IN THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 4D2024-0537
Lower Tribunal No. 502010CA00977XXXXMB

PATRICK T. SILL

Appellant,

vs.

JBK ASSOCIATES, INC., f/k/a COASTAL INSULATION, INC.,

Appellee.

APPELLANT'S INITIAL BRIEF

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KEY TO ABBREVIATIONS USED IN THIS BRIEF

In this Initial Brief, for ease of reference;

Appellant, PATRICK T. SILL, shall be referred to as "Appellant" or "Sill".

Appellee, JBK ASSOCIATES, INC., f/k/a COASTAL INSULATION, INC., shall be referred to as "Appellee" or "JBK".

References to the pleadings on the docket shall be referred to by their docket number ("DN__")

STATEMENT REGARDING ORAL ARGUMENT

Based upon the facts and nature of this case, Appellant believes that oral argument would significantly aid this Court in determining the issues and would request oral argument in this case.

STANDARD OF REVIEW

The standard of review in this case is *de novo*. *Cadle Company v. Pegasus Ranch, Inc., 920 So. 2d. 1276 (4th DCA, 2006),* (holding orders construing garnishment statutes are reviewed *de novo).* See also, *Alan v. State 873 So. 2d 576 (Fla. 2d DCA 2004)*(holding the questions of statutory interpretation are reviewed *de novo); Winn Dixie Stores Inc. v. Reddick 954 So. 2d 723 (Fla. 4th DCA 2007)*,(holding that the application of undisputed facts to statute is subject to *de novo* review).

STATEMENT OF FACTS

The facts relevant to the matters before this court are undisputed. In fact, the Trial Court held no evidentiary hearings on this matter, and the matter was decided purely on procedural/ legal grounds.

Sill is a 73 year old retiree. On May 12, 2010, a Final Judgment was entered in favor of Appellee JBK Associates, Inc. ("JBK") and against Sill in the amount of $740,487.22.

Prior to the garnishment in this action, Sill had paid a total of $510,000 towards the balance owed on the Final Judgment.

Undersigned counsel was originally retained by Sill for the post judgment procedures in 2014. At that time certain collection activities were being undertaken by JBK . Specifically, there was an attempt to garnish an account containing Sill's homestead proceeds. The litigation between the parties went all the way to the Florida Supreme Court, who issued a ruling affirming the lower courts in favor of the Defendant, (Case 4D14-3049).

After the conclusion of the appeal, the case was for all intents and purposes, over, and no further action was taken. In fact, the last appearance in this case by counsel for Sill, occurred on or about May 4, 2016, over seven (7) years before the actions contained herein (there was a procedural motion filed by a third party in 2020, but Sill did not participate, as it was not relevant to Sill).

On March 13, 2023, the underlying case was closed by the court.

On July 26, 2023, JBK filed a Motion for Writ of Garnishment After Judgment as to Wells Fargo (DN 579). On that same day, a Writ of Garnishment as to Final Judgment was issued (DN 580).

On August 4, 2023, pursuant to Florida Statutes, JBK issued the first Notice of Garnishment to Sill via regular mail. As Sill's former

counsel, Rappaport Osborne and Rappaport, PLLC (Hereinafter "ROR FIRM") did receive a copy of the same electronically through the courts noticing system.

On August 10, 2023, Wells Fargo, the Garnishee, filed its answer to the Writ of Garnishment (DN 588), the answer was amended on August 11, 2023 (DN 589). The answer (and the amended answer) stated that the funds held for Sill were in an IRA account, exempt under Florida law.

On August 11, 2023, the Notice to Defendants and Other Interested Persons was filed (DN 586).

On August 14, 2023, a Notice to Defendants and Other Interested Persons was sent to Sill.

On August 29, 2023, Sill filed his Motion to Dissolve Writ of Garnishment (DN 595).

In paragraph 4, the Motion to Dissolve the Writ of Garnishment specifically states that "All of the accounts included in the Garnishee's answer constitute Mr. Sill's retirement, profit sharing or pension money and exempt pursuant to Florida Statute, §222.21. This account is an IRA, which is over four (4) years old, and which

the Defendant has not made any contributions in the last four (4) years".

The Motion to Dissolve the Writ of Garnishment also contained an affidavit of Sill which states in paragraph 2, "The account being garnished is an IRA and made up solely of retirement funds. It is over four (4) years old, and I have not made any contributions to this account in the last four (4) years".

On August 31, 2023, Plaintiff filed an affidavit in opposition to Sill's Motion to Dissolve Writ of Garnishment (DN 596). The affidavit did not set forth any factual basis challenging the fact that these funds were an IRA, and simply stated that Sill had to prove they were. On October 13, 2023, JBK filed its Motion for Entry of Final Judgment in Garnishment (DN 605).

