RENDERED: JANUARY 22, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000364-MR

LISA RANSOM — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE KEVIN HORNE, JUDGE
ACTION NO. 05-CI-00089

HALISA MURRELL AND
MICHAEL MURRELL — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

STUMBO, JUDGE: Lisa Ransom appeals from the Order of the Boone Circuit Court granting the motion of Halisa Murrell and Michael Murrell to set aside a prior order dismissing their action for lack of prosecution. The circuit court

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

reinstated the action after determining that the failure of the Murrells' counsel to notify the court of counsel's change of address did not justify dismissing the action. Ransom contends that counsel's failure did not rise to the level of "extraordinary circumstances" sufficient to justify the reinstatement of the action under Kentucky Rules of Civil Procedure (CR) 60.02(f). She also maintains that the court lost jurisdiction because more than one year had elapsed subsequent to the matter being dismissed. We are persuaded that plaintiff counsel's failure to notify the court that he changed his mailing address does not constitute an extraordinary circumstance under CR 60.02(f), and accordingly reverse the Order on appeal.

On January 15, 2004, Halisa Murrell was operating a motor vehicle in Florence, Kentucky, when her vehicle was struck in the driver's side door by a vehicle operated by Ransom. Halisa Murrell allegedly sustained physical injuries and incurred medical costs associated with the accident. On January 14, 2005, she filed the instant action against Ransom in Boone Circuit Court alleging that Ransom was negligent in operating her vehicle and that this negligence proximately caused Halisa Murrell's injuries and pecuniary loss. Halisa Murrell's husband, Michael, joined in the action as a party plaintiff alleging a loss of consortium.

The trial record contains no additional entries until January 22, 2007, when the court rendered a *sua sponte* notice to show cause why the action should

not be dismissed for lack of prosecution pursuant to CR 77.02(2). When the Murrells did not respond, an Order Dismissing for Lack of Prosecution was rendered on March 23, 2007.

On December 12, 2008, the Murrells filed a motion to set aside the March 23, 2007 Order. As a basis for the motion, the Murrells' counsel claimed that he had moved the physical location of his office during the intervening months, and that the motion to dismiss and the resultant order were mailed to the old address. He further stated that had he been made aware of the motion to dismiss, he would have filed a timely response to keep the claim active. The Murrells' counsel noted that the instant action set idle because Halisa Murrell was prosecuting a Workers' Compensation claim arising from the same accident which gave rise to the instant action. Counsel also filed an affidavit in support of the claim stating that he did not receive notice of the motion to dismiss or resultant order until several months after they had been filed. Counsel argued that "it is unclear why the notice was sent to the prior address of counsel," though the clerk of the court sent the notice to the address that counsel set out in the Complaint.

On December 30, 2008, Ransom filed a responsive pleading requesting that the court deny the Murrells' motion to set aside the order dismissing the action. The basis of her argument was that the Murrells' counsel did not file any notice with the court informing the court or the parties of his change of address, and that as such he bore the responsibility for not receiving the

motion to dismiss and for not responding to it. Ransom went on to argue that the Murrells cited no Civil Rule in support of their motion to set aside, and that if CR 60.02 were the basis for their motion, none of its provisions were applicable. Ransom maintained that the court lost jurisdiction over the case, that the Murrells' motion to set aside was not filed within one year from the order they sought to set aside, and that no extraordinary circumstances were present.

On February 2, 2009, the Boone Circuit Court rendered the Order granting the Murrells' motion to set aside the prior order dismissing the action. Ransom then apparently filed a motion to strike the Murrells' post-hearing memorandum and to dismiss the case for lack of prosecution. This motion is not contained in the record, though it is referenced by the court in an order rendered on February 10, 2009, denying same. In this order, the court recognized that depriving a party of trial is an extreme action which constitutes a "death sentence" for the proceeding. It determined that under the facts of the case, dismissal would be inappropriate and unwarranted. This appeal followed.

Ransom now argues that the circuit court erred in granting the Murrells' motion to set aside the order dismissing their action. Ransom contends that the trial court lost jurisdiction over the action because the time for the Murrells to file a Notice of Appeal from the March 23, 2007 Order dismissing has long past, and because she is entitled to a finality of judgment. Ransom's primary argument, however, is that the Murrells' motion to set aside the order dismissing was brought

under CR 60.02, and that none of its provisions justify the circuit court's reinstatement of the Murrells' action some 23 months after the dismissal. She notes that CR 60.02(a), which allows for setting aside an order for mistake or excusable neglect, must be brought within one year of the order sought to be set aside. Ransom also directs our attention to CR 60.02(f), which allows for setting aside an order or judgment for a "reason of extraordinary nature" within a reasonable time. The substance of Ransom's argument on this issue is that the failure of the Murrells' counsel to notify the clerk of his change of address is not a "reason of extraordinary nature" justifying the setting aside of an order rendered almost two years earlier.

