

[Cite as *Amerifirst Home Improvement Fin. v. Francis-Smith*, 2009-Ohio-5247.]

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

AMERIFIRST HOME IMPROVEMENT  
FINANCE (DIRECT)

Plaintiff-Appellant

-VS-

ALICIA M. FRANCIS-SMITH, ET AL.

Defendants-Appellees

JUDGES:

Hon. Sheila G. Farmer, P.J.

Hon. Julie A. Edwards, J.

Hon. Patricia A. Delaney, J.

Case No. 2009CA00170

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,  
Case No. 2008CV03856

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

September 30, 2009

APPEARANCES:

For Plaintiff-Appellant

MICHAEL J. BARREN  
ADAM A. BEANE  
110 Polaris Parkway  
Suite 302  
Westerville, OH 43082

For Defendants-Appellees

ALICIA M. FRANCIS-SMITH  
TONY J. SMITH  
520 Gobel Avenue, SE  
Canton, OH 44707

*Farmer, P.J.*

{¶1} On August 18, 2006, appellees, Alicia Francis-Smith and Tony Smith, executed a note in the amount of \$32,901.42 payable to appellant, Amerifirst Home Improvement Finance (Direct). Appellees defaulted on the note.

{¶2} On September 8, 2008, appellant filed a complaint against appellees for the amount due and owing on the note. By agreed judgment entry filed October 27, 2009, appellant received judgment for the full amount prayed for in the complaint. Appellees were to make monthly payments to appellant. Appellees failed to pay.

{¶3} On March 20, 2009, appellant sought a garnishment order on the personal earnings of appellee Tony Smith. The wage garnishment order was granted and entered the same day.

{¶4} On April 8, 2009, appellee Tony Smith filed a request for hearing on the garnishment order. A hearing was held on May 1, 2009. Appellee appeared for the hearing, but appellant did not. By judgment entry filed May 6, 2009, the trial court dismissed the garnishment order due to appellant's failure to attend the hearing, and declared any future garnishments against appellee Tony Smith to be null and void. On June 2, 2009, the trial court filed a judgment entry nunc pro tunc to include the release of all garnished funds to appellee Tony Smith.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DISMISSED APPELLANT'S GARNISHMENT OF PERSONAL EARNINGS OF T.

SMITH WITHOUT PROOF OF ANY APPLICABLE EXEMPTION OR OTHER DEFENSE TO THE WAGE GARNISHMENT ORDER, BUT RATHER SOLELY BECAUSE COUNSEL FOR APPELLANT DID NOT ATTEND THE GARNISHMENT HEARING."

II

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT BARRED APPELLANT FROM FILING ANY FUTURE GARNISHMENTS AGAINST T. SMITH BY INCLUDING AN ORDER IN THE MAY 6 JUDGMENT ENTRY AND THE JUNE 2 JUDGMENT ENTRY THAT ALL FUTURE GARNISHMENTS IN THIS CASE AGAINST T. SMITH SHALL BE NULL AND VOID."

I

{¶8} Appellant claims the trial court erred in dismissing the garnishment for its failure to appear at the garnishment hearing. We agree.

{¶9} Appellee timely requested a garnishment hearing pursuant to R.C. 2716.06. From the transcript of the hearing and the judgment entry filed on May 6, 2009, it is clear the sole reason for the dismissal was appellant's failure to appear.

{¶10} R.C. 2716.06 places the burden on the garnishee to establish why the garnishment is unlawful:

{¶11} "The judgment debtor may receive a hearing in accordance with this division by delivering a written request for a hearing to the clerk of the court within five business days after receipt of the notice provided pursuant to division (A) of this section. The request may set forth the judgment debtor's reasons for disputing the judgment creditor's right to garnish the personal earnings; however, neither the judgment debtor's

inclusion of nor the judgment debtor's failure to include those reasons upon the request constitutes a waiver of any defense of the judgment debtor or affects the judgment debtor's right to produce evidence at the hearing. If the request is made by the judgment debtor within the prescribed time, the court shall schedule a hearing no later than twelve days after the request is made, unless the judgment debtor indicated that the judgment debtor felt the need for the hearing was an emergency, in which case the court shall schedule the hearing as soon as practicable after the request is made. Notice of the date, time, and place of the hearing shall be sent to the parties in accordance with division (E) of this section. The hearing shall be limited to a consideration of the amount of the personal earnings of the judgment debtor, if any, that can be used in satisfaction of the debt owed by the judgment debtor to the judgment creditor."

{¶12} In his request for hearing filed April 8, 2009, appellee stated the following:

{¶13} "I dispute the claim for possession of my personal earnings in the above case and request that a hearing in this matter be held no later than twelve days after delivery of this request to the Court.

{¶14} "I, do not, feel that the need for the hearing is an emergency. I dispute the claim for the following reasons:

{¶15} "We got behind due to a job termination. I just recently started working and am trying to get back on my feet. Please contact me for details and possible negotiations."

{¶16} It is clear appellee confesses that he was delinquent in payment and the debt is owed, however, the garnishment would be a hardship.

{¶17} Although we sympathize with the trial court's frustration over appellant's failure to appear, we nonetheless find that dismissal was not appropriate. In order to solve one's anger over the failure of a party to appear, contempt was a viable option. Because the garnished funds were returned to appellee, we find the issue to be moot.

{¶18} Assignment of Error I is moot.

II

{¶19} Appellant claims the trial court erred in barring further garnishments. We agree.

{¶20} Consistent with our opinion in Assignment of Error I, we find the trial court abused its discretion in barring further garnishments.

{¶21} Assignment of Error II is granted.

{¶22} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby reversed.

By Farmer, P.J.

Edwards, J. and

Delaney, J. concur.

s/Sheila G. Farmer

s/ Julie A. Edwards

s/ Patricia A. Delaney

JUDGES

