STATE OF MICHIGAN

COURT OF APPEALS

TII, L.L.C.,

Plaintiff-Appellant,

v

LEFTY'S RESTAURANTS, INC., d/b/a LEFTY'S STEAK HOUSE,

Defendant,

and

CHEMICAL BANK,

Garnishee Defendant-Appellee.

UNPUBLISHED
November 15, 2007

No. 272557
Shiawassee Circuit Court
LC No. 04-001155-CK

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

In this garnishment action, plaintiff appeals as of right the trial court's order denying its motion for a default judgment against garnishee defendant. We affirm.

In December 2002, defendant Lefty's Restaurant entered into an account application agreement with Gordon Food Service ("GFS"). GFS sold food products and restaurant supplies to defendant, and defendant failed to pay for the goods. GFS assigned defendant's account to plaintiff, TII, L.L.C., and plaintiff initiated an action against defendant to recover the unpaid balance on the account. Plaintiff obtained a judgment against defendant. Thereafter, plaintiff served a request and writ for non-periodic garnishment upon garnishee defendant Chemical Bank, seeking to collect $147,194.69, which reflected the amount of the unpaid judgment, plus interest and costs.

On March 15, 2006, garnishee defendant disclosed that it was indebted to defendant in the amount of $35,789.34, which represented the balance in defendant's deposit account. The disclosure provided that garnishee defendant would withhold that amount and forward it to plaintiff. On April 5, 2006, garnishee defendant filed an amended disclosure, in which it asserted that it was entitled to a setoff against defendant's account for all of the funds in defendant's deposit account because defendant was "obligated to Chemical Bank on loans with

unpaid principal and interest in an aggregate amount in excess of the balance in the Defendant's accounts."

Plaintiff moved for a default judgment against garnishee defendant. In the alternative, plaintiff moved the trial court to compel garnishee defendant to pay the money in defendant's deposit account to plaintiff. Plaintiff argued that garnishee defendant waived its right to claim the setoff because it failed to claim the setoff in its initial disclosure. Following a hearing on plaintiff's motion, the trial court entered an order, which provided, in part, that garnishee defendant "may amend its disclosure and claims its right of setoff" and that, "per the amended disclosure, the Garnishee-Defendant is not liable to the Plaintiff." This appeal followed.

Plaintiff contends that the trial court erred in permitting garnishee defendant to amend its garnishee disclosure to assert the right of setoff. Plaintiff argues that garnishee defendant's failure to claim the right of setoff in the initial disclosure resulted in waiver of the claim and, thus, it is entitled to a judgment against garnishee defendant. We disagree.

We review a trial court's decision to allow a garnishee to amend its disclosure for an abuse of discretion. See *M M Gantz Co v Alexander,* 258 Mich 695, 697; 242 NW 813 (1932). The "[i]nterpretation of court rules is a matter that we review de novo." *Waknin v Chamberlain,* 467 Mich 329, 332; 653 NW2d 176 (2002). "The question of what constitutes a waiver is a question of law," which we review de novo on appeal. *Angott v Chubb Group Ins,* 270 Mich App 465, 469-470; 717 NW2d 341 (2006) (citation omitted). We also review de novo the grant or denial of a motion for summary disposition. *Id.* at 475.

MCR 3.101 governs garnishment proceedings in Michigan and provides, in part:

> (H) Disclosure. The garnishee shall mail or deliver to the court, the plaintiff, and the defendant, a verified disclosure within 14 days after being served with the writ.
>
> (1) Nonperiodic Garnishments.
>
> (a) If indebted to the defendant, the garnishee shall file a disclosure revealing the garnishee's liability to the defendant as specified in subrule (G)(1) and claiming any setoff that the garnishee would have against the defendant, except for claims for unliquidated damages for wrongs or injuries.
>
> (b) If not indebted to the defendant, the garnishee shall file a disclosure so indicating.

MCR 3.101(G) clearly provides that the garnishee may claim any setoff available to it against the principal defendant when determining its liability to that defendant.

A garnishee defendant's claim against a defendant has priority over the plaintiff's claim with regard to the property being garnished. *Blow v Blow,* 134 Mich App 408, 411; 350 NW2d 890 (1984). However, "[i]t is a garnishee's duty when he makes a disclosure to set forth the true condition of the liability." *Baios v Clark,* 304 Mich 159, 163; 7 NW2d 255 (1943) (quotation omitted). If there is a dispute concerning a garnishee defendant's liability, the issue shall be tried

in the same manner as other civil actions. MCR 3.101(M); *Admiral Ins Co v Columbia Cas Ins Co,* 194 Mich App 300, 309; 486 NW2d 351 (1992). "The garnishment affidavit acts as the plaintiff's complaint against the garnishee defendant, and the disclosure serves as the answer, thus framing the issues. MCR 3.101(M)(2)." *Id.*

Generally, a party is bound by its pleadings. *Angott, supra* at 470. However, it is well established that

> "[u]nder MCR 2.118(A)(2), leave to amend pleadings should be freely given when justice so requires. Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party, or where amendment would be futile." [*Miller v Chapman Contracting,* 477 Mich 102, 105; 730 NW2d 462 (2007) (quotation omitted).]

