Case Name:

Manley v. Manley

IN THE MATTER OF a motion to set aside a default order made against a corporate garnishee for its failure to obey a notice of garnishment
Between
Marie Marlene Manley, creditor, and
Kenneth Ralph Manley and Armor Moving and Storage Limited, debtor and garnishee

[1988] O.J. No. 2942

1988 CanLII 3596

1988 CarswellOnt 3592

9 A.C.W.S. (3d) 260

Toronto Registry No. 12258/80

Ontario Provincial Court - Family Division

James Prov. Ct. J.

March 28, 1988.

(20 paras.)

Garnishment -- Order made under Rule 88 required garnishee to pay $7,600 into court -- Review of cases concerning power of court to set aside its own judgment -- Relationship between debtor and garnishee complicated by intervention of agent paying commissions.

Facts: Having failed to appear at a garnishment hearing, the garnishee employer company was ordered to pay the sum of $7,600. plus costs to the creditor. The garnishee now moved to have this order set aside to enable it to file a dispute and have a new hearing on the merits.

Issues: Does the Provincial Court (Family Division) have an inherent jurisdiction to set aside its own orders?

Held: motion is dismissed on its merits without resolving the issue of whether or not the court has jurisdiction to set aside its own orders.

Reasons: Although the Provincial Court (Family Division) is "a court of record" under the Courts of Justice Act, caselaw suggests that this may not necessarily bestow on the court an inherent jurisdiction to control its own orders and judgments. The expression "court of record" may have different meanings in different legal contexts. Without deciding on this jurisdictional issue, His Honour considered the motion on its merits and came to the same conclusion that he would have even if he had found that the court had no jurisdiction; namely the motion would be dismissed.

Counsel:

James S. Marks, for the creditor.
Eric W. Chodak, for the garnishee.
The debtor was not represented.

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1 **JAMES PROV. CT. J.**:-- This is a motion brought on behalf of the garnishee, Armor Moving and Storage Ltd., for an order to set aside the order of Judge Main made on 16 September 1987 under rule 88 of the Rules of the Provincial Court (Family Division), R.R.O. 1980, Reg. 810, as am. by O. Reg. 808/84, in which the garnishee was directed to pay $7,601.08 and costs of $250.00 to the creditor, Mrs. Marie Manley.

2 The creditor is entitled to receive child support payments from the debtor, Kenneth Manley, under the provisions of a decree nisi of divorce issued on 11 April 1979. The debtor has fallen into arrears that, as of 1 December 1987, stood at about $15,000. The debtor is employed by the garnishee company as a long distance trucker under a complex arrangement that has given rise to this motion.

3 Before 15 January 1986, the debtor received his commissions directly from the garnishee company. On that date, apparently at the urging of the debtor who wanted clear printouts of the transactions affecting him, the garnishee company entered into a "broker administration agreement" with the Aero Mayflower Transit Company, under which most of the garnishee's bookkeeping would be performed by Aero Mayflower's computers. This broker company owns no trucks or trailers and has no contractual relationship with Kenneth Manley at all. It is the garnishee company that is and has been Kenneth Manley's employer and has the sole right to suspend or dismiss him from employment, but it is the broker company that issues the man's pay-cheques and provides him periodically with an accounting on computer print-out statements. For this service, Kenneth Manley bears the cost at the rate of 1% of his earnings that is held back from his earnings by the broker corporation. I do not fully appreciate the full advantages of this agreement to the garnishee company, especially when it is the garnishee company and not the broker company whose credit is drawn upon by Kenneth Manley to purchase fuel and when it is the garnishee company that continues to pay for Manley's vehicle insurance, hospital insurance plans and telephone bills. It is because of these latter expenses that the garnishee company claims that it is owed money by Kenneth Manley.

4 On 7 April 1986, at the request of Marie Manley, the clerk of this court issued a Notice of Garnishment directed to Armor Moving and Storage Ltd. The garnishee company did not file a

formal Dispute but sent a letter stating that there was no debt owing to Kenneth Manley that could be attached. Five months later, Marie Manley insisted on having a garnishment hearing to test this apparent absence of an exigible debt. After at least one adjournment, Marie and Kenneth Manley entered into negotiations in this courthouse, just before the hearing would have commenced. The garnishee's representative was in attendance for that hearing, but was left waiting outside while the former spouses attempted to resolve their differences. As a result of their talks, they agreed to adjourn the garnishment hearing indefinitely on condition that Kenneth Manley was to make certain periodic and lump-sum payments of child support.

5 Kenneth Manley failed in the performance of that condition and the matter was returned to the court docket, only to be adjourned once more on the consent of the former spouses. Again, the garnishee's representative was left out of their discussions.

