

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-13-677

SELECT CONCRETE COMPANY, LLC
APPELLANT

V.

CANE CREEK CONCRETE
SERVICES, INC., and CDI
CONTRACTORS, LLC
APPELLEES

Opinion Delivered MARCH 12, 2014

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[NO. CV-12-66]

HONORABLE DON GLOVER,
JUDGE

REVERSED AND REMANDED

BILL H. WALMSLEY, Judge

Appellant Select Concrete Company appeals from the trial court's order dismissing its writ of garnishment filed against appellee CDI Contractors. We reverse and remand.

Appellant sued Cane Creek Concrete Services, Inc., for unpaid invoices and obtained a consent judgment awarding it \$32,216.57 plus interest. The judgment ordered Cane Creek to pay \$3000 per month and stated that upon the failure to timely pay, the entire balance of the judgment would become "immediately due and payable in full, and execution, garnishment and attachment may then immediately issue for collection of same."

Appellant served a writ of garnishment on CDI on August 1, 2012. Appellant alleged that Cane Creek owed it \$29,972.55, and there was reason to believe that CDI was indebted to Cane Creek or had in its possession goods, chattels, moneys, credits, or effects belonging to Cane Creek. CDI filed an answer to the writ on August 21, 2012, denying possession of money owed to Cane Creek. Appellant denied CDI's assertion, and a bench trial was held

on March 12, 2013.

The parties introduced into evidence a joint exhibit consisting of copies of checks issued by CDI to Cane Creek during the time between service of the writ of garnishment and the filing of CDI's answer. This included four checks totaling \$42,620. The parties also stipulated to the admission of four subcontracts between CDI and Cane Creek on four construction projects for which CDI was the general contractor.

Lloyd Garrison, the president and chief executive officer of CDI, testified that the checks CDI paid to Cane Creek were progress payments. Garrison said that a progress payment is a payment made by a contracting company to a subcontractor for work done and materials provided if the work is accepted by the owner and liens have been satisfied or lien releases have been supplied. Garrison agreed that when the checks were issued to Cane Creek they had been earned and CDI had obtained lien releases and had checked on the quality of the work.

Garrison acknowledged that none of the checks admitted into evidence were restricted in any way and that once the checks went to Cane Creek, CDI had no control over the funds. Garrison claimed that if CDI had not paid Cane Creek, the laborers would not have continued to show up to work. Garrison said that CDI had not taken any action against Cane Creek to collect back the amounts represented by these checks. He agreed that the payments were not subject to refund and were not contingent on anything.

On cross-examination, Garrison read the last sentence of paragraph 7.1 of the subcontracts: "Notwithstanding anything in this Subcontract to the contrary, all progress

payments and the final payment under this Subcontract are contingent upon Owner's acceptance of all Work performed and upon Contractor's receipt of payment from the Owner for Work performed by the Subcontractor." He testified that Cane Creek had not completed all of the work, that the owner had not accepted all of the work, and that the contingency for the payments had not been met.

CDI called Steven Crain, the president of Cane Creek Concrete Services, to testify. Crain admitted that his company did not finish the four projects it was hired by CDI to perform. He testified that he used the checks dated August 2 and August 9 to pay his laborers. On cross-examination, Crain testified that those checks were progress payments and that in order to receive them, he had to show CDI some work that he had performed and materials that he had provided. He said that CDI paid him ninety percent of his requests for payment and held back ten percent for retainage. Crain said that the payments were unrestricted and he could decide how to spend the money. He said that the checks represented money earned and owed to his company for work performed, and they were not subject to any kind of refund.

Tommy Weed, a senior project manager at CDI, testified that Cane Creek had not met the contingency described in paragraph 7.1 of the subcontracts. He said that progress payments are not actually earned until the subcontractors complete their contract requirements and that the checks were advanced to Cane Creek contingent upon completing the work and the owner's acceptance.

The trial court entered an order on April 12, 2013, dismissing the writ of garnishment.

The court found that Cane Creek failed to finish its subcontracts and that final payment was contingent upon finishing the job and the owner's acceptance of all work performed. The court concluded that "until the conditions are complied with, the judgment creditor's right to garnishment does not materialize."

On April 22, 2013, appellant filed a "motion for findings and for a ruling on waiver argument and for reconsideration/new trial." The motion was not ruled upon. On May 9, 2013, appellant filed a notice of appeal from the April 12 order. On June 6, 2013, appellant filed an amended notice of appeal from the April 12 order and from the denial of its motion that had been deemed denied.

