

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

March 5, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

ECI BUILDING COMPONENTS, INC.,)
)
Plaintiff/Appellant)
)
v.)
)
CHANL-LOC DOCKS, INC. and)
GENE SMITH,)
)
Defendants)
)
and)
)
MARINA DOCK & SUPPLY, INC.)
)
Garnishee/Appellee)

LOUDON CHANCERY
NO. 03A01-9509-CH-00301

AFFIRMED

J. Myers Morton, Knoxville, Attorney for the Appellant, ECI Building Components, Inc.

C. Paul Harrison, Knoxville, Attorney for the Appellee, Marine Dock & Supply, Inc.

OPINION

_____ INMAN, Senior Judge

I

A judgment was entered against the defendants, jointly, on September 2, 1992. A garnishment in aid of a writ of execution was issued by the Clerk on January 19, 1993 to Marina Dock and Supply, Inc., which answered by letter on January 20, 1993 that it "was not indebted to the defendant at the time of the service of the garnishment."

On May 24, 1993, the judgment creditor filed a motion for a conditional judgment against the garnishee for the entire balance of the judgment. The stated ground of this motion was that Gene Smith, one of the judgment debtors, was the manager of the garnishee who was liable to Smith for wages accrued during the months of February, March and April, 1993, which were unaccounted for.

This motion galvanized the garnishee to file a formal answer to the garnishment. It responded that during January, February, and March, 1993 it paid Smith \$2,415.05, of which 25% was paid to the Clerk,¹ and that Smith had no regular salary. Simultaneously, it filed a response to the motion for a conditional judgment essentially reiterating the content of its answer to the garnishment.²

A second garnishment was served on May 27, 1993. The garnishee responded that

" . . . 3. Gene Smith has not taken a salary from Marina and Dock Supply, Inc. since our receipt of the above referenced garnishment. Marina and Dock Supply, Inc. loaned Gene Smith \$500.00 on June 11, 1993, and that is the only drafts written to Gene Smith since our receiving the garnishment on May 27, 1993.**
4. Gene Smith receives no regular salary at this time.
** Three Checks equaling \$389.65 for expense reimbursements were also written . . . "

The matter thereafter came on for hearing before the Chancellor on the issue of whether a conditional judgment should be entered against the garnishee pursuant to TENN. CODE ANN. § 26-2-209, or whether execution should be awarded against the garnishee pursuant to TENN. CODE ANN. § 26-2-206.

The Chancellor found that "the garnishee was not indebted to the judgment creditor and dismissed the motion for a conditional judgment or for execution.

II

The judgment creditor appeals, and presents for review this issue, *in haec verba*:

"Despite proof payments being made on behalf of Gene Smith, and despite proof of willful and deliberate agreement to work for free to defeat the garnishment, the Chancellor ruled that garnishee had no property, debt, effects in its hands or under its control, nor liable for the defendant, Smith's debt."

The testimony of Madeline Werhoven Haynes, bookkeeper for Marina and

¹Disposable earnings subject to garnishment are protected by Truth-in-Lending legislation. Generally, only 25% of weekly earnings is garnishable. 15 USCA 1673.

²The procedure is not questioned on appeal.

Dock Supply, is revealing:

BY MR. MORTON:

