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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000617-MR

CHRISTOPHER BALL AND
HIS WIFE, FRANKIE BALL — APPELLANTS

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 13-CI-00177

ALBERT G. WITHROW AND
WIFE, LIDA WITHROW — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

NICKELL, JUDGE: Christopher and Frankie Ball appeal an order entered by the Whitley Circuit Court on April 6, 2015, denying their motion to vacate an earlier order dismissing with prejudice for lack of prosecution their complaint against

Albert G. and Lida Withrow. Having reviewed the scant record, the briefs and the law, we affirm.

ANALYSIS

At the heart of this appeal is a piece of property located in Corbin, Kentucky; more specifically, the home that sits atop it. The question is whether the home is situated on land owned by the Balls or the Withrows. The mailing address for the Balls is in Lexington, Kentucky; the address for the Withrows is in Owingsville, Kentucky.

According to the Withrows, Timothy and Barbara Barton previously owned the land and made significant improvements to it, transforming a mobile home into a permanent structure. In 2008, the Withrows acquired the property from Deutsche Bank National Trust Company at a judicial sale following a foreclosure.

On March 21, 2013, a complaint was filed by attorney Jason P. Price on behalf of the Balls alleging the home occupied by the Withrows on Roden Road in Corbin, Kentucky, sits primarily on land owned by the Balls. In a subsequently filed affidavit, Christopher claimed "90%" of the Withrow home sits on Ball property. The Withrows timely answered[1] the complaint on December 6, 2013, asserting six defenses,[2] coupled with a counterclaim seeking to quiet title in their

[1] Counsel for the Withrows successfully moved for an enlargement of time to answer the complaint.

[2] Factual denial of the Balls' location of the common boundary; factual denial of encroachment; adverse possession based on the Withrows having enjoyed hostile, actual, exclusive, continuous, open and notorious possession of the disputed land for more than fifteen years before the

own possession. Price answered the Balls' counterclaim on January 16, 2014, generally denying all claims.

Thereafter, the encroachment alleged by the Balls languished until January 23, 2015, when the Withrows moved to dismiss the complaint with prejudice under CR[3] 41.02(1) since the Balls had done nothing to advance their claim for nearly two years. There being no response of any kind from the Balls or their attorney, the Whitley Circuit Court entered an order of dismissal with prejudice on February 2, 2015, citing lack of prosecution. In its order, the court noted the action had been filed on March 31, 2013, and the only action by the Balls since that time was the filing of an answer to the counterclaim on January 16, 2014. Entry of the order was distributed to counsel for both parties.

On March 20, 2015, Hon. Paul K. Croley II, tendered three items: a motion to vacate the order of dismissal based on CR 60.02; a proposed order of dismissal; and, an affidavit from Christopher stating he had retained Price in March 2013 and explaining:

> I have been trying to contact Jason Price since December 2014. I needed to know the court date as I live in Lexington and would need to make arrangements to drive to Whitley County in the event I needed to appear in court. After several attempts to contact Jason Price, I was unable to reach him. I did speak with him once,

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complaint was filed; laches and/or estoppel as the appropriate time to complain was when construction began, not after it was completed; failure of Balls to put Bartons' mortgagee on notice during foreclosure action or at master commissioner's sale; and, failure of Balls to put Deutsche Bank's realtor on notice when a "for sale" sign was placed on property.

[3] Kentucky Rules of Civil Procedure.

> however, he appeared ill and it became very hard to understand him because he wasn't speaking clearly. I have tried calling his office, his cell, his home, and even sent him text messages. Jason Price has not responded to any of my efforts to contact him.

The motion to vacate blamed Price for not informing the Balls of the hearing on the motion to dismiss, not appearing at the hearing, and not objecting or responding to the motion to dismiss. According to the motion to vacate, had the Balls known what was happening in their case they would have responded, but due to "their former attorneys (sic) mistake, inadvertence, or excusable neglect," they were unaware of the status of their case and should not be penalized for Price's failures. On March 23, 2015, Croley entered an appearance[4] in the case.

Four days later, the Withrows responded to the motion to vacate, detailing the Balls' complete lack of attention to the case, including their failure to: respond to the motion to dismiss; timely move to vacate entry of the dismissal; and, appeal the dismissal. Citing *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797, 799 (Ky. App. 1984), the Withrows argued the Balls should be held accountable for Price's inaction because:

> [n]egligence of an attorney is imputable to the client and is not a ground for relief under CR 59.01(c) or CR 60.02(a) or (f). *See Childers v. Potter*, 291 Ky. 478, 165 S.W.2d 3 (1942).

On April 6, 2015, the trial court denied the motion to vacate dismissal. This appeal follows.

[4] The pleading indicates Croley is appearing on behalf of the "Defendant." He represents the Plaintiffs—the Balls.

ANALYSIS

We review a trial court's denial of a CR 60.02 motion for abuse of discretion. *Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002). We will reverse only if convinced the trial court's ruling "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) (citing *Commonwealth v. English,* Ky., 993 S.W.2d 941, 945 (1999)).

The Balls argue CR 60.02 relief should have been granted due to Price's "reckless, grossly negligent and unprofessional behavior, which constituted excusable neglect." In particular, they argue Price's alleged drug addiction, unknown to them when they retained Price, justified relief under CR 60.02(a) to correct "mistake, inadvertence, surprise or excusable neglect." We disagree.

> The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and *could not have been known to the moving party by the exercise of reasonable diligence* and in time to have been otherwise presented to the court. *Davis v. Home Idem. Co*., Ky., 659 S.W.2d 185 (1983).

