Jamie [Sauers] and Alan Crosslin d/b/a U-Save Auto in the amount of $19,718.94 together with any and all costs and interest at the judgment rate from and after October 17, 2012. This is a final order.

Garnishees filed a motion for new trial, asserting that a conditional judgment had not been entered by the General Sessions Court on May 23, 2012, as demonstrated by an attached docket call sheet generated by that court. Garnishees asserted that even if a valid conditional judgment had been entered on May 23, 2012, the General Sessions Court should not have entered a final judgment on August 15, 2012, because Garnishees had answered and paid monies into the registry of that court. The Circuit Court denied Garnishees' motion for new trial, and Garnishees have timely appealed that ruling to this Court.

II. Issues Presented

The parties present the following issues for our review, which we have restated slightly:

1. Whether the trial court erred by failing to recognize that Garnishees had filed an answer and made payment relative to the garnishment prior to trial.

2. Whether the trial court erred by awarding a judgment against Garnishees.

3. Whether the trial court erred by excluding documents requested by Garnishees in the technical record on appeal.

4. Whether Mr. Emrick should receive an award of attorney's fees on appeal pursuant to Tennessee Code Annotated § 27-1-122.

III. Garnishments

The parties' first two issues involve the validity of the judgment entered against Garnishees for the full amount owed by Mr. Moseley to Mr. Emrick. A thorough explanation of the garnishment process is contained in *Boyd v. Cruze*, No. E2003-02697-COA-R3-CV, 2005 WL 1493157 at *8 (Tenn. Ct. App. June 24, 2005), wherein this Court elucidated:

> Garnishment is a proceeding whereby the plaintiff seeks to

> subject to his claim property of the defendant in the hands of a third person or money owed by such third person to defendant. The person in whose hands such effects are attached is the garnishee, because he is garnisheed, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. Upon its service the property, effects, or debts in the hands of the garnishee are in the custody of the law, and beyond the control of either the garnishee or the judgment debtor.

Stonecipher v. Knoxville Sav. & Loan Assoc., 298 S.W.2d 785, 787 (Tenn. Ct. App. 1956) (quoting 38 C.J.S. Garnishment, § 1, p. 199). The failure of a garnishee to respond to a garnishment is addressed in Tenn. Code Ann. § 26-2-209:

> The date garnishee's answer is received by the court clerk shall be noted on the docket book in the proper manner, whether or not the answer discloses any property subject to garnishment. If the garnishee fails to appear or answer, a conditional judgment may be entered against the garnishee for the plaintiff's debt, upon which a notice shall issue to the garnishee returnable at such time as the court may require, to show cause why judgment final should not be rendered against the garnishee. On failure of the garnishee to appear and show cause, the conditional judgment shall be made final, and execution awarded for the plaintiff's entire debt and costs.

If a garnishee fails to answer the garnishment, the next step in the process is the entry of a conditional judgment "for the plaintiff's debt." *Id*. The statute provides that, when the conditional judgment is entered, "a notice shall issue to the garnishee . . . to show cause why judgment final should not be rendered against the garnishee." *Id*. A "conditional judgment" is also addressed in Tenn. Code Ann. § 29-7-114 (2000):

> If, when duly summoned, the garnishee fail [sic] to appear and answer the garnishment, the garnishee shall be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and a conditional judgment shall be entered up against the garnishee accordingly.

Boyd, 2005 WL 1493157 at *8.

Regarding conditional judgments, this Court has explained:

> A conditional judgment is somewhat similar to a default judgment, but is not identical. Both recognize a failure to respond to process. Both provide a possible substitute for evidence. However, there are distinct differences. The default judgment declares an admission of facts alleged in the complaint, but leaves unliquidated damages for future proof. The conditional judgment is what the name implies. It is a threat of final judgment if response should not be forthcoming. It is a means of inducing a response and a threat of a penalty for failure, but it is not a judgment establishing any rights.
>
> The conditional judgment is a notification to the garnishee that if he does not make timely answer, the Court will presume that he (the garnishee) is indebted to the judgment [debtor] in an amount sufficient to satisfy the judgment.
>
> It is significant that a conditional judgment does not award execution (fieri facias), i.e. "cause to be made, or satisfied," for its enforcement but, in its usual form awards a scire facias (cause to know) i.e., "notify the garnishee". Until the garnishee is served with scire facias, he has not been officially notified of the possibility of liability for the full amount of the judgment. Until so notified he has not received due process for the entry of such a final judgment.
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> For this reason, a conditional judgment is frequently called a "judgment nisi" (unless). That is, it is an order that unless the garnishee makes timely answer to the scire facias, the conditional judgment will be made final.
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> . . .
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> The purpose of a conditional judgment against a garnishee is to give the garnishee, who has defaulted additional time or another opportunity to answer the garnishment. 6 Am.Jur.2d Attachment & Garnishment § 388, p. 832, *Busby v. Merchants & Manufacturers Bank*, 158 Miss. 843, 131 So. 645 (1931).
>
> A conditional judgment against a garnishee is not a final adjudication of the respective rights of the plaintiff and garnishee, but is a proposed or threatened judgment to be actually imposed if the garnishee does not "show cause" in response to the scire facias.

