

RENDERED: JUNE 12, 2020; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-001708-MR

CARLOS LAMAR

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT  
HONORABLE JAY A. WETHINGTON, JUDGE  
ACTION NO. 17-CI-01106

UNIDENTIFIED INDIVIDUALS  
HOLDING THEMSELVES OUT AS  
THE TRUSTEES OF CENTER  
STREET BAPTIST CHURCH, AN  
UNINCORPORATED, VOLUNTARY  
ASSOCIATION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS AND JONES, JUDGES; BUCKINGHAM,<sup>1</sup> SPECIAL  
JUDGE.

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<sup>1</sup> Special Judge David C. Buckingham sitting as Special Judge pursuant to assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Special Judge Buckingham concurred in this opinion prior to the expiration of his term on May 31, 2020. Release of this opinion was delayed by administrative handling.

COMBS, JUDGE: Carlos Lamar appeals from an order of the Daviess Circuit Court entered on November 1, 2018, which denied the motion he filed pursuant to CR<sup>2</sup> 60.02 to set aside a default judgment. After our review, we affirm.

This case arises from an underlying dispute between trustees of Center Street Baptist Church in Owensboro (the trustees) and Lamar, whom the church hired in 2015 to serve as its pastor. Almost immediately, Lamar developed a strained relationship with some members of his congregation. According to the trustees, some church members expressed their concerns about what they considered to be Lamar's "inappropriate behavior" -- as well as his ability to lead the church. The trustees also believed that Lamar appointed those members who were loyal to him to official positions within the church and unilaterally dismissed those who questioned him.

The breaking point came in late 2016 or early 2017. Lamar informed the congregation that the church's building was dilapidated to the point of no longer being insurable and that as a result, the church would be moving to a new location. The trustees conducted their own investigation of the issue and believed that the lack of insurability was due to Lamar's failure to properly pay premiums to the insurance company. The trustees also consulted the City of Owensboro and learned the building was not scheduled to be condemned, discrediting Lamar's

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<sup>2</sup> Kentucky Rules of Civil Procedure.

claims of the building's allegedly extreme dilapidation. Nonetheless, despite protests from some members, Lamar relocated the congregation and renamed it "New Beginning in Christ Baptist Church." From the perspective of the trustees, it appeared that Lamar had removed assets belonging to the Center Street Baptist Church and used them to create a new church.

On October 20, 2017, the trustees filed a complaint asserting the facts just recited and claiming that Lamar had violated his fiduciary obligations to the church. As relief, the trustees asked the trial court: (1) to award damages; (2) to require an accounting for any financial accounts that Lamar held for the church; (3) to require the return of any property belonging to the church which Lamar removed from the old building; and (4) to issue an order removing Lamar as its pastor pursuant to KRS<sup>3</sup> Chapter 273.<sup>4</sup>

The record reflects that a civil summons with the attached complaint was properly served on Lamar on October 22, 2017. The summons -- on standardized form AOC-E-105 -- indicated in bold type that Lamar had twenty days in which to file a response to the complaint or face the possibility of a default judgment. Acting *pro se*, Lamar met with the trustees' counsel on or about November 2, 2017, in order to discuss exchanging information. According to the

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> The caption for this chapter of KRS is: "Religious, Charitable, and Educational Societies; Nonstock, Nonprofit Corporations."

trustees' counsel, that was the last time Lamar communicated with him. More significantly, Lamar **never filed a response** to the complaint with the trial court.

Nearly seven months later, on May 29, 2018, the trustees filed a motion for default judgment. The trial court granted the motion the next day. On June 6, 2018, Lamar, again *pro se*, moved the trial court to vacate the default judgment. He admitted that he had not filed a response, but he claimed that this omission was due to the fact that the trustees' counsel told him that he did not need to do so. In a hearing on the motion, the trial court specifically found no merit in Lamar's claim regarding counsel's conduct. The trial court subsequently entered an order denying Lamar's motion to vacate judgment.

Following this denial, Lamar obtained counsel. On August 9, 2018, Lamar filed a second motion -- this one entitled, "motion to set aside default judgment order and all subsequent orders." Lamar argued: (1) that his failure to respond to the complaint was due to a misunderstanding of his conversation with opposing counsel; and (2) that the judgment was void because the church could not sue in its own name since it is an unincorporated association, not a legal person; and (3) that the trustees who were acting on behalf of the church were not specifically identified in the complaint. After a hearing, the trial court denied the motion in an order entered on November 1, 2018. This appeal followed.

We first note that this appeal appears to be taken from a successive post-judgment motion, which is improper procedure under the civil rules. “Our rules of civil procedure do not permit successive motions or the relitigation of issues which could have been raised in prior proceedings.” *Stoker v. Commonwealth*, 289 S.W.3d 592, 597 (Ky. App. 2009) (citation omitted). Lamar should have filed a direct appeal from the judgment or from the order denying his first motion to vacate judgment. “CR 60.02 is not properly invoked where the movant is alleging errors which could have, in the exercise of due diligence, been raised in a direct appeal.” *Owens v. Commonwealth*, 512 S.W.3d 1, 15 (Ky. App. 2017) (quoting *Goldsmith v. Fifth Third Bank*, 297 S.W.3d 898, 903 (Ky. App. 2009)). Nevertheless, because the trial court considered Lamar’s second post-judgment motion on the merits, we will entertain the appeal on the merits as well.

