NOT DESIGNATED FOR PUBLICATION

No. 104,560

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EXPLORER, INC.,
Appellee,

v.

DURANOTIC DOOR, INC.,
and
MARK THOMAS,
Appellants.

MEMORANDUM OPINION

Appeal from Johnson District Court; GERALD T. ELLIOTT, judge. Opinion filed November 18, 2011. Appeal dismissed.

Ronald K. Barker, of Ronald K. Barker, P.C., of Lee's Summit, Missouri, and *Michael W. Wharton*, of Couch, Pierce, King & Wharton Chartered, of Overland Park, for appellants.

Geoff W. Hetley, of Hetley Law Firm, P.A., of Olathe, for appellee.

Before ATCHESON, P.J., ARNOLD-BURGER and BRUNS, JJ.

ARNOLD-BURGER, J.: A default judgment was entered against Duranotic Door, Inc. (Duranotic) when its counsel failed to appear at a pretrial conference before a district magistrate judge. Duranotic's motion to set aside the default judgment, filed 3 months later, was denied as untimely. Duranotic argued that the district magistrate judge lacked jurisdiction to hear the matter because the cause of action did not fall under the jurisdiction of the Kansas Code of Civil Procedure for Limited Actions (limited civil code). Duranotic did not appeal the denial of its motion to set aside the default, instead

choosing to continue to challenge the district magistrate judge's jurisdiction to hear the case. In the meantime, the plaintiff, Explorer, Inc. (Explorer) successfully and without objection, garnished Duranotic's bank account and filed a satisfaction and release of judgment. When Duranotic finally did appeal the district magistrate judge's ruling finding that he had jurisdiction over the case under the limited civil code, it did so out of time. Duranotic argues that the district magistrate judge did not have jurisdiction to enter the default judgment and the cause of action should be dismissed. Finding that Duranotic failed to timely appeal the district magistrate judge's rulings and that it has also acquiesced in the judgment, we dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

The path by which this case has arrived before this court is a long one, spanning a period of almost 7 years. The saga began in the closing months of 2004, when Explorer filed an action under the Kansas Code of Civil Procedure for Limited Actions (limited civil code) against Duranotic. Explorer sought to recover more than $75,000 for unpaid rent and taxes as well as for drywall and insulation damage at premises Duranotic leased from Explorer under a commercial and industrial lease agreement. After Duranotic was properly served with and answered the petition, the parties apparently worked toward settlement over the next 2 years.

Although properly notified, on January 5, 2007, Duranotic, through its counsel, failed to appear at the pretrial hearing. Accordingly, the district magistrate judge orally entered a default judgment against Duranotic, but stayed its execution for 20 days to allow Duranotic to "file [a] motion." The same day, counsel for Explorer sent a letter to counsel for Duranotic advising him of the court's order. When Duranotic failed to take any action, on January 31, counsel for Explorer sent counsel for Duranotic a fax advising him that since he had not received anything from Duranotic, he was going to file a journal entry of judgment and implored Duranotic's counsel to contact him if he had any

questions. On February 2, 2007, a journal entry of default judgment was entered against Duranotic for $79,796.88.

Almost 3 months later, Duranotic moved to set aside the default judgment based on (1) inadvertence or excusable neglect under K.S.A. 60-260(b), and (2) the magistrate judge's lack of subject matter jurisdiction over the cause of action under the limited civil code at K.S.A. 61-2802. Specifically, Duranotic argued that the action was excluded from coverage under the limited civil code because the cause of action did not arise out of a contract for the providing of goods, services, or money as required by K.S.A. 61-2802(a)(1); and it was an action for specific performance of a real estate contract, which is also excluded from coverage under the limited civil code under K.S.A. 61-2802(b)(2). So Duranotic asked that the default judgment be set aside as outside the district magistrate judge's jurisdiction and the case transferred to the chief district court judge for assignment and hearing under Chapter 60, as provided by K.S.A. 61-2911. Explorer objected because Duranotic failed to move to set aside the default judgment within 10 days as required under the limited civil code.

