

IN THE SUPREME COURT OF MISSISSIPPI

KIMBERLEE DAVENPORT, Appellant

VS.

No. 2015-CA-01164-SCT

HANSAWORLD, USA, INC., Appellee

MOTION FOR REHEARING

ORAL ARGUMENT REQUESTED

COMES NOW Appellant, Kimberlee Davenport, by and through counsel, and respectfully moves this Honorable Court to grant Appellant's request to reconsider its January 19, 2017 decision affirming the trial court's decision, and to rehear Davenport's claims, for the following reasons:

1. ***No waiver occurred because Davenport cannot object to a request that was never made. HansaWorld never requested a bond regarding the Writ of Execution.*** The Court held that Davenport failed to object to the bond request, and therefore waived her right to appeal the issue, but HansaWorld NEVER requested the bond in regards to the writ of execution, so therefore Davenport had nothing to object to. HansaWorld only requested a bond should the court enjoin the sheriff's sale.
2. This Court's January 19, 2017 opinion misstated the facts of what was requested and objected to at the trial court. The only request for a bond made by HansaWorld was in regards to the sheriff's sale, not the writ of execution. Davenport could not object to the issuance of a bond regarding the writ of execution because the bond was not requested for that purpose. Because Davenport could not

object to a request that was not made, Davenport cannot waive the issue on appeal.

3. Because the trial court committed plain error, this Court should still exercise its power to correct a gross miscarriage of justice.

DISCUSSION

The matter presented to the Court is not fact intensive, but the facts are essential. On March 4, 2014, a final judgment was entered against Davenport in favor of HansaWorld in the Circuit Court of Miami-Dade County Florida. (R. 9)

The matter appealed from was filed in the Circuit Court of Forrest, County, Mississippi by HansaWorld in an effort to collect on the Florida judgment and strip Davenport of her federal suit against HansaWorld. (R. 1). Shortly thereafter, Davenport was forced to file bankruptcy in Texas, which brought a temporary halt to HansaWorld's attempts to execute upon Davenport's civil action. (R. 25).

However, Davenport could not even afford to continue in the bankruptcy, and the bankruptcy was dismissed. (R. 33). HansaWorld, in an effort to strip Davenport of her constitutional rights, caused to be issued an alias writ of execution on Davenport's federal lawsuit against HansaWorld. (R. 42). The alias writ of execution, sought to be quashed by Davenport, was issued on June 30, 2015 by the court clerk. R.23. The Notice of sale of the writ of execution was a separate document in its entirety and stated:

By virtue of an alias writ of execution issued by the circuit clerk of Forrest County...the sheriff of Forrest County will offer for sale...on the 13th day of July 2015...

R.55.

The sheriff's sale was scheduled to take place on the courthouse steps, which would include the writ of execution on Davenport's civil action. HansaWorld chose not to include any other items or property at the sheriff's sale. Davenport's federal lawsuit consists of claims

for sexual harassment and discrimination under Title VII, as well as state law claims for discharge in violation of public policy and payment of lost wages and taxes. (R. 43-54).

Davenport filed her Motion Quash the Writ of Execution, and did not seek to enjoin the sheriff's sale, (R. 36), which was granted by the Circuit Court. (R. 162). The Court stated "I am going to grant [Davenport's] motion, but I'm going to require that [Davenport] post a \$100,000 bond." T.19. The Court then stated that if the bond is not posted then the sale would be allowed to proceed. T.20. The Court never stated that the bond was required to quash the writ of execution, rather, it seemed clear to Davenport that the bond was related solely to the sheriff's sale¹. There was no reason for the court to require a bond in order to quash the writ of execution, because no bond was requested by HansaWorld in regards to quashing the writ of execution.

The Circuit Court held, in an order prepared and submitted by HansaWorld after the hearing had concluded:

After considering the pleadings and the arguments and representations of counsel, the court finds that the emergency motion to quash the alias writ of execution shall be and hereby is granted, conditioned on the posting of a bond by Davenport in the amount of \$100,000.

IT IS THEREFORE HEREBY ORDERED that if Davenport posts with the Clerk of this Court a bond in the amount of \$100,000, the alias writ of execution will be quashed and the sheriff's sale of Davenport's chose in action against HansaWorld scheduled for 2:00 p.m. July 13, 2015, shall be stayed.

