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ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-22-97

MATTHEW MABE, LAURA MABE, AND HARVEST CONSTRUCTION GENERAL CONTRACTING, INC. APPELLANTS V. LATCO CONSTRUCTION, INC. APPELLEE	Opinion Delivered March 15, 2023 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72CV-09-4068] HONORABLE JOHN C. THREET, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Appellants Matthew Mabe, Laura Mabe, and Harvest Construction General Contracting, Inc., appeal from an order of the Washington County Circuit Court granting a writ of scire facias to revive a judgment in favor of appellee Latco Construction, Inc. On appeal, appellants assert that the circuit court erred in granting the writ by finding that "the filing of Latco, Inc.'s Chapter 11 reorganization is not relevant to the issues at bar" and that appellee was separate from Latco, Inc., for purposes of its bankruptcy. Further, they argue appellee is judicially estopped from seeking to enforce the judgment. Appellants lastly contend that if appellee wants to revive and collect on the judgment, it should be required to reopen the bankruptcy case and explain to the bankruptcy court its failure to provide full disclosure of the administration of its assets thereunder. We affirm.

On July 22, 2021, appellee filed a petition to revive a judgment that was entered on August 23, 2011.[1] The judgment was against appellants jointly and severally in the amount of $84,712.53, with postjudgment interest at 10 percent per annum. Appellee asserted that the total balance now due was $150,793.25. The court entered a writ of scire facias the same day the petition was filed, which was served on appellants along with the petition.

On September 7, appellants filed a written request for a hearing and a motion to dismiss based on collateral estoppel as a result of appellee's failed attempt to revive the same judgment in Kansas. Alternatively, appellants argued that appellee had its corporate charter revoked by the State of Arkansas in 2015 and lost capacity to sue. Appellants also argued that Latco, Inc., filed a petition for bankruptcy on September 18, 2013, in the United States Bankruptcy Court for the Western District of Arkansas; the bankruptcy petition listed appellee in its statement of financial affairs as an affiliated entity; and Latco, Inc., did not list the judgment in its bankruptcy schedules. Appellants attached items from the record in the Kansas proceedings, which included items related to the bankruptcy filing.[2]

Appellee responded that collateral estoppel did not apply because the sole issue in the Kansas case was whether the valid Arkansas judgment had been properly registered as a Kansas judgment (and that expired after five years) and whether it could be revived after the

[1]Appellants appealed from the order granting the judgment; we affirmed in *Harvest Construction General Contracting, Inc. v. Latco Construction, Inc.*, 2012 Ark. App. 610.

[2]The Kansas proceedings related to appellants' collateral-estoppel argument, which is not at issue on appeal.

registration had expired. Appellee acknowledged that its corporate charter had been revoked for a period of time but was reinstated at the time the current petition for scire facias was filed. Appellee further argued that there was nothing about Latco, Inc.'s bankruptcy case that affected the validity of the judgment.

On November 24, appellants filed a brief in support of their September motion to dismiss the petition. In addition to addressing their collateral-estoppel argument, appellants argued the elements of judicial estoppel. Appellants reasoned that because appellee asserted it was a debtor in possession in the Latco, Inc. bankruptcy case, appellee should be judicially estopped to enforce the judgment because it was not listed in the schedules filed in the bankruptcy case and appellee lacks standing to enforce the judgment.

On December 2, appellee filed an amended brief in support of its response to appellants' motion to dismiss. In addition to arguing that collateral estoppel was inapplicable, appellee asserted that Latco, Inc., filed bankruptcy and that nothing in the bankruptcy case affected the validity of the judgment. Appellee argued that the bankruptcy court was well aware that Latco, Inc., and its affiliated entities had assets that were in the nature of accounts receivable and "even entered its order on March 12, 2014 acknowledging the disclosure of the Latco accounts receivable appointing attorney David Stubbs to assist with collection efforts on those accounts," which included appellants' account.