Following a hearing and supplemental briefing, on August 22, 2007, the district magistrate judge entered judgment denying Duranotic's motion to set aside the default judgment as untimely under K.S.A. 61-3301 because it was filed more than 10 days after the default judgment was entered. See *Rose & Nelson v. Frank*, 25 Kan. App. 2d 22, 26-27, 956 P.2d 729, *rev. denied* 265 Kan. 886 (1998). Duranotic did not appeal from this decision. Explorer subsequently successfully garnished Duranotic's bank account and filed a satisfaction and release of judgment.

At this point, one might conclude that the case was over. But that was not to be.

In November 2007—3 months after the district magistrate judge's final order and after Explorer filed the satisfaction and release of judgment—Duranotic filed a second

motion to set aside the default judgment. It characterized this second motion as a renewal of its previous request for dismissal for lack of subjection matter jurisdiction, since the district magistrate judge did not specifically rule on the jurisdiction issue in his August 22, 2007, decision. This motion lay dormant on the court's docket for almost a year before a hearing was scheduled. Eventually, the district magistrate judge orally denied Duranotic's motion, finding that he did have jurisdiction under the limited civil code based on the written lease agreement. However, memorializing that ruling took a laborious trek, resulting in the parties twice requesting the district magistrate judge's assistance in settling the journal entry under Supreme Court Rule 170 (2010 Kan. Ct. R. Annot. 249).

Ultimately, the court's journal entry denying Duranotic's second motion to set aside the default judgment was filed on July 31, 2009. Duranotic filed a notice of appeal from that decision to the district court on August 20, 2009—20 days after the final judgment.

The case came to a conclusion when the district court dismissed Duranotic's appeal. The district court held that the district magistrate judge did have subject matter jurisdiction over the action under the limited civil code, and, regardless, Duranotic had failed to timely appeal the district magistrate judge's order, thereby depriving the district court of jurisdiction. Duranotic then appealed to this court.

STANDARD OF REVIEW

The existence of jurisdiction is a question of law over which our scope of review is unlimited. See *Harsch v. Miller*, 288 Kan. 280, 286, 200 P.3d 467 (2009).

ISSUE PRESENTED

Duranotic argues that there was no subject matter jurisdiction under the limited civil code for the district magistrate judge to decide Explorer's cause of action; and because this is a jurisdictional issue, it can continue to raise this issue regardless of any statutory appeal time limits. Thus, Duranotic insists the default judgment should be set aside and the case remanded for a trial on the merits under Chapter 60.

Explorer responds that the district court (and, consequently, this court) was deprived of jurisdiction at three different stages in this matter: (1) when Duranotic failed to appeal the August 22, 2007, denial of its first motion to set aside the default; (2) when Duranotic failed to appeal the July 31, 2009, denial of its second motion to set aside the default judgment; and (3) when Duranotic acquiesced in the judgment by failing to object to the garnishment and satisfaction of the judgment. Thus, Explorer urges us to summarily dismiss Duranotic's appeal.

ANALYSIS

An overview of subject matter jurisdiction

Subject matter jurisdiction defines the legal authority of a particular court to hear a type of case or dispute. *Padron v. Lopez*, 289 Kan. 1089, 1106, 220 P.3d 345 (2009). A court must have subject matter jurisdiction as a prerequisite to entering a valid judgment. *In re Estate of Heiman*, 44 Kan. App. 2d 764, 766, 241 P.3d 161 (2010). In Kansas, the district courts "have general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law." K.S.A. 20-301. That includes subject matter jurisdiction over cases under both Chapter 60 (the civil code) and Chapter 61 (the limited civil code). Designating what was actually a Chapter 60 action as an action under the limited civil code does not render the action void. *Hole-in-One, Inc. v. Kansas Industrial Land Corp.*, 22 Kan. App. 2d 197, 200, 913 P.2d 1225, *rev. denied* 260 Kan. 993 (1996).

