

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002066-MR

WANDA WRIGHT-STARNES

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 14-CI-000867

CONTINENTAL REALTY
ADVISORS, LTD.; AND
PMR COMPANIES LLC

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Wanda Wright-Starnes (“Starnes”) appeals from the Jefferson Circuit Court’s order denying her motion for CR¹ 60.02 relief due to excusable neglect. For the following reasons, we affirm.

¹ Kentucky Rules of Civil Procedure.

On February 6, 2013, Starnes filed for Chapter 13 bankruptcy. Two weeks later, she fell and injured herself on property owned by Continental Realty Advisors, Ltd. (“Continental”), giving rise to the personal injury lawsuit at issue here. Starnes’ bankruptcy plan was confirmed in April 2013, but her plan failed to include her personal injury claim against Continental. Starnes failed to make payments on her bankruptcy plan, and her bankruptcy was dismissed on February 12, 2014. Starnes filed suit seeking damages for her injuries from Continental on February 18, 2014. She then filed a motion with the bankruptcy court to reinstate her bankruptcy proceedings, but made no amendment or request for amendment to notify the bankruptcy court of her pending lawsuit against Continental. Starnes’ bankruptcy was reinstated on March 1, 2014, and she eventually filed an amendment to her bankruptcy schedule, including the personal injury action, on April 14, 2014.

On May 29, 2014, the Jefferson Circuit Court sustained Continental’s motion to dismiss/for summary judgment under the doctrine of judicial estoppel. The circuit court found that Starnes’ failure to disclose her personal injury claim to the bankruptcy court before her bankruptcy plan was confirmed was intended to prevent creditors from taking the proceeds of the claim, and therefore, she cannot pursue that claim for fear that the court might reward her for asserting an inconsistent position in another court. Starnes filed a motion to vacate/reconsider, which the circuit court denied on August 25, 2014. Following that denial, Starnes

filed an untimely notice of appeal on September 26, 2014, and a motion to abate her appeal based upon her filing of a CR 60.02 motion in the circuit court, alleging that the untimely notice of appeal was due to the illness/injury of her counsel. This Court dismissed Starnes' first appeal, 2014-CA-001596-MR, as untimely on November 13, 2014. Thereafter, the circuit court denied Starnes' CR 60.02 motion, stating, "[t]he plaintiff having moved the Court to vacate its order entered on August 25, 2014, pursuant to CR 60.02(a) and the Court being sufficiently advised, IT IS ORDERED that the plaintiff's motion to reconsider is DENIED pursuant to CR 73.02(1)(d)." From that denial, Starnes now appeals.

The "standard of review of a trial court's denial of a CR 60.02 motion is whether the trial court abused its discretion." *Richardson v. Brunner*, 327 S.W.2d 572, 574 (Ky. 1959). The test for abuse of discretion is whether the trial court's decision was "arbitrary, unreasonable, unfair or supported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

Starnes takes issue with the fact that the circuit court cited CR 73.02(1)(d) in its order denying her motion. CR 73.02(1)(d) directs:

[u]pon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment or an order which affects the running of the time for taking an appeal, the trial court may extend the time for appeal, not exceeding 10 days from the expiration of the original time.

Starnes argues that she did not seek relief under this rule, and that this rule does not apply to her counsel's failure to file a notice of appeal because her counsel did not

fail to learn of the entry of the circuit court's order dismissing her case - he simply failed to notice the deadline for filing the notice of appeal due to his injury/illness. We agree that Starnes is not entitled to relief, specifically an extension of the time for filing an appeal, under CR 73.02(1)(d) when her counsel knew of the entry of the circuit court's order. However, CR 60.02 is also not an appropriate avenue for the relief Starnes seeks.

CR 60.02 states:

[o]n 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.

Starnes alleges that (a), specifically excusable neglect on the part of her counsel in failing to file a timely notice of appeal, provides grounds for relief from the circuit court's judgment dismissing her lawsuit.

However, failure to file the timely notice of appeal is the only instance of neglect Starnes cites – Starnes' counsel presumably met all filing deadlines prior

to the circuit court's entry of the order dismissing Starnes' case. Accordingly, no neglect, let alone excusable neglect, occurred which would have affected the circuit court's final order from which Starnes sought relief via her CR 60.02 motion. Starnes has shown no reason why she should be granted relief from the circuit court's order, and therefore, the circuit court did not abuse its discretion by denying the motion.²

CR 60.02 is not designed to allow a party to evade the deadlines for filing an appeal as set forth in CR 73.02(1)(a) and (1)(d). CR 73.02(1)(d) presents an avenue for parties to seek an extension of the time to file a notice of appeal in instances of excusable neglect, and Starnes neither sought nor was eligible for relief under that rule. While we sympathize with Starnes' predicament, we believe the circuit court properly applied its discretion in denying Starnes' CR 60.02 motion, including considering the statutory scheme regarding appellate deadlines established by CR 73.02.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

CLAYTON, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

² Starnes' citation to *Union Carbon Co. v. Ramsey*, 350 S.W.2d 454 (Ky. 1961) for the proposition that illness can form the basis for excusable neglect in missing a deadline to appeal is misplaced. *Ramsey* only establishes that illness can create excusable neglect when the illness prevents counsel from **knowing of the entry** of an order. Here, Starnes' counsel knew of the entry of the order and thus the deadline for filing a notice of appeal. In fact, Starnes' counsel was not injured until 24 days *after* the entry of a final order in this case – in other words, six days before the notice of appeal filing deadline.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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