RENDERED: AUGUST 6, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000204-MR

DAVID WADE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NOS. 08-CI-004766 & 91-CI-000782

POMA GLASS & SPECIALTY WINDOWS, INC., D/B/A AGC FLAT GLASS NORTH AMERICA; SUCCESSOR TO AMERICAN FLAT GLASS DISTRIBUTORS, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: The appellant, David Wade, appeals from an opinion and order of the Jefferson Circuit Court allowing Poma Glass & Specialty Windows, Inc.,

d/b/a AGC Flat Glass North America to pursue collection of its 1991 judgment against him.[1] The circuit court determined that the limitations period applicable to judgments, Kentucky Revised Statutes (KRS) 413.090(1), had not expired. For the reasons stated, we affirm.

The issue in this case is a narrow one: how do we define "execution" as that term is used in KRS 413.090(1)? In pertinent part, the statute states

> the following actions shall be commenced within fifteen (15) years after the cause of action first accrued:
>
> (1) An action upon a judgment or decree of any court of this state or of the United States, or of any state or territory thereof, *the period to be computed from the date of the last execution thereon*[.]

KRS 413.090(1)(emphasis supplied).[2]

As highlighted in the quote, the limitations period runs from the "date of the last execution." KRS 413.090(1). Wade interprets the single word "execution" in a technical sense, *i.e.*, the issuance of the formal process, known as a "writ of execution," for the collection of a judgment as described in KRS

[1] The judgment was by default and in the amount of $13,232.21. Upon Poma's motion, the 1991 action (*American Flat Glass Dist., Inc. v. Wade*, Jefferson Circuit Court, No. 91-CI-782) and Wade's declaratory judgment action were consolidated.

[2] A technical argument exists that, since the original 1991 action remained on the docket, and since it was through that action that Poma pursued collection by execution, garnishment and the filing of judgment liens, no "action upon the judgment" was "commenced" that could be barred by KRS 413.090(1). However, in accordance with our discussion of statutory construction and jurisprudential history, and in view of our previous determination that "the 'action' contemplated by the statutes of limitations involves judicial proceedings[,]" *Metts v. City of Frankfort*, 665 S.W.2d 318, 319 (Ky.App.1984)(interpreting KRS 413.250), we conclude that each of Poma's post-judgment collection efforts constituted the commencement of an action upon the original judgment.

426.020. The Jefferson Circuit Court concluded that, as the term is intended in KRS 413.090(1), the word "execution" has a more general meaning.

If Wade is correct, the limitations period has expired because Poma last caused the issuance of a writ of execution on April 2, 1991, and the limitations period would have ended April 2, 2006. However, if the circuit court is correct, then the fifteen-year limitations period began anew when Poma filed judgment liens pursuant to KRS 426.720 in 1992 and in 2000, and again most recently on March 8, 2005, when Poma last pursued garnishment proceedings pursuant to KRS 425.501.[3] We agree with the circuit court's interpretation of KRS 413.090(1).

The limitations statute was enacted as part of Kentucky Revised Statutes in 1942, but the relevant language can be traced to 1852. *Davidson v. Simmons*, 11 Bush 330, 74 Ky. 330, 332, 1875 WL 6748 (1875) ("Section 1 of article 3, chapter 63 of the Revised Statutes, which went into effect in 1852, fixed fifteen years as the period of limitations to actions on the judgments or decrees of the courts of the United States or of any state or territory thereof, the period to be computed from the date of the last execution thereon."). Although the law pertaining to enforcement and collection of judgments has seen notable administrative and substantive changes in the century and a half since the statute's

[3] The consolidated record shows that Poma has been pursuing collection efforts largely uninterrupted and primarily by means of garnishment orders and post-judgment discovery proceedings since the judgment was entered in 1991. Wade was aware of these efforts as indicated by his *pro se* filing of a pleading on May 8, 2003, denominated "Correction of Order of Garnishment" claiming that orders of garnishment sent to two of his business entities were improper because the 1991 judgment did not name those entities as defendants.

original enactment, our legislature never found its language incompatible with those changes. Nor do we.

We can immediately dispense with Wade's initial argument that *only* the issuance of a writ of execution will extend or restart the limitations period. More than a hundred years ago, our highest court said a partial payment in satisfaction of a judgment and execution will restart the limitations period.

> [I]f there had been a partial payment of the judgment, voluntarily made, by the defendant, within 15 years after September 28, 1872 [the issuance date of first writ of execution] when it was rendered, the running of the limitation in this case would have likewise been suspended; and, if the date of such partial payment had been less than 15 years prior to issual of the second execution, there would be no bar to either it or the execution issued in 1894.

