RENDERED: FEBRUARY 5, 2010; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001086-MR

EARL GAY AND JAMES GAY — APPELLANTS

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE KEVIN HORNE, SENIOR JUDGE
ACTION NO. 03-CI-90101

CHARLES W. OLDHAM;
CHRISTINE OLDHAM; MICHAEL
BIBB; VERA DAUGHTERY;
OCTAVENE TURNER; GLENDA
HARDGRAVES; WENDELL OLDHAM;
MARY LONES; SARAH BARNES;
NADINE DABNEY; TOOTSIE
DABNEY; ROBERTA GAY;
DELORIS G. JONES; ERNIE
GAY JR.; RUTH BANKS;
WILBUR GAY; FRANK GAY;
MABLE BRADSHAW; AND
THELMA NUTTER — APPELLEES

OPINION
DISMISSING

** ** ** ** **

BEFORE: FORMTEXT KELLER, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: In this case, Earl Gay and James (Jimmy) Gay appeal an order of the Montgomery Circuit Court entered May 15, 2007, denying appellants' motion to set aside a final order entered April 30, 2007. The April order adjudged that the parties' settlement agreement entered at trial in June 2006 provided for joint and several liability against appellants, as stated in the judgment which was subsequently entered on July 11, 2006. For the reasons stated, we dismiss this appeal.

BACKGROUND

This is another of many cases from Montgomery County involving the heirs of James M. Gay, who died intestate on February 15, 1953. All of the parties to this litigation are heirs of James M. Gay and his decedents. Upon James M. Gay's death, the Gay heirs inherited a tract of land in Montgomery County that contained more than 200 acres and has been the centerpiece of numerous lawsuits and appeals to this Court dating back to 1994. Appellants, Earl Gay and Jimmy Gay, entered into an agreement in 2002 with Ricky Prater to remove timber from the family farm. Appellees were not aware of this agreement nor did they share in the proceeds. Upon discovering that timber had been removed from the farm, appellees initiated this action against Earl, Jimmy, and Prater in May 2003. The complaint asserted a claim for damages arising from the wrongful removal of timber pursuant to Kentucky Revised Statutes (KRS) 381.390 and sought treble damages pursuant to KRS 381.400.

To fully understand the issue raised in this appeal, a chronology of relevant events that have occurred in this litigation is warranted:

(i) This case was set for jury trial on four different occasions, the last being set for a three day trial beginning on June 28, 2006;

(ii) In conjunction with one of the continuances, on November 22, 2005, an order was entered against appellants assessing a jury fee and attorney fees incurred by appellees as a result of the delay of the trial. Appellants appealed this order to the Kentucky Court of Appeals which was dismissed as being interlocutory on February 10, 2006, in Appeal No. 2005-CA-002423-MR;

(iii) On the first day of trial, June 28, 2006, a settlement was announced with Prater and an order was entered dismissing all claims against Prater;

(iv) Also, on June 28, 2006, appellants and appellees entered into an oral settlement agreement whereby appellants would pay appellees the sum of $65,000 for the removal of timber from the farm. A judgment reflecting the settlement was entered July 11, 2006. This judgment sets forth that the liability of Earl and Jimmy would be joint and several, with interest not accruing thereon until August 28, 2006. The order also provided that it was "final and appealable";

(v) Although no new motions were filed of record, Earl then tendered another judgment to the trial court that provided Earl and Jimmy would pay $65,000 to appellees (without reference to joint and several liability) and further dissolved a restraining order that prohibited Earl and Jimmy from entering

upon the farm. The trial court entered this judgment on July 28, 2006, and it was also designated "final and appealable";

(vi) On November 3, 2006, appellees filed a "Motion to Amend Judgment" seeking to amend the July 28, 2006, judgment to reflect that Earl and Jimmy were jointly and severally liable for the entire judgment as originally set forth in the first judgment;

(vii) On November 7, 2006, the trial court entered an "Amended Judgment" that again reflected that Earl and Jimmy were jointly and severally liable for the entire judgment. This judgment was also designated as "final and appealable";

(viii) In December 2006, Jimmy paid one-half of the judgment amount plus accrued interest to date;

(ix) In March 2007, the trial court conducted a hearing on whether the agreed judgment originally entered in this case on July 11, 2006, placed joint and several liability on appellants. On April 30, 2007, the trial court entered an order finding that appellants agreed to joint and several liability in the settlement reached in July 2006. This order also provided that it was "final and appealable."

(x) On May 7, 2007, Jimmy Gay filed a "Motion to Set Asid [sic] Order," pursuant to Kentucky Rules of Civil Procedure (CR) 55.02 and CR 60.02, seeking to set aside the order entered April 30, 2007, and to reinstate the judgment entered July 28, 2006. By order entered May 15, 2007, the trial court denied this motion;

(xi) This appeal follows from the May 15, 2007, order, said appeal having been filed on May 24, 2007.

ISSUE

The sole issue raised on appeal is whether the parties agreed in their settlement in July 2006 for the total outstanding judgment of $65,000, plus accrued interest, to be joint and several against appellants. In other words, appellants argue that it was the intention of the parties at the time of the settlement that each appellant would only be responsible for one-half of the total judgment plus interest accrued thereon.

