RENDERED: APRIL 2, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002264-MR

NICHOLAS A. BLAIR APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 06-CI-00092

JENNIFER CRABTREE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT, SENIOR JUDGE.

WINE, JUDGE: Nicholas Blair appeals from the denial of a motion for relief by the Daviess Circuit Court under Kentucky Rule of Civil Procedure ("CR") 60.02. Blair filed the CR 60.02 motion specifically citing sections (a), (c), (d), (e), and (f), in response to a judgment awarding Jennifer Crabtree a total of $8,667.96 in attorney's fees and child support arrearages. Finding no error, we affirm.

Factual and Procedural Background

In an original action, Blair filed a complaint with the Daviess District Court to determine paternity of a child born to Crabtree. An order was entered on October 20, 2005, adjudging Blair to be the father. The district court reserved for future determination the dollar amount of support due for the period from the child's birth to the date of the order. After appeals by Crabtree on other issues, the district court declined further jurisdiction on February 2, 2006.

Crabtree subsequently filed a petition with the circuit court seeking, *inter alia*, the following: (1) all arrearages of child support; (2) attorney's fees; and (3) final judgment on all issues transferred from the district court. A hearing was held before the Domestic Relations Commissioner ("DRC") on November 21, 2006. Unfortunately, the audio recording of this hearing has apparently been lost and therefore is unavailable for review. On December 5, 2006, Blair's attorney, the Honorable Misty Miller, filed a response to Crabtree's request for attorney's fees. Subsequently, the Honorable Richard Ford, Crabtree's attorney, tendered a proposed order.[1] Thereafter, on July 2, 2007, an order was entered adopting findings submitted by Crabtree's counsel. Absent the filing of any exceptions, that order became final ten days later, on July 12, 2007. The DRC order required Blair to pay Crabtree's attorney's fees in the amount of $2,700.00 ($3,000.00 with a credit for $300.00 previously paid), and found Blair to be in arrears on his child support payments to Crabtree in the amount of $5,967.96. Although the order

[1] The tendered order included an undated certificate of service to Blair's attorney.

contained no finality language under CR 54.02 , it is clear that all remaining issues now had been resolved.

The circuit clerk's "Certification of the Record on Appeal" does not show that a copy of the July 12, 2007 order, which had been entered by the clerk, was mailed or hand-delivered to Miller. A copy of the order was hand-delivered to Ford. Subsequently, citing "irreconcilable differences," Miller later withdrew as Blair's counsel by an order entered August 29, 2007.

Blair retained new counsel, the Honorable Albert Barber III, in August of 2008. Barber filed a motion to set aside the DRC order pursuant to CR 60.02 on October 28, 2008, more than a year after the disputed order was entered. That motion alleged the following: (1) the issues regarding attorney's fees and retroactive child support were not heard or ruled upon during the November 21, 2006 DRC hearing; (2) the specific amount of the child support award was based on a mistake of fact with respect to Blair's income during the time period at issue; (3) based on the foregoing, the judgment for attorney's fees and child support in the total amount of $8,667.96 was "predicated on means of fraud [and] mistake…" and was therefore void.

A hearing was held before the Daviess Circuit Court on November 5, 2008. Unfortunately, Blair failed to designate for the record on appeal the video tapes of this hearing as required by CR 75.07(1) and (5). *See also*, CR 75.02(3). Therefore, we are without the benefit of the testimony heard by the trial court. However, in an affidavit from Miller, which is included in the certified record, she

claims she never received a copy of either Ford's tendered proposed order or the order signed by the court. Additional evidence contained within the record certified by the clerk which was available for the court's consideration included a “Recommended Order” from the DRC entered February 28, 2007 and signed by Miller, which indicated that any pending matters (including those for attorney’s fees) would remain before the Commissioner for entry of a “final recommended order”; a subsequent order from the Daviess Circuit Court entered on March 7, 2007 which noted that the issues of retroactive child support and attorney’s fees remained before the Commissioner for further ruling; and finally, a letter from Crabtree’s attorney to Miller dated January 8, 2007 which stated that a copy of the original proposed order (addressing retroactive child support and attorney’s fees) would be submitted to the Commissioner. That same letter also referred to a fax of December 8, 2006 from Miller which included suggested changes to the proposed order. A copy of a proposed "Recommended Order" with strike-throughs purportedly made by Miller was entered into the record during the hearing and made a part of the certified record. In an affidavit responding to the CR 60.02 motion, Crabtree stated that she showed her copy of the DRC order to Blair during the first week of August 2007, and that he had read it. The record on appeal contains no counter-affidavit from Blair or any other evidence inconsistent with Crabtree’s statements.