> The office of the scire facias is to notify the garnishee of the necessity to appear on a date and at a time certain to show cause why the conditional judgment should not be made final.
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> Upon proper response to the scire facias with full disclosure of the indebtedness of the garnishee to the judgment debtor, the garnishee has "shown cause" why the conditional judgment for the entire judgment debt should not be made final. Such showing having been made, it is the duty of the court to set aside the conditional judgment or to modify it to conform to the facts as disclosed by the answer of the garnishee and any other evidence presented; that is, the court should render final judgment only for the amount admitted by the garnishee to be due the debtor, or the amount shown by other evidence to be due.

Meadows v. Meadows, No. 88-135-II, 1988 WL 116382 at *4-5 (Tenn. Ct. App. Nov. 2, 1988).

In the instant action, the record does not reflect that a conditional judgment was ever entered by the General Sessions Court or that the statutorily mandated notice of such a judgment was sent to Garnishees. The record contains no conditional judgment or order, and it is well settled that the court "speaks only through its written judgments, duly entered upon its minutes." *Wood v. Starko*, 197 S.W.3d 255, 264 (Tenn. Ct. App. 2006). Further, in its Final Judgment entered after the August 15, 2012 hearing, the General Session Court stated:

> The Plaintiff's Motion for Conditional Judgment against JAMIE SAUERS AND ALAN CROSSLIN (Employers) DBA U-SAVE AUTO was heard on May 23, 2012, at which an appearance was made on behalf of the Employers by their attorney Ms. Lynn Morton and testimony was offered in open court by the Defendant Greg Moseley. The Court then scheduled a hearing for final judgment on June 6, 2012. The matter was later continued to June 27, 2012 and then to August 15, 2012.

Significant to the issues presented on appeal, although the Final Judgment recites that a hearing was held on May 23, 2012, it does not state that a conditional judgment was entered. As such, we have no evidence that a conditional judgment was ever entered by the General Sessions Court.

Further, regarding the requirements of notice to the garnishee, it is clear that:

> Upon the entry of a conditional judgment, "a scire facias shall issue to the

> garnishee . . . to show cause why final judgment should not be entered against the garnishee." T.C.A. § 29-7-115 (2000); *see In re Warner*, 191 B.R. at 709. If, after proper service, the garnishee fails to appear at the scire facias hearing, a final judgment for the debtor's entire indebtedness may be entered against the garnishee. *See* T.C.A. § 29-7-114. In sum, the garnishee is "required to respond or risk total liability." *In re Warner*, 191 B.R. at 709. "While these procedures may yield harsh results as to the garnishee, the harshness is ameliorated by the ease with which the garnishee may respond to the garnishment, including by a written answer." *Id.* (citing T.C.A. § 29-7-103(b)).

Dexter Ridge Shopping Ctr., LLC v. Little, 358 S.W.3d 597, 607 (Tenn. Ct. App. 2010) (emphasis added). Similarly, Tennessee Code Annotated § 26-2-209 (2000) states in pertinent part:

> If the garnishee fails to appear or answer, a conditional judgment may be entered against the garnishee for the plaintiff's debt, upon which a notice shall issue to the garnishee returnable at such time as the court may require, to show cause why judgment final should not be rendered against the garnishee. On failure of the garnishee to appear and show cause, the conditional judgment shall be made final, and execution awarded for the plaintiff's entire debt and costs.

(Emphasis added). Tennessee Rule of Civil Procedure 69.05 also addresses the proper procedure for obtaining judgment on a garnishment, as it provides:

> If the garnishee fails to timely answer or pay money into court, a conditional judgment may be entered against the garnishee and an order served requiring the garnishee to show cause why the judgment should not be made final.

(Emphasis added).

Assuming, *arguendo*, that a conditional judgment was entered by the General Sessions Court, the record fails to demonstrate that the statutorily required notice of a conditional judgment was served upon Garnishees. Garnishees testified that they were not served with any notice other than the garnishment.

Due to the failure of the General Sessions Court to properly enter or give notice of a conditional judgment, we conclude that the entry of a Final Judgment for the entire amount of the debt was improper. Tennessee Code Annotated §§ 26-2-209 and 29-7-115 (2012), as

well as Tennessee Rule of Civil Procedure 69.05, clearly and unambiguously state that a conditional judgment must be entered and that the garnishee must be given notice of same, along with the opportunity to show cause why a final judgment should not be entered for the full amount of the debt, before such a final judgment can be entered. Neither of these mandatory actions was accomplished in this case. Due to these procedural deficiencies, the Final Judgment entered by the General Sessions Court and affirmed by the Circuit Court for the full amount of the debt owed to Mr. Emrick must be reversed. *See Boyd*, 2005 WL 1493157 at *11.