On November 22, 2023, the Trial Court entered an order denying Sill's Motion to Dissolve Writ of Garnishment (DN 607). Subsequently, entering the Final Judgment.

The order specifically states that the response was filed untimely and, in essence, by titling it "Motion to Dissolve Writ", as opposed to titling it as a "Claim of Exemption" and/or using the form

provided by Florida Statute, the Defendant did not properly claim the exemption timely and therefore it was disallowed.

On December 1, 2023, Sill filed a Motion for Rehearing (DN 610). In his motion, Sill pointed out that pursuant to Florida Rules of General Practice and Judicial Administration 2.514 an additional five (5) days extension applies when the defendant is served by mail. JBK argued that as ROR FIRM had not formally withdrawn, electronic service was proper, and no 5 day mail rule applied. JBK and the Court ignored the fact that the case had been closed. Due to the fact that the case had been closed meant that no matter what, ROR FIRM was no longer representing Sill. As such, the defendant should have had 25 days to file its response, the twenty statutory days plus the five day mail rule.

The trial court denied the Motion for Rehearing without any explanation, by order dated February 26, 2024 (DN 614).

Sill timely filed his Notice of Appeal on February 29, 2024, and the instant appeal ensued (DN 615).

SUMMARY OF THE ARGUMENT

There were no evidentiary hearings held in this matter, and the Court ruled on a procedural basis that the Appellant's claim of exemption to his IRA was denied.

The Court first ruled that Sill **never** filed a claim of exemption, this is clearly erroneous. On August 29, 2023, a Motion to Dissolve Writ of Garnishment was filed, which specifically claimed the assets as exempt, set forth the statutory basis for the exemption, and contained an affidavit supporting the claim of exemption. Appellee argued that because the form provided for ease under Florida Statutes was not used, the exemption was invalid. The Court seemed to believe this argument. In of its determination the trial Court relied primarily on *Zivitz v. Zivitz 16 So. 3d 841 (Fla, 2d DCA 2009).*

The Court did not consider the Zvitz' case in its entirety. This very case, upon which the Court relied upon in rendering its determination of lateness in this case, also addressed the issue of what form for claim exemption(s) needed to be used. The *Zivitz'* Court specifically stated that a debtor may use any form it wishes or may create its own form, and is not required to use the statutory form. Therefore. the Court's first determination was incorrect.

The Court further determined that strict construction must be applied in ruling on garnishment statutes. The Court, however, only applied strict construction to part of the statute. The Court ruled that the Motion to Dissolve Writ of Garnishment, which was filed twenty-five (25) days after the Notice of Garnishment was filed untimely, by five days. The Court completely ignored the law which provides an additional five (5) days when service is required to be made by mail. The garnishment statute specifically requires service to be made by mail, therefore Sill had the additional five (5) days to respond to the Notice of Garnishment. Despite that fact, the Court determined that since Sill had former counsel from seven (7) years earlier, who was served electronically, that this somehow satisfied the statute and due process. The determination ignores the language of the statute and the law of Florida.

The Court also ignored the law that says exemption statute should be strictly construed in favor of the debtor.

It appears that the Court accepted the argument of the Appellee, that since no formal motion to withdraw had ever been filed, service upon former counsel was sufficient. Not only does this ignore the garnishment statute itself, but ignores Florida Law, which clearly

states that once a case is closed by the court, no withdrawal is required. This case was closed in March of 2023, many months before the garnishment was issued in this case. There was no case for former counsel to withdraw from. The trial Court's determination here clearly is wrong with regard to whether an exemption claim was filed, and as to the timeframe that it was required to be filed in. As such the decision of the trial court must be reversed.

ARGUMENT ON APPEAL

Section 1 Trial Court Erred as a Matter of Law in Determining that Sill Never Filed a Claim for Exemption, pursuant to Florida Statute 77.041

The trial court erred as a matter of law in determining that Sill never filed a claim of exemption in this case pursuant to Florida Statute 77.041. The first argument raised by the Plaintiff was that Sill never filed a claim of exemption as required by Florida Statute 77.041. In fact, the trial court believed this argument and even made a ruling stating "that despite the strict requirement of Florida Statute 77.041, the defendant has never filed a claim of exemption pursuant to Florida Statute 77.041 in this case" [emphasis added]. In rendering this determination, the trial court relied primarily on *Zivitz v. Zivitz*

16 So. 3d 841 (Fla, 2nd DCA 2009). In *Zivitz*, the plaintiff filed a motion for a writ of garnishment and served it on January 17, 2008. It wasn't until March 12, well over a month after any deadline, that defendant hired counsel and attempted to file a response. Defendant also then waited until March 24, 2008, to file a claim of exemption. At a hearing ,the Court ruled that the deadlines had long passed without the defendant taking any appropriate action.

