

RENDERED: AUGUST 30, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002250-MR

RANDALL S. WALDMAN;
H&R PROPERTIES, LLC;
AND WLW PROPERTIES, LLC

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 05-CI-00894

PBI BANK, INC., F/K/A
BULLITT COUNTY BANK; AND
LOUISVILLE GALLERIA, LLC

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Randall S. Waldman, H&R Properties, LLC, and WLW

Properties, LLC (collectively referred to as appellants) bring this appeal from June

23, 2011, September 27, 2011, November 18, 2011, and November 28, 2011, orders of the Bullitt Circuit Court. We affirm.

The underlying facts of this case are vigorously disputed, and the procedural facts are rather convoluted. In an effort to reduce confusion, we will only set forth those facts necessary to disposition of this appeal.

The genesis of the controversy between the parties stems from the lease of commercial premises from Louisville Galleria, LLC (Galleria) to Thirteenth Floor Entertainment Center, LLC (Thirteenth Floor)¹ for use as a fitness center. The lease was executed in late 2003.² Shortly after entering into the lease, Thirteenth Floor started renovating the leased premises; however, Thirteenth Floor allegedly experienced difficulties performing under the terms of the lease. After Thirteenth Floor entered into the lease agreement, Waldman became interested in purchasing an interest in Thirteenth Floor and purportedly became CEO of Thirteenth Floor around this time. At Waldman's request, on July 20, 2004, PBI Bank, Inc., issued Letter of Credit No. 31344 (letter of credit) in the amount of \$400,000 for the benefit of the Galleria.³ To secure the letter of credit, PBI Bank placed reserve holds in the amount of \$400,000 on Waldman's

¹ Thirteenth Floor Entertainment Center, LLC (Thirteenth Floor) was formerly known as Premier Health and Fitness Clubs, LLC (Premier). The business name was changed by amendment dated October 4, 2004. For the sake of clarity, we will simply refer to both as Thirteenth Floor.

² The lease was formally entered into on November 24, 2003.

³ PBI Bank, Inc., is successor in interest to Bullitt County Bank. Bullitt County Bank issued the Letter of Credit No. 31344 (letter of credit) on July 20, 2004. For the sake of clarity, we simply refer to both as PBI Bank.

preexisting lines of credit with PBI Bank.⁴ The reason for which Waldman sought to obtain the letter of credit is a matter of dispute between the parties, although it is alleged that the Galleria required the letter of credit as a condition to lease Thirteenth Floor additional space in its building.

Thirteenth Floor eventually vacated the leased premises, and numerous mechanics' liens were filed against the property by unpaid contractors engaged by Thirteenth Floor. Thirteenth Floor filed a Chapter 11 bankruptcy petition with the United States Bankruptcy Court for the Western District of Kentucky on October 4, 2004. The case was converted to Chapter 7 on November 8, 2004. Subsequently, the Galleria presented the letter of credit to PBI Bank for payment.⁵ Waldman then demanded that PBI Bank not honor the letter of credit and raised various allegations, including fraud. Thereupon, PBI Bank denied payment on the letter of credit.

Beginning in August 2005, after PBI Bank declined to honor the letter of credit, the parties filed various petitions, counter-claims, and cross-claims in the Bullitt Circuit Court as set forth, in relevant part, below:

08/17/05 Petition for Declaratory Judgment
 - Filed by PBI Bank
 - Named as defendants Waldman, H&R Properties,
 LLC (H&R), WLW Properties, LLC (WLW),

⁴ Waldman was the sole member of H&R Properties, LLC, and also a member of WLW Properties, LLC. Upon issuing the letter of credit, PBI Bank actually held in reserve existing lines of credit extended to H&R, WLW, and Waldman personally.

⁵ According to the record, the Louisville Galleria, LLC, formally presented the letter of credit to PBI Bank, Inc., in July 2005.

Thirteenth Floor and the Galleria.

09/07/05 Answer, Counter-Claim and Cross-Claim

- Filed by appellants (Waldman, H&R and WLW).