"Amendment is generally a matter of right rather than grace, and a motion to amend ordinarily should be denied only for particularized reasons." *Int'l Brotherhood of Elec Workers, Local Union No 58 v McNulty,* 214 Mich App 437, 447; 543 NW2d 25 (1995).

Furthermore, the process of considering the sufficiency of a garnishee disclosure "is comparable to action on a motion for summary disposition pursuant to MCR 2.116(C)(9)." *Blue Water Fabricators, Inc v New Apex Co, Inc,* 205 Mich App 295, 299; 517 NW2d 319 (1994). And, it is well established that "[a] trial court is required to permit amendment of pleadings to avoid summary disposition, unless such amendment would be futile." *Id.* See MCR 2.116(I)(5). In addition, MCL 600.2301 allows a court "to amend any process, pleading or proceeding . . . either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein." MCL 600.2301 applies in this case, as it "applies generally to claims filed in Michigan." *Glisson v Gerrity,* 274 Mich App 525, 536; 734 NW2d 614, reversed in part on other grounds ___ Mich ___; 738 NW2d 237 (2007).

Our Supreme Court has held that a trial court does not abuse its discretion in allowing a garnishee defendant to amend its disclosure, where the initial disclosure was made in error. See *Crew v Zabowsky,* 357 Mich 606, 611; 99 NW2d 542 (1959); *M M Gantz, supra* at 696. Further, in *Blue Water Fabricators, supra* at 298-299, this Court held that the trial court had discretion to allow the garnishee to file an amended disclosure where, in its initial disclosure, it failed to claim a setoff to which it is entitled.

In this case, it is undisputed that garnishee defendant failed to claim a right of setoff in its initial disclosure. Plaintiff does not dispute, however, that under the terms of the loan agreement executed between defendant and the Bank, the Bank was entitled to claim a right of setoff in the event that defendant defaulted on the loan. Plaintiff also does not dispute that defendant defaulted on the loan. Thus, garnishee defendant's initial disclosure clearly did not set forth the "true condition" of its liability to defendant. *Baios, supra* at 163. Hence, the amendment, which contained the Bank's claim to the setoff, and revealed the true condition of the Bank's liability to defendant, was not futile. Furthermore, nothing in the record supports the conclusion that garnishee defendant acted in bad faith in completing the initial disclosure, or that the disclosures were motivated by bad faith or dilatory motive. *Id.* The record reflects that the initial disclosure

was a mistake; it was the result of an oversight or inadvertent failure to recognize that defendant had defaulted on his loan and that garnishee defendant was entitled to a setoff. The delay between the initial disclosure and the time that garnishee defendant claimed that it was entitled to a setoff did not preclude the trial court from allowing garnishee defendant to amend its disclosure. "Mere delay is an insufficient ground for denial of a motion to amend." *Lynd v Adapt, Inc,* 200 Mich App 305, 306; 503 NW2d 766 (1993); *Stanke v State Farm Mut Auto Ins Co,* 200 Mich App 307, 321; 503 NW2d 758 (1993).

In the interests of justice, and given the liberal application of the court rule governing the amendment of pleadings, and the policy encouraging amendments, particularly upon a motion for summary disposition, we find that the trial court did not abuse its discretion in permitting garnishee defendant to amend its disclosure. Contrary to plaintiff's argument, nothing in *LeDuff v Auto Club Ins Ass'n,* 212 Mich App 13; 536 NW2d 812 (1995) or *Guilds, supra* at 616, precluded the trial court from allowing garnishee defendant to file an amended disclosure in this case.

Additionally, in a garnishment proceeding, "[j]udgment may be entered against the garnishee for the payment of money or the delivery of specific property as the facts warrant." MCR 3.101(O)(1). "[S]ummary disposition in a garnishment proceeding can issue only to the extent of the admissions of the garnishee in the disclosure." *Admiral Ins Co, supra* at 309. In this case, garnishee defendant's claim against defendant had priority over plaintiff's claim with regard to the money in defendant's deposit account. *Blow, supra* at 411-412. Moreover, the amount of garnishee defendant's setoff was greater than the balance in the deposit account. A plaintiff in a garnishment action cannot recover a judgment in any amount where the garnishee defendant has a setoff of a greater amount. *Buckenhizer v Times Pub Co*, 267 Mich 393, 395; 255 NW 213 (1934); *Blow, supra* at 411-412. Thus, plaintiff was not entitled to a judgment against garnishee defendant in this case.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly