RENDERED: DECEMBER 7, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000060-MR

TIM LARKINS, TRUSTEE OF THE MARSHALL
AND DORIS LARKINS TRUST — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NO. 15-CI-00031

PHILLIP TARVER FEEDLOT, LLC,
A KENTUCKY LIMITED LIABILITY COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Tim Larkins, a trustee of the Marshall and Doris Larkins Trust, appeals from an order of the Hickman Circuit Court which awarded Phillip Tarver Feedlot, LLC $325,000 based on a promissory note. The order also found that the promissory note was not entered into fraudulently. Finally, the

circuit court also ordered the sale of a parcel of land which Appellee was given a mortgage to in order to secure the promissory note.[1] Appellant also appeals the circuit court's denial of a Kentucky Civil Rule (CR) 60.02 motion seeking to vacate the judgment due to new evidence. We find that the trial court did not err and affirm.

The managing member of Appellee is Phillip Tarver. Mr. Tarver and his wife were family friends of Marshall and Doris Larkins, the original settlors of the Marshall and Doris Larkins Trust. The Larkins had a daughter named Robin Larkins Johnson and a son named Timothy Larkins. Robin worked as a bookkeeper for Appellee from 2007 until 2010. A review of Appellee's books and records for this period of time found financial discrepancies and it was discovered that Robin had embezzled hundreds of thousands of dollars from Appellee.

Due to the relationship between the two families, Mr. Tarver allowed Robin to make restitution. Robin executed a promissory note to Appellee in January of 2011. In the note, Robin promised to pay Appellee $325,000 in restitution. The note also indicated it was being secured by a mortgage on certain real estate owned by the Trust. The note was signed by Robin, Marshall Larkins, both individually and as a trustee, Doris Larkins, both individually and as a trustee,

[1] Appellee was given a mortgage to two parcels of property, but the parties agreed to allow one of the parcels to be sold prior to the entry of the orders being appealed.

and Tim Larkins, as a trustee. In addition, the note guaranteed that each signatory would be jointly and severally liable for the amount owed. The note was payable by January 1, 2015.

A meeting later occurred between the parties on or about February 15, 2011. Attending this meeting were Mr. Tarver, Robin, Robin's husband, Marshall Larkins, and Tim Larkins. Attorneys for Robin, her husband, and Appellee were also present. During this meeting, an accounting of the embezzlement was presented to the Larkins. On or about October 6, 2011, another meeting was held. There, the Larkins Trust, via Marshall, Doris, and Tim Larkins, executed a mortgage on the real estate at issue that would secure Robin's promissory note. Subsequently, Marshall Larkins died on June 13, 2012, and Doris Larkins was adjudged legally disabled by the Graves District Court on November 12, 2013.

Robin failed to pay the note by January 1, 2015, and the underlying foreclosure action was initiated by Appellee on July 27, 2015. In answering the foreclosure action, the Trust also raised a counterclaim against Appellee and a cross-claim against Robin. The Trust alleged that Appellee, through Mr. Tarver, and Robin obtained the guarantee and mortgage through fraud and collusion. The Trust claimed that the embezzlement did not happen, and the guarantee and note were an attempt to obtain money from Robin's parents and their trust. In the alternative, the Trust also claimed that Robin embezzled the money with the

consent of Mr. Tarver. The Trust alleged that Robin and Mr. Tarver were in a romantic or financial relationship and were attempting to fraudulently obtain money from the Trust.

In 2016, and after discovery, the trial court entered orders granting summary judgment on behalf of Appellee. The court found that Robin and the Trust owed Appellee $325,000 based on the note and that the property securing the note should be sold. A judgment and order of sale was entered on July 11, 2016. The property was sold and the Master Commissioner filed her report of sale on September 22, 2016. On October 17, 2016, the Trust filed a CR 60.02 motion seeking approval to vacate the judgment, reopen the case, and file additional evidence in the form of phone records. This motion was denied on December 8, 2016. The Trust is now appealing the court's summary judgment orders which found no fraudulent activity and sold the property securing the note. The Trust is also appealing the denial of its CR 60.02 motion.[2]

As a preliminary matter, we must address Appellee's request that we dismiss this appeal as being untimely. We agree that part of this appeal is untimely. The July 11, 2016, order for the sale of land was a final and appealable order, *Sec. Fed. Sav. & Loan Ass'n of Mayfield v. Nesler*, 697 S.W.2d 136, 138

[2] The trial court has withheld confirmation of the Master Commissioner's sale pending the resolution of this appeal.

(Ky. 1985); however, Appellant did not file a notice of appeal until January 9, 2017, well outside the 30-day time period required for filing an appeal. CR 73.02(1)(a). Appellant argues that the order of sale was not a final and appealable order because it did not resolve all the claims in the case, namely, those Appellant raised against Robin. Appellant also claims the order was not final because the trial court kept the case on its docket in order to ascertain the costs of the action and approve the disbursement of the funds collected from the judicial sale.

