

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001917-MR

AUBREY HALL

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
ACTION NO. 11-CI-00056

KINZER INVESTMENT REALTY, LTD

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * **

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellant, Aubrey Hall, appeals from an order of the Letcher Circuit Court ordering the sale of and distribution of proceeds from undeveloped real property in which Hall owned a share. Hall argues that the trial court lacked jurisdiction to enter this order because an appeal of the court's prior Final Judgment and Order of Sale was still pending before this Court. However, Hall

failed to name indispensable parties to this appeal when he filed his notice of appeal. Hence, we dismiss.

Background

Hall owned a 6/25th share in undeveloped land located near Jenkins Kentucky. Along with two other parties and their spouses, Appellee, Kinzer Investment Realty, Ltd. (hereinafter “Kinzer”) owned the remaining interest in the land. Those are the few and uncontested facts of this case. However, the procedural history which then developed is relatively lengthy and winding.

On February 9, 2011, Kinzer petitioned the trial court for sale of the property pursuant to KRS¹ 389A.030. Kinzer named Hall and the two other interest-holders and their spouses as defendants to this Petition.² In May 2012, the trial court ordered the property sold as a single whole parcel, having found that dividing it according to ownership interest would unduly impact the land’s value. The trial court subsequently overruled Hall’s motion to alter, amend, or vacate; and Hall filed a notice of appeal from the May 2012 order.

Kinzer filed a motion asking this Court to dismiss Hall’s appeal for various procedural defects; and on April 11, 2014, we granted the motion on the basis that Hall failed to file a timely notice of appeal and to join indispensable parties to the appeal, namely, his four co-defendants. Hall filed a motion to reconsider on April 25, 2014. While this motion was pending, the Master

¹ Kentucky Revised Statutes.

² Kinzer also named any unknown defendants, including unknown heirs and spouses of the named defendants.

Commissioner scheduled sale of the property in question. We overruled Hall's motion to reconsider on June 12, 2014, but not before the Master Commissioner sold the property seven days prior.

Hall filed an Exception to the sale with the trial court, arguing that the matter was still on appeal and hence, the trial court lacked jurisdiction to proceed with sale and distribution of proceeds. Kinzer countered that our order dismissing Hall's appeal immediately re-endowed the trial court with jurisdiction. The trial court ultimately agreed with Kinzer, entering an Order of Distribution on September 29, 2014 and a Final Judgment three weeks later. Hall now appeals.

Hall's sole argument on appeal is that the trial court lacked jurisdiction to proceed with sale of the property because the matter was still on appeal to this Court, and the motion to reconsider was still pending, when the property was sold. Before we address Hall's sole argument, we must first address a procedural matter Kinzer brings to our attention in its brief.

In his notice of appeal and prehearing statement, Hall stated, "[t]he Appellant shall be the Defendants, Aubrey Hall, et al, and the Appellee shall be the Plaintiff, Kinzer Investment Realty, LTD." Kinzer contends that this designation did not comply with CR³ 73.03 and constitutes a jurisdictional defect that cannot be remedied. We agree; and therefore, the instant appeal must be dismissed without review of its substantive issues.

³ Kentucky Rules of Civil Procedure.

A notice of appeal, when filed, transfers jurisdiction over the case and over the named parties from the circuit court to the appellate court. *See City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). CR 73.03(1) requires Appellants, in their notice of appeal, to specify all Appellants and all Appellees. The use of “‘et al.’ and ‘etc.’ are not proper designation of parties....” CR 73.03(1). Failure to name a party in the manner prescribed in CR 73.03 prevents the appellate court from obtaining jurisdiction over that party and is a fatal defect which cannot be remedied even by substantial compliance. *See Nelson Cnty. Bd. of Educ. v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011). *See also Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983).

Hall’s notice of appeal clearly ran afoul of this express language. Therefore, we must conclude that it failed to name the four other parties subject to the trial court’s Final Judgment and Order of Sale; and we now look to whether those parties were indispensable to the appeal, as Kinzer contends.

An indispensable party is one “whose absence prevents the Court from granting complete relief among the parties.” *Browning v. Preece*, 392 S.W.3d 388, 391 (Ky. 2013) (citing *Milligan v. Schenley Distillers, Inc.*, 584 S.W.2d 751, 753 (Ky. App. 1979) and CR 19.01. Designation as “indispensable” “depends not on whether the party was indispensable at the trial court but whether the party is indispensable in the appeal.” *Forte*, 337 S.W.3d at 624. That an omitted party did not himself appeal or that he would not be adversely affected by the appeal is not determinative of his indispensability. *Id.*

As we have already concluded, and just as in his 2013 appeal, Hall's notice of appeal failed to name the four other parties whom the trial court's Final Judgment and Order of Sale affected. As Kinzer points out, the excluded parties, over whom this Court cannot not exercise jurisdiction because of their omission, were four individuals who had an exact and partial interest in the sale of and distribution of proceeds from property which this appeal could potentially affect. For this reason, we agree with Kinzer that their absence from the appeal cannot be taken lightly, nor can it be considered harmless. That these parties did not actively pursue an appeal did not relieve Hall of his responsibility to join them as indispensable parties, so as to effect "complete relief among the parties." *See Browning*, 584 S.W.2d at 753. Consistent with this Court's decision to dismiss Hall's prior appeal on the same procedural basis, we dismiss the present appeal due to his failure to join four indispensable parties.

ALL CONCUR.

ENTERED: November 23, 2016

/s/ Irv Maze

JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

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