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AUG 15 1994

APPEAL TO THE APPELLATE COURT  
THE THIRD JUDICIAL DISTRICT  
OTTAWA, ILLINOIS  
FROM THE CIRCUIT COURT OF  
HENRY COUNTY, ILLINOIS  
FOURTEENTH JUDICIAL CIRCUIT

NATIONAL LAWYERS GUILD  
FOR EQUAL JUSTICE

BILL LAPPIN,	)	
	)	
Plaintiff-Appellee,	)	
	)	Appellate Court No. 3-94-0388
vs.	)	Circuit No. 93 LM 142k
	)	Trial Judge: Clark Barnes
HAROLD GERARD,	)	
	)	
Defendant-Appellant.	)	

ORDER and Report of Proceedings

This cause comes before the Court on Defendant-Appellant's Notice of Hearing pursuant to Supreme Court Rule 323 in regard to the proposed report of proceedings (Bystander's report) of the hearing held in this cause on April 29, 1994. The Court having reviewed the proposed report(s) and <sup>included its</sup> ~~for proposed~~ amendments, having heard the arguments of counsel and having been otherwise fully informed, the Court hereby Orders as follows:

1. That the attached Report of Proceedings (Bystander's Report) is incorporated herein as if set forth word-for-word;
2. That the attached Report of Proceedings (Bystander's Report) is certified as an accurate report of the proceedings which occurred in this cause on April 29, 1994.

Date: 12 July 1994

Entered: Clark Barnes  
Judge

Filed 7-12-94  
Debra Doss Burmann, Clerk of Circuit Court  
By DB Deputy

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	)	
Defendant-Appellant.	)	

REPORT OF PROCEEDINGS  
(BYSTANDER'S REPORT)

The cause was before the Court on the Plaintiff-Appellee's Rule to Show Cause and the Defendant-Appellant's Motion to Vacate pursuant to Sections 2-1401 and 2-1402(j) of the Code of Civil Procedure and Motion to Quash pursuant to Sections 2-1303, 2-1401 and 2-1402(j) of the Code of Civil Procedure. The hearing in question occurred on Friday, April 29, 1994, at 10:30 a.m. at the Courthouse of Henry County in Kewanee, Illinois. The Honorable Clark Barnes presided over the proceedings. Present were the Plaintiff-Appellee, Bill Lappin, in person and by his attorney, Martin G. DeWulf, and the Defendant-Appellant, Harold Gerard, in person and by his attorney, Stephanie Barrick of Prairie State Legal Services, Inc.

The Defendant-Appellant presented evidence that as of the date of the hearing, his monthly income was \$762.00 per month which consisted of \$648.00 Social Security benefits and \$114.00 pension benefits from the Veteran's Administration. At the time of the prior hearings, being June 25, 1993, and December 17, 1993, the

Filed 070894  
Debra Doss Burney, Clerk of Circuit Court  
By HR

Defendant's income consisted of only Social Security benefits and pension benefits from the Veteran's Administration, but at slightly lesser amounts. Mr. Gerard testified that as of the date of the hearing and at all times relevant to the prior proceedings, he had little personal property, with the value being approximately a few hundred dollars. That property consisted of a few pieces of furniture, clothes, a few tools and personal items. Mr. Gerard testified that at all times relevant to the proceedings, he did not own or have any vehicles, real estate, stocks, bonds, securities, certificates of deposits or bank accounts.

Mr. Gerard initially stated that his expenses had not changed since the entry of the payment order. He later explained that he now owed a balance to a local store, that he had incurred recent medical expenses of an unknown amount and that he had a past due bill to a local utility company for approximately \$900.00. Mr. Gerard explained that his monthly expenses consisted of \$160.00 for rent and expenses for food and utilities. However, he was unable to estimate the monthly expenses for food and utilities. Mr. Gerard testified that he could not afford to pay the \$100.00 amount per month which had been entered by the Court on June 25, 1993. Initially, he stated that he wanted the amount to be reduced to \$50.00 per month but then testified that he could only pay towards the judgment as money was available.

