NOT FOR OFFICIAL PUBLICATION
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

Case No. 121,271

STORM SHIELD ROOFING AND RESTORATION, INC.,

Plaintiff,

vs.

GARY M. DESHAZER, JR.,

Defendant,

and

TRACY W. ROBINETT, P.C., d/b/a Robinett, Swartz & Duren,

Intervenor/Appellee,

vs.

CELLCO PARTNERSHIP d/b/a Verizon Wireless Services,

Garnishee/Appellant.

APPEAL FROM THE DISTRICT COURT OF
POTTOWATOMIE COUNTY, OKLAHOMA

HONORABLE JOHN G. CANAVAN, DISTRICT JUDGE

REVERSED

Dylan T. Duren
ROBINETT, SWARTZ & DUREN
Tulsa, Oklahoma

For Intervenor/Appellee

Justin P. Grose
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
Oklahoma City, Oklahoma For Garnishee/Appellant

OPINION BY GREGORY C. BLACKWELL, JUDGE:

Cellco Partnership d/b/a Verizon Wireless Services (Verizon) appeals the district court's denial of its motion to vacate a default judgment assigning a $51,945.41 judgment liability to Verizon for failure to respond to an order compelling discovery during an ongoing garnishment proceeding. On review, we find that under *Hagar v. Goodyear Tire & Rubber Co.*, 1993 OK 48, 853 P.2d 768, Verizon was entitled to notice of the motion and an opportunity to appear before the trial court could grant the motion for default. We therefore reverse the denial of the motion to vacate.

BACKGROUND

This matter begins with an agreed judgment of $52,894 taken against nonparty Gary Deshazer in favor of nonparty Storm Shield Roofing and Restoration, Inc. The judgment purportedly arose from an unpaid roofing bill.

In March 2020, Storm Shield sent a garnishment affidavit and summons to Deshazer's employer, Verizon. Verizon answered the garnishment as required. Deshazer's earnings were evidently variable, and the garnished amount ranged from $190 to $1500 per check. Deshazer filed a hardship application, after which the court determined that Verizon should remit $100 of Deshazer's income to Storm Shield each two-week pay period. Verizon complied and remitted the required payments.

In July 2020, Storm Shield's then counsel[1]—the firm of Robinett, Swartz & Duren ("Robinett Law Firm" or intervenor)—withdrew, and new counsel was retained. In November 2020, although Verizon was still answering the continuing affidavit and remitting garnished funds as ordered, Storm Shield's new counsel sent extensive interrogatories and requests for production to Verizon, including requests for details of every payment previously made, copies of cancelled checks for prior payments, paystubs, W2s, worksheets and documents "supporting your calculations," employment contracts, and any promissory notes that Deshazer might have made to Verizon. Verizon did not reply. On December 18, 2020, Storm Shield, now represented by a fifth firm, filed an application for an order requiring Verizon to answer. The same day, the court made an order requiring Verizon to answer the discovery "within ten days of service." This order was filed December 28, 2020, mailed December 29, 2020, and actually received on December 31, 2020.

On January 14, 2021, with no reply from Verizon having been received, Storm Shield filed a motion for default judgment against Verizon. The trial court granted the motion the same day and awarded Storm Shield a judgment of $51,945.41, plus accrued interest. Verizon did not appeal.

Meanwhile, the Robinett Law Firm, had sued Storm Shield in Tulsa County for unpaid legal work. In November 2021, the firm obtained a default judgment

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[1] Storm Shield had attorneys from not less than five firms enter an appearance on their behalf below. In order of appearance, they were: (1) the Rice Law Firm, (2) the Downtown Legal Group, (3) Robinett, Swartz & Duren, (4) Phillips Murrah, and (5) Cheek & Falcone.

of $25,754. In March 2022, the firm successfully intervened in this garnishment case and had, pursuant to "Okla. Stat. tit. 12, § 841 *et seq.* and Oklahoma common law," a portion of the judgment owed to Storm Shield by Verizon assigned to it on account of its Tulsa County judgment against Storm Shield. Verizon then moved to vacate the January 14, 2021, default judgment entered against it. The court denied that motion, and Verizon timely appealed.[2]

STANDARD OF REVIEW

The standard to be employed when reviewing an order resolving a motion to vacate is whether the trial court used its sound discretion in vacating the earlier decision, or not. *See Schepp v. Hess*, 1989 OK 28, 770 P.2d 34. The reviewing court does not look to the original judgment, but rather the correctness of the trial court's response to the motion to vacate. *Yery v. Yery,* 1981 OK 46, 629 P.2d 357; *Kordis v. Kordis,* 2001 OK 99, ¶ 6, 37 P.3d 866, 869.

ANALYSIS

The question as presented by the parties concerns the provisions of 12 O.S. § 1179 and District Court Rule 10. Section 1179 provides, in part:

> If the garnishee shall fail to file and deliver or mail the answer affidavit as required in the order, appear for deposition, or to *answer interrogatories as provided in the order,* then the court *shall render judgment against the garnishee for the amount of the judgment* and costs due the judgment creditor from the defendant in the principal action together with the costs of the garnishment, including a reasonable attorney's fee to the judgment creditor for prosecuting the garnishment. The garnishee may also be subject to punishment for contempt; provided, however, the court shall have power to

[2] Verizon's motion, made under 12 O.S. § 1031(3) for "irregularity in obtaining a judgment or order," is permissible up to three years after the entry of the judgment. 12 O.S. § 1038.

