

**IN THE CIRCUIT COURT FOR THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA**

**SYBIL and CLEVELAND DAVIS,**

Appellants,

v.

**CASE NO.: CVA1 07-59**

Lower Court Case No.: 2007-CC-3656

**DE ALBANY CONSTRUCTION COMPANY, INC.,**

Appellee.

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An appeal from the County Court,  
for Orange County,  
Antoinette Plogstedt, Judge.

Andrean Eaton, Esquire,  
for Appellants.

Travis W. Fulford, Esquire,  
For Appellee.

Before RODRIGUEZ, LUBET, and EVANS, JJ.

PER CURIAM.

**FINAL ORDER AND OPINION AFFIRMING TRIAL COURT**

Appellants Cleveland Davis and Sybil Davis (Appellants) timely appeal the trial court's Final Judgment in favor of Appellee De Albany Construction Company (Appellee). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Appellee filed a Complaint for breach of contract and unjust enrichment on March 15, 2007, stating that Appellants entered into a roofing and repair contract with Appellee on or about February 16, 2006, and Appellants breached the contract by failing to pay for services performed. On April 19, 2007, Appellee filed a Motion for Clerk-Entered Default asserting that

Appellants had failed to file an answer or otherwise serve timely pleadings upon Appellee. The Clerk entered defaults against Appellants on April 24, 2007.

On May 17, 2007, Appellee filed a Motion for Entry of Default Final Judgment seeking \$1,973.62 plus interest, costs, and attorney's fees. The trial court entered a Default Final Judgment against Appellants on May 23, 2007, granting judgment in favor of Appellee in the amount of \$5,831.76 and compelling Appellants to complete and serve Florida Rule of Civil Procedure Form 1.977 within forty-five days from date of the Final Judgment, unless it is satisfied or post-judgment discovery is stayed.

In response to Appellee's Motion for Writ of Garnishment filed on or about May 29, 2007, and the Writ of Garnishment entered on June 4, 2007, Wachovia Bank filed an Answer of Garnishee and Demand for Garnishment Deposit on June 22, 2007, stating that it retained the sum of \$11,663.52 in good faith in accordance with section 77.06(2) and (3), Florida Statutes. Thereafter, on June 25, 2007, Appellee filed an Acceptance of Answer of Garnishee and a Notice of Compliance with section 77.055, Florida Statutes, along with a Motion for Entry of Final Judgment Against Garnishee. The trial court entered a Final Judgment as to Garnishee, Wachovia Bank, on July 5, 2007, allowing Appellee to recover \$5,831.76 from Wachovia Bank as Garnishee for Appellants' account. This appeal followed.

It is well established that in appellate proceedings the decision of a trial court is presumed to be correct and the burden is on the appellant to demonstrate error. Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150, 1152 (Fla. 1980); Wright v. Wright, 431 So. 2d 177, 178 (Fla. 5th DCA 1983). In reviewing a discretionary act, the appellate court should apply the "reasonableness" test to determine whether the trial judge abused his or her discretion. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). "If reasonable men could differ as to

the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.” Id. In the absence of facts showing an abuse of discretion, the trial court’s decision excusing, or refusing to excuse, noncompliance with rules must be affirmed. Farish v. Lum’s, Inc., 267 So. 2d 325, 327-28 (Fla. 1972).

This appeal involves the procedural aspects of post-judgment writs of garnishment under Chapter 77, Florida Statutes. Appellants assert that the trial court erred by entering the order of garnishment prematurely and the garnishee, Wachovia Bank, erred in freezing more funds than the judgment required. Alternatively, Appellee argues that even if the trial court’s final judgment was premature, it was Appellants’ failure to timely file a notice of claim of exemption or a motion to dissolve that resulted in a forfeiture of those rights, not the entry of the final judgment.

Since garnishment is a remedy which has been legislatively created, Chapter 77, Florida Statutes, must serve as primary guidance for any decision on the appropriate procedure for obtaining or challenging a writ of garnishment. Int’l Travel Card, Inc. v. R.C. Hasler, Inc., 411 So. 2d 215, 217 (Fla. 1st DCA 1982). The statutory procedure for post-judgment garnishment involves primarily the judgment creditor, Appellee De Albany Construction Company, and the garnishee, Wachovia Bank. The judgment debtors, Appellants Cleveland Davis and Sybil Davis, play a limited role in the proceedings.

