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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000204-MR

BARRISTER CONSTRUCTION CORPORATION — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 11-CI-001684

ROUCK PLUMBING COMPANY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, JONES, AND J. LAMBERT, JUDGES.

J. LAMBERT, JUDGE: Barrister Construction Corporation (Barrister) appeals from the Jefferson Circuit Court's order granting Rouck Plumbing Company's (Rouck) motion to vacate an order dismissing its counterclaims and vacating an order which had deemed certain requests for admission admitted. After careful review of the parties' briefs and their oral arguments, we vacate the trial court's

January 5, 2015, order and remand for further consideration of the parties' arguments under Kentucky Rules of Civil Procedure (CR) 54.02.

The underlying dispute concerns a contract between Barrister, which was the construction manager for a project to build an office building in Louisville, Kentucky, and Rouck, which was to install plumbing and the HVAC system. In March 2011, Barrister filed a complaint against Rouck, asserting that Rouck had breached the contract by failing to fulfill its obligations. Barrister also asserted a claim for damages to real property, alleging that Rouck caused damage to the building. Barrister sought compensatory damages, punitive damages, attorney's fees, and costs.

Rouck answered and filed a counterclaim, alleging that Barrister had failed to pay Rouck for its work performed under the contract. Rouck also asserted statutory claims of violations of the Kentucky Fairness in Construction Act, Kentucky Revised Statutes (KRS) 371.400 *et seq.* and KRS 514.070, and asserted a claim for unjust enrichment.

In April 2012, Barrister filed a motion for judgment under CR 12.03 on Rouck's counterclaims. Originally, Rouck was given until May 7, 2012, to respond to Barrister's motion. Rouck did not file a response, and at a hearing on June 21, 2012, the trial court continued the matter and entered an order directing Rouck to appear for a hearing on July 2, 2012, and show cause as to why its counterclaims should not be dismissed. This order was not entered until June 27, 2012. At the July 2, 2012, hearing Rouck's counsel, Brennen Ragone, did not

appear, and the trial court entered an order that day granting Barrister's motion to dismiss Rouck's counterclaim. The record reflects that, at some point, the parties discovered that Mr. Ragone had left town to care for his sick mother and had not provided Rouck with information related to the case for the remainder of 2012. Rouck was unaware of Barrister's motion to dismiss Rouck's counterclaim and was unaware that Mr. Ragone had not appeared at the July 2, 2012, show cause hearing and had not responded to the motion or the court's related orders.

Sometime in late 2012 or early 2013, Mr. Ragone contacted Rouck and indicated that he had just returned after being out of town caring for his sick mother, that she had passed, and that he was ready to resume work on the case. On February 5, 2013, Mr. Ragone sent Barrister's counsel an email explaining his absence. In that email, Mr. Ragone referenced "a mountain of old mail," and it was not entirely clear whether Mr. Ragone was aware that Barrister's motion to dismiss Rouck's counterclaims had been granted. The following day, on February 6, 2013, Barrister served discovery requests on Rouck, and an agreed order extended the discovery deadline through April 8, 2013. On March 20, 2013, the trial court held a pre-trial conference, and the record reflects that counsel was present for both Barrister and Rouck. On April 10, 2013, Rouck filed answers and responses to Barrister's discovery requests. These included interrogatories, requests for admissions, and requests for production of documents. Counsel for Barrister corresponded with Mr. Ragone on May 20, 2013, and requested supplemental information and responses to Barrister's initial requests. According

to Rouck, Mr. Ragone never forwarded the May 20, 2013, correspondence with Barrister's counsel requesting supplements to Rouck. After no response from Rouck, Barrister filed a motion to compel supplemental discovery and to schedule mediation, which was passed to the previously scheduled June 17, 2013, pre-trial conference. Mr. Ragone attended this conference, and the trial court ordered Rouck to respond to the discovery motion by July 18, 2013.

On August 13, 2013, Mr. Ragone sent an email to Barrister's counsel, explaining that he was sick in the hospital and was out of town and therefore unable to respond to the discovery motion as required by the trial court. Mr. Ragone followed up on August 29, 2013, stating that he was still sick in the hospital and was unable to appear at another pre-trial conference scheduled for the following day, August 30, 2013.

