



## Rocky Mountain Wholesale

2003 | Cited 0 times | California Court of Appeal | June 17, 2003

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Home Exteriors, Inc. appeals a right to attach order in the amount of \$113,507.58 in favor of Rocky Mountain Wholesale, Inc. We reverse.

### PROCEDURAL BACKGROUND

In a complaint filed May 17, 2002, plaintiff, Rocky Mountain Wholesale, Inc., alleged inter alia that defendant, Home Exteriors, Inc., had failed to pay for merchandise of a value of \$115,104.70, which it had sold and delivered at agreed prices on an open book account.

On June 3, 2002, plaintiff applied pursuant to Code of Civil Procedure section 484.010 for a right to attach order and a writ of attachment. The application was noticed for a hearing on July 12, 2002, and supported by a declaration of plaintiff's credit manager, Mary Lynn Van Horn, who appended a list of invoices amounting to the sum of \$114,172.36. On July 11, 2002, the day before the hearing, defendant filed an opposition to the application supported by a declaration of its accounting manager, Derrina Hale, who denied that defendant owed plaintiff the money claimed, and claimed plaintiff engaged in flawed accounting practices.

At the hearing, the court refused to consider the late-filed declaration. Defendant then argued that the application was supported only by a list of purportedly unpaid invoices, lacking a detailed statement of the debit and credit balances between the parties or other documentation. Nevertheless, the trial court granted the application, including a request for attorney fees, and ordered the writ of attachment to issue in the amount of \$126,672.36 upon plaintiff's filing of an undertaking of \$10,000. The right to attach order was filed on August 6, 2002, and an undertaking of \$10,000 was filed on August 16, 2002.

On July 17, 2002, defendant made an ex parte application for an order to quash the writ of attachment and set aside the right to attach order pursuant to Code of Civil Procedure section 485.240. The trial court denied the application on the ground that there was "no basis for granting the relief requested on an ex parte basis," without prejudice to defendant's right to seek relief by motion.



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Defendant next filed a motion for reconsideration under Code of Civil Procedure section 1008 on July 22, 2002, which was noticed for a hearing on September 5, 2002, and supported by declarations of Sunita Kapoor, defendant's attorney, and Derrina Hale. The Kapoor declaration recited the procedural history of the case. The Hale declaration attached cancelled checks in excess of \$126,000 which defendant had written in payment of purchases from plaintiff and identified two errors in plaintiff's statement of open invoices.

Before the scheduled hearing, plaintiff and defendant agreed to extend the dates for compliance with discovery and to continue the hearing on the motion for reconsideration. On September 5, 2002, the court ordered plaintiff to "forthwith" produce to defendant an accounting of all payments and invoices pertaining to its course of dealing with defendant and continued the motion for reconsideration until September 24, 2002. The minute order stated: "Opposition and reply papers shall be filed and served as per CCP section 1005(b)."

On September 13, 2002, within ten days of the hearing, plaintiff filed an opposition to the motion for reconsideration. An attached declaration stated that on September 5, 2002, plaintiff faxed to defendant a complete history of its payments to plaintiff "consisting of 35 pages of a spread sheet which showed the listing of the payments and the reference of the payments to an invoice." A declaration of Mary Van Horn set forth plaintiff's accounting of business with defendant from March 31, 1995, to October 5, 2001.

On September 19, 2002, five calendar days before the hearing, defendant filed a reply to plaintiff's opposition to its motion for reconsideration. The reply brief maintained, first, that defendant made payments to plaintiff totaling \$117,962.23 that were not accounted for in plaintiff's payment history. A declaration of Derrina Hale attached copies of nine checks cashed in the year 2000, which added up to this total, including one check in the amount of \$14,371.19, which plaintiff reported as being only \$82.49. A letter of plaintiff's counsel dated September 12, 2002, revealed that defendant had made a further request for payment records and plaintiff enclosed "again" the previously submitted accounting.

