DISTRICT COURT CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	 ▲ **COURT USE ONLY** ▲
Plaintiff-Appellee: SECURITY CAPITAL FUNDING CORP. v. **Defendant:** DANIEL DECLEMENTS **Garnishee-Appellant:** US METRO GROUP, INC.	Case Number: 11CV7890 Courtroom: 5D

RULING ON APPEAL

THIS MATTER comes before the Court on appeal from Denver County Court case number 08C34920. The Court, having reviewed the record on appeal and the parties' briefs, finds and rules as follows:

Background

Plaintiff Security Capital Funding Corp. filed this action against Defendant Daniel Declements to recover an unpaid debt in the amount of $4,608.85. The Plaintiff obtained a judgment against the Defendant in the total amount of $9,273.93, including interest, costs and attorney's fees. Thereafter, the Plaintiff served a writ of continuing garnishment upon Garnishee US Metro Group, Inc. in its capacity as the Defendant's employer. The Plaintiff then sought and was granted a default against the Garnishee for its failure to answer the writ. A hearing was scheduled to permit the Plaintiff to establish the liability of the Garnishee to the Defendant and the Plaintiff subpoenaed the Garnishee to testify at the hearing. The Garnishee, however, failed to appear on the subpoena. In response, the Plaintiff asked the County Court to enter judgment against the Garnishee in the same amount as the judgment against the Defendant, which, with costs, fees and interest, had accumulated to $14,250.77, plus an additional $900 in attorney's fees incurred in connection with the garnishment proceedings. The County Court granted the request and entered judgment against the Garnishee in the full amount requested.

After obtaining the judgment against the Garnishee, the Plaintiff garnished $15,650.56 from a bank account belonging to the Garnishee. The Garnishee then filed a motion to set aside the default and vacate the writ of garnishment (the "Motion to Set Aside"). In connection with its motion, the Garnishee acknowledged that the Defendant worked for the Garnishee for just over a month following issuance of the writ of continuing garnishment. Based upon a 25% figure for nonexempt earnings, the Garnishee asserted that it should have withheld a total of

$566.10 from the Defendant's paychecks during that period of time. The Garnishee's Motion to Set Aside was denied following a hearing, and this appeal followed.

Legal Standard

Pursuant to C.R.S. § 13-6-310 and C.R.C.P. 411, appeals from judgments of the county court are taken to the district court for the judicial district in which the county court is located. The function of the district court is to correct errors of law committed by the county court. *People v. Williams*, 473 P.3d 982 (Colo. 1970).

Garnishment is a remedy which was unknown at common law and which exists only by reason of procedural rules enacted pursuant to statutory authority. *Worchester v. State Farm Mut. Auto. Ins. Co.*, 473 P.2d 711 (Colo. 1970). As such, the provisions of that remedy must be strictly followed. *Jayne v. Peck*, 395 P.2d 603 (Colo. 1964).

Although there a number of forms of garnishment, a writ of continuing garnishment is the procedure for withholding a portion of the earnings of a judgment debtor for successive pay periods to be applied to a judgment debt. C.R.C.P. 403 § 1(a)(1). Service of a writ of continuing garnishment gives a court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee. C.R.C.P. 403 § 1(e). In the event of a default by a garnishee, the Rule permits a judgment creditor to "proceed before the court to prove the liability of the garnishee to the judgment debtor." C.R.C.P. 403 § 7(b)(1). To assist in proving that amount, a judgment creditor may subpoena the garnishee to appear as a witness at the related hearing. If the garnishee fails to appear in response to such a subpoena, the court may enter such sanctions as are just, including contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense to the judgment creditor. C.R.C.P. 403 § 7(b)(2). If a hearing is held, and the court finds the garnishee liable to the judgment debtor, the court may enter a judgment in favor of the judgment debtor against the garnishee for the use and benefit of the judgment creditor. C.R.C.P. 403 §7 (b)(3)(A). A garnishment, however, only secures a judgment debtor's interest against a garnishee. *People ex rel. J.W.*, 174 P.3d 315 (Colo.App. 2007). As such, a judgment creditor cannot recover sums from a garnishee that the judgment debtor could not, himself, recover from the garnishee. *Id.*

With regard to the issuance of sanctions, as a general matter, entry of default judgment is the harshest of all sanctions and should only be imposed in extreme circumstances. *Nagy v. District Court*, 762 P.2d 158 (Colo.1988).

