

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000262-MR

KIMBERLY CLARK

APPELLANT

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 12-CI-00099

FIRST FEDERAL SAVINGS BANK
OF ELIZABETHTOWN, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, D. LAMBERT, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Kimberly Ann Clark appeals the January 12, 2015 Meade Circuit Court order denying the Kentucky Rules of Civil Procedure (CR) 59.05 motion to alter, amend, or vacate the September 15, 2014 order. In the September 15, 2014 order, the trial court denied Clark's CR 60.02 motion to set aside the August 28, 2013 judgment and order of sale for First Federal Savings Bank of

Elizabethtown, Inc. (hereinafter "First Federal"). After careful consideration, we affirm.

BACKGROUND

The case involves a mortgage foreclosure action in which the trial court enforced the mortgage and authorized the sale of the attached real property. The sale occurred on June 15, 2015.

The case begins on September 14, 2008, when Clark executed and delivered to First Federal a promissory note in the principal amount of \$263,000.00. The loan was a five-year loan due and payable by a balloon payment on September 4, 2013. As noted on the loan documents, the loan was for business purposes. In fact, Clark filed a commercial loan application rather than a consumer loan application to obtain the loan. Further, the loan proceeds were used primarily to pay off a business line of credit with River City Bank and several other business-related debts. To secure the promissory note, Clark concurrently executed a mortgage with First Federal on real property located in Meade County, Kentucky.

Then, on October 24, 2008, Clark procured a second commercial loan from First Federal for the principal sum of \$20,000.00. Again, the purpose of this loan was to maintain cash flow for Clark's construction company.

By March 14, 2009, Clark was delinquent on the payments and First Federal was charging an additional \$125.86 per month in late charges. The late charges affected the principal and interest payments. At the end of 2011, Clark

was in payment default on both notes. Based on the default on both notes, First Federal filed a complaint on March 30, 2012, seeking recovery of the principal balance due, interest, and late charges. In addition, First Federal sought to enforce its mortgage and use the proceeds of the sale of the mortgage to cover the amounts owed to it.

Clark filed an answer and counterclaim. In general, she denied the allegations and asserted a defense alleging unfair trade and predatory lending practices by First Federal. Further, Clark made three claims in the counterclaim. First, she asserted that First Federal should have known that she would be unable to make regular payments on the first note, and therefore, it violated the Kentucky Consumer Protection Act (“KCPA”). Second, Clark contended that First Federal had violated the Truth-in-Lending Act (“TILA”) by failing to provide her with information pertaining to her right to rescission. Lastly, she argued that First Federal’s actions were done with actual malice and/or recklessly in derogation of her rights and property, which entitled her to an award of punitive damages under Kentucky Revised Statutes (KRS) 411.184 and 411.186.

First Federal moved for summary judgment in fall 2012 averring that no genuine issues of material fact existed, and hence, it was entitled to judgment as a matter of law. The trial court entered findings of fact, conclusions of law, and partial summary judgment on January 7, 2013. In its order, the trial court substantively ruled on the legal issues presented by First Federal in its complaint and Clark in her counterclaim.

In essence, it held that the provisions of KCPA did not apply because its statutes only apply when a person purchases or leases goods or services primarily for personal, family or household purposes. Furthermore, the provisions of KRS 367.170 do not apply to mortgage loans; TILA did not apply because the loans were business loans, which the Act does not affect. And, regarding Clark's assertion that First Federal promised to renew her loan and reneged, no written documentation supports this claim which is required by the Statute of Frauds. KRS 371.010(9). Lastly, the trial court concluded that Clark's allegations of fraud in her counterclaim must fail because broad allegations are insufficient to support the requirement of the civil rules that fraud be claimed with specificity.

The partial summary judgment was interlocutory because the trial court still had to determine the amount of damages including not only interest, fees, taxes, expenses, and attorney's fees, but also the date, time, and terms of the foreclosure sale. The trial court held numerous evidentiary hearings on the amount of damages owed to First Federal. On August 28, 2013, the trial court entered its final judgment against Clark and in favor of First Federal.

In the judgment, the trial court determined that First Federal was entitled to a judgment on the mortgage and mortgage note in the amount of \$232,782.30, which included unpaid principal and interest. In addition, First Federal was to receive interest thereafter at the rate of 7.875 percent per annum until the debt was paid in full. First Federal was also authorized by the judgment for unpaid property taxes and insurance, which were \$4,115.99 and \$2,160.65

respectively. Clark also owed First Federal \$10,000.00 plus interest at the rate of 8.5 percent per annum from February 17, 2012, until paid in full, for the unsecured line of credit note that originated on October 24, 2009, and matured on October 25, 2009.