We begin our analysis by describing the appropriate standard of review:

CR 60.02 is an exceptional remedy necessitating cautious application. *Louisville Mall Associates, LP v. Wood Center Properties, LLC*, 361 S.W.3d 323, 335 (Ky. App. 2012). Relief under CR 60.02 is appropriate “only under the most unusual and compelling circumstances.” *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011). For that reason, the decision “to grant or to deny a motion filed pursuant to the provisions of CR 60.02 lies within the sound discretion of the trial court.” *Id.* We will not disturb the circuit court’s decision absent an abuse of that discretion. *Kurtsinger v. Bd. of Trustees of Ky. Ret. Sys.*, 90 S.W.3d 454, 456 (Ky. 2002). Only a decision that is

“arbitrary, unreasonable, unfair, or unsupported by sound legal principles[.]” manifests an abuse of discretion.  
*Artrip v. Noe*, 311 S.W.3d 229, 232 (Ky. 2010).

*Edwards v. Headcount Management*, 421 S.W.3d 403, 404-05 (Ky. App. 2014).

On appeal, Lamar first contends that the trial court abused its discretion in refusing to set aside the default judgment based on his claim that counsel for the trustees had advised him not to file a response. “CR 55.02 states that ‘[f]or good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.’” *S.R. Blanton Development, Inc. v. Investors Realty and Management Co., Inc.*, 819 S.W.2d 727, 729 (Ky. App. 1991). The trial court duly noted that “default judgments are not favored[.]” *Id.* at 730. However, the trial court also correctly ruled that the party moving to set aside the judgment has the burden to show the following: “(1) a valid excuse for default, (2) a meritorious defense to the claim, and (3) absence of prejudice to the nondefaulting party.” *Id.* at 729 (quoting 7 W. BERTELSMAN AND K. PHILIPPS, KENTUCKY PRACTICE, CR 55.02, Comment 2 (4th ed. 1984)). “All three elements must be present to set aside a default judgment.” *Id.*

In considering whether to set aside the default judgment, the trial court found that Lamar had no valid excuse for his failure to file a response:

The Defendant had more than six months to file an answer before [the trustees] moved for default judgment; the Court addressed [Lamar’s] arguments for that failure in his original *pro se* motion and found them wanting.

The record reflects that the trial court did not give any credence to Lamar's assertion that he was misled by opposing counsel. Aside from Lamar's bare assertion, there was no other evidence in the record to support this claim.

"[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (citation omitted); CR 52.01. Although "default judgments are disfavored and the trial court is vested with broad discretion to set them aside . . . we have never stripped the trial court of its discretion in determining whether to set aside a default judgment." *VerraLab Ja LLC v. Cemerlic*, 584 S.W.3d 284, 287-88 (Ky. 2019) (citations and internal quotation marks omitted). We discern no abuse of discretion.

Lamar next contends that the trial court erroneously refused to set aside the default judgment as void. Lamar asserts that "the purported 'Trustees' are not identified by name and had no authority to bring this action on behalf of the church." Additionally, he argues that the church is an unincorporated entity which has not filed a certificate of association with the Kentucky Secretary of State. Therefore, he contends that the church is barred from the right to sue or be sued in its own name pursuant to KRS Chapter 273A. As a result, Lamar claims there was no legal person acting as a party-plaintiff in the underlying action.

The trial court carefully considered this argument and concluded that it was waived by operation of CR 9.01, which provides, in pertinent part, as follows:

When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

We directly considered the effect of non-compliance with CR 9.01 in *Edwards v. Headcount Management, supra*:

[A]lthough an objection to a party's capacity . . . is not technically speaking an affirmative defense, it can be analogized to an affirmative defense and treated as waived if not asserted by motion or responsive pleading, subject, of course, to the liberal pleading amendment policy of Rule 15. To assert capacity as a defense—whether the basis of that assertion is a plaintiff's capacity to bring suit or a defendant's capacity to be sued—compliance with CR 9.01 is *compulsory and non-negotiable*.

421 S.W.3d at 405 (emphasis added) (citations and internal quotation marks omitted).

Although he had more than six months to do so, Lamar did not file a response to the complaint. Consequently, he also failed to comply with the mandate of CR 9.01. Indeed, he did not raise his capacity issue until his second post-judgment motion, which was too late to comply with the rule. *See id.* at 405-

06 (holding the summary-judgment hearing was too late to raise the issue of capacity under CR 9.01). The trial court did not err in finding that Lamar waived this issue.

We affirm the order of the Daviess Circuit Court denying relief pursuant to CR 60.02.

ALL CONCUR.

BRIEF FOR APPELLANT:

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