A hearing on the petition occurred on December 6, 2021. At the outset of the hearing, the court addressed the issues before it in determining whether to extend the judgment or dismiss the request:

> And the issues—there's a bunch of issues, I guess. Whether it was dissolved—Latco was dissolved administratively; therefore giving it two years to re-up; or whether it was under the statute you cited giving it seven years to re-up; whether only the bankruptcy trustee can pursue that judgment; what effect the fact that it wasn't listed in the scheduled assets of the bankruptcy court; and whether the – this court is collaterally estopped from proceeding. Because if I remember and understood correctly, Kansas dismissed because they were five year time periods. Is that correct?

The court heard arguments from the parties, and appellee called one witness, Kim Pergeson, who was then serving as president of Latco Construction, Inc.

Pergeson had been with the Latco companies since 1990 and was familiar with Latco, Inc.'s bankruptcy. She testified that appellee was an affiliated company of Latco, Inc. She stated that one set of books was maintained for all of the Latco companies and that the company had consolidated financials and filed a consolidated tax return. As a result of the consolidated financial arrangement, she said that the listing of accounts receivable amounting to around $177,000 in Latco, Inc.'s bankruptcy case would have included the accounts receivable of appellee. She said Latco, Inc., did not hide anything from the bankruptcy court.

On cross-examination, Pergeson was asked if she had documentation with her that reflected that the judgment at issue was included in the $177,000 amount and whether she was aware of any documentation submitted to the bankruptcy court that reflected the judgment being part of the $177,000 amount. She replied that she did not.

At the conclusion of the hearing, the court orally ruled as follows:

> [A]fter reading through all of the pleadings, listening to the argument, the Court's going to rule collateral estoppel does not apply. The Court believes that because the issue in Kansas was one of they were not at the time an entity, that they had been

> revoked and not reinstated; therefore, they could not pursue, and that was, I believe what the issue was in Kansas, that's not the issue in Arkansas, that it's as if they were never revoked in Arkansas.
>
> As far as the bankruptcy is concerned, if Latco Construction did not file bankruptcy, even if it is so tied in, I believe the proof is that it was -- at least from the evidence, was listed, but that's even if you -- the -- if the Court's wrong on Latco Construction never filed for bankruptcy. Therefore, it would be irrelevant.
>
> As far as the other issues, as far as who can pursue it, the bankruptcy court order says Mr. Stubbs can pursue it.

When the court asked whether that "cover[ed] all the issues," appellee's counsel requested a determination that appellee's corporate charter reinstatement was "good," and the court responded that it was going to allow appellants until Thursday to respond to additional arguments on reinstatement that were brought up in appellee's December 2 response and argued at the hearing.

On December 9, appellants filed a supplemental brief in support of their motion to dismiss, arguing judicial estoppel and the issues related to Latco, Inc.'s bankruptcy case. Appellee responded on December 10. The circuit court entered an order on December 16, granting the writ of scire facias reviving the judgment. The court found that appellee had timely complied with the requirements of Ark. Code. Ann. §§ 16-65-501 et seq. (Repl. 2005 & Supp. 2021), governing the revival of the judgment; the validity of the Arkansas judgment had never been in dispute and was not affected by any ruling of the Kansas court; and the judgment was entitled to be revived by appellee. The court further found that collateral estoppel did not apply because the issues before the court were different than the issues before the Kansas court. The court found appellee was a viable corporation at the time it

filed its petition as its corporate charter had been reinstated since January 11, 2018, and pursuant to Ark. Code Ann. § 26-54-112 (Supp. 2021), a corporate charter is reinstated to the time that it was declared forfeited, which was January 1, 2015. Finally, the court found:

> 8. The Court finds that Latco Construction, Inc. is a separate corporation and has never filed a bankruptcy. While Latco, Inc. did file a petition in bankruptcy, the Court finds that Latco, Inc.'s accounts receivable were disclosed to the bankruptcy court and plaintiff's attorney, L. David Stubbs, was specifically given authority to pursue the collection of Latco, Inc. and its affiliate's accounts receivable, including this account by its order entered on March 12, 2014. The Court finds that the filing of Latco, Inc.'s Chapter 11 reorganization is not relevant to the issues at bar.

