

RENDERED: SEPTEMBER 11, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001514-MR

CHAD BECKER

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE FRED A. STINE V, JUDGE
ACTION NO. 04-CI-01556

A. D. COLLINS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND DIXON, JUDGES.

CLAYTON, JUDGE: Chad Becker (Becker) appeals the July 10, 2008, order of the Campbell Circuit Court, denying his motion to set aside the March 16, 2005, order dismissing, with prejudice, his lawsuit against A. D. Collins (Collins).

Finding no abuse of discretion, we affirm.

On December 28, 2003, Becker was involved in an altercation at a business located at 525 W. 6th Street, Newport, Kentucky. As a result of the altercation, Becker allegedly suffered from several injuries. On December 28, 2004, Becker filed a personal injury lawsuit against Collins, alleging that Collins owned the business where the altercation took place and seeking compensatory and punitive damages under a theory of *respondeat superior*. In response, Collins acknowledged ownership of the property where the business was located, but denied ownership of the business itself. Collins maintained that the business was run by another party who leased the property from him. On March 16, 2005, the trial court entered an order dismissing the action, with prejudice.

On May 20, 2008, Becker filed a motion to set aside the order of dismissal, pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Becker alleged that newly discovered information revealed that Collins was, in fact, the owner of the business at the time of the altercation, and therefore should be held liable for Becker's injuries. The trial court denied Becker's motion in an order entered on July 10, 2008. This appeal followed.

A CR 60.02 motion is the process by which a party may move to be relieved from a final judgment or order based on mistake; inadvertence; excusable neglect; newly discovered evidence; fraud; perjury; a void judgment; or any other reason of an extraordinary nature justifying relief. CR 60.02. The rule reads, in pertinent part:

[o]n 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; . . . or (f) any other reason of an extraordinary nature justifying relief. The 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.

The rule “is not intended merely as an additional opportunity to relitigate the same issues which could ‘reasonably have been presented’ by direct appeal or [Kentucky Rules of Criminal Procedure] RCr 11.42 proceedings.”

McQueen v. Com., 948 S.W.2d 415, 416 (Ky. 1997) (*quoting* RCr. 11.42(3)). Thus, CR 60.02 relief “is available only to raise issues which cannot be raised in other proceedings.” *McQueen* at 416..

Before the movant is entitled to an evidentiary hearing, he must affirmatively allege facts which, if true, justify vacating the judgment and further allege special circumstances that justify CR 60.02 relief.

Gross v. Com., 648 S.W.2d 853, 856 (Ky. 1983).

Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial judge, and the standard of review is whether there has been an abuse of that discretion. . . . The evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result if a new trial was granted.

Caldwell v. Com., 133 S.W.3d 445, 454 (Ky. 2004) (*citing* *Foley v. Com.*, 55 S.W.3d 809 (Ky. 2000)).

We first note that Becker has failed to show that the newly discovered evidence could not have been previously discovered by due diligence, as required by CR 60.02(b). We further note that Becker's motion was filed more than three years after the order dismissing his action and therefore fails to meet the timeliness requirement of CR 60.02. Accordingly, Becker has failed to meet the threshold for CR 60.02 relief. Becker has further failed to allege any special circumstances for which CR 60.02(f) relief is justified.¹ We therefore hold that the trial court did not abuse its discretion in its denial of Becker's motion. Accordingly, the July 10, 2008, order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Theodore Knoebber
Newport, Kentucky

BRIEF FOR APPELLEE:

Richard G. Johnson
Ft. Thomas, Kentucky

¹ The remaining grounds of relief, pursuant to CR 60.02, were not alleged by Becker and therefore need not be addressed by this Court.