

RENDERED: May 5, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000845-DG

DONNIE H. WHITE

APPELLANT

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
v. HONORABLE SHEILA R. ISSAC, JUDGE
ACTION NO. 05-XX-00003

ESTATES OF ALBERT B. LEE
AND MARY L. LEE

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Donnie H. White has appealed from the March 28, 2005, order of the Fayette Circuit Court which affirmed the January 4, 2005, order of the Fayette District Court which reopened the Estates of Albert B. Lee and Mary L. Lee¹ (collectively, the Estates) and ordered the supersedeas bond be distributed to the appellees, the respective heirs of each of the Estates (collectively, the heirs). This Court granted

¹ These two estates were never officially consolidated.

White's motion for discretionary review on July 21, 2005.

Having concluded that the 15-year statute of limitations had been tolled during the pendency of the previous appeal, we affirm.

White was the attorney for the personal representative of the Estates. Various motions were filed in the Estates challenging the legal fees charged by White. The Fayette District Court entered an order on August 4, 1989, directing White to repay \$4,150.00 to the estate of Albert B. Lee and to repay \$8,000.00 to the estate of Mary B. Lee. White filed a notice of appeal in the Fayette Circuit Court on August 29, 1989, and executed a supersedeas bond in the amount of \$24,300.00, pledging real estate that he owned as surety thereon.²

The circuit court did not rule on White's appeal for almost four years.³ On May 17, 1993, the circuit court entered an order affirming the August 4, 1989, district court order and returned the cases to the district court for final disposition of all matters. The bond remained in place, the judgment

² Because the bond surety was real estate rather than a cash bond, White had to post surety of \$24,300.00 instead of the \$12,150.00 that was required.

³ According to the heirs' response to White's motion for discretionary review the delay between the appeal dated August 29, 1989, and the ruling by the circuit court on May 15, 1993, was because of the following: (1) two Fayette Circuit Court judges recused themselves; (2) the parties filed numerous motions; and (3) a settlement conference was ordered, but no resolution was obtained.

remained unpaid, and there was no attempt by the Estates to execute on the judgment.

On October 6, 1995, the Public Administrator of Fayette County, who had been appointed by the district court to finalize all pending matters for the Estates, filed a proposed settlement and a request for approval to make a final distribution of the assets of the Estates. The district court approved the proposed settlement by an order entered on October 27, 1995.⁴ The Public Administrator filed the final settlements of the Estates on November 21, 1995. At this time the Estates were deemed closed and no further action was taken.

On June 7, 1995, White had replaced the real property securing the supersedeas bond with cash in the amount of \$24,300.00,⁵ making the bond now a cash bond. That money was not distributed to the Estates prior to their being closed, but remained on deposit with the Fayette District Court Clerk. Again, no attempt had been made by the heirs to execute on the judgment and/or collect the money. No action was taken with regard to the funds being held by the district court clerk until August 10, 2004, when the district court, on its own motion, sent to all parties and to all counsel who had been counsel of

⁴ This proposed settlement referred to the judgment against White, although no attempt had been made to collect on the judgment.

⁵ White replaced the real estate bond with \$24,300.00 cash even though the original surety was only \$12,150.00 cash.

record at any time during the administration of the Estates a notice of intent to release the bond. White, as well as counsel for the heirs, filed motions requesting that the funds be distributed to their respective clients. The district court held a hearing on October 24, 2004, and after reviewing written arguments, it entered findings of fact and conclusions of law and an order on January 4, 2005. The order directed that the Estates be reopened for the limited purpose of receiving the funds from the Fayette District Court Clerk that were being held in accordance with prior orders of the district court.

White then appealed the district court's January 4, 2005, order to the Fayette Circuit Court on January 12, 2005, which affirmed the ruling in its entirety by an order entered on March 28, 2005. White then filed a motion for discretionary review with this Court on April 26, 2005, which was granted on July 21, 2005.

White argues that the statute of limitations began to run on August 4, 1989, the date the district court's final and appealable order ordered White to pay the money to the heirs.⁶

⁶ White argues in his motion for discretionary review that there were no subsequent orders of any court providing a new ruling. It simply affirmed the original findings of the district court on August 4, 1989. White also notes in his motion for discretionary review that the supersedeas bond executed for the August 4, 1989, order was not in effect for the May 28, 2005, order. White raises the question in his motion for discretionary review that since the order of August 4, 1989, expired on August 3, 2004, as to what order is being enforced by payment of proceeds of supersedeas bond to the heirs.

He further argues that in order for the 15-year statute of limitations to be tolled, a party seeking to enforce the judgment must execute on the judgment. He argues that since execution did not occur, the statute was not tolled and the statute of limitations barred any recovery after August 2004. Thus, he contends the \$24,300.00 he placed into the account with the district court clerk should be returned to him.

The heirs argue that the statute of limitations was tolled when White appealed the August 4, 1989, order of the district court and posted the supersedeas bond. The heirs contend that this tolling lasted at least until May 17, 1993, when the circuit court issued an opinion in White's appeal. The heirs argue that when White posted the bond, he precluded the Estates from taking any action until such time as the appeal was ruled upon which did not occur for nearly four years.

White argues that the controlling law in this case is KRS⁷ 413.090 which states, in pertinent part, as follows:

Except as provided in KRS 396.205, 413.110, 413.220, 413.230 and 413.240, 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

⁷ Kentucky Revised Statutes.

computed from the date of the last execution thereon.

Thus, White argues that the judgment had to be executed within 15 years of its entry. The heirs do not concede that KRS 413.090 applies to the August 4, 1989, district court order;⁸ however, assuming that it does, they argue that White's action of appealing to the circuit court and in posting a supersedeas bond clearly tolled the statute of limitations established in KRS 413.090. Thus, according to the heirs the statute of limitations had yet to expire and would not do so until May 16, 2008.

In order to extend the statute of limitations, a party must execute⁹ on the judgment, or otherwise the 15-year statute of limitation applies.¹⁰ To toll the running of the statute,¹¹ the execution must be issued on the debt and not just on costs. "[A debtor] may keep [a judgment] 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 . . . within the time

⁸ The heirs argue in their response to White's motion for discretionary review that the August 4, 1989, order was a "directive" not a judgment against White, so KRS 413.090 does not apply. However, the heirs fail to set out which statute they believe applies in this case.

⁹ See 33 C.J.S. Executions §2 (Supp. 2005) (stating that an execution is a remedy but is not "a cause of action, an action, nor a special proceeding").

¹⁰ Looney v. Justice, 299 Ky. 729, 730, 187 S.W.2d 289, 290 (1945).

¹¹ Id.

and in the manner prescribed . . . and keeping the action on the docket.”¹²

White notes that more than 15 years had passed between the date of the original order and the district court’s notice of intent. The heirs admit that prior to the district court’s notice on August 10, 2004, they had taken no action to enforce the judgment; however, they argue that during this period they were precluded from taking action during part of this period as a result of the appeal. Thus, the heirs argue that if KRS 413.090 applies, they have until May 16, 2008, to enforce the district court judgment. White claims there is no case law or statutory law to support this argument. We disagree.

The heirs cite in support of their argument CR¹³ 62.03, which states in section 1, in part, that “[w]hen an appeal is taken the appellant may stay enforcement of the judgment by giving a supersedeas bond as provided in Rule 73.04.” “[I]f such judgment be obstructed by appeal, supersedeas or injunction, the time of such obstruction shall also be disallowed’” [citations omitted].¹⁴ This Court has stated that the period of time that a judgment is superseded cannot be counted as part of the statute of limitations period. In

¹² Slaughter v. Mattingly, 155 Ky. 407, 159 S.W. 980, 982 (1913).

¹³ Kentucky Rules of Civil Procedure.

¹⁴ McGovern v. Rectanus, 139 Ky. 365, 105 S.W. 965, 967 (1907).

Cavanaugh v. Britt,¹⁵ our former Court of Appeals stated as follows:

In the case now before us the debtor superseded the judgment. . . . This deprived the appellee of the right to bring any action looking to the collection or even the protection, of his judgment. The superseding of it prevented any step in that direction. This condition resulted from the act of the debtor who was a necessary party to any suit to annul his conveyance. The law gave him the right to thus stop his creditor from proceeding to collect his demand; and it would be unreasonable to permit him to exercise this right, and then allow one holding under a fraudulent conveyance from him to claim that the time during which the right to sue had been thus superseded should be estimated as a part of the limitation. This would bar the creditor of a right by lapse of time, when, during the same time, he was forbidden by law from exercising the right, and would have been in contempt of court if he had attempted to do so. It was decided in Johnson v. Williams, 82 Ky. 45, that, after a judgment has been obtained and superseded by the debtor, the creditor has no right to bring an action upon it, and protect it by suing out an attachment against the debtor's property. He cannot harass the debtor with another suit while the judgment is thus suspended, and the right to it in question. This being so, it is not supposable that such a solecism exists in the law as to say that one must exercise a right within a certain period, or he shall be barred from doing so, when during that same time, it forbids the exercise of the right.¹⁶

¹⁵ 90 Ky. 273, 13 S.W. 922 (1890).

¹⁶ Cavanaugh, 13 S.W. at 923.

For the foregoing reasons, we affirm the order of the
Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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