RENDERED: MARCH 11, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001946-MR
AND
NO. 2014-CA-002005-MR

JACK HOWELL — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 13-CI-006229

DF REALTY GROUP, LLC;
DF INVESTMENT GROUP, INC.;
DF OPERATIONS, INC.;
DF PROPERTY HOLDINGS, LLC;
DENTON FLOYD REAL ESTATE
GROUP; CHRISTOPHER THOMPSON;
THOMAS FLOYD; AND BRANDON
DENTON — APPELLEES/CROSS-APPELLANTS

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: KRAMER, D. LAMBERT, AND STUMBO, JUDGES.

KRAMER, JUDGE: By Show Cause Order entered December 2, 2015, this Court ordered the parties to show good cause why the above-styled appeal and cross-appeal should not be dismissed as being untimely under Kentucky Rules of Civil Procedure (CR) 73.02. Appellant Jack Howell was the only party who filed a response. Having considered his response and being sufficiently advised, we dismiss.

By way of background, on July 18, 2014, the Jefferson Circuit Court entered findings of fact, conclusions of law, and an order of judgment that resolved civil claims (arising from a contract dispute) between Jack Howell and the remaining parties captioned above. In pertinent part, the circuit court determined Jack Howell was entitled to judgment against the remaining parties and, to that effect, awarded him an "amount of $129,337.50, plus pre-judgment interest in the sum of 8% per annum, from the date of November 21, 2013, until the entry of judgment [*e.g.*, July 18, 2014], and 12% thereafter until paid." The circuit court reserved, however, the issue of whether Howell was entitled to "judgment on the issue of attorney's fees and costs."

Howell subsequently made a motion for attorney's fees and costs. The other parties opposed his motion, arguing that Howell had no contractual right to attorney's fees and costs under the circumstances in which this case was brought. Thereafter, by order entered September 29, 2014, the circuit court agreed with the parties opposing Howell and denied his motion for attorney's fees and costs.

On October 9, 2014, Howell timely moved the circuit court (per Kentucky Civil Rule (CR) 59.05) to reconsider its decision to deny him an award of attorney's fees. He also requested reconsideration regarding his court costs, arguing he was entitled to an award of court costs as the prevailing party. The circuit court entered an order overruling his motion on October 23, 2014.

On October 29, 2014, Howell then filed a motion asking the circuit court "to enter a final judgment in this matter in accordance with its prior rulings. The Judgment is attached." The "Judgment" Howell drafted and attached to his motion, and which the circuit court ultimately signed and entered on November 5, 2014, merely incorporated by reference each of the circuit court's previously discussed orders and concluded by stating "this is a final and appealable Order, there being no just cause for the delay of its entry and there being no other issues before the Court."[1] Howell then filed his notice of appeal on December 1, 2014, and the above-captioned cross-appellants filed their notice on December 12, 2014.

With the above in mind, we now turn to the issue of our jurisdiction to review this matter.

The time for filing an appeal begins to run on the date of the clerk's notation of service of a final judgment on the parties. CR 73.02(1)(a). A final judgment, in turn, is defined in CR 54.01 as "a final order adjudicating all the

[1] As indicated below, it is unnecessary for an order that resolves every issue before the court to include the finality language of CR 54.02(1). Thus, if the circuit court's November 5, 2014 order was valid, and if it did effectively resolve all of the claims between the parties in this matter, its closing statement that "this is a final and appealable Order, there being no just cause for delay in its entry," while thorough, would have ultimately been meaningless.

rights of all the parties in an action or proceeding." Here, although it did not contain language of finality, the circuit court's September 29, 2014 order, by operation and definition, was a final judgment. This is because it resolved the only issue that remained before the circuit court (*i.e.*, whether Howell was entitled to attorney's fees and costs). *See* CR 54.02(2).[2] Indeed, the proposition that the circuit court's September 29, 2014 order resolved the last remaining issue in this matter is patently conceded in the circuit court's November 5, 2014 order. There, the circuit court merely incorporated all of its prior rulings by reference and further represented that no other issues remained.

Howell's CR 59.05 motion rendered the circuit court's September 29, 2014 order interlocutory, but only for the purpose of tolling the time for filing a notice of appeal. *See* CR 73.02(1)(e); *Kentucky Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907, 910 (Ky. App. 1993). Thus, after the circuit court refused to reconsider its order on October 23, 2014, (1) the circuit court's authority to entertain any successive motions to amend its judgment effectively expired; (2) the circuit court's subsequent November 5, 2014 order had no legal effect; (3) Howell's proper remedy was an appeal to this Court; and (4) the time for filing his notice of appeal commenced to run on October 23, 2014. *Cloverleaf Dairy v. Michels*, 636 S.W.2d 894, 896 (Ky. App. 1982).

[2] CR 54.02(2) provides "When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment."

As noted, Howell filed his notice of appeal on December 1, 2014, and the cross-appellants filed their notice on December 12, 2014. The time for filing an appeal terminated thirty days after October 23, 2014. Thus, both of these notices were untimely and we lack jurisdiction to consider either of these appeals. *See* CR 73.02(2); *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990).

In his response to our Show Cause Order, Howell urges his appeal was timely for two reasons, neither of which have merit.

First, Howell points out that six days after the circuit court overruled his CR 59.05 motion, he filed a "motion for entry of [a] final judgment." He argues that this motion remained outstanding until the circuit court effectively "granted" it by entering the November 5, 2014 judgment which, as noted, merely incorporated by reference each of its previously discussed orders. He reasons that because the circuit court had not ruled on his "motion for entry of [a] final judgment" until November 5, 2014, any judgment the circuit court could have rendered prior to that date was interlocutory and, thus, his time for filing an appeal did not start until November 5, 2014.

Howell's reasoning is incorrect. To begin, only a motion filed under the purview of CR 50.02, 52.02, or 59 has the effect of tolling the appellate window following the entry of a final and appealable order or judgment. *See* CR 73.02(1)(e). Howell's "motion for entry of [a] final judgment" was not filed pursuant to any of those rules, and therefore had no such effect. Moreover, even if his motion was considered to have been a successive motion filed under one of

those civil rules, it likewise would have had no effect. *See Cloverleaf Dairy*, 636 S.W.2d at 896 (explaining "the time for appeal began to run immediately upon the circuit court's denying the motion under Rule 59.05" and that there is "no authority in the Civil Rules for a party to make more than one motion for reconsideration of a judgment.").

Second, Howell argues the September 29, 2014 order could not have qualified as a "final judgment" within the meaning of CR 54.01 because it did not specify when he could execute upon it or how the master commissioner should go about releasing certain escrowed funds to satisfy his judgment.

What Howell has identified, however, are not "claims" that a final judgment must adjudicate within the meaning of CR 54.01. They are administrative acts that do not affect the finality of a judgment. *See Security Federal Sav. & Loan Ass'n of Mayfield v. Nesler*, 697 S.W.2d 136, 139 (Ky. 1985) ("The only purpose of retaining the case on the docket was to enforce the judgment by marshaling the assets, conducting the sale, and distributing the proceeds. . . . That action does not diminish the finality of the first judgment and order of sale." (Citation omitted)).

In light of the foregoing, the above-captioned appeal and cross-appeal are DISMISSED.

D. LAMBERT, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

ENTERED: March 11, 2016

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

BRIEF FOR APPELLANT/CROSS-APPELLEE:

F. Larkin Fore
Sarah M. Fore
Louisville, Kentucky

BRIEF FOR APPELLEES/CROSS-APPELLANTS:

Paul R. Schurman, Jr.
Louisville, Kentucky