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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000972-MR

JOHNNY A. HITCHCOCK APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 09-CI-011107

CSX TRANSPORTATION, INC. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL, AND TAYLOR, JUDGES.

ACREE, JUDGE: The Jefferson Circuit Court entered an order denying Appellant Johnny Hitchcock's CR[1] 60.02 motion to set aside a prior order dismissing his case under CR 77.02 for failure to prosecute. We must determine if the circuit court's decision constitutes an abuse of discretion. We discern no abuse, and affirm.

[1] Kentucky Rules of Civil Procedure.

I. Facts and Procedure

On November 4, 2009, Hitchcock filed a complaint against Appellee CSX Transportation, Inc., his employer, asserting a right-shoulder cumulative trauma claim arising under the Federal Employers' Liability Act, 45 U.S.C.A.[2] § 51 *et seq.* Hitchcock later filed an amended complaint that added a claim alleging injury to his left shoulder. CSX answered, and a period of discovery ensued. Written discovery was served and answered by both sides. Documents were produced. Hitchcock's deposition was taken, and the depositions of other witnesses were scheduled.

Pretrial activity dwindled in early 2011. The record reflects nothing occurred in this case between March 11, 2011, and April 10, 2012. On April 11, 2012, the circuit court notified Hitchcock that, unless good cause was shown, it would dismiss the case in thirty days due to lack of prosecution. Hitchcock made no response and, as promised, on May 11, 2012, the circuit court dismissed the case without prejudice. The orders were stamped and entered with check marks indicating the orders were mailed to counsel and parties of record.

On January 29, 2014, more than twenty months after the circuit court dismissed the case, Hitchcock filed a motion to set aside the dismissal under CR 60.02(e) and (f) citing extraordinary circumstances. Hitchcock was represented at the trial level by local counsel and out-of-state counsel. Hitchcock argued only

[2] United States Code Annotated

local counsel received the April 11, 2012 notice, and neither counsel nor Hitchcock received the May 11, 2012 dismissal order. Counsel for CSX received both orders.

The circuit court denied the motion. Hitchcock appealed.

II. Standard of Review

Our review of a denial of a CR 60.02 motion is for an abuse of discretion. *Kurtsinger v. Bd. of Trustees of Kentucky Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). To amount to an abuse of discretion, the circuit court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Absent a "flagrant miscarriage of justice," we will affirm the circuit court. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

III. Analysis

Hitchcock presents a host of arguments for our consideration. He contends CR 60.02(e) and (f) compel the circuit court to set aside the dismissal order, and that the circuit court abused its discretion when it denied his CR 60.02 motion. Hitchcock also contends the May 11, 2012 dismissal order was, as a practical matter, a dismissal with prejudice and a "death sentence" to plaintiff's case because the statute of limitations has expired, thereby preventing Hitchcock from refiling his complaint. For that reason, Hitchcock argues that the dismissal order should be vacated and set aside pursuant to *Toler v. Rapid American*, 190 S.W.3d 348 (Ky. App. 2006), *Stapleton v. Shower*, 251 S.W.3d 341 (Ky. App. 2008), and *Bradley v. Creech*, No. 2011-CA0002289-MR, 2013 WL 3237697 (Ky.

App. June 28, 2013), because the circuit court failed to apply the factors from *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), prior to dismissal.

Because Hitchcock has failed to convince us that the circuit court abused its discretion when it denied his CR 60.02 motion, we need not address the substantive arguments pertaining solely to whether the May 11, 2012 dismissal order was entered in error.

CR 60.02 provides several mechanisms by which relief from a final judgment may be achieved. The rule may be invoked in six particular instances: "(a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence; (c) perjury or falsified evidence; (d) fraud affecting the proceedings; (e) the judgment is void; or (f) any other reason of an extraordinary nature justifying relief." *Kurtsinger*, 90 S.W.3d at 456. A motion based on subsections (a), (b), or (c) must be filed within one year of the judgment; all other motions under the rule must be made "within a reasonable time[.]" *Sanders v. Commonwealth*, 339 S.W.3d 427, 436 (Ky. 2011) (quoting CR 60.02).

Before this Court, as he did before the circuit court, Hitchcock argues he is entitled to relief under CR 60.02 because, as alleged by Hitchcock, the circuit court failed to provide copies of the April 11, 2012 and May 11, 2012 orders to Hitchcock or his counsel; counsel for Hitchcock was surprised to learn of the dismissal in October 2013; and, because Hitchcock had no notice of the dismissal prior to this date, his failure to respond to the April 11, 2012 notice was certainly understandable and excusable. Hitchcock seeks relief under CR 60.02(e) and (f)

because they are "the only grounds available." (Appellant's Brief at 7). He "concedes that ground (a) was not and is not available because more than a year passed from the court's order of May 11, 2012[.]" *Id.*

