SD36233

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

BERMAN, DELEVE, KUCHAN & CHAPMAN, LLC,

Appellant,

vs.

417 RENTALS, LLC,

Respondent.

On Appeal from the Circuit Court of Greene County
Honorable Jason R. Brown, Circuit Judge
Case No. 1931-CC00096

REPLY BRIEF OF THE APPELLANT

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Reply Argument

A. This Court reviews the trial court's judgment *de novo*.

In its opening brief, Berman Deleve Kuchan & Chapman, LLC ("BDKC") stated that both its points in this appeal from the trial court's judgment setting aside the registration of a purported foreign judgment are reviewed *de novo* (Brief of the Appellant ["Aplt.Br."] 18). It pointed to five decisions concerning requests to set aside a purported foreign judgment, including the most recent one from the Supreme Court of Missouri, all of which held that such a judgment is reviewed *de novo* (Aplt.Br. 18) (citing *Blanchette v. Blanchette*, 476 S.W.3d 273, 277 (Mo. banc 2015); *The Cadle Co. II, Inc. v. Hubbard*, 329 S.W.3d 706, 709 (Mo. App. 2010); *Doctor's Assocs., Inc. v. Duree*, 30 S.W.3d 884, 887 (Mo. App. 2000); *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 301 (Mo. App. 1997); *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 32 (Mo. banc 1991)).

In response, and without addressing any of BDKC's authorities, 417 Rentals, LLC ("417") argues that review is for "abuse of discretion," reciting the familiar "clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of care consideration" standard (Brief of the Respondent ["Resp.Br."] 12). 417 apparently believes this is because the motion to set aside the registration it filed below invoked Rule 74.06, and abuse of discretion is the general standard on a Rule 74.06(b) motion (Resp.Br. 12).

417's argument is without merit. An ordinary Rule 74.06*(b)* motion to set aside a judgment, an independent proceeding requiring the production of evidence, is reviewed on the merits for abuse of discretion. *See McCullough*

v. Commerce Bank, 349 S.W.3d 389, 392 (Mo. App. 2011) (denial on merits of post-judgment motion for new trial filed as Rule 74.06(b) motion); *Clark v. Clark*, 926 S.W.2d 123, 126 (Mo. App. 1996) (grant on merits of Rule 74.06(b) motion to set aside default judgment). But 417's motion was not a Rule 74.06(b) motion at all, let alone one for which evidence was produced (Aplt.Br. 27). Instead, it was a motion to set aside the registration of a purported foreign judgment, the judgment on which every decision from this Court and the Supreme Court hold is reviewed *de novo* (Aplt.Br. 18).

This makes sense. Even where review is for abuse of discretion, a trial court "can abuse its discretion … through the application of incorrect legal principles." *State v. Taylor*, 298 S.W.3d 482, 492 (Mo. banc 2009). So, when a trial court's exercise of discretion is challenged on legal grounds, no deference is warranted and this Court's review is *de novo*. *See id.*; *Bohrn v. Klick*, 276 S.W.3d 863, 865 (Mo. App. 2009); *Hurlock v. Park Lane Med. Ctr., Inc.*, 709 S.W.2d 872, 880 (Mo. App. 1985). A court necessarily abuses its discretion when it bases an otherwise discretionary ruling on an erroneous legal conclusion. *Bohrn*, 276 S.W.3d at 865.

Whether a registration of a purported foreign judgment should have been set aside is a question of law (Aplt.Br. 18). And both of BDKC's points challenge the trial court's judgment doing so here on purely legal grounds: (1) whether the court had authority to do so and (2) if it had that authority, whether the purported foreign judgment at issue was entitled to full faith and credit. So, even if review technically would be for abuse of discretion, these legal conclusions still would be reviewed *de novo*.

B. No procedure 417 invoked six months after service on it authorized the trial court to set aside the registration of the Order as a foreign judgment.