11/14/05 Circuit Court Order

- Stayed proceedings against Thirteenth Floor due to its pending bankruptcy.

07/05/06 Third-Party Complaint

- Filed by appellants against John Howell, James Schwab, Hurstbourne–Shelbyville Road Entertainment Center, LLC, (Hurstbourne – Shelbyville) and PF Investments of Ky., LLC (PF Investments).⁶

09/11/06 Answer

- Filed by third-party defendants (Howell And Schwab. Answer states that Hurstbourne – Shelbyville, and PF Investments had filed a Chapter 11 bankruptcy petition).

12/14/10 Motion to Withdraw as Counsel

- Appellants' attorney, Kenneth Bohnert, sought to withdraw from case as attorney for appellants.

12/20/10 Order

- Granted appellants' attorney Bohnert's motion to withdraw.
- Gave appellants thirty days to acquire substitute counsel.

04/06/11 Order

⁶ On October 8, 2004, Premier Fitness Health and Wellness Center, LLC, changed its name to Hurstbourne–Shelbyville Road Entertainment Center, LLC (Hurstbourne – Shelbyville). This is a separate legal entity from Thirteenth Floor. Hurstbourne – Shelbyville filed a Chapter 11 bankruptcy petition on August 14, 2006. In their third-party complaint, appellants allege that Hurstbourne – Shelbyville, PF Investments, LLC, and Thirteenth Floor operated as a single entity. Appellants further alleged that John Howell and James Schwab committed fraud, negligence, and *ultra vires* acts in presenting the letter of credit to the Galleria.

- Recited that pretrial conference took place on March 28, 2011, and appellants failed to appear.
- Ordered status review set for May 16, 2011, at which time appellants were to appear by counsel or *pro se*.
- Warned that all claims asserted by appellants will be dismissed if appellants failed to appear.

- 06/23/11 Order
- Reciting that appellants failed to appear.
 - Dismissed all claims asserted by appellants against PBI Bank and the Galleria.
 - Included complete CR 54.02 language.
- 08/19/11 Motion for Summary Judgment
- Filed by PBI Bank.
 - Seeking summary judgment upon its claims against appellants.
- 09/27/11 Order
- Awarded summary judgment in favor of PBI Bank upon its claims against appellants.
 - Included complete CR 54.02 language.
- 11/04/11 Notice of Entry of Appearance
- Counsel sought to appear on behalf of appellants.
- 11/04/11 Motion to File Late Notice of Appeal
- Filed by appellants.
 - Citing excusable neglect (failure to receive notice of June 23, 2011, or September 27, 2011, orders), appellants sought leave to file late notices of appeal from these orders.
- 11/04/11 Motion for CR 60.02 Relief
- Filed by appellants.
 - Sought to set aside June 23, 2011, and September 27, 2011, orders for failure to receive notice thereof.
- 11/18/11 Agreed Order

- Dismissed all remaining claims between PBI Bank and the Galleria.
- PBI Bank and the Galleria settled their claims and agreed to dismissal.

11/28/11 Order

- Denied appellants' CR 60.02 motion.

12/09/11 Notice of Appeal

- Filed by appellants.
- Recited appealing June 23, 2011, September 27, 2011, November 18, 2011, and November 28, 2011, orders.

This appeal follows.

Appellants contend that the circuit court erred by denying their Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate the June 23, 2011, and September 27, 2011, orders. In particular, appellants claim that they failed to receive notice of entry of these orders or of any court filings after the withdrawal of their counsel by order entered December 20, 2010. In particular, they argue:

In July, 2010, Randall Waldman was forced to vacate his residence located at 18719 Weatherford Circle[,] Louisville[,] Kentucky, 40245[,] in a foreclosure proceeding and moved to 17200 Mallett Hill Drive, Louisville, Kentucky[,] 40245.