6 On 4 September 1987, Marie Manley had a fresh Notice of Garnishment Hearing issued, returnable for 1:30 in the afternoon of 16 September 1987. The garnishee's representative did not attend this time. Neither did Kenneth Manley, but an hour before the scheduled hearing, he appeared at the office of Marie Manley's lawyer, leaving an envelope containing a letter and $1,200. The letter, which was tabled at the hearing, indicated that Kenneth Manley suffered from some medical problem that need attention and that he could not wait. He expressed the hope that the enclosed payment and his promise of future payments would settle the matter.

7 An hour later, at the hearing attended by Marie Manley's solicitor, Judge Main, who was presented with this material, issued an order under rule 88 commanding the garnishee company to pay $7,601.08 and costs of $250.00 to Marie Manley. It is this order that the garnishee company now wishes me to set aside. Counsel for the garnishee explained the company's failure to defend these proceedings as a mistake, it having been lulled into a sense of inaction and perhaps unwelcome by the conduct of Marie and Kenneth Manley who excluded the garnishee's representative from their settlement discussions on the court's doorsteps and by its reliance on Kenneth Manley to achieve a similar settlement on 16 September 1987. The garnishee company would like the hearing to be re-opened so that it could file a proper dispute and resolve the question of its indebtedness to Kenneth Manley on its merits.

8 Both counsel assumed that the Provincial Court (Family Division) has the jurisdiction to set aside its own orders. Neither counsel pointed to any authority for that assumption. There is no statute that vests this court with such a power. The Rules of the Provincial Court (Family Division) are silent on the point. And needless to say, it Is wrong to import the rules of the Supreme Court of Ontario to govern or guide proceedings in the Provincial Court (Family Division); see Boucher v. Boucher (1983), 44 O.R. (2d) 481, 1 O.A.C. 47, 4 D.L.R. (4th) 479, 37 R.F.L. (2d) 124, 40 C.P.C. 160 (Ont. C.A.).

9 In Re Grice and Orr (1980), 31 O.R. (2d) 300, 15 R.F.L. (2d) 350, Judge Nasmith of this court was faced with a default order of child support made against an irresponsible respondent who realized the order's significance only when its enforcement against him brought him to his.senses. In entertaining an attempt to re-open the case, Judge Nasmith looked into subsection 21(1) of the Family Law Reform Act, 1978, c. 2 [now superseded by subsection 37(2) of the Family Law Act, 1986, c. 4], under which the court had the power to vary a support order when "evidence has become available that was not available on the previous hearing", and gave that phrase a broad but cautious interpretation. See also Re Chapman and Rupert (1983), 43 O.R. (2d) 445, 35 R.F.L. (2d) 454 (Ont.

Co. Ct). For the purposes of this case, however, there is no analogous power to vary an order made under rule 88 against a garnishee upon the production of fresh evidence.

10 A different approach was taken in Gubbins v. Stewart (1982), 37 O.R. (2d) 427, 29 C.P.C. 284 (Ont. U.F.C.), where Judge Gravely considered three distinct arguments by which his court could found its authority to set aside its own orders and judgments. The first was incorporation into his court of the rules of practice of the Supreme Court of Ontario. Judge Gravely rejected this avenue of jurisdiction and in this, he was shortly thereafter upheld by the Ontario Court of Appeal in Boucher v. Boucher, supra. The second was an invocation of rule 5 of the Rules of the Unified Family Court, R.R.O. 1980, Reg. 939 [which is identical in its wording to rule 5 of the Rules of the Provincial Court (Family Division)], whereby any matter on which the rules are silent can be regulated by analogy to the rules or to the Act governing the proceeding. Judge Gravely was unable to construct any analogy to the rules or the statute that would have produced a power to set aside orders. As far as I can judge, nothing prevents the Rules Committee of the Unified Family Court or of the Provincial Court (Family Division) from promulgating a rule for setting aside orders of the court, but at present, no such rule exists.

11 Judge Gravely was, however, able to find the needed authority in the court's own inherent powers. His reasons for judgment drew on many precedents, most of which, it seemed to me, were addressed to the High Court of Justice, but Judge Gravely appropriated them for his court. His logic in respect of the Unified Family Court is significant to the Provincial Court (Family Division) for several reasons. The Unified Family Court is, first of all, a court created by statute. It is a tribunal not known to the common law. It is also an inferior court. Furthermore, section 38 of the Courts of Justice Act, 1984, S.O. 1984, c. 11, makes the Unified Family Court "a court of record". This phrase, "court of record", is not an empty title. It carries within it a legacy of jurisprudence that affirms the existence of "inherent" powers in the court for the control of its own process. Being a "court of record" means that the court is immediately blessed with an array of procedural powers, one of which is the power to set aside its own judgments.