White v. Moore, 100 Ky. 358, 38 S.W. 505, 505-06 (1897). And as Wade acknowledged in his reply brief, *Slaughter v. Mattingly*, 155 Ky. 407, 159 S.W. 980 (1913), held

> that after an execution on a judgment has been returned, "No property found," the judgment creditor has two ways to keep the judgment alive: He may keep it alive indefinitely by causing executions to issue on it from time to time within the period prescribed by the statute, *or he may keep it alive indefinitely by commencing an action on the judgment under section 439 of the Civil Code* within the time and in the manner prescribed by said section, and keeping the action on the docket. And, so long as it is pending, he may have alias attachments issued and levied on any property of the debtor subject to attachment, regardless of when the last attachment was issued in the action or the last execution was issued on the judgment.

Slaughter at 982 (emphasis supplied). By tracing the evolution of collection law, we see that *Slaughter* still holds the answer to the question in the case before us.

Slaughter was decided when the ancient rules of pleading and collection required the filing of a separate action in a court of equity in order to collect on a judgment obtained in a court of law. *Shepherd v. Haymond*, 291 Ky. 780, 165 S.W.2d 812, 816 (1942)("The reason for Section 439 *et seq.*, of the Civil Code of Practice, is that the plaintiff's claim or demand is purely a legal one and the law is inadequate to afford him complete redress by reaching over and out into the province of equity."). Only by filing a separate action in a court of equity, pursuant to section 439 of the old Civil Code, could a judgment creditor discover and garnish assets of the judgment debtor.[4] *Davidson v. Simmons, supra*, 74 Ky. at 333 (equity action "was the only kind of action that could then or can now be maintained upon a judgment of a court of this state"). When the Kentucky Revised Statutes supplanted the old Civil Code and the modern rules of procedure were adopted, the distinction between suits in equity and actions at law was eliminated. *Caudill v. Little*, 293 S.W.2d 881, 882 (Ky. 1956)("our new Civil Rules of Practice and Procedure abolish distinctions between a suit in equity and an action at law and provide that there shall be but one form of action"; citing Kentucky Rule of Civil Procedure (CR) 2). Specifically, the old Section 439 was replaced by KRS

[4] An action pursuant to KRS 439 required as a prerequisite that an execution be returned declaring, in whole or in part, "no property found to satisfy" the judgment. This requirement is retained, of course, in KRS 426.381.

426.381(1) which took into account the elimination of the equity/law dichotomy.[5] Today, a judgment creditor may proceed with collection efforts in the same proceeding in which the judgment was awarded. KRS 426.381(1). Furthermore, the judgment creditor now "may have an attachment against the property of the defendant in the execution, pursuant to the attachment procedures provided for in KRS Chapter 425." KRS 426.381(2). These attachment procedures include garnishment pursuant to KRS 425.501. While garnishment existed at common

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[5] Section 439 of the Civil Code read as follows:

> "After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution *may institute an equitable action* [that is, a new action] for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to the defendant, or holding money or property in which he has an interest, or holding evidences or securities for the same, may be also made defendants."

Cassada v. First Nat. Bank, 268 Ky. 373, 105 S.W.2d 149, 150 (1937)(quoting Section 439 of the Civil Code of Practice). When KRS 426.381(1) incorporated Section 439 into the revised statutes, the requirement of a separate action in equity was eliminated. KRS 426.381(1) reads:

> After an execution of fieri facias, directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution *may by an amended and supplemental petition filed in the action have the same redocketed* [that is, in the same action] and join with the execution defendant or defendants any person believed to be indebted to him or them, or to hold money or other property in which he or they have an interest, or to hold evidences or securities for the same. Upon the filing of such amended petition the case shall be transferred to the equity docket and summons issued thereon. In such supplemental proceeding *or in a separate suit in equity against such parties (at his option)* the plaintiff may have discovery and disclosure from the judgment creditor and his debtor or bailee, and may have any property discovered, or a sufficiency thereof, subjected to the satisfaction of the judgment.

While it may be time for the legislature to revisit this statute in light of modern practice, the language does not affect the outcome of the case *sub judice*.

law, these specific procedures did not; they were created for the first time by enactment of the statute in 1976, thereby expanding the available processes by which a judgment may be collected.

Slaughter specifically holds that a creditor relying on a judgment "may keep it alive indefinitely by commencing an action on the judgment under section 439 of the Civil Code within the time and in the manner prescribed by said section, and keeping the action on the docket." *Slaughter* at 982. It is logical to conclude that a creditor relying on a judgment may keep it alive indefinitely by pursuing the relief afforded by the successor statutes to section 439, *i.e.*, KRS 426.381 and KRS 425.501, *et seq*. and keeping the action on the docket. That is what occurred here.[6] We are buoyed in this reasoning by a number of considerations.

