

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TJ 2012-001634

07/24/2014

COMMISSIONER JAMES R. MORROW

CLERK OF THE COURT

S. Stulz

Deputy

SANALINA HOMEOWNERS ASSOCIATION

MARK W WALDRON

v.

DAVID RAMIREZ, et al.

EDNA M GUTIERREZ DE GUTIERREZ
DE RAMIREZ
15337 W BOCA RATON RD
SURPRISE AZ 85379
DIGNITY HEALTH
3033 N 3RD AVE
PHOENIX AZ 85013
STATE BAR OF ARIZONA

RULING

On May 20, 2014, the Court conducted a lengthy proceeding with Judgment Debtor Edna Gutierrez and Allen Quist, attorney for Judgment Creditor Sanalina Homeowners Association to resolve Judgment Debtor's objection to the continuing garnishment of her earnings by Judgment Creditor. After hearing the evidence presented concerning the earnings withheld under the Writ of Garnishment served on Garnishee Dignity Health, the Court found that the amounts subject to the Writ of Garnishment were satisfied as of February 7, 2014. (Minute Entry filed May 27, 2014) Accordingly, Judgment Debtor's objection was sustained and the Garnishee discharged. *Id.* At the conclusion of that proceeding the Court urged the parties to confer concerning the pending application for fees and costs (filed the day before the hearing) and the Judgment

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Debtor's claim to the earnings withheld after February 7, 2014. It is evident from the numerous documents filed by the parties since that time that they were unable to resolve their differences.

Judgment Debtor Awarded Costs

With respect to hearings concerning garnishment objections, A.R.S. § 1598.07(E) provides in pertinent part that “[t]he prevailing party may be awarded costs and attorney fees in a reasonable amount determined by the court.” Judgment Debtor seeks an award of \$222.00 as her costs associated with the filing of her request for the garnishment hearing. (May 30, 2014, Motion) Judgment Debtor was the prevailing party. Judgment Creditor, apparently unfamiliar with filing fee amounts, opposed the award of the \$222.00 in its June 16, 2014, response as unsupported in that Judgment Debtor failed to “attach any statements/receipts to substantiate this figure.” A review of the record, however, shows that Judgment Debtor paid the \$222.00 filing fee in order to file her request for hearing on May 7, 2014. As is its practice, the Clerk of Court stamps the receipt of payment in the upper right-hand corner of the document. (May 7, 2014, hearing request) As Judgment Debtor's costs are supported by the record, the Court awards her \$222.00.

Judgment Creditor Wrongfully Withheld Earnings in Excess of Amount Necessary to Satisfy Judgment

A.R.S. § 12-1598.12(D) obligates a judgment creditor to take reasonable action to avoid withholding amounts from a judgment debtor in excess of the amount needed to satisfy the underlying judgment.

D. It is the obligation of the judgment creditor to take reasonable action to assure that the garnishee does not withhold more nonexempt earnings of the judgment debtor than are necessary to satisfy the underlying judgment. Reasonable action includes at least written notice directed to the garnishee or his authorized representative if the balance due on the judgment is less than double the amount of the nonexempt earnings received in the preceding two pay periods. The judgment creditor shall instruct the garnishee to cease withholding earnings after the full amount of the judgment has been paid to the judgment creditor or when the judgment creditor has been notified that sufficient monies have been withheld to satisfy the underlying judgment.

THE COURT FINDS that the Judgment Creditor failed to take reasonable action to assure that Garnishee did not withhold more nonexempt earnings from the Judgment Debtor's earnings than were necessary to satisfy the underlying judgment. In a typical pay period, Judgment Creditor was receiving approximately \$480. Once the balance due on the judgment

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fell to less than approximately \$1920—double the amount of the nonexempt earnings received in the preceding two pay periods ($\$480+\$480=960 \times 2=\$1920$)—Judgment Creditor was obligated to at least provide written notice to the Garnishee. The balance due on the judgment fell below this amount before the December 13, 2013, payment date, yet Judgment Creditor took no action at that time.