At the time of the prior court hearings during which the payment order was entered, the Defendant testified that he was not represented by counsel. Mr. Gerard testified that he did agree to the payment order at the June 25, 1993, hearing. However, he also

testified that he was unaware of his exemption rights and that his income was protected by state law and that he only learned of his exemption rights after talking to his counsel, Stephanie Barrick.

He testified that he entered into the agreement because he believed he was required to do so.

*Defendant further stated he had the money to pay the payments, but didn't pay because Mr. Lappin didn't stop by to pick up the money.*

Cross-examination focused on the fact that Mr. Gerard agreed to pay \$100.00 per month towards the judgment and that his income had not substantially changed since the time of the agreement.

Cross-examination also focused on the fact that at a subsequent hearing on December 17, 1993, for a Rule to Show Cause against the Defendant, the Defendant had stated what his income was at the time

and that the payment order was affirmed. There was also testimony to the fact that there was confusion on Mr. Gerard's part as to

whether or not the payments were to be mailed or to be picked up by Mr. Lappin and that at one point, Mr. Gerard would have made a

payment to Mr. Lappin had he picked it up. Given that Mr. Lappin did not pick up the money, Mr. Gerard spent the money elsewhere.

Mr. Lappin testified that Mr. Gerard had not complied with the payment Order of the Court and that Mr. Gerard had made only a few payments during the previous 10 months. He testified that he made

efforts to pick up the payments, but that on several occasions, his attempts were unsuccessful, and that he had on at least one

occasion provided Mr. Gerard with an envelope in which to send the payment at a later date.

Plaintiff argued that the Defendant entered into an agreement to pay \$100.00 per month towards the judgment and that there had

not been a change in circumstances in regard to the Defendant and

that the requirements of Section 2-1401 had not been met. Plaintiff's position was that the Defendant had merely changed his mind and that there was no basis for Section 2-1401 relief, relying upon the case of Lofendo v. Ozog, 454 N.E.2d 806, 118 Ill. App. 3d 237 (1st Dist. 1983). Plaintiff further argued that the Defendant had not complied with the payment order, that the Defendant should be held in contempt and that the Plaintiff should be awarded attorney fees.

Defendant argued that his income and property was, at all times relevant to the matter, exempt by state statute. Defendant further argued that he was not represented by counsel at the time the payment order was agreed upon, that he was unaware of his exemption rights at the time the agreement was made and that he entered into the agreement because he believed that he had to do so. Defendant argued that the requirements of Section 2-1401 of the Code of Civil Procedure were met, that the case of Lofendo v. Ozog, relied upon by the Plaintiff, was not applicable and that those portions of the Orders entered by the Court on June 25, 1993, and December 17, 1993, be vacated, and as such, the Defendant should not be held in contempt.

The Court noted that the Defendant's testimony was that his current liability and financial condition was unchanged since the order of December, 1993. Defendant entered into an agreement, and a concurrent agreement was entered in December, 1993. The Court found that because Defendant's counsel told the Defendant that his income was not subject to garnishment, he concluded that his agreement was ill advised and that he could have avoided paying the

judgment. Court also found that the payment order was lawful and enforceable through law by contempt process. Defendant, Harold Gerard, was found in civil contempt. Motion to Vacate and Motion to Quash were denied. Attorney fees were awarded to the Plaintiff, Bill Lappin, in the amount of \$150.00.

The Court explained its ruling that the order to pay was a consent order that defendant, by his own testimony he could have complied with. Defendant's income, though meager and apparently exempt from execution can be pledged to pay a just debt. Changing his mind does not exempt him from civil contempt, enforcement of the payment order. Payment of rent seems to be a debt that the defendant may wish to pay - even his meager income is reasonably spent on necessary expenses. While the court found defendant in contempt this court explained it was not prepared to use the threat of commitment of defendant to the county jail to enforce compliance in view of his infirmity.