

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

CHERYL LEE DURHAM GORDON,

Petitioner-Appellee,

vs.

Ct. App. No. 29, 441

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 11 2009



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.

Appeal from the Eleventh Judicial District Court, San Juan County

Cause Number DM 2004-118-9

The Honorable William C. Birdsall, District Court Judge

ANSWER BRIEF OF PETITIONER-APPELLEE CHERYL GORDON

Submitted by:

Patrick L. McDaniel

Attorney for Petitioner-Appellee Cheryl Gordon

Atkinson & Kelsey, P.A.

P.O. Box 3070

Albuquerque, NM 87190

505/883-3070

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I. ADDENDUM TO INTERVENER/APPELLANT’S SUMMARY OF PROCEEDINGS

While the sections of Intervener/Appellant’s entitled “Nature of Case” and “Summary of Relevant Facts and Proceedings” do not contain factual inaccuracies per se, the summary is incomplete. Intervener fails to point out the following omissions, with respect to the judgements claimed interveners against Timothy E. Gordon and Cheryl Durham Gordon:

1. At no time did Intervener request the trial court to take judicial notice of the judgments ostensibly held by the interveners, which were apparently foreign judgments.
2. At no time did Intervener provide evidence that the judgements in question were domesticated in New Mexico.
3. Intervener did not provide evidence that either Cheryl Gordon or Timothy Gordon was served with notice of the pendency of the collection actions ostensibly leading to the judgment.
4. The judgements are not part of the record in the case at bar.
5. Based on the Record Proper, Intervener did not present any evidence regarding whether the foreign judgments were reduced or sought to be reduced in amount in any court as a result of mitigation of

damages. Nor did intervener produce any evidence of what the current judgment amounts were or are.

6. Based on the Record Proper, Intervener did not produce any evidence that, at the time of the entry of the Stipulated Order Appointing Receiver, on February 7, 2008 and May 27, 2008, Cheryl Durham Gordon had notice or actual knowledge of the purported judgment. R.P. 309-315.
7. The record does not reflect that Intervener produced any evidence that Cheryl Durham Gordon was a party to the purported foreign judgments.
8. Intervener did not state that the purported debts to Interveners were not listed in the Marital Settlement Agreement of Dissolution of Marriage entered into by the parties in November 28, 2007. R.P. 304-315.
9. Intervener relies in part on oral statements of counsel as evidence (see Brief in Chief 6) as to the intent of the parties.
10. There is no evidence in the record that Wife was notified of her statutory right to claim an exemption from collection of the debt.

II. ISSUES

- A. Under New Mexico law concerning waiver and under New Mexico's exemption statute, NMSA 42-10-1, et seq., whether Wife voluntarily, knowingly, and intentionally waived her statutory exemption with respect to collection actions by the interveners, nor is there any evidence that such a purported waiver was supported by consideration
- B. Under New Mexico law, whether the interveners are intended third party beneficiaries when Wife had no knowledge of the existence of the alleged debts and there is no evidence she intended to make the interveners beneficiaries of an agreement to liquidate exempt assets to pay debts owed to the interveners.

ARGUMENT

Point 1. Under New Mexico's exemption statute, and under New Mexico law of waiver, Wife did not voluntarily, knowingly, and intentionally waive her statutory exemption with respect to collection action by the creditors who are a party to this case.

The standard of review is whether the trial court correctly applied the law to the facts in upholding the exemption related to retirement funds and annuities and thereby barring collection of the retirement funds by the creditors. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 782, 975 P. 2d 392-395. The issue was possibly preserved through the Interveners' submissions to the Hearing Officer regarding the effect of exemptions on the purported judgment and the Hearing Officer's Order. R.P. 434. With respect to standard of review, it is incorrect to state that this is a contract issue, and therefore subject to a de novo review as does counsel for interveners, Brief in Chief at 8. The purported

“contract” must be seen in light of whether Wife waived a statutory exemption, which is subject to the above stated standard of review. See Interveners’ Brief in Chief 8.

New Mexico’s exemption statute, specifically NMSA 42-10-2, states:

[A]ny interest in or proceeds from a pension or retirement fund of every person supporting only himself is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, executors or administrators in probate, fines, attachment, execution or foreclosure by a judgment creditor.

