

COPY

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

CHERYL LEE DURHAM GORDON,

Petitioner-Appellee,

vs.

Ct. App. No. 29,441

TIMOTHY E. GORDON,

Respondent-Appellee.

HPSC, Inc., and DE LAGE LANDEN
FINANCIAL SERVICES, INC.,

Intervenors-Appellants,

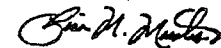
NASSAU LENS COMPANY, Inc., d/b/a/ NOVA OPTICAL
LABORATORY, Intervenor,

ZIA TRUST, INC., Receiver-Appellee.

An Appeal from the Eleventh Judicial District Court, San Juan County
Cause Number DM 2004-118-9
Hon. William C. Birdsall, District Court Judge

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

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ANSWER BRIEF OF APPELLEE, TIMOTHY GORDON

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TABLE OF CONTENTS

I. ARGUMENT

- | | | |
|----|----------------------------------------------------------------------------------------------------------------------|---|
| A. | The court did not set aside the agreement of the parties. | 1 |
| B. | Appellants did not provide any evidence to the court that the agreement of the parties was intended to benefit them. | 3 |
| C. | The assets in the receivership estate are exempt under sections 42-1-2 and 42-10-3 NMSA 1978. | 5 |

TABLE OF AUTHORITIES

NEW MEXICO CASES

<u>Ed Black's Chevrolet Center, Inc. V. Melichar, d/b/a New Mexico Salvage Co.</u> 81 N.M. 602, 471 P.2nd 172 (SC 1970).....	6
<u>Fort Knox Self Storage v. Western Technologies, Inc.</u> 140 N.M. 233, 142 P.3rd 1 (Ct. App. 2006).....	1
<u>Gomez v. Chavarria</u> 146 N.M. 46, 206 P.3rd 157, (Ct. App. 2009).....	5
<u>Salopek v. Hoffman</u> 137 N.M. 47, 107 P. 3 rd (Ct. App. 2004).....	7
<u>Sisneroz v. Polanco</u> 126 N.M. 779, 975 P.2nd 392 (App. Ct. 1999).....	3

ARGUMENT

A. THE COURT DID NOT SET ASIDE THE AGREEMENT OF THE PARTIES.

The meaning of a contract is an issue of law that is reviewed de novo. Fort Knox Self Storage v. Western Technologies, Inc., 140 N.M. 233, 142 P.3rd 1 (Ct. App. 2006).

The parties agreed in both their Marital Settlement Agreement (RP 308) and in Stipulated Order Appointing Receiver (RP 331) that taxes and community debts existing as of July 24, 2007 would be paid by the receiver. Both documents also recite the parties agreement that the receiver would give priority to the payment of taxes. The pertinent part of Paragraph H of the Marital Settlement Agreement reads as follows:

- H. Appointment of Receiver: The parties agree that a receiver should be appointed to deal with all taxing entities and to pay taxes and all other community debts existing as of July 24, 2007, either personal or business. The receiver's priority shall be to pay all personal , federal and state income taxes due. After the taxes are paid, the receiver shall pay any other debts existing as of July 24, 2007. (RP 308)

Similar language appears in the Stipulated Order Appointing Receiver (RP 331).

The court's Order Adopting Findings and Recommendations of Domestic Relations Hearing Officer (RP 460, 461) was in response to the question raised by the receiver in her motion as to whether the assets in the receivership estate are exempt under New Mexico exemption statutes (RP

388, 389). The court's order answers that question and gives direction to the receiver as to how to proceed with her duties. The order does not modify the agreement of Cheryl and Timothy Gordon, but protects the assets for the use of the receiver to accomplish her mission and to maximize the receivership estate. The parties assets are protected from creditors until such time as they voluntarily use them for the payment of taxes and debts.

Appellants read the court's order as leaving the receiver with no role or duties. He spends considerable time reciting cases that support the position that courts must enforce the agreement of the parties and argues that the court's order had, in effect, modified the agreement made by Timothy and Cheryl Gordon.

