RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001754-MR
&
NO. 2014-CA-000869-MR

JOYA DE ANDALUCIA FARMS, LLC;
CHRISTINA D. CARDENAS; AND
JOSE A. CARDENAS — APPELLANTS

v.

APPEALS FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 13-CI-00503

FIRST NATIONAL BANK NORTH PLATTE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: This is a consolidated appeal from an order granting summary judgment in favor of Appellees and from an order denying Appellants' motion for

CR[1] 60.02 relief and for leave to file an amended answer and counterclaims. After careful review, for the reasons more fully explained below, we affirm both orders.

I. Factual and Procedural Background

Appellants, Jose and Christina Cardenas, are husband and wife. They moved to North Platte, Nebraska in 2006, so that Dr. Cardenas could start a medical practice there. After moving to Nebraska, the Cardenas purchased approximately 128 acres of undeveloped farmland, which was split into two (2) separate tracts. The Cardenas planned to build a residence on one part of the land and operate an Andalusian horse farm on the remainder. They formed a limited liability company, Joya De Andalucia Farms, LLC, ("Joya Farms") to run the horse farm.[2]

Thereafter, the Cardenas and their LLC developed a lending relationship with Appellee, First National Bank ("the Bank"). This relationship produced several loans. The loans included the Bank financing the Cardenas' Spanish style residence, funding the construction of a large scale, state of the art barn facility, funding the construction of an indoor riding arena for competition activities relative to the horses, and other various personal and small business loans. Each of the Cardenas' loans was cross-collateralized with deeds of trust

[1] Kentucky Rules of Civil Procedure.

[2] Joya De Andalucia Farms, LLC, previously registered as a Nebraska limited liability company, is a Kentucky Limited Liability Company registered on March 22, 2013, with its registered office at 475 Woodside Drive, Somerset, KY, 42503.

such that each separate deed of trust secured each individual loan which was owed to the Bank.

In May of 2012, the Cardenas left Nebraska and moved to Somerset, Kentucky. In February of 2013, the Bank declared the Cardenas and Joya Farms to be in default with respect to three separate promissory notes and accelerated their debt in accordance with the terms of the notes. The balance on the three notes combined exceeded four hundred thousand dollars plus interest from March of 2013. The notes were secured by personal property, which had been moved to Kentucky, and real property located in Nebraska.[3]

On April 26, 2013, the Bank filed an action in Pulaski Circuit Court against Joya Farms and the Cardenas. The Bank requested the circuit court to award it a writ of possession ordering that the collateral in possession of Joya Farms and the Cardenas be delivered to the Bank as well as a money judgment against the Cardenas and Joya Farms, jointly and severally, in the amount of any deficiency remaining after the Bank's disposition of the collateral including late charges, interest, collections costs, and attorneys' fees.

With the assistance of counsel, the Appellants filed an answer to the complaint. Therein, the Appellants admitted the existence of the notes, but denied that the unpaid balances were due. They also took issue with the Bank's description in its complaint of some of the collateral. The answer did not set forth

[3] The Bank proceeded separately against the Appellants in Nebraska as related to the real property.

any counter-claims or affirmative defenses. Instead, Appellants stated: "The Defendants may have causes of action which become more apparent as the process of discovery takes place, and therefore reserve the right to make such Counter-Claims at the time when their proof becomes substantiated. They therefore preserve any right to file compulsory counter-claims."

On July 5, 2013, the circuit court conducted an evidentiary hearing. At this hearing, David DeTurk, Vice President of First National Bank, North Platte, testified regarding Appellants' default. On August 7, 2013, the court entered an Order awarding the Bank a writ of possession which allowed it to recover the various horses and equipment at issue.

The Bank filed a motion for summary judgment on August 23, 2013. The motion included an affidavit with supporting documentation on the notes and default. In response, Appellants argued that summary judgment was improper because there were outstanding issues concerning whether the Bank followed the proper procedures in setting up the notes, giving credit for payment, and declaring the notes to be in default.

The court held a hearing on the Bank's summary judgment motion. After the hearing, by order entered September 6, 2013, the court granted summary judgment to the Bank. On September 30, 2013, Appellants filed a CR 60.02 motion for relief from judgment and for leave to file an amended answer and counterclaim. They filed a supporting memorandum of law a few days later.[4]

[4] At some point after the court's entry of summary judgment, Appellants also obtained new counsel and an agreed order substituting R. Aaron Hostettler in place of Bruce Singleton was

On October 4, 2013, prior to the court's ruling on their CR 60.02 motion, Appellants timely appealed the court's summary judgment order.[5] This Court agreed to hold the appeal in abeyance until such time as the trial court disposed of the CR 60.02 motion.

The circuit court then held a hearing on Appellants' CR 60.02 motion on December 6, 2013. Following the hearing, and various filings by the parties, on May 14, 2014, the court entered an order denying Appellants relief under CR 60.02 as well as the opportunity to amend their answer. Appellants filed a timely appeal for review of this order. Thereafter, we returned the prior appeal to the Court's active docket and consolidated the appeals for review.