Rouck claimed to the trial court and in its brief to this Court that it was not aware that Mr. Ragone was not responding to Barrister's counsel during this time period, was not attending all court appearances, and was not obeying the orders of the court. Rouck stated that its first knowledge of this came as a result of being copied on Mr. Ragone's August 13, 2013, and August 29, 2013, emails to Barrister's counsel. Further, Mr. Ragone was not responding to Rouck's attempts to contact him. Mr. Ragone did not attend the August 30, 2013, pre-trial conference. Barrister contends that there is some evidence in an email exchange between its counsel and Mr. Ragone that indicated Rouck had knowledge prior to August 13, 2013, that Mr. Ragone was not adequately participating in the case on

its behalf and had consulted with other counsel during this time. At oral argument, Barrister contended that the trial court's order ignored this evidence; however, the trial court's order references this email exchange. A review of the record indicates to this Court that while Rouck knew it was having trouble communicating with Mr. Ragone, it was unaware of the July 2, 2012, order dismissing its counterclaims and was unaware of the full extent to which Mr. Ragone was not participating.

The trial court issued an order in September 2013 directing Rouck to respond to Barrister's motion and appear before the court on October 7, 2013. This order reflects that Rouck and two of its representatives were included on the distribution list. On October 15, 2013, Barrister filed a motion to strike Rouck's defenses. The trial court's October 23, 2013, order indicated that several of Barrister's requests for admissions (Nos. 8, 9, and 10) were deemed admitted and ordered Rouck to reimburse Barrister for the expenses associated with bringing the motion to compel supplemental responses. Further, the trial court ordered that Rouck would have until November 20, 2013, to respond to the outstanding motion to compel and stated that if Rouck failed to respond, sanctions would be imposed.

In its brief to this Court, Rouck states that once it became aware of the trial court's October 23, 2013, order, it immediately sought new counsel; and, based on the timeline, there is no reason to dispute this assertion. New counsel for Rouck filed a motion to appear and for substitution of counsel on November 20, 2013. Counsel asked that the court stay deadlines, and the trial court granted the motion. Rouck filed supplemental discovery responses to requests propounded by

Barrister on January 9, 2014. Also, on that day, Rouck filed a written response to Barrister's motion to strike its defenses. The following day, on January 10, 2014, Rouck filed motions to vacate the court's orders entered on July 2, 2012, and October 23, 2013, under CR 60.02(f).

In February 2014, the trial court ordered the motions to be held in abeyance while the parties attended mediation. Mediation was not successful in resolving the underlying dispute, and on August 1, 2014, the trial court ordered a briefing schedule and hearing date for the pending motions to vacate, in an attempt to move the case along. Ultimately, the trial court entered an order on January 5, 2015, vacating, in part, its July 2, 2012, order and vacating and setting aside the October 23, 2013, order. The trial court also denied Barrister's motion to strike Rouck's defenses. The trial court held that under CR 60.02(f), Mr. Ragone's conduct amounted to an "extraordinary nature justifying relief" from its previous orders. Barrister now appeals from the January 5, 2015, order.

The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). "[A]ctions under CR 60.02 are addressed to the 'sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse.'" *Id*. (Internal citation omitted). "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).

CR 60.02 states:

> 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. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

In *Asset Acceptance, LLC v. Moberly*, 241 S.W.3d 329 (Ky. 2007), the Supreme Court of Kentucky emphasized that CR 60.02 orders granting relief from final judgments are not generally appealable, but it recognized a limited exception for immediate appeal when the allegation is that CR 60.02(f) has been invoked to evade the one-year limitations period for claims that are more properly brought under CR 60.02(a), (b), or (c). The Court stated:

> As Moberly and the Court of Appeals correctly observe, the general rule in Kentucky is, and for some time has been, that an order setting aside a judgment and reopening the case for trial is not final or appealable. *Asher v. Asher*, 339 S.W.2d 630 (Ky. 1960). We borrowed this rule from federal practice. *Hackney v. Hackney*, 327 S.W.2d 570 (Ky. 1959). Federal courts have recognized an exception, however, permitting an immediate appeal from orders setting aside a judgment

