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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001262-MR

ROY L. TYNDALL — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 12-CI-00591

BANK OF AMERICA, N.A. SUCCESSOR,
BY MERGER TO BAC HOME LOANS
SERVICING, LP F/K/A COUNTRYWIDE
HOME LOANS SERVICING, LP — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Roy L. Tyndall, *pro se*, appeals from an order denying his Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate.

On September 16, 2004, Tyndall borrowed money from America's Wholesale Lender. He entered into a promissory note for the loan, which he and

his wife agreed to secure through a mortgage on their home. Both the note and mortgage were properly signed by Tyndall, and the mortgage was recorded. In 2010, Tyndall allegedly defaulted on the loan.

On June 15, 2012, Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP F/K/A Countrywide Home Loans Servicing, LP (Bank of America), filed an action against Tyndall[1] to enforce the overdue note as secured by the mortgage. Bank of America attached the note, mortgage, the assignment of the mortgage from America's Wholesale Lender through Mortgage Electronic Registration Systems (MERS) to BAC Home Loans Servicing, LP, and a subordination agreement with Countrywide Home Loans.

Tyndall's answer through counsel was served on September 1, 2012. In his answer, Tyndall stated he could not admit or deny most of the allegations in the complaint "because it is not clear in the attachments that [Bank of America] is a true holder in due course of said note, as no proof of the chain of custody is contained therein" and raised affirmative defenses.

On November 7, 2012, Bank of America filed a motion for summary judgment and default judgment arguing Tyndall failed to demonstrate a genuine issue of material fact or meritorious defenses, and it established its secured debt through attached documents and the affidavit in support of summary judgment. The affidavit of Julia Susick stated she is an officer of Bank of America, had

[1] Although Tyndall's wife was also named as a defendant and Tyndall purported to represent her interests when signing motions and ultimately his notice of appeal *pro se*, she personally took no action and the Court of Appeals determined by order that only Roy L. Tyndall properly appealed. We refer only to Tyndall.

reviewed its business records, and Bank of America has possession of the promissory note and is the assignee of the security instrument. She referenced attached business records showing that Tyndall defaulted and establishing the amount due on the note. However, no business records were attached to her affidavit submitted with the motion, or otherwise part of the record.

On November 19, 2012, Tyndall's counsel filed a motion to withdraw and requested Tyndall be given time to retain alternative counsel. On November 29, 2012, at a motion hearing, Tyndall's counsel was allowed to withdraw and the hearing on the motion for summary judgment was passed until December 13, 2012, to allow Tyndall time to obtain counsel and make a defense.

On December 13, 2012, Tyndall appeared at the hearing, *pro se*, and explained that he had not been able to obtain counsel and requested the opportunity to file an amended answer. The circuit court asked Tyndall if he had any defense and whether he was the person who signed the note and owed money. Tyndall refused to answer. Instead, Tyndall questioned the court's jurisdiction. The circuit court orally granted judgment in favor of Bank of America, denied Tyndall's motion to amend his answer and entered a written judgment and order of sale, which was filed on December 14, 2012. Tyndall did not file a direct appeal.

On May 14, 2013, Tyndall filed a motion to vacate a void judgment pursuant to CR 60.02. At the hearing on this motion, Tyndall argued the circuit court lacked jurisdiction because the affidavit submitted by Bank of America's counsel in support of the motion for summary judgment was hearsay evidence. The circuit

court explained that a motion for summary judgment could properly be supported by an affidavit, there was subject matter jurisdiction and personal jurisdiction, and Tyndall failed to submit proof or testimony to oppose summary judgment. The circuit court orally denied Tyndall's motion to vacate, and this decision was noted as a calendar order.

On June 28, 2013, Tyndall filed and served his motion to reconsider pursuant to CR 59.05. During the hearing on this motion, Tyndall reiterated his previous arguments. On July 15, 2013, the circuit court denied Tyndall's motion for reconsideration through a calendar order. On July 19, 2013, Tyndall filed a notice of appeal.

Tyndall appeals the trial court's denial of CR 60.02 relief. CR 60.02 provides in relevant part as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief.

As explained in *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997), "CR 60.02 is not a separate avenue of appeal to be pursued in addition to

other remedies, but is available only to raise issues which cannot be raised in other proceedings." Tyndall did not appeal from the December 14, 2012 judgment. All of Tyndall's claims that were brought in his CR 60.02 motion could have been raised in a direct appeal. Tyndall is not entitled to a substitute appeal under CR 60.02.

Additionally, even if Tyndall had properly appealed from the original judgment, relief would not be available. Tyndall argues the circuit court erred by: (1) failing to allow him to enter his amended answer into the record to oppose summary judgment; (2) failing to void the judgment for lack of subject matter jurisdiction over this particular case because Bank of America had no standing to bring the action; and (3) granting summary judgment where Bank of America failed to meet its burden under CR 56.

The circuit court did not err by refusing to allow Tyndall to enter his amended answer into the record during the summary judgment hearing. CR 15.01 provides that a party may amend a pleading to which no responsive pleading is permitted "at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Because Tyndall's request to amend his answer was made more than twenty days after his original answer was served, the circuit court had discretion to grant or deny him leave to amend it. The circuit court's decision denying such leave should not be disturbed unless it abused its discretion. *Nichols v. Zurich Am. Ins. Co.*, 423 S.W.3d 698,

707 (Ky. 2014). "Although amendments should be freely allowed, the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself." *First Nat. Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky.App. 1988). Having reviewed Tyndall's amended answer, it fails to provide any basis for the denial of the motion for summary judgment and, therefore, the circuit court's denial of leave to file it cannot have been prejudicial to him. *Smith v. Hilliard*, 408 S.W.2d 440, 443 (Ky. 1966).

The circuit court did not err by not voiding the judgment for lack of standing. To the extent that Tyndall may have raised this issue before the circuit court, a matter which is doubtful given his focus on challenging the court's jurisdiction without explaining this was really a challenge to standing, Tyndall simply failed to take any action which would allow him to raise a material issue of fact as to standing. While Tyndall could have challenged whether the note was transferred and the mortgage properly assigned to Bank of America, he failed to request any discovery on this issue, such as the production of documents to establish the chain of title from America's Wholesale Lender to MERS and then to Bank of America to support his allegations that it lacked standing. *See Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky.App. 2007) (summary judgment is inappropriate if the opposing party has not had an adequate opportunity for discovery, with less time being needed for straightforward matters).

Tyndall's argument that the circuit court erred by granting summary judgment where Bank of America failed to meet its burden under CR 56 is precluded from our consideration because it was first raised in his brief on appeal. This argument is not a rewording of Tyndall's argument below that the circuit court lacked jurisdiction because summary judgment could not be established through reliance on an affidavit. Instead, Tyndall specifically argues that Bank of America's affidavit supporting its motion for summary judgment stated it established default through attached documents establishing default and the remaining debt due, but these documents were missing from the record. Tyndall argues that without the inclusion of these documents, Bank of America could not establish its right to summary judgment.

We cannot review an argument made for the first time on appeal. As our courts have repeatedly stated "we will not allow appellants, under the guise of 'developing' an argument raised in the trial court, to feed one can of worms to the trial judge and another to the appellate court." *Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (internal quotation marks and footnote omitted).

Therefore, we affirm the Jessamine Circuit Court's order denying Tyndall's CR 60.02 motion.

ALL CONCUR

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Roy L. Tyndall, *Pro Se* Nicholasville, Kentucky	No brief filed.