On January 11, 2022, appellants filed a joint notice of appeal.

In *Middleton v. Lockhart*, 2012 Ark. 131, at 4, 388 S.W.3d 451, 454, the supreme court set out the following standard of review on an appeal of an order granting revival of a judgment:

> Where the issue is one of law, our review is de novo. *See Preston v. Stoops*, 373 Ark. 591, 285 S.W.3d 606 (2008). However, we will not reverse a circuit court's factual findings unless they are clearly erroneous. *Hickman v. Courtney*, 361 Ark. 5, 203 S.W.3d 632 (2005). A finding of fact made by a trial court sitting in equity is clearly erroneous when, despite supporting evidence in the record, the appellate court viewing all of the evidence is left with a definite and firm conviction that a mistake has been made. *Id.*

A writ of scire facias is a writ issued requiring a person against whom it is brought to show cause why a judgment should not be revived. *Rose v. Harbor E., Inc.*, 2013 Ark. 496, at 9, 430 S.W.3d 773, 779. Scire facias is not the institution of a new suit but is a continuation of the old one, and its object is not to procure a new judgment for the debt but to execute the judgment that has already been obtained. *Id.* Arkansas Code Annotated sections 16-65-501 et seq. govern the issuance of a writ for scire facias. Service of the writ is required by Ark.

Code Ann. § 16-65-501(b). If upon service of the scire facias, the defendant or any other interested person does not appear and show cause why such judgment shall not be revived, the judgment shall be revived and the lien continued for another period of ten years. Ark. Code Ann. § 16-65-501(d); *see also Horne v. Cuthbert*, 2015 Ark. App. 592, at 6–7, 473 S.W.3d 559, 562.

Here, appellants do not challenge the validity of the judgment or the circuit court's ruling on collateral estoppel. Rather, they raise the following arguments: (1) the circuit court erred in entering its order granting the writ of scire facias reviving the judgment because it found that "the filing of Latco, Inc.'s Chapter 11 reorganization is not relevant to the issues at bar," and it found that appellee is separate from Latco, Inc., for purposes of its bankruptcy; (2) the circuit court erred in entering its order granting the writ of scire facias reviving the judgment because appellee is judicially estopped from seeking to enforce the judgment; and (3) if appellee still wishes to revive and collect on the judgment, it should be required to reopen the bankruptcy case and explain to the bankruptcy court its failure to provide full disclosure of the administration of its assets thereunder.

In their first point on appeal, appellants argue that the circuit court erred in entering its order granting the writ of scire facias reviving the judgment because it found that "the filing of Latco, Inc.'s Chapter 11 reorganization is not relevant to the issues at bar," and it found that appellee was separate from Latco, Inc., for purposes of its bankruptcy. Under this point in their opening brief, the argument reads, "As an initial matter, the Trial court erred when it found that the Bankruptcy Case is not relevant to the issues related to the judgment

and further erred to the extent it relied on the corporate distinction between Latco, Inc. and Appellee to determine that judicial estoppel does not bar Appellee's revival of the judgment[.]" They also assert that the actions taken by Latco, Inc., in the bankruptcy court are "not only relevant to but determinative of the issue of judicial estoppel" in this case. In addition, appellants contend that the circuit court erred to the extent that it relied on the corporate distinction between Latco, Inc., and appellee (Latco Construction, Inc.) "to determine that judicial estoppel does not bar appellee's revival of the judgment." Appellants, in their reply brief, continue to argue that these alleged erroneous findings relate to the judicial estoppel argument.

Herein lies the problem: The court never specifically ruled on judicial estoppel. As a result, we do not address whether the circuit court erred in making these findings.