Judgment Creditor, through the inaction of its representatives, exacerbated the circumstances by failing to act after being notified by Judgment Debtor that there was a discrepancy in the amounts they were calculating as due and the amounts deducted from her pay checks. (May 7, 2014, request for hearing) Two weeks before the judgment was satisfied through the earnings withheld from Judgment Debtor’s February 7, 2014, pay check, the billing records for the Judgment Creditor’s attorneys show that both Attorney Quist and Myriam Elias were aware of Judgment Debtor’s inquires. Neither took action to correctly calculate the amount due on the judgment and notify the Garnishee. (January 21, 2014, time entries)

Judgment Debtor seeks reimbursement of the amounts wrongfully withheld from her earnings. Judgment Debtor seeks the return of \$3,792.41. (May 30, 2014, Motion) Judgment Creditor opposes Judgment Debtor’s Motion, but also acknowledges that it received \$3,352.54 from the Garnishee after February 7, 2014. (June 16, 2014, Response) Judgment Creditor provides no explanation in its response as to why it failed to promptly return the excess monies it acknowledges having received. Given that the parties were not able to reach a consensus, the Court has performed the following accounting of the amounts withheld from Judgment Debtor’s earnings in excess of the amount subject to the Writ of Garnishment served on August 6, 2013, and interest accrued on the amounts wrongfully withheld.

Earnings Withheld Through 2/7/14	¹ \$6,093.84	
Principal, Interest, Assessment through 2/7/14	² \$6,036.42	
Excess Amount Withheld on 2/7/14	<u>\$57.42</u>	
Interest on amount from check date to 7-24-14		\$1.12
Amount Withheld from 2/21/14 Earnings ³	\$494.69	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amounts from check date to 7-24-14		\$8.90
Amount Withheld from 3/7/14 Earnings	483.98	

¹ Based on information presented at May 20, 2014, garnishment hearing.

² Based on information presented at May 20, 2014, garnishment hearing.

³ The Court was provided with Garnishee’s payment statements to the Judgment Debtor with the briefing of the parties in this matter. As it is unclear where these statements were filed in the record in this matter, the Court directs the Clerk of Court to file these payment statements in this case to complete the record.

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Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amounts from check date to 7-24-14		\$7.91
Amount Withheld from 3/21/14 Earnings	469.36	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amount from check date to 7-24-14		\$6.90
Amount Withheld from 4/4/14 Earnings	469.35	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amount from check date to 7-24-14		\$6.13
Amount Withheld from 4/18/14 Earnings	450.02	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amount from check date to 7-24-14		\$5.14
Amount Withheld from 5/2/14 Earnings	507.58	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amount from check date to 7-24-14		\$4.95
Amount Withheld from 5/16/14 Earnings	477.56	
Garnishment Fee Assessed by Garnishee	\$5.00	
Interest on amount from check date to 7-24-14		\$3.88
Totals:	\$3,444.96	\$44.94

THE COURT FINDS that \$3,444.96 was withheld from Judgment Debtor’s earnings as a result of Judgment Creditor’s failure to fulfill its obligations under A.R.S. 12-1598.12(D). The Court awards Judgment Debtor this amount against Judgment Creditor.

As the amounts wrongfully withheld are sums certain and were due to Judgment Debtor on set dates, the Court awards prejudgment interest in the amount of \$44.94 against the Judgment Creditor. A.R.S. § 44-1201(F) provides for an award of prejudgment interest at the rate described in subsection A or B. Subsection A calls for an interest rate of ten per cent per annum, unless a different rate is contracted for in writing. Subsection B calls for an award of interest “at the lesser of ten per cent per annum or a rate per annum that is equal to one percent plus the prime rate published by the board of governors of the federal reserve system in statistical release H.15 or any publication that may supersede it on the date that the judgment is entered.” The Court has elected to calculate prejudgment interest at the lesser rate called for under subsection B, which is 4.25%.

