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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001515-MR

FOX TROT PROPERTIES, LLC — APPELLANT

v.

APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 95-CI-00307

DLX, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Fox Trot Properties, LLC, has appealed from the order of the Letcher Circuit Court granting the motion of DLX, Inc., to reduce and abate interest on a 1995 judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60. We affirm.

This case has been before the appellate courts in this Commonwealth before, and we shall rely upon the succinct recitation of the factual and procedural background of this matter as set forth by the Supreme Court of Kentucky in *Fox Trot Properties, LLC v. Wright*, 314 S.W.3d 286, 287 (Ky. 2010):

> This case involves an order of the Letcher Circuit Court staying the enforcement of its own judgment. In 1995, the court entered default judgment against DLX, Inc., the real party in interest, for $312,234.40 [the Wausau judgment].[1] This judgment was then assigned to Appellant, Fox Trot Properties, LLC, in 2004.[2]
>
> The only asset DLX has which could satisfy the judgment is an 82-acre tract of land in Estill County. This land has been subject to substantial litigation in Estill Circuit Court, Letcher Circuit Court, and U.S. Bankruptcy Court, all relating to Fox Trot's failed attempts to claim ownership of the tract, its placing clouds of title over the tract, and its attempts to force a sale of the tract to satisfy the judgment. This litigation has been going on from at least 2001 until at least 2008.
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> Based on this protracted litigation, DLX moved the Letcher Circuit Court in 2008 for partial relief from the judgment under CR 60.[3] DLX claims that it should not have to pay full post-judgment interest because the only reason it has not yet satisfied the judgment is that Fox Trot has prevented the sale of the 82-acre tract through

[1] In the 1995 lawsuit, Wausau Insurance Companies sought unpaid premiums for workers' compensation coverage from 1993 and 1994.

[2] At the time of the assignment to Fox Trot in 2004, the balance owed was $824,075.59, including $511,679.19 in interest (December 13, 1996, through July 1, 2004, at a rate of 12%) and $162.00 in court costs. Fox Trot notified the circuit court that it had served DLX with notice of the judgment lien in August 2004. In December 2007, Fox Trot filed a notice of deposition and service of a subpoena duces tecum on Don LaViers of DLX. Fox Trot requested that LaViers produce a list of DLX's financial documents.

[3] DLX filed a motion to void or reduce judgment on August 7, 2008, followed by an amended motion to void or reduce judgment, to abate and suspend post-judgment interest, and to stay enforcement of the judgment later that month.

> its many lawsuits. This is based on the equitable concept that a debtor does not owe interest during the period when the creditor prevents payment.
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> The Letcher Circuit Court ordered the parties to brief the motion and that Fox Trot be "stayed from any further actions to enforce the judgment until the issues have been fully briefed, presented and ruled upon by the Court."[4] In response, Fox Trot filed a writ of prohibition in the Court of Appeals, asserting that the Letcher Circuit Court did not have jurisdiction to stay enforcement of its judgment while it considered DLX's motion.
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> The Court of Appeals denied the writ.[5] Fox Trot appealed to this Court as a matter of right. Ky. Const. § 115.

The Supreme Court affirmed this Court's denial of the writ,[6] holding that:

> [T]he Letcher Circuit Court has jurisdiction to entertain motions for relief from its own judgment and to stay enforcement of its own judgment while it considers such motions. That is all that occurred in this case. Fox Trot's other arguments, as to why DLX's motion should be denied, can be raised and fairly addressed in the Letcher Circuit Court.

Id. at 289.

After the Supreme Court's opinion became final in July 2010, Fox Trot moved the circuit court to dissolve the September 5, 2008, order holding its collection efforts in abeyance or in the alternative for a security bond to stay

[4] The order was entered on September 5, 2008.

[5] The order was entered May 6, 2009.

[6] The Supreme Court's opinion affirming was rendered on June 17, 2010, and it became final on July 12, 2010.

enforcement of the judgment. By separate motion, Fox Trot moved the court for an order denying DLX's pending motions, noting that none of the coal from the refuse pile tract had been sold, nor had any funds been paid toward the judgment. In its response, DLX stated that the parties had been able to resolve some of their differences, in particular clearing up the cloud Fox Trot had placed on DLX's title in June 2010, which had negatively affected DLX's ability to market the coal on the property. DLX also pointed out language in the Supreme Court's opinion stating that its claim was valid and that CR 60 was the proper mechanism to bring it before the court. In a later notice, DLX filed an affidavit from Don LaViers. The court scheduled the matter for an evidentiary hearing in April 2011.

