

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000202-MR

MARY CAROL GREENE

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-00469

CHIPPENDALE SQUARE
ASSOCIATION, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹
BUCKINGHAM, JUDGE: Mary Carol Greene appeals pro se from an
order of the Fayette Circuit Court denying her CR² 60.02 motion
to set aside a previous order denying her motion to alter,
amend, or vacate a judgment entered by the court in favor of
Chippendale Square Association, Inc. We affirm.

¹ Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Kentucky Rules of Civil Procedure.

On November 26, 2001, Chippendale filed a complaint against Greene in the small claims division of the Fayette District Court for \$672.91 in unpaid homeowner's assessments. On January 4, 2002, Greene filed a motion to have the case moved to the Fayette Circuit Court, alleging she had a counterclaim in excess of the jurisdictional limits of the district court.³ However, she did not attach a counterclaim to her motion.

Greene filed her counterclaim on January 28, 2002, alleging that Chippendale was responsible for damage to her property that she estimated would cost \$4,449 to repair. The district court held a hearing on January 29, 2002, and transferred the case to the circuit court. See KRS⁴ 24A.310(1).

On May 9, 2003, Chippendale filed a motion for summary judgment and attached an affidavit stating that Greene currently owed the association \$2,015.75 in unpaid assessments, late fees, attorney fees, and court costs. The affidavit was signed by Edwin M. Gibson, the principal of Chippendale's management company. Chippendale served the motion on Greene at her Chippendale property address and at the new address she had entered into the court record on January 14, 2003. Chippendale noticed a hearing on the motion for May 22, 2003. Because that

³ Greene represented herself at all times before the district court and the circuit court. She continues to represent herself in this appeal.

⁴ Kentucky Revised Statutes.

date was not the date the court heard motions, Chippendale re-noticed the hearing for May 23, 2003. Chippendale served notice of the new hearing date to both addresses on May 12, 2003.

On May 16, 2003, Greene filed a motion requesting the court to deny Chippendale's motion and to refer the case to mediation. She did not file any other response to the motion. On May 23, 2003, the circuit court held a hearing on Chippendale's motion. Based on its review of the record and the fact that Greene provided no defense in her response to the motion, the court awarded summary judgment in favor of Chippendale.

On June 3, 2003, Greene filed a motion to have the summary judgment set aside. The court did not actually enter its order awarding summary judgment to Chippendale until the following day. Also, Greene did not schedule a hearing on her motion.

On October 20, 2003, Chippendale filed a motion to have Greene's motion denied. On October 24, 2003, Greene filed a response, alleging that counsel for Chippendale had, on several occasions, intentionally sent notices to the wrong address in an attempt to prevent her from appearing in court. Greene failed to appear at the October 24 hearing, and the court entered an order on October 29, 2003, reflecting her non-appearance and denying her motion to set aside the judgment.

Chippendale filed an additional notice for hearing on Greene's motion in order to address her allegations that Chippendale's counsel intentionally mailed notices to her old address to give her less time to respond. That hearing was held on November 7, 2003, and Greene failed to appear. On November 12, 2003, the court entered an order denying her motion.

On December 1, 2003, Greene filed another motion to set aside the summary judgment. She explained therein that she missed the November 7 hearing because she was delayed in traffic. That motion was set for a hearing on December 5, 2003. Greene did not appear at the hearing due to illness.

On December 12, 2003, Greene filed another motion to set aside the summary judgment. That motion was heard on December 19, 2003. At the hearing Chippendale acknowledged it had set notices to an incorrect address, but had remedied the problem in time for Greene to receive the notices and respond to the motions.

The court denied Greene's motion, characterizing it as a CR 60.02 motion to vacate the court's November 12, 2003 order denying her CR 59.05 motion to alter, amend, or vacate the summary judgment. The court stated that insufficient grounds existed to alter, amend, or vacate the summary judgment and that Greene's non-appearance was inconsequential given her arguments

in the pleadings and her arguments before the court on December 19, 2003. This appeal by Greene followed.

After Greene filed her notice of appeal with this court, Chippendale filed a motion to dismiss. Greene did not respond. Nevertheless, this court denied the motion. However, this court noted that the only issue Greene may raise in this appeal is whether the circuit court abused its discretion in denying her CR 60.02 motion. This court noted that the time in which to appeal from the summary judgment had expired when this appeal was filed.

Greene acknowledges that this court's order limits her to arguing that the circuit court's decision not to set aside its summary judgment was wrong. She asserts, however, that "it is impossible to argue that the Court was wrong when it refused to overturn its summary judgment without arguing that the summary judgment was wrong." Therefore, she continues to attack the summary judgment. Greene raises the following arguments in this appeal:

1. The circuit court was wrong in granting summary judgment because there were genuine issues of material fact.
2. There was no authority for the court to award attorney's fees.

3. The court erred by not writing an opinion setting out how it decided every question and showing the authority for its decision.
4. Chippendale never filed a complaint asking for any more than \$672.91 or for attorney fees or interest at a rate to which it was not entitled.

CR 60.02 allows a court to relieve a party from a judgment on 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;
- f. any other reason of an extraordinary nature justifying relief.

CR 73.02 sets out the procedure concerning when and how an appeal is taken. CR 73.02(1)(a) states that the notice of appeal must be filed within 30 days after the date of notation of service of the judgment. "A party may not resort to CR 60.02 to gain an additional extension of time to prevent the application of CR 73.02." United Bonding Ins. Co., Don Rigazio, Agt. v. Commonwealth, 461 S.W.2d 535, 536 (Ky. 1970). Because Greene did not file a timely appeal from the summary judgment, and because she continues to attack that judgment, it appears she is improperly resorting to CR 60.02 in order to prevent the application of CR 73.02. The United Bonding case specifically states that such action is not allowed. Id.

"CR 60.02 is not a separate avenue of appeal to be pursued in addition to other remedies, but is available only to raise issues which cannot be raised in other proceedings." McQueen v. Commonwealth, 948 S.W.2d 415, 416 (Ky. 1997). Each of the issues raised by Greene in her appeal are issues that could have been raised before the circuit court in response to the summary judgment motion or in an appeal therefrom. In short, we will not address the arguments raised by Greene in her brief because they concern matters that could have been raised by her in an appeal from the summary judgment.

On appeal, this court will not disturb the exercise by the circuit court of its discretion in denying a CR 60.02 motion

unless that discretion was abused. See Fortney v. Mahan, 302 S.W.2d 842, 843 (Ky. 1957). Under the circumstances in this case, we conclude the court did not abuse its discretion in denying the motion.

Finally, Greene did not properly preserve the issue of the denial of the CR 60.02 motion. CR 76.03(8) states that “[a] party shall be limited on appeal to issues in the prehearing statement except when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” Five months before Greene filed her prehearing statement, this court entered an order specifically limiting Greene’s issue on appeal to whether the circuit court abused its discretion in denying her CR 60.02 motion. Despite having notice of the issue to which she was limited, Greene did not raise the issue in her prehearing statement. Therefore, the issue of whether or not the circuit court abused its discretion by denying her CR 60.02 motion to vacate the order denying her motion, to alter, amend, or vacate the summary judgment is not preserved for our review. See Osborne v. Payne, 31 S.W.3d 911, 916 (Ky. 2000).

The order of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary Carol Greene, *Pro Se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

John P. Brice
Lexington, Kentucky