No consequence is set forth in the limited civil code for an improper designation. 22 Kan. App. 2d at 200. Instead, if it is determined that a cause of action should have been filed under Chapter 60, the proper action would be to simply amend the petition to reflect Chapter 60 and transfer the case, if necessary, from a district magistrate judge to a district judge. K.S.A. 61-2911.

Whether a district magistrate judge has the authority to hear a case is a different question. The jurisdictional authority of district magistrate judges is set out in K.S.A. 20-302b. If a district magistrate judge enters a decision for which he or she has no statutory authority, the decision is invalid. *State v. Valladarez*, 288 Kan. 671, 686-87, 206 P.3d 879 (2009). District magistrate judges clearly have the authority to hear cases brought under the limited civil code. However, if the case does not fall under the limited civil code, the district magistrate judge's jurisdiction is subject to several limits, including a cap of $10,000 on the amount in controversy. K.S.A. 20-302b(a)(1).

Duranotic's failure to timely appeal the district magistrate judge's decision

In this case, 3 months after a default judgment was entered against it and 28 months after it filed an answer in this case, Duranotic raised the issue of subject matter jurisdiction for the first time. It argued, by way of a motion to set aside the default judgment, that the district magistrate judge lacked jurisdiction over Explorer's cause of action under the limited civil code. The motion was denied as untimely.

Whether the district magistrate judge's decision to dismiss the motion to set aside the default was correct or whether the district magistrate judge had jurisdiction to enter the decision is not properly before us because Duranotic did not appeal the district magistrate judge's decision. Duranotic was required to appeal the decision within 10 days to vest jurisdiction in the district court. K.S.A. 61-3902; K.S.A. 60-2103a. Duranotic did not appeal the district magistrate judge's August 22, 2007, decision denying its first

motion to set aside the default judgment. In addition, even if we found that Duranotic extended its appeal rights by filing a second motion to set aside the default judgment, it did not appeal from the district magistrate judge's July 31, 2009, final judgment denying the second motion to set aside default within 10 days either. Therefore, the appeal must be dismissed. See *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006) (where record on appeal discloses lack of appellate jurisdiction, appeal must be dismissed).

Duranotic attempts to avoid such a conclusion by suggesting its challenge to subject matter jurisdiction trumps any procedural filing deadlines. If, in the opinion of Duranotic, the district magistrate judge's judgment was void as lacking subject matter jurisdiction under the limited civil code, it is free to continue to espouse its argument regardless of its failure to appeal decisions that are adverse to its position. Certainly, as Duranotic argues, the law is clear that subject matter jurisdiction can be raised at any time. See, *e.g.*, *Valladarez*, 288 Kan. 671, Syl. ¶ 1. Likewise, we recognize that a void judgment is a nullity and may be vacated at any time. See *Board of Jefferson County Comm'rs v. Adcox*, 35 Kan. App. 2d 628, 635-36, 132 P.3d 1004 (2006). But for an appellate court (whether the district court sitting on appeal or this court) to have authority to consider those legal principles, the party must first properly invoke appellate jurisdiction by filing a timely notice of appeal. The nature or the merits of the claims being advanced on appeal play no role in the determination of appellate jurisdiction. *In re D.M.-T.*, 292 Kan. 31, 35, 249 P.3d 418 (2011).

The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Kansas appellate courts have jurisdiction to entertain an appeal only if the appeal is taken in the manner prescribed by statutes, and our courts no longer recognize equitable exceptions to this rule. *Board of Sedgwick County Comm'rs v. City of Park City*, 293 Kan. ___, Syl. ¶¶ 1-3, 260 P.3d 387 (2011) (No. 100,157, filed September 9, 2011). As a result, we may exercise jurisdiction only in circumstances allowed by

statute and do not have discretionary power to entertain appeals from all district court orders. See *Williams v. Lawton*, 288 Kan. 768, 778, 207 P.3d 1027 (2009).