These are not the facts in the instant case. In rendering its determination that no claim of exemption was filed; the trial Court completely ignored the facts of the case. The motion to dissolve writ of garnishment specifically alleged that the assets were exempt and in fact set forth the claim of exemption and its statutory basis. It contained an affidavit of Sill in support which further asserted the exemption.

Despite the fact that this argument was made, the plaintiff argued, and the trial court ruled, that by failing to use the form supplied by Florida Statute 77.041(1), Sill failed to claim his exemption. The trial Court ignores the ruling by the *Zivitz'* court, the very court it relies upon to render its determination, who further stated; "while section 77.041(1) provides a standard form that can be

used to claim an exemption, nothing prevents a garnishment defendant from drafting his own original document to claim the exemption" id at 848, fn 1 (Citing, *Cadle Company, supra at 1278).*

As such, the trial court's ruling that no claim of exemption was filed at all is clearly erroneous, in contradiction of the very case law that the court relies upon and must be reversed. The simple fact that a claim of exemption was included in the motion to dissolve writ of garnishment instead of being labeled claim of exemption, is merely an argument by JBK of form over substance, is incorrect under the law, and should not be condoned by this court.

Section 2- The trial court erred as a matter of law in determining the claim of exemption was untimely filed.

JBK also relied upon the *Zivitz*' court for the proposition that garnishment action should be strictly construed and that under strict construction, plaintiffs response was untimely.

There is no dispute that the writ of garnishment notice was served on August 4, via mail on Sill. There is no dispute at the motion to dissolve writ, which contained the claim of exemption, was filed on August 29, 2023. The only dispute in this case, is whether the five (5) day mail rule applies in this case. The plaintiff argued, and the

trial court ruled, at "Given that the first notice was electronically served upon defendants' counsel, and not served upon counsel via US Mail, the five additional days permitted for responding to a mail pleading, as discussed under Florida Rules of General Practice and Judicial Administration 2.514 is not applicable in calculating the timeframe in which the defendant was to respond to the first notice". The trial court ruled that since plaintiff's counsel was served electronically, the five day mail rule did not apply, and thus the answer was due by August 24; Sill was therefore late and under strict construction Sill cannot otherwise argue that His exempt IRA is exempt.

The Appellee and the trial Court, however, ignore the plain language of the statute. The selfsame statute, which they argue should be strictly construed, is Florida Statute 77.041. Section 2 of Florida Statute 77.041, states, "the plaintiff must mail, by first class, a copy of the writ of garnishment, a copy of the motion for writ of garnishment, and if the defendant is an individual, the notice to the defendant's last known address within five business days after the writ is issued, or three business days after the writ is served on the garnishee, whichever is later" [Emphasis Added].

Nowhere in the statute does it say it must serve the defendant's counsel electronically, nor that the defendant's former counsel being served electronically is sufficient. The rule specifically requires service by mail to Sill. There is no dispute that it was mailed to Sill. However, if the statute requires mail, then the mail rule must apply. Sill's response therefore was timely filed.

See also, *Cadle Company, supra*; "the statutory provision regarding exemptions from garnishment must be strictly construed in favor of the debtor"; *Keen v. President Condo Association 181 So. 1247 (Fla. 3rd DCA 2015);* "garnishment statutes must be strictly construed in statutory provisions regarding exemptions from garnishment and must be strictly construed in favor of the debtor.

When Florida Statute Section 77.041 is strictly construed, it is clear that service should be on the defendant and not on defendant's counsel, let alone defendant's former counsel. As such, the timeframe to respond would have been twenty-five (25) days, making the response due on August 29. As a response in this case was filed on August 29, 2023, the same was timely filed.

When Sill filed his motion for rehearing, after the court ruled that the matter was an untimely, Sill pointed out to the trial court

the fact that the mail rule applies. The trial court, without any explanation, denied this rehearing.

In its response to the motion for rehearing, JBK argued that since this was a post judgment proceeding, Rule 2.505(f) Florida Rules of General Practice and Judicial Administration applied., This rule specifically deals with termination of appearance as attorney of record for a party and sets forth that an appearance of attorney for a party in an action or proceeding shall terminate only upon; "in non-criminal matters in which attorneys appeared after the entry of judgment, the filing of a notice of termination of appearance". Based upon that rule, JBK argued, and the court apparently agreed, that that Sill's former counsel remained his current counsel, and that service was proper.

This ignores the statutory requirement of service upon the defendant. It also ignores other provisions of Rule 2.505.

Rule 2.505(f); states; "The appearance of an attorney for a party in an action or proceeding shall terminate only in one of the following ways:

(1) …
(2)…

(3) *Termination of Proceeding*. Automatically, without order of court, upon termination of a proceeding, whether by final order of dismissal, by adjudication, or otherwise, and following the expiration of any applicable time for appeal, where no appeal is taken.