Judgment Creditor Failed to File a Timely Satisfaction or Release of Writ

At the May 20, 2014, hearing, the Court directed “Judgment Creditor to file with the Court a memorandum explaining why Judgment Creditor failed to discharge Garnishee after satisfaction of the Judgment with an attached affidavit of factual support from an authority of the Sanalina Homeowners Association.” (May 20, 2014, Minute Entry at 2) A.R.S. § 12-

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1598.12(E) obligates a judgment creditor to immediately file a satisfaction or release of writ after the underlying judgment is satisfied.

E. Immediately after the underlying judgment is satisfied or expires, the judgment creditor shall file with the clerk of the court a satisfaction or release of the writ and shall deliver a copy of that satisfaction or release to the garnishee, the judgment debtor and any creditor who has delivered a written request for such notice to the judgment creditor or his attorney.

The Court explained to Judgment Creditor's attorney during the May 20, 2014, proceeding that the affidavit from his client accompanying the explanation was required because the Court wanted to make sure that the client who is charged with complying with A.R.S. § 12-1598.12(E) was aware of the situation (i.e., the law firm's failure to avoid wrongfully withholding earnings in the name of the Judgment Creditor). Inexplicably, attorney Quist filed a memorandum without a signed affidavit from his client.⁴

THE COURT FINDS that the Judgment Creditor failed to meet its obligation under A.R.S. § 12-1598.12(E), as Judgment Creditor failed to file a satisfaction or release of writ after its receipt of the earnings withheld by the Garnishee from the February 7, 2014, pay check. In the memorandum filed on its behalf, Judgment Creditor asserts that it could continue to garnish Judgment Debtor's earnings even after satisfaction of the judgment to recoup attorney fees and costs that had not been awarded by the Court (nor even applied for by Judgment Creditor). This assertion is not well grounded in fact nor warranted by existing law or a good faith argument for the extension of the law.

The Default Judgment entered in the Justice Court of Hassayampa in CC2011-063671 provides in part, "[t]he Court awards all reasonable costs and attorneys' fees incurred by Plaintiff after entry of this judgment in collecting the amounts awarded herein." A transcript of the

⁴ Attorney Quist, who signed the June 3, 2014, memorandum, notes in the first paragraph of the memorandum that it "is accompanied by an affidavit of factual support. See Affidavit of Roger Hartzog attached hereto as Exhibit "A" and incorporated herein by this reference." A review of the purported affidavit, however, reveals that it was not executed and contains no suggestion that the Judgment Creditor was made aware of its obligations under A.R.S. § 12-1598.12(E) or its attorney's failure to avoid wrongfully withholding earnings in the name of the Judgment Creditor. The unsigned document contains the notation under the signature line that the "Original will be filed separately upon receipt." Although the memorandum was filed on June 3, 2014, a review of the docket reveals that a signed affidavit has never been filed. Attorney Quist's failure to comply with the Court's specific directive increases the Court's concern that its attorneys are not keeping the Judgment Creditor apprised in this matter.

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judgment was filed in this matter. This Court has not been provided with any suggestion that Judgment Creditor has applied for an award from the Justice Court of any post-judgment fees and costs in connection with the transcript of the judgment before this Court. A review of the file before this Court shows that a document entitled "Statement/Affidavit of Costs" was filed on August 1, 2013. As discussed at the May 20, 2014, hearing, however, the August 1, 2013, document does not contain any certificate of service showing that it was mailed to Judgment Debtors or, more importantly, that it was served on Judgment Debtors in compliance with Rule 5(c)(4) concerning service of documents after judgment. The August 1, 2013, document does not request any action by the Court and none was taken. Judgment Creditor did not take any other actions seeking a post-judgment award of attorney's fees and costs until May 19, 2014, well after the Judgment was satisfied by the withholding from earnings out of the February 7, 2014, pay check.

