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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001514-MR

ISAAC JAIR BAKER AND
JOHN MOODY — APPELLANTS

v.

APPEAL FROM BRECKINRIDGE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 10-CI-00187

GREENGO CONSTRUCTION, LLC;
ALTERNATIVE GREEN SOLUTIONS;
MARK BARKER; KELLY
MCCARTHY; AND RYDER WATHEN — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND STUMBO, JUDGES.

MAZE, JUDGE: Isaac Jair Baker (Baker) and John Moody (Moody) appeal from a final order and judgment of the Breckinridge Circuit Court following a jury trial, and an earlier order granting Greengo Construction, LLC's motion made pursuant to Kentucky Rules of Civil Procedure (CR) 60.02.

On June 23, 2010, Greengo Construction, LLC (Greengo), filed a complaint against Baker, claiming that he owed Greengo $27,200.00 and $2,057.50 under two unpaid construction contracts. Baker filed an answer and counterclaims on July 20, 2010. On August 6, 2010, the trial court granted a motion to intervene made by Moody. On August 18, 2010, the trial court granted Greengo an extension of time to answer the counterclaims and Moody's claims. Greengo failed to respond by the due date of September 5, 2010, however, and Baker and Moody filed a motion for summary judgment. The trial court granted the motion on October 22, 2010, entering an order dismissing Greengo's complaint and leaving the matter of damages open for further proceedings. The parties attempted unsuccessfully to mediate Baker and Moody's counterclaims. Greengo thereafter filed a motion to set aside the summary judgment pursuant to CR 60.02. The trial court granted the motion, and the case proceeded to trial.

The jury found that Greengo entered into an agreement to construct straw-bale houses for Baker and Moody, that Greengo began to build the houses but that further performance was prevented by Baker and Moody, that Baker and Moody benefited from the performance of Greengo, that Greengo had entered into contracts for materials to be used in the construction, had requested payment from Baker and Moody, and that Baker refused to pay Greengo for its performance and materials.

The jury further found that Greengo had not breached its contract with Baker or with Moody, and that Greengo was not liable to either Baker or Moody for fraud

by misrepresentation. The jury awarded $7,235.59 in compensatory damages to Greengo. Greengo filed a motion for judgment notwithstanding the verdict, which the trial court denied. This appeal followed.

Moody and Baker's first argument is that the trial court abused its discretion in granting Greengo's CR 60.02 motion and vacating its earlier grant of summary judgment. CR 60.02 functions as:

> a safety valve, error correcting device for trial courts. . . . The rule is designed to allow trial courts a measure of flexibility to achieve just results and thereby "provides the trial court with extensive power to correct a judgment." Accordingly, CR 60.02 addresses itself to the broad discretion of the trial court and for that reason, decisions rendered thereon are not disturbed unless the trial judge abused his/her discretion.

Kurtsinger v. Board of Trustees of Kentucky Retirement Systems, 90 S.W.3d 454, 456 (Ky. 2002) (internal citations omitted).

"Two of the factors to be considered by the trial court in exercising its discretion are whether the movant had a fair opportunity to present his claim at the trial on the merits and whether the granting of the relief sought would be inequitable to other parties." *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957) (internal citations omitted).

As the basis for requesting relief under CR 60.02, Greengo argued under section (a) of the Rule, which permits relief for "mistake, inadvertence, surprise or excusable neglect," that it had never contemplated the defendants' numerous countersuits, that it had no funds with which to retain legal representation to the

extent of the litigation involved in the countersuits, and that its representatives had left town to work on a project in another state and were "incommunicado." Greengo also claimed that its attorney had not foreseen the scope of the litigation, and had withdrawn on October 20, 2011, two days before the grant of summary judgment.

Under section (e), which permits relief if "it is no longer equitable that the judgment should have prospective application," Greengo stated that its representatives were no longer out of state, that they now had excellent communication with an attorney with whom they had contracted for representation on the counterclaims, and that they had produced discovery documents to the defendants.

The motion also argued under section (f) that there were reasons of "an extraordinary nature justifying relief," namely that Mark Barker and Ryder Wathen, Greengo's principals, had put tremendous efforts and energies into improving the defendants' lives without sufficient pay, and that they were liable under contracts from which the defendants had been unjustly enriched. The motion stressed that Barker and Wathen had not been financially, geographically or organizationally prepared to reply to the defendants' demands.

