



In the Missouri Court of Appeals Eastern District

DIVISION FOUR

UNIFUND CCR PARTNERS,	)	No. ED109524
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Louis County
v.	)	2107AC-13029-01
	)	
GILES COBBINS,	)	Honorable Virginia W. Lay
	)	
Appellant.	)	FILED: October 5, 2021

Giles Cobbins appeals the circuit court’s denial of his motion to quash service of process and to set aside the revival of a monetary judgment against him and in favor of Unifund CCR Partners (“Unifund”). We conclude the circuit court erred in denying Cobbins’s motion because service of process of Unifund’s motion to revive the judgment was ineffective in that Cobbins was not personally served. The judgment is reversed, and the case is remanded.

Factual and Procedural Background

The underlying case arose from a breach of contract action filed by Unifund, as assignee of Palisades Collection, LLC, to recover the outstanding balance on Cobbins’s credit card. On September 18, 2007, the circuit court entered a default judgment in favor of Unifund and against Cobbins for \$4,690.78 plus interest from the date of the judgment.

Almost 10 years later, on September 6, 2017, Unifund filed a Rule 74.09¹ motion to revive the judgment against Cobbins. Unifund requested appointment of a special process server to serve Cobbins at 7417 Liberty Avenue in St. Louis, Missouri, and the circuit court issued an order to show cause. A person named Giles Cobbins was served at that address and appeared at the show-cause hearing, but the circuit court quashed service because it determined he was a different Giles Cobbins than the defendant in the original action.

On February 2, 2018, Unifund requested an order of publication, informing the circuit court that personal service could not be obtained on Cobbins, that he could not be found and that his last known address was 7417 Liberty Avenue. On March 27, 2018, the circuit court issued a notice upon order for service by publication. On July 3, 2018, Unifund filed its affidavit of publication, which indicated the notice had been published in a newspaper.

Unifund gave notice that it would argue its motion to revive on August 27, 2018 and mailed a copy of the notice to 7417 Liberty Avenue. Cobbins did not appear on that date, and the circuit court entered an order reviving the September 2007 judgment. In October 2020, Unifund garnished Cobbins's bank account, seeking a total of \$19,829.21.

The following month, Cobbins filed a motion to quash service and to set aside the revived judgment, contending the 2007 judgment should be presumed paid and satisfied because 10 years had elapsed since its entry and the judgment had not been revived through personal service on him as required by section 516.350.² In an affidavit attached to the motion, Cobbins averred he had never been served with or otherwise received Unifund's motion to revive the judgment and that he

¹ All rule references are to the Missouri Supreme Court Rules (2017), unless otherwise indicated.

² All statutory references are to the Revised Statutes of Missouri (2016), unless otherwise indicated.

did not have knowledge of it until his bank account was garnished. After a hearing, the circuit court denied Cobbins's motion. This appeal follows.³

Standard of Review

The sole issue presented in this appeal is whether the circuit court properly applied the law governing motions to revive judgments. This is a purely legal issue that we review de novo. *Capitol Fin. Grp., LLC v. Bray*, 603 S.W.3d 700, 702 (Mo. App. E.D. 2020).

Discussion

In his first point on appeal, Cobbins argues the circuit court erred in denying his motion to quash service and to set aside the judgment of revival “because service by publication was improper.” In his second point, Cobbins contends the circuit court also erred in denying his motion because Unifund filed its motion for revival in the wrong sub-case number. We conclude Cobbins's first point has merit and, because that point is dispositive, we do not address his second point.

The procedures for reviving a judgment are set forth in Rule 74.09, which provides:

- (a) When and by Whom. A judgment may be revived by order of the court that entered it pursuant to a motion for revival filed by a judgment creditor within ten years after entry of the judgment or the last prior revival of the judgment.
- (b) Order to Show Cause. Upon the filing of a motion of revival of a judgment, an order shall issue to the judgment debtor to show cause on a day certain why such judgment should not be revived. The order to show cause shall be served pursuant to Rule 54 on the judgment debtor, his successors in interest, or his legal representatives.
- (c) Judgment of Revival. If the judgment debtor, his successors in interest, or legal representatives fail to appear and show cause why the judgment should not be revived, the court shall enter an order reviving the judgment.

³ A circuit court's order regarding the revival of a judgment is appealable as a “special order after final judgment in the cause” pursuant to section 512.020(5). *Unifund CCR Partners v. Abright*, 566 S.W.3d 594, 594 n.2 (Mo. banc 2019).

Rule 74.09(a)-(c); *see also Bray*, 603 S.W.3d at 702.

Rule 74.09's procedures for the revival of a judgment and lien are similar to older proceedings on an application for a writ of scire facias, which is outlined in sections 511.370 to 511.430. *See Hanks v. Rees*, 943 S.W.2d 1, 3-4 (Mo. App. S.D. 1997); *Meyer v. Ragar*, 935 S.W.2d 97, 99 n.2 (Mo. App. W.D. 1996). Those sections provide that an individual "may, at any time within ten years, sue out a scire facias to revive a judgment and lien; but after the expiration of ten years from the rendition of the judgment, no scire facias shall issue." Section 511.370.

The presumption of payment statute, section 516.350, echoes the 10-year limitation period for revivals of judgments. That section provides, in relevant part:

Every judgment, order or decree of any court or record . . . shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.

Section 516.350.1.

In other words, judgments are presumed paid and satisfied 10 years after entry of the judgment unless a payment on the judgment has been entered upon the record or the judgment is revived. In clear terms, the presumption of payment and satisfaction applies unless a judgment "has been revived upon personal service duly had upon the defendant or defendants therein." *Id.* The only exception to this personal service requirement—an exception that does not apply here—pertains to "[a]ny judgment, order, or decree awarding unpaid rent," which "may be revived upon publication consistent with the publication requirements of section 506.160 and need not be personally served on the defendant." Section 516.350.5. Given this specific reference to revival

of judgments upon personal service, section 516.350 is inconsistent with sections 511.410 through 511.430, which allow for service by publication of a scire facias if the defendant “cannot be found.” Section 511.410.

The Supreme Court of Missouri construed these sections in *Driscoll v. Konze* (“*Driscoll I*”), 296 S.W.2d 31 (Mo. 1956) and *Driscoll v. Konze* (“*Driscoll II*”), 322 S.W.2d 824 (Mo. 1959). In *Driscoll I*, the court held that, under sections 511.400 to 511.410, a defendant must be personally served with the scire facias if the defendant can be found in the state and that service by publication is authorized only if the defendant “is a nonresident or for any other reason cannot be found, for purposes of service, in this state.” 296 S.W.2d at 34.

Three years later, in *Driscoll II*, the court acknowledged the *Driscoll I* opinion “may have indicated by implication that if the publication made in that case had been based on the finding noted, good service by publication would have been had and the ensuing judgment based on such service would have been valid.” 322 S.W.2d at 830. The *Driscoll II* court clarified that such a conclusion would be “misleading” in light of the express requirement of personal service set forth in section 516.350, RSMo (1949). *Id.* at 830-31. The court explained that “even though service of a scire facias by publication is authorized . . . a judgment must, nevertheless, be revived upon *personal service* . . . if the bar of the presumption of payment statute, Section 516.350, is to be avoided.” *Id.* The court continued:

Desirable as it is to have an effective procedure for reviving a judgment against a judgment debtor whose whereabouts are unknown and who, therefore, may not be personally served, ***the language of Section 516.350 seems unmistakably plain in providing for revival only upon personal service.*** Whether Section 516.350 should be harmonized and made consistent with other statutory provisions authorizing revival of judgments on the service of scire facias by publication (e.g., by substituting for “upon personal service” the words “upon such service as may be authorized by law”) is a matter for the legislature.

Id. at 831 (emphasis added).

Unifund primarily relies on *Lammers v. Lammers*, 884 S.W.2d 389, 391 (Mo. App. W.D. 1994), where the Western District held a judgment of revival was valid even though the defendant had only been served by publication. *Id.* at 391-93. That case, however, is inapposite because it was based on rules that are no longer in effect. In holding that service by publication was sufficient, the *Lammers* court followed former Rules 74.40 to 74.42, which were in effect from April 30, 1960 to January 1, 1988. *Id.* at 392 n.3. Those former rules governed revivals of judgments during the time period at issue in *Lammers* and expressly allowed service by publication of motions to revive when the defendant could not be found. *Id.* at 391-92. Indeed, the *Lammers* court acknowledged those former rules were “in conflict with [section] 516.350 and the Supreme Court’s construction of that statute in *Driscoll [II]*,” but concluded that, “under Rule 41.02, the rules allowing for service by publication supersede[d] the requirement of personal service in [section] 516.350 and *Driscoll [II]*.” *Id.* at 392; *see also* Rule 41.02 (providing that Rules 41 to 101 “supersede all statutes and existing court rules inconsistent therewith”).