NMSA 42-10-3 states:

[Annuities of all types] shall in no case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or who is protected by said contract, or who receives or is to receive the benefit thereof, nor shall it be subject in any other manner to the debts of the person whose life is so insured, or who is protected by said contract or who receives or is to receive the benefit thereof, unless such policy, contract or deposit be taken out, made or assigned in writing for the benefit of such creditor.

In this case, the assets over which the receiver has control are pensions, retirement funds, and annuities, specifically: a Vanguard Money Purchase Account, a Vanguard Profit Sharing Plan; a Metlife Annuity; a Fidelity IRA in Wife’s name; and a Fidelity IRA in Husband’s name. See MSA, RP 308-309; Partial Decree, RP 322-324. There is no evidence that any non-retirement or non-annuity assets are in the control of the receiver.

All of the retirement and annuity plans in question were retirement plans

and exempt from collection actions by creditors under New Mexico law. The creditors, however, claim that the exemptions were waived. This is contrary to New Mexico law concerning waiver.

The issue with respect to waiver of exemptions relating to the Metlife Annuity is clear cut under NMSA 42-10-3. Under that statute, the annuity policy must be made or assigned in writing for the benefit of the creditor. There is no evidence that such an assignment was made. As a result, the creditor's claim that the exemption related to the annuity was waived is invalid on its face.

With respect to the other retirement accounts, there is no evidence that Wife knowingly and intentionally waived her statutory exemption. A waiver is

the intentional abandonment or relinquishment of a known right. 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 a privilege." Brannock v. Brannock, 104 N.M. 385, 385, 722 P. 2d 636, 636 (1986)(citation omitted).

A waiver must be supported by consideration, which may be either a benefit to the promisor or a disadvantage to the promisee. Id. There are two types of waiver in issue in this case: an express waiver or waiver by acquiescence. By definition, an express waiver must be expressly stated. Waiver by acquiescence occurs "where the evidence shows the existence of an agreement...supported by consideration,

and where the agreement has been acquiesced in over a period of time under circumstances giving rise to estoppel. Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 782, 9975 P. 2d 392, 395.

In this case, there is no evidence of an express waiver of the right to claim an exemption related to the retirement accounts. Furthermore, in the case of either an express waiver or waiver by acquiescence, there must be a voluntary abandonment of the right to claim the statutory exemption and this must be supported by consideration. In the case at hand, there is no evidence of any express or implied agreement related to the debt in question, no evidence that Wife had any knowledge of the debt in question, no evidence of any negotiations to waive the exemption, and no evidence of an actual intention to waive the exemption with respect to the debt. There is no evidence Wife was served with a complaint for money due; that she had any knowledge of the action or the alleged debt or judgment; or that she was aware of any amounts of the judgment. The record does not even show that the judgment was domesticated or made part of the record in this case. Furthermore, there is no evidence of consideration, which is required in either type of waiver. The record also does not show that the debt was listed in the Marital Settlement Agreement or Decree. R.P. 309-315; RP 322-324.

As a result, as a matter of law, Wife did not waive her statutory right to

claim an exemption which bars execution against the retirement funds and annuities. Furthermore, even if there were an intent to waive the right to the exemption, the collection of this debt was not assigned to a priority under the Order Appointing Receiver. It should be left to the receiver and the Court to determine the priority, should it be decided that Wife waived her exemption.

Intervenors claim that Wife's exemption is barred by her failure to timely claim the exemption. However, Wife could not be expected to expressly claim an exemption when there is no evidence in the record that she had knowledge of any debt or judgment. There is no evidence in the record that the creditor followed the procedures in NMRA 1-065.1 NMRA that require notice to the debtor regarding an exemption. This failure to give notice to Wife is in direct violation of procedural due process and New Mexico law and procedure.

Intervenors argue that Wife is judicially estopped from asserting a claim of exemption because this would constitute taking an inconsistent position in the litigation. See Brief in Chief 24-26. This argument is not supported by substantial evidence in the record, because the record does not demonstrate that Wife knew of the existence of this specific alleged debt or took any position with respect to this specific debt. As stated previously, there is no evidence that she knowingly, intentionally, or for consideration waived her right to an exemption.