In its first point in its opening brief, BDKC explained that the trial court lacked power to set aside the registration of the Bankruptcy Court's interim order awarding BDKC $146,848.50 in attorney fees and $13,980.57 in costs ("the Order") in its representation of 417 Rentals, LLC ("417") as a foreign judgment (Aplt.Br. 16, 19-32). This is because when 417 did not object to the registration within 30 days after service on it, under Rule 74.14 and § 511.760, R.S.Mo. the registration became a final Missouri personal judgment against 417 (Aplt.Br. 20-23, 26-27).

At that point, the trial court only could set the registration aside under Rule 74.06(b), an independent action that 417 had to properly plead and prove attacking the registration, not the underlying Order (Aplt.Br. 23-25, 27). But the only procedures 417 invoked six months after service were to argue the registration was a "clerical error" under Rule 74.06(a), was "fraud" under Rule 74.06(d), and 417 had "good cause" under § 511.200, R.S.Mo. (Aplt.Br. 27-32). This was insufficient, as there was no "clerical error," 417 did not plead or prove fraud, and § 511.200 is an obsolete, inapplicable statute with which 417 did not comply anyway (Aplt.Br. 27-32). Instead, 417 had to make any argument that the Order was not entitled to full faith and credit in a timely objection to registration, which it waived (Aplt.Br. 32).

417 barely responds to BDKC's first point at all. It spends nearly all of its response arguing that the Order was not entitled to full faith and credit and so should not have been registered as a foreign judgment (Resp.Br. 13-

19). But as BDKC explained in its opening brief, under § 511.760.8, to make that argument below 417 had to do so in a timely objection to registration within 30 days of service, and because it did not it waived the issue (Aplt.Br. 22, 32). An argument that the Order was not entitled to full faith and credit is a defense to registration, and under § 511.760.8 any defense to registration has to be raised within 30 days of service or otherwise is waived (Aplt.Br. 32) (citing *Gentry v. Rush Truck Leasing, Inc.*, 124 S.W.3d 490, 491-92 (Mo. App. 2003); *Kilgore v. Kilgore*, 666 S.W.2d 923, 928 (Mo. App. 1984)). 417 offers no response to this at all, because it cannot.

Beyond that, 417 just calls BDKC's first point an "attempt to confuse the relevant issues," a "rambl[ing] on about Rule 74.06 pleading and proof," and "a 'smoke and mirrors' approach designed to 'muddy the waters'" (Resp.Br. 19-20). It says that the *real* issue is "that the [O]rder itself is not a judgment" (Resp.Br. 19). But again, the problem is that for 417 to make that argument below, § 511.760.8 required it to do so within 30 days of service on it (Aplt.Br. 32). Because it did not, it only can do so procedurally under some lawful auspice of Rule 74.06(b) (Aplt.Br. 23-25, 27). It did not, leaving the trial court without power to entertain its argument six months after the argument should have been made (Aplt.Br. 27-32).

The law of Missouri does not allow 417 to be served process, do nothing for six months, and then come into court and for the first time mount a defense to registration. The trial court erred in permitting this.

The trial court lacked power to set aside the registration of the Order. This Court should reverse its judgment and order it re-registered.

C. Regardless of whether the Order was or could be denominated a "judgment" under the Rules of Bankruptcy Procedure, under federal law it is enforceable against 417 in Missouri.

In its second point, BDKC explained that even if the trial court somehow had authority to consider 417's belated defense to registration, it erred in holding that the Order was not entitled to full faith and credit (Aplt.Br. 17, 33-44).

This is because any judgment of any American court, however denominated, that is enforceable by the judgment creditor against the judgment debtor under the laws of that court is entitled to full faith and credit and is registrable as a foreign judgment in Missouri (Aplt.Br. 34-36). The Order here granted the motion of BDKC, 417's counsel in its bankruptcy, for an interim allowance of fees under 11 U.S.C. § 331 (Aplt.Br. 43). As a matter of federal law, such an interim order is final and enforceable by the counsel against the debtor once the bankruptcy case has been dismissed (Aplt.Br. 36-39). This made it entitled to full faith and credit and registrable in Missouri, just as every other state court has held when faced with such an order in this posture (Aplt.Br. 39-44).

