

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY

FILED

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SUPREME COURT CLERK

2006-SC-0617
(2006-CA-0863)

Asset Acceptance, LLC

Appellant

v.

Appeal from Madison Circuit Court
CASE NO. 03-CI-1363
Hon. Julia Hylton Adams, Judge

Sondra Moberly

Appellee

Appellant's Reply Brief

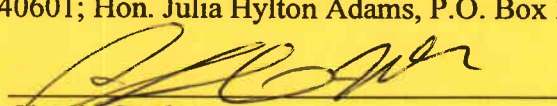
Respectfully submitted,
GREENE & COOPER, P.S.C.



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served this 25 day of APR, 2007, upon Counsel for the Defendant, at his last known address appearing below according to the Rules of Civil Procedure: Jason S. Wilson, James T. Gilbert: Coy, Gilbert & Gilbert; 212 North Second Street Richmond, KY 40202; Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Julia Hylton Adams, P.O. Box 313, Winchester, KY 40392


Charlie Gordon

ARGUMENT

APPELLEE'S ANALYSIS OF THE PRIOR LAW IN KENTUCKY BEFORE THE ADOPTION OF THE FEDERAL FINAL ORDER RULE IS NOT CORRECT.

A. Prior Kentucky Law

Whether a court can take action to set aside a judgment outside a statute of limitation in CR 60.02 is a jurisdictional question. The federal exception to the final order rule is based upon the jurisdictional question of the a court's power to act.

Under previous Kentucky law, a motion to set aside and granted which was made during the same term was interlocutory. However, a motion to set aside and granted made outside the term of the court that the order or judgment was entered was final and appealable. McCall v. Hitchcock, 7 Bush 615, 70 Ky. 615 (Ky. 1870); Wilhoit v. Nicely, 280 Ky. 793, 134 S.W.2d. 615, 616 (1939). The cases cited by the Appellee are in accord with this proposition. The Appellee contention that orders setting aside akin to the present case have been interlocutory for a 150 years is not correct.

In Breading's Heirs v. Taylor, 6 Dana 226, 36 Ky. 226 (1838) the court in reciting the history states "James Taylor, at the next term succeeding that at which the judgment had been obtained. . ." In *Taylor*, the sheriff in executing a habere facias possessionem delivered more land than the defendant held and in conjunction with an order setting aside the judgment entered an order of restitution. Id. In analyzing the order of restitution the court noted "Nor can it be justified by an order setting aside the judg't made at a subsequent term -- when the court had no power over the judg't." Id. In Darby v. French, 112 S.W. 1132 (1908) the action to set aside the judgment was made two (2) days after the judgment was entered. In Cooper v. Clark, 183

Ky. 492, 209 S.W. 857 (1919), judgment was entered on October 6 and “On October 10th, and at the same term, defendants appeared by counsel and filed a motion and grounds for setting aside the judgment. . .” The court in *Clark* also noted “It will be observed that the appeal is prosecuted from an order setting aside a judgment in term time. . .” *Id.* In ***Ward v. Todd***, 251 Ky. 356, 65 S.W.2d 74 (1933) judgment was entered on November 19, 1932 and the motion to set aside was filed November 21, 1932 which was within the same term as the judgment was entered. *Id.*

The cases the Appellee relies upon are based upon motions to set aside made close in time to the entry of the judgment and not more than two years later as in the present case. In the present case, the trial court order is similar to the orders in *Taylor* and the court in *Taylor* found the court was without the power to enter the order. The power or jurisdiction of a court to set aside outside the one year limitation in CR 60.02(d),(e) or (f) motion is the issue fully determined by a trial court’s ruling on such a motion. It is a final determination on the judgment creditor’s right to proceed under a judgment that has been final for over a year and therefore is a final order and not interlocutory.

B. Federal Final Order Rule Exception

The Sixth Circuit in ***Fuller v. Quire***, 916 F.2d. 358, 360 (1990) explains the exception as follows:

The argument that the district court acted without power is as follows. Rule 60(b)(1) authorizes the trial court to grant relief for “mistake, inadvertence, surprise, or excusable neglect,” but limits the exercise of that power to one year. Rule 60(b)(6) permits the court to grant relief from a judgment for “any other reason justifying relief from the operation of the judgment.” There is no time limit on the exercise of the court’s power under Rule 60(b)(6), except that the motion for relief must be made “within a reasonable time.”

This court has held that 60(b)(6) is to be used “ only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the rule. . . This can mean nothing less than reasons not stated in 60(b)(1) and the other exceptions. A second reason why the plain language of the statute indicates that the exceptions must be mutually exclusive is that the time limitation placed upon the four discrete grounds stated in Rule 60(b)(1) would otherwise be rendered nugatory by action of 60(b)(6), which is without limit.

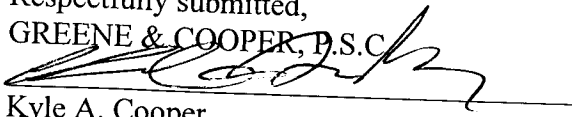
Defendant’s contention is that the instant situation falls within 60(b)(1), thus excluding power to act under 60(b)(6). . .
(Emphasis Added)

Consequently, this exception only applies when motions are made and granted to set aside judgments more than one year old. Therefore, contrary to Appellee’s contention, the exception does not swallow the final judgment rule. Furthermore, Appellee’s reliance on PNC Bank, N.A. v. Citizens Bank of N. Ky. Inc., Ky. App., 139 S.W.3d 527 (2003) for the standard in the present case is misplaced. In *PNC Bank N.A.* the motion to set aside was made one month after the entry of the default judgment. In the present case, the motion to set aside was made more than two years after entry of the judgment. Under CR 55.02, one can move to set aside default judgment in accordance with CR 60.02 the standards related to motions outside the one year limitation would still apply.

CONCLUSION

Kentucky law is in accord with the proposition that an order setting aside a judgment entered when a court is without the power to act is a final appealable order and not interlocutory. The standards under CR 60.02(d)(e)(f) should include the federal exception to the final order rule.

Respectfully submitted,
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