We find that the order of sale was a final and appealable order. It settled all claims against all parties as they related to the land at issue. In *Nesler*, *supra*, the Kentucky Supreme Court held that retaining the case on the docket after the order of sale in order to enforce the judgment, conduct the sale, and distribute the proceeds did not diminish the finality of the order of sale. *Nesler* at 139. In addition, Appellant's remaining cross-claim against Robin did not cause the order of sale to cease being final and appealable. *See Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754 (Ky. App. 2005) (where an order of sale was held to be final and appealable even though a counterclaim was still being litigated).

Having found the order of sale to be final and appealable, all issues raised on appeal stemming from the order of sale should not be considered by this Court. However, in order to ensure that Appellant knows his claims were fully

considered and adjudicated, and as it will not change the outcome of this case, we will still discuss the merits of all issues raised on appeal.

We will first consider the Trust's argument regarding the granting of summary judgment.

> The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. . . . "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." Consequently, summary judgment must be granted "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor[.]"

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996) (citations omitted). "A party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial." *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) (internal quotation marks and citations omitted).

The Trust argues that the trial court erred in granting summary judgment because it presented evidence that there exists either a romantic or

financial relationship between Mr. Tarver and Robin; therefore, the promissory note, guarantee, and mortgage were all entered into pursuant to fraudulent activity.

> In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) made with inducement to be acted upon e) acted in reliance thereon and f) causing injury.

United Parcel Serv. Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999) (citing *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357, 359 (Ky. App. 1978)).

The following are the facts the Trust allege are affirmative evidence of fraud: that Robin signed over her vehicle to Appellee, but was allowed to continue driving it for two years before it was sold; that Robin deeded her house to Appellee, but was allowed to live there rent free for five years until the property sold; that Robin called Mr. Tarver from the scene of a vehicle accident and Mr. Tarver picked her up and had her car towed away; and that when Robin was arrested for stealing from a subsequent employer, she called Mr. Tarver to bail her out, but the call could not be completed because Mr. Tarver's phone does not allow collect calls. The Trust alleges that these facts indicate Mr. Tarver and Robin had some kind of relationship and worked together to fraudulently steal money from the Trust. In essence, the Trust alleges these facts are proof of a false, material representation.

Fraud may be proven by evidence that is circumstantial, *id.*; however,

> it must do more than suggest liability as a matter of conjecture, surmise or speculation. A fact is not proved by circumstantial evidence if it is merely consistent with such fact. In other words, the circumstantial evidence must go far enough to induce a reasonable conviction that the facts sought to be proved are true and must tend to eliminate other rational theories.

United Elec. Coal Companies v. Brown, 354 S.W.2d 502, 503 (Ky. 1962) (citations omitted).

We do not believe that these facts are material facts that would preclude summary judgment. While these facts can be seen as circumstantial evidence of some kind of relationship between Mr. Tarver and Robin, be it friendly as claimed by Robin and Mr. Tarver or romantic as alleged by the Trust, what they do not show is fraud. The Trust has provided no evidence to suggest that Mr. Tarver and Robin conspired to fraudulently obtain money from the Trust or that the embezzlement did not occur. Robin admitted to the embezzlement, stole from a subsequent employer, signed over her car and house to Mr. Tarver, and cashed in her retirement account, giving the proceeds to Mr. Tarver. Additionally, the Larkins family was presented with an accounting showing the embezzlement and the Trust has presented no evidence that this accounting was incorrect or otherwise faulty.

An "opposing party has an obligation to do something more than rely upon the allegations of his pleading." *Cont'l Cas. Co. v. Belknap Hardware &*

Mfg. Co., 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to require a resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (citation and internal quotation marks omitted). "'Belief' is not evidence and does not create an issue of material fact. A plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990) (citation omitted). We find that the Trust's entire theory of fraud is based on speculation, supposition, and belief; therefore, summary judgment was properly granted.

The Trust's other argument on appeal is that the trial court erred in denying its CR 60.02 motion. 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.

The Trust sought relief pursuant to subsections (b), (c), (d), and (f). The Trust brought this motion because it had obtained phone records that showed multiple phone calls between Mr. Tarver and Robin during a nine-month period in 2012. The phone records came from a previously undisclosed and undiscovered phone number belonging to Robin. The trial court denied the motion because it believed the phone number could have been found had the Trust been more diligent during discovery and because the records were from 2012, not during the time of the embezzlement or when the promissory note and other documents were entered into.

> On review of the denial of a CR 60.02 motion, we review for an abuse of discretion. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000). 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).

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

> 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).

We find that the trial court did not abuse its discretion in denying the Trust's CR 60.02 motion. The trial court's justification for denying the motion was fair and reasonable. The late discovery of these phone records does not necessitate the granting of this motion which is only to be used in extraordinary circumstances.

Based on the foregoing, we affirm the judgment of the Hickman Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
J. Todd Elmore Mayfield, Kentucky	Ryan L. Toombs Mayfield, Kentucky