RENDERED: SEPTEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000740-MR

LALIT DHADPHALE APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 15-CI-01651

CARLO RAVAGNAN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND MAZE, JUDGES.

DIXON, JUDGE: Lalit Dhadphale appeals an order of the Boone Circuit Court denying his motion for post-judgment relief pursuant to CR 60.02(e)-(f). After careful review, we affirm.

In June 2013, Appellant and two others, Michael Peppel and Wayne Corona, signed a promissory note to Appellee for $60,000. Appellee loaned the

money to Appellant, Peppel, and Corona for their business venture, HealthWarehouse.com. In December 2015, Appellee filed a complaint for breach of contract against Appellant, Peppel, and Corona's estate, alleging they had defaulted on their obligation to repay the promissory note.[1] Following a period of discovery, Appellee moved for summary judgment. Appellee contended Appellant admitted in his request for admissions that he signed the promissory note. Appellee also presented proof of the loan with a copy of a check that cleared his bank and was deposited in HealthWarehouse's account. Appellant argued summary judgment was improper, alleging he only signed the promissory note at Peppel's request when a hostile takeover threatened the company; consequently, he argued he received no consideration for signing the note. Appellant further revealed Peppel pled guilty, in August 2010, to federal charges involving securities and wire fraud (not related to HealthWarehouse), and Peppel was ordered not to take part in management of any company directly or indirectly. In an order entered on December 29, 2016, the trial court granted the motion for summary judgment, stating, in relevant part:

> Dhadphale signed the $60,000 note. According to Dhadphale's own account, he did so to aid Peppel in fighting off a hostile takeover of the company Dhadphale co-founded. By reciting Peppel's previous convictions,

[1] Appellant was the only defendant to participate in the circuit court litigation. Default judgment was entered against Peppel, and it appears Corona's estate did not file an answer to Appellee's complaint.

> Dhadphale appears to hint that perhaps something more sinister was afoot. But Dhadphale presents no factual allegations – much less evidence – to establish any basis for such an inference. What may be inferred from the facts presented is that Dhadphale knew Peppel well. And that nearly three years before Dhadphale signed the note, Peppel pled guilty to criminal fraud, and was "ordered not to be directly or indirectly involved with the management of any other companies." Despite this, Peppel was CEO of the company Dhadphale co-founded and Peppel was acting in that capacity at the time Dhadphale co-signed a note that related to management issues concerning HealthWarehouse. Dhadphale was in a position to know all of this (and also to know Peppel's trustworthiness) before cosigning and indorsing the note.
>
> It may be Dhadphale has a claim against Peppel. But no facts or evidence [have] been presented to refute the legitimacy of the note, or to otherwise justify setting it aside. On the contrary, Dhadphale admits that he signed it, and that he did so in furtherance of his own interests, i.e., for the benefit of HealthWarehouse.

Approximately one month after the trial court rendered the order granting summary judgment, Appellant filed a motion to set aside the judgment pursuant to CR 60.02(e)-(f). Appellant tendered the affidavit of Dan Seliga, the former CFO of HealthWarehouse, wherein Seliga asserted the company had satisfied the $60,000 debt by issuing stock to Appellee in March 2013. Following a hearing, the court rendered an order denying CR 60.02 relief. The court stated, in relevant part:

> Seliga avers that the stock conversion was concluded in March 2013 for purposes of paying the Note, on which Note the Court granted the underlying

summary judgment. Dhadphale also presented a draft "Shares of Common Stock Conversion Agreement," a computer generated stock report purporting to show stock registration in Plaintiff's name, and a "Form of Common Stock Purchase Warrant" in favor of Plaintiff Carlo Ravagnan that is accompanied by a "Form of Election to Purchase" those shares. However, the Conversion Agreement is not signed by anyone. In fact, none of these documents bear any signatures except the Purchase Warrant, and that is signed only by Defendant Dhadphale in his capacity as president of the corporation. The "Form Election to Purchase" stock is also unsigned.

. . .

In his affidavit, Dan Seliga avers that the stock transfer occurred in March 2013, and that it occurred for the purpose of paying off the Note. However, the Note was not signed until nearly three months later. Dhadphale was president of HealthWarehouse and purportedly signed the Stock Purchase Warrant in 2013, for the sole purpose of paying or canceling the $60,000 debt at issue. If that were the case, however, when Dhadphale was asked to sign the promissory note in June 2013 to personally guaranty the corporation's debt, given that he was also president of the corporation, surely he would have known that debt was already paid by the stock conversion he supposedly signed three months earlier. Because it is inexplicable that he would not know this, his reason for signing the Note after payment cries out for an explanation. Far more importantly, however, and contrary to Defendant's argument, Rule 60.02 does require that excusable grounds be shown to justify not raising such a critical defense until post-judgment. "A chief factor guiding the grant of CR 60.02 relief is the moving party's inability to present his claim prior to the entry of the order sought to be set aside." *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 335 (Ky. App. 2012). Thus, even if the stock conversion documents presented

> by Dhadphale bore signatures, he would still have to justify his failure to present this as a defense. CR 60.02 "was never meant to be used as another vehicle to revisit issues that should have been included or could have been included in prior requests for relief." *Baze v. Commonwealth*, 276 S.W.3d 761, 766 (Ky. 2008).

The trial court is vested with broad discretion to determine whether to grant CR 60.02 relief; accordingly, appellate review of the court's decision is pursuant to the abuse of discretion standard. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

CR 60.02 provides that a court may set aside a previous judgment on 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.

Appellant contends the trial court abused its discretion by denying his motion to set aside the summary judgment because he presented evidence the debt

had been satisfied by the stock transfer in March 2013; accordingly, he asserts the judgment was satisfied pursuant to CR 60.02(e). Alternatively, he argues the satisfaction of the debt constituted an extraordinary circumstance warranting relief pursuant to CR 60.02(f). Appellant specifically contends he was not obligated to establish that the information regarding the stock transfer/debt satisfaction was unknown to him or undiscoverable with due diligence prior to the entry of summary judgment. We disagree.

In *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 797 (Ky. App. 2010), this Court explained, when presenting a theory of post-judgment relief pursuant to CR 60.02(e) or (f):

> In those instances where grounds . . . 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.

In its order denying post-judgment relief, the court succinctly explained:

> Dhadphale presents no basis that would excuse his failure to raise this new defense during litigation of the case. After all, as president of HealthWarehouse.com, Inc., he should have known about these documents and

> the purported conversion of the Note from debt to stock. And Dhadphale acknowledged in his discovery responses that he consulted affiant Dan Seliga in answering discovery. Thus, Dhadphale should have been aware of the facts Seliga averred in his affidavit during litigation as well. Moreover, it also remains true that the purported stock conversion documents that Dhadphale presented are not executed.

We are mindful that the trial court was in the best position to weigh the credibility of the evidence. CR 52.01. The record supports the court's conclusion Appellant knew or should have known the information regarding the stock exchange during the breach of contract litigation; consequently, post-judgment relief pursuant to CR 60.02(e)-(f) was unavailable. *Foster*, 338 S.W.3d at 797. The court's order reflects that it fully considered and rejected Appellant's post-judgment arguments. We have carefully reviewed the record and conclude the court did not abuse its discretion by denying Appellant's CR 60.02 motion.

For the reasons stated herein, the order of the Boone Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Christopher J. Mulvaney Cincinnati, Ohio	Daniel A. Hunt Covington, Kentucky