

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

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No. 94-10173

(Summary Calendar)

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NATIONAL LOAN INVESTORS, L.P.,

Plaintiff Garnishor-  
Counter Defendant-  
Appellee,

versus

FIDELITY BANK, NA,

Defendant Garnishee-  
Appellee,

versus

DANNY D. PITZER,

Judgment Debtor-  
Counter Plaintiff-  
Appellant,

versus

GEORGE S. HENRY,

Counter Defendant-Appellee.

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Appeal from the United States District Court  
For the Northern District of Texas

(3:93-CV-2308-X)

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(March 30, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:\*

Danny Duane Pitzer failed to make timely payments pursuant to an agreed judgment entered by the district court. In response, National Loan Investors ("NLI") obtained a writ of garnishment from the court. Pitzer filed a motion to dissolve the writ of garnishment, which the district court denied. Pitzer appeals the denial of his motion; we vacate and remand.

I

NLI is the holder in due course of two promissory notes executed by Danny Duane Pitzer. The parties reached a settlement agreement, under which Pitzer agreed to pay NLI \$16,500.00 in sixty monthly installments of \$275.00. Pitzer failed to make three monthly payments in a timely manner. NLI, seeking to enforce the agreed judgment, petitioned the district court for a writ of garnishment. Pitzer filed a motion to dissolve the writ of garnishment that included counterclaims against NLI and its attorney, George Henry, for violations of the Texas Deceptive Trade Practices Act, unfair debt collection, abuse of process, and negligent infliction of emotional distress. NLI responded with a motion to strike Pitzer's counterclaims and a motion for misjoinder of George Henry. Without holding a hearing, the district court denied Pitzer's motion and granted NLI's motions, striking all

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\* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

claims and counterclaims against Henry. Pitzer appeals the district court's denial of his motion to dissolve the writ of garnishment, claiming that the district court erred by (1) failing to require service of process on the judgment debtor, (2) failing to hear evidence in support of Pitzer's motion to dissolve the writ before denying the motion, (3) failing to require a sufficient affidavit to support NLI's writ of garnishment, (4) failing to allow the judgment debtor an opportunity to present defenses to the garnishment action and to present his DTPA claims, and (5) denying his motion in violation of his due process rights.

## II

### A

The Federal Rules of Civil Procedure require that federal courts conduct garnishment proceedings pursuant to the law of the state in which the district court sits. See Fed. R. Civ. P. 64 (providing generally for seizure of persons or property); see also Fed. R. Civ. P. 69 (giving rules for executions on judgments). Thus, because NLI sought the writ of garnishment from the United States District Court for the Northern District of Texas, we apply Texas garnishment law to the present case. Appellees NLI and Henry assert that an order denying a motion to dissolve a writ of garnishment is interlocutory and thus not appealable, and cite *Bowden v. Hunt*, 571 S.W.2d 550, 551 (Tex. Civ. App.) Dallas 1978, no writ), as support. However, the *Bowden* court limited its holding to prejudgment garnishment actions, *id.* at 551, whereas the present case involves a postjudgment writ of garnishment.

Generally, "[a] garnishment action, although ancillary to the underlying suit, is a separate proceeding. . . . Because it is a separate proceeding, an appeal will lie from a final judgment in a garnishment suit independently of the underlying suit." *Varner v. Koons*, 888 S.W.2d 511, 513 (Tex. App.)El Paso 1994, n.w.h.) (citations omitted). Because the denial of a motion to dissolve a postjudgment writ of garnishment is a final judgment, Pitzer's appeal from the district court's order is properly before this court. See Fed. R. Civ. Pro. 1291 (granting federal courts of appeals jurisdiction over appeals from federal district courts' final judgments).

B

Pitzer claims that NLI and Henry violated Texas law by failing to serve him with notice of the garnishment action. Rule 663a of the Texas Rules of Civil Procedure requires that the garnishor notify the judgment debtor of the garnishment proceedings.<sup>1</sup> *Hering v. Norbanco Austin I, Ltd.*, 735 S.W.2d 638, 641 (Tex. App.)Austin 1987, writ denied). NLI and Henry contend that they properly served Pitzer by certified mail. We need not address this factual issue because Pitzer filed an answer to the writ of garnishment. A defendant's right to notice is waived if the defendant makes a

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<sup>1</sup> Rule 663a provides:

The defendant shall be served in any manner prescribed for service of citation or as provided in Rule 21a with a copy of the writ of garnishment, the application, accompanying affidavits and orders of the court as soon as practicable following the service of the writ.

Tex. R. Civ. P. 663a.

general appearance. See *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658, 660 (Tex. App.) Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that general appearance waives any error in citation); *Dodson v. Seymour*, 664 S.W.2d 158, 161 (Tex. App.) San Antonio 1983, no writ) (maintaining that appearance waives service of process); see also *Terry v. Caldwell*, 851 S.W.2d 875, 876 (Tex. App.) Houston [14th Dist.] 1993, no writ) (noting that policy guiding Rule 124 of Texas Rules of Civil Procedure, which allows party to waive service of process, "is to assure the defendant knows about the proceedings and can, therefore, defend against them").<sup>2</sup> Thus, the district court did not err in denying Pitzer's motion to dissolve the writ of garnishment for failure to give proper notice.

C

Pitzer asserts next that the district court erred in failing to hear evidence in support of his motion to dissolve the writ of garnishment, which the district court denied without a hearing. The Texas Rules of Civil Procedure require the trial court to hold a hearing on a motion to either dissolve or modify a writ of garnishment.<sup>3</sup> "[T]he remedy of garnishment is summary and harsh

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<sup>2</sup> Pitzer relies in part on *Hering*, 735 S.W.2d at 641, in which a Texas court of appeals held that a creditor's failure to serve the judgment debtor with notice of the garnishment action is fatal to the judgment. *Id.* However, in *Hering*, there is no indication that the judgment debtor filed a responsive pleading. In the present case, Pitzer appeared and waived his right to notification when he filed an answer to the writ of garnishment despite his claims that he was not properly served.

<sup>3</sup> Rule 664a provides in pertinent part:

Such motion [for dissolution or modification of writ of garnishment] shall admit or deny each finding of the order directing the issuance

and should not be sustained unless there is strict compliance with statutory requirements." *Baca v. Hoover, Bax & Shearer*, 823 S.W.2d 734, 738 (Tex. App.)Houston [14th Dist.] 1992, writ denied). Thus, the district court erred in not holding a hearing on Pitzer's motion to dissolve the writ of garnishment, and we remand to the district court for such a hearing.<sup>4</sup>

### III

For the foregoing reasons, we VACATE the district court's order denying Pitzer's motion to dissolve the writ of garnishment and REMAND to that court for further proceedings consistent with this opinion.

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of the writ except where the movant is unable to admit or deny the finding, in which case movant shall set forth the reasons why he cannot admit or deny. Unless the parties agree to an extension of time, the motion shall be heard promptly, after reasonable notice to the plaintiff (which may be less than three days), and the issue shall be determined not later than ten days after the motion is filed. The filing of the motion shall stay any further proceedings under the writ, except for any orders concerning the care, preservation or sale of any perishable property, until a hearing is had, and the issue is determined.

Tex. R. Civ. P. 664a; see also *Swiderski v. Victoria Bank & Trust Co.*, 706 S.W.2d 676, 678 (Tex. App.)Corpus Christi 1986, writ ref'd n.r.e.) (holding that Rule 664a mandates hearing on motion to dissolve writ of garnishment).

<sup>4</sup> Because we remand for a hearing on Pitzer's motion to dissolve the writ of garnishment, we need not address Pitzer's remaining claims.