In March, one month before the scheduled hearing, DLX filed a second amended motion to void or reduce the judgment, seeking modification of interest that was accruing on the default judgment. DLX specifically sought 1) suspension of interest between July 20, 2001, and June 3, 2010, based upon Fox Trot's actions that interfered with DLX's ability to raise the funds to pay the judgment; 2) a reduction of the interest rate from 12% because that rate was inequitable; and 3) a stay of enforcement of the judgment for six months after the entry of the order establishing the applicable interest rate to allow DLX to market and sell enough coal refuse to satisfy the judgment. In June 2011, the court continued the April hearing until discovery was sufficiently complete.

More than three years later, in October 2014, DLX moved the court for a hearing date in 2015 on its motions, to order Fox Trot to show cause why it

should not be held in contempt related to a filing in an Estill Circuit Court action in violation of the 2008 stay,[7] and to enforce the stay. Fox Trot filed a response requesting that the court deny DLX's substantive motions and noted that the amount due as of November 1, 2014, was in excess of $3M, inclusive of 12% interest. The circuit court scheduled an evidentiary hearing for April 2015 and a show cause hearing for January 2015. DLX filed a reply memorandum prior to the show cause hearing date, and the court entered an order in March 2015 in which it ruled that the January 2008 stay would remain in effect; that DLX's motion to hold Fox Trot in contempt was denied based upon Fox Trot's agreement to abate the action in Estill County; and that no bond was necessary due to DLX's agreement to have the BRC entities deposit payments from the sale of processed refuse into the court's registry.

Fox Trot filed a status report and pre-trial motions on April 1, 2015, in which it stated that DLX had not alleged any facts that would entitle it to relief under CR 60.02(f) and that there were not any factual issues to try. Shortly thereafter, Fox Trot filed a response in opposition to DLX's motion to void or reduce the original judgment under equity jurisdiction, noting that DLX had abandoned its claims for relief under CR 60.02(f) and CR 60.03 and that the circuit court did not have the power to grant relief through its general equity power because DLX had delayed the matter since 2008, for more than eight years. DLX

[7] This lawsuit had to do with a 2014 lease between DLX and Bowie Refined Coal, LLC, and related companies (the BRC entities) to process waste coal from the refuse pile tract in coal washing facilities on Fox Trot's property for which DLX received a $300,000.00 advance royalty, which had not been paid to satisfy the Wausau Judgment.

then filed a memorandum in support of its motions for relief under CR 60.02(f) and CR 62.01. It argued that Fox Trot had put forward two inconsistent claims – first, as to title to the property and second, seeking foreclosure – that impacted DLX's ability to sell the refuse pile tract and pay what was due under the Wausau Judgment until it was able to lease the property to the BRC entities in July 2014. Exhibits attached to the memorandum established that without any abatement in the interest, the total amount due as of December 13, 2014, was $2,803,827.15, and with an abatement, the total amount due was $471,265.04. Both parties tendered proposed orders to the court.

On August 19, 2015, the circuit court entered an order granting the requested relief, adopting the proposed order tendered by DLX, with the addition of two paragraphs. DLX filed a CR 59 motion to amend the order for clarification purposes, including filling in an empty blank with the amount due on the judgment as of the date of the hearing and regarding the findings and conclusions on champerty. Fox Trot did not object to the CR 59 motion, although it indicated that it would be appealing the final order and was not waiving its right to do so. The circuit court entered an order on September 18, 2015, amending the prior order and adopting the proposed order tendered by DLX with its CR 59 motion. The court abated the interest rate to 8% from December 13, 1995, through July 20, 2001; abated interest entirely from July 20, 2001, through July 28, 2014; and ordered it to resume to the 12% interest rate from July 29, 2014, until paid. The amount owed as of the date of entry of the order was $548,769.42. This appeal now follows.

In its brief, Fox Trot contends that DLX was not entitled to relief under CR 55.02 or CR 60.02(f) as a matter of law, that the circuit court did not have the inherent equitable authority to reopen the 1995 judgment, and that even if the court did have the equitable authority to do so, there was no basis for reducing the judgment in this case. DLX, on the other hand, contends that the only questions before the circuit court were whether its motion for relief was timely and whether it was entitled to equitable relief, which this Court would review for abuse of discretion.