Appellant's argument that the court must enforce the agreement of the parties is correct, but his insistence that the court's order did not do so is incorrect. The court's ruling merely maintained the status quo. The receivership is in place. The parties's agreement to pay taxes and community debts is still in force. What the court's order did, however, was to put creditors at bay until such time as the parties agree that debts should be paid. While the assets of the receivership estate were determined by the court to be exempt, they are still available to the parties for the payment of taxes and debts when they agree to waive their exemptions. The intent of

the parties's agreement was that debts be paid. Their agreement and the court's order do not contradict one another.

What Appellants fear is that the assets of the receivership estate will be consumed by the payment of taxes and they will have to find other means to satisfy the judgments they may have against the Gordons. They want to rewrite the agreement so that they might somehow have priority over the payment of taxes or are, at least, on similar footing.

B. APPELLANTS DID NOT PROVIDE ANY EVIDENCE TO THE COURT THAT THE AGREEMENT OF THE PARTIES WAS INTENDED TO BENEFIT THEM.

The standard of review is whether the law has been correctly applied to the facts, viewing the evidence presented at trial and all reasonable inferences drawn therefrom in the light most favorable to the prevailing party. Sisneroz v. Polanco, 126 N.M. 779, 782, 975 P.2nd 392, 395 (App. Ct. 1999).

Appellants are two separate entities, HPSC, Inc. and Delage Landen Financial Services, Inc. Both were allowed to intervene as parties to the Gordon's divorce action.

Although Appellants argue that they are third party beneficiaries to the Gordon's Marital Settlement Agreement, they have yet to provide evidence to the court that they are intended beneficiaries of that agreement. In Dona Ana Mutual Domestic Water Users Ass'n v. City of Las Cruces, New Mexico,

516 F.3rd 901, 904-905 (10th Cir., 2008), the court states that "the burden is on the person claiming to be a third-party beneficiary to show that the parties to the contract intended to benefit him."

The obvious beneficiaries of the Gordon's Marital Settlement Agreement are taxing authorities and creditors that existed on July 24, 2007. Although both Appellants may have judgments against Mr. Gordon, neither of them presented evidence that they fall within the category of intended beneficiaries, those creditors who existed as of July 24, 2007. Appellants can not claim third-party status without having offered such evidence. The burden was on them to offer evidence that the Gordon's intended them to benefit from their agreement and they failed to do so.

Appellants state in their brief that they requested the court take judicial notice of the judgment against Mr. Gordon by Delage Landen Financial Services, Inc. (Appellant's Brief, page 23). The record does not show that Appellant made the same request concerning the HPSC, Inc. judgment. Furthermore, the record does not show that the court, in rendering its order, took judicial notice of either judgment.

Because the court did not take judicial notice of the judgments against Mr. and/or Mrs. Gordon, there are numerous questions that relate to Appellants's claims that they are third party beneficiaries to the Gordon's agreement that are not answered in the record, including questions that go

to Appellants arguments regarding the claim of exemption. Did either Appellant have a judgment against Cheryl or Timothy Gordon? If judgment was entered against either Cheryl Gordon or Timothy Gordon, was it entered before July 24, 2007? Was the judgment against both Cheryl and Timothy Gordon or against just one of them? Was Tim Gordon served with Claim of Exemption? If Tim Gordon was served with Claim of Exemption, was it before or after the receiver was appointed? Was Cheryl Gordon served with Claim of Exemption? If Cheryl Gordon was served with Claim of Exemption, was it before or after the receiver was appointed?

Without such evidence regarding the judgments, Appellants fail in their burden to prove that the Gordon's agreement was intended to benefit them. In addition, without such evidence regarding the judgments, Appellants fail to make the necessary record to support the arguments made by them in Paragraph C of their brief.

C. THE ASSETS IN THE RECEIVERSHIP ESTATE ARE EXEMPT UNDER SECTIONS 42-10-2 AND 42-10-3 NMSA 1978.

The appellate court reviews issues of statutory construction de novo. Gomez v. Chavarria, 146 N.M. 46, 206 P.3rd 157, 159 (Ct. App. 2009).