> vacate or modify any order issued pursuant to this section in the manner provided in Sections 1031 or 1031.1 of this title.

12 O.S. § 1179 (emphasis supplied). The statue makes no mention of notice of taking default.

District Court Rule 10, however, generally requires that,

> [i]n matters in default in which an appearance, general or special, has been made or a motion or pleading has been filed, default shall not be taken until a motion therefore has been filed in the case and five (5) days notice of the date of the hearing is mailed or delivered to the attorney of record for the party in default ....

12 O.S. Ch. 2, App, Rules for District Courts, Rule 10. The intervenor argued that a later part of Rule 10 is clear, however, that garnishment defaults are specifically exempted from the general requirements of the rule. That portion of the rule states, "notice of taking default is not required in the following cases even if the defaulting party has made an appearance: ... 7) any garnishment proceeding ...." *Id.*

We note that application of this exemption from Rule 10 to a failure to provide discovery during an ongoing garnishment gives rise to anomalous results, however. Normally, substantial protections are interposed before a court may impose the "draconian penalty" of default judgment against a party for a simple failure to answer a discovery order.[3] *Payne v. Dewitt*, 1999 OK 93, ¶ 9, 995 P.2d 1088. The Rule 10 exemption indicates that an employer is accorded

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[3] *Barnett v. Simmons*, 2012 OK CIV APP 44, requires a court to make explicit findings on numerous factors identified in paragraph eight of *Payne v. Dewitt*, 1999 OK 93, 995 P.2d 1088, before imposing default as a discovery sanction. "These draconian penalties should be applied only when a party's failure to comply with a discovery order is occasioned by fault, willfulness, or bad faith." *Id.* ¶ 9.

none of the protections given to a party who fails to answer discovery and may be defaulted without further notice, hearing, or inquiry.

Hagar v. Goodyear Tire & Rubber Co., 1993 OK 48, 853 P.2d 768, addresses this situation. In that case, Goodyear had answered three garnishment summonses, but did not answer a fourth. The garnishor did not send notice of the motion for default, notice that default was being taken, or notice of the default judgment to Goodyear. *Id.* ¶ 10. The Court held that "[e]ven though rule 10 does not require notice be given in the present case, due process does." *Id.* ¶ 9. *Hagar* is clear that a garnishment court cannot assign liability for a judgment against an employee to an employer without appropriate due process, and this negates the Rule 10 exception.[4]

The intervenor argues, however, that a case of this Court, *Traitz v. Traitz*, 2023 OK CIV APP 1, ¶ 16, 524 P.3d 497, 500, upholds Rule 10 in this situation. *Traitz* approved of default in a case where a petitioner sought a divorce and the respondent counterclaimed seeking an annulment. The petitioner failed to respond to discovery, failed to appear at a pre-trial conference and earlier hearings, and failed to appear at trial. *Id.* ¶ 5. This Court upheld the default, stating:

> We agree with James that he was not required to file a motion for default because the case was at issue and had been regularly set on the trial docket. The Rule 10 requirement of a motion for default judgment by its very language does not apply in this case, particularly when Jessica had numerous notifications of the vital

[4] If *Hagar* holds that default for a *failure to answer a garnishment summons* requires notice of taking default, it further appears that a default for the arguably "lesser offense" of failure to answer discovery *while garnishment payments are still being regularly remitted* should receive at least the same degree of protection.

> appearance dates which could result in a default judgment against her and she chose to ignore them.

Id. ¶ 21.

Traitz is far removed from the situation here, however. The petitioner in *Traitz* was not defaulted simply for a failure to answer a discovery order. We find little similarity between a party that initiates a suit, then fails to make scheduled appearances, fails to attend pre-trial, and fails to appear at trial, and an employer whose only relationship to the suit is that it employed a party. *Hagar* is controlling in this case.

The intervenor next argues that *Hagar* only prohibits default judgment in a garnishment proceeding "without notice to the defaulting party" and the warning of default attached to its discovery request, combined with the warning stated in the court's order requiring Verizon to answer the discovery within ten days of service provided notice sufficient to satisfy *Hagar.* We disagree. *Hagar* was not based on a lack of notice that a failure to answer *could lead* to default, but on the lack of notice and hearing before *actually taking* default. *Hagar* holds that actual notice of a hearing to take default is necessary. As such, we hold that the district court erred in granting the motion for default without sufficient notice or opportunity to appear afforded to Verizon. This lack of notice was an irregularity in obtaining the judgment that should have caused the trial court to

vacate the default judgment. Thus, the trial court's order declining to do so is reversed and the default judgment is vacated.[5]

REVERSED.

HUBER, P.J., and HIXON, J., concur.

October 11, 2024

[5] Although we find *Hagar* controlling, we note that there is another irregularity clearly evident on the face of the judgment roll. Namely, the trial court granted default judgment *prior* to the end of the period the court had given Verizon to answer, being "within ten days of service" of the order. No matter whether the filing date of December 28, 2020, the mailing date of December 29, 2020, or the actual receipt date of December 31, 2020, is used as the service date, less than ten days had elapsed from the date of service to the entry of the default judgment. Using the earliest possible date—being the filing date of December 28, 2020—only nine days had elapsed as of January 14, 2021, as three days must be added for service and all intervening weekends and holidays must be excluded from the calculation. *See* 12 O.S. § 2006.