1. The Bankruptcy Court's decision not to re-denominate the Order as a "judgment" does not affect the Order's enforceability.

In response, 417 does not address a single one of BDKC's authorities (Resp.Br. 13-19, 20-25). Instead, 417 grounds its argument on the fact that the Bankruptcy Court later denied BDKC's motion to re-denominate the Order as a "judgment" (Resp.Br. 13-19, 20-25). It says that this means the Order "is not a final determination by the Bankruptcy Court" (Resp.Br. 17),

"is not a final determination on the merits and is not certain and unconditional" (Resp.Br. 19), and so "is a not a judgment" that can be registered in Missouri (Resp.Br. 21).

This is without merit. The Bankruptcy Court may well have been correct that the Order could not be denominated "judgment" under the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 7054(a) and 7058 only provide that a document can be denominated a "judgment" in bankruptcy court in an adversary proceeding. And because 417's Chapter 11 proceeding was not an adversary proceeding, it was not one in which a "judgment" could be entered. That is exactly why the Bankruptcy Court denied the request to re-denominate the Order: "This Court is authorized to enter judgments in adversary proceedings under Rule 7058. Notably, Rule 7058 does not apply to contested matters under Rule 9014" like 417's Chapter 11 proceeding (D9 p. 3).

But that does not mean that the Order is not enforceable by BDKC against 417. To the contrary, as in all the decisions BDKC cited in its opening brief, to which none of which 417 responds at all, under 11 U.S.C. § 349(b)(3) (a statute 417 also ignores) all orders granting counsel's motion for an interim allowance of fees in a bankruptcy case under 11 U.S.C. § 331 automatically become final and enforceable by the counsel against the debtor once the bankruptcy case has been dismissed (Aplt.Br. 36-39).

Nor was the Bankruptcy Court wrong that at the time it was entered, the Order was not final. Note that in denying the request to redenominate, the Bankruptcy Court used the past tense: "The Order allowing interim

compensation ***was*** not a final determination of reasonableness and necessity of the services provides [*sic*] since interim fees are always reviewable pending determination of the final application for compensation. The fact that the case ***was*** dismissed before Counsel could submit a final application does not convert the Court's Order into a 'Judgment'" (D9 p. 3) (emphasis added).

But the Bankruptcy Court did not hold that the Order was *unenforceable* after the dismissal of the bankruptcy. Nor could it, because that would be wrong as a matter of law (Aplt.Br. 36-39). As in all the decisions BDKC cited in its opening brief, the Order became enforceable by BDKC against 417 by automatic operation of 11 U.S.C. § 349(b)(3) as soon as the bankruptcy was dismissed (Aplt.Br. 36-39). Indeed, in *Wolf v. Sweports, Ltd.*, the bankruptcy court entered a similar order to the Bankruptcy Court here, refusing to clarify the interim fee order or call it a "judgment," but the Illinois Appellate Court held this did not matter, as the order automatically became enforceable by the counsel against the debtor as soon as the bankruptcy was over, making it entitled to full faith and credit and registrable under Illinois' identical Uniform Enforcement of Foreign Judgments Act to Missouri's. No. 1-18-0584, 2019 WL 2000555 at *1, 7-9 (Ill. App. May 2, 2019). 417 offers no response to *Wolf*, because it cannot.

As a matter of both federal and Missouri law, the Bankruptcy Court's order denying BDKC's motion to redenominate the Order as a "judgment" has no bearing on its enforceability in Missouri, and therefore its registrability as a foreign judgment in Missouri. The Order automatically became enforceable by BDKC against 417 as soon as the bankruptcy was dismissed.

2. 417's few other arguments are belied either by BDKC's opening brief or by the record.

