RENDERED: OCTOBER 18, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001128-MR

INSURANCE COMPANY OF NORTH AMERICA;
ACE AMERICAN INSURANCE COMPANY;
JOHN HOUSTON, M.D.; CHERYL HOUSTON;
VON LEQUATTE; AND BRENDA LEQUATTE — APPELLANTS

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NOS. 05-CI-00204 AND 05-CI-00205

GREEN TURTLE BAY, INC., D/B/A TURTLE BAY MARINA;
AND ENGINEERED DOCK SYSTEMS, INC.
D/B/A FLOATING DOCKS MANUFACTURING CO. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Insurance Company of North America, John and Cheryl Houston and Von and Brenda LeQuatte (collectively, the "Appellants") appeal from the

judgment of the Livingston Circuit Court which dismissed their suit against Appellees for lack of prosecution and denying their subsequent motions for relief from that judgment. After a thorough review of the facts and record in this case, and given the trial court's considerable discretion over the issues at hand, we find no error in the trial court's denial of Appellants' motions. Therefore, we affirm.

On December 22, 2005, two of the Appellants, Von and Brenda LeQuatte filed suit against Appellees, Green Turtle Bay Marina (hereafter "Marina") and Floating Docks Manufacturing Company (hereafter "Floating Docks") for damage sustained to their houseboat. Five days later, Insurance Company of North America, to whom four other plaintiffs had subrogated their claims, filed suit for similar damage to their houseboats. The damage occurred one year prior when the roof above several boat slips at the Marina collapsed onto the vessels below. Floating Docks had designed and constructed these portions of the roof only months prior. Floating Docks never entered its appearance during the pendency of the circuit court cases.[1]

Both cases proceeded through the normal steps of litigation, including discovery requests from the Appellants to both the Marina and Floating Docks in late 2006. The discovery request propounded to the Marina was the last action Appellants undertook regarding their claim against the Marina before March 16, 2012. Having received no answer to their complaint and discovery requests regarding Floating Docks, Appellants moved for default judgment against it as to

[1] Floating Docks entered its appearance on appeal and submitted a brief seeking affirmation of the trial court's orders.

liability. On September 7, 2007, the trial court issued orders consolidating the two cases and granting Appellants' motion for default judgment against Floating Docks as to liability. For three years after entry of this order, little occurred in the case.

In June 2010, Appellants entered their Submission of Evidence of Damages against Floating Docks. At both parties' request, the trial court held a hearing to establish damages on June 30, 2010. The trial court subsequently requested that Appellants submit an order which itemized their damages; however, the trial court did not receive this document. In February of 2011, the trial court contacted Appellants' counsel and requested the order once again. In response, Appellants' counsel assured the court he would remit the order; however, the trial court never received the proposed order for damages.

Other than this brief and informal conversation between court staff and Appellants' counsel, nothing occurred in the case between June 30, 2010 and August 18, 2011, when the trial court notified Appellants that, unless good cause was shown, it would dismiss the case in thirty days due to lack of prosecution. None of the Appellants responded to this notice and the trial court dismissed both consolidated cases without prejudice on September 29, 2011.

Nearly six months after the trial court had dismissed the cases, Appellants filed a Motion to Set Aside the dismissal on the grounds of excusable neglect under Kentucky Rules of Civil Procedure (CR) 60.02(a). Appellants' counsel argued that notice of the trial court's intent to dismiss had come in to their office during an "extraordinary period of activity" and had been excusably

overlooked. The trial court denied this motion. Appellants then filed a Motion to Alter, Amend or Vacate the trial court's ruling pursuant to CR 59.05. The trial court denied this motion as well, and Appellants now appeal from the trial court's denial of both motions.

The issue at hand is whether the trial court erred in dismissing the consolidated cases for lack of prosecution and denying Appellants' request for relief under CR 60.02 and CR 59.05. Accordingly, we review the trial court's rulings for an abuse of its discretion. *See Toler v. Rapid American*, 190 S.W.3d 348 (Ky. App. 2006); *Wildcat Property Management, LLC v. Reuss*, 302 S.W.3d 89 (Ky. App. 2009); *Copas v. Copas*, 359 S.W.3d 471 (Ky. App. 2012); *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (Ky. 2009). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On appeal, Appellants' argument is two-fold: 1) That the trial court erred in dismissing their suit pursuant to CR 77.02; and 2) that the trial court erred in denying its motions under CR 60.02 and CR 59.05 because Appellants' failure to prosecute the case or to respond to the trial court's notice was excusable under the circumstances. We address both arguments in turn.

CR 77.02(2), also known as the "housekeeping rule," states

> (2) At least once each year trial courts shall review all pending actions on their dockets. Notice shall be given to each attorney of record of every case in which no pretrial

> step has been taken within the last year, that the case will be dismissed in thirty days for want of prosecution except for good cause shown. The court shall enter an order dismissing without prejudice each case in which no answer or an insufficient answer to the notice is made.

As this Court has recently stated, "this is a housekeeping rule, within the wide discretion of the trial court, intended to expedite the removal of stale cases from the court's docket." *Honeycutt v. Norfolk Southern Ry. Co.*, 336 S.W. 3d 133 (Ky. App. 2011) (citing to *Hertz Commercial Leasing Corporation v. Joseph*, 641 S.W. 2d 753 (Ky. App. 1982)).