Once the issue of jurisdiction is raised, if a party disagrees with the court's ruling, it is required to properly appeal the ruling. In other words, although a party may raise the lack of subject matter jurisdiction at *any* time, a party may not raise it *many* times. When an appealable order is not appealed, it becomes the law of the case. *State v. Finical*, 254 Kan. 529, 532, 867 P.2d 322 (1994). Consequently, failure to timely appeal a final order divests an appellate court—including a district court sitting on appeal—of jurisdiction to review that judgment. See *In re Estate of Williams*, 238 Kan. 651, 654-56, 714 P.2d 948 (1986). Such is the case here. Duranotic failed to timely appeal an adverse ruling regarding the district magistrate judge's jurisdiction. Therefore, the district court did not acquire jurisdiction over the case on appeal, and neither do we.

Duranotic acquiesced in the judgment

Not only did Duranotic fail to properly appeal the district magistrate judge's ruling, it acquiesced in the judgment and has therefore waived the right to appeal.

Whether a party acquiesced to a judgment involves our jurisdiction to hear the matter, so it is a question of law subject to unlimited review. *Alliance Mortgage*, 281 Kan. at 1271.

Acquiescence is the result of the appellant's voluntary compliance with the judgment and cuts off the right of appeal. To find acquiescence in a judgment, appellate courts must be shown that the appellant either assumed burdens or accepted benefits of the judgment contested in the appeal. A party who voluntarily complies with a judgment cannot thereafter adopt an inconsistent position and appeal that judgment. 281 Kan. at 1271.

As noted, after the district magistrate judge denied Duranotic's first motion to set aside the default judgment, the default judgment was satisfied as a result of garnishment proceedings initiated by Explorer. Nothing in the record indicates Duranotic ever responded after being served with notice of issuance of the garnishment order under K.S.A. 61-3508; and counsel for Duranotic confirmed during oral argument that it had not taken any action to challenge the garnishment, either before or after it was final. This court has held under similar facts that a defendant's failure to move for a stay of execution or otherwise oppose a garnishment proceeding resulting in a full satisfaction of the judgment amounts to acquiescence. See *Vap v. Diamond Oil Producers, Inc.*, 9 Kan. App. 2d 58, 60-61, 671 P.2d 1126 (1983) (finding defendant acquiesced in judgment by allowing bank account to be garnished without filing stay of execution, and defendant's filing of motion to set aside default judgment did not prevent payment from being characterized as voluntary). In *Younger v. Mitchell*, 245 Kan. 204, 208, 777 P.2d 789 (1989), the Kansas Supreme Court approved the ruling in *Vap* that payment of a judgment may be considered voluntary even if it is made following issuance of execution. In discussing the case, the Supreme Court made particular note of the fact that Vap had not taken any action to halt execution of the judgment, hence he had acquiesced in the default judgment and waived his right to appeal. See also *Huet-Vaughn v. Board of Healing Arts*, 267 Kan. 144, 150, 978 P.2d 896 (1999) (citing *Vap*'s reasoning with approval).

Given that Duranotic failed to timely appeal the district magistrate judge's rulings and given that Duranotic acquiesced in the judgment, we are required to dismiss the appeal.

Appeal dismissed.

* * *

ATCHESON, J., concurring: I join in the dismissal of this appeal as moot. I do so, however, solely on the grounds that Defendant Duranotic Door, Inc. acquiesced in the judgment as outlined in the majority decision. The majority and concurring opinions in *Vap v. Diamond Oil Producers, Inc.*, 9 Kan. App. 2d 58, 671 P.2d 1126 (1983), apply here and require that result. Apart from acquiescence, this case presents a civil procedure quagmire. Unless absolutely necessary, I don't venture into quagmires, especially civil procedure ones. In this case, it isn't. So I won't.