

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002590-MR

NATIONWIDE LIFE INSURANCE
COMPANY OF AMERICA

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 05-CI-008904

KEVIN NEWTON

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Nationwide Life Insurance Company of America

(Nationwide) appeals from an order of the Jefferson Circuit Court denying its motion for post-judgment relief. We affirm.

Nationwide filed a complaint against Kevin Newton in the Jefferson Circuit Court on October 14, 2005 regarding commissions paid to Newton. On November 16, 2005, Newton filed a motion to dismiss the claim alleging that the complaint failed to

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 KRS 21.580.

mention that he should repay certain commissions or that he breached any sort of agreement or contract with Nationwide. The trial court agreed and dismissed the case with prejudice on December 27, 2005. Nationwide filed a notice of appeal on January 27, 2006, thirty-one days after the circuit court entered its judgment. This Court issued a show cause order on February 16, 2006, and subsequently dismissed Nationwide's appeal on April 24, 2006, as untimely.² Nationwide did not file a motion for discretionary review with the Supreme Court.

On November 9, 2006, Nationwide filed a “motion for relief from order dismissing or to alter, amend or vacate” with the Jefferson Circuit Court. In its motion, Nationwide simply reiterated the standard of review for a motion to dismiss for failure to state a claim, which is clearly an argument to be made on direct appeal. However, nothing was mentioned in the motion about post-judgment relief pursuant to CR 60.02. Nationwide failed to explain how its present appeal falls under one of the subsections outlined in CR 60.02 or how such relief applies to its claims. The motion was denied by the trial court on November 21, 2006.

Now, Nationwide argues “the nature and legal effect of a motion is determined by the substance, not the mere linguistic form.” *Cargo Truck Leasing Co. v. Piper*, 394 S.W.2d 472, 474 (Ky. 1965) (citation omitted). It is correct, as Nationwide notes, that the substance of a motion controls and not merely the way a motion is captioned. In this case, the caption of the motion is not the problem. The memorandum filed in support of the motion clearly lacks the necessary requirements of a proper CR

² No. 2006-CA-000239-MR

60.02 motion. Nationwide argues that the attached affidavit of its counsel is sufficient to provide the appropriate explanation required, but the affidavit only explains why the notice of the direct appeal was untimely. To be a proper CR 60.02 motion, Nationwide was required to set out in its motion which subsection of the rule its appeal falls under. Nationwide is not entitled to circumvent appellate procedure by a misplaced substance-over-form argument. The “motion for relief from order dismissing or to alter, amend or vacate” does not meet the standards of a CR 60.02 motion. Thus, the denial of Nationwide's motion is not reviewable by this court.

Therefore, we affirm the November 21, 2006, order of the Jefferson Circuit Court.

ALL CONCUR.

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