

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001723-MR

DONALD RAY NEWCOMB

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
CIVIL ACTION NO. 97-CI-00065

JERRY J. COX

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: PAISLEY and TACKETT, Judges; and HUDDLESTON, Senior Judge.¹

HUDDLESTON, Senior Judge: This appeal arises from the denial as untimely filed of Donald Newcomb's post-judgment motion to modify, alter or vacate a judgment confirming a Master Commissioner's sale of real property. In that this case has

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

previously been before this Court,² we adopt from our prior opinion the statement of facts and procedural history of this case:

In 1992, [Newcomb] was sentenced in a criminal action following a jury trial. [Newcomb] had been represented at trial by private counsel, Cox. As [Newcomb] was unable to pay Cox the full attorney fee for his services, he made a down payment of \$5,000.00 and executed a promissory note, a bond assignment and a real estate mortgage on property he owned. The mortgage secured an indebtedness of \$20,000.00. No appraisal of the real property was conducted prior to the mortgage being entered into by the parties. The mortgage was executed in 1992.

In 1994, [Newcomb] attempted to transfer the mortgaged property to Betty Jane Newcomb (Betty) and Rebecca Jane Newcomb (Rebecca) for the sum of \$1.00. [Newcomb] also claims that certain "non-enumerated" conditions attached to the transfer of the property. He asserts that Cox released the mortgage prior to the property transfer with the understanding that he would receive all profits from the transaction. [Newcomb]

² See Newcomb v. Cox, No. 1998-CA-003165-MR (opinion rendered April 7, 2000).

states that a portion of the property was subsequently sold to an unrelated third party and the proceeds from that sale were paid to Cox. The record contains an affidavit filed by Cox showing that no payments have been made on this debt. [Newcomb] asserts that Cox's release of the lien in 1992 bars him from claiming the proceeds of any later sale.

In 1997, [Newcomb] requested attorney fee arbitration with the Kentucky Bar Association claiming that Cox was not entitled to the full attorney fee promised. This action was dismissed without objection. [Newcomb] then filed a pro se petition asking that he be permitted to sell the real property to pay his debts. This petition admitted that [Newcomb] owed Cox an attorney fee debt he was unable to pay without selling the property. Cox responded, stating that he was entitled to have the property sold, and his attorney fee paid. Betty and Rebecca, who claimed to own the property pursuant to the 1994 property transfer, alleged that no condition attached to the transfer and that they were the owners of the property. Betty and Rebecca argued that [Newcomb] was not entitled to the proceeds of any sale of the property. All parties agreed to submit the matter to

the trial court on the record. The trial court granted summary judgment for Cox in 1998, and denied [Newcomb's] post judgment motions.

Following the rendition of our opinion affirming the judgment ordering the sale of the property, a sale was conducted and affirmed by the court on August 11, 2000. On January 14, 2002, Newcomb filed a motion to amend or correct the judgment confirming the sale. Although Newcomb pointed to Kentucky Rules of Criminal Procedure (RCr) 10.10 as the authority on which his motion was based, the circuit court treated the motion as having been brought under Kentucky Rules of Civil Procedure (CR) 60.02. Because RCr 10.10 exists as a vehicle to correct clerical mistakes in criminal judgments, the circuit court correctly treated Newcomb's motion as one under CR 60.02, and we will as well.

In instances of mistake, newly discovered evidence, or perjury or falsified evidence, a motion for relief must be made within one year of the judgment.³ In instances where there has been fraud affecting the proceedings, the judgment is void, or there is some other extraordinary reason justifying relief, a post judgment motion must be made within a reasonable time.⁴

³ Ky. R. Civ. P. (CR) 60.02(a), (b) and (c).

⁴ CR 60.02(d), (e) and (f).

In this case, Newcomb's motion was made more than one year after the entry of judgment. He has not asserted a basis for relief predicated on CR 60.02(d), (e) or (f). Hence, the circuit court was correct in holding that his motion was untimely.

Even if his motion was not time-barred, it fails on the merits. Both arguments Newcomb raises on appeal were presented to this Court in the prior appeal. We addressed his argument regarding an alleged factual dispute as to ownership of the property in question as follows:

[Newcomb] states that the trial court "seized" his real property without making a factual determination as to who was the rightful owner of the property. He claims that the trial court's refusal to name the alleged purchaser of a portion of the property as a party to this action was an abuse of discretion. The record is devoid of any evidence tending to show that there is such a third party purchaser or that any third party should have been named in the action. Under such circumstances, the trial court's judgment must be affirmed.

That Newcomb now frames the issue as one of a failure of the circuit court "to order proof of deeds to real property in

question" is irrelevant; this argument is substantially the same one we rejected previously.

Newcomb's second argument presented in this appeal was likewise rejected by this Court:

. . . [Newcomb] claims that he was denied effective assistance of counsel in the civil litigation relating to the property transfer and the enforceability of the attorney fee contract. It is uncontroverted that [Newcomb] was appointed several guardians ad litem with regard to these matters, and that the court-appointed counsel took legal action on his behalf. A claim of ineffective assistance of trial counsel is not properly made in a civil action, as this claim attaches only in a criminal action.^[5] Any claims [Newcomb] may have had against his guardian ad litem were not properly before the trial court. The trial court found that [Newcomb] had failed to exhaust his administrative remedies with regard to the ineffective assistance of counsel and improper attorney fee claims. This finding is supported by the record, and must be affirmed.

⁵ Gall v. Commonwealth, Ky., 702 S.W.2d 37, 40 (1985).

Accordingly, the order denying Newcomb's motion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald R. Newcomb, pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Bobby L. Amburgey
John E. Clontz
CLONTZ & COX, LLC
Mt. Vernon, Kentucky