Before addressing the merits of this appeal, we note that DLX has moved to strike footnote 5 from Fox Trot's reply brief and to seal the motion to strike and any response to the motion. While consideration of the information in that footnote is not relevant or necessary to our review, by separate order we shall grant the motion to strike footnote 5 from Fox Trot's reply brief and continue to seal the motion and response thereto.

Turning now to the merits of the appeal, we shall first address the applicable standard of review. Fox Trot argues that whether relief from a default judgment is permitted under CR 55.02 and CR 60.02 is a matter of law that is subject to *de novo* review, citing *W. Vale Homeowners' Ass'n, Inc. v. Small*, 367 S.W.3d 623, 628 (Ky. App. 2012) ("CR 60.02 affords the trial court the discretion to reopen a judgment or order for the consideration of newly discovered evidence, which was unavailable to the court at the time of judgment. It does not, however,

allow for a judgment to be reopened and altered on the basis of facts which occurred after the judgment was entered.").

On the other hand, DLX contends that we must review the circuit court's order for abuse of discretion: "The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion. For a trial court to have abused its discretion, its decision must have been arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Grundy v. Commonwealth*, 400 S.W.3d 752, 754 (Ky. App. 2013) (internal citations omitted). We agree with DLX and shall therefore review the order on appeal for abuse of discretion.

CR 60.02 provides that a court may grant a party relief from a final judgment upon one of several listed grounds, including mistake, newly discovered evidence, perjury, fraud, a void judgment, or for "any other reason of an extraordinary nature justifying relief." CR. 60.02(f). Under that subsection, "a judgment may be set aside for a reason of an extraordinary nature justifying relief from the operation of the judgment. However, because of the desirability of according finality to judgments, this clause must be invoked only with extreme caution, and only under most unusual circumstances." *Cawood v. Cawood*, 329 S.W.2d 569, 571 (Ky. 1959). The rule provides that a CR 60.02(f) motion "shall be made within a reasonable time[.]"

Fox Trot argues that DLX is not entitled to relief under CR 55.02 ("For good cause shown the court may set aside a judgment by default in

accordance with Rule 60.02.") or CR 60.02(f). However, DLX is not attempting to set aside the entire default judgment; rather, DLX is attempting to obtain relief from the amount of interest that had accrued over the time period. It intended to, and has, paid the principal amount of the default judgment. As DLX states in its brief, it was seeking an equitable abatement of post-judgment interest based upon events that took place following the entry of the judgment. We hold that such relief is within the equitable power of the trial court to grant.

First, we agree with DLX that its motion for relief was timely filed, despite the lengthy passage of time between the entry of the default judgment in 1995 and the motion for relief filed in 2008. The court found the motion had been filed "a little more than a month after the judgment adjudicating title to the Refuse Pile Tract became final." The following findings support this conclusion:

> 8. In 2001, Fox Trot decided that it wished to purchase the assets of Kentucky Processing Company at a sale thereof to be held in a Chapter 11 bankruptcy action pending in the United States Bankruptcy Court for the Eastern District of Kentucky, Lexington, styled *In Re: Kentucky Processing Company, et al.*, Case No. 98-52437 (the "Bankruptcy"), and the record therein being incorporated by reference herein as if set out at length.
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> 9. In the Spring of 2001, after a sale had been ordered in the Bankruptcy, DLX learned that Fox Trot and/or one or more of its principals and/or officers had said that the Refuse Pile Tract was included within the assets of the debtor, Kentucky Processing Company, and would be sold.
>
> 10. On July 10, 2001, before the sale, DLX filed an adversary action styled *DLX Inc. v. Kentucky Processing Company, Fox Trot Corporation and Fox Trot*

> *Properties, LLC*, Adversary No. 01-5199 (the "Adversary") in the Bankruptcy to protect its interest in the property from the cloud that Fox Trot had placed on its title and to prevent any from being created by the upcoming sale, the record therein being incorporated by reference herein as if set out at length.
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> 11. Fox Trot purchased the assets of Kentucky Processing Company that were sold at the sale in the Bankruptcy even though it knew of DLX's interest and of the pendency of the Adversary.
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> 12. Fox Trot claimed in the Adversary that Kentucky Processing Company owned the Refuse Pile Tract and that it, Fox Trot, had acquired it at the sale.
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> 13. By opinion and order entered in the Adversary on May 5, 2005, Judge Joe Lee found in favor of DLX against Fox Trot and, among other things, quieted title to the Refuse Pile Tract and its appurtenances in DLX, which ruling was ultimately affirmed by the United States Court of Appeals for the Sixth Circuit on June 18, 2008, in *Fox Trot Properties, LLC v. DLX, Inc.*, Appeal No. 06-6060, the mandate having been issued therein on July 10, 2008, the record therein being incorporated by reference herein as if set out at length.

