NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1208

FOUNDATION MATERIALS, INC.

VERSUS

HARMON CONSTRUCTION, L.L.C.

DATE OF JUDGMENT: MAR 06 2015

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER C625-529, SECTION 22, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: MOTION TO DISMISS DENIED; AFFIRMED.

CHUTZ, J.

D.F. Chase, Inc. (Chase), named as a garnishee in a proceeding instituted by plaintiff-judgment creditor, Foundation Materials, Inc. (FMI), appeals a judgment ordering Chase to pay the sum of $98,510 plus court costs in partial satisfaction of a writ of *fieri facias* obtained by FMI for property belonging to judgment debtor, Harmon Construction, LLC (Harmon), that Chase had in its possession at the time of garnishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

FMI obtained a money judgment against Harmon in Orleans Parish, the collection of which it sought to enforce by filing a petition to make the judgment executory in East Baton Rouge Parish. FMI subsequently filed a petition for garnishment under a writ of *fieri facias*, naming Chase as garnishee. It is undisputed that the private works project for which Harmon had contracted with Chase[1] was unrelated to the matter for which FMI had obtained a judgment against Harmon in Orleans Parish. In its petition, FMI averred that Chase was in possession of funds belonging to Harmon which FMI sought to garnish in satisfaction of Harmon's indebtedness to FMI, calculated by FMI to be $102,475.42, inclusive of interest, attorney's fees, commission, and court costs. Attached to FMI's petition were interrogatories directed to Chase to answer categorically and under oath.

Chase subsequently answered the interrogatories, stating that at the time of garnishment it possessed and "arguably owed" to Harmon an "outstanding draw" of $98,510 that Chase had not satisfied, claiming that under the contract between Chase and Harmon, Chase was entitled to exercise rights of setoff in which case, according to Chase's answer, it may not have any payment obligations to Harmon. In response to the inquiry of whether Harmon was employed by Chase in any capacity at the time

[1] The private works project was contractually identified as "SEFL-Lafayette, LA" located in Carenco, Louisiana. The record does not contain the contract between the owner of the project and Chase.

of the garnishment, Chase responded that it had entered into a subcontract agreement with Harmon for the original amount of $520,261, but due to numerous change orders, the subcontract amount was reduced to $161,888.99. Chase stated, "Based on the subcontract agreement, [Chase] compensated [Harmon] after [Harmon] submitted its application for payment by the 20th of each month and within seven ... days following [Chase's] receipt of funds from the Owner [of the private works project]." According to Chase's answer, Chase's last payment to Harmon was for $53,646 on October 10, 2013.

Chase subsequently filed supplemental responses to FMI's interrogatories, reiterating its earlier answer that at the time of garnishment it possessed and "arguably owed" to Harmon an outstanding draw of $98,510 that Chase had not satisfied but also answering that it had exercised its contractual setoff rights and suggesting that Harmon may be entitled to only $19,212.90. Chase restated the original amount of the subcontract agreement, the amount after change orders, and its last payment of $53,646 on October 10, 2013, under the terms of the subcontract agreement. A second set of interrogatories and a request for production of documents were made by FMI to which Chase responded.

FMI filed a rule to show cause, stating that despite a conditional admission of possession of $98,510 due and owing to Harmon, Chase had refused to turn over that amount. The pleading expressly requested an order directing Chase to turn over "all funds in its possession due and owing to" Harmon. It attached a memorandum "in Support of Rule for Turnover," in which it expressly requested that Chase turn over "the original amount it stated was in its possession, $98,510," as well as attorney's fees and court costs.

After the hearing on the rule in which FMI expressly indicated that the only relief it sought was $98,510 and for which evidence was adduced, the trial court

granted FMI a judgment ordering Chase to turn over the sum of $98,510 "in partial satisfaction of the writ of [*fieri facias*]." Chase appeals.