> when the trial court lacked jurisdiction to grant that relief. Asset contends that Kentucky courts should follow suit.
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> . . . .
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> We are persuaded that there are sound reasons for this viability and therefore join the federal courts to the extent of recognizing a narrow exception to the rule that orders setting aside a judgment may not be appealed. **Where a final judgment has been ordered reopened, where the disrupted judgment is more than a year old, and where the reason offered for setting it aside is allegedly an "extraordinary circumstance" under CR 60.02(f), permitting an immediate appeal helps to maintain the important balance between, on the one hand, the equitable insistence on justice at all costs and, on the other, the equally vital insistence that litigation must at some point conclude and reasonable expectations founded upon long-established final judgments must not lightly be overturned. This is the balance that the limitations provisions of CR 60.02 attempt to strike, and we agree with Asset that when that balance is threatened by the trial court's alleged disregard of those provisions, an immediate appeal is appropriate.**
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> . . . .
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> In sum, we agree with Asset that in the narrow circumstances presented by this case, an order setting aside a judgment more than a year old pursuant to the "reason of an extraordinary nature" provision of CR 60.02(f) is subject to immediate appellate review to ensure that CR 60.02(f) has not been invoked to, in effect, evade the one-year limitations period CR 60.02 imposes on claims appropriately regarded as falling under CR 60.02(a), (b), or (c).

Id. at 332-335. (Emphasis added).

Barrister argues that the trial court improperly determined that Mr. Ragone's actions qualified as an exceptional or extraordinary circumstance under CR 60.02(f) and contends that Mr. Ragone's actions fit more squarely under CR 60.02(a), which has a one-year statute of limitations. Because Rouck's motion to vacate the trial court's order was filed outside of one year, Barrister argues that the trial court did not have jurisdiction to vacate the July 2, 2012, order.

At oral argument, Rouck acknowledged that it improperly filed its motion for relief under CR 60.02(f). Instead, Rouck argues that because the July 2, 2012, and October 23, 2013, orders did not dispose of all the claims in the case, they were not final and appealable, and the trial court had discretion to vacate them at any time prior to finality of the case under CR 54.02(1). Rouck distinguishes this case from *Asset Acceptance*, wherein the appeal was taken from an order setting aside a default judgment, which was a final order adjudicating all the claims between the parties. In the alternative, Rouck argues that the trial court did not abuse its discretion in vacating the orders pursuant to CR 60.02(f).

CR 54.02(1) provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. **In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties**

> **shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.**

(Emphasis added). In *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722, 726 (Ky. 2008), the Kentucky Supreme Court stated, "In any case presenting multiple claims or multiple parties, CR 54.02, like FRCP 54(b), vests the trial court —as the tribunal most familiar with the case—with discretion to 'release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions.'" *Id*., citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437, 76 S.Ct. 895, 100 L.Ed. 1297 (1956).

In the instant case, the trial court's July 2, 2012, and October 23, 2013, orders were not designated as final and appealable, and the underlying contract and damages claims were still pending before the court. Those orders, unlike the default judgment in *Asset Acceptance*, were interlocutory in nature and subject to revision or vacation by the trial court pursuant to CR 54.02(1) at any time prior to final judgment of all the claims. Because CR 60.02 applies to final judgments, and the orders the trial court set aside were not final and appealable, the trial court improperly evaluated Rouck's claims for relief under that rule. We again emphasize that during oral arguments, Rouck's counsel conceded he filed for relief under the wrong rule, and Barrister argued that it had not had an opportunity to present its arguments to the trial court under CR 54.02. Thus, we remand for a

determination under CR 54.02 as to whether Rouck is entitled to the relief it requests.

Based on the foregoing, we vacate the Jefferson Circuit Court's January 5, 2015, order and remand for consideration of the parties' arguments under CR 54.02.

ALL CONCUR.

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