Judgment Creditor cites to only one case in its memorandum, *Branch v. State*, 15 Ariz. 99, 136 P. 628 (1913). It is unclear to the Court why Judgment Creditor cited to this case in its memorandum. Aside from a pithy quote, this case provides "not a twinkle of light upon the path before us" concerning Judgment Creditor's assertion that it may use garnishment proceedings to recoup attorney fees and costs which have never been awarded by a court (nor even applied for by Judgment Creditor). *Id.* at 104, 136 P. at 632. The appellate court in *Branch* was considering the jurisdiction of a Justice Court to hear criminal matters involving crimes occurring outside of the Justice Court's precinct under the law as in effect in 1913. This case does not support Judgment Creditor's assertion that it may use garnishment proceedings to collect amounts not included in the judgment or in a post-judgment award.

Judgment Creditor asserts in the alternative that Judgment Creditor acquiesced in its practice of recouping attorney's fees and costs without a specific award by the Court. First, Judgment Creditor points out that it filed a Statement/Affidavit of Costs on August 1, 2013, which included post-judgment fees and costs, and the Judgment Debtor failed to object. As discussed above, there is no support in the record that this document was even served on Judgment Debtor. Second, Judgment Creditor argues that Judgment Debtor did not object to Garnishee's August 19, 2013, Answer. Judgment Creditor fails to identify what information included in Garnishee's August 19, 2013, Answer was objectionable. The Garnishee's Answer does not include any suggestion that Judgment Creditor intended to use the garnishment process to collect monies in excess of those awarded in the judgment. Third, Judgment Creditor argues that the Order of Continuing Lien issued by the Court on September 17, 2013, specified that "[t]hat amount outstanding on the underlying Judgment at the time of service of the Writ of Earnings Garnishment was \$7,336.90." While Judgment Creditor's quotation from the Order of Continuing Lien is accurate, it fails to acknowledge that the form of Order of Continuing Lien, including the specified amount, was prepared by its counsel. As Judgment Creditor had not sought an award of post-judgment attorney fees and costs, there was no grant of such in the

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Order of Continuing Lien. Moreover, there is no indication that Judgment Debtor had any opportunity to contest the amount specified in the Order of Continuing Lien, as there had been no application for post-judgment fees and costs served upon them by Judgment Creditor. Fourth, Judgment Creditor argues that Judgment Debtor could have objected to the quarterly judgment balance report Judgment Creditor filed on January 21, 2014. A review of that document, however, shows that Judgment Creditor did not sign it. And again, the document is not in the form of an application for fees and costs which would cause a party to file a response. Perhaps most telling, Judgment Creditor fails to provide any legal authority in support of its practice of using garnishment proceedings to collect amounts that have not been awarded by the Court.

Judgment Creditor, in its June 3, 2014, memorandum, mischaracterizes the Court's May 20, 2014, finding and orders as leaving open the question as to whether the Judgment had been satisfied. The Court specifically found "that as of February 7, 2014, the amounts subject to the Writ of Garnishment were satisfied." Judgment Creditor had an opportunity at the hearing to present its evidence and arguments. The Court rejected Judgment Creditor's unsupported arguments concerning its efforts to recoup attorney fees and costs through the garnishment proceedings absent an award from the Court. Based on its May 20, 2014, FINDING that the Writ of Garnishment was satisfied, the Court discharged the Garnishee and signed a formal written Order to that effect on May 30, 2014 (filed June 3, 2014).

Judgment Creditor's Late Application for Fees and Costs Are Denied

More than three months after satisfaction of the amounts due on the Judgment, Judgment Creditor filed a Post-Judgment Application for Amount of Attorney Fees and Statement of Costs on May 19, 2014, seeking an award of \$1,450.00 in fees and \$194.02 for costs. Judgment Creditor then filed on June 3, 2014, its Supplemental Post-Judgment Application for Amount of Attorney Fees Incurred by the Waldron Law Group, PLLC, and Statement of Costs seeking an award of \$789.25 in fees and \$397.00 in costs. Judgment Debtor objected to the applications on a number of bases, including that the applications were untimely. (May 28, 2014, and June 12, 2014, responses) In its reply memorandum, Judgment Creditor did not address the timeliness of its applications.

THE COURT FINDS fees and costs incurred by Judgment Creditor in its attempt to collect on the Judgment after the Judgment was satisfied on February 7, 2014, are not reasonable. Therefore, the fees and costs as reflected in the billings statements after February 7, 2014, are denied.

