

COMMONWEALTH OF KENTUCKY  
28th JUDICIAL CIRCUIT  
PULASKI CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO: 07-CI-00458

ENTERED GEORGE FLYNN, CLERK MAR 23 2009 PULASKI CIR, DIST COURT BY _____ D.C.
---

LARRY HONEYCUTT

Plaintiff

v.

NORFOLK SOUTHERN RAILWAY  
COMPANY

Defendant

**ORDER DENYING PLAINTIFF'S  
MOTION TO REINSTATE ACTION**

This matter comes before the Court on Plaintiff's Motion to Reinstate Action and Vacate Order Dismissing for Lack of Prosecution. The Court having considered Plaintiff's motion and Defendant's objection thereto, and being sufficiently advised, Plaintiff's motion is hereby ***DENIED***.

Prior to Plaintiff's motion, filed March 9, 2009, the last action by the parties in this case was the filing of Defendant's Answer and Motion to Dismiss on April 24, 2007, nearly two years ago. More than a year later, on August 5, 2008, when no further action had been taken, the Court filed a Notice to Dismiss for Lack of Prosecution, pursuant to CR 77.02(2). That Notice was served on Defendant, and on Plaintiff's counsel at the only address on record with the Court for counsel – 521 Cedar Way, Suite 200, Oakmont Station, Building 5, Oakmont, Pennsylvania 15139. Mail to Plaintiff's counsel was returned undeliverable.

On September 26, 2008, the Court entered an Order Dismissing for Lack of Prosecution. This, again, was served in the same way as the prior Notice, and Plaintiff's mail was returned undeliverable. Nothing further happened in the case until Plaintiff's motion to reinstate more than five months since the case was dismissed.

Plaintiff's grounds for requesting this relief are that: Plaintiff had counsel from Alabama handling this case prior to Plaintiff's current counsel; the parties were in settlement negotiations when the instant case was filed, but Defendant's claims agent ceased negotiations until it would be dealing with only one counselor; Plaintiff's current and prior counsel were confused about who would continue representing Plaintiff; Plaintiff's current counsel thought the prior counsel was to continue representation; Plaintiff's (current) counsel relocated his office and failed to notify the Court of his new address; and, thus, Plaintiff did not receive notice of the pending dismissal.

CR § 59.05 provides that a motion to alter, amend or vacate a judgment must be served within ten (10) days of the judgment. In this case, the Court's Order Dismissing for Lack of Prosecution was filed on September 26, 2008. Defendant's motion requesting reinstate and vacation of that Order was not served until March 5, 2009.

The Kentucky Court of Appeals recently reaffirmed that “a trial court loses control of a judgment ten (10) days after the entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made.”<sup>1</sup> Therefore, the Court cannot grant Plaintiff the relief requested construing Plaintiff’s motion as a motion to alter, amend, or vacate.

Thus, the only statute under which Plaintiff may claim relief is CR 60.02.

CR 60.02 provides that

[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.

CR 60.02.

There is no evidence of mistake, surprise, or excusable neglect justifying the relief requested by Plaintiff, and if any inadvertence was involved it was not on the

---

<sup>1</sup> *Marrs Elec. Co. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. Ct. App. 2006) (quoting *Ohio River Pipeline Corp. v. Landrum*, 580 S.W.2d 713, 718 (Ky. Ct. App. 1979)).

part of the Court. Also, there has been no newly discovered evidence, perjury, falsified evidence, or fraud affecting the proceedings, so those grounds do not support granting Plaintiff relief.

In a very similar case recently presented to the Kentucky Court of Appeals, the plaintiff asserted that “the failure of her attorney to actually receive the notice [of dismissal for lack of prosecution] [made] the order of dismissal void.”

*Coleman v. El-Mallakh*, 2008 WL 899805, at \*3 (Ky. App. 2008).<sup>2</sup> The Kentucky Court of Appeals stated, “[w]e do not believe that the language in CR 77.02(2) can be construed to require that actual notice be received by each attorney of record before the court may proceed with dismissing a case for want of prosecution.” *Id.* at \*3. This Court finds that there is no evidence that the Order Dismissing is void or otherwise no longer equitable.