The facts in *Boyd* are somewhat similar to the facts in the case at bar. Although a conditional judgment was proposed by the judgment creditor, it was never signed or entered by the trial court. *See Boyd*, 2005 WL 1493157 at *10. The garnishee thereafter filed an answer, stating that the judgment debtor was not employed by him and that he held no assets belonging to the judgment debtor. *Id*. at *2. Despite this response, the trial court entered a final judgment against the garnishee for the full amount of the debt. *Id*. This Court found that final judgment to have been erroneously entered due to the absence of entry of a conditional judgment. *Id*. at *10.

As this Court explained:

> [E]ven assuming either that the conditional judgment was in some way effective on or about the date it was lodged with the trial court clerk, or that the judgment creditor was entitled to a *nunc pro tunc* entry of same–positions with which we do not agree–we conclude, as did the court in *Smith*, that a garnishee's response, even if untimely, is sufficient to constitute an answer and rebut the Tenn. Code Ann. § 29-7-114 presumption that the garnishee is obligated for the entire amount of the judgment debtor's obligation. *Smith*, 2004 WL 229089, at *9. Since a response was filed in the instant case, the relief described in Tenn. Code Ann. § 26-2-209, being premised on a "fail[ure] to appear or answer," is not available. Such relief simply does not apply to a factual scenario such as the one presented in this case.
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> If, after a response is filed, the trial court determines that "the garnishee is indebted to the [judgment debtor], or has property and effects of the [judgment debtor] subject to the attachment, the court may, in case recovery is had by the plaintiff against the defendant, give judgment against the garnishee for the amount of the recovery or of the indebtedness and property." Tenn. Code Ann. § 29-7-112 (2000) (emphasis added). The latter statute is the appropriate vehicle for a recovery once a response is filed; Tenn. Code Ann. § 26-2-209 is no longer "in play ."

Boyd, 2005 WL 1493157 at *11.

In the instant action, Garnishees filed an answer to the garnishment on June 5, 2012, stating that they had paid a total of $4,200.00 to Mr. Moseley since the filing of the garnishment. It is also undisputed that Garnishees paid $2,100.00 into the registry of the court regarding this garnishment, which Mr. Emrick had received by the date of trial. Therefore, it is undisputed that Garnishees properly answered and informed the court regarding their indebtedness to Mr. Moseley prior to entry of the Final Judgment. As such, the trial court erred in awarding a judgment for the entire amount of the debt. Once an answer was filed by Garnishees, "the relief described in Tenn. Code Ann. § 26-2-209, being premised on a 'fail[ure] to appear or answer,' is not available." *Boyd*, 2005 WL 1493157 at *11.

Instead, the trial court should only have entered judgment against Garnishees if the court determined that the amount they had already paid into the court's registry ($2,100.00) was insufficient to satisfy their obligation pursuant to Tennessee Code Annotated §§ 26-2-106 and 26-2-404 (Supp. 2013).[1] Therefore, we remand this action to the trial court for a determination of the proper amount of judgment to be awarded against Garnishees, if any.

IV. Trial Court Record

Garnishees assert that the Circuit Court also erred in refusing to include the "missing" General Sessions Court filings in the record on appeal. These documents included the original judgment and garnishment, as well as the receipt showing the $2,100.00 payment by Garnishees. This issue is moot in the present case because all facts contained in these documents were proven by witness testimony during the Circuit Court hearing. We do generally note, however, that when a case is appealed from general sessions court to circuit court, the parties are not required to file formal pleadings, issue new process, or reconstruct any procedural steps that have been completed prior to the appeal to circuit court. *See* Tenn. Code Ann. § 16-15-729 (2009); *Vinson v. Mills*, 530 S.W.2d 761, 765 (Tenn. 1975). We also note that all "papers relative to the trial of a cause" in general sessions court are to be transmitted to the circuit court when an appeal is taken. Tenn. Code Ann. § 16-15-303 (Supp. 2013). Therefore, any papers filed during the pendency of the action in General Sessions Court should have been transmitted to the Circuit Court upon appeal and properly included in the Circuit Court record.

[1]Tennessee Code Annotated § 26-2-106 provides that only a specified portion of an employee's earnings are subject to garnishment, and Tennessee Code Annotated § 26-2-404 provides the calculation for determining the proper amount of a garnishment.

V. Attorney's Fees on Appeal

Finally, Mr. Emrick argues that he should be awarded his attorney's fees for defending this "frivolous" appeal. Tennessee Code Annotated § 27-1-122 (2000) states:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Because we have found Garnishees' contentions to have merit, we conclude that this is not a frivolous appeal. An award of attorney's fees is therefore unwarranted.

VI. Conclusion

For the reasons stated above, we hereby vacate the trial court's grant of a final judgment in favor of Mr. Emrick against the Garnishees for the full amount of Mr. Moseley's debt. We remand this action to the trial court for further proceedings consistent with this opinion. Costs on appeal are assessed equally, one half to the plaintiff, Alfred E. Emrick, Jr., and one half collectively to the Garnishees, Jamie Sauers and Alan Crosslin.

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THOMAS R. FRIERSON, II, JUDGE