Young v. Edward Technology Group, Inc., 918 S.W.2d 229, 231 (Ky. App. 1995). [Emphasis added]. Price's alleged drug use, if true, did not excuse the personal inattentiveness of the Balls. In other words, we are unconvinced the Balls diligently checked on the progress of their case as evidenced by a very thin record and the lack of any movement between January 16, 2014, and January 23, 2015.

Patience is said to be a virtue, but time is of the essence and tolerance functions within reasonable limits.

By his own affidavit, Christopher hired Price in March 2013, and did not try to contact Price again until December 2014, some twenty-three months later. As expressed in *Perry v. Central Bank & Trust Co*., 812 S.W.2d 166, 170 (Ky. App. 1991), "carelessness" at the hands of a party, or even the party's attorney, does not justify setting aside a judgment.

Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 385–86, 113 S. Ct. 1489, 1493, 123 L. Ed. 2d 74 (1993), cited by the Balls is factually distinct. *Pioneer* was a bankruptcy case—admittedly an area of law with its own unique filing requirements and rules—in which a delay of twenty days in filing proofs of claim did not adversely impact court administration or prejudice the opposing party, two of five factors to consider when evaluating excusable neglect.[5] In *Pioneer,* counsel missed a filing date that was not "prominently announced" as the Supreme Court believed it should have been. *Id.* at 507 U.S. 398, 113 S.Ct. 1499. The fact that the attorney was "experiencing upheaval in his law practice at the time" carried little weight. The deciding factor was the nearly buried filing date. Under those facts, denying relief was an abuse of discretion. The same cannot be said of this case where a matter was pending nearly two years without any movement and no indication the Balls took steps to

[5] Other factors to consider are whether delay was beyond reasonable control of person who was to perform; whether creditor acted in good faith; and whether clients should be penalized for attorney's mistake or neglect. *In re Dix*, 95 B.R. 134, 138 (B.A.P. 9th Cir. 1988).

pursue the matter. From March 2013 until February 2015, the Withrows had to wonder what the outcome would be and the court had to carry the matter on its docket.

Christopher stated in his affidavit that he began trying to contact Price in December 2014. When he finally reached Price by telephone, Price seemed ill and "it became very hard to understand him because he wasn't speaking clearly." Subsequent attempts to contact Price were unsuccessful. Then, on March 19, 2015, Ball learned Price had been arrested for drug trafficking. The next day, Ball hired a new attorney and learned the case had been dismissed. That same day, March 20, 2015, a motion to vacate the dismissal was tendered—demonstrating Christopher's ability to make things happen when needed. This was a case of neglect, not "excusable neglect." The extraordinary relief afforded by CR 60.02 was unavailable and properly withheld.

> [The Balls] voluntarily chose [Price] as [their] representative in the action, and [they] cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." [*Link v. Wabash R. Co.,* 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962)] (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)).

Pioneer, 507 U.S. at 397, 113 S.Ct. at 1499.

For the foregoing reasons, dismissal of the complaint with prejudice and denial of the motion to vacate are AFFIRMED.

CLAYTON, JUDGE, CONCURS AND FILES SEPARATE OPINION IN WHICH JONES, JUDGE, CONCURS.

CLAYTON, JUDGE, CONCURRING: I concur with the analysis and the result reached in the majority opinion, but write separately to express my concern regarding motions to dismiss under CR 41.02.

As stated by the majority, the law imputes the negligence of the attorney to the client, and therefore, the negligence of the attorney is not a ground for relief for the client under CR 59.01(c), CR 60.02 (a), or (f), *Vanhook*, 678 S.W.2d at 799. Nonetheless, I am troubled by this jurisprudence since the client does not have the same opportunity to respond to a motion to dismiss. Here, based on this legal reasoning, neither the appellees' attorney nor the court ever notified the appellant that a motion to dismiss was filed or that an order was subsequently entered.

Ironically, the attorney upon whom the motion to dismiss was served, was the one, who knew or should have known, that the claim had not been timely prosecuted. Nonetheless, while the attorney was properly advised of the pending dismissal, the client, the litigant, who probably did not know that the claim had not been timely prosecuted, but who, according to the law, should have surmised that the claim was in jeopardy, was not entitled to receive notice. Consequently, the client shares the penalty for failure to act without any opportunity to address the problem, and likely without any knowledge of the problem or the penalty. This is troubling.

The civil rules requires that "… every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each party except those in default for failure to appear." CR 5.01. As a result, CR 41.02 requires that actual notice of the motion be given to opposing counsel. Actual notice is defined as "notice expressly and actually given." *Black's Law Dictionary*.

The purpose of notice of motion to dismiss under CR 41.02 is to alert the opposing party that their claim may be dismissed with prejudice. The finality of this dismissal makes the motion different from many of the other motions that may be filed during litigation because the opportunity for a party's case to be heard and the cause to be litigated is about to be lost forever. Moreover, it is not implausible to believe that if a motion to dismiss is filed, some disruption in the attorney-client relationship has occurred. Further, notice to the attorney is not necessarily notice to the client. While I agree that the movant is entitled to have a case resolved and that the court should be able to dispose of abandoned causes of action, I also believe that if the attorney is required to be given notice, and thereby allowed an opportunity to save a case from dismissal, then the litigants should also be given that same notice and opportunity.

BRIEF FOR APPELLANT:

Paul K. Croley, II
Williamsburg, Kentucky

BRIEF FOR APPELLEE:

Ralph W. Hoskins
Corbin, Kentucky