Most of the fees and costs incurred by Judgment Creditor before February 7, 2014, concern Judgment Creditor's efforts to garnish Judgment Debtor's earnings. "Garnishment proceedings are 'purely statutory,' *Patrick v. Associated Drygoods Corp.*, 20 Ariz. App. 6, 8, 509

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P.2d 1043, 1045 (1973), and are ‘treated in all respects . . . as an original independent action’ from the underlying lawsuit, *Davis v. Chilson*, 48 Ariz. 366, 371, 62 P.2d 127, 130 (1936)). *Blum v. Cowan*, 690 Ariz. Ad. Rep. 4, ¶ 13 (App. July 3, 2014). A.R.S. § 12-1580(E) specifically provides the mechanism for an award of attorney fees and costs in the context of garnishment proceedings and “impliedly prohibits parties from waiving its requirements.” *Id.* at ¶¶ 14-16. Therefore, the fees and costs as reflected in the billings statements concerning the garnishment proceedings are denied.

With respect to the remaining entries concerning the May 19, 2014, application, Judgment Creditor seeks an award of \$67.50 for drafting a notice of change of address on September 10, 2013, and \$67.50 for reviewing the file received from the prior firm and researching the status of the file. THE COURT FINDS that these fees are reasonable.

The Court denies the supplemental application for fees and costs filed on June 3, 2014, on alternative bases. First, Judgment Creditor unduly delayed bringing its application. It seeks an award for fees and costs primarily incurred more than two years: February 21, 2012, and July 23, 2012 (fees) and February 21, 2012, to December 6, 2012, (costs). The only cost incurred within the year prior to the filing of the application concerned \$150.00 for a service of process fee incurred on June 27, 2013, which is not recoverable as it was for service of the Writ of Garnishment. *See Blum v. Cowan*, 690 Ariz. Ad. Rep. 4. Second, as an alternative basis for denial of the fees sought in the supplemental application, Judgment Creditor’s failed to support its application in accordance with the standards enunciated in *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App. 1983). Specifically, no information is provided in the affidavit submitted in support of the supplemental application as to the agreed upon hourly billing rate and the time incurred in completing the tasks.

As the conduct of Allen Quist and Mark Waldron, the attorneys representing Judgment Creditor in the garnishment proceedings, has brought to the Court’s attention that they have committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer and information indicating a substantial likelihood that they have committed a violation of the Rules of Professional Conduct, the Court directs that the Clerk of Court endorse Bar Counsel for the Arizona State Bar with this Minute Entry. Code of Judicial Conduct, Rule 2.15. *See* E.R. 1.1, 1.3, 1.4, 3.1, 3.3, 3.4, 5.1, and 5.2.

IT IS ORDERED awarding Edna M. Gutierrez her costs of \$222.00 against Sanalina Homeowners Association in accordance with A.R.S. § 1598.07(E).

IT IS FURTHER ORDERED awarding Edna M. Gutierrez \$3,444.96 against Sanalina Homeowners Association.

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IT IS FURTHER ORDERED awarding Edna M. Gutierrez \$44.94 against Sanalina Homeowners Association as prejudgment interest on the amounts wrongfully withheld through July 24, 2014.

IT IS FURTHER ORDERED awarding Edna M. Gutierrez post-judgment interest against Sanalina Homeowners Association on the principal amount of \$3,444.96 at the rate of 4.25% per annum (\$0.40 per day) from July 25, 2014. A.R.S. § 44-1201(B).

IT IS FURTHER ORDERED awarding Sanalina Homeowners Association \$135.00 against Judgment Debtors David Ramirez and Edna M. Gutierrez for attorney fees and costs.

IT IS FURTHER ORDERED awarding Sanalina Homeowners Association post-judgment interest against on the principal amount of \$135.00 at the rate of 4.25% per annum (\$0.01 per day) from July 25, 2014. A.R.S. § 44-1201(B).

/ s / COMMISSIONER JAMES R. MORROW

JUDICIAL OFFICER OF THE SUPERIOR COURT