SUPREME COURT OF KENTUCKY
No. 2010-SC-000572-

DAVID WADE — APPELLANT

COURT OF APPEALS No. 2009-CA-204-MR
JEFFERSON CIRCUIT COURT
No. 91-CI-782
No. 08-CI-4766

versus

POMO GLASS & SPECIALTY WINDOWS, INC., doing business AGC FLAT GLASS NORTH AMERICA, formerly known as AMERICAN FLAT GLASS DISTRIBUTORS, INC. — APPELLEE

REPLY BRIEF FOR APPELLANT, DAVID WADE

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ATTORNEY FOR APPELLANT

CERTIFICATE

I hereby certify that I have served a true copy of this pleading upon Gregory E. Watson, Esq., P.O. Box 43369, Louisville, KY 40253-0369, Hon. Audra Eckerle, Judge, Jefferson Circuit Court, Division 7, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202, and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, by mailing the same to each of them upon this 19th day of August, 2011

PHILIP C. KIMBALL
Attorney for Movant

STATEMENT OF POINTS & AUTHORITIES

Argument

This is the Reply Brief of the Appellant/Petitioner, David Wade.

ARGUMENT

Appellee's brief is an exposition of and supplement to (or expansion of) the arguments made in the Opinion of the Court of Appeals. Like the Court of Appeals, Appellee would have us believe that one attempting to collect on a judgment may extend or toll the fifteen (15) year statute of limitations found at KRS 413.090(1) by using *any* post-judgment collection procedure. In addition, argues the Appellee, such post-judgment enforcement mechanisms as Bills of Discovery and the recording of judgment liens also serve this purpose. Basically, anything more serious than a demand letter qualifies, according to the Appellee, to toll the relevant limitations period for actions upon judgments.

As the Court of Appeals sought to justify its holding by equating the remedy set forth at KRS 426.381 with garnishment procedures, so the Appellee would extend this equation to the recording of judgment liens and the use of Bills of Discovery and challenged garnishments. Appellant does not believe that any of this activity may be equated with the filing of, "… an amended and supplemental petition filed in the [original] action," the same to be redocketed in the original action, or "a separate suit in equity against

such parties as the "execution defendant ... or any person believed to be indebted to him or them [etc.]," as is authorized by KRS 426.381.

Again, KRS 426.381 exists primarily as a means for judgment creditors to conduct discovery against third persons to the judgment. A judgment creditor need not rely upon this particular statute in order to conduct discovery from the judgment debtor himself. As Appellee itself points out, such discovery is authorized, in Jefferson Circuit Court, by local rule 508, "Bills of Discovery." No doubt other judicial circuits have similar or identical rules which authorize the creditor to summon the debtor before a commissioner to give evidence about his assets.

Much as Appellee would like for the law to be otherwise, garnishments are obviously not intended as discovery vehicles. While the requirement of an affidavit may not preclude a garnishment's being quashed or denied, it certainly indicates that the procedure is not intended as a discovery device. The proper discovery mechanism for the discovery of assets held for a judgment debtor by third parties is a proceeding brought pursuant to KRS 426.381. It permits a direct action against such third parties. No other provision of Kentucky law does so.

It is true that all provisions of Kentucky law for the enforcement of judgments except for writs of execution are "supplementary proceedings."

This includes actions brought pursuant to KRS 426.381. the flaw in Appellee's argument is that the procedure set forth at KRS 426.381 is simply not the same procedure as any other provision for the enforcement of judgments. It is not a garnishment procedure. It is not a Bill of Discovery. It is not a recorded judgment lien. It is what it is; if it did not exist, perhaps the arguments of the Appellee and the Court or Appeals would have some force. Since it does exist, these arguments have no force, and amount to little more than opportunistic sophistry.

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A judgment lien, whatever it may be, does not act to extend or toll the fifteen year statute of limitations at issue in this case.