During the pendency of the appeal, FMI filed a motion to dismiss the appeal, urging that the appealed judgment was interlocutory. The motion was referred to the merits. The gist of FMI's contention in its motion is that Chase's answer admitting the amount of the subcontract agreement was $161,888.99 shows that, after application of credits for Chase's October 10, 2013 payment to Harmon in the amount of $53,646 and the judgment amount of $98,510 that the trial court ordered Chase to pay to FMI, the sum of $9,732.89 ostensibly owed to Harmon is still in Chase's possession. FMI asserts that the issue of that additional sum as well as Chase's claim to a right of setoff against unpaid portions of the contract demonstrate that the judgment, failing to address all the issues in this case, is interlocutory and not a final appealable judgment.

Garnishment:

A garnishment proceeding is a separate and distinct proceeding from the original suit and is between different parties. La. C.C.P. arts. 2411-2417; ***Covington Pontiac-Buick-GMC Trucks, Inc. v. AAA Sewer & Water Fabrication & Serv., LLC***, 2002-2676 (La. App. 1st Cir. 2/13/04), 873 So.2d 56, 57-58, writ denied, 2004-0651 (La. 5/7/04), 872 So.2d 1082. It is nothing more than a streamlined legal process for obtaining the seizure of property of a judgment debtor in the hands of a third party. ***Id.***, 873 So.2d at 59.

The garnishment seizure is effective upon service of the petition, citation, and interrogatories. La. C.C.P. art. 2411B. Other than as is statutorily applicable to garnishments of wages, a garnishment shall not be continuing in nature, and the garnishee need only respond as to property of the judgment debtor that the garnishee has in his possession or under his control at the time the garnishment interrogatories are served on him. La. C.C.P. art. 2411C. The test of a garnishee's liability to the

judgment creditor is whether the garnishee has in his hands the principal debtor's property, funds, or credits for the recovery of which the debtor has a present subsisting cause of action. ***Houma Mortg. & Loan, Inc. v. Marshall***, 94-0728 (La. App. 1st Cir. 11/9/95), 664 So.2d 1199, 1203.

Where the garnishee's answers admit that he does indeed hold something belonging to the debtor, a garnishment judgment is then entered. La. C.C.P. art. 2415; ***Covington Pontiac-Buick-GMC Trucks, Inc.***, 873 So.2d at 58. If, on the other hand, the garnishee denies possession of any of the judgment debtor's property, the judgment creditor may file a contradictory motion traversing the answer. La. C.C.P. art. 2414.

Motion to Dismiss:

Despite the misnomer, because Chase had answered the interrogatories when FMI filed its rule requesting that Chase turn over money belonging to Harmon that it had in its possession, FMI's rule to show cause was in effect a contradictory motion traversing the answer. See La. C.C.P. art. 2414; see also ***Thomas v. Bridges***, 2012-1439 (La. App. 1st Cir. 6/28/13), 120 So.3d 338, 341, aff'd, 2013-1855 (La. 5/7/14), 144 So.3d 1001 (courts look beyond the caption, style, and form of pleadings to determine from the substance of the pleadings the nature of the proceeding; therefore, a pleading is construed for what it really is, not for what it is erroneously called). Thus, FMI had the initial burden of proving the untruthfulness of Chase's answers. See ***Reading & Bates Const. Co. v. Baker Energy Resources Corp.***, 96-1276 (La. App. 3d Cir. 5/21/97), 698 So.2d 413, 421, writ denied, 97-2548 (La. 1/16/98), 706 So.2d 976.

FMI did not produce anything challenging the answers Chase provided and did not raise any arguments relative to Chase's answer stating that it had entered into a subcontract agreement with Harmon for the original amount of $520,261, but due to numerous change orders, the subcontract amount was reduced to $161,888.99, and

that under the provisions of the subcontract it had last paid Harmon $53,646 on October 10, 2013. Moreover, prior to filing its rule, FMI did not direct any additional interrogatories seeking clarity in Chase's answers directed at whether Chase had any additional sums that FMI now asserts are in Chase's possession. Because a garnishment shall not be continuing in nature and the garnishee need only respond as to property of the judgment debtor that the garnishee has in his possession or under his control at the time the garnishment interrogatories are served on him, see La. C.C.P. art. 2411C, it was incumbent on FMI to raise the issue of the propriety of Chase's answers in the hearing on FMI's rule. Having failed to do so, FMI cannot now challenge the finality of the judgment awarding it the sum of money it stated it sought both before the trial court and in its memorandum attached to its pleading invoking the hearing without in any manner reserving a right to pursue entitlement to additional sums under the subcontract agreement between Chase and Harmon.