Appellants argue that the trial court's decision to dismiss their case was erroneous because it effectively vacated the court's prior default judgment on liability in their favor, which a court has no authority to do *sua sponte*. Appellants also argue that no "pretrial steps" remained to be taken because the court had already found in their favor. We disagree that the trial court's decision to dismiss was in error.

Appellant's characterization of the trial court's order dismissing pursuant to CR 77.02(2) as an order vacating its prior default judgment is incorrect. The trial court did not seek to vacate its order granting a default judgment. It simply proceeded, as it was entitled to do under a completely unrelated procedural rule, to dismiss the case due to the Appellant's failure to continue prosecuting their claim after the issue of liability had been resolved.

We also find Appellants' argument that no "pretrial steps" remained unpersuasive. Indeed, the trial court had already found in their favor regarding

liability. However, the issue at the heart of this case arose after June 30, 2010, when the trial court requested that Appellants submit a proposed order for damages. Appellants agreed to submit this order but failed to do so, despite at least one reminder from the trial court itself. Hence, one simple but vital step remained pertaining to Appellants' claim against Floating Docks, and the Appellants failed to follow through.

Furthermore, following the trial court's proper and unchallenged consolidation of the cases in 2007, significant "pretrial steps" pertaining to Appellants' claims against the Marina remained to be taken. The record reflects no such steps were taken by Appellants to advance their claims against the Marina for nearly five years prior to dismissal. Hence, Appellants' claim that no "pretrial steps" remained to be taken in the consolidated cases is inaccurate and cannot form the basis for a successful challenge to the trial court's order dismissing.

Overall, the record reflects and the Appellants do not dispute, that between June 30, 2010, when Appellants filed evidence of damages with the court and August 18, 2011, when the trial court sent parties notice of its intent to dismiss, nothing occurred in this case. Furthermore, the record reflects and the Appellants do not dispute, that they did not respond to the trial court's notice of intent to dismiss as they were expressly required to do to prevent dismissal. Nevertheless, Appellants cite to *Toler v. Rapid American, et al*, 190 S.W.3d 348 (Ky. App. 2008), and this Court's statement that dismissals under CR 77.02 "should be resorted to only in the most extreme cases." They also cite to *Polk v.*

Wimsatt, 689 S.W.2d 363 (Ky. App. 1985), in arguing that the trial court was required to look to "less drastic remedies." However, both of these cases concerned dismissals *with prejudice*. The trial court dismissed Appellants' case *without prejudice*, a far less "drastic measure." Furthermore, Appellants failed to respond to the court's notice under CR 77.02 and, in doing so, failed to proffer any "less drastic remedies" for the court's consideration. Given these facts, we find that it was well within the trial court's discretion to dismiss the present case, without prejudice, for lack of prosecution.

Appellants next argue that the trial court abused its discretion in denying them relief under CR 60.02 and CR 59.05. They first contend that, under CR 60.02(a), the trial court should have relieved them of the burden of dismissal because their failure to prosecute the case and to respond to the court's notice was the result of "excusable neglect." Appellants proffer that the trial court's notice of intent to dismiss "arrived during an extraordinary period of activity for [their] counsel" and that their failure to respond was an "excusable oversight" for which their clients should not be held responsible. This argument is unpersuasive.

We have held in a similar case that such circumstances do not fulfill CR 60.02(a)'s requirement of mistake, inadvertence, surprise or neglect when any of the above are at the hands of an attorney or a party and not at the hands of the court. *Honeycutt*, *supra*, at 136. This Court has also stated, in very clear terms, that the "[n]egligence of an attorney is imputable to the client and is not a ground for relief under … CR 60.02(a) or (f)." *Brozowski v. Johnson*, 179 S.W.3d 261,

263 (Ky. App. 2005) (quoting *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984)). While this may be an unforgiving principle, the purpose of CR 60.02's extraordinary relief is not to prevent harsh results. *See Honeycutt*, *supra*, at 136. Though the neglect Appellants' counsel showed in failing to respond to the court's notice may well have been due to a busy week or month, it was nonetheless inexcusable for purposes of CR 60.02. Accordingly, the trial court did not abuse its considerable discretion in denying Appellants' CR 60.02 motion or in denying to alter, amend, or vacate that judgment pursuant to CR 59.05.

Trial courts possess broad discretion over both the dismissal of cases for lack of prosecution under CR 77.02 and grants of extraordinary relief under CR 60.02 and CR 59.05. While it is true that trial courts must weigh other interests and options before taking the extreme measure of dismissing a case, we are confident in this case that the trial court gave Appellants every opportunity to continue prosecuting their case before dismissing it. Appellants' counsel inexcusably failed to take those opportunities.

For the reasons we state herein, the order of the Livingston Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James M. Gary
A. Andrew Draut
Louisville, Kentucky

BRIEF FOR APPELLEES:

Edward K. Box
Paducah, Kentucky

Alan K. Goldstein
St. Louis, Missouri

Stacey A. Blankenship
Paducah, Kentucky