- Q. And you're Madeline Werhoven?
A. I'm Madeline Haynes, I got married.
Q. You're Madeline Haynes, I'm sorry Mrs. Haynes. And you're the bookkeeper for Marina and Dock Supply; correct?
A. Correct . . .
Q. Okay, and I'll try to be brief. It's true back at the time of January of 1993, that when - - Gene Smith, he worked for Marina Dock and Supply; correct?
A. Right.
Q. And there was a time where he borrowed money from Marina Dock and Supply; correct?
A. Yes.
Q. In January of 1993 and February of 1993, and prior to that he - - he'd come to you and say, "I need money"; correct?
A. Correct.
Q. And you would give him money if Marina Dock and Supply's bank account had money; correct?
A. Correct.
Q. And you worked out a deal with Mr. Smith that the amount of money you gave him corresponded to the amount of his salary, the same amount of his salary; correct?
A. The same amount that he cleared.
Q. Okay, so if he was making - - he was making \$805.02 every two weeks, that's what his salary was up until January or February of 1993?
A. That was his net salary.
Q. His net salary, okay. So, if he had a loan - - if he came and got a loan from you, you loaned him either 402.51, which is a weekly amount, or 805.02; correct?
A. Correct.
Q. And up until February of 1993, when he needed money and you had it, you paid it to him; correct?
A: Yes.
Q: And at some point Carlie, he was the owner of Marina Dock and Supply; right?
A. Correct.
Q. At some point after you received the garnishment of Gene Smith's wages, Carlie Smith told you, "Do not pay Gene anything else"; correct?
A. That's correct.
Q. Make no more loans to him?
A. Right.
Q. And it was after the garnishment was received; correct?
A. Yes, I - - yeah.
Q. Gene Smith's last payroll check was March 5th, 1993, is that right?
A: Yes . . .
Q. If the Court please, one of those employees is Gene Smith, he still works for Marina Dock and Supply; right?
A. He does not collect salary.
Q. But he's the boss there; is that right?
A. Yes.
Q. He also signs the checks?
A. Correct.

Q. As far as you know, he doesn't pay any rent or Marina Dock and Supply any rent?

A. No, he does not.

THE COURT: How does he eat; where does he get his food; how does he buy gas?

THE WITNESS: His wife, as I see it.

TENN. CODE ANN. § 26-2-202 provides that:

All property, debts and effects of the defendant in the possession of the garnishee, or under his control, shall be liable to satisfy the plaintiff's judgment from the service of the notice, or from the time they came to his hands, if acquired subsequent to the service of the notice, and before judgment.

III

The issue before us is not whether a conditional judgment should have been entered against the garnishee, because such relief is available only when a garnishee fails to appear or answer. See TENN. CODE ANN. § 26-2-209. The garnishee appeared and answered, and its officers were examined upon the issue of whether it held any property, debts or effects of the debtor. The issue properly was whether the garnishee held or had control of any property, money, or effects of the debtor. TENN. CODE ANN. § 26-2-206. The Chancellor found that the garnishee held no assets of the debtor, and we review, *de novo* the record to determine if the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d).

There is reason to believe that the garnishee and debtor deliberately set upon a course to defeat the garnishment, as revealed by the testimony of the bookkeeper, but the matter appears to have been thoroughly considered by the Chancellor.

In summary, the debtor is the manager of the garnishee, a corporation whose shares are wholly owned by the debtor's brother. At all times material he was a full-time employee of the garnishee; he "was the boss"; he signed the checks, and lives on the premises in a trailer furnished by the garnishee for which he pays no rent. He "collects no salary", and before the second garnishment was

served he simply "borrowed" from his employer an amount equivalent to his salary. Later, the borrowing ceased, as we deduce, on the advice of counsel.

While this arrangement is suspect, we cannot disagree with the conclusion of the Chancellor that the parties are free to make whatever contract they choose. If the debtor agreed to work gratis, and "live off his wife," as they testified, we know of no reason in law why he may not do so. We are not at liberty to assume deliberate and willful perjury, especially when the Chancellor sat in judgment on the credibility of the witnesses. While the issue is a close one, we are unable to find that the evidence preponderates against the judgment, which is affirmed at the costs of the appellant.

William H. Inman, Senior Judge

CONCUR:

Herschel P. Franks, Judge

Charles D. Susano, Jr., Judge

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CHANL-LOC DOCKS, INC. and)	
GENE SMITH,)	
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Defendants)	
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MARINA DOCK & SUPPLY, INC.)	
)	AFFIRMED
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J U D G M E N T

_____This appeal came on to be heard upon the record from the Chancery Court of Loudon County and briefs filed on behalf of the respective parties. Upon consideration thereof, this court is of the opinion that there is no reversible error in the trial court's judgment.

It is therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court is affirmed. Costs are assessed to the appellant and its surety. The case is remanded to the Chancery Court of Loudon County for collection of costs pursuant to applicable law.

PER CURIAM