A party asserts the doctrine of judicial estoppel by arguing that "a party may be prevented from taking inconsistent positions in successive cases with the same adversary." *Dupwe v. Wallace*, 355 Ark. 521, 529, 140 S.W.3d 464, 469 (2004) (quoting *Muncrief v. Green*, 251 Ark. 580, 583–84, 473 S.W.2d 907, 909 (1971)). Moreover, there are four specific elements that must be proved in order to establish a prima facie case of judicial estoppel: (1) a party must assume a position clearly inconsistent with a position taken in an earlier case or with a position taken in the same case; (2) a party must assume the inconsistent position with the intent to manipulate the judicial process to gain an unfair advantage; (3) a party must have successfully maintained the position in an earlier proceeding such that the court relied upon the position taken; and (4) the integrity of the judicial process of at least one

court must be impaired or injured by the inconsistent positions taken. *Id.* at 533–34, 140 S.W.3d at 472; *see also Cox v. Miller*, 363 Ark. 54, 62–63, 210 S.W.3d 842, 847 (2005).

Here, appellants raised collateral estoppel in their initial motion to dismiss, argued it at the hearing, and obtained a ruling on collateral estoppel. However, they do not challenge this ruling on appeal. As for judicial estoppel, appellants raised it intermittently. It was addressed in the brief in support of the motion to dismiss filed two months after the motion to dismiss and just before the hearing. However, judicial estoppel was not even mentioned at the hearing. Appellants did discuss it in their posttrial brief, but the order on appeal is silent on judicial estoppel.

It is well settled that a party's failure to obtain a ruling is a procedural bar to this court's consideration of an issue on appeal. *See Cox*, 363 Ark. at 63–64, 210 S.W.3d at 848 (holding that judicial-estoppel argument was not reserved where appellants failed to raise it and obtain a ruling); *Beverly Enters.-Ark., Inc. v. Thomas*, 370 Ark. 310, 315–16, 259 S.W.3d 445, 449 (2007) (refusing to address judicial-estoppel argument where, although it was raised in the briefs, Thomas never specifically argued the four elements of judicial estoppel to the circuit court and did not obtain a ruling); *McWhorter v. McWhorter*, 2009 Ark. 458, at 14–15, 344 S.W.3d 64, 72–73 (holding issue of judicial estoppel not preserved; although appellant "did raise the general argument below that appellee was taking a position with regard to the amount of arrearages that was inconsistent with his bankruptcy filings, and that he was attempting to manipulate the court, appellant failed to specifically argue the four elements of judicial estoppel to the trial court, nor did she obtain a ruling on the issue");

Nationwide Assur. Co. v. Lobov, 2009 Ark. App. 385, at 5, 309 S.W.3d 227, 230 ("We will not consider judicial-estoppel arguments on appeal when a party has failed to obtain a ruling from the circuit court.").

Although we agree that appellants raised judicial estoppel below, albeit intermittently, the law is well settled that in the absence of a ruling, it is not preserved for our review. In their reply brief in response to appellee's preservation argument, appellants contend that the circuit court's finding that the bankruptcy case was not relevant to the action "foreclose[ed] further findings based on judicial estoppel"; thus, our court is not precluded from addressing the merits of this argument on appeal. However, they fail to cite any authority in support of their argument. It was the appellants' burden to obtain a specific ruling on the issue of judicial estoppel, and their failure to do so precludes this court from considering the issue on appeal.

In their final point on appeal, appellants assert that if appellee still wishes to revive and collect on the judgment, it should be required to reopen the bankruptcy case and explain to the bankruptcy court its failure to provide full disclosure of the administration of its assets thereunder. Because this request was not decided in the circuit court's order, we do not address it on appeal for the reasons delineated herein.

Affirmed.

VIRDEN and BROWN, JJ., agree.

Spencer Fane LLP, by: *Jason C. Smith*, for appellants.

L. David Stubbs; and *Taylor & Taylor Law Firm, P.A.*, by: *Andrew M. Taylor*, for appellee.