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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001546-MR

GARLOCK SEALING
TECHNOLOGIES, LLC — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A. C. MCKAY CHAUVIN, JUDGE
ACTION NO. 12-CI-004046

DELORES ANN ROBERTSON,
INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE
OF THOMAS E. ROBERTSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: The issue before us is whether the Jefferson Circuit Court erroneously dismissed Appellant Garlock Sealing Technologies, LLC's complaint for failure to state a claim upon which relief may be granted under Kentucky Rules of Civil Procedure (CR) 12.02(f). We find no error and affirm.

I. Facts and Procedure

We must take as true the allegations contained in Garlock's complaint. Accordingly, we narrate the complaint's contents as if they were undisputed facts.

The parties and this matter are not strangers to this Court.[1] They have been here once before. *Garlock Sealing Technologies, LLC. v. Robertson*, No. 2009-CA-000483-MR, 2011 WL 1811683, at *1 (Ky. App. May 13, 2011). Some of the underlying facts are set forth in our prior opinion, and we endeavor to avoid repetition to the furthest extent possible.

In the course of his employment, decedent Thomas Robertson came into contact with a variety of asbestos-containing products, including Garlock gaskets.[2] He later died from lung cancer, and his widow, appellee Delores Ann Robertson, in her executrix and individual capacities, filed suit against Garlock, E.I. du Pont de Nemours & Company, and a number of other defendants claiming the decedent's exposure to asbestos-containing products, including Garlock gaskets, had contributed to his illness and led to his death. Garlock and other defendants impleaded approximately thirty third-party defendants.[3]

[1] This is especially true for the author of this Opinion, for he also penned the opinion disposing of Garlock's first appeal.

[2] Garlock manufactures industrial and commercial fluid-sealing products such as gaskets and gasketing material.

[3] The third-party defendants consisted of former employers, property owners, and other manufacturers of asbestos-containing products.

The matter played out at the trial level, culminating in a jury verdict in Robertson's favor. The jury apportioned twenty-five percent of fault to Garlock, five percent to DuPont, ten percent to the decedent, and three percent to each of twenty other entities (settling and third-party defendants identified on the verdict form for apportionment).[4] The circuit court entered a judgment on December 1, 2008, against Garlock and ordered it to pay compensatory and punitive damages to the estate and to Robertson. Garlock appealed to this Court, arguing the circuit court committed reversible error when it denied Garlock's directed-verdict motions and allowed punitive damages. We affirmed the judgment. *Robertson*, 2011 WL 1811683, at *1. The Supreme Court denied Garlock's subsequent motion for discretionary review.

On July 26, 2012, Garlock filed a CR 60.03 independent action in Jefferson Circuit Court attacking the original judgment on the basis of CR 60.02(d) fraud affecting the proceedings. Garlock pleaded that Robertson committed fraud when she failed "to disclose during pretrial discovery the decedent's known asbestos exposure from at least four (4) other manufacturers' products." (R. at 1-2). It then affirmatively alleged that "Robertson's fraud affected the proceedings by depriving Garlock of relevant and material information within her knowledge, which Robertson had a duty to disclose, and that if properly disclosed would have

[4] Not every third party impleaded by Garlock made it on the verdict apportionment form. The circuit court included only those parties from which the "evidence in the record would permit a reasonable juror to find fault on behalf of that party and could conclude that apportionment of some liability to that party was justified." (R. at 11).

been material to Garlock's defense and would have resulted in the identification of four (4) additional parties on the apportionment form." (R. at 20).

In lieu of an answer, Robertson filed a CR 12.02(f) motion to dismiss for failure to state a claim. The circuit court granted that motion in an order entered on August 13, 2013. Its reasoning was two-fold. First, the circuit court found the fraud allegations pleaded by Garlock did not subvert the integrity of the court itself and therefore did not qualify as "fraud affecting the proceedings" under CR 60.02(d). And, second, Garlock's complaint was not filed within one year after judgment was entered, as is required for claims of perjury or falsified evidence under CR 60.02(c), and therefore was untimely. Garlock appealed.

Before moving on to our analysis, we think a closer examination of the factual basis of Garlock's fraud claim is needed.