12 The Provincial Court (Family Division) is also a court created by statute and it too is unknown to the common law. It is an inferior court. And by virtue of subsection 74(1) of the Courts of Justice Act, 1984, it is "a court of record". This title should have the same meaning for the Provincial Court (Family Division) that it has for the Unified Family Court, or even the District Court of Ontario, another statutory inferior court of record in this province. There is a suspicion, however, that this is not so. In Ex parte Hill, [1970] 1 O.R. 699, 9 D.L.R. (3d) 321, [1970] 2 C.C.C. 264, 8 C.R.N.S. (Ont. H.C.), Justice Pennell found that "court of record" has more than one sense and concluded that the words any court of record" in the Habeas Corpus Act, R.S.O. 1960, c. 169 [now R.S.O. 1980, c. 193], did not include the Provincial Court (Criminal Division) Queen v. Gibson (1898), 29 O.R. 660, 2 C.C.C. 302, the Ontario High Court seemed to make distinctions between "principal" and "less principal" courts of record.

13 All of this leaves me very little wiser on this court's ability to entertain the garnishee's motion. Without the benefit of well-reasoned submissions and full arguments from counsel, I hesitate to express an opinion on the existence of a power as significant as the one to set aside orders. For the purpose of my reasons for judgment in this particular case, I will assume that the court does have that power and, as it happens, the result will be the same as if I decided that I lacked it. Perhaps the matter can be resolved in some future case or the issue avoided altogether by the promulgation of a rule that expressly vests the power to set orders aside in this court.

14 I have carefully read the written submissions of both counsel and examined their references to the transcript of the examination of Barbara Wright, general manager and co-owner of the garnishee company, in aid of execution. In my estimation, the broker administration agreement between Armor Moving and Storage Ltd. and Aero Mayflower Transit Company was made in good faith, at the request and for the benefit of Kenneth Manley and not for any improper purpose, least of all a conspiracy to evade the claims of Marie Manley. This agreement, in fact, predates the garnishment process.

15 The precise relationship between the garnishee company and Aero Mayflower Transit Company has not been fully set out before me. In the agreement, Aero Mayflower Transit Company refers to Armor Moving and Storage Ltd. as "the Agent" (with a capital "A"). The terms of this agency are likely set out in some other document that was not filed with the court, but even if it were, I feel certain that it would not be very relevant to the disposition of this motion. For virtually all of their dealings, the garnishee company is an agent of Aero Mayflower Transit Company. The exception is found in the last paragraph of the agreement, just above the garnishee's signature, where the "Agent" garnishee company appoints Aero Mayflower Transit Company as its "agent" (with a lower case "a") to perform the services set out in that agreement. Thus, as far as the broker administration agreement is concerned, it is the garnishee company that is the principal and the controlling power.

16 As for the agreement itself, I find to be, at heart, nothing more than a contract to provide an accounting or bookkeeping service for Kenneth Manley. The garnishee could, in theory, have approached any one of a number of accounting establishments, or even a bank, that would, for a fee, offer the desired level of bookkeeping service. It is the garnishee company that sought out the service for its employee and it retained overall dominion over that arrangement. With or without the agreement, it seems to me that nothing happens for the benefit of Kenneth Manley without the implied or express direction of the garnishee company. I find, therefore, that the broker administration agreement is a distracting irrelevance, a "red herring", for the purposes of this case. The garnishee company may not set up this bookkeeping device to exempt itself from its duty to observe the Notice of Garnishment.

17 The garnishee company has no hesitation in accepting demands for payment from third persons in respect Kenneth Manley's fuel bills, insurance (health, hospital and equipment), damage claims, licences and vehicle maintenance. For these items, it appears that the employee has an open line of credit. The garnishee company simply invoices these expenses to its bookkeeper, Aero Mayflower Transit Company, which in turn deducts them from Kenneth Manley's commissions. But when Marie Manley asked for payment under her Notice of Garnishment, the line of credit was suddenly unavailable. Banks, trust companies and other financial institutions regard lines of credit as attachable by garnishment and regularly honour such demands, but Armor Moving and Storage Ltd. sees it only as proof that Kenneth Manley owes money to the company and therefore as justification for ignoring the Notice of Garnishment. I doubt that any court would endorse the company's logic. I will not.

18 Commissions earned by a debtor, like wages, are a debt owed by an employer to the debtor and are exigible. In his submissions, Marie Manley's solicitor referred to information apparently supplied by the garnishee's solicitor, namely that in the eleven-month period from 1 January 1987 to 27 November 1987, Kenneth Manley grossed $70,000 in commissions, netting him about $30,000. His commissions were and are attachable. They will continue to be attachable for the next six years

after service of the Notice of Garnishment on the garnishee company. I see nothing in the garnishee's submissions that would support any exemption from the garnishment process.

19 If I had re-opened this matter, I cannot see how or why my result would have materially differed from the order that was imposed by Judge Main. On its merits, therefore, I am dismissing the motion made by the garnishee company.

20 I find that the garnishee company in this case had acted mistakenly, perhaps out of an erroneous perception of the garnishment process, but its conduct was not motivated by malice or by bad faith. On the contrary, it has undertaken to abide by whatever decision I may make in this matter. Under these circumstances, I decline to make any order as to costs.

JAMES PROV. CT. J.

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