In *Don J. Best Trust v. Cherry Creek Nat. Bank*, 792 P.2d 302 (Colo.App. 1990), as in the present action, the garnishee failed to answer a writ of garnishment. The trial court noted the garnishee's default and, without holding a hearing, entered a judgment against the garnishee for the total amount of the unpaid judgment in the underlying action. The Colorado Court of Appeals found that the judgment was entered in violation of the garnishee's right to procedural due process. In such regard, in order for any notice to provide adequate support for entry of a default judgment, the notice must advise the recipient of the nature of the relief sought. *Id.*, at 305. Further, a default judgment may not be different from that prayed for in a demand for judgment. *Id.*, at 305. Since the collective contents of the garnishment rule and the writ of

garnishment only advised the garnishee that it could be liable for a judgment based upon the garnishee's liability to the judgment debtor, it was error to enter judgment based solely upon the amount of the original judgment to the judgment creditor.

Analysis

Under the specific procedures of C.R.C.P. 403 § 7, which must be strictly applied, judgment could not enter against the Garnishee for the full amount of the Plaintiff's judgment against the Defendant. Instead, the amount of the judgment was limited by the amount of the Defendant's earnings held by the Garnishee. In fact, pursuant to C.R.C.P. 403 § 1(e), the County Court only had jurisdiction over the non-exempt earnings of the Defendant within the control the Garnishee and not over any other amounts. Accordingly, entry of a judgment based on the amount of the Plaintiff's judgment against the Defendant was in error.

The holding in *Don J. Best* makes clear that the writ of continuing garnishment was insufficient to provide due process notice that judgment could enter against the Garnishee without consideration by the County Court of the Garnishee's liability to the Defendant or that judgment could enter against the Garnishee based solely upon the amount of the judgment entered against the Defendant. *Don J. Best*, at 305. The Plaintiff, however, attempts to distinguish the present case from *Don J. Best* on the grounds that the Garnishee was also subpoenaed to attend the liability hearing. Similarly, in its ruling on the Motion to Set Aside, the County Court indicated that default judgment entered, not for the failure to answer the writ of garnishment, but for the failure to appear at the hearing. (*See* Ruling, para. 2.) This distinction, however, neglects the basis for the holding in *Don J. Best*. In such regard, to illustrate that the plaintiff and trial court had not followed the procedure under the garnishment rule, the Colorado Court of Appeals noted:

> Plaintiff made no allegation that the garnishee was indebted to the defendant in any amount, and the trial court conducted no hearing to determine that issue. Instead, based solely on the garnishee's failure to respond to the writ, a judgment was entered against it for the full amount of plaintiff's unsatisfied judgment against the judgment debtor.

Id., at 304. If the word "writ" in the last sentence is replaced with the word "subpoena" the observation directly applies to this case: the Plaintiff made no allegation that the Garnishee was indebted to the Defendant in any amount; the County Court conducted no hearing to determine that issue; but instead, based solely upon the Garnishee's failure to respond to the subpoena, judgment was entered against the Garnishee for the full amount of the Plaintiff's judgment against the Defendant. Further, as noted in *Don J. Best*, default judgment cannot be premised on a notice which does not advise the recipient of the nature of the relief sought. *See Id.*, at 305. The subpoena in this case provided even less of a description of the nature of the relief sought than did the writ. Even if the combination of the writ and the subpoena were sufficient to advise the Garnishee of the relief sought, default judgment still cannot be different in kind from that prayed for by the demand for judgment. *Id.* At best, those documents indicate that the Plaintiff was seeking to recover the nonexempt portion of the earnings paid to the Defendant by the

Garnishee after the issuance of the writ. That is not what was awarded as the judgment against the Garnishee, however.