---

The only remaining ground for relief is some extraordinary reason which justifies relief. CR 60.02(f). In analyzing the propriety of granting relief on this basis it is quite helpful to look to the language of the Kentucky Court of Appeals in *Coleman*:

Appellant’s final argument is raised under CR 60.02(f), alleging that there exist other reasons of an extraordinary nature justifying relief

---

<sup>2</sup> CR 76.28(4)(c) permits the use of an unpublished Kentucky appellate decision rendered after January 1, 2003, if there is no published opinion that would adequately address the issue before the court. *See also Alexander v. Com.*, 220 S.W.3d 704, 710-11 (Ky. App. 2007) (the new provision of CR 76.28(4), which permits the citation of unpublished opinions upon a showing that there are no published opinions on point, relates only to unpublished opinions that have become final).

from the order of dismissal. However, appellant does not present any additional reasons, but rather argues the cumulative effect of all the issues that she has raised in this appeal justify setting aside the order of dismissal. She also asserts that she did not receive a fair opportunity to present her claims to the trial court or a jury. We disagree with the entire CR 60.02(f) argument, the crux of which looks to the conduct of appellant's attorneys in managing her case. Our Court has previously held in *Vanhook v. Stanford-Lincoln County Rescue Squad, Inc.*, 678 S.W.2d 797 (Ky. App. 1984), that the conduct of an attorney is generally not a ground for relief under 60.02(f). In *Vanhook*, our Court emphasized that a litigant who voluntarily chooses an attorney to represent him cannot later avoid the consequences of the attorney's acts. *Id.* (citing *Link v. Walbash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)).

Although the result in this case is harsh for appellant, we can find no authority that holds a harsh result constitutes an extraordinary reason to justify relief under CR 60.02. If this were true, our courts would be full of cases revived under CR 60.02 for bad results. Further, we believe appellees would be substantially prejudiced by reinstating this case, especially where their conduct did not contribute to the dismissal. Thus, we hold that appellant has failed to present sufficient grounds of an extraordinary nature to this Court that would warrant CR 60.02 relief from the order of dismissal.

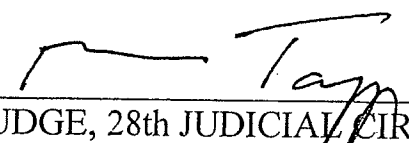
*Coleman*, 2008 WL 899805, at \*5.

Though the result may be harsh, the Court must decline to grant Plaintiff the relief he seeks as it is too late in time to vacate the Order Dismissing and none of the CR 60.02 grounds justify relief in this case. The Court finds that this case was properly dismissed in accordance with CR 77.02(2).

*Conclusion*

It is **ORDERED** that Plaintiff's Motion to Reinstate Action and Vacate Order Dismissing for Lack of Prosecution is hereby **DENIED**. This is a final and appealable Order and there is no just cause for delay.

This 23<sup>d</sup> day of March, 2009.

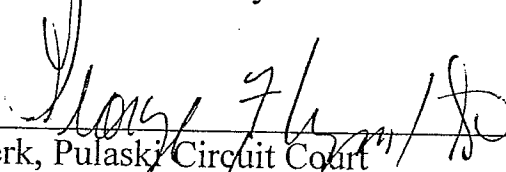
  
\_\_\_\_\_  
JUDGE, 28th JUDICIAL CIRCUIT

DISTRIBUTION:

Hon. Mark T. Wade [M]  
901 Western Ave., Ste. 206  
Pittsburgh, Pennsylvania 15233

Hon. Kathiejane Oehler [K]  
Hon. Justin S. Gilfert

Huddleston Bolen LLP  
9780 Ormsby Station Rd., Ste. 2800  
Louisville, Kentucky 40223

  
\_\_\_\_\_  
Clerk, Pulasky Circuit Court Date 3-23-09