DLX filed its original motion to void or reduce judgment on August 7, 2008, and an amended version later that month. Accordingly, we agree with DLX that its motion for relief was filed within a reasonable time.

We also agree with DLX that the circuit court did not abuse its discretion by granting relief in this instance, and we shall adopt the following portions of the circuit court's order as our own:

> 3. Kentucky law authorizes the imposition of interest on an unpaid judgment. KRS § 360.040. The purpose of post-judgment interest is not, however, to punish the defendant, but to encourage prompt payment and to

compensate the plaintiff for another's use of his or her money, 44B Am.Jur.2d Interest and Usury § 40; *Overbeek v. Heimbecker*, 101 F.3d 1225 (7th Cir. 1996) (applying Wisconsin law); *American Family Mut. Ins. Co. v. Ginther*, 843 N.E.2d 575 (In. App. 2006), from the date of entry until the judgment is paid. *Id*.; *State v. Thompson*, 197 S.W.3d 685 (Tenn. 2006); *Kansas City Power & Light Co. v. Bibb & Associates, Inc.*, 197 S.W.3d 147 (Mo. App. W.D. 2006). It follows that interest must be abated so as to not punish a judgment debtor who is unable to pay or satisfy the judgment through no fault of its own[.] . . . In the absence of an agreement to the contrary, the rule is that where a debtor is ready and willing to make payment of an obligation, and intends to do so, but is prevented by the act or omission of his creditor, the accrual of interest on the obligation is suspended. [44B Am.Jur.2d Interest and Usury § 73]. "Where a debtor is really and bona fide ready to make payment and intends to do so, but is prevented from doing so by the act or omission of his creditor, the latter will not be entitled to interest." *Holmes v. Bates*, 67 So.2d 273, 236 (Miss. 1953). *See also Farnworth v. Jensen*, 217 P.2d 571 (Utah 1950). Consequently, the running of interest is suspended by the plaintiff's own actions and by other equitable considerations. *Matra Building Corp. v. Kucker*, 19 A.D.3d 496 (N.Y. 2005). This principal has long been recognized in Kentucky.

4. In *Hart v. Brand*, 8 Ky. (1 A. K. Marsh.) 159 (1818), the buyer was ready to close and pay the seller, but the seller refused to perform his part of the contract by insisting upon payment of a different nature. Later, the seller claimed that he was due interest from the date of the first attempted closing until the transaction was completed, but the [former Kentucky Court of Appeals] disagreed:

> With respect to interest. No proposition can be more clear, that if the purchaser were really and bona fide prepared to make payment, and intended to do so, free from all shuffling, equivocation,

> and technical quibble; and the vendor has ever since evinced a determination not to perform a contract, if possible--having never given notice to the vendee when to attend on the premises and receive possession--that he is not entitled to interest. In other words, that one holding himself in readiness to pay, and the other refusing to do what the contract injoined upon him, ought to subject the latter to the loss of interest and not the former. The wrong was with him, and he can not charge the effect to the other.

Id.

Here, DLX was ready, willing and able to sell portions of the refuse on the Refuse Pile Tract to pay the Judgment as soon as the Refuse Pile Tract became commercially viable in 2001. However, after Fox Trot made a claim to the Refuse Pile Tract in 2001, DLX was prevented from satisfying the Judgment as a direct result of Fox Trot's acquisition of the assets of Kentucky Processing Company and its insistence throughout the Adversary and subsequent appeals that it or Kentucky Processing Company, and not DLX, actually owned title to the Refuse Pile Tract.

5. The only asset owned by DLX that is substantial enough to satisfy the Judgment is the Refuse Pile Tract and the refuse thereon. However, prior to 2001, the reclamation liability associated with the Refuse Pile Tract prevented it from becoming commercially viable. DLX, therefore, was and has been unable to sell refuse from the Refuse Pile Tract and tender payment or satisfy the Judgment through no fault of its own from the time that Fox Trot claimed that Kentucky Processing or it, as the purchaser of Kentucky Processing's property at the July 20, 2001, sale, held title to the Refuse Pile Tract.