Secondly, the reply brief contended that plaintiff had "not established a basis for the validity of the summary accounting contained in the table." In support of this contention, defendant attached a declaration of Terry B. Meader, CPA, who stated that he had reviewed the records produced to defendant in discovery and reached the conclusions expressed in a letter dated September 18, 2002, appended to the declaration. The letter stated that plaintiff's accounting reveals "a very inadequate system of accounting and internal controls" that proved "nothing." On their face, the records produced in discovery indicated that defendant had overpaid plaintiff since it revealed unlisted checks totaling \$117,962.23, a sum that exceeded by \$4,454.64 the amount of plaintiff's claim of \$113,507.58, but, in Meader's opinion, a reliable accounting would require a much more "time consuming" investigation into business records.



At the hearing on September 24, 2002, the trial court stated that it had not read the reply brief because "it was late, because it wasn't here . . . when I reviewed the file, and I didn't go back and look at anything further." Counsel for defendant stated that she had filed the brief five calendar days before the hearing as required by Code of Civil Procedure section 1005, subdivision (b). The court insisted, "You didn't file it when I expected it to be filed."

The trial court concluded that plaintiff had made a proper showing for issuance of the writ of attachment but expressed an intention to "reduce the amount of the attachment." On the same day of the hearing, the court granted the application for a right to attach order in the amount of \$113,507.58 -- approximately \$13,000 less than the amount specified in the original right to attach order. Defendant filed a timely notice of appeal from the right to attach order entered September 24, 2002.

### DISCUSSION

#### A. Appealability of Order

At the outset, we must address plaintiff's contention that the appeal should be dismissed as being from a non-appealable order, i.e., an order denying a motion for reconsideration. In fact, the order entered on September 24, 2002, granted the motion for reconsideration in part and ordered a modified right to attach order for \$113,507.58 rather than the sum of \$126,672.36 specified in the original right to attach order. On this record, we do not need to enter into the controversy regarding the appealability of an order denying a motion for reconsideration <sup>1</sup> or consider the effect of a motion for reconsideration in extending the period for filing a notice of appeal under California Rules of Court, rule 3. <sup>2</sup> The order entered on September 24, 2002, falls within the rule that the period of appeal runs from the entry of a substantially amended judgment.

As stated in *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 743-744, "[w]hen a judgment has been modified, an appeal must be taken from the original judgment if the change was a clerical one, and from the modified judgment if the change was material and substantial." Where the change is substantial, a new appeal period then starts to run from entry of the amended judgment. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 634; *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048.) We do not doubt that this rule applies to the amendment of a right to attach order appealable under Code of Civil Procedure section 904.1, subdivision (a)(5) or that the modification of the original order by reducing the sum to be attached in the amount of \$13,000 constituted a material and substantial change.

#### B. Denial of Right to Fair Hearing

In its principal assignment of error, defendant contends that the trial court denied it the right to a fair hearing on September 24, 2002, by refusing to consider the evidence submitted in its reply papers. The record of the hearing reveals that the trial court did not consider the reply papers

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because of a mistaken belief that they were filed "late." The court announced that it did not "go back" to read the reply papers and displayed no meaningful understanding of their contents.<sup>3</sup> The reply papers were, however, filed five days before the hearing, the last day allowed by the court's instruction that opposition and reply papers would be served "as per CCP 1005(b)."

Before addressing this assignment of error, we must first consider plaintiff's argument that the motion for reconsideration was not supported by affidavits showing "new or different facts, circumstances, or law" required by the Code of Civil Procedure section 1008. It is well established that this procedural showing is jurisdictional in nature. (*Darling, Hall & Rae v. Kritt* (1999) 75 Cal.App.4th 1148, 1156; *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 685-686; *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1499-1500; Code Civ. Proc., § 1008, subd. (e).) It follows that defendant cannot predicate error on the court's failure to hear the motion for reconsideration if the court did not have jurisdiction to consider the motion because of defendant's failure to make the requisite showing of new evidence.

The courts have consistently held that the evidence of "new or different facts, [or] circumstances" must include a showing that the party could not, with reasonable diligence, have produced the evidence earlier. (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198-2000; *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342; *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1467; *Blue Mountain Development Co. v. Carville* (1982) 132 Cal.App.3d 1005, 1013.) Hence, "[t]he party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time." (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457.)

In the case at bar, we find that the record compels the conclusion that defendant met the jurisdictional prerequisite of Code of Civil Procedure section 1008. In its reply papers, defendant presented documentation that on its face indicates that plaintiff failed to recognize payments totaling \$117,962.23 in its accounting of business with defendant. Unless it can be rebutted by a more detailed accounting, this evidence entirely undercuts plaintiff's claim of underpayment and supports defendant's argument that the plaintiff's claim is the product of bad accounting practices.