On December 14, 2010, counsel for [appellants] filed a motion to withdraw accompanied by a tendered order. On December 20, 2010, the Court entered the order prepared by [appellants'] counsel allowing Appellants' counsel to withdraw. The distribution list for the December 20, 2010[,] Order allowing Appellants' counsel to withdraw *specifically* includes Randall Waldman's address at 9616 Taylorsville Rd. Ste. 201 Louisville, KY 40299. H&R Properties is listed at the same address, 9616 Taylorsville Rd. Ste. 201 Louisville, KY 40299, care of Randall Waldman. WLW Properties

is listed at 100 East Southland Boulevard Louisville, Kentucky 40214, care of Sharon Landrum, Process Agent.

Nevertheless, after Appellants' counsel withdrew, the Bullitt Circuit Court mailed documents to Appellants at their previous addresses, which were no longer valid.

....

Had the Bullitt Circuit Court and PBI Bank sent court filings to either Waldman's office, as directed by the distribution list on the Order granting [appellants'] motion to withdraw, [appellants] would have received the notice of the Court's March 28, 2011[,] pre-trial conference, the May 16, 2011[,] pre-trial conference, with resulted in dismissal of its counter-claims and cross-claims, and PBI Bank's August 19, 2011[,] Motion for summary Judgment.

Further, PBI Bank knew Waldman had changed his address due to the foreclosure proceedings because PBI Bank redirected several financial statements and other correspondence to Randall Waldman at his new address at 17200 Mallett Hill Drive. Additionally, this address was known to PBI Bank and Louisville Galleria, as reflected by the October 19, 2011[,] witness list filed by Louisville Galleria.

In short, the Bullitt Circuit Court and PBI Bank did not take notice of the last known address provided by [appellants'] previous counsel, and such failure to send court filings to the last known address constitutes excusable neglect under CR 60.02.

Appellants' Brief at 3-4, 8-9 (citations omitted). Essentially, appellants maintain that their failure to receive notice of the June 23, 2011, and September 27, 2011, orders constitutes excusable neglect under CR 60.02. As a result, appellants allege

the circuit court erred by denying their CR 60.02 motion. For the following reasons, we disagree.

It is well-established that relief under CR 60.02 is of an extraordinary nature and requires a “very substantial showing.” *U.S. Bank, N.A. v. Hasty*, 232 S.W.3d 536 (Ky. App. 2007). Under CR 60.02, a circuit court may vacate an order upon the basis of excusable neglect. *Kurtsinger v. Bd. of Tr. of Ky. Ret. Sys.*, 90 S.W.3d 454 (Ky. 2002). Excusable neglect may be found where a party fails to receive notice of entry of an adverse judgment due to no fault of that party. *Id.* However, the circuit court possesses “broad discretion” under CR 60.02, and its ruling will only be disturbed upon an abuse of that discretion. *Kurtsinger*, 90 S.W.3d 454.

In denying appellants’ CR 60.02 motion, the circuit court did not believe that a showing of excusable neglect was made; rather, the court found that appellants “had every opportunity to enter and monitor the case and to secure alternative counsel.” In so finding, the circuit court relied on the fact that appellants admitted they received notice of the December 20, 2010, order allowing the withdrawal of their counsel. In the December 20, 2010, order, the circuit court specifically gave appellants thirty days to secure new counsel and to enter an appearance. Appellants failed to do so and explained in their brief that they “could not afford substitute counsel.” Appellants’ Reply Brief at 2. Most importantly, appellants did not inform the circuit court of same and simply opted to do nothing for some eleven months.

It has been recognized that “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 entry of the order sought to be set aside.” *Hasty*, 232 S.W.3d at 541-42. Here, appellants had ample opportunity to present their claims before entry of the June 23, 2011, and September 27, 2011, orders. Appellants were fully aware of the proceedings which had been pending in the Bullitt Circuit Court since August of 2005, and chose not to participate in the proceedings for some eleven months after their attorney had withdrawn from the case. This fact cannot be overlooked. While we may be sympathetic to appellants’ assertions that they could not afford legal counsel, at minimum, Waldman could have entered an appearance *pro se*. Based upon these circumstances, we cannot conclude that the circuit court abused its discretion in denying appellants’ CR 60.02 motion.