The County Court also held that the subpoena granted the Garnishee the right to argue the merits of the Plaintiff's claim for funds. (*See* Ruling, para. 3.) The function of a subpoena, however, is simply to compel a witness to appear and give testimony. There is nothing in C.R.C.P. 403 which suggests that a subpoena in a garnishment proceeding serves an additional function. *See also Don J. Best*, 792 P.2d at 304 (noting that section 7(b)(2) sets forth the means by which a judgment creditor may compel a garnishee to appear and produce evidence). The County Court further stated that the Garnishee's Motion to Set Aside was tantamount to a request for another chance to respond to the question of the Garnishee's liability to the Plaintiff; and that the Garnishee, in essence, had waived its right to argue its liability. (*See* Ruling, para. 3.) This would be a valid basis for denying a re-hearing if a hearing had actually been conducted in the first instance. In the present case, however, no hearing was held. This is contrary to the express language of C.R.C.P. 403 § 7(b)(2) which requires a judgment creditor to "proceed before the court to prove the liability of the garnishee." The burden of proof rested on the Plaintiff, not the Garnishee, to prove the amount of the Garnishee's liability to the Defendant. Stated another way, the fact that the Plaintiff could subpoena the Garnishee as a witness at the hearing did not eliminate the Plaintiff's obligation to present evidence – it simply provided a means by which to obtain that evidence. This is further reflected in the fact that the types of sanctions available for a garnishee's failure to comply with a subpoena, such as the issuance of a bench warrant or a finding of contempt, are consistent with a failure of any witness to appear and testify, not with the failure of a party to defend a claim. Although the list of sanctions under the Rule is not exclusive, there would be no need for any of the listed remedies if a failure to appear simply subjected a garnishee to entry of judgment.

The Plaintiff suggests the $15,650.56 judgment was award to it as a "sanction" under C.R.C.P. 403 § 7(b)(2). On the date for the hearing, however, the Plaintiff discussed default judgment with the County Court and merely requested the entry of a judgment. Nothing in the statements made to the County Court suggests that the Plaintiff actually sought a sanction under C.R.C.P. 403 § 7(b)(2) as opposed to a default judgment for the Garnishee's failure to answer or appear at the hearing. The first reference to the award as a sanction came in the Plaintiff's response to the Garnishee's Motion to Set Aside. Therein, the Plaintiff suggested that the County Court determined that judgment should enter as "a sanction and contempt of court" for the Garnishee's failure to file an answer to the writ and failure to appear pursuant to a subpoena. This conclusion is unsupported by the transcript of the hearing or any other part of the record on appeal. Further, under C.R.C.P. 407, indirect contempt, such as the failure to appear on a subpoena, requires the issuance of a citation to show cause and a related hearing, and the available punitive sanctions for contempt involve a fine or imprisonment, not entry of judgment. As such, the County Court could not have entered a judgment as part of a finding that the Garnishee was in contempt of court. Instead, the characterization of the judgment as "a sanction and contempt of court" appears to be an after the fact effort by the Plaintiff to characterize the judgment it requested so as to have it fall under the provisions of C.R.C.P. 403. The County Court, however, did not adopt the Plaintiff's characterization. Instead, its ruling on the Motion to Set Aside repeatedly refers to a judgment or default judgment and never to a sanction. Even if the award had been a sanction instead of a default judgment, given the other remedies available

for the Garnishee's failure to appear on the subpoena, the fact that the Garnishee could not have owed the Defendant close to $15,000 in exempt earnings, and the fact that default judgment is the harshest of all possible sanctions and is to be imposed only in extreme circumstances, the County Court would have abused its discretion in imposing such a sanction.