(R. 62)

The order was entered before Davenport could formally object. Davenport was unable to post such a significant bond, and Davenport's civil action against HansaWorld, was purchased by HansaWorld for a mere \$1,000. (R. 164). The Circuit Court provided no

¹ Davenport should not be punished for any vagueness or ambiguity in the Court's ruling.

basis for the bond in its ruling. (R. 62). Davenport objected to the wording of the order in correspondence with opposing counsel and correspondence with the Court.

In federal court, HansaWorld has filed a motion to substitute itself as the party in interest in Davenport's place. HansaWorld has stated that it intends to dismiss the action if the federal court grants its motion to substitute. The federal court matter has been stayed pending resolution of the issues before this Court.

1. No waiver occurred because Davenport cannot object to a request that was never made. HansaWorld never requested a bond regarding the Writ of Execution.

In this matter, the trial court, without explanation, required Davenport to post a bond before granting her permanent relief, quashing the writ of execution. The dissent properly notes that the requirement of a bond in this matter was not just error, but plain error, because the bond requirement for permanent relief was not within the court's power under Rule 65². The majority opinion found that Davenport waived her right to appeal the bond issue because she did not object to the bond before the trial court. Davenport could not object to a request that was never made, and therefore, Davenport has not waived the bond issue on appeal.

In its opinion, the Court stated that "HansaWorld correctly asserts that it asked the court, both in brief and at the hearing, to condition any relief given to Davenport on the positing of a bond³..." Respectfully, this finding by the Court was in clear error, because not once did HansaWorld request a bond in order to quash the writ of execution. HansaWorld never asked the court to condition "any relief" on the posting of a bond. HansaWorld only requested a bond should the court deem proper to enjoin the sheriff's sale.

The writ of execution and the sheriff's sale are two distinct and separate matters, and

² Opinion at p. 8 ¶ 18

³ Opinion at p. 6 ¶ 13

both must be dealt with as separate issues⁴. In HansaWorld's Response in Opposition to Defendant's Emergency Motion to Quash Writ of Execution, HansaWorld only requested a bond in order to enjoin the sheriff's sale, never mentioning the writ of execution. HansaWorld never mentioned the writ of execution when requesting any bond. Specifically, HansaWorld stated:

Even if the court determines that the sheriff's sale should be blocked on an emergency basis, which it should not, the court should not do so without requiring the posting of a bond by Davenport. As to the amount of the bond, Davenport valued the chose in action at \$500,000 in her bankruptcy schedules. We would leave this to the sound discretion of the court.

R.67

Not once in its response in opposition did HansaWorld request a bond in regards to quashing the Writ of Execution. Davenport could not object to a request that was never made, and therefore the Court was in error to find that Davenport waived the issue on appeal. The sheriff sale is separate from the writ of execution, and the sheriff's sale was not contingent on the writ of execution. The sheriff's sale could have continued without this particular writ of execution.

During the hearing, HansaWorld did not ask for a bond in regards to quashing the writ of execution, rather, counsel for HansaWorld stated "no relief should be granted in the form of enjoining a sale today, if the Court were inclined to do that, without requiring the movant to post a bond." T.15. Again, HansaWorld did not request a bond in regards to the quashing of the writ of execution, only enjoining the sheriff's sale, which was a separate issue entirely. Davenport

⁴ In the matters are combined, then HansaWorld's request is too vague and ambiguous for Davenport to object to such a vague request.

cannot object to a request that was never made. The sheriff sale could continue, only the writ of execution on that particular piece of property would have been quashed. Davenport had no interest in enjoining any sheriff's sale. Davenport's only interest in her Motion to Quash dealt with a specific piece of property, her action against HansaWorld for its misdeeds.

Because HansaWorld, neither in briefing or at argument ever requested a bond in regards to the quashing of the writ of execution, Davenport cannot waive the issue on appeal, because the issue was never raised for Davenport object to at the trial court level. To hold otherwise would be a gross miscarriage of justice for Davenport, who has spent over four years litigating with HansaWorld, only to have her rights stripped away without any notice.