In the underlying action, Garlock coordinated its discovery efforts with at least two other defendants, Cardinal Industrial Insulation Company, Inc., and DuPont. On July 30, 2007, Robertson served Garlock with her answers to Cardinal's first set of interrogatories. In response to interrogatory number 17, which asked Robertson to "state each separate occasion on which [decedent] claims that he has come into contact with or been exposed to asbestos or asbestos-containing products," Robertson claimed:

> The specific dates and time periods where [decedent] came into contact with or was exposed to asbestos are not known. Set forth below are the years in which he was so exposed, the location/job site where he was so exposed, the name and address of the employer with whom he was

> employed at the time of each such exposure. . . . [Decedent] was exposed to asbestos insulation and Garlock asbestos-containing gaskets at each of these [identified] job sites. The names of the asbestos insulation manufacturer [are] unknown as the asbestos consisted primarily of thermal insulation pipe covering that has been installed prior to [decedent's] exposure . . . Discovery is ongoing and [Robertson] reserves the right to supplement this interrogatory.

(R. at 29-30). Similarly, interrogatory number 33 asked Robertson to state whether decedent:

> has filed or asserted any type of claim or action against any former manufacturer, distributor, or contractor of asbestos-containing products which is, or has been at any time in the past, under the protection of the United States Bankruptcy Court, or against any trust, fund, or entity established on behalf of any such manufacturer, distributor, or contractor, relating to any claim for injury as a result of [decedent's] alleged exposure to asbestos-containing products.

(R. at 37-38). Robertson objected, claiming the information was protected by both the attorney-client privilege and the work-product doctrine, and that the information was inadmissible pursuant to Kentucky Rules of Evidence (KRE) 408. Without waiving the objection, Robertson stated that counsel had not submitted any claims at that time.

Thereafter, on November 26, 2007, Robertson served Garlock with her answers to DuPont's first set of interrogatories. DuPont's interrogatory number 3 was similar in nature to Cardinal's interrogatory number 17, and Robertson's answer to DuPont's interrogatory mirrored her answer to Cardinal.

Robertson's responses to both sets of interrogatories contained duly notarized verifications. Robertson never supplemented her answers.

While pretrial discovery was ongoing in this matter, other manufacturers of asbestos-containing products were seeking relief and protection under 11 U.S.C.[5] § 524(g) of the United States Bankruptcy Code "in an effort to globally resolve their mounting and prospective liability from suits brought by plaintiffs alleging injury from asbestos exposure."[6] (R. at 3). One such entity was the Quigley Company.

On June 9, 2008, Robertson's attorneys submitted to Quigley a "master ballot" to vote on Quigley's proposed plan of reorganization under the bankruptcy code. The ballot was only to be used for tabulating votes solicited from individual holders of certain asbestos personal-injury claims. By signing the master ballot, Robertson's attorneys certified, under penalty of perjury, that "[e]ach of the claimants identified on the Exhibit to this Mater Ballot holds an Asbestos PI Claim against Quigley based on the disease identified in this Exhibit." (R. at 65). A separate document defined an "Asbestos PI Claim" as "any Claim or Demand seeking recovery for damages for bodily injury allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products[.]" (R. at 10).

After the jury trial in this action, Robertson cast similar reorganization master ballots in bankruptcy actions for The Flintkoke Company, W.R. Grace &

[5] United States Code.

[6] This provision permits Chapter 11 plans of reorganization to establish a trust funded by the assets of the debtor to pay for all present and future asbestos-related claims against the debtor in lieu of further litigation and trials in tort.

Co., and Flintkoke Mines, Limited.[7] Upon casting each ballot, Robertson's attorneys again certified that the decedent had been exposed to an asbestos-containing product or material connected in some fashion to the named company.

This brings us back to the fraud claim. Garlock pleaded that Robertson knew of the decedent's exposure to asbestos-containing products manufactured by Quigley, Flintkoke, Grace and Mines before the jury trial in this case commenced, and could have seasonably supplemented her interrogatory responses. Her failure to disclose the exposure evidence in her original answers or in supplemental answers, claims Garlock, constituted a knowing and willful concealment and an intentional, false, and material misrepresentation by omission. Further, Garlock claims Robertson's fraudulent concealments interfered with Garlock's ability to present evidence that asbestos manufactured by other companies contributed to the decedent's illness and death, and hindered its ability to include those companies on the verdict apportionment form.

With this background in mind, and after addressing our standard of review, we turn to the arguments presented.

II. Standard of Review

The parties disagree regarding the applicable review standard.[8] We think it rather straightforward. The circuit court granted Robertson's CR 12.02(f) motion to dismiss Garlock's complaint for failure to state a claim. We review

[7] The Flintkoke ballot was submitted on December 11, 2008; the Grace ballot was submitted on May 7, 2009; and the Mines ballot was submitted on September 17, 2009.

