

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000387-MR  
AND  
NO. 2003-CA-000388-MR

NATIONAL CITY BANK OF KENTUCKY

APPELLANT

v. APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE R. CLETUS MARICLE, JUDGE  
ACTION NOS. 02-CI-00084 & 02-CI-00346

TONI ROSE BOWLING and  
DARRELL BOWLING

APPELLEES

OPINION  
AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.

BARBER, JUDGE: Appellant, National City Bank (National City),  
appeals its dismissal as a party to a foreclosure proceeding in  
2003-CA-000387 and a dismissal of a later filed action, appealed  
as 2003-CA-000388. The actions are consolidated herein. We  
affirm the ruling of the Clay circuit court.

National City Mortgage Company filed a foreclosure proceeding against Appellees, Toni Rose Bowling and Darrell Bowling, (The Bowlings). The Bowlings were alleged to have defaulted on a December 23, 1997 mortgage agreement. National City held two additional mortgages on the property, dated April 25, 1997 and June 27, 1997. In its action, National City Mortgage asserted its belief that the earlier mortgages had been paid, but noted that they were unreleased as of record.

Appellant National City filed an Answer and Disclaimer in which it stated that National City "disclaimed any interest in the property described in this Complaint and asks that it be dismissed as a party herein." The trial court then entered an Order dismissing National City as the Bank had requested. The final Order of Dismissal was entered in July, 2002, and was not appealed. Months later, National City claimed that it found out that it had not assigned the mortgage to National City Mortgage, and argues that it did, in fact, retain an interest in the subject property. At that point, National City filed a motion to set aside the order of dismissal. National City claimed that if the order was not set aside, National City would lose its right to enforce the mortgage. That motion was overruled by the Clay circuit court in September, 2002.

National City filed a separate action against the Bowlings relating to the identical property interest voluntarily

dismissed. In September, 2002, the Bowlings filed a motion to have that complaint dismissed, arguing that the Order granting National City its requested dismissal barred the claim. National City did not appear at the hearing on the Bowlings' motion to dismiss. The circuit court dismissed that action on the grounds that the order of dismissal in the underlying case barred the filing of the separate action under the doctrine of res judicata. National City then filed a motion for post-judgment relief, asking that the earlier dismissal be vacated. The circuit court denied that motion. In the order denying the motion, the court noted that no appeal had been taken from the July order of dismissal or the September dismissal of the separate action, and that the orders were final due to the lack of timely filing of a notice of appeal. National City asserts that that it was entitled to relief under CR 60.02 subsections (a) and (e). CR 60.02 allows a court to set aside an earlier order on the grounds of "(a) mistake, inadvertence, surprise or excusable neglect. . . ." Subsection (e) permits setting aside an order where "the judgment is void, or has been satisfied, released, or discharged, or . . . it is no longer equitable that the judgment should have prospective application. . . ." The Bowlings did not file a brief in support of the court's actions.

The standard for review of a circuit court's denial of a motion to set aside an order of dismissal is whether an abuse

of discretion is shown. Granville & Nutter Shoe Co., Inc. v. Florsheim Shoe Co., Ky. App., 569 S.W.2d 721 (1978). National City argues that the trial court abused its discretion in refusing to set aside the order of dismissal. National City asserts that it proved a valid interest in the property, and that the judgment should have been set aside for that reason. National City further asserts that it was an abuse of discretion to dismiss the later filed action as being barred by the earlier order of dismissal. CR 60.02 permits a trial court to correct a judgment where justice so requires. A party requesting such relief must show that the requested relief would not be inequitable to other parties. Fortney v. Mason, Ky., 302 S.W.2d 842, 843 (1957), citing Mason v. Lacy, 274 Ky. 21, 117 S.W.2d 1026 (1932). National City made no attempt to provide the trial court with such a showing. As the court properly noted, parties are entitled to some measure of closure, and re-opening a foreclosure proceeding months after final judgment was entered and the time for appeal had lapsed would be inequitable.

The record shows plainly that National City requested dismissal from the initial mortgage action. The record also shows that National City failed to timely appeal the dismissal of the later action against the Bowlings. The trial court felt that National City's dilatory behavior barred relief in its favor months after the time for appeal had expired. CR 60 is

supposed to provide relief that an appeal or a motion to alter, amend or vacate a judgment cannot. The civil rule is not an alternate vehicle to provide relief where an appeal was incomplete or untimely. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 101 (1998).

National City was an experienced business entity which held all relevant records in this case. National City failed to properly present its interests; failed to timely note its error to protect its interests with a CR 59 motion to alter, amend or vacate; or file a timely appeal. National City has shown no abuse of discretion in the circuit court ruling. Therefore, we affirm the ruling of the Clay circuit court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Keffer  
Cincinnati, Ohio

BRIEF FOR APPELLEE:

No Brief Filed.