

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001065-MR

STEPHEN D. PRICE

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT OVERSTREET, JUDGE
ACTION NO. 97-CI-00241

DANNY TOD FRYMAN;
CONNIE FRYMAN
MILLIE CORCORAN;
RICHARD CORCORAN; AND
WALTER STONE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Stephen D. Price ("Price") appeals from an order of the Scott Circuit Court dismissing Walter Stone ("Stone") from Price's action seeking a restoration of demolition rights or damages. We affirm.

In late 1992, Price and Danny Tod Fryman ("Danny") allegedly entered into an oral agreement allowing Price to demolish and remove a structure located on a parcel of real property owned by Danny and Connie L. Fryman ("Connie"). On

January 20, 1993, Danny and Connie entered into a sales and purchase contract in which they agreed to sell the parcel to Richard H. Corcoran ("Corcoran"). The parties to the sales contract agreed that the structure would be removed by Price no later than March 1, 1993. Price was not a party to the sales contract.

Price did not demolish and remove the structure by the end of March, 1993, and title to the parcel was transferred to Corcoran. More than four years later, on May 30, 1997, Price filed the instant action in Scott Circuit Court against Danny, Connie, Corcoran, and Walter Stone ("Stone"), who served as the real estate broker in the 1993 sale. Price's pro se complaint alleged that the parties provided an unreasonable deadline for the removal of the structure, and sought restoration of the demolition rights or damages.

On June 23, 1997 Stone moved for dismissal from the action. The following month, a hearing on the motion was conducted, and the circuit judge subsequently ordered the filing of briefs on the matter no later than July 17, 1997. Price did not file a responsive brief, and Stone was dismissed from the action on August 12, 1997.

Approximately 19 months later, Price filed a CR 60.02 motion seeking relief from the August 12, 1997 order dismissing Stone. Price argued therein that he had experienced a barn fire on June 12, 1997, and that this fire had distracted him from his legal proceedings. He maintained that the fire constituted, in the language of CR 60.02, a reason of extraordinary nature

justifying relief from the August 12, 1997 order dismissing Stone. The motion was denied, and the remaining defendants were dismissed for lack of prosecution on April 5, 1999. This appeal followed.

Price now argues that the barn fire, which he attributes to arson, should properly be regarded as "fraud" for purposes of relief under CR 60.02(d), and that this fraud justifies the reinstatement of Stone as a defendant. He further maintains the farming equipment lost in the fire and consequent damage to his profession constitute a " . . . reason of an extraordinary nature . . . " justifying relief under CR 60.02(f). Finally, Price argues that the circuit judge was improperly influenced by defense counsel Carroway's erroneous statement that Price had failed to produce requested contracts, and that the court improperly dismissed the case for lack of prosecution.

The first question for our consideration is whether Price's barn fire constitutes fraud for purposes of relief under CR 60.02, and whether the circuit court erred in failing to so rule. Having closely examined the facts, the law, and the arguments on this issue, we find no error.

CR 60.02 provides in relevant part that " . . . the court may . . . relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: . . . (d) fraud affecting the proceedings, other than perjury or falsified evidence" Fraud affecting the proceedings is also referred to as "extrinsic fraud." Rasnick v. Rasnick, Ky. App., 982 S.W.2d 218, 219 (1998). "[Extrinsic fraud

is] 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." Id., citing 7 W. Bertelsman and K. Philips, Kentucky Practice, CR 60.02, Comment 6 (4th ed. 1984).

By any measure, the "fraud" to which Price directs our attention is not the type of fraud envisioned by CR 60.02. First, Price is merely speculating when he suggests that his barn fire was the result of arson. Second, he stipulates that none of the parties to the instant action were involved in the fire. ("Suspected arson fire, not attributed to the parties herein" Appellant's brief, p. 4). And third, even if the fire was arson, and even if it was attributable to one of the defendants/appellees, it simply is not the kind of bad act which, in the language of Bertelsman and Philips, prevented Price from appearing or presenting fully and fairly his side of the case. It is uncontroverted that Price and his counsel attended the July 3, 1997 hearing (after the fire) on Stone's motion to dismiss, yet failed to comply with the trial judge's request to produce a brief on Stone's motion to dismiss. We also find persuasive Stone's argument that CR 60.02 relief is reserved for issues which could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court. Young v. Edward Technological Group, Inc., Ky. App., 918 S.W.2d 229 (1995). Price's argument is specious, not supported by the law, and does not form an adequate basis for tampering with the order on appeal.

Price also offers CR 60.02(f) as a basis for his appeal, arguing that the barn fire was a "reason of an extraordinary nature" justifying relief from judgment. CR 60.02(f) relief, however, is not available unless the alleged grounds for relief are not recognized under sections (a) through (e) of the rule. As Stone notes, the fire would be grounds for relief, if at all, under the excusable neglect provision set forth in section (a), and the statutory period for filing under this provision expired in 1998. Price has failed to show that the trial court erred on this issue.

Lastly, Price argues that the trial judge's denial of relief was influenced by erroneous statements made by attorney Carroway, and that the court erroneously found that Price had taken no pre-trial steps within the preceding year. We do not find these arguments persuasive. Price has offered no evidence that the court's dismissal of Stone as a party defendant was in any way induced by alleged erroneous statements of counsel. Stone was dismissed not on defense counsel's statements, but on Price's failure to file a brief in response to Stone's motion to dismiss.

Similarly, we are not persuaded by Price's argument that his March 26, 1999 filing¹ served to revive the prosecution of his action against Stone. Stone was dismissed from the action on August 13, 1997, and Price's filing, some 18 months later, has no bearing on Stone's dismissal.

¹On March 26, 1999, Price tendered a single sentence "Addendum to Memorandum" which cited a 1977 case.

For the foregoing reasons, we affirm the Scott Circuit Court's order dismissing Stone.

ALL CONCUR.

BRIEF FOR APPELLANT, PRO SE:

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STONE:

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No brief filed for Appellees,
Richard and Millie Corcoran
and Danny and Connie Fryman