6. Just as in *Hart v. Brand*, the judgment creditor, Fox Trot prevented the judgment debtor, DLX, from satisfying the judgment through no fault of its own. As a result, Fox Trot should be estopped from claiming any

post-judgment interest for the period of time it interfered with DLX's ability to satisfy the judgment and until such time as title to the Refuse Pile Tract is finally quieted in favor of DLX and DLX is reasonably able to satisfy the judgment according to well-established equitable considerations, thereby abating and further suspending the accrual of post-judgment interest on the Judgment for a reasonable period to redress the harm that DLX suffered.

7. The Court has the authority to vacate or abate interest and to stay all of Fox Trot's efforts to enforce the Judgment since both questions arise from and depend upon the same set of facts.

8. Fox Trot is trying to have DLX's entire interest in the Refuse Pile Tract sold before DLX can market and sell enough of the refuse to pay the Judgment and thereby benefits from its efforts to keep DLX from enjoying its property by litigating the title action in the Adversary in Bankruptcy Court. But for the pendency of the Adversary, DLX would have had time to market and sell enough refuse to pay whatever is ultimately adjudged due on the Judgment and all other claims that are secured by valid liens on the Refuse Pile Tract.

9. Fox Trot should not be permitted to benefit from the effects of claiming to have a lien against real property that is also claimed to own and DLX should be given the time it would have otherwise had to sell part of the coal refuse which Fox Trot kept DLX from doing for seven years. Granting this relief will not prejudice Fox Trot, as it has a lien on the Refuse Pile Tract, an asset that easily exceeds the amount of the Judgment, nor will it affect the other parties to the Estill County action, since the relief granted herein will only stay Fox Trot's activities.

10. This Court issued the judgment as to which DLX seeks relief therefrom under CR 60, CR 60.02(f), and CR 62.01. DLX also requested that Fox Trot's enforcement of its judgment lien in the Estill County action be stayed, which this Court did by an order entered on September 5, 2008. It was within the Court's discretion under CR

62.01 to stay enforcement until it could rule on DLX's motion. In fact, this Court is the only court with jurisdiction to stay enforcement of the subject judgment, and this rule is applicable to cases involving enforcement actions against real estate in other counties, as is true here. [Citations omitted.]

11. It follows from the foregoing authority, from the equitable considerations cited above and the circuit court's inherent equitable powers that this Court has the authority to stay the enforcement of a judgment until such time as a judgment debtor is free from interference and is able, as a practical matter, to satisfy the judgment. Fox Trot will not be prejudiced in any way because it allegedly holds a judgment and judgment liens securing the same.

. . . .

13. DLX is entitled to the entry of an order abating interest on the Wausau Judgment from the date of the entry on December 13, 1995, to the date when DLX filed the action in which Fox Trot counterclaimed to quiet title in itself, July 20, 2001, from 12% to 8%, compounded annually, because Wausau failed to timely enforce or attempt to enforce its rights. [Citation omitted.]

14. DLX is entitled to the entry of an order abating judgment interest on the Wausau Judgment in its entirety from July 20, 2001, through July 28, 2014, when DLX leased the Refuse Pile to the BRC Entitles, because Fox Trot's claim that it owned the Refuse Pile during the pendency of the quiet title action (July 20, 2001, through June 3, 2010), and its assertion that it held judgment liens that were, in reality, invalid (beginning on April 28, 2010), preventing DLX from selling or leasing it so that it could pay the judgment until DLX was able to lease its coal refuse to the BRC Entities on July 28, 2014. [Citation omitted.]

. . . .

16. As the direct and proximate result of Fox Trot's intentional interference with DLX's rights, DLX was unable to market and sell the coal refuse on the Refuse Pile Tract and was unable to pay the Judgment and Fox Trot should be barred from collecting any interest that would have accrued from July 20, 2001, through July 28, 2014. Even after DLX was able to lease its coal refuse to the BRC Entities on July 28, 2014, Fox Trot sought to interfere with DLX's efforts to realize value from the Refuse Pile Tract when it filed Estill 2 which sought, among other things, to set the DLX lease aside, despite having agreed in the Fox Trot Lease, as amended, to facilitate the BRC Entities' acquisition thereof and despite having received additional royalties as the result of mining, processing and selling DLX's coal refuse under the DLX Lease.

17. DLX, Inc., has no adequate remedy at law and has established that it will continue to suffer irreparable harm if Fox Trot is not enjoined from collecting and enforcing the Judgment as aforesaid.

For the foregoing reasons, the order of the Letcher Circuit Court is affirmed.

ALL CONCUR.

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