ANALYSIS

As noted in the chronological summary, there have been five judgments or orders entered by the trial court addressing the joint and several liability issue during the period of July 11, 2006, through May 15, 2007. The notice of appeal filed in this case attempts to appeal all five judgments and orders entered. Although not raised by appellees, we must first address whether this Court has jurisdiction over this appeal before considering the merits of the case. *See Jacoby v. Carrollton Fed. Sav. & Loan Ass'n,* 246 S.W.2d 1000 (Ky. 1952); CR 73.02. Additionally, we note that this Court's jurisdiction cannot be conferred by consent. *Id.*

The original judgment entered in this case was agreed to by the parties in open court on June 28, 2006, at the time that the settlement was reached. The judgment was subsequently entered on July 11, 2006. This judgment provides that

it is final and appealable, although it does not have all of the "magic words" required under CR 54.02 if that rule is applicable to this case. CR 54.02 is applicable where a judgment is entered upon multiple claims or involving multiple parties and may be subject to appeal if it is final upon one or more but less than all the claims or parties, only upon a determination that there is no just reason for delay and that the judgment is final. However, the inclusion of CR 54.02 language is not necessary if the judgment adjudicates all of the rights of all of the parties before the court and is thus appealable pursuant to CR 54.01. *Sec. Fed. Sav. & Loan Ass'n of Mayfield v. Nesler*, 697 S.W.2d 136 (Ky. 1985). As noted, the other defendant in this case, Ricky Prater, settled all claims with appellees prior to the scheduled trial and an order dismissing those claims was entered on June 28, 2006. Accordingly, the judgment entered by the trial court on July 11, 2006, was clearly a final judgment resolving all claims between all of the remaining parties to the litigation and thus was final and appealable pursuant to CR 54.01.

Upon entry of a judgment, the jurisdiction of the trial court to alter or amend the judgment is limited by the plain and unambiguous language of CR 59.05. This rule provides that a motion to alter or amend a judgment, or to vacate a judgment and enter a new one, must be served not later than ten days after entry of the final judgment. Additionally, the trial court retains jurisdiction to consider a motion for new trial for ten days also under CR 52.02. At the time that the trial court entered the second judgment on July 28, 2006, neither party had filed a motion under CR 52.02 or CR 59.05. Since more than ten days had passed, the

trial court lost jurisdiction to alter or amend its original judgment which, as noted, was final and appealable effective on its date of entry on July 11, 2006. It is well-established in Kentucky that any judgment or order issued by a court that did not have proper jurisdiction is "*void ab initio*." *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804 (Ky. App. 2008). The judgment entered July 28, 2006, was void on its face and thus there can be no dispute that the July 11, 2006, judgment was a final and appealable judgment. Unfortunately, appellants failed to file a timely appeal from this judgment as required by CR 73.02(1). Compliance with the time requirements in this rule are mandatory and failure to comply precludes jurisdiction of this Court to hear the appeal. *United Tobacco Warehouse, Inc. v. S. States Frankfort, Coop., Inc.*, 737 S.W.2d 708 (Ky. App. 1987).

On November 3, 2006, appellees filed a motion to amend judgment, presumably under CR 59.05, and the trial court subsequently entered an amended judgment on November 7, 2006. This amended judgment is also void for the same reasons and grounds as the judgment entered on July 28, 2006. The trial court could have considered appellees' motion to amend judgment under CR 60.01 or CR 60.02. However, CR 60.01 is limited strictly to clerical mistakes. Appellee's motion was not premised upon a clerical mistake arising from entry of the original judgment on July 11, 2006. Relief under CR 60.02 may be granted for reason of mistake, newly discovered evidence, fraud, or other reason of an extraordinary nature that would justify relief. Again, there are no grounds set forth in the motion that would justify granting relief under CR 60.02. In fact, the motion states that it

is filed for the purpose of having the trial court reinstate its original judgment entered on July 11, 2006.

As concerns the order entered by the court on April 30, 2007, it references that a motion was filed by appellants, and upon thorough review of the record we find no such motion in existence. Presumably, the court scheduled a hearing on the joint and several liability issue out of an abundance of caution as a result of a response that was filed by appellants to appellees' motion to amend judgment after the amended judgment was entered on November 7, 2006. Regardless, this order, like the orders entered July 28 and November 7, 2006, is also void for the same reasons previously stated.

The fifth and final order entered regarding this issue is from a motion filed by appellants to set aside the order entered on April 30, 2007. Given that the April 30, 2007, order was null and void for the reasons stated, appellants' motion to set that order aside was without legal basis or foundation and like the earlier orders, the order entered on May 15, 2007, is likewise void and of no effect.

Since appellants failed to timely appeal the original judgment in this action entered on July 11, 2006, as required by CR 73.02(1), we conclude that this Court is lacking in jurisdiction to hear this appeal and must otherwise dismiss the same.

Notwithstanding dismissal of this appeal, we recognize that appellants have proceeded *pro se* in this appeal, and also were acting *pro se* on their behalf at the time that the parties entered into a settlement on June 28, 2006, which resulted

in the judgment entered on July 11, 2006. Accordingly, this Court has reviewed the taped proceedings regarding the settlement discussions on June 28, 2006, which are part of the record of this case. These proceedings were in Chambers with the trial court. Upon review, we find no discussions whatsoever between appellants, appellees, and the trial judge regarding the judgment being divided and allocated in half to each of the individual appellants. Additionally, the judgment that was tendered by appellants directly to the trial court, which was entered on July 28, 2006, and which this court has heretofore adjudicated as being void and of no effect, clearly states that appellants will pay the sum of $65,000 to appellees in this case. There is no reference to any several or individual allocation of liability in that judgment and thus, if valid, would require imposition of joint and several liability as required under KRS 381.390.

For the foregoing reasons, we dismiss the appeal.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Earl Gay, *Pro Se*
James Gay, *Pro Se*
Winchester, Kentucky

BRIEF FOR APPELLEES:

Steven W. Hughes
Mt. Sterling, Kentucky