[8] Garlock claims we review the issue *de novo*, while Robertson seeks the more deferential "abuse of discretion" review standard.

dismissals under CR 12.02(f) *de novo*. *Morgan & Pottinger, Attorneys, P.S.C. v. Botts*, 348 S.W.3d 599, 601 (Ky. 2011).

CR 12.02(f) is designed to test the sufficiency of a complaint. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). It is proper to grant a CR 12.02(f) dismissal motion if:

> it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. . . . [T]he question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002) (internal quotation and citation omitted). For purposes of a CR 12.02(f) motion, this Court, like the circuit court, must accept as true the plaintiff's factual allegations and draw all reasonable inferences in the plaintiff's favor. *Pike*, 434 S.W.2d at 627.

We are of course aware that the denial of a CR 60.02 motion is typically reviewed under an abuse of discretion standard. *Foley v. Commonwealth*, 425 S.W.3d 880, 886 (Ky. 2014); *Love v. Walker*, 423 S.W.3d 751, 758 (Ky. 2014). But to apply that review standard here would ignore the procedural posture of this case. The circuit court *granted* Robertson's CR 12.02(f) motion to dismiss. It did not, as Robertson suggests, *deny* or *rule upon* the substantive CR 60.02 allegations contained in Garlock's complaint.

III. Analysis

Garlock argues its complaint amply stated a valid independent action for CR 60.03 relief because of Robertson's fraud affecting the proceedings as contemplated by CR 60.02(d). It faults the circuit court for relying on abrogated appellate authority to support its grant of Robertson's CR 12.02(f) motion. Garlock's brief focuses almost entirely on what it denominates "the Rasnick problem." Its argument is as follows.

In *Rasnick v. Rasnick*, 982 S.W.2d 218 (Ky. App. 1998), this Court drew a distinction between extrinsic and intrinsic fraud. It found the former constitutes fraud affecting the proceedings, but the latter does not. *Rasnick* narrowly defined extrinsic fraud to include "only the most egregious conduct," such as bribing a jury or jury member, evidence fabrication, and improper attempts by counsel to influence the court. Fraud between the parties, the *Rasnick* court held, did not rise to the level of fraud upon the court.

Four years later, as Garlock notes, the Kentucky Supreme Court abrogated *Rasnick* in *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002), when it held "that fraud upon a party is, in fact, 'fraud affecting the proceedings.'" *Id.* at 818. The Court also noted that "[w]hatever popularity the distinction between intrinsic and extrinsic fraud may have enjoyed in the past, the judicial tide is turning against the distinction in favor of equity." *Id.*

Garlock claims this Court has repeatedly failed to acknowledge, appreciate, or recognize *Terwilliger*'s abrogation of *Rasnick* and has instead continued to wholly apply *Rasnick* and its extrinsic/intrinsic fraud distinction. The

circuit court, in turn, followed our lead, Garlock submits, when, applying *Rasnick* concepts, it held that only fraud that "subverts the integrity of the court itself" amounts to fraud affecting the proceedings under CR 60.02(d). Garlock implores this Court to "set the record straight" regarding any lingering vestiges of *Rasnick*.

We believe at least some of this confusion can be explained by going to the rule itself. In effect, that is what the circuit court did. We shall do the same in a more explicit manner.

Notwithstanding "the Rasnick problem," the circuit court also concluded that Garlock's allegations, taken as true, describe nothing more than "perjury or falsified" evidence under CR 60.02(c) and, therefore, the independent action under CR 60.03 was subject to the one-year limitations period. Garlock says little about this portion of the circuit court's ruling. Robertson agrees with the court's analysis and argues Garlock is trying to jam its claim into the contours of CR 60.02(d) to avoid the time limitations of CR 60.02(c). We agree.

Before proceeding with analysis of the limitations portion of CR 60.02, we note that neither Kentucky's CR 60.02(c) nor the exception contained in CR 60.02(d) has any *express* counterpart in the federal rule from which CR 60.02[9]

[9] 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

as a whole is drawn – Fed. R. Civ. P.[10] 60(b)-(c).[11]

Comparing the rules, we see that the identical topics addressed by CR 60.02(a), (b) and (f) are addressed by Fed. R. Civ. P. 60(b)(1), (2) and (6), respectively. However, CR 60.02(e) combines the topics covered by Fed. R. Civ. P. 60(b)(4) and (5). Of the federal rule, this leaves only Fed. R. Civ. P. 60(b)(3) which authorizes a federal court to grant relief from a final judgment on the basis of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party[.]"