The trial court ultimately found that the unexpected counterclaims, lack of communication between the plaintiff and its counsel, and the plaintiff's purported willingness to go forward with the lawsuit were reasons of an extraordinary nature, justifying the relief requested.

The appellants argue that the circumstances simply did not meet the high standard required for the grant of relief under CR 60.02, which was intended to codify the common law remedy of *coram nobis*, "an extraordinary and residual remedy to correct or vacate a judgment[.]" *Harris v. Commonwealth*, 296 S.W.2d 700, 701 (Ky. 1956). For instance, they question the legitimacy of Greengo's argument that it was entitled to relief because its principals were out of town, when Greengo was in fact the party that initiated the litigation in the first place. They also question Greengo's claims regarding the unexpectedness of Moody's counterclaims, pointing out that his intervention was foreseeable because his claims were non-frivolous and compulsory. Furthermore, they argue that under Kentucky law, the negligence of counsel, or the lack of communication between a party and counsel, are not sufficient grounds for relief under CR 60.02. In *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc*., a panel of this Court reversed a grant of CR 60.02 relief to a party whose attorney failed to attend a trial, on the grounds that "[n]egligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f)." 678 S.W.2d 797, 799 (Ky. App. 1984). In *Vanhook*, a three-day trial regarding damages in a serious automobile accident involving multiple injuries had already occurred prior to the grant of CR 60.02 relief. The grant of relief would have required a re-trial of the original action against the owners and drivers of the vehicles; the Court of Appeals' decision to reverse was based in large part on the conclusion that "we cannot compel them to go through another trial."

By contrast, in this case, the defendants were not forced to undergo a lengthy re-litigation of the case. And, in any event, Greengo's attorney's failure to anticipate the scope of the litigation was not the sole reason for the grant of CR 60.02 relief. In granting the motion, the trial court acknowledged that its decision required the balancing of competing principles: on the one hand, that summary judgment not be used to deny anyone the right to have their case heard, and on the other hand, the desire for finality of judgments. "The desire that justice be accorded the parties clashes on some occasions with the principle that litigation must end within a reasonable time." *Fortney*, 302 S.W.2d 843. Under the circumstances, we cannot say that the trial court abused its discretion when it balanced these competing concerns and decided that the equities favored the appellees.

Next, the appellants argue that the trial court erred in denying their motion for judgment notwithstanding the verdict, on the grounds that the amount of damages was palpably and flagrantly against the evidence, such as to indicate that it was reached as the result of passion or prejudice. See CR 59.01(d). They argue that the amount of damages awarded by the jury was not identical to the amounts claimed by Greengo in its complaint ($25,200.00 and $2,057.50), and that there is no indication which debts the jury was referencing when it found for Greengo under the theory of *indebitatus assumpsit*, which allows a "party who has substantially performed his contract in part, and been prevented by the fault of the opposite party from fully performing it according to its terms, [to] recover on a

quantum meruit for what he has done." *Madison-Jackson-Estill Lumber & Development Co. v. Coyle*, 166 Ky. 108, 178 S.W. 1170, 1172 (Ky. App. 1915). The appellees have responded that the jury's choice of remedy was to award them half of the amount of their contractual obligations.

Our review is hampered by the fact that neither the appellants nor the appellees have complied with CR 76.12(4)(c)(v), which requires that a brief contain "ample supportive references to the record[.]" There are no meaningful references to the written record, to any exhibits, or to any portions of the trial when evidence of the alleged damages was presented to the jury. In any event, however, "where it is reasonably certain that damage has resulted, mere uncertainty as to the amount does not preclude one's right of recovery or prevent a jury decision awarding damages." *Curry v. Bennett*, 301 S.W.3d 502, 506 (Ky. App. 2009) (internal citation omitted). "The amount of damages is a dispute left to the sound discretion of the jury[.] . . . If the verdict bears any relationship to the evidence of loss suffered, it is the duty of the trial court and this Court not to disturb the jury's assessment of damages." *Savage v. Three Rivers Medical Ctr.*, 390 S.W.3d 104, 119 -20 (Ky. 2012). We are precluded from stepping "into the shoes" of the trial court, and disturbing its ruling on a CR 59 motion unless it is found to be clearly erroneous. *Miller v. Swift*, 42 S.W.3d 599, 601 (Ky. 2001). We find no such error in this case; thus, the trial court did not abuse its discretion in denying the motion for judgment withstanding the verdict.

For the foregoing reasons, the order granting CR 60.02 relief and the final judgment are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE
GREENGO CONSTRUCTION, LLC:

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