- 2. This Court's January 19, 2017 opinion misstated the facts of what was requested and objected to at the trial court. The only request for a bond made by HansaWorld was in regards to the sheriff's sale, not the writ of execution. Davenport could not object to the issuance of a bond regarding the writ of execution because the bond was not requested for that purpose.**

In its opinion, the Court denied Davenport relief on her claims finding that Davenport had waived the bond issue on appeal because Davenport did not write a response brief to HansaWorld's request for a bond, neither did Davenport object at the hearing when the judge stated he was going to grant the motion and require a \$100,000 bond.⁵ The trial court only stated that without the bond, the sale would be allowed to continue. T.20. There was no mention of the writ in regards to the \$100,000 bond.

As discussed *supra*, there was no reason to object to any bond for enjoining the sheriff's sale itself. Davenport never sought to enjoin the sheriff's sale. The only request ever made by HansaWorld for a bond was solely in regards to the sheriff's sale itself, not the writ of execution. The sheriff's sale could continue without anything to sell, just like a store can open its doors

⁵ Opinion at p. 6-7 ¶ 13

without any merchandise. Likewise, HansaWorld could have issued writs of execution on other items or property which were not quashed, but HansaWorld did not.

At the very least, any request for a bond being made by HansaWorld, based upon the facts and the evidence, was so vague and ambiguous that no reasonable person should have understood that HansaWorld was requesting a bond regarding the writ of execution. Every time HansaWorld mentioned a bond, it was only in regards to enjoining the sheriff's sale itself, not any individual pieces of property such as the writ of execution. Davenport cannot be held to waive the issue on appeal, because HansaWorld never properly raised the issue at the trial court for Davenport to raise an objection.

3. Because the trial court committed plain error, this Court should still exercise its power to correct a gross miscarriage of justice.

As noted by the dissent and held by this Court in *Hyman*, "This Court will ignore this requirement for preservation on appeal when a substantial right is affected. This Court retains the power to notice plain error. Miss.R.Evid. 103(d); Comment to Miss.R.Evid. 103. The plain error doctrine reflects a policy to administer the law fairly and justly. A party is protected by the plain error rule when (1) he has failed to perfect his appeal and (2) when a substantial right is affected. The Commission's appeal is not perfected because the error was not objected to at trial. And a substantial right is affected." *State Highway Comm'n of Mississippi v. Hyman*, 592 So.2d 952, 957 (Miss. 1991).

The trial court's ruling constituted plain error because no statute, rule, or other law empowered the court to issue a bond based upon Davenport's requested permanent relief. Notwithstanding the fact that Davenport could not object to a request that was never made, this Court must still reverse the trial court to make right a gross miscarriage

of justice. Davenport has a constitutional right to bring her litigation against HansaWorld in federal court, which is most certainly a “substantial right.”

This Court must administer the law fairly and justly. Davenport deserves her day in court regarding her suit against HansaWorld which has been stripped from her, through plain error. A federal court jury should decide whether or not HansaWorld is liable for the tortious acts complained of by Davenport in her litigation against HansaWorld in the Southern District of Mississippi, not a plain error made by the trial court.

CONCLUSION

For the foregoing reasons, counsel for Davenport asks that this court rehear and reconsider its January 19, 2017 opinion denying Davenport relief.

Respectfully submitted, this 24th day of January, 2017,

KIMBERLEE DAVENPORT, Appellant

BY:

/s/Daniel M. Waide

CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellant, do hereby certify that on this date, I have electronically filed the foregoing Motion for Re-Hearing with the Clerk of the Supreme Court using the MEC system which sent notification of such to the following:

Richard Montague, Esq
Jason Marsh
Phelps Dunbar, LLP
Richard.montague@phelps.com
Jason.marsh@phelps.com

Hon. Robert Helfrich (via mail)
PO box 309
Hattiesburg, MS 39403

This, the 24th day of January, 2017.

 /s/ Daniel M. Waide
Daniel M. Waide, MSB #103543

Daniel M Waide, MS Bar #103543
Johnson, Ratliff & Waide, PLLC
1300 Hardy St.
PO Box 17738
Hattiesburg, MS 39404
601-582-4553 (Office)
601-582-4556 (Fax)
dwaide@jhrlaw.net