

RENDERED: OCTOBER 23, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002003-MR

DLX, INC.

APPELLANT

v. APPEAL FROM FAYETTE COUNTY CIRCUIT COURT
HONORABLE ERNESTO SCORSONE, JUDGE
ACTION NO. 96-CI-02571

FOX TROT PROPERTIES, LLC,
as assignee of
STAR TRANSPORT, INC.,
the assignee of
RED STAR COAL COMPANY

APPELLEE

OPINION AND ORDER DISMISSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

MOORE, JUDGE: DLX, Inc., appeals a judgment of the Fayette County Circuit Court specifying the nature of interest to be assessed on a prior, final judgment it rendered in 1998. For the reasons herein stated, we dismiss this appeal.

On January 13, 1998, in a case styled *Red Star Coal Company v. DLX, Inc.*, 96-CI-2571, the Fayette Circuit Court entered a judgment in favor of Red Star Coal Company against DLX, Inc., for “\$95,209.59, with interest thereon at 12% per annum from the date of Judgment until paid.”

Red Star assigned the judgment and judgment lien to Star Transport, Inc., on February 20, 1998. Then, on July 17, 2008, Star Transport assigned the judgment and judgment lien to Fox Trot Properties, LLC.

On August 19, 2008, Fox Trot filed an action in the Estill County Circuit Court to enforce the judgment and lien against DLX. This action is still pending, and is styled *Fox Trot Properties, LLC, as Assignee of Wausau Insurance Company v. DLX, Inc.*, 08-CI-131.

Shortly after Fox Trot filed its action to enforce the Red Star judgment against DLX, a dispute arose between Fox Trot and DLX regarding the calculation of interest owed upon that judgment. Fox Trot claimed that the interest had compounded. DLX, on the other hand, claimed that the language of the January 13, 1998 judgment mandated only simple interest, *i.e.*, interest calculated on a principal sum, not compounded on earned interest. In the alternative, DLX also claimed that even if the interest could have been compounded, Fox Trot, through its assignors, had waived the issue.

On September 8, 2008, over eleven years after the Fayette Circuit Court entered a final judgment in favor of Red Star Coal Company in *Red Star Coal Company v. DLX*, DLX filed a motion in the Fayette Circuit Court, in that case, titled

DLX'S MOTION FOR THE ENTRY OF AN ORDER
DECLARING THE JUDGMENT SATISFIED IN
FULL, FOR THE DEPOSIT OF THE TENDERED
FUNDS, FOR THE RECORDING OF ASSIGNMENTS
OF THE JUDGMENT AND THE RELEASE THEREOF
BY FOX TROT, AND TO HOLD IN ABEYANCE ALL
EFFORTS TO COLLECT OR ENFORCE THE
JUDGMENT AND TO DISMISS THE SAME WITH
PREJUDICE

In filing this motion, DLX sought a determination from the Fayette Circuit Court of the nature of the interest due under the judgment, *i.e.*, whether it was compounded or simple. DLX also tendered a check to the clerk of the Fayette County Court, payable to the court's registry for the benefit of Fox Trot, alleging it fully satisfied the judgment.

On September 23, 2008, the Fayette Circuit Court entered an Opinion and Order denying DLX's motion. It also held that the interest on the judgment should be interpreted as compounded, rather than simple. As such, it amended its previous order of January 13, 1998 for clarification.

As the sole issue on appeal, DLX contends the circuit court erred when it clarified and amended its January 13, 1998 order to mean that the post-judgment interest was compounded, rather than simple. However, we do not

address this issue because the Fayette Circuit Court had no jurisdiction to amend its order under the circumstances of this case.

The Civil Rules allow a trial court to amend a final judgment it has previously rendered under very limited circumstances. Relevant to the circumstances of this case are Kentucky Civil Rules (CR) 52.02, allowing the court to amend its judgment, and 60.01, allowing the court to correct a clerical error on the face of its judgment. However, under the circumstances of this case, neither rule applies.

Regarding CR 52.02, the plain language of that rule mandates that

[n]ot later than 10 days after entry of judgment the court of its own initiative, or on the motion of a party made not later than 10 days after entry of judgment, may amend its findings or make additional findings and may amend the judgment accordingly.

After the ten-day period expired in January of 1998, the judgment became final, the circuit court lost jurisdiction once its judgment became final, and the circuit court was without jurisdiction to reconsider or amend its order. *See, e.g., Silverburg v. Commonwealth*, 587 S.W.2d 241, 244 (Ky.1979). Thus, the trial court had no authority under CR 52.02 to amend for clarity its January 13, 1998 judgment, as its September 23, 2008 order doing so came over ten years too late.

Regarding CR 60.01, neither Fox Trot nor DLX contends, makes any showing, or even raises as an issue that the omission of the form of interest to be calculated in the circuit court's January 13, 1998 order resulted from clerical mistake, warranting correction at "any time." (*See, e.g., CR 60.01*). As such, we

are precluded from making such an inference. *See Whittenberg Eng'g & Constr. Co. v. Liberty Mut. Ins. Co.*, 390 S.W.2d 877, 884 (Ky. 1965) (holding that “where failure to include interest is a clerical error it is correctible under CR 60.01, but where no clerical error is shown then relief may be had only under the provisions of CR 59 or CR 60.02 or by appeal.).

Moreover, the time for taking an appeal from the original judgment has long since expired. Even if it should be considered that the circuit court’s failure to specify the interest in its order could be supplied by way of correction of a clerical mistake under CR 60.01, correction of the judgment by insertion of a statement of the nature of interest could not operate to revitalize the judgment in such a way as to start anew the running of the period for taking an appeal. *See Maslow Cooperage Corp. v. Jones*, 316 S.W.2d 860, 861-862 (Ky. 1958). Consequently, CR 60.01 would be of no avail to DLX.

In sum, the circuit court of Fayette County was without authority to amend and clarify its order nearly eleven years after rendering final judgment in this case and this matter is outside the jurisdiction of this Court as well.²

For these reasons, the September 23, 2008 order and opinion of the Fayette County Circuit Court is VACATED, and this appeal is DISMISSED.

ALL CONCUR.

² As noted above, Fox Trot filed a collections suit in Estill County. The Estill County Circuit Court is the proper forum to decide any dispute regarding the amount due to Fox Trot under this judgment.

ENTERED: October 23, 2009

/s/ Joy A. Moore
JUDGE, COURT OF APPEALS

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