According to Chapter 77, every person who has recovered judgment in any court against any person has a right to a writ of garnishment to subject any debt due to defendant by a third person. § 77.01, Fla. Stat. (2007). Chapter 77 further provides that service of a writ of garnishment upon a garnishee makes the garnishee liable for all debts due by him to the defendant and for any tangible or intangible personal property of defendant in the garnishee’s

possession or control at the time of the service of the writ. § 77.06(1), Fla. Stat. (2007). Procedurally, after a writ of garnishment is issued by the court, the writ is served on the garnishee, the garnishee answers, and the plaintiff replies. §§ 77.04, 77.061, Fla. Stat. (2007). If no reply is filed, judgment of garnishment may be entered on the garnishee's answer. §§ 77.082, 77.083, Fla. Stat. (2007). Additionally, within five days after service of the garnishee's answer on the plaintiff, the plaintiff shall serve the following documents upon the defendant: a copy of the garnishee's answer and a notice advising the defendant that he or she must move to dissolve the writ of garnishment within twenty days after the date indicated on the certificate of service in the notice if any allegation in the plaintiff's motion for writ of garnishment is untrue. § 77.055, Fla. Stat. (2007).

Pursuant to sections 77.041 and 77.07, Florida Statutes, judgment debtors or defendants have two ways of challenging a writ of garnishment: (1) by filing a claim of exemption from garnishment or (2) by filing a motion to dissolve the garnishment within twenty days after the date indicated on the certificate of service in the notice. Because garnishment is a statutory proceeding, the trial court does not have discretion to bend the deadline to move to dissolve the writ. BNP Paribas v. Wynne, 944 So2d. 1004, 1004 (Fla. 4th DCA 2005).

Appellants argue that the final judgment for garnishment was entered prematurely because the twenty day time period for Appellants to file a motion to dissolve the garnishment had not expired. Appellees assert that this Court should apply the reasoning in Sun Bank/Southwest, N.A. v. Schad to the instant case and hold that the final judgment, although entered prematurely, was not void, but only voidable. 482 So. 2d 554 (Fla. 4th DCA 1986).

In Schad, the appellants suffered a default in a mortgage foreclosure action due to their failure to appear, answer, or respond, and a final judgment of foreclosure was entered. Id. at 555. Following the foreclosure sale, a deficiency judgment was entered which became the basis of a writ of garnishment. Id. The trial court issued a writ of garnishment two days after the final deficiency judgment was filed. Id. at 556. The appellants argued seven months later that the writ of garnishment should be dissolved because it was prematurely issued. Id. The appellants claimed that any writ issued within the ten day period for filing for rehearing was void. Id. The appellate court affirmed the trial court's decision to deny the motion for dissolution and held that the premature writ of garnishment was merely voidable, not void, because any right the appellants had to seek to dissolve the writ of garnishment had expired by the time they sought such relief. Id.

This Court finds that the reasoning in Schad is applicable to the instant case. The garnishee's answer was filed on June 22, 2007, and the trial court entered the final judgment of garnishment on July 5, 2007. It is undisputed that at the time the final judgment was entered, the twenty days for Appellants to file a motion to dissolve had not expired. However, Appellants' first attempt to challenge the writ of garnishment was through their initial appellate brief. Appellants did not timely file a motion to dissolve or a notice of claim of exemption from garnishment, nor have they stated any grounds upon which to support a basis for either a motion to dissolve or notice of claim of exemption. Therefore, this Court finds that the premature final judgment was merely voidable, not void, because it did not preclude Appellants from filing a notice of claim of exemption or a motion to dissolve the writ of garnishment.

Appellants next argue that the garnishee, Wachovia Bank, erred in freezing more funds than the judgment required. In response to Appellee's Motion for Writ of Garnishment, the trial court entered a Writ of Garnishment in the amount of \$5,831.76. (R. at 38-39, 45-46.) According to the Answer of Garnishee and Demand for Garnishment Deposit, Wachovia Bank retained the sum of \$11,663.52.

Section 77.19, Florida Statutes, states that no garnishee "shall retain out of the money more than double the amount which the writ of garnishment specifies as the amount plaintiff expects to recover or more than double the amount of the judgment plaintiff has recovered." Accordingly, this Court finds that Wachovia Bank did not err in retaining \$11,663.52 because that amount is exactly double the amount specified in the writ of garnishment.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's Final Judgment As To Garnishee, Wachovia Bank, National Association entered on July 5, 2007, is **AFFIRMED**; Appellee's Motion for Attorney's Fees and Costs is **GRANTED**, the assessment of which is **REMANDED** to the trial court; and this case is **REMANDED** for further proceedings consistent with this opinion.

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this  
\_\_25\_\_ day of \_March\_\_\_\_\_, 2009.

\_\_\_\_\_/S/\_\_\_\_\_  
**JOSE R. RODRIGUEZ**  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**MARC L. LUBET**  
Circuit Court Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**ROBERT M. EVANS**  
Circuit Court Judge

