

RENDERED: JANUARY 31, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001463-MR

DREW BOWLAND

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 07-CI-00868

LAWRENCE F. GARDNER AND
LINDA C. GARDNER

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND MAZE, JUDGES.

CLAYTON, JUDGE: This is an appeal from the granting of a summary judgment motion which the McCracken Circuit Court treated as a Kentucky Rules of Civil Procedure (CR) 60.02 motion. Based upon the following, we affirm the decision of the trial court.

OPINION

Appellant, Drew Bowland, helped the appellees, Lawrence and Linda Gardner, after their residence burned and their insurance company failed to pay under their policy. The Gardners hired an attorney to represent them in an action against the insurance company, but the action was dismissed due to the failure of their counsel to file the action within the applicable statute of limitations.

Bowland asserts that he then helped the Gardners by introducing them to the attorney which they eventually hired who pursued a legal malpractice action against their former attorney. Bowland requested payment from the Gardners based upon his assistance in the matter and, when they refused to pay, he filed an action for breach of contract with the McCracken Circuit Court.

Bowland argued in his action that he and the Gardners had entered into a written contract, under which he agreed to perform investigatory and support services for them for one-third of any recovery for their loss. Bowland also contends that without his knowledge, the Gardners entered into a settlement agreement and received \$67,500.00. He argues that they paid him an initial installment of \$2,500.00, but failed to pay anything further.

Bowland filed the action on August 13, 2007, and a default judgment was entered on September 27, 2007. A hearing for damages was originally scheduled for October 19, 2007, however, it was continued until December 14, 2007. On October 4, 2007, the Gardners served upon Bowland interrogatories, request for production of documents, and request for admissions. Bowland asserts

that due to the default judgment being entered, he believed he was not obligated to respond to these discovery requests.

On December 12, 2007, the Gardners filed a motion for summary judgment due to the lack of response on the discovery requests. The Gardners also filed, in the alternative, a motion to compel Bowland's response to the discovery requests. On December 26, 2007, the trial court granted the Gardners' motion for summary judgment stating that it deemed admitted the request for admission which stated that: "Plaintiff, Drew Bowland, has been compensated in full for the allegations contained in the Complaint initiating this action."

Bowland then filed an appeal with our Court. A panel of our Court held that the motion for summary judgment was filed only two days prior to the date it was heard by the trial court. Since CR 56.03 requires that a summary judgment be served at least ten days before the time fixed for the hearing, the Court reversed and remanded the action. The Court also held that Bowland should have been able to amend his admissions.

A special judge was assigned to the case and a hearing to set damages was held on May 26, 2011. The trial court treated the Gardners' summary judgment motion as a CR 60.02 motion and found that the initial contract was predicated by fraud and that new evidence had been presented to prove the fraud. Bowland then brought this appeal.

CR 60.02 provides as follows:

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 family of a judgment or suspend its operation.

Bowland first contends that the trial court should not have entertained the motion for summary judgment because the Gardners had not filed an original action and that the fraud issue was not affirmatively pled. The trial court, however, held a damages hearing at which it heard evidence regarding Bowland's assertion that he suffered damages and then Linda Gardner's assertion that he had not. The trial court found that no damages were proved and, as a result, awarded judgment in favor of the Gardners. We hold this was not in error.

Bowland also asserts that the trial court erred in granting the motion because it was unsupported and not warranted. As set forth above, however, the trial court stated that it was treating the motion as a CR 60.02 motion. The trial court did not err in this finding.

Finally, Bowland argues that the trial court lacked authority to grant the Gardners' motion for summary judgment based on fraud and against the rule of the appellate court. Our Court did not, however, hold that the trial court could not enter a summary judgment motion. Rather, it held that the trial court had entertained a motion too early given CR 56.03.

Therefore, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Drew Bowland, *pro se*
Benton, Kentucky

BRIEF FOR APPELLEE:

Linda C. Gardner, *pro se*
Paducah, Kentucky