At the conclusion of that hearing, the circuit court found no evidence of fraud in connection with the entry of the order. Interestingly, while Blair's

counsel alleges that the tape of the November 21, 2006 DRC hearing was missing at the time of the 60.02 hearing, the circuit court's ruling on the 60.02 motion specifically refers to statements made by the Commissioner on that tape. Due to the failure of appellant to demonstrate fraud or other cause for extraordinary relief, the court held that the one-year limitation of CR 60.02 would be enforced. Blair's motion for relief was therefore denied by the Daviess Circuit Court in an order entered November 7, 2008. Blair filed this timely appeal from the Daviess Circuit Court.

Analysis

On appeal, Blair makes the following claims: (1) the circuit court abused its discretion by denying the CR 60.02 motion to set aside the judgment; (2) the tendered recommended Order dated July 2, 2008 did not comply with a "Have Seen" requirement under the Daviess Circuit Court Rule 24 ("RDCC); and (3) service of the adopted order did not comply with CR 77.04 with respect to notice of the entry of orders.

CR 60.02 allows for relief of final judgment on 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; (e) the judgment is void, or has been satisfied, released, or discharged; or (f) any other reason of an extraordinary nature justifying relief. Under this Rule, the motion must be made within a reasonable time, and with

respect to grounds (a), (b), and (c), not more than one year after the judgment or order was entered.

Blair's CR 60.02 motion filed October 28, 2008, alluded to "fraud", but made no specific allegations. As to "mistake", he alleges the DRC made a decision about the amount and period of child support even though no testimony was presented during the hearing on November 21, 2006. However, in the order of November 7, 2008, the trial judge notes attorney Miller was "unable to offer any evidence of fraud affecting the proceedings and was unable to recall if evidence about the Respondent's [Blair] earnings was provided to the(c)ourt at the November 21st hearing." On appeal Blair now argues that grounds for relief due to fraud or mistake under 60.02 exist based on the claim that neither Blair nor his former counsel received notice of the DRC order. Blair did not raise the issue of notice in his original motion before the trial court, and because we have no record of the November 5, 2008, hearing, we can not determine whether the notice issue was ever raised before the trial court. In denying the 60.02 motion, the circuit court did not address the notice issue. Since Blair did not properly preserve the notice issue for the record, this Court is not required to now consider it on appeal. The law clearly establishes the burden of producing the record necessary to decide an appeal rests on the appellant. *Fanelli v. Commonwealth*, 423 S.W.2d 255 (Ky. 1968). An appellate court must presume that any portion of the record not supplied would support the decision of the trial court. *Colonial Life & Accident Ins. Co. v. Weartz*, 636 S.W.2d 891 (Ky. App. 1982). Once the 60.02 motion was denied,

Blair's counsel did not seek additional findings of fact under CR 52.05 or file a motion to alter or amend the judgment under CR 59.05. As a result, we must conclude that testimony heard during the CR 60.02 hearing would support the circuit court's denial of that motion.

Even if Blair had properly designated the record, a substantive and procedural analysis on the facts as alleged by Blair reveals no sufficient grounds for reversal. CR 60.02 clearly sets out a one year limitation with respect to sections (a), (b), or (c), and lists no exceptions to that Rule. Although Blair's former counsel (Miller) averred she did not learn of the order until August of 2008, under CR 77.04(4) the one-year limitation for purposes of CR 60.02 begins to run at the time the order is entered, not at the time movant's counsel learns of the denial.

Failure of the trial court to require service of notice of entry of any judgment or order under this Rule or the failure of the clerk to serve such notice, or the failure of a party to receive notice, shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73.02(1).

The original DRC order became final on July 12, 2007, and Miller did not withdraw until August 29, 2007.

