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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001125-MR

BERT W. WILLIAMS, JR. — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN EDWARDS, JUDGE
ACTION NO. 13-CI-401583

CITIMORTGAGE, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND STUMBO, JUDGES.

KRAMER, JUDGE: Bert W. Williams, Jr., appeals from an order of the Jefferson Circuit Court reinstating a prior judgment of foreclosure it had entered against him and in favor of appellee, Citimortgage, Inc. Upon review, we affirm.

By way of background, Citimortgage initiated foreclosure proceedings against Williams by filing its complaint in this matter on April 30, 2013. Williams

answered with a general denial and added that he was "working to get a loan modification as well." Nevertheless, the circuit court ultimately entered a summary judgment of foreclosure in favor of Citimortgage on December 11, 2013.

Although the circuit court's December 11, 2013 judgment was final and appealable, Williams did not appeal it. Instead, Williams filed a Kentucky Civil Rule (CR) 60.02 motion on April 2, 2014, asking the circuit court to set it aside. As grounds, Williams argued Citimortgage should have been prohibited from filing its foreclosure action because (1) Citimortgage had violated the covenant of good faith and fair dealing implicit in their mortgage contract; (2) Citimortgage had lacked standing to sue; and (3) Williams' previous failure to defend against Citimortgage's foreclosure action was due to the fact that he had relied upon negligent legal advice.

On April 8, 2014, the circuit court entered an order granting Williams the relief he had requested in his CR 60.02 motion. However, on May 21, 2014, the circuit court entered an order reinstating its December 11, 2013 judgment. As to why, Citimortgage had filed a motion for reinstatement on April 11, 2014, arguing that it had not received notice of Williams' CR 60.02 motion and that the bases offered in Williams' CR 60.02 motion for setting aside the December 11, 2013 judgment were meritless; unpreserved prior to the entry of the judgment; and were improper bases for CR 60.02 relief.

On June 2, 2014, Williams then served Citimortgage with a CR 59.05 motion. There, Williams argued an additional reason supported setting aside the

December 11, 2013 judgment, *i.e.*, *res judicata*. Specifically, Williams pointed out (for the first time) that the December 11, 2013 judgment was actually duplicative of a prior judgment of foreclosure that Citimortgage had already received against him in another action. Williams also included a copy of the prior judgment as an attachment to his motion.

In response, Citimortage did not contest the correctness of what Williams had represented or the authenticity of the prior judgment Williams had attached to his motion. Instead, Citimortgage asserted (1) the circuit court had no jurisdiction to consider Williams' motion under the purview of CR 59.05; and (2) in any event CR 59.05 cannot be used as a vehicle to raise new affirmative defenses.

On June 4, 2014, the circuit court overruled Williams' CR 59.05 motion without further elaboration. This appeal followed.

At the onset, Citimortgage has moved to dismiss this appeal as untimely.[1] Its motion is DENIED. As to why, the target of this appeal is the circuit court's May 21, 2014 order which effectively overruled Williams' April 8, 2014, CR 60.02 motion. A court's ruling on a CR 60.02 motion qualifies as a final judgment from which an appeal may be taken and is also subject to reconsideration under the purview of CR 59.05. *See Mingey v. Cline Leasing Service, Inc.*, 707 S.W.2d 794, 796 (Ky. App. 1986). Here, Williams' CR 59.05 motion certifies that

[1] A motion panel of this Court previously overruled Citimortgage's motion to dismiss. Citimortgage has renewed its motion.

it was served upon Citimortgage on June 2, 2014—a point Citimortgage does not contest. June 2, 2014, in turn, was a date within the period allowed for the circuit court to properly consider such a motion.[2] Williams filed his notice of appeal on July 9, 2014, thirty days after the circuit court overruled his CR 59.05 motion on June 9, 2014. Therefore, his notice of appeal was timely. *See* CR 73.02(1)(e).

We now proceed to the merits.

A decision to grant or deny a motion under CR 60.02 or CR 59.05 rests within the circuit court's sound discretion. *See Schott v. Citizens Fidelity Bank & Trust Co.*, 692 S.W.2d 810, 814 (Ky. App. 1985). Accordingly, we apply an abuse of discretion standard of review. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 483 (Ky.2009); *Bethlehem Minerals Co. v. Church and Mullins Corp.*, 887 S.W.2d 327, 329 (Ky.1994). 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, Williams asserts that each of the bases he specified in his CR 60.02 and CR 59.05 motions (*i.e.,* Citimortgage's asserted lack of standing, its purported breach of the covenant of good faith and fair dealing, *res judicata*, and

[2] CR 59.05 provides "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." To be sure, June 2, 2014, was 12 days after May 21, 2014. However, the 10th and 11th days (*i.e.*, May 31 and June 1, 2014) were respectively a Saturday and Sunday, and thus Williams had until June 2, 2014, to serve his motion. *See* CR 6.01.

his own reliance upon negligent legal advice) should have justified setting aside the December 11, 2013 foreclosure judgment.

We disagree. An aggrieved party's decision to rely upon negligent legal advice is not a basis for setting aside a judgment under CR 60.02. *See Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957). None of the remaining bases offered by Williams implicated the circuit court's subject matter jurisdiction. *See* CR 8.03 (listing "estoppel"[3] as an affirmative defense); *Bailey v. Bailey*, 231 S.W.3d 793, 800 (Ky. App. 2007) (explaining *res judicata* is a non-jurisdictional affirmative defense that cannot be raised *sua sponte*); *Harrison v. Leach*, 323 S.W.3d 702, 708-709 (Ky. 2010) (explaining "standing" is a non-jurisdictional affirmative defense that likewise cannot be raised *sua sponte*). We add that where there are two judgments regarding the same subject matter—as is apparently the case here—the general rule provides that when an action is pursued until the entry of a final decision inconsistent with a prior judgment, the second decision is supersceding and ordinarily prevails whether the *res judicata* effects of the first judgment were ignored by the parties or expressly rejected by the decision-maker in the second action. *See* 47 Am. Jur.2d Judgments § 536.

Moreover, *res judicata*, standing, and estoppel are affirmative defenses that Williams could have asserted prior to the entry of the December 11, 2013 judgment. CR 59.05 and CR 60.02 do not permit disappointed litigants to raise affirmative defenses that could have been raised prior to a judgment as a basis

[3] "Estoppel" is the essence of Williams' defense regarding Citimortgage's purported breach of the implied covenant of good faith and fair dealing.

for setting the judgment aside. *See Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997); *see also Board of Trustees of Policemen's and Firemen's Retirement Fund of City of Lexington v. Nuckolls*, 507 S.W.2d 183, 186 (Ky. 1974).

For these reasons, we AFFIRM.

ALL CONCUR.

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