In the end, under the procedures set forth by C.R.C.P. 403 § 7, the County Court was required to conduct a hearing. It did not do so. The Plaintiff had the burden to prove the liability of the Garnishee to the Defendant. It did not do so. If the Plaintiff was unable to meet its burden of proof without the testimony of the Garnishee, then the Plaintiff had the ability to reschedule the hearing and utilize the tools available under C.R.C.P. 403 § 7(b)(2) to try to force the Garnishee to comply with the subpoena. Even if the imposition of a judgment could be a sanction under C.R.C.P. 403 § 7(b)(2), there is nothing under C.R.C.P. 403 § 7(b) which suggests that judgment can enter without a hearing. Even if the County Court had the ability to enter such a judgment, since neither the writ of continuing garnishment nor the subpoena: sought a particular amount; indicated that judgment could enter without a hearing and without consideration of the amount of nonexempt earnings paid or owing; or indicated that judgment might be entered against the Garnishee in the total amount owed to the Plaintiff by the Defendant, the Garnishee was denied procedural due process. Even if the Garnishee was on notice that default judgment could enter for the failure to appear on the subpoena, the County Court necessarily exceeded its jurisdiction when it entered judgment in an amount approximately thirty times greater than the Defendant could have collected from the Garnishee. Accordingly, the judgment cannot stand.

The judgment against the Garnishee also includes $900 in attorney's fees requested by the Plaintiff which also must be addressed on remand. Even assuming the preparation for the liability hearing was entirely wasted, the Affidavit of Attorney Fees submitted by the Plaintiff indicates that all but $456.25 in fees would still have been incurred had the Garnishee appeared in response to the subpoena. Pursuant to C.R.C.P. 403 § 7(b)(2), the sanctions imposed for the failure to appear on the subpoena are required to be just. Although the Plaintiff should not be subjected to additional fees and costs which arise as a result of the Garnishee's non-compliance with the subpoena, there is no suggestion that the Plaintiff should receive a windfall either. Accordingly, the amount of the award of attorney's fees should be adjusted.

Finally, both parties seek an award of attorney fees in connection with this appeal. The Garnishee asserts that it is entitled such an award based upon the wrong-of-another doctrine. That doctrine, however, applies when the wrongs of one party cause the second party to become involved in litigation with yet a third party. *See Rocky Mountain Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067 (Colo. 2010); *Elijah v. Fender*, 674 P.2d 946 (Colo.1984). The actions of the Plaintiff did not cause the Garnishee to be involved in litigation with some other party. As such the wrong-of-another doctrine is inapplicable. Instead, the proper standard for both parties' requests is whether the bringing or defending of the appeal was substantially frivolous, groundless or vexatious. C.R.S. § 13-17-102(4). In ruling in favor of the Garnishee on the appeal, the Court is finding that the appeal had merit and the Plaintiff is not entitled to an award of attorney fees. Although the Court ultimately disagrees with the Plaintiff's position, the Plaintiff's arguments were not groundless, frivolous or vexatious. Accordingly, both parties' requests for attorney's fees in connection with the appeal are denied.

Ruling

For the reasons discussed above, the judgment issued against the Garnishee is vacated and the matter is remanded to the County Court to conduct a hearing to determine the Garnishee's liability to the Defendant for any non-exempt earnings subject to the writ of continuing garnishment. The County Court may also determine an appropriate sanction, pursuant to C.R.C.P. 403 § 7(b)(2) for the Garnishee's failure to appear at the prior liability hearing. Such sanction, however, may not include entry of a default judgment. To the extent the sanction involves an award of attorney fees, costs and expenses, such fees, costs and expenses must be limited to amounts which would not have been incurred had the Garnishee appeared on the original hearing date.

SO ORDERED this 21st day of November, 2011

BY THE COURT:

John W. Madden, IV
District Court Judge