Opinion issued March 31, 2011

In The

Court of Appeals

For The

First District of Texas

No. 01–09–00747–CV

No. 01-09-01084–CV

MICHAEL W. ELLIOTT, Appellant

V.

JAMES A. WEST AND ROSS REPORTING, INC., Appellee

On Appeal from the Civil County Court at Law Number Four
Harris County, Texas
Trial Court Case No. 932254-801

MEMORANDUM OPINION

Appellant Michael W. Elliott appeals from the denial of his motion to dissolve a writ of garnishment and a final judgment in a garnishment action brought by appellees Ross Reporting Services, Inc. ("Ross") and James A. West to

collect on prior judgments against Elliott. Elliott argues that the trial court abused its discretion by issuing the writ of garnishment because the writ was issued against property that Elliott does not own, and Elliott did not receive notice of the writ pursuant to Rule 663a of the Texas Rules of Civil Procedure. With respect to the final judgment in the garnishment proceeding, Elliott asks whether the trial court erred "by proceeding to judgment on a garnishment action when the underlying case was on appeal, but no supersedeas bond has been filed?" We affirm.

Background

Elliott has filed three related appeals in this court. We have consolidated these two appeals[1] and issued an opinion in the other related appeal concurrently with this opinion. In his first appeal, Elliott appealed from a summary judgment granted in favor of Ross and West by the county court at law on April 16, 2009. We affirmed. This appeal relates to a subsequent garnishment action filed by Ross and West to collect on their judgments against Elliott.

[1] Elliott first appealed from the trial court's denial of his motion to dissolve the writ of garnishment prior to the entry of a final judgment, and that appeal was assigned Cause No. 01–09–00747–CV. After entry of final judgment, Elliott filed a timely appeal from the judgment, which appeal was assigned Cause No. 01–09–01084–CV. Because the trial court has now entered final judgment in the case, we treat Elliott's appeal from the denial of his motion to dissolve the writ of garnishment as a prematurely filed appeal under Rule 27.1 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 27.1(a). We have therefore separately ordered that Cause No. 01–09–01084–CV be consolidated into Cause No. 01–09–00747–CV.

Ross and West commenced this garnishment action by filing an application for writ of garnishment, naming Brazos Valley Schools Credit Union (the "bank") as the garnishee. The bank filed an answer in which it stated that it held funds belonging to Elliott in three accounts in amounts of $410.83, $82.98, and $2,551.52 ($1,800.00 frozen), respectively. The bank identified the accounts as held in Elliott's name with Elliott's wife as the co–owner of the accounts. The county court at law granted the application for writ of garnishment and denied Elliott's subsequent motion to dissolve the writ of garnishment. The county court at law subsequently entered a final summary judgment awarding the garnished funds to Ross and West, and this appeal followed.

The Garnishment Action

A. Standard of Review

We review summary judgments de novo. *Amegy Bank Nat'l Ass'n v. S. Crushed Concrete, Inc.*, No. 01–07–00359–CV, 2009 WL 943758, at *3 (Tex. App.—Houston [1st Dist.] April 9, 2009, pet. denied) (mem. op.) (affirming summary judgment in garnishment action) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). We review the evidence in the summary judgment record in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable

jurors could not. *Id.* (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005)). Traditional summary judgment may be granted only if the movant establishes that no genuine issue of material fact exists and that judgment should be rendered in the movant's favor as a matter of law. *Id.*; TEX .R. CIV. P. 166a(c).

We review a trial court's ruling on a motion to dissolve a writ of garnishment for abuse of discretion. *Simulis, L.L.C. v. G.E. Capital Corp.*, 276 S.W.3d 109, 112 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing *Gen. Elec. Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 705 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)). A trial court abuses its discretion if it acts without reference to guiding rules and principles or in an arbitrary or unreasonable manner. *Id.* (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

B. Applicable Law

Garnishment is a statutory proceeding whereby the property, money, or credits of a judgment debtor that are in the possession of another are applied to the payment of the debt owed by the judgment debtor. *See* TEX. CIV. PRAC & REM. CODE §§ 63.001-.008 (West 2008); TEX. R. CIV. P. 657–679; *Bank One, Tex. v. Sunbelt Sav.*, 824 S.W.2d 557, 558 (Tex. 1992). A garnishment action is commenced by a judgment creditor against a third party garnishee who holds property of the judgment debtor. TEX. R. CIV. P. 658, 659. Garnishment can only proceed on a prior judgment that is final. TEX. R. CIV. P. 658. A judgment is final

for purposes of a garnishment action when the judge signs the judgment, unless the judgment debtor posts a proper supersedeas bond. TEX. R. CIV. P. 657.

When a garnishment action is commenced, the court may, after hearing or upon final judgment, grant the application for writ of garnishment, entering specific findings of fact to support the statutory grounds found to exist and specifying the maximum value of property or indebtedness that may be garnished and the amount of bond that must be posted by the judgment creditor. TEX. R. CIV. P. 658. If the court grants the application for garnishment, the writ is served on the garnishee and the judgment debtor. TEX. R. CIV. P. 663, 663a. The garnishee then files an answer that details any funds it is holding for the judgment debtor. TEX. R. CIV. P. 659, 665. At this point, the judgment debtor may replevy the funds held by the garnishee by posting sufficient bond. TEX. R. CIV. P. 664. The only issue to be tried in a garnishment proceeding is who is entitled to the funds involved in the proceeding. *Owen Elec. Supply, Inc. v. Brite Day Constr., Inc.*, 821 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (citing *Home Improvement Loan Co. v. Brewer*, 318 S.W.2d 673, 677 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.)). If the garnishee holds funds for the judgment debtor and the court determines that the judgment creditor is entitled to those funds, the court may enter a final garnishment judgment directing the garnishee to pay funds it holds for the

judgment debtor directly to the judgment creditor. *See, e.g.*, *Simulis, L.L.C.*, 276 S.W.3d at 116; *Amegy Bank Nat'l Ass'n*, 2009 WL 943758, at *4 n.7.

C. The Writ of Garnishment

Elliott challenges the trial court's writ of garnishment on two bases: (1) the writ was issued against property that Elliott does not own, and (2) Elliott did not receive notice of the writ pursuant to Rule 663a of the Texas Rules of Civil Procedure. We overrule both complaints.

1. Ownership of the Garnished Funds

In his verified motion to dissolve the writ of garnishment, Elliott asserts that the funds held by the bank are actually the sole and separate property of his wife. Elliott contends that this statement in the motion is evidence establishing that he does not own the money in the accounts as a matter of law. Ross and West respond that the bank's answer is some evidence that Elliott owns the funds in the accounts; Elliott's assertion that the funds are the separate property of his wife is conclusory and, therefore, not competent summary judgment evidence; and in any event, Elliott has failed to overcome the strong presumption that property held by either spouse during the marriage is community property.

The parties do not dispute that the funds in question are held by the bank in an account on which Elliott and his wife are co-owners. Under Texas law, property possessed by either spouse during marriage is presumed to be community

property. TEX. FAM. CODE ANN. § 3.003(a) (West 2006); *e.g.*, *Filingim v. Fillingim*, — S.W.3d —, No. 10–0013, 2011 WL 117664, *2 (Tex. Jan. 14, 2011); *Osborn v. Osborn*, 961 S.W.2d 408, 414 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). To overcome that presumption, the party claiming separate ownership of the property must trace and clearly identify the property in question as separate by clear and convincing evidence. *Filingim*, — S.W.3d at —, 2011 WL 117664, at *2 (citing TEX. FAM. CODE ANN. § 3.003; *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973); *Tarver v. Tarver*, 394 S.W.2d 780, 783 (Tex. 1965)); *see Osborn*, 961 S.W.2d at 414. Elliott's conclusory assertion that the funds are the sole and separate property of his wife does not satisfy his burden of providing clear and convincing evidence tracing ownership of the property so as to establish his wife's separate ownership of the funds. *Cf. Filingim*, — S.W.3d at — , 2011 WL 117664, at *2 (holding that property was community property because party failed to offer clear and convincing evidence of separate character of property).

We conclude that the trial court did not abuse its discretion in failing to dissolve the writ of garnishment on this ground.

2. Notice

Elliott asserts in his appellate brief that he was "never served with a copy of the writ [of garnishment]." *See* TEX. R. CIV. P. 663a (governing service of writ of

garnishment on defendant). In support of this assertion, he cites a single page in the appellate record, which is the second page of his motion to dissolve the writ of garnishment. On that page, Elliott admits that he received the writ of garnishment from the bank on July 6, 2009 but, in a footnote, complains that he was not also served with the writ of garnishment by the trial court or Ross and West. Ross and West respond that they did serve Elliott with notice of the writ of garnishment and have evidence to verify service, but the evidence is not in the appellate record because Elliott never raised this issue before the trial court and, therefore, did not preserve the issue for appeal.

The writ of garnishment in the record complies with the specific form set out in Rule 663a. TEX. R. CIV. P. 663a. Rule 663a requires that the defendant be served with the writ in any manner permitted by Rule 21a, "as soon as practicable following the service of the writ." *Id.*; *see also* TEX. R. CIV. P. 21 (governing methods of service). The record establishes that Elliott received a copy of the writ from the garnishee, the bank, on June 6, 2009—four days after it was issued. To the extent Elliott's issue on appeal may be read as arguing that Rule 663a is not satisfied here because he was served by the wrong party or service did not comply with Rule 21a, Elliott did not raise this issue before the trial court. Elliott's only indication of a complaint about service appears in the footnote where he states that he was not served by the court or Ross and West. Elliott did not ask the trial court

to dissolve the writ of garnishment on this ground or otherwise put the issue before the trial court for ruling. *Cf. Conwright v. State*, No. 05–09–01409–CR, 2010 WL 4324442, *2 (Tex. App.—Dallas Nov. 3, 2010, pet. filed) (not designated for publication) (holding that complaints relating to garnishment were not preserved for appeal where appellant failed to raise complaints in trial court). Thus, Elliott did not give the trial court an opportunity to rule on any objection he might have had to defects in service of the writ, nor did the trial court make any such ruling. Additionally, Ross and West were not put on notice that they needed to file evidence on this issue. We therefore conclude that Elliott has not preserved for appeal his complaint about the procedural correctness of the manner in which he received the writ of garnishment. *See Conwright*, 2010 WL 4324442, at *2; TEX. R. APP. P. 33.1(a).

D. Judgment in the Garnishment Action

Elliott argues that the county court at law's entry of final judgment in the garnishment action was improper because the action in which an underlying judgment was entered was pending on appeal. Relying on *Taylor v. Transcontinental Properties, Limited*, 670 S.W.2d 417 (Tex. App.—Tyler 1984), *rev'd* 717 S.W.2d 890 (Tex. 1986), Elliott argues that the underlying judgment is not final until it has reached the stage of the judicial process in which it is no longer subject to being set aside by the trial or appellate court. This Court has

rejected reliance on *Taylor* for this proposition, noting that the Tyler court's opinion was subsequently reversed by the Texas Supreme Court and expressly renouncing the principal that a judgment is not final until expiration of the appellate timetables where no supersedeas bond has been filed. *Rosenthal v. Rosenthal*, No. 01-99-00058-CV, 2001 WL 1383132, at *7 (Tex. App.—Houston [1st Dist.] Nov. 8, 2001, pet. denied) (not designated for publication). As noted above, Rule 657 expressly provides that a judgment is final for purposes of a garnishment action when the judge signs the it, unless it is properly superseded by the judgment debtor. TEX. R. CIV. P. 657.

Elliott also relies on this Court's opinion in *Thomas N. Heap, D.D.S., Inc. v. Val-Pak of Greater Houston*, No. 01-00-00756-CV, 2001 WL 699944 (Tex. App.—Houston [1st Dist.] June 21, 2001, pet. denied) (not designated for publication). Elliott's reliance on *Heap* is misplaced. In *Heap*, we cited *Taylor* for a different proposition and held that the final judgment in the garnishment action was proper. *Id.* at *2–3. Contrary to Elliott's assertion, we specifically noted in *Heap* that where, as here, a judgment debtor has not posted supersedeas bond to prevent enforcement of the underlying judgment during the pendency of appeal, "a judgment creditor may pursue post-judgment enforcement by filing for a writ of garnishment *once the trial court signs its judgment*." *Id.* at *2 (emphasis added). Elliott admits that he has not filed a supersedeas bond in the underlying action.

We therefore conclude that the county court at law did not err in entering final judgment in this garnishment proceeding on the grounds that the underlying judgment was not final. *See Rosenthal*, 2001 WL 1383132, at *7–8 (rejecting argument that final judgment in garnishment action was erroneous because appeal was pending, where no supersedeas bond was filed); *Fincher v. Mischer Enters., Inc.*, No. 01-92-01049-CV, 1993 WL 143147, at *1–2 (Tex. App.—Houston [1st Dist.] May 6, 1993, writ dism'd w.o.j.) (not designated for publication) (rejecting argument that prior judgment was not final for purposes of garnishment merely because all appellate time tables had not yet expired); *see also Amegy Bank*, 2009 WL 943758, at *4 n.7 (noting that, absent proper supersedeas bond, underlying judgment was final for purposes of garnishment proceedings when trial court signed it); *Wrigley v. First Nat'l Sec. Corp.*, 104 S.W.3d 252, 257 (Tex. App.—Beaumont 2003, no pet.) (noting that a judgment debtor may enforce a domestic judgment while appeal is pending if not supersedeas bond has been filed).

Conclusion

We affirm the judgment of the county court at law.

Elsa Alcala
Justice

Panel consists of Chief Justice Radack and Justices Alcala and Bland.