CR 60.02(f) aims "to provide relief where the reasons for the relief are of an extraordinary nature." *U.S. Bank, N.A. v. Hasty*, 232 S.W.3d 536, 541 (Ky. App. 2007) (citation omitted). CR 60.02(f) is the "catch-all" provision of CR 60.02 and allows a party to request relief from a judgment based on "any other reason of an extraordinary nature justifying relief." Relief under CR 60.02(f) is only available if "none of that rule's [other] specific provisions applies." *Snodgrass v. Snodgrass*, 297 S.W.3d 878, 884 (Ky. App. 2009) (quoting *Alliant Hospitals, Inc. v. Benham*, 105 S.W.3d 473, 478 (Ky. App. 2003)); *Commonwealth v. Spaulding*, 991 S.W.2d 651, 655 (Ky. 1999) ("60.02(f) is a catch-all provision that encompasses those grounds, which would justify relief pursuant to writ of coram nobis, that are not otherwise set forth in the rule."). "The point is that subsection (f) was not intended to provide a means for evading the strictures of the other subsections." *Alliant Hospitals*, 105 S.W.3d at 479. Thus, if the asserted ground for relief plainly falls under subsections (a) – (e) of the rule, then the more specific subsection, rather than the more general CR 60.02(f), applies.

Here, the specific subsection CR 60.02(a) applies; subsection (f) does not. Hitchcock repeatedly claims his failure to prosecute the case or to respond to the circuit court's April 2012 notice was excusable because the circuit court mistakenly failed to provide him or his counsel copies of the orders, and he was

surprised to learn of the dismissal in October 2013. CR 60.02(a) (affording relief based on "mistake, inadvertence, surprise, or excusable neglect"). Applying the proper subsection, CR 60.02(a), Hitchcock's January 2014 motion is untimely as it was filed more than a year following entry of the May 11, 2012 dismissal order. *Sanders*, 339 S.W.3d at 436 (a motion based on subsection (a) must be filed within one year of the judgment); CR 60.02.

Affording Hitchcock the benefit of every doubt and assuming the motion is instead governed by CR 60.02(e) or (f), it would still be untimely because it was not, as impliedly found by the circuit court,[3] "made within a reasonable time." CR 60.02. Hitchcock waited more than twenty months following dismissal to seek relief under CR 60.02. The circuit court thought this "an extraordinary amount of time" under the particular facts of this case. We agree.

CR 77.02 states that in "every case in which no pretrial step has been taken within the last year," the circuit court shall give "[n]otice . . . that the case will be dismissed in thirty days for want of prosecution except for good cause shown." CR 77.02(2). The Rule further warns that if "no answer or an insufficient answer to the notice is made," the court "***shall*** enter an order dismissing [the] case." *Id.* (emphasis added).

[3] While not expressly denying Hitchcock's CR 60.02 motion as untimely, the circuit court remarked that "an extraordinary amount of time lapsed before any action was taken," and twice referenced that Hitchcock waited twenty months after entry of the dismissal order before taking steps to revive the case. "Generally, of course, an appellate court may affirm a judgment on a ground other than that relied on by the trial court, provided that the alternative ground is supported by the record." *Rumpel v. Rumpel*, 438 S.W.3d 354, 365 (Ky. 2014).

Hitchcock's attorneys were certainly on notice that they needed to check in with the court at least once a year when no pretrial steps are recorded with the court. Attorneys admitted to practice in this Commonwealth – whether directly or *pro hac vici* – must ensure they are adequately familiar with our procedural rules. Supreme Court Rule (SCR) 3.130(V) ("In all professional functions a lawyer shall be competent, prompt and diligent."). A simple phone call to the clerk's office would have notified Hitchcock that his case had been dismissed. Perhaps even more telling, upon discovering his client's case had been dismissed seventeen months prior, Hitchcock's counsel delayed another four months before seeking relief. We, like the circuit court, are not convinced that Hitchcock's counsel acted with due diligence and promptly upon learning of the dismissal.

Nevertheless, even if Hitchcock's motion was timely filed, the circuit court was not convinced that extraordinary reasons existed justifying relief. We are likewise not convinced.

CR 77.02 is mandatory in nature. That is, *if* no pretrial steps have been taken in over a year and *if* no answer or an insufficient answer to the notice is made, the trial court *shall* dismiss the case. CR 77.02(2); *Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 296 (Ky. 2010)("Shall means shall." (Citation omitted)). It should have come as no surprise – and it is certainly not an extraordinary circumstance – that the circuit court in fact complied with the rule's plain language. Assuming Hitchcock's counsel did not receive notice of the May 11, 2012 dismissal order, counsel allowed almost three years to pass before filing

anything with the court.[4] It was incumbent upon Hitchcock's counsel to ensure it took the necessary steps to make certain Hitchcock's case was not disposed of under CR 77.02. In this Commonwealth, "'[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) (citation omitted); *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797 (Ky. App. 1984) (reiterating that the conduct of an attorney is generally not a ground for relief under CR 60.02(f)). While perhaps an unforgiving principle and even though the ultimate result may be a harsh one, "we can find no authority that holds a harsh result constitutes an extraordinary reason to justify relief under CR 60.02." *Honeycutt v. Norfolk S. Ry. Co*, 336 S.W.3d 133, 136 (Ky. App. 2011) (citation omitted).