417's few other arguments are equally meritless. 417 argues the Order is unenforceable because it "doesn't [*sic*] specify to whom or which party it applies and does not order any party to pay any amount" (Resp.Br. 13). But as BDKC explained in its opening brief, the Order did not have to, because the only parties to it were BDKC as counsel and 417 as debtor, and by automatic operation of 11 U.S.C. § 349(b)(3) as soon as the bankruptcy ended it became a debt of 417 to its counsel, BDKC (Aplt.Br. 37-39, 42). Every court to have addressed this has agreed (Aplt.Br. 37-39, 42). 417 offers no response, because it cannot.

417 argues BDKC somehow admitted the Order was unenforceable, stating BDKC "specifically acknowledges in its Motion to Amend the interlocutory Order to a Judgement that the Bankruptcy Court's partial order is a not 'Judgement' [*sic*] within the meaning of MRCP 74.13" (Resp.Br. 14). That is untrue. BDKC merely reported to the Bankruptcy Court that "The Circuit Clerk of the Circuit Court of Greene County, Missouri" initially was refusing to register the Order "for the reason the word 'judgment' does not appear in the Order" (D6 p. 1). But at all times below and in the Bankruptcy Court, BDKC has maintained that the clerk was wrong: once 417's bankruptcy was over, the Order automatically became enforceable by it against 417.

Ignoring all the authorities BDKC cited, 417 points to one federal decision, *In re Callister*, 673 F.2d 305 (10th Cir. 1982), to argue that interim orders of compensation "are always, therefore, interlocutory" (Resp.Br. 20-

21). But at the time of the appeal to the Tenth Circuit in *Callister*, the bankruptcy was still "ongoing litigation," so the Tenth Circuit held that at that point the interim fee order was interlocutory and unappealable. *Id.* at 306-07.

Callister is inapposite. 417's bankruptcy is over. Therefore, as in the decisions BDKC cited in its opening brief in *that* posture, which *Callister* was not, the Order is final and enforceable by BDKC against 417 (Aplt.Br. 37-39) (citing and discussing *In re Sweports, Ltd.*, 777 F.3d 364, 366 (7th Cir. 2015) (interim fee order final and enforceable by attorney against debtor once bankruptcy dismissed); *In re Iannochino*, 242 F.3d 36, 44 (1st Cir. 2001) (same once attorney discharged); *In re Boddy*, 950 F.2d 334, 336 (6th Cir. 1991) (same once plan confirmed); *In re Dahlquist*, 751 F.2d 295, 297 (8th Cir. 1985) (same once bankruptcy dismissed); *In re Yermakov*, 718 F.2d 1465, 1469 (9th Cir. 1983) (same once attorney discharged); *In re Salazar*, No. 15-13194, 2016 WL 7377043 at *3 (Bankr. D.N.M. Dec. 19, 2016) (same once bankruptcy dismissed); *In re Pericone*, No. 10-152, 2010 WL 11541706 at *5 (E.D. La. Feb. 25, 2010) (same once attorney discharged); *In re Delta Petroleum (P.R.), Ltd.*, 193 B.R. 99, 105 (D.P.R. 1996) (same)). 417 offers no response to any of these *apposite* decisions, because it cannot.

If the trial court somehow had authority to entertain 417's untimely defense to registration, it erred in holding that the Order was not entitled to full faith and credit. This Court should reverse its judgment setting aside the registration of the Order as a foreign judgment and remand this case with instructions to re-register the Order.

Conclusion

The Court should reverse the trial court's judgment setting aside the registration of the Order as a foreign judgment.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b), as this brief contains 3,053 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief of the appellant, which is being maintained by Jonathan Sternberg, Attorney, P. C. per Rule 55.03(a), and that on December 22, 2019, I filed a true and accurate Adobe PDF copy of this brief of the appellant and its appendix via the Court's electronic filing system, which notified the following of that filing:

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