(4)…"

In this case, the proceeding had been terminated and in fact, was closed by the Court on March 13, 2023. Therefore, pursuant to the very rule upon which JBK relies, Rule 2.505(f) Florida Rules of General Practice and Judicial Administration, ROR FIRM's representation had been terminated as a matter of law. See *Bussey v. Legislative Auditing Committee 298 So. 2d 219 (Fla. 1st DCA 1974*); (a requirement to file a motion to withdraw representation only is required if furtherance of the case did not occur within thirty (30) days or appealed. Once the case is closed, settled, dismissed, adjudicated, attorney representation ends).

In this case, the collection activities for which ROR FIRM had been retained, concluded with the ruling by the Florida Supreme Court in May of 2016. No action had been taken in the seven (7) years following. See also, *Ginsberg v. Chastain 501 So. 2d 27 (Fla. 3d DCA 1986)*, holding that when attorneys are retained for the sole purpose of a specific representation, relationship is terminated when the transaction is concluded.

In this case, representation was with regard to collections upon a judgment and was concluded upon the appeal and resolution by the Supreme Court in 2016. No further action had been taken in the interim.

The doctrine of futility also supports this position.

Under the doctrine futility, a party may be excused from a condition precedent, when a useful result is not attainable. The law does not require a party to take action that would clearly be futile. *Warks Enterprises, Inc. v. Oregon Properties, Inc. 862 So. 35 (Fla 2d DCA 2003*). In this case the argument that ROR FIRM should have filed a motion to withdraw fails under the doctrine of futility. Once the case was closed in March of 2023, withdrawal would have been futile. As such, would not be required by law, and once again, clearly Sill would have needed to be served and would have twenty (25) days in total to respond.

Article I, Section 9 of the Florida Constitution, states "No person shall be deprived of life, liberty or property without due process of law. In Florida, due process requires that a trial court not wander outside in the pleadings to ensure fairness and justice. In the instant case, undersigned counsel made his last appearance and/or filing on

behalf of the defendant on May 4, 2016. No other actions were taken by undersigned counsel, nor by the defendant in this case since that time. As a matter of fact, no contact between the two even occurred during this seven year timeframe.

This matter was closed by the trial court on March 13, 2023, pursuant to Court Order (DN 572), prior to the issuance of the Notice of Garnishment in this case on August 4, 2023. To assume that ROR FIRM continued to represent the defendant after this case was closed and after the passage of seven years, is an obvious deprivation of due process. This assumption places Sill in an unfair and prejudicial position. To just assume that Sill's former counsel could get a hold of him in the appropriate timeframe, or that former counsel was even still representing him, is an assumption that should not be made. This is one of the reasons why the statute requires that the motion and notice to be served on the defendant, not on the defendants counsel. These are post-judgment matters where counsel may no longer be representing the defendant. The Plaintiff has argued, and the trial court has ruled, that garnishment statutes must be strictly construed. If one part is strictly construed, then it all must be. If Florida Statutes Section 77.041 is strictly construed, then service

should be on the defendant and not on counsel or former counsel. This case was closed by the court on March 13, 2023, and counsel no longer represented defendant, both in fact, and due to there no longer being a case to represent him in. Therefore, service should only count as made directly upon the defendant.

It is undisputed that the Florida Statutes give twenty (20) days to respond. It's also undisputed that pursuant to Florida Rules of General Practice and Judicial Administration 2.514, the defendant is entitled to additional five day extension on service completed by mail upon the defendant. “When a party may or must act within a specified time after service and services made by mail, five days are added after the period that would otherwise expire”. It is undisputed that the Motion to Dissolve the Writ of Garnishment, which contained the claim of exemption, was filed within 25 days of the notice. Due process and the law of the land mandate that this response be deemed timely filed. Under the constitutional requirements, statutory interpretation, and rules of the Court, no other rational resolution can be reached. Even strict construction of the statute requires a finding that a response was timely filed. The trial court simply ignored the precedent before it, ignored other

provisions of the same statute and case law that it was relying upon in rendering its determination. The Garnishment statute does not support the trial court. The Constitution does not support the trial court. Logic does not support the trial court, and the long standing rule that exemptions should be construed strictly in favor of the debtor does not support the court. For all of the foregoing reasons , the decision of the trial court must be reversed Sill's exemption to his IRA funds be granted.

CONCLUSION

It is clear the Appellant complied with the requirements as to the claim of exemption and as to filing the Motion to Dissolve Writ of Garnishment in the time provided by Florida Statutes. For these reasons, the Order from the trial Court should be reversed.

Dated: July 11, 2024

Respectfully submitted,

/s/ Les S. Osborne

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically and by U.S. Mail on July 11, 2024 on the following parties:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer Brief satisfies the font and word count limit requirements of Rule 9.045(e) of the Florida Rules of Appellate Procedure. The brief was generated in Bookman Old Style 14 point font.

/s/ Les S. Osborne
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