The implication of *Lammers* is that in the absence of rules similar to those governing that case, “[t]he Missouri Supreme Court’s strict interpretation of the [section] 516.350 personal service requirement” controls. *See Lammers*, 884 S.W.2d at 392. The former rules on which the *Lammers* holding was based were superseded by Rules 74.08, 74.09 and 74.10 (effective January 1, 1988), which govern the case before us. *Id.* at 392 n.3; *see also Strunk v. Com. Plastics Co.*, 800 S.W.2d 779, 781 (Mo. App. S.D. 1990).

Rule 74.09(b) provides that the order to show cause why the judgment should not be revived must be served on a judgment debtor pursuant to Rule 54, which sets forth the requirements for service of process in numerous types of actions. Rule 54.12(c) is the only sub-part of Rule 54 that allows for service by publication. Rule 54.12 is titled “Service – In Rem or Quasi In Rem

Civil Actions,” and applies only to “civil actions affecting a fund, will, trust, estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court.” Rule 54.12(a). Although a proceeding to revive a personal money judgment is not itself a proceeding in personam and is merely a continuation of the previous action, *see State ex rel. Silverman v. Kirkwood*, 239 S.W.2d 332, 335 (Mo. 1951), neither is such a revival proceeding an action “affecting a fund, will, trust, estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court” that is covered by Rule 54.12. Therefore, Unifund could not effectuate service by publication pursuant to that rule.

Like the former Rules 74.40 and 74.41 governing proceedings to revive judgments, Rule 74.09 could have been drafted to expressly provide for service by publication. But it was not drafted that way and instead directs a judgment creditor to effectuate service of process as set forth in Rule 54, which only allows for service by publication in limited circumstances that are not present in this case. Similarly, the presumption of payment statute requires revival only upon personal service except in the limited circumstance of unpaid rent awards. *See* section 516.350. Rule 74.09 is therefore not inconsistent with section 516.350 and the two provisions should be read together.

Unifund argues this Court recently “acknowledged the validity of service by publication with respect to revivals of judgments” in *Bray*. Unifund specifically relies on one passage in *Bray* in which this Court noted that “[t]he only available defenses to revival of a judgment are those concerning ‘whether the judgment creditor initiated the proceeding within the prescribed time of ten years; whether service, either personal or by publication, was obtained on the judgment debtor; whether the judgment existed; and whether the judgment was satisfied.’” 603 S.W.3d at 703 (quoting *Elliott v. Cockrell*, 943 S.W.2d 328, 330 (Mo. App. E.D. 1997)). Unifund’s reliance on

Bray, however, is misplaced. *Bray*'s mention of service "either personal or by publication" referenced the fact that there are circumstances where personal service in a revival proceeding is necessary and circumstances where service by publication is authorized. See section 516.350 and Rule 54.12. Contrary to Unifund's assertion, *Bray* did not hold that all judgments may be revived upon service by publication. See *Bray*, 603 S.W.3d at 701-04.

The present case involves neither the revival of a judgment awarding unpaid rent nor an action allowing for publication under Rule 54.12. We are therefore bound by the "unmistakably plain" language of section 516.350 providing for revival only upon personal service, which is consistent with Rule 74.09. See *Driscoll II*, 322 S.W.2d at 831. Because the show cause order to Cobbins was only served by publication, the circuit court erred in failing to quash service and set aside the judgment of revival. Point I is granted.

Conclusion

For the foregoing reasons, we reverse the judgment of the circuit court denying Cobbins's motion to quash service of process and to set aside the judgment of revival. We remand for further proceedings consistent with this opinion.

A handwritten signature in blue ink, appearing to read "M. Gardner", written over a horizontal line.

MICHAEL E. GARDNER, Presiding Judge

James M. Dowd, J., concurs.
Lisa P. Page, J., concurs.