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Medical Recovery Services v. Bonneville Billing
and Collections Appellant's Reply Brief Dckt.
39408

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MEDICAL RECOVERY SERVICES,)
PLLC,)
)
Plaintiff-Respondent,)
)
vs.)
)
BONNEVILLE BILLING AND)
COLLECTIONS, INC.,)
)
Defendant-Appellant.)
_____)

Docket No. 39408

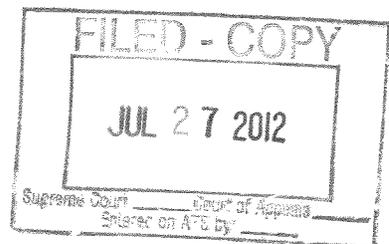
APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County.

The Honorable Dane H. Watkins, Jr., District Judge presiding.

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I. CASES CITED BY RESPONDENT HAVE NO APPLICATION HERE AS ARGUED BY RESPONDENT.

Medical Recovery Services (“MRS”) cites *Potlatch Lumber Co. v. Runkel*, 16 Idaho 192 (1909). *Potlatch* dealt with real property. *Potlatch* has no application here.

MRS cites *Federal Reserve Bank of San Francisco v. Smith*, 42 Idaho 224, 244 P. 1102, 1103 (1926). *Federal Reserve Bank* referred to C.S., sec. 6782 which required “the writ of attachment to be directed to the sheriff, directing him ‘to attach and safely keep’ all the property of the defendant . . .” *Federal Reserve Bank* also referred to C.S., sec. 6785 which “provides for the garnishment of credits or other personal property in the hands of third parties, who may discharge the garnishment by delivering to the officer making the levy all such credits or personal property in their possession . . .” *Federal Reserve Bank* requires delivery of the credits or personal property to the officer. MRS’s reading of *Federal Reserve Bank* has no application here.

MRS cites *Eagleson v. Rubin*, 16 Idaho 92, 100 P. 765, 767 (1909). The full quotation in *Eagleson* is as follows: “Garnishment is the admonition judicially given to the attachment defendant’s debtor or holder of property, warning him against payment or restoration to the defendant, and bidding him hold the property or credit subject to the order of court. It is the process by which the garnishee is brought into court, and also that by which the defendant’s credit or property is attached in the garnishee’s hands. Its service is constructive seizure by notice. It is attachment in the hands of a third person.” *Id.* at 100. *Eagleson* also provides as follows: “The right of attachment by garnishment was unknown to the common law, and is purely of statutory regulation, and where the statute provides for the procedure in such cases, the plaintiff is only required to pursue such course in order to sustain his action against he garnishee.” *Id.* *Eagleson* states that

garnishment is a statutory regulation which must be complied with and *Eagleson* states that a garnishment deals with property in the hands of the garnishee. *Eagleson* does not support MRS's position.

MRS cites *Letz v. Letz*, 215 P.2d 534 (Mont. 1950) which cites *Keith v. Ramage et al.*, 214 P. 326 (Mont. 1923). *Keith* provides as follows: “[T]he remedy by attachment being entirely statutory, the requirements of the statute must be substantially followed; otherwise the creditor acquires no superior right or lien upon the debtor’s property in satisfaction of any judgment the creditor may subsequently obtain.” *Id.* at 329. “The statute requires a specific course to be pursued, and recognizes no equivalent or evasion.” *Id.* “Proceedings by attachment are statutory and special, and the provision of the statute must be strictly followed, or no rights will be acquired thereunder.” *Id.* at 330. *Keith* states that the attachment is abandoned and dissolved if possession is not maintained, and *Keith* states if the attachment statute is not strictly followed no rights are acquired. *Letz* has no application here as argued by MRS. In fact, it supports Appellant’s argument.

MRS cites *Bass v. Stodd*, 357 F.2d 458 (9th Cir. 1966). *Bass* states that “The levying officer acquires only a special lien dependent on possession which authorizes him to hold the property for the benefit of the attaching creditor.” *Id.* at 464. *Bass* provides that a lien is dependent on possession. *Bass* has no application here as argued by MRS. In fact, it supports Appellant’s argument.

In re Aughenbaugh, 2002 WL 33939738 (Bankr. D. Idaho 2002), provided that in a case dealing with property in the hands of the garnishee, not a third party, that service of the writ of garnishment created a lien but did not constitute an irrevocable or absolute transfer of the debtor’s rights in the proceeds or property. *Id.* at 6. The case provided

that with respect to a debtor's creditors, funds in the hands of a third party not subject to the claim of the debtor are not subject to attachment. "Under Idaho's statutes, service of a garnishment on a party owing money to the judgment debtor simply creates a new liability in the third party to the judgment creditor until the judgment is satisfied." *Id.* at 4. *In re Aughenbaugh* has no application here as argued by MRS. In fact, it supports Appellant's argument.

MRS cites *Tzovolos v. Wiseman*, 51 Conn. Supp. 532 (2007). *Tzovolos* involves a Uniform Commercial Code security interest filing for personal property. *Tzovolos* has no application here.

MRS cites *Reinbold v. Utah Fun Shares*, 850 P.2d 487 (Utah Ct. App. 1993). *Reinbold* deals with real property and a recorded trust deed and recorded liens. *Reinbold* has no application here.

II. POSSESSION BY THE GARNISHEE IS A NECESSARY ELEMENT FOR EXISTENCE OF A GARNISHMENT LIEN.

"By the service in the manner provided by statute, whether it be named 'garnishment' or 'service of the attachment,' while the possession is not necessarily disturbed, 'a lien is obtained on defendant's title to the property in the hands of the garnishee.'" *Sullivan v. Mabey*, 45 Idaho 595, 599, 264 P. 233 (1928).

"In case of tangible property, susceptible of manual seizure and delivery, such property must be actually seized and taken into possession by the levying officer, and that officer must take and maintain actual custody and control of the property by such means as will exclude others from such custody." *American Fruit Growers, Inc. v. Walmstad*, 44 Idaho 786, 793, 260 P. 168 (1927). In *American Fruit Growers* the lien was

absolutely lost when the sheriff or his keeper permitted appellant to take and retain possession of the property. *Id.*

In re Loren v. Ducommun, 159 B.R. 919 (Bkrtcy. D. Idaho 1993), makes it clear that the lien created by garnishment is limited to property actually held by the garnishee. The lien is to property in the hands of the garnishee. “Possession by the garnishee is, therefore, a necessary element for existence of the garnishment lien.” *Id.* at 920.

The element of possession is absent in this matter. Therefore, a garnishment lien cannot exist.

III. CONCLUSION.

The district court decision should be reversed and vacated, and the magistrate decisions should be affirmed.

DATED this 25th day of July, 2012.



Todd R. Erikson

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 25th day of July, 2012, by first class mail:

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