

STATE OF VERMONT
WASHINGTON COUNTY, ss.

FILED
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SUPERIOR COURT
WASHINGTON COUNTY

Bill Hohman, }
Plaintiff-Appellee, }
 }
v. } Washington Superior Court
 } 530-10-01 Wncv
 }
Anthony Cote, }
Defendant-Appellant. }

Decision and Order

In this small claims case, Plaintiff Bill Hohman prevailed on the merits of his claims after a court trial. Soon thereafter, Defendant Anthony Cote failed to appear at a financial disclosure hearing and the court ordered monthly payments in the amount of \$100.00. The court then denied Defendant's "motion to reconsider." Defendant Anthony Cote appeals from that decision. Both parties represent themselves. For the reasons stated below, this case is hereby REMANDED to the small claims court.

Plaintiff filed the complaint on January 31, 2001. The court then mailed a summons and the complaint to Defendant. Defendant signed, dated, and returned the acknowledgment, which was filed on February 16, 2001. Defendant filed an answer and counterclaim on March 2, 2001. Both parties were present at the trial by court, which was held on March 28, 2001. Judgment was granted in Plaintiff's favor for \$3,500.00 in damages and \$50.00 in costs, for a total award of \$3,550.00. The "findings and order" form was filed on March 30, 2001. Neither party appealed that decision.

On May 29, 2001, Plaintiff filed a motion for a financial disclosure hearing. The financial disclosure hearing was scheduled for July 25, 2001. A notice of hearing was sent to Defendant's 3 Warren Court address. Previous mailings from the court to Defendant reflect an address of "Cote Hill Rd." In some of those documents, the Cote Hill Rd. address is crossed out by hand and the Warren Court address is written in. On July 2, the court issued a subpoena commanding Defendant's presence at the July 25, 2001 hearing. The return of service reveals that Defendant was served the subpoena, notice of hearing, and small claims financial and income statement on July 9, 2001. On July 16, 2001, Defendant filed a motion to continue the hearing, which was granted on July 18.

The hearing was rescheduled for August 22, 2001, and again a notice of hearing was sent to Defendant's 3 Warren Court address. The record contains no evidence, such as a returned envelope, implying that Defendant did not receive this notice. The hearing was held on August 22, 2001 as scheduled and noticed. Plaintiff appeared, but Defendant did not. The court determined that the judgment remained unpaid for thirty days and that Defendant had the present

ability to pay. The court ordered: "if not paid at \$100/month, court will proceed to wage garnishment." A copy of the decision was sent to Defendant, return receipt requested, at the Warren Court address. The returned receipt reveals that Defendant acknowledged receipt on August 27, 2001.

On August 29, 2001, Defendant filed the following request: "I Anthony Cote hear by [sic] request to file a motion to have a new hearing because I was not properly notified of the hearing August 22, 2001 by the Washington County Sheriff or by U.S. Mail." Court staff considered this request a "motion to reconsider" and notified Plaintiff that he had fifteen days to respond before the motion would be forwarded to the judge for review. The court denied the "motion to reconsider" without elaboration on September 6, 2001.

Defendant then filed a notice of appeal on October 5, 2001. On October 12, 2001, the court sent a notice to the parties explaining the appellate procedure. The notice was sent to Defendant at a Ward Hill Road address. Case records suggest that this address is Defendant's most recent. The case file includes no written evidence of requests to the court to update its records with regard to any of Defendant's addresses.

On November 9, 2001, Defendant filed a small claims financial and disclosure form, and an informal letter stating, among other things: "I do work at the Waterbury Post Office as a Letter Carrier, and the [sic] 3 Warren Court is on my every day Route. I did not receive any notice to appear on August 22, 2001. However, I do [realize] I owe the amount of \$3500.00 to Mr. Hohman and [intend] to pay him throughout time." This letter bears a return address on Ward Hill Road. Plaintiff filed his own informal letter on November 27, 2001.

Defendant never filed a statement of legal questions on appeal. Defendant has never filed an affidavit or any other evidence supporting his assertion that he never received notice of the financial disclosure hearing.

At a status conference on September 12, 2002, the parties made clear their irreconcilable differences and their desire for the court to render a decision on the issue appealed. The issue appealed is whether the small claims court erred by denying Defendant's "motion to reconsider" filed in response to the court's August 22, 2001 decision after the financial disclosure hearing in which he failed to appear.

A trial court's findings of fact are reviewed for clear error and "in the light most favorable to the prevailing party, disregarding modifying evidence. . . . A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding." Mullin v. Phelps, 162 Vt. 250, 260 (1994) (citation omitted). "The decision will be affirmed if the conclusions of law are supported by the findings." Abbiati v. Buttura & Sons, Inc., 161 Vt. 314, 318 (1994).

Defendant has clarified that the intent of the motion was to request a new financial

disclosure hearing because his failure to appear was caused only by a lack of notice. He does not cite to any particular error in fact or law occurring at the hearing itself. Thus, Defendant seeks to reopen the hearing, pursuant to Rule 59 or 60(b), for presentation of evidence.

Because the small claims court denied the motion without explanation, this court now, on appeal, cannot determine whether the judge who decided the motion properly viewed the motion as a request to reopen the financial disclosure hearing, or whether he treated it as a request to reconsider the outcome. It is now clear that Defendant wants to reopen the August 22, 2001 hearing on the grounds that he did not receive notice of it, and he wants to be heard on the issue of his ability to pay. Plaintiff disputes whether Defendant actually received notice, and argues that Defendant is pursuing a delay tactic. The court below, in acting on the Defendant's request which was titled a "motion to reconsider," did not have before it any sworn statements, and had inconclusive information about whether adequate notice was sent to Defendant. It did not make findings on that issue.

Defendant is entitled to at least an opportunity to present sworn testimony to the court related to his claim that he did not receive notice, and Plaintiff is entitled to an opportunity to refute that. The court is sensitive to the delay in resolution of this appeal. Therefore, the small claims court shall address this issue at the upcoming wage garnishment hearing. Plaintiff has requested wage garnishment, but a hearing on that request has not yet been scheduled pending resolution of the "motion to reconsider." Because this hearing needs to be held anyway, Defendant can use that occasion as a chance to prove a basis for reopening the hearing, and Plaintiff will not have been required to attend an additional court hearing unnecessarily.

Defendant is advised that any evidence he seeks to present in support of reopening the financial disclosure hearing, whether an affidavit or other evidence of lack of notice, must be filed or presented at the hearing or prior to it.


This decision does not affect the Order granting judgment to Plaintiff; that Order is final.

Order

For the foregoing reasons,

The ruling of the small claims court denying Defendant's motion to reopen is VACATED and this case is REMANDED for a hearing in Small Claims Court on Defendant's motion, filed August 29, 2001; to reopen the financial disclosure hearing, to be held at the same time as a hearing on Plaintiff's motion for wage garnishment, which can now be scheduled.

Dated at Montpelier, County of Washington and State of Vermont, this 10th day of September, 2002.



Mary Mills Teachout
Superior Court Judge