In civil bench trials, the standard of review on appeal is not whether there is substantial evidence to support the findings of the court, but whether the court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Primus Auto. Fin. Servs., Inc. v. Wilburn*, 2013 Ark. 258, 428 S.W.3d 480. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* Where the issue is one of law, our review is de novo. *Id.*

A writ of garnishment is a suit directed to a third party to determine whether the third party possesses property of the judgment debtor. *Thompson v. Bank of Am.*, 356 Ark. 576, 157 S.W.3d 174 (2004). The effect of the service of a writ of garnishment is to impound all property in the hands of the third-party garnishee that belongs to the judgment debtor at the time of the service, or that may thereafter come into his or her possession up until the filing

of a true and correct answer. *Id.* We adhere to our rule that whenever the writ of garnishment is served, any moneys, credits, goods, or effects, in the hands of the garnishee due the defendant must be reported to the court, and if any such is surrendered by the garnishee to the defendant, such surrender is at the peril of the garnishee. *Bray v. Ed Willey & Son*, 239 Ark. 855, 395 S.W.2d 342 (1965). In *Wyatt Lumber & Supply Co. v. Hansen*, 201 Ark. 534, 147 S.W.2d 366 (1940), and *Coward v. Barnes*, 232 Ark. 177, 334 S.W.2d 894 (1960), the supreme court quoted with approval an annotator's note to a Rhode Island case, which stated as follows:

It is held that, in order that a garnishee may be charged, there must be an existing debt at the time of the service of the garnishment, and not a mere conditional or contingent liability. So, in the case of a construction contract, where the employer is not to become indebted to the contractor until performance in all particulars, there is no indebtedness owing to the contractor which may be reached in a garnishment proceeding until the terms of the contract have been performed.

Appellant argues that the payments CDI actually made to Cane Creek were not contingent on completion of the entire subcontract. Appellant cites Garrison's testimony that the payments were earned by Cane Creek for work done and materials provided, that they were owed by CDI because the work was accepted and lien releases were supplied, that they were not subject to refund, and that they were not contingent on anything.

CDI argues that the payments it made after receipt of the writ of garnishment remained contingent until the successful completion of the subcontracts. CDI contends that the *Wyatt* case provided that a garnishment cannot be maintained on a building construction contract that had not been completed. In *Wyatt*, the contract price for the work was payable "upon completion of the work," and the building contract was not fully completed. Thus, nothing

was owed to the judgment-debtor contractor and a garnishment could not attach. Here, however, Cane Creek's contracts with CDI made specific provision for Cane Creek to be paid in installments during the progress of the job. Paragraph 7.1 of the subcontracts provides as follows:

7.1 Payments: In consideration of the faithful performance by the Subcontractor of all the covenants and conditions, to be paid as the work progresses, on requests to be made of the proportionate amount of materials delivered and accepted and work properly done by Subcontractor, such payments to be 90 percent of the amount of such request to be made within seven (7) days after the like amount of each request is received from the Owner by CDI CONTRACTORS, LLC and in proportion to the amount of such request, the remaining 10 percent to be paid after that part of the Work and material herein provided for is finally completed to the satisfaction of the Owner and the Architect and has been paid for by the Owner to CDI CONTRACTORS, LLC, and after all waivers of lien, submittals, closeout documents, and communications have been submitted to CDI CONTRACTORS, LLC. Notwithstanding anything in this Subcontract to the contrary, all progress payments and the final payment under this Subcontract are contingent upon Owner's acceptance of all Work performed and upon Contractor's receipt of payment from Owner for Work performed by the Subcontractor.

Appellant contends that while any unpaid progress payments can be withheld if there is a problem with acceptance of the work or if the owner has yet to pay CDI, all conditions precedent were fulfilled for the payments actually made. We agree. The payments were contingent until CDI determined that the prerequisites had been met. Garrison's testimony and the fact that the checks were actually issued shows that CDI had determined that the conditions were met and that the payments were owed under the contract. Thus, the trial court's finding that appellant had no right to garnishment was clearly erroneous. We reverse and remand for the trial court to reinstate the writ of garnishment.

Reversed and remanded.

Cite as 2014 Ark. App. 161

GRUBER and GLOVER, JJ., agree.

Gibson & Keith, PLLC, by: C.C. “Cliff” Gibson, III, for appellant.

Friday, Eldredge & Clark, LLP, by: Jeffrey H. Moore, for appellee.