

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001238-MR

CHARLES F. MCWHORTER AND
PATRICIA L. MCWHORTER

APPELLANTS

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 13-CI-00061

THOMAS V. HANDY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: Thomas V. Handy loaned \$100,000 to the McWhorters, executing three documents: a commercial promissory note, a contract and security agreement, and a stock transfer agreement. Handy received a security interest in all of the stock owned by the McWhorters in Gas City, Inc. in the event that the McWhorters defaulted on repaying the loan. The loan also accrued interest. The

McWhorters did not timely repay the loan, and Handy eventually filed a Complaint for recovery under the terms of the agreement. Specifically, Handy sought that the Master Commissioner be ordered to execute the necessary documents to transfer the stock to Handy.

Following discovery, on March 25, 2014, the trial court granted Handy's motion for summary judgment. The trial court also issued a Judgment on the same date, adjudging that Handy was entitled to recover almost \$110,000 on the terms of the note. In lieu of that amount, and pursuant to the terms of the parties' agreement, the trial court ordered the McWhorters to transfer all right, title, and interest in Gas City, Inc. stock to Handy.

On April 8, 2014, the McWhorters filed a combined Kentucky Rules of Civil Procedure (CR) 59.05 and CR 60.02 motion for relief from the March 25, 2014 Judgment. The McWhorters never appealed the Judgment. The trial court denied the CR 59.05 and CR 60.02 motions, and the McWhorters now appeal the order denying those motions. The McWhorters claim the Judgment is erroneous because it allegedly violates the Uniform Commercial Code.

In response, Handy argues that the trial court properly denied the CR 59.05 and CR 60.02 motions for two reasons. First, the CR 59.05 motion was untimely filed. We agree. The trial court properly found the motion was not filed within the 10-day window permitted by the rule. The time period was not extended simply because the clerk mailed the Judgment to the parties. *Arnett v. Kennard*, 580 S.W.2d 495 (Ky. 1979) (holding the 10-day filing period for a CR

59.05 motion begins to run from date of entry of the judgment on the docket, not when the judgment is served on the parties by the clerk). Moreover, the McWhorters do not contest the denial of the CR 59.05 motion on appeal. Thus, we affirm the Order inasmuch as it denied the McWhorters' CR 59.05 motion.

Second, Handy argues that the CR 60.02 motion was not a proper vehicle to bring the McWhorters' claims, and the motion should have been summarily dismissed as procedurally improper. We agree that the trial court did not abuse its discretion by denying the CR 60.02 motion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000).

Here, the trial court denied the CR 60.02 motion substantively, finding that the Uniform Commercial Code permitted the express terms of the agreement to control. The express terms of the stock transfer agreement were as follows:

1. McWhorter agrees that in the event of a default on the above described Promissory Note, McWhorter will transfer all his right, title and interest in the stock he now owns or may acquire hereinafter to Handy.
2. McWhorter agrees to sign any necessary documents to perfect the stock transfer and present Handy with all McWhorter's Stock Certificates.

Having reviewed the remainder of the terms in the promissory note, the security agreement, and the stock transfer agreement, we find no ambiguity. The agreement was to transfer all right, title, and interest in the stock to Handy in the event of a default. The parties were "experienced businessmen[,]" as the trial

court found, who were at liberty to contract and vary by agreement the terms of Kentucky's Uniform Commercial Code. *See A&A Mechanical, Inc. v. Thermal Equipment Sales, Inc.*, 998 S.W.2d 505, 510 (Ky. App. 1999) ("Parties wishing to disclaim UCC provisions may, to a limited extent, do so, but deviations from the Code and from the presumptions underlying it should be clearly expressed."); Kentucky Revised Statutes (KRS) 355.1-102(3), KRS 355.1-302(1), KRS 355.9-601(1). Thus, the trial court found the parties are bound to the terms of the agreements they negotiated at arm's length, and it denied the motion.

While we affirm, we base our decision on reasoning different than the trial court. Because the motion was procedurally improper, the trial court did not abuse its discretion by denying the motion. "In instances where a trial court is correct in its ruling, an appellate court, which has de novo review on questions of law, can affirm, even though it may cite other legal reasons than those stated by the trial court." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011).

Here, the trial court properly denied the motion because a party cannot use a CR 60.02 motion to circumvent an untimely CR 59.05 motion. CR 60.02 motions "are limited to afford special and extraordinary relief **not available in other proceedings.**" *Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2008) (emphasis added) (citing *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997)). "CR 60.02 is not a vehicle for parties to re-litigate previously determined issues." *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 336 (Ky. App. 2012) (citing *Baze v. Commonwealth*, 276 S.W.3d 761,

765 (Ky. 2008)). If the issues raised in the CR 60.02 motion “would have been the proper subject for a CR 59.05 motion[,]” and the party failed to timely file a CR 59.05 motion, then “[s]uch failure constitutes a knowing waiver of any arguments [the party] could have raised in a CR 59.05 motion[.]” *Louisville Mall*, 361 S.W.3d at 336. That error is precisely the error the McWhorters committed here.

There is no doubt the issues raised in the combined CR 59.05 and CR 60.02 motion were proper CR 59.05 issues. The motion itself relied on the CR 59.05 standards announced in *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). It argued the trial court should, pursuant to CR 59.05, vacate the order granting summary judgment. It neither argued nor listed a subsection of CR 60.02 upon which it relied. The motion was, for all intents and purposes, a CR 59.05 motion with a single citation to CR 60.02. Thus, it was an untimely CR 59.05 motion.

Even more problematic, though, is the fact that the McWhorters did not appeal the judgment and the order granting summary judgment. The issues they now raise on appeal are issues that are properly addressed on direct appeal.

Accordingly, the McWhorters failed both to timely file a CR 59.05 motion to alter, amend, or vacate, and to timely file a notice of appeal of the Order and Judgment. They cannot now raise direct appeal or CR 59.05 issues through a CR 60.02 motion. *See McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky.1997) (“In summary, 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.”). Nor could the trial court have used CR

60.02 to cure the untimely CR 59.05 motion, because the failure to timely mail a CR 59.05 motion “does not constitute excusable neglect or ‘any other reason of an extraordinary nature justifying relief.’” *Arnett v. Kennard*, 580 S.W.2d 495, 497 (Ky. 1979).

Therefore, the McWhorters’ attempt to use CR 60.02 to resurrect direct appeal issues and an untimely CR 59.05 motion was procedurally improper. The trial court properly denied the CR 60.02 motion, albeit for different reasons. Accordingly, we affirm the trial court’s order because the issues raised in the CR 60.02 motion were issues that could have and should have been raised in other proceedings.

ALL CONCUR

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