Under the peculiar circumstances of the case, defendant did not have an opportunity to present this evidence on an earlier occasion. Plaintiff's claim was based on a history of numerous transactions amounting to over \$1 million and going back to 1995. In support of its application for an order of right of attachment, plaintiff offered no more than a conclusory tabulation and fragmentary listing of invoices, which did not provide defendant with sufficient information to form the basis for a reasoned defense. Defendant needed to understand how plaintiff arrived at its claim before it could present any effective rebuttal.

It was not until September 5, 2002, that plaintiff provided defendant through court-ordered discovery with a complete history of payments and invoices. On September 12, 2002, plaintiff responded by



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letter to an inquiry of defendant, and on September 13, 2002, it filed a formal opposition to the motion for reconsideration. After receiving this confirmation of plaintiff's belated disclosures on September 5, 2002, defendant had for the first time an opportunity to present an analysis of the basis for plaintiff's claim. In the following six days, it identified a possible error of a magnitude sufficient to rebut the claim and succeeded in securing an opinion of a qualified accountant regarding the plaintiff's accounting methodology.

On this record, it is clear that defendant could not have presented its analysis at an earlier date. It could not identify unlisted payments before receiving plaintiff's disclosure of the record of payments on which the claim of nonpayment was based. Plaintiff first offered this disclosure through discovery on September 5, 2002; it was confirmed with the filing of plaintiff's opposition on September 13, 2002, and reviewed by a qualified accountant on September 18, 2002, the day before the deadline for filing the reply papers.

We conclude that the motion for reconsideration was properly before the court on September 24, 2002, and therefore is subject to appellate review. "A trial court's ruling on a motion for reconsideration is reviewed under the abuse of discretion standard." (Glade v. Glade, *supra*, 38 Cal.App.4th 1441, 1457; see also Garcia v. Hejmadi, *supra*, 58 Cal.App.4th 674, 686; Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal.App.4th 1017, 1027.) Although defendant claims error of constitutional dimension, we do not find it necessary to go beyond this conventional standard of review.

In Glade v. Glade, *supra*, 38 Cal.App.4th 1441, the trial court found an abuse of discretion on facts offering certain points of similarity to the present case. Carla Glade filed a petition to dissolve her marriage to Roger Glade. Subsequently, the parents of Roger brought an action to foreclose a secured loan on the couple's home and filed a summary judgment motion. Two days before the scheduled hearing on the motion, the family law court issued a stay of the foreclosure action. Carla's attorney went to the hearing to notify the court of the stay but arrived five minutes late, and the court informed him that the summary judgment had already been granted. Carla then filed a motion for reconsideration of the summary judgment of foreclosure, which was denied. On appeal, the court held that it was an abuse of discretion to deny the motion for reconsideration: "[s]ince Carla properly showed new or different facts, the court should have reached the merits of her motion for reconsideration. . . . Upon reaching the merits of her motion, the court should have recognized the validity of the family law court's order and its failure to do so was an abuse of discretion which warrants reversal." (Id. at pp. 1457-1458.)

In the present case, we prefer to place our holding on narrower grounds. Since defendant properly showed new or different facts, the court should have reached the merits of its motion for reconsideration, as presented in defendant's reply papers. We hold that the court abused its discretion by failing to consider this factual showing because of a mistaken belief that the reply papers were untimely filed. Unlike the Glade court, we decline to hold as a matter of law that



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defendant was entitled to an order granting the motion for reconsideration and defer to the trial court for a determination of this factual issue.

The order subject to appeal is reversed and the cause is remanded for further proceedings consistent with this opinion. Costs are awarded to defendant.

We concur:

Stein, Acting P. J.

Margulies, J.

1. See *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1679; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) paragraphs 2:158 to 2:160.
2. See California Rules of Court, rule 3(d) [requiring an appeal within the earliest of three alternative extension periods].
3. The court's remark, "[Y]ou've given me an opinion of an accountant," suggests a cursory glance at the reply brief that did not consider the principal point that plaintiff's accounting failed to reflect \$117,962.23 paid by defendant.

