

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000806-MR

GEORGE GREGORY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 01-CI-00580

CATHERINE GREGORY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, COMBS, and KNOPF, Judges.

COMBS, JUDGE. George Gregory appeals from the February 20, 2002, order of the Campbell Circuit Court denying his motion filed pursuant to CR¹ 60.02 to set aside the final judgment in a dissolution of marriage proceeding between the parties. We vacate and remand.

The parties married in 1989 and separated in April 2001. The appellee, Catherine Gregory, filed a petition for dissolution of the marriage on May 10, 2001. At the time the petition was filed, George was in Texas obtaining treatment for a substance addiction. He was not represented by legal counsel,

¹ Kentucky Rules of Civil Procedure.

and he did not file an answer to the petition. A waiver of service of summons and an entry of appearance, executed by George, were filed in the record on August 24, 2001.

The parties could not reach an agreement on how the property should be divided. Catherine sent George her proposed property settlement agreement, which he found unsatisfactory. Upon Catherine's motion, the matter was set for a final hearing on December 4, 2001. George appeared at the hearing and asked for a continuance in order to obtain legal representation. The hearing was passed until December 19, 2001, at 9:15 a.m. Neither George nor his legal representative appeared at the hearing, and the trial court proceeded without them. In its final decree, entered on December 20, 2001, the trial court essentially divided the property according to the agreement originally proposed by Catherine.

On January 16, 2002, George filed a motion to alter, amend, or vacate the judgment pursuant to CR 59.05, 59.07, and 60.02. He alleged that he had been "mistakenly informed" by Catherine's attorney that the hearing was set for 11:15 a.m. on December 19, 2001. When he and his attorney appeared at that time, they learned that the hearing had been conducted two hours earlier. He argued that there had never been a full disclosure of the parties' assets and debts, that the judgment allotted Catherine more than her fair share of the marital property, and

that the parties had several assets that were not disposed of in the court's judgment.

Catherine responded that George was not entitled to any relief pursuant to CR 59 because his motion was filed more than ten days after the entry of the judgment. Her counsel also claimed that she had not misinformed George with respect to the time for the hearing. In reply, George argued that he had been denied a chance for a fair hearing:

[whether he] was mistakenly informed by opposing counsel regarding the time of the final hearing, or whether he simply wrote down the wrong time, this was certainly excusable neglect and [he] had a right to have his side of the divorce heard.

The motion was denied on February 20, 2002. George petitioned the trial court to reconsider its ruling, urging that principles of fairness and equity mandated that he be afforded a hearing and an opportunity to be awarded a fair share of the marital estate. On March 14, 2002, the trial court denied the motion. This appeal followed.

George argues that the trial court abused its discretion in denying his motion to set aside the judgment. He cites a series of contingencies that prevented him from having an opportunity for a hearing in court. First, he was unable to defend the action due to illness and the fact that he was institutionalized in another state. He notes that although the

trial court granted his *pro se* motion to continue the final hearing, "he was given just more than a week to retain counsel" and was either "mistakenly informed" about the time for the hearing or he "inadvertently wrote down the wrong time." Under these circumstances, he urges that he was not given a fair opportunity to present his claims concerning the marital estate on their merits.

Catherine argues that George's confusion with respect to the time of the hearing does not constitute "mistake, inadvertence, surprise or excusable neglect" as contemplated by CR 60.02. She contends that George failed to avail himself of other avenues of relief from the judgment; *i.e.*, a timely motion for a new trial under CR 59 or an appeal from the judgment itself.

In reviewing the denial of a motion pursuant to CR 60.02, this Court may reverse the trial court only upon a showing of an abuse of discretion. Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957); Bethlehem Minerals Company v. Church and Mullins Corporation, Ky., 887 S.W.2d 327 (1994); Schott v. Citizens Fidelity Bank & Trust Co., Ky.App., 692 S.W.2d 810, 814 (1985). We believe that this case presents a viable basis for invoking the relief afforded by CR 60.02(a) to relieve the parties from the final judgment either due to mistake or excusable neglect. There is no dispute that George and his

attorney appeared for a hearing on the correct day but two hours late. They expected a hearing on the merits of the case. George contends additionally that substantial property issues were never adjudicated in the final judgment, a fact that would entitle him to relief under CR 60.02(f) ("any other reason of an extraordinary nature justifying relief").

Coupling the fact of mistake or excusable neglect with the sound policy reasons disfavoring default judgments, we believe that this case should have been given the opportunity for a hearing and that the failure of the trial court to set aside its judgment under these rather unique circumstances amounted to an abuse of discretion.

Therefore, we vacate the judgment of the Campbell Circuit Court and remand this matter for its consideration of the merits of this case.

ALL CONCUR.

BRIEF FOR APPELLANT:

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