Appellant has no quarrel with the Appellee's assertion that a judgment creditor may wait until he has discovered whether his debtor has real property, and where it is located, before recording his judgment lien.

After all, the judgment creditor has fifteen (15) years from the issuance of the last execution, per KRS 426.020 and KRS 413.090(1), during which to perfect such liens!

That is what the language from KRS 426.720(1), cited by Appellee at page 6 of its brief is about; *perfecting* liens on real estate. It is not about extending any statute of limitations.

Appellee has cited no authority to the contrary, and has admitted that, "KRS 426.720 does not contain the word execution," (Appellee's Brief, P. 7).

Like garnishments, liens may be a form of "execution" as a matter of legal shorthand or ready reference, as Appellant has acknowledged at page 29 of his first brief. But neither liens nor "supplementary remedies" other than that described at KRS 426.381 serve in any manner to extend the statute of limitations on actions upon judgments for this reason. This is what *Slaughter v. Mattingly*, 155 Ky. 407, 159 S.W.980 (1913) says. Given the near identity of KRS 426.381 and Civil Code 439, the 1913 case is still good law.

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Appellee and the Court of Appeals protest too vehemently about the purported, "... elimination of the distinction between a suit in equity and an action at law," Appellee's Brief, P. 18).

Actually, the only difference between CC 439 and KRS 426.381is that, as Appellee itself stated, "... a judgment creditor may [now] proceed with collection efforts in the same case in which a judgment is awarded," (Appellee's Brief, P. 18).

The remedies of execution (legal) and "supplementary remedies" such as garnishments and the procedure specified at KRS 426.381 (equitable) remain distinct. Indeed KRS 426.381 still provides for a "separate suit in equity," if the judgment creditor so prefers. It also (archaically?) requires that, "Upon the filing of such amended petition (in the same case) the case shall be transferred to the *equity* docket and summons issued thereon," [emphasis added].

When all is said and done, other than the "same case" provision in KRS 426.381, it is practically identical to CC 439 as an enforcement remedy for judgment creditors. Certainly there is nothing in the differences between the former code provision and the current statute to undermine the holding of the *Slaughter* opinion, *supra*. That holding, again, requires a judgment creditor to use (and/or reuse) the execution remedy set forth at KRS 426.020 or the "amended and supplemental petition" or "separate suit in equity" provisions of CC 439 (now KRS 426.381) to keep his judgment alive. Failure to use either of these remedies during the proceeding fifteen years precludes any action upon his judgment.

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Finally, Appellee attempts to describe his enforcement attempts against one James Winn as its use of KRS 426.381.

This is not true. No proceeding pursuant to KRS 426.381 was ever filed against Winn. There was no reason for such an action. Appellee knew that Winn was a commercial tenant of Appellant who owed rent to him. There was nothing to discover from Winn himself about this situation. What Appellee was doing relating to Winn was trying to get him to honor garnishments Orders. He did not need KRS 426.381 and obviously did not attempt to use it to do this.

As Appellee argues, its efforts to get money out of James Winn to satisfy Appellee's judgment against Appellant arose from a "supplementary proceeding." Unfortunately for Appellee, the "supplementary proceeding" was that of garnishment and not the supplementary proceeding set forth at KRS 426.381.

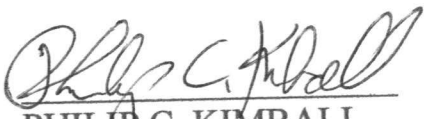
CONCLUSION

The law of post-judgment remedies has not changed enough since 1913 for this Court to reverse *Slaughter v. Mattingly, supra*, or to modify it except to indicate that KRS 426.381 is the only true successor statute to CC 439.

Since the Appellee last caused an execution to issue more than fifteen (15) years before the Appellant filed the action that is the subject of this appeal, and the Appellee never availed itself of the use of the remedy

described at KRS 426.381, this Court should provide to the Appellant the relief he requested in the Conclusion to his first brief.

Respectfully Submitted,



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