

RENDERED: OCTOBER 26, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-000367-MR

SUZANNE CARTER and  
JAMES CARTER

APPELLANTS

v. APPEAL FROM TRIMBLE CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 10-CI-00055

HSBC MORTGAGE CORPORATION USA

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

CLAYTON, JUDGE: James and Suzanne Carter appeal from the February 1, 2011, order of the Trimble Circuit Court that denied their motion for Kentucky Rules of Civil Procedure (CR) 60.02 relief. Because we hold that the trial court did not abuse its discretion in the denial of said relief, we affirm.

The underlying action is a foreclosure action commenced by HSBC Mortgage Corporation USA (HSBC) by complaint filed on March 29, 2010,

against the Carters for failure to provide payment on a note attached to certain real property. No answer was filed by the Carters. On April 30, 2010, HSBC filed a motion for default judgment, which was granted by judgment and order of sale entered on May 7, 2010. The matter was then referred to the Master Commissioner who entered a report of sale on July 1, 2010, indicating the property had been sold on June 25, 2010. Thereafter, on July 8, 2010, counsel for the Carters filed an entry of appearance, as well as a motion for relief pursuant to CR 62.02. That motion was denied on February 1, 2011, and this appeal followed.

We review an appeal involving a CR 60.02 motion for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83 (Ky. App. 2000). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Miller v. Eldridge*, 146 S.W.3d 909, 914 (Ky. 2004)(footnote omitted).

The Carters argue to this Court that HSBC was not entitled to the default judgment and order of sale, because HSBC had no standing on the day it initiated the foreclosure action. There is no question that the Carters failed to timely appeal from the default judgment. *See* CR 73.02; CR 59.05. Therefore, the real issue before this Court is whether the trial court abused its discretion when it denied the Carters CR 60.02 relief based on their argument that HSBC lacked standing. We hold that it did not.

“A defendant shall serve his/her answer within 20 days after service of the summons upon him/her.” CR 12.01. Default judgments are appropriately

granted when a party “has failed to plead or otherwise defend” the action brought against them. CR 55.01. In the instant action, the Carters failed to file an answer to HSBC’s complaint, filed on March 29, 2010, and default judgment was therefore entered on May 7, 2010. The Carters argue that they did not participate in the action because they were attempting to renegotiate the terms of the note with HSBC outside of the action. However, nothing to this effect was ever filed with the trial court until after the filing of the CR 60.02 motion. In fact, the Carters did not file anything in the record until more than two months after judgment had been entered against them and almost two weeks after the property had been sold.

“CR 60.02 ‘is designed to provide relief where the reasons for the relief are of an extraordinary nature.’” *U.S. Bank, NA v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007)(citation omitted). “Moreover, one of the chief factors guiding the granting of CR 60.02 relief is the moving party’s ability to present his claim prior to the entry of the order sought to be set aside. *Id.* at 541-42. Lack of standing is an affirmative “defense which must be timely raised or else will be deemed waived.” *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010); *see also* CR 8.03. “With minimal effort” the Carters could have filed an answer alleging HSBC’s lack of standing. *Hasty*, 232 S.W.3d at 542. Nonetheless, they waited three and half months after the filing of the complaint and two months after the entry of the default judgment before filing their first documents: a notice of appearance by their attorney and their motion for CR 60.02 relief. This Court has held that an appellant’s delay of two and half months after the filing of a

complaint, before attempting to defend an action, was too long and therefore did not warrant CR 60.02 relief. *Terrafirma, Inc. v. Krogdahl*, 380 S.W.2d 86, 87 (Ky. 1964). The Court held “that appellant should have employed an attorney to have looked after this case before judgment was entered by default.” *Id.* While we are not unsympathetic to the parties and their efforts to renegotiate the note, we cannot grant relief when the parties themselves failed to submit themselves to the trial court or otherwise participate in the underlying action until after judgment had been entered, and carried out, against them. The remaining arguments of the Appellants are without merit. We therefore hold that the trial court did not abuse its discretion when it denied CR 60.02 relief to the Carters.

For the foregoing reasons, the February 1, 2011, order of the Trimble Circuit Court is affirmed.

ALL CONCUR.

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