II. Analysis

A. Summary Judgment

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial

---

entered on October 2, 2013.

[5] In their notice of appeal, Appellants stated they were appealing the trial court's August 7, 2013 Order awarding the Bank a writ of possession which the trial court specifically stated was not final and appealable, further they appealed the trial court's order entered September 6, 2013 awarding the Bank an additional writ of possession, and the court's order of summary judgment entered on September 6, 2013.

warranting a judgment in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476 (Ky. 1991). Summary judgment "is proper where the movant shows that the adverse party could not prevail under any circumstances." *Id*. (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky.1985)). "A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment." *Haugh v. City of Louisville,* 242 S.W.3d 683, 686 (Ky. App. 2007). "[T]he party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *O'Bryan v. Cave*, 202 S.W.3d 585, 587 (Ky. 2006) (quoting *Steelvest*, 807 S.W.2d at 481).

"Although a defendant is permitted to move for a summary judgment at any time, this Court has cautioned trial courts not to take up these motions prematurely and to consider summary judgment motions 'only after the opposing party has been given ample opportunity to complete discovery.'" *Blankenship v. Collier*, 302 S.W.3d 665, 668 (Ky. 2010) (quoting *Pendleton Bros. Vending, Inc. v. Commonwealth Finance and Admin. Cabinet*, 758 S.W.2d 24, 29 (Ky. 1988)). "Whether a summary judgment was prematurely granted must be determined within the context of the individual case." *Suter v. Mazyck*, 226 S.W.3d 837, 842 (Ky. App. 2007).

Approximately six month elapsed between the time the Bank filed its complaint and entry of the circuit court's summary judgment order. Admittedly,

this is not a great deal of time. However, on its face, this matter did not appear to be overly complex. The only issue presented for determination was whether Appellants defaulted on the notes at issue. In answering the complaint filed against them, Appellants asserted no affirmative defense and only denied the precise description of the collateral and whether the Bank had properly declared them to be in default and properly made a demand of them to pay. In responding to the Bank's summary judgment motion, the Appellants only made the vaguest of arguments without any supporting evidence as to why the motion was premature.[6]

Even so, the circuit court scheduled an evidentiary hearing prior to ruling on the Bank's motion for summary judgment. At the hearing, Appellants had the opportunity to call witnesses, present evidence, and cross-examine the Bank's witnesses. Additionally, counsel was permitted to make arguments to the court. At this time, counsel could have requested additional time for discovery; no such request was made of the trial court. We cannot identify anywhere in the record where Appellants were denied an opportunity to present their own evidence,

[6] The Appellants' response to the Bank's motion for summary judgment is one paragraph in length. It states:

> With respect to the issue of Summary Judgment, the issue remain [sic] as to whether the proper procedures were maintained in setting up the notes and giving credit for payment by the Defendants and whether the bank followed appropriate protocol by declaring the note to be in default. To date, all the Court has had to determine was whether there was a default, however small, in order to justify the issuance of a writ of possession for the collateral. That narrow issue now has been settled, but the entire case involving the evolution of the several notes is still unsettled.

to cross-examine the witnesses called by the Bank, or to make any legal arguments they deemed relevant. Likewise, we cannot find anywhere in the record where Appellants requested the trial court to allow them to take any specific, additional discovery prior to it deciding the issue of default on summary judgment. Having reviewed the record, we must conclude that Appellants were provided with ample opportunity to develop or request discovery to defeat summary judgment, but failed to do so.

If a respondent to a summary judgment motion has proof that a genuine fact issue exists, it is the respondent's duty to tender some proof to the court or make known to the court what additional discovery is necessary to enable it to properly respond. *Neel v. Wagner-Shuck Realty Co*., 576 S.W.2d 246 (Ky. App. 1978). A party who fails to challenge underlying facts presented by the movant in support of the summary judgment risks having the summary judgment granted and then affirmed on appeal. *Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 557 (Ky. App. 1998). In sum, none of the arguments and legal theories that Appellants now contend render the summary judgment erroneous were put before the trial court as part of the summary judgment proceedings. An appellant "will not be permitted to feed one can of worms to the trial judge and another to the appellate court." *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976).

B. *CR 60.02*

The circuit court entered summary judgment in favor of the Bank on September 6, 2013. Appellants did not file a CR 59.05 motion within ten days. Instead, Appellants filed a CR 60.02 on September 30, 2013. The court ultimately denied this motion on the basis that Appellants failed to demonstrate why they were unable to put forth their "new" legal and factual theories before the court prior to entry of the final judgment.

The standard of review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion. *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or supported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

CR 60.02 provides relief from judgment in six particular circumstances. In relevant part, the rule provides:

> (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.