Point 2. The creditors are not intended third party beneficiaries of the MSA, Decree or Order Appointing Receiver, because Wife had no knowledge of the existence of the alleged debt and did not intend to make the creditors beneficiaries of an agreement to liquidate exempt assets to pay the alleged debt in question.

There is no evidence that this issue was preserved at the trial court level.

The standard of review is whether the law has been correctly applied to the facts.

Sisneroz v. Polanco, 1999-NMCA-039, 126 N.M. 779, 782, 975 P. 2d 392-395.

Intervenors acknowledge that intent to name a third party beneficiary is a pre-requisite to the existence of that status. See Intervenors' Brief in Chief at 17, citing Tarin's, Inc. v. Tinley, 2000-NMCA-048, ¶ 13, 129 N.M. 185, 3 P.3d 680 (Ct. App. 1999); Doña Ana Mutual Domestic Water Users Ass'n. V. City of Las Cruces, New Mexico, 516 F. 3d 901, 904-905 (10th Cir. 2008). The case law establishes that the party claiming beneficiary status must prove intent to "benefit him." Id. Contrary to the assertions of Intervener, there was not only no unambiguous intent to create a third party beneficiary status for intervenors, there was no evidence that Wife even knew of the existence of the purported intended beneficiary, i.e., the intervenors. In no document was the purported debt to creditors listed, and there is no evidence that Wife even now has been served with any judgment or that any judgment is part of the record in the case at hand. The language in the Marital Settlement Agreement cited by Intervener is not

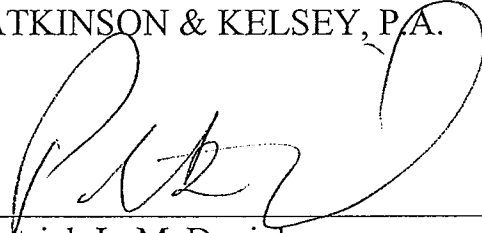
sufficiently clear and specific to allow for the third-party beneficiary status of the Interveners. Even if the interveners were granted third-party beneficiary status, however, collection and enforcement of the debt would still be barred by the New Mexico exemption statutes.

CONCLUSION

The funds that the interveners are seeking are exempt from collection proceedings under New Mexico law. In order for the annuity retirement fund to be subject to collection, it is necessary under the statute that any assignment for the benefit of a creditor be in writing. No allegation was made that such assignment occurred and there is no evidence of a writing to document the alleged assignment. With respect to the other retirement accounts, under New Mexico law, the waiver of a statutory exemption must be clear, specific, knowing, voluntary, and supported by consideration. No evidence was produced to support the existence of an express or implied waiver. Nor was there any evidence that Wife intended to make a creditor of whose existence she was unaware, a third-party beneficiary to the receivership agreement. The trial court correctly applied the law to the facts, and the decision of the trial court should be affirmed. The relief sought by interveners should therefore be denied.

Respectfully submitted,

ATKINSON & KELSEY, P.A.

A handwritten signature in black ink, appearing to read 'P. McDaniel', written over a horizontal line.

Patrick L. McDaniel

Attorney for Petitioner-Appellee Cheryl Lee Durham Gordon

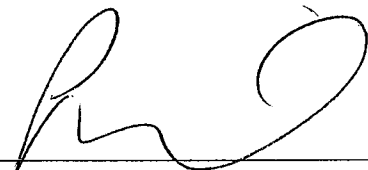
CERTIFICATE OF MAILING

I hereby certify I have caused to be mailed a true and correct copy of Petitioner-Appellee's Answer Brief to each of the following this 11th day of September, 2009:

David A. Grammar III
Aldridge, Grammar, Jeffrey & Hammar, P.A.
1212 Pennsylvania St. NE
Albuquerque, NM 87110

Susan I. Brown
Attorney at Law
4300 Carlisle Blvd. NE #4
Albuquerque, NM 87107-4827

Kenneth C. Leach
Leach & Filayson PC
320 Osuna Rd. NE Unit G4 Box 15
Albuquerque, NM 87107-5954



PATRICK L. McDANIEL
Attorney for Petitioner-Appellee
Atkinson & Kelsey, P.A.
P.O. Box 3070
Albuquerque, NM 87190
505/883-3070