When Timothy Gordon and Cheryl Gordon negotiated the division of their community property and debt, they realized that certain taxes were owing from past years and that there might be other outstanding debts of which neither of them were aware. After a long and contentious divorce

proceeding, they realized that without assistance of a third party they would not be able reach the necessary agreements and marshal the necessary assets, to file tax returns, pay taxes and pay any debts owed as of July 24, 2007. Their solution was to agree to the appointment of a receiver to assist them in accomplishing those tasks in an orderly fashion.

By allowing the receiver possession of their assets, they did not waive the exemption statute. In Ed Black's Chevrolet Center, Inc. v. Melichar, d/b/a New Mexico Salvage Co., 81, N.M. 602, 471 P.2nd 172 (174) (SC 1970), the Supreme Court defined the elements of waiver as follows:

To constitute a waiver, there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege. In no case will waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.

Appellants argue that by the very act of giving the receiver possession of their assets the Gordons waived their rights under the exemption statute. However, nowhere in any document agreed to by the parties is there any actual reference to the exemption statutes or a knowing waiver of them. "Waiver will not be presumed or implied". To accept Appellant's position that putting the assets into a receivership waives the exemption would be to imply waiver. Nothing in the order appointing the receiver shows an intent

by the parties to relinquish rights under the exemption statutes. It is simply a vehicle by which community bills and taxes would be paid.

In Salopek v. Hoffman, 137 N.M. 47, 107 P.3rd (Ct. App. 2004), the court dealt with the issue of the waiver of statutory rights granted by the probate code. In Salopek, Petitioner-Appellant, Dacia Salopek, had entered into a post-nuptial agreement with the decedent, John Salopek, shortly after their marriage. In that agreement, she waived all rights to the decedent's property. When John Salopek died, Dacia Salopek filed a Petition for Allowance of Claims for Personal Property Allowance and for Family Allowance. The decedent's children objected claiming that Dacia had waived her rights to the allowances in the post-nuptial agreement. At the hearing, Dacia testified that she did not know that the right to the allowances might be available to her when she signed the post-nuptial agreement. The court, discussing the issue of waiver stated that "common law waiver is an intentional relinquishment or abandonment of known right." It goes on to say:

Respondents do not explain how Wife could have waived her right to allowances that she testified she did not even know existed at the time of the purported waiver. Furthermore, there is no language anywhere in the post-nuptial agreement indicating an intent to waive the statutory allowances. The terms "waiver" or "allowances" do not appear anywhere in the agreement.

The agreement made by the Gordons did not include any language that the court could interpret as an intent to waive their statutory

exemptions. There was no testimony by either of the Gordons as to their intent and Appellants produced no other evidence that waiver was intended. "The language of the agreement standing by itself cannot meet the common law requirement for waiver of the statutory allowance." *Id.* Likewise, the language in the Gordon agreement, which is silent regarding the exemption statutes, does not meet the common law requirement of intentional relinquishment or intentional abandonment of a known right.

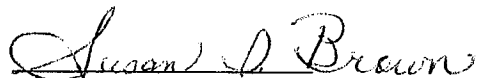
Appellants argue that "the intent to waive can be implied from their conduct in expressly turning over control of the retirement plans and account to the receiver and directing the receiver to use their proceeds to pay community debts." Again, Appellants provide no evidence from either of the parties or from their written agreement that they knew of the exemptions statutes and intended to waive them. Neither did they provide any evidence that Appellants had been misled to their prejudice into the honest belief that such waiver was intended or consented to. No evidence of intent was presented by Appellants and without such evidence of intent Appellants's arguments fail.

The court's ruling allows the Gordons to make further decisions as to the payment of taxes and debts and to, at a later date, voluntarily waive their right to the exemption. It clearly acknowledges the right of parties to protect their assets and to use them for the purposes they intended.

CONCLUSION

Appellants provided no proof that they are entitled to the relief they are seeking. Therefore, Timothy Gordon requests the Court of Appeals to affirm the trial court's order.

Respectfully submitted,



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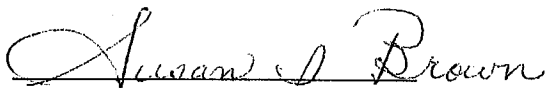
CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Answer Brief was mailed to the following persons on September 15th, 2009:

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