

RENDERED: JULY 7, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000813-MR
AND
NO. 2014-CA-000254-MR

TROY GUINN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 11-CI-003921

CENTURY CAPITAL GROUP, LLC,
D/B/A AUTO INJURY ASSISTANCE
AND RICHARD MILLS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Troy Guinn appeals from orders of the Jefferson Circuit Court which denied his motion for relief pursuant to Kentucky Rule of Civil Procedure (CR) 60.02(f) and assessed damages against him. On appeal, Guinn

argues that the trial court erred in not granting his CR 60.02 motion. We find no error and affirm.

Appellees brought the underlying suit against Guinn alleging, amongst other things, breach of contract. Guinn then brought a counterclaim against Appellees also alleging breach of contract. On December 15, 2011, the circuit court entered a standard trial order containing deadlines for pretrial filings. This order also listed a pretrial conference date of July 16, 2012, and a trial date of August 14, 2012.

On February 21, 2012, Guinn's trial counsel, Kenneth Sales, moved to withdraw as counsel. The motion to withdraw listed Guinn's current address as one different from the address at which he was served with the complaint. Guinn claims the address listed in the motion to withdraw was an old business address that he no longer utilized. The motion to withdraw was granted on February 27, 2012, and the court gave Guinn 45 days to retain new counsel.

On June 22, 2012, Appellees filed with the court a motion for summary judgment and sent a copy to Guinn at the allegedly incorrect address. On July 16, 2012, Appellees appeared for the previously scheduled pretrial conference. Neither Guinn nor new counsel appeared at the conference. On August 14, 2012, Appellees appeared for trial. Again, neither Guinn nor new counsel appeared. At this time, Appellees made an oral motion to dismiss Guinn's counterclaim. The court granted the motion. The court also stated that it would take Appellees'

motion for summary judgment under submission. On September 18, 2012, the court entered summary judgment on behalf of Appellees.

On October 11, 2012, Guinn filed the CR 60.02 motion currently at issue. Guinn argued that he should be relieved from the judgments against him because he was not properly served with the motion for summary judgment due to it being sent to the incorrect address used in his previous counsel's motion to withdraw. The trial court denied Guinn's motion and held that Appellees properly served Guinn at his last known address and that by the use of due diligence, he could have, or should have, known about the motion by appearing at the pretrial conference or trial. Guinn then appealed this order. On January 13, 2014, the trial court entered an order awarding damages and attorney fees to Appellees. Guinn then filed his second appeal. The appeals were later consolidated.

On appeal, Guinn argues that the trial court erred when it denied his motion for relief pursuant to CR 60.02(f). CR 60.02(f) states that "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: . . . (f) any other reason of an extraordinary nature justifying relief."

CR 60.02 "is designed to provide relief where the reasons for the relief are of an extraordinary nature." A very substantial showing is required to merit relief under its provisions. Moreover, one of the chief factors guiding the granting of CR 60.02 relief is the moving party's ability to present his claim prior to the entry of the order sought to be set aside.

U.S. Bank, NA v. Hasty, 232 S.W.3d 536, 541-42 (Ky. App. 2007) (citations omitted). “On review of the denial of a CR 60.02 motion, we review for an abuse of discretion. The test for abuse of discretion is ‘whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.’”

Baze v. Commonwealth, 276 S.W.3d 761, 765 (Ky. 2008) (citations omitted).

We believe the trial court correctly denied Guinn’s CR 60.02(f) motion.

In those instances where grounds relief [sic] upon for relief under a 60.02 motion are such that they were known or could have been ascertained by the exercise of due diligence prior to the entry of the questioned judgment, then relief cannot be granted from the judgment under a 60.02 proceeding. Relief afforded by a 60.02 proceeding is extraordinary in nature and should be related to those instances where the matters do not appear on the face of the record, were not available by appeal or otherwise, and were discovered after rendition of the judgment without fault of the party seeking relief.

Bd. of Trustees of Policemen's & Firemen's Ret. Fund of City of Lexington v. Nuckolls, 507 S.W.2d 183, 186 (Ky. 1974).

Here, Guinn’s counsel withdrew from the case in February of 2012. Guinn then took no action for around 8 months and missed a pretrial conference and trial date which had been scheduled before his counsel withdrew. The trial court was correct, Guinn’s lack of due diligence resulted in orders being entered against him. In addition, even if we ignored Guinn’s lack of diligence and believed the unfavorable result was caused by his previous counsel’s negligence in incorrectly stating Guinn’s address, the negligence of one’s own attorney is not grounds for

relief under CR 60.02(f). *Vanhook v. Stanford-Lincoln Cty. Rescue Squad, Inc.*,
678 S.W.2d 797, 799 (Ky. App. 1984).

Based on the foregoing, we affirm the trial court's denial of Guinn's CR
60.02 motion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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