The judgment before us clearly determines the merits and, therefore, is a final judgment. See La. C.C.P. art. 1841. Although all the relief to which FMI now asserts it should have been entitled was not granted, FMI failed to meet its burden of proving that Chase owed that amount at the hearing on the rule it invoked. Accordingly, we deny FMI's motion to dismiss the appeal.

Merits of Chase's Appeal:

On appeal, Chase asserts the trial court committed manifest error by finding any amounts were due and owing Harmon and legal error by failing to enforce the contractual setoff provisions contained in the subcontract agreement Chase and Harmon entered into in conjunction with the private works project. Thus, according to Chase, it did not owe $98,510 to Harmon, and the trial court's conclusion to the contrary was error. We disagree.

Chase concedes that it was served FMI's petition of garnishment, citation, and interrogatories on November 5, 2013.[2] And Chase answered the interrogatories admitting, albeit conditionally, that it had $98,510 due and owing to Harmon on November 5, 2013.

According to the provisions of the subcontract agreement between Chase (Contractor) and Harmon (Subcontractor):

> **5. PROJECT COMPENSATION**
>
> 5.1 **Payments to Subcontractor.** Subcontractor shall make written application for payment by the 20th of each month ....
>
> 5.1.1 With each application for payment, Subcontractor shall submit interim waiver and release of lien, conditioned upon receipt of payment, covering the period through which the application for payment is sought. ...
>
> 5.1.3 Contractor shall make cash disbursements to Subcontractor, less retainage of 5.00%, no later than seven ... days following receipt of such monies from the Owner.
>
> 5.1.4 Notwithstanding any other provision in this Agreement, receipt of payment by the Contractor from the Owner shall be an express condition precedent to the right of Subcontractor to receive payment. As such, Subcontractor acknowledges that Contractor's obligation to pay is specifically contingent upon receipt of payments from Owner and by its signature below specifically acknowledges this "pay when paid clause."

When it originally answered FMI's interrogatories, and again in its supplemental answers, Chase acknowledged that at the time of garnishment, an outstanding draw of $98,510 was due to Harmon, but that Chase had not satisfied it because receipt of payment to Chase from the owner of the private works project had not been received; however, the owner subsequently paid Chase. Thus, under an application of the subcontract agreement Section 5, the trial court's finding that at the time of garnishment Chase had in its possession $98,510 belonging to Harmon is not

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[2] FMI maintains that the sheriff served the registered agent for service of process on November 1, 2013, and hence that is the effective date of seizure. Whether the date of seizure was effective on November 1, 2013, or November 5, 2013, is immaterial under the facts of this case. Therefore, for purposes of disposition of the issues in this appeal, we utilize November 5, 2013 as the date that Chase concedes.

manifestly erroneous. The trial court could correctly infer that on October 20, 2013, Harmon complied with the provisions of Section 5, and, thus, on November 5, 2013, Chase had in its hands Harmon's property, funds, or credits for the recovery of which Harmon had a present subsisting cause of action.

Chase next asserts upon service of FMI's writ, under the provisions of the subcontract agreement between Chase and Harmon, Harmon was "insolvent," thereby rendering Harmon in default and making any further payments to Harmon – including the outstanding draw of $98,510 it was holding until receipt of payment from the owner – subject to the setoff provisions.