First Federal obtained a sale date of November 12, 2013, for the real property securing the loan. However, the day before the scheduled foreclosure sale, Clark filed for Chapter 13 bankruptcy protection and a CR 60.02 motion to set aside the judgment on the grounds of newly discovered evidence. The alleged new evidence was Clark's discovery of a taped conversation between herself and Dwight Brown, a First Federal employee. But the trial court could not consider the CR 60.02 motion because an automatic stay had been imposed in the litigation by Clark's bankruptcy action. In addition, on September 27, 2013, Clark appealed the August 28, 2013 judgment, *pro se*, to our Court.

Then, on February 5, 2014, the Bankruptcy Court entered an order wherein First Federal obtained stay relief from Clark's bankruptcy action. On June 19, 2014, Clark's bankruptcy action was dismissed for failure to comply with the bankruptcy code. And, Clark's appeal was dismissed because no action was taken by her to further it.¹ Following the dismissal of the bankruptcy, a hearing was held on February 14, 2014, concerning Clark's CR 60.02 motion to set aside the August 28, 2013 judgment; Clark did not appear at the hearing. At the hearing, the trial

¹ The dismissal of Clark's first appeal has no applicability to the issues herein. Any arguments suggesting its relevance are not persuasive.

court ordered that Clark be deposed about the “newly discovered” evidence, the audiotape.

In the deposition, Clark explained that on November 1, 2011, unbeknownst to her, a voice-activated recorder, which had been in the bottom of her purse, taped a conversation between Brown, a First Federal employee, and her. As indicated by the date, the taped conversation occurred several months prior to the commencement of this action. The tape is unclear, broken up, and certain portions are inaudible.

Regarding the discovery of the audiotape, Clark alleged that she did not even know the recorder was turned on. Further, she did not even know of the audiotape’s existence until September 2013 when her ex-boyfriend, who had the recorder in his possession, informed her about it. Apparently, the recorder had been in his possession for some time. In sum, she maintains that she was unaware the conversation with the bank employee was taped or that her boyfriend possessed the tape. Clark contended that the audiotape supports her claim that First Federal promised to renew the loan. Keep in mind the trial court had already considered the issue and determined that this assertion was barred by the Statute of Frauds.

After the parties submitted briefs, the trial court held that the matter was still not ready for a ruling and ordered that a forensic expert examine the audiotape and that Clark establish a proper chain of custody for the audiotape. Moreover, since Clark’s ex-boyfriend had been in possession of the recorder on which the audiotape was discovered, the trial court ordered him to be deposed.

Both parties tendered copies of the forensic expert's report in July 2014. The forensic expert, OneSource Discovery, stipulated that deletions and changes had been made to the recorder, including the pertinent audiotape. (In fact, Clark stated in her deposition that she deleted conversations on the recorder.) According to the expert, deletions had been made after the November 11, 2011 date that the conversation had been recorded. Moreover, the expert stated that such modifications are usually associated with modifications to a file's content. Additional inconsistencies in the credibility of the audiotape were also reported.

Thereafter, on September 15, 2014, trial court entered an order that denied Clark's CR 60.02 motion to set aside the judgment and order of sale. In doing so, the trial court noted the following: Clark never denied execution of any loan documents including the note and the mortgage; she did not assert fraud as an affirmative defense under CR 8.03 or CR 9.02 in her answer, which under CR 8.03 must be pled, and under CR 9.02 must be made with particularity. Moreover, the trial court noted the arguments about violations of KCPA and Title 12 of Federal Code, and malice and recklessness under KRS 411.184 and KRS 411.186 were not new arguments and had previously been considered.

When the trial court discussed specifically the newly discovered evidence – the audiotape – it questioned the credibility of the appearance of the audiotape years after the litigation ensued, questioned its fortuitous recovery in September 2013, and highlighted that it contained admittedly deleted portions. The trial court ultimately determined that the audiotape is not sufficient evidence

to set aside the trial court's original August 28, 2013 judgment and denied the CR 60.02 motion.

Clark's next step was to institute a CR 59.05 motion for the trial court to alter, amend, or vacate the September 15, 2014 order. The legal basis of the motion was Clark's inability to brief the issue – failure to plead fraud – for the trial court. Additionally, on December 5, 2014, Clark had filed *ex parte*, without knowledge of her counsel, and with no accompanying motion a March 19, 2009 letter from First Federal. She purportedly just discovered the letter in a box of Christmas ornaments. The letter discussed approval of a mortgage between the bank and Clark.

The trial court, after observing the letter was dated three years prior to this litigation, only valid for thirty days, and unclear as to its mortgage proposal, denied the CR 59.05 motion on January 12, 2015. The letter was also written two and a half years prior to the November 11, 2011 taped conversation. The trial court observed that the issues proffered by Clark in the motion had already been litigated and were *res judicata* because of the Court of Appeals' previous order. Clark now appeals from this particular order.