In their brief, as in their motion at the trial court level, Appellants advance a number of arguments purporting to establish entitlement to relief under the rule above. These arguments include: 1) the filing of this action by the Bank

violated the Nebraska Farm Mediation Act; 2) the Bank has violated the Cardenas' Nebraska Statutory right to cure any alleged default; 3) the Bank violated Nebraska law by not crediting the Cardenas' account with the full market value of their Nebraska real property with improvements after selling same pursuant to the trust deeds; 4) the forum selection clauses and choice of law provisions within the contract documents, as well as considerations of *forum non conveniens*, mandated that this matter be litigated solely in Nebraska rather than subjecting the Cardenas to double the litigation expense; 5) the award of attorneys' fees in this case is contrary to Nebraska law; and 6) the Bank has acted in bad faith.

We begin by observing that action under CR 60.02 is not a part of the normal progression of litigation but is an extraordinary procedure whereby a collateral attack is made upon a judgment based on the specific grounds set forth in the rule. *Faris v. Stone*, 103 S.W.3d 1, 4 (Ky. 2003). CR 60.02 is an exceptional remedy necessitating cautious application. *Louisville Mall Assocs., LP v. Wood Center Props., LLC*, 361 S.W.3d 323, 335 (Ky. App. 2012). And, relief under CR 60.02 is appropriate "only under the most unusual and compelling circumstances." *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011). We agree with the trial court that such circumstances are not present here.

None of the legal or factual assertions presented by Appellants constitute "newly discovered evidence." The purpose of CR 60.02 is to allow for the correction of mistakes of fact, not mistakes of law. *See Toyota Motor Mfg., Kentucky, Inc. v. Johnson*, 323 S.W.3d 646 (Ky. 2010). The facts and law were all

available to Appellants prior to entry of summary judgment against them. The fact that Appellants' former counsel did not make those arguments is of no help to them. *See Vanhook v. Stanford-Lincoln Cty. Rescue Squad, Inc.,* 678 S.W.2d 797, 799 (Ky. App. 1984); *Fortney v. Mahan*, 302 S.W.2d 842, 843 (Ky. 1957).

After careful review, we conclude that the allegations of error offered by Appellants are not the kinds of error intended to be addressed by CR 60.02. Appellants provided no new facts that were unknown to them prior to the court's judgment. We agree with the trial court that the bases for Appellants' CR 60.02 motion are issues and arguments that were all available prior to the entry of the judgment at issue. Further, Appellants failed to provide any excuse for having failed to raise these issues at the appropriate time. Under these circumstances, we cannot find that the trial court abused its discretion in denying Appellants' motion for relief from judgment.

Additionally, we reject Appellants' contention that the trial court's judgment is void due to its failure to follow various procedures in Nebraska's law, which was never brought to its attention in the first instance. The personal property at issue in this case was located in Kentucky. Joya Farm was registered in Kentucky when this suit was commenced. The Cardenas were residents of Kentucky. And, the amount in controversy was well in excess of the circuit court's threshold jurisdiction amount. Subject matter jurisdiction was proper. "A basic rule with respect to civil actions is that if the court has jurisdiction of the subject

matter and the parties, its judgment, whether erroneous or not, is not void." *Skinner v. Morrow*, 318 S.W.2d 419, 423 (Ky. 1958).

The circuit court also correctly determined that fraud was not a basis for setting aside the summary judgment. Appellants' fraud claim is based on their assertion that one of the Bank's witnesses, David DeTurk, committed perjury, or at least willfully misled the court, at the July 5, 2013 hearing. Appellants allege that Mr. DeTurk misrepresented to the court that the only way the Cardenas could cure the alleged default was by paying the entire accelerated amount of the loans in full, which they argue was false under Nebraska law and amounted to fraud perpetrated on the court.

The trial court concluded that Mr. DeTurk's testimony was not false within the context of the questions he was asked at the hearing. We cannot conclude that the trial court abused its discretion is so finding.

Additionally, in *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 904 (Ky. 2009), this Court discussed fraud under rule 60.02:

> Fraud upon the court is "that species of fraud which does or attempts to subvert the integrity of the court itself." Such fraud has been construed to include only the most egregious conduct, such as bribery of a judge or a member of the jury, evidence fabrication, and improper attempts to influence the court by counsel. Generally, fraud between the parties, without more, does not rise to the level of fraud upon the court. *Id., quoting Wise v. Nirider,* 261 Mont. 310, 862 P.2d 1128 (1993) (internal citations omitted).

Further, the court noted that extrinsic fraud does not include "fraudulent representations or concealments made during court proceedings." *Id.* Here, it cannot be said that the statement by Mr. DeTurk, even if knowingly false, would support a finding of "extrinsic fraud" as contemplated in CR 60.02(d).

IV. Conclusion

Accordingly, for the foregoing reasons, we affirm the rulings of the Pulaski Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

R. Aaron Hostettler
London, Kentucky

BRIEF FOR APPELLEE:

Jane Adams Venters
Somerset, Kentucky