RENDERED: JANUARY 27, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001525-MR

JOHN MCGLADDERY, J. DAVID WILTSHIRE, CORPORATE ACTION GROUP, AND THE WILTSHIRE GROUP, LLC — APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 09-CI-01886

BRANDON HANSEN AND FOUNTAIN HEAD CONSULTING, LLC — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: ACREE AND WINE[1] JUDGES; LAMBERT,[2] SENIOR JUDGE.

---

[1] Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Joseph E. 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.

ACREE, JUDGE: The issue presented to this Court is whether the Boone Circuit Court erred when it dismissed, with prejudice, the appellants' claims against the appellees on the ground that appellees were not subject to personal jurisdiction before that court. However, the order from which the appeal is taken is interlocutory and did not include both determinations required by Kentucky Rules of Civil Procedure (CR) 54.02 necessary to convert the interlocutory order into a final and appealable order. Therefore, we dismiss the appeal.

The plaintiffs who originally brought the action in circuit court, David and Bethany Remenowsky, and Matt Jacobsen ("Remenowskys," collectively), are not parties to this appeal. The Appellants, J. David Wiltshire, The Wiltshire Group, LLC, John McGladdery, and Corporate Action Group ("CAG," collectively), were the defendants and third-party plaintiffs in the circuit court. The Appellees, Brandon Hansen and Fountain Head Consulting, LLC ("Fountain Head," collectively), were the third-party defendants.

This case began when the Remonowskys, investors in Corporate Action Group, sued the appellees for breach of contract, fraud, negligence, and conversion relative to their investment in New Frontier Holdings, LLC, a New York limited liability company. Although John McGladdery is an Arizona resident and Corporate Action Group is a Nevada corporation, and although J. David Wiltshire and The Wiltshire Group are California residents, they all voluntarily appeared before the circuit court when summoned without asserting a defense of lack of personal jurisdiction, thereby waiving it. CR 12.08(1).

CAG defended against the Remonowskys' complaint, in part, by claiming reliance on the due diligence investigation performed by Fountain Head. CAG then sought the circuit court's leave to file a third-party complaint against Fountain Head, which was granted.

Fountain Head was served with the third-party complaint and responded by immediately moving to dismiss it. Brandon Hansen and Fountain Head were both Utah residents; they argued they were not subject to personal jurisdiction in Kentucky. The motion to dismiss was supported by an affidavit from Brandon Hansen stating his and Fountain Head's residence and attesting to an absence of any contacts with the forum state, the Commonwealth of Kentucky.

CAG responded first by arguing the merits of the claim against Fountain Head. Attached to the response were the affidavits of David Wiltshire and John McGladdery; however, nothing in the response or the affidavits suggests the existence of any fact indicating any activity that would authorize the circuit court to exercise jurisdiction over Hansen or Fountain Head in accordance with KRS 454.210(2)(a). Despite the absence of jurisdictional facts, CAG argued that "impleader through Rule 14 is appropriate[,]" that "Hansen and Fountain Head Consulting are indispensible parties" under CR 19.01, and that Boone Circuit Court should "avoid circuity of action and settle related claims in one litigation . . . ."

The circuit court analyzed the motion in accordance with the three-prong test expressed in *Wilson v. Case*, 85 S.W.3d 589 (Ky. 2002) (overruled by *Caesars*

Riverboat Casino, LLC v. Beach, 336 S.W.3d 51, 57 (Ky. 2011)), and on June 3, 2010, granted Fountain Head's motion to dismiss with prejudice.

CAG filed a timely CR 59 motion to vacate the order dismissing Fountain Head. As grounds, CAG argued that Mr. and Mrs. Remenowsky were Kentucky residents who invested in CAG, which in turn invested in New Frontier based on Fountain Head's negligent due diligence investigation. This argument was supported by a second affidavit from David Wiltshire stating that he had indicated to Fountain Head that "the majority of the money we invested had been from members of our company who lived in Kentucky." This information was available to CAG before entry of the June 3, 2010 order dismissing. CAG also reasserted its arguments under CR 14.01 and CR 19.01. Furthermore, CAG argued that the order dismissing should have been without prejudice and should have contained finality language from CR 54.02.

On August 5, 2010, the circuit court re-entered the original order verbatim, but added one final sentence reading: "This Order is final and appealable." It is in this context that we are asked to review the case.

This court is required to raise a jurisdictional issue on its own motion if the underlying order lacks finality. *Huff v. Wood–Mosaic Corp.*, 454 S.W.2d 705, 706 (Ky. 1970). Unfortunately, we recognize a jurisdictional issue in this case and must dismiss the appeal because the circuit court did not make the necessary determination that "there is no just reason for delay." CR 54.02.

The Kentucky Supreme Court has explained how CR 54.02 operates:

> In any case presenting multiple claims or multiple parties, CR 54.02 . . . , vests the trial court – as the tribunal most familiar with the case – with discretion to release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. In such a case, the trial court functions as a dispatcher. If the trial court grants a final judgment upon one or more but less than all of the claims or parties, that decision remains interlocutory unless the trial court makes a separate determination that there is no just reason for delay. And the trial court's judgment shall recite such determination and shall recite that the judgment is final.

Watson v. Best Financial Services, Inc., 245 S.W.3d 722, 726 (Ky. 2008) (internal citations and quotation marks omitted).

These recitations on the part of the trial court are mandatory:

> For the purpose of making an otherwise interlocutory order final and appealable, the trial court is required to determine "that there is no just reason for delay," and the judgment must recite this determination and also recite that the judgment is final. CR 54.02(1). The omission of one of these requirements is fatal.

Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975).

CAG cannot appeal the dismissal of Fountain Head until the order doing so becomes final. As for now, the order "is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." CR 54.02(1).

We are not unmindful that CAG may immediately request that the circuit court revise the order again to make it final and appealable by including all the proper findings and recitations. However, circuit courts should not reflexively grant motions to convert interlocutory orders into final judgments. As noted, the

rule requires more of the circuit court than the mere recitation of CR 54.02(1) language in the order. It requires

> a ***determination*** that there is no just reason for delay. *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722 (Ky. 2008). ***That determination should be sensitive to the general rule disallowing piecemeal appeals***, but the trial court is granted discretion in applying the rule. Where the judgment ***truly disposes of a distinct and separable aspect of the litigation***, the trial court's determination that there is no just reason for delay will only be disturbed if that discretion was abused. *Id.* at 725-27.

Shawnee Telecom Resources, Inc. v. Brown, --- S.W.3d ----, 2011 WL 5248307 at *6 (Ky. Oct. 27, 2011) (finality order entered Nov. 17, 2011; emphasis supplied).

This Court does not have jurisdiction to review the Boone Circuit Court's August 5, 2010 order. Accordingly, we dismiss the appeal.

ALL CONCUR.

ENTERED: January 27, 2012

/s/ Glenn E. Acree
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS:

Steven J. Megerle
Covington, Kentucky

BRIEF FOR APPELLEES:

Alexander F. Edmondson
Covington, Kentucky