In a section of the subcontract agreement entitled "**SUBCONTRACTOR DEFAULT**," are the following provisions:

> 9.1 **Subcontractor Default.** Subcontractor shall be in material breach and default of this Agreement if it: (1) becomes insolvent; (ii) files or has filed against it any petition in bankruptcy or makes a general assignment for the benefit of creditors; (iii) fails to make prompt payment to its workers or Sub-Subcontractors ….; (iv) refuses or fails to prosecute the Work ….; (v) fails, refuses or neglects to supply sufficient labor, material or supervision in the prosecution of the Work; (vi) improperly interferes with or disrupts the operations of Contractor or other person working on the Project; (vii) abandons the Project; (viii) disregards laws or orders of any public authority ….; (ix) otherwise violates the terms of the Agreement.

The remaining provisions of the subcontractor default section articulate in detail the setoff rights that Chase, as contractor, has against Harmon as a subcontractor in default. We find no error in the trial court's conclusion that upon service of the garnishment petition, citation, and interrogatories, a seizure was effectuated. See La. C.C.P. art. 2411B (the garnishment seizure is effective upon service of the petition, citation, and interrogatories); ***Houma Mortg. & Loan, Inc.***, 664 So.2d at 1203.

Likewise we find no manifest error in the trial court's conclusion that at the time of garnishment, Harmon was not insolvent so as to bring into operation Chase's rights of setoff insofar as the outstanding draw of $98,510 owed to Harmon under the

subcontract agreement that Chase admitted it had in its possession. The subcontract agreement did not include a provision that specifically defined "insolvent" as including a garnishment by a third-party creditor of the subcontractor. And the record is devoid of any evidence that at the time of garnishment, Harmon demonstrated an inability to pay his debts in conjunction with the "prosecution of the Work" as stated in the subcontract agreement between Harmon and Chase or as to any creditors until FMI served Chase with the garnishment. Thus, the trial court correctly concluded that Chase's rights of setoff as to the outstanding draw of $98,510 that Chase owed to Harmon on the date of garnishment were not effective because Harmon was not in default due to insolvency.[3]

Chase also suggests that the setoff provisions came into operation by Harmon's abandonment of the project under Section 9.1(vii) of the subcontract agreement. This contention is also without merit because it was not until December 10, 2013, that Harmon submitted written notice of abandonment to Chase, over a month after the effective date of seizure of the outstanding draw of $98,510. To the extent that Chase contends that Harmon in fact abandoned its obligations under the subcontract agreement at an earlier date, the record is devoid of any evidence to support an earlier date of abandonment by Harmon.

Accordingly, the trial court correctly applied the terms of the subcontract agreement to find that the outstanding draw of $98,510 in Chase's possession on November 5, 2013, was property, funds, or credits for the recovery of which Harmon had a present, subsisting cause of action. The trial court was neither legally nor

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[3] Chase's reliance on ***Cagle Supply of Lafayette, Inc. v. Hinson***, 155 So.2d 773 (La. App. 3d Cir.), writ denied, 157 So.2d 230 (La. 1963), ***Camp v. Gibbs***, 331 So.2d 517 (La. App. 2d Cir. 1976), and ***Packard Mgmt., Inc. v. Real Key Mgmt. Transp. Services, Inc.***, 98-643 (La. App. 3d Cir. 2/3/99), 736 So.2d 850, is inapposite. In each of those cases, the contractual rights of setoff had been initiated by events that preceded the seizure of property in the hands of the garnishee on the date of garnishment. In this case, we review only the propriety of the seizure of the outstanding draw of $98,510 in Chase's possession on the date of garnishment and, as noted in our denial of FMI's motion to dismiss, have concluded any issues relative to any moneys Harmon may have been due under the subcontract agreement after November 5, 2013, including whether Chase has any rights of setoff insofar as those moneys, are not before us in this appeal.

manifestly erroneous. As such, the trial court correctly concluded that Chase is liable for the outstanding draw of $98,510 in partial satisfaction of the writ of *fieri facias*.

DECREE

For these reasons, we deny the motion to dismiss, filed by Foundation Materials, Inc. The trial court's judgment is affirmed. Appeal costs are assessed against garnishee, D.F. Chase, Inc.

MOTION TO DISMISS DENIED; AFFIRMED.