First, KRS 446.015 instructs that statutes be written "in [a] clear and coherent manner using words with common and everyday meanings."[7] When interpreting these words we assume that the legislature followed this directive so that we will ascribe to a word its common meaning, not a technical one. KRS 446.015 ("Enactment of a bill by the general assembly shall be a conclusive presumption that such bills conform to this section."). In this case, the word

[6] Wade argues that Poma failed to comply with KRS 426.381 because it never filed an "amended and supplemental petition." We disagree. Poma's collection efforts comported with KRS 426.381 because they came only "[a]fter an execution of fieri facias [was] returned . . . no property found" and in the form of a garnishment naming and summoning additional parties as garnishees who were compelled by KRS 425.501(8) to answer. This satisfies the statute's requirement of an amended and supplemental petition.

[7] KRS 446.015 was enacted in 1978. We must presume this rule of statutory interpretation is applicable to statutes enacted before 1978 despite the seeming technicality of the older statutes.

"execution" is used. Webster's Dictionary defines execution as "the act or process of executing." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 405 (10th ed. 1993). Execute means "to carry out fully." *Id.* Black's Law Dictionary defines execution as "[t]he act of carrying out or putting into effect[.]" BLACK'S LAW DICTIONARY 589-90 (7th ed. 1999).

Second, our use of the more common and general definition is consistent with authority that has addressed the question in a broader sense.

> As used in statutes the term "execution" often is construed in a broad sense as including more than the writ as already defined, although it is sometimes used as merely equivalent to a fieri facias. Thus, it sometimes embraces all the appropriate means of execution of the judgment; all means by which the judgments or decrees of courts are enforced; all processes issued to carry into effect the final judgment of a court; and all processes and proceedings in aid of, or supplemental to, execution that are customary in civil cases.

33 C.J.S. Executions § 1 (citations in footnotes omitted).

Third, this Court has specifically referred to the collection method used most often by Poma, garnishment, as a form of execution. *Brown v. Commonwealth*, 40 S.W.3d 873, 880 (Ky.App. 1999)("In *Barton v. Hudson*, [560 S.W.2d 20 (Ky.App. 1977)] this Court was asked to decide whether a joint checking account . . . was subject to *garnishment* [or] was immune from *such execution*." Emphasis supplied); *accord*, *Moory v. Quadras, Inc*., 970 S.W.2d 275, 277 (Ark. 1998)("a writ of garnishment is a form of 'execution' in the general sense as a post-judgment collection remedy"); *Division of Employment Sec. v.*

Westerhold, 950 S.W.2d 618, 621 (Mo.App. 1997)("Garnishment is a form of execution."); *Russell v. Fred G. Pohl Co.*, 7 N.J. 32, 80 A.2d 191, 194 (N.J. 1951)("Attachment and garnishment are forms of execution").

Fourth, the garnishment statute itself treats garnishment as a form of execution from which the debtor may claim exemption if such exemption is applicable in the debtor's particular case. KRS 425.501(4)(debtor may "claim the exemption of any property or debt that is exempt from *execution*"; emphasis supplied); KRS 425.501(5)("If . . . garnishee [possessed] property of the judgment debtor, or was indebted to him, and the property or debt is not exempt from *execution*, the court shall order the property or the proceeds of the debt applied upon the judgment." Emphasis supplied). Furthermore, for decades our legislature has equated attachment, garnishment and execution in its enactments.[8]

Finally, because Poma's last effort at collection undertaken in 2005 was the garnishment proceeding, we need not opine whether the judgment liens 1992 and 2000 filed pursuant to KRS 426.720 are executions under KRS 413.090(1). However, in an unpublished decision, this court determined that issuance of a judgment lien is a form of execution under KRS 413.090(1). *Davis v. Tucker*, 2004 WL 2417428 (No. 2004-CA-000299-MR)(Ky.App. October 29,

[8] The following statutes place attachments, garnishments, and executions on an equal footing. KRS 21.470; KRS 61.690(1); KRS 67A.350; KRS 154A.110(1); KRS 161.700; KRS 164.2871; KRS 164A.350(9); KRS 304.33-110(3)(a); KRS 304.33-580; KRS 304.39-260; KRS 427.010(1); KRS 427.030; KRS 427.040; and KRS 427.045. KRS 304.14-330(1)(b) specifically refers to the process of "garnishee execution".

2004). While we do not cite *Davis* as authority, we do so to indicate its consistency with our analysis.

Therefore, we hold that when a judgment creditor complies with KRS 426.381, the successor statute to section 439 of the prior Civil Code, and pursues garnishment proceedings pursuant to KRS 425.501, *et seq.*, the most recent date on which such garnishment proceeding is initiated is "the date of last execution" on a judgment as that term is used in KRS 413.090(1).

For the foregoing reasons, the opinion and order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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