Appellants next argue that the circuit court erred by rendering summary judgment on September 27, 2011, in favor of PBI Bank on all claims asserted against appellants. In their brief, appellants attack the underlying merits of the September 27, 2011, summary judgment. However, the record indicates that the September 27, 2011, summary judgment included complete CR 54.02 language and was final for appeal purposes as it adjudicated complete claims between PBI Bank and appellants. *See Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008). Moreover, the record is also clear that appellants failed to timely file a notice of appeal from the September 27, 2011, summary judgment. Appellants’ notice of appeal was filed on December 9, 2011, well outside the mandatory thirty-

day time limit for filing the appeal. CR 73.02(1)(a). And, the failure of appellants to receive notice of entry of the September 27, 2011, summary judgment does not affect its finality for appeal purposes. *See Steward v. Ky. Lottery Corp.*, 986 S.W.2d 918 (Ky. App. 1998); *Kurtsinger*, 90 S.W.3d 454. Consequently, we decline to review the merits of the December 9, 2011, summary judgment as appellants failed to timely appeal same.

Appellants final argument is that the automatic stay imposed by 11 U.S.C. § 362 arising from the bankruptcies of Thirteenth Floor, Hurstbourne – Shelbyville, and PF Investments in some way protected appellants’ rights and claims in this action and necessitates the orders entered by the Bullitt Circuit Court being adjudicated void as a matter of law. For the reasons stated, this argument is totally without merit.

First and foremost, there is no co-debtor stay protection available to appellants under the United States Bankruptcy Code. Co-debtor stay protection is afforded on a limited basis in Chapter 13 bankruptcies for consumer debts. 11 U.S.C. § 1301. There are no consumer debts involved between any of the parties to this proceeding – all of the indebtedness is business or commercial in nature. There are no provisions that provide for co-debtor stay protection under Chapter 7 or Chapter 11 of the Bankruptcy Code, and appellants have provided no authority to this Court to the contrary. Additionally, any relief for co-debtor stay protection must be sought from the bankruptcy court, not a state court. The Bullitt Circuit Court had absolutely no jurisdiction to determine whether any of appellants were

entitled to “co-debtor” stay protection. The subject matter of this action looks to the enforcement of a letter of credit issued to the Galleria by PBI Bank at the request of Waldman and thus, is unrelated to any of the bankruptcy proceedings cited to this Court by appellants.

Notwithstanding, nothing in the Bullitt Circuit Court action has precluded appellants from: (1) filing proofs of claims in the respective bankruptcies of Thirteenth Floor, Hurstbourne – Shelbyville, and PF Investments, (2) filing motions under 11 U.S.C. § 362(d) to terminate the automatic stay to pursue any state court claims that appellants believe they may have against the debtors, or (3) pursue adversary complaints against the debtors in the bankruptcy court.

Ironically, appellants’ primary argument looks to a purported indemnity claim against Thirteenth Floor. Although filed in 2004, the Chapter 7 bankruptcy proceeding of Thirteenth Floor (Case No. 04-36349) remains on the active bankruptcy court docket in the United States Bankruptcy Court for the Western District of Kentucky, yet appellants have taken no action to pursue a claim therein to date. Similarly, the Chapter 11 bankruptcy of Hurstbourne – Shelbyville (Case No. 06-32061) was dismissed on September 5, 2007. This dismissal, as a matter of law, terminated any stay protection for this debtor under 11 U.S.C. § 362. Appellants have been free to pursue any claims against Hurstbourne – Shelbyville since September 5, 2007.

Accordingly, any and all arguments presented by appellants in this appeal premised upon protection under 11 U.S.C. § 362 of the United States Bankruptcy

Code or any other provision therein is totally without merit or legal basis whatsoever.

For the foregoing reasons, the orders of the Bullitt Circuit Court are affirmed.

ALL CONCUR.

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