We have closely examined the record and the law, and are persuaded by Ransom's argument that the facts at issue did not justify relief under CR 60.02. CR 60.02 states that,

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and

> on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

The question, then, is whether counsel's failure to notify the clerk of the court of his change of business address constituted either "mistake, inadvertence, surprise or excusable neglect" under section (a), or a "reason of an extraordinary nature justifying relief" under section (f). We must conclude that counsel's failure to give notice of his change of address is properly characterized as a mistake, inadvertence or excusable neglect. While our research has uncovered a paucity of Kentucky caselaw on the issue, extra-jurisdictional caselaw supports the conclusion that the failure to notify the court of a change of address is properly characterized as mistake, inadvertence, surprise or excusable neglect. *See generally Struett v. Arlington Trust Co.*, 499 N.E.2d 845 (Mass. App. Ct., 1986), wherein the court determined that a motion to set aside default judgment, which was entered as result of mistake, inadvertence or neglect of defendant's counsel in failing to notify the court of counsel's change of address, was not timely when brought more than one year after entry of default judgment.

Relief from judgment for "any other reason of an extraordinary nature justifying relief" under CR 60.02(f) is not available unless asserted grounds for relief are not encompassed within any of the provisions set out in CR 60.02(a) – (e). *McMurry v. McMurry*, 957 S.W.2d 731 (Ky. App. 1997). Having determined

that counsel's failure to notify the court of his change of address is properly characterized as a mistake, inadvertence or excusable neglect, relief from a resultant order or judgment must be sought within one year of the order or judgment. Counsel's contention that it is unclear why the show cause notice was sent to the wrong address is not persuasive, as notice was sent to the address contained in the Complaint.

Ransom's jurisdictional argument is also persuasive. A trial court loses jurisdiction over a judgment ten days after the entry of final judgment. CR 59.05; *see also Silverburg v. Commonwealth,* 587 S.W.2d 241, 244 (Ky. 1979). Such jurisdiction can only be revived by operation of rule or statute. The Murrells were availed of the opportunity to seek CR 60.02 relief for mistake, inadvertence or excusable neglect for a period of one year after entry of the order dismissing. Their motion to revive the action was not filed until some 21 months after the action was dismissed. The Murrells, through their counsel, knew or should have known through the exercise of due diligence that the action would not be continued in perpetuity with no participation on their part. After they filed the Complaint in January of 2005, they took no further action to prosecute their claim until moving to set aside the order dismissing in December of 2008.

The recent case of *Goldsmith v. Fifth Third Bank*, --- S.W.3d ----, 2009 WL 3486696 (Ky. App. 2009) (to be published) provides additional insight. In *Goldsmith*, the movant sought CR 60.02 relief because he was incarcerated for a

misdemeanor at the time a hearing was conducted. A panel of this Court stated that,

> [f]inally, we find that the CR 60.02 motion was untimely and that the trial court was without jurisdiction to grant it because of the holding in *Asset Acceptance v. Moberly,* 241 S.W.3d 329 (Ky. 2007). In *Moberly,* the Court decried the use of the "extraordinary circumstances" provision in CR 60.02(f) as a way to avoid the one-year time limitation found in CR 60.02(a), (b), and (c). *Id.* at 334-35. Here, Goldsmith's CR 60.02(f) claim is really one of "excusable neglect" rather than some other extraordinary circumstance. Indeed, no extraordinary circumstance exists where one waits for more than one year to seek relief to a judgment of which he must have certainly known of (or should have known of through the exercise of due diligence) much sooner. We also note that the Court in *Moberly* established that a direct appeal could be maintained from an order granting CR 60.02 relief where the movant was proceeding under CR 60.02(f) and it appears that the movant "invoked [CR 60.02(f)] to, in effect, evade the one-year limitations period." *Id.* Moberly made clear that CR 60.02(f) should only be invoked with extreme caution and "is available only for reasons not otherwise set forth in the rule and ought not to be invoked so as to undermine the time constraints applicable to other subsections." *Id.* at 332. The Court's holding stemmed from the fact that many federal courts "have recognized a right to appeal from a trial court order setting aside a judgment . . . if the trial court lacked jurisdiction to enter it." *Id.* at 333.

In sum, we must conclude that the Murrells' claim for relief under CR 60.02 should have been brought, if at all, as a claim alleging mistake, inadvertence or excusable neglect within one year of the order dismissing the action for failure to prosecute. The Murrells' counsel was charged with the duty to inform the court

that he wished to receive mailings at an address other than the one indicated on the Complaint, and to exercise due diligence to ensure that the proceeding remained viable during its long period of dormancy. Because CR 60.02 allows for relief under sections (a), (b) and (c) only for one year following the judgment or order at issue, the Boone Circuit Court's Order setting aside the order dismissing the action was therefore erroneous. As such, we must reverse.

For the foregoing reasons, we reverse the Order of the Boone Circuit Court granting the Murrells' motion to set aside the prior order dismissing the action.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Stephen D. Wolnitzek
Covington, Kentucky

BRIEF FOR APPELLEES:

C. Ed Massey
Erlanger, Kentucky