In *Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918, 920 (Ky. 1998), the Court held that an employee's untimely appeal after denial of a CR

60.02 motion would not be excused by a clerk's failure to notify parties of the entry of an order denying a motion to reconsider. In *Stewart*, neither party received notice of entry of the order denying the motion to reconsider. Still, the Court found that under CR 77.04(4), while the clerk is required to serve a notice of the entry, neither the failure of the clerk to serve such notice nor a party's failure to receive notice will affect the validity of the order, or the time for taking an appeal. *Stewart*, at 920. The Court also noted that, under the rule, an extension for filing cannot be authorized beyond ten days past the expiration for the time for taking an appeal. *Id.*

As stated above, Crabtree's affidavit provides uncontroverted testimony that Blair read the order within weeks after it became final, and Blair's former counsel Miller knew that a judgment was pending in the matter before the Commissioner. But had the appellant never received notice of the order, CR 77.04(4) and the *Stewart* holding dictate that the burden of obtaining the results of a pending ruling clearly rests with the movant.

Had Blair's CR 60.02 motion been timely filed rather than more than fifteen months after the order became final, any ruling by the court on the motion with respect to allegations of mistake, perjury or falsified evidence would only be reviewed for abuse of discretion. For a decision to constitute an abuse of discretion, it must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). Where a CR 60.02 motion has been denied, the factors to consider with respect to abuse of

discretion are 1) whether the movant had a fair opportunity to present his claim; and 2) whether the granting of the relief sought would be inequitable to the other parties. *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957).

Here, there is ample evidence that Blair had a fair opportunity to present his claim for relief. While Blair did not properly designate the record to include the hearing held on November 5, 2008, we can deduce the nature of the claims presented for the court's consideration from the court's order.

In addition, granting the CR 60.02 motion would be unfair to Crabtree, who requested retroactive child support only after Blair himself sought to establish paternity of the child, then waited nearly two years for the DRC ruling. The order remains valid, and the one-year limitation for appeal under CR 60.02(a), (b), and (c) should not have been deferred.

Blair also seeks relief under CR 60.02(d), (e), and (f). Where a motion is based on allegations of fraud, where the judgment is void, or where there is any other "extraordinary" reason justifying relief, the motion must merely be made within a "reasonable" time. While a void judgment would not be entitled to deference under CR 60.02(e), Blair's passing mention of the claim lacks merit, and will not be reviewed by the court at this time.

The type of "fraud affecting the proceedings" necessary to justify reopening under CR 60.02(d) generally relates to extrinsic fraud, which involves "fraudulent conduct outside of the trial which is practiced upon the court, or upon the defeated party, in such a manner that he is prevented from appearing or

presenting fully and fairly his side of the case." *McMurry v. McMurry*, 957 S.W.2d 731, 733 (Ky. App. 1997). As discussed above, Blair provides no specific allegations that Crabtree, her attorney, or any other party acted in a fraudulent manner. "Bare allegations will not suffice to establish 'fraud affecting the proceedings.'" *Id*. Having examined the issues of the missing tape and "notice" to Blair, there are no additional facts which might constitute an "extraordinary" reason justifying relief under CR 60.02 (f).

Finally, Blair claims that the tendered recommended Order of July 2, 2007, submitted to the Commissioner by Crabtree, did not comply with Local Rule ("RDCC") 24 of the Daviess Circuit Court regarding orders and judgments. Rule 24 states that "[i]n all civil and criminal cases in which a verbal order or judgment is announced by the Judge . . . an order or judgment in conformity therewith shall be prepared by counsel for the successful party within five (5) working days after the order or verdict, unless directed otherwise by the Judge. It shall be signed 'have seen' or 'OK to enter' by all attorneys of record, and shall be presented to the Court." The tendered Recommended Order was a proposal prepared by appellee's counsel, not a verbal order issued from the bench. So although it was later adopted by the Commissioner, it was not subject to the requirements of Rule 24. As a result, the claim for relief based on Rule 24 is clearly without merit.

Conclusion

Absent a "flagrant miscarriage of justice," a trial court decision will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). In the present case, were this court to accept facts as alleged by appellant to be true, there was adequate opportunity to present a claim under CR 60.02. The circuit court's denial of relief under that section was not "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007), *citing Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). In sum, we are of the opinion that appellant has no basis for an "abuse of discretion" claim. In addition, the "Have Seen" requirement of the RDCC Rule 24 does not apply to the facts of this case. For the foregoing reasons, the opinion of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Albert W. Barber, III
Owensboro, Kentucky

BRIEF FOR APPELLEE:

Richard T. Ford
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