ISSUES

On appeal, Clark proffers the following three errors – that the trial court erred as a matter of law in finding that the Bank did not breach any fiduciary duty to Clark by engaging in improper loan practices when it took Clark's note and the collateral in her farm and residence; that the trial court erred by finding as a

matter of law that First Federal did not breach the covenant of good faith in dealing with Clark; and, that the trial court erred by finding as a matter of law that First Federal's loan to Clark was not governed by the Truth in Lending Act, 15 United States Code Annotated § 1601.

First Federal counters that Clark's issues are barred by the doctrine of *res judicata*; that the claims of breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing are not preserved; that even if the claims are preserved, she cannot establish that First Federal violated them; and, that the issue regarding TILA and KCPA have already been litigated and found not to apply to Clark's business loans.

STANDARD OF REVIEW

The notice of appeal filed by Clark states that she appeals from the January 12, 2015 order. In this order, the trial court denied Clark's CR 59.05 motion to alter, amend, or vacate its September 15, 2014 order. The underlying order denied Clark's CR 60.02 motion to alter, amend, or vacate the August 28, 2013 judgment and order of sale based upon newly discovered evidence.

The decision to grant or deny a motion under CR 60.02 or CR 59.05 rests within the trial judge's sound discretion. *See Schott v. Citizens Fidelity Bank & Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985). Accordingly, we apply an abuse of discretion standard of review to a trial court's rulings on CR 59.05 and CR 60.02 motions. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478,

483 (Ky. 2009); *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky. 1994).

“The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Accordingly, a trial court's decision is affirmed unless there is a showing of some “flagrant miscarriage of justice.” *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

With these standards of review in mind, we address the issues of the case at hand.

ANALYSIS

Our review of the issues in this case involves solely the propriety of the trial court's denial of Clark's CR 59.05 motion, and ultimately, the CR 60.02 motions. In the actual notice of appeal, Clark only references the denial of a CR 59.05 motion. CR 59.05 permits a circuit court to “alter or amend a judgment, or to vacate a judgment and enter a new one” if a proper motion is filed within ten days of the final judgment's entry. CR 59.05; *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky. 2009).

“A party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before the entry of the judgment.” *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997) (citing 7 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 59.05, cmt. 6 (5th ed.1995)). *Givens v. Commonwealth*, 359 S.W.3d 454, 466 (Ky. App. 2011). In

the CR 59.05 motion, Clark violates this premise and merely presents already litigated arguments and evidence that could have been presented during the original proceedings.

In the motion, she pleads the affirmative defenses in her original answer, pleads fraud from her counterclaim, cites the evidence in her deposition and affidavits without particularity, and maintains she has not been provided the opportunity to plead fraud. Because she has provided nothing that was not or could not have been argued in the original proceedings, the trial court's actions in denying her CR 59.05 motion were proper.

The basis of the CR 59.05 motion was Clark's CR 60.02 motion. She sought relief under CR 60.02 as follows:

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: . . . (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.

And any such 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." CR 60.02. Further, as stated in the civil rule, "a motion under this rule does not affect the finality of the judgment or suspend its operation." *Id.*

We begin by observing that action under CR 60.02 is not a part of the normal progression of litigation but is an extraordinary procedure whereby a collateral attack is made upon a judgment based on the specific grounds set forth in

the rule. *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003). Significantly, CR 60.02 is an exceptional remedy necessitating cautious application. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 335 (Ky. App. 2012). And relief under CR 60.02 is appropriate “only under the most unusual and compelling circumstances.” *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011).

The trial judge made an extensive and thorough consideration of the challenges made by Clark in the CR 60.02 motion regarding its August 28, 2013 judgment. As outlined in the facts above, the “newly discovered” evidence, that is, the audiotape, was not only unreliable, it was also incomprehensible as to the loans herein. Moreover, First Federal and the trial court’s assertion that Clark’s claims are barred by the doctrine of *res judicata* is not pertinent. The issues herein are resolved by the procedural constraints under the civil rules.

Again, we find no error in the trial court’s denial of this CR 60.02 motion in its September 15, 2014 order. Further, while a CR 59.05 motion may be used to challenge a CR 60.02 order, it may not be used to collaterally attack the original judgment. In the case at bar, Clark improperly sought another bite at the apple in making both motions. See *Kentucky Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907, 910 (Ky. App. 1993).

Regarding Clark’s suggestion in the reply brief that the judgment was not final until the order of sale was entered, the argument is presented for the first time in the reply brief, and thus, unpreserved. Also, Clark’s ability to make a CR 60.02 motion necessitates that the August 28, 2013 order was a final order. Lastly,

the cited statute, KRS 426.575, is pertinent only to the conveyance itself after a sale of property. Therefore, this argument is specious.

CONCLUSION

CR 59.05 and CR 60.02 do not permit disappointed litigants to raise affirmative defenses that could have been raised prior to a judgment as a basis for setting the judgment aside, or, in this case, repeat arguments that have already been raised. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997). We affirm the decision of the Meade Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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