> 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.

[10] Federal Rules of Civil Procedure.

[11] Fed. R. Civ. P. 60(b)-(c) states:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.
> (c) Timing and Effect of the Motion.
> (1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
> (2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

Kentucky's closest corollary to Fed. R. Civ. P. 60(b)(3) is CR 60.02(d) which permits a Kentucky court to set aside a final judgment based on "fraud affecting the proceedings, *other than perjury or falsified evidence*[.]" (Emphasis added). That exception leads us to Kentucky's unique rule, CR 60.02(c), allowing for the setting aside of a final judgment on the basis of "perjury or falsified evidence[.]" CR 60.02(c).

The distinction has been with us for more than half a century. *See*, *e.g.*, *Tartar v. Medley*, 371 S.W.2d 480, 481 (Ky. 1963). Whatever the drafters' original intent, lost or forgotten over the decades, its effect can be discerned. Justice Palmore said: "The enumeration of perjury or falsified evidence as ground (3) and its pointed exclusion from ground (4) evince an unmistakeable intention that as a basis for relief it be subject to the one-year limitation." *Id.* However, while this is technically correct, Justice Palmore misses the point.

Limiting motions based on perjured testimony to one year was *not* a change from the federal rule. In federal court, a judgment could be set aside on the basis of perjured testimony pursuant to Fed. R. Civ. P. 60(b)(3) even though that basis was not expressly articulated in the rule. *Diaz v. Methodist Hosp.*, 46 F.3d 492, 497 (5th Cir. 1995) ("If unequivocal evidence establishes that a party willfully perjured himself, and thereby prevented the opposition from fully and fairly presenting its case, use of [Fed.] Rule [Civ. P.] 60(b)(3) to grant the innocent party a new trial would be a proper response."). And motions pursuant to Fed. R. Civ. P. 60(b)(3) have always been limited to one year. Fed. R. Civ. P. 60(c)(1).

The real and consequential, and uniquely Kentucky, effect of tweaking the rule was to place all kinds of fraud *other than perjury or falsified evidence* under CR 60.02(d), thereby making a motion based on such *other* kinds of fraud subject to the more flexible "reasonable time" standard. CR 60.02. In order to benefit by this liberality in the Kentucky rule, however, the fraud (regardless of the *Rasnick* problem of an extrinsic or intrinsic distinction) must *not* be perjury or falsified evidence.

Garlock cannot escape the fact that its motion was based purely on alleged perjury or falsified evidence in the form of discovery responses. By definition, Robertson's interrogatory responses were made under oath. CR 33.01(2) ("Each interrogatory shall be answered separately and fully in writing under oath[.]"). Garlock's alternative theory as to when Robertson knew of claims against Quigley and the others yields the same result. That is, Robertson subsequently came into possession of additional information regarding the decedent's asbestos exposures that she knowingly failed to disclose by supplementing her responses. Taking this as true, Robertson had a duty to seasonably amend her prior response, and her intentional failure to do so allowed false evidence to stand. *See* CR 26.05(b).

Reaching the conclusion that Garlock's independent action was based on alleged perjury, we need look at only two dates: (1) the date of the judgment in the underlying case – December 1, 2008; and (2) the date Garlock filed its independent action under CR 60.03 – July 26, 2012. "Relief shall not be granted in

an independent action if the ground of relief sought . . . would be barred because not brought in time under the provisions of" CR 60.02. CR 60.03.

If Garlock had brought a motion pursuant to CR 60.02 based on perjury or falsified evidence, that motion would have to have been filed not later than one year from December 1, 2008, not three-and-one-half years later. By the terms of CR 60.03, and taking all the allegations in the complaint as true,[12] Garlock's independent action is time-barred and the circuit court was correct in so ruling.

IV. Conclusion

We affirm the Jefferson Circuit Court's August 13, 2013 Order and Opinion granting Robertson's CR 12.02(f) motion to dismiss.

ALL CONCUR.

[12] Robertson devotes a sizeable portion of her brief to bitterly contesting the truth of the factual allegations contained in Garlock's complaint. In light of our review standard, we have largely ignored these sections. They are best left to the merits of the underlying claim, upon which the circuit court never ruled.

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