Furthermore, and significantly, it is undisputed that Hitchcock's local counsel ***did*** receive the April 11, 2012 notice warning that Hitchcock's case would be dismissed if no response was made. Yet local counsel made no response. Local counsel pleads innocence, claiming his arrangement with outside counsel was such that local counsel need not respond to the notice; that burden fell upon outside counsel. We need only point out that local counsel was still counsel of record. At the very least, local counsel should have ensured that outside counsel responded within the stated time period. Local counsel may not abdicate all responsibility

[4] The last pretrial filing occurred on March 10, 2011. Hitchcock's CR 60.02 motion was filed in January 2014. Working under the assumption that Hitchcock's counsel did not receive the April 2012 and May 2012 orders, we can deduce that, to counsel's knowledge, no filings occurred in this case between March 2011 and January 2014.

simply because outside counsel had agreed to take lead on the case. As succinctly put by the circuit court, "[t]he fact that away and local counsel for [Hitchcock] failed to communicate [is] not an extraordinary basis" justifying relief under CR 60.02(f).

We are fully convinced that the circuit court did not abuse its discretion in finding that Hitchcock failed to present an extraordinary reason justifying relief under CR 60.02(f).[5]

That leaves subsection (e); it is similarly inapplicable. CR 60.02(e) "provides an avenue by which a party may move the court to relieve it from a judgment, order, or proceeding on the basis that the judgment is void." *Soileau v. Bowman*, 382 S.W.3d 888, 890 (Ky. App. 2012). Hitchcock contends the May 11, 2012 dismissal order is void because neither he nor his counsel actually received the order.[6] This Court rejected that argument in *Honeycutt*, *supra*. After first reiterating that CR 77.02(2) is a housekeeping rule that permits our courts to clear their dockets of stale cases, the Court then reasoned:

> As noted *supra*, the trial court relied on an unpublished opinion, *Coleman v. El–Mallakh*, 2008 WL 899805, which we find to be persuasive authority in this case and

[5] Hitchcock argues that it is extraordinary that the circuit court's order denying was based upon the court's misunderstanding that local counsel for Hitchcock received the court's May 11, 2012 dismissal order when in fact local counsel only received the April 11, 2012 notice, and that this misunderstanding on a critically important point is a clear abuse of discretion. That misunderstanding by the circuit court, if a misunderstanding at all, does not demand reversal. We do not labor under the same misunderstanding, and yet find more than sufficient grounds to affirm the circuit court's decision.

[6] Hitchcock packages this same argument under CR 60.02(f), claiming it is an "extraordinary reason" justifying relief. It fails under CR 60.02(f) for the same reasons it fails under CR 60.02(e). We need not include duplicate analyses.

proper to cite as it fulfills the criteria of CR 76.28(4). In Coleman at *3, this Court held that:

> where a statute requires actual notice to be received by a party, it is then incumbent upon the party whose duty it is to give that notice to see that the notice is actually received by the party entitled to notice. We do not believe that the language in CR 77.02(2) can be construed to require that actual notice be received by each attorney of record before the court may proceed with dismissing a case for want of prosecution.
>
> Clearly, the method contemplated for service of the notice is the same as that required for the service of the order dismissing a case under the rule, that being service shall be made by mail in the manner provided in CR 5. CR 77.04(1). Specifically, CR 5.02 provides for service upon the attorney of record by mailing a copy of the notice to the attorney at his last known address and that service by mail is complete upon mailing. (Citations omitted).

In *Coleman*, we pointed out that because hundreds of cases are disposed under this rule each year, it is simply not feasible to place the onerous burden on our circuit clerks to personally ensure that every attorney of record receive actual notice that the case may be dismissed for lack of prosecution absent a showing of good cause. We agree with the language in Coleman stating that "we know of no authority in Kentucky that would impose a duty upon circuit clerks to track down attorneys who have moved their offices without giving notice to the court in order for the court to satisfy the notice provision of CR 77.02(2)." *Id.* at *4.

Honeycutt, 336 S.W.3d at 135-36. Accordingly, we are not persuaded that the May 11, 2012 order dismissing Hitchcock's case is void pursuant to CR 60.02(e)

as a result of his counsel not receiving actual notice from the circuit court that the case was dismissed for want of prosecution under CR 77.02(2).

Before concluding, we are compelled to once again make it clear that "CR 60.02 relief is discretionary. The rule provides that the court '*may*, upon such terms as are just, relieve a party from its final judgment[.]'" *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983) (quoting CR 60.02). The circuit court in this case capably exercised its broad discretion, and it did so in a reasonable manner. Hitchcock has failed to convince us that the circuit court in any way abused its considerable discretion.

IV. Conclusion

For the foregoing reasons, we affirm the Jefferson Circuit Court's May 15, 2014 Order denying Hitchcock's CR 60.02 motion.

ALL CONCUR.

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