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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NOS. 2016-CA-000233-MR & 2016-CA-000337-MR

SUZANNE ETSCORN — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE DEANA C. MCDONALD, JUDGE
ACTION NO. 11-CI-501207

WILLIAM ETSCORN,
DAVID ETSCORN,
BRYAN ETSCORN,
BRENT ETSCORN,
MY THREE SUNS, LLC
BILL ETSCORN, INC.,
BILL ETSCORN & SONS, INC.,
BILL ETSCORN & SONS, LLC,
ETSCORN BROTHERS, LLC, AND
MIDDLETOWN FAMILY GROUP, LLC — APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This appeal concerns complex litigation in a marital dissolution action initiated by Suzanne Etscorn against her husband, William Etscorn. As many of the material facts are disputed, and we ultimately hold that the order being appealed is void because the trial court has no jurisdiction to add parties that have previously been dismissed, we only recite a summary of the relevant background information.

Ms. Etscorn claims that during the marriage, her husband transferred valuable marital property to his three sons. The three sons are products of Mr. Etscorn's prior marriage. Ms. Etscorn claims these transfers were done without her knowledge and with the intent of depriving Ms. Etscorn of the marital estate in the event of a divorce.

During the course of the dissolution proceedings, Ms. Etscorn filed an Amended Petition and joined the sons and the business entities as parties to the action. The sons and the business entities then moved to be dismissed from the action pursuant to Kentucky Rules of Civil Procedure ("CR") 9.02 and 12.02(f), claiming that Ms. Etscorn's Amended Petition failed to plead with specificity and consisted solely of bare legal conclusions without sufficient allegation of underlying facts to prove her claims. Following extensive briefing, on December 12, 2013, the trial court granted the motion and dismissed the parties:

> The Court has reviewed the Amended Petition and the controlling law of the matter. Even reviewing the Amended Petition in the light most favorable to Petitioner the Court does not find that it can survive a motion to dismiss. For what appears to be obvious

> reasons, Petitioner cannot meet the requirements of a claim for dissipation of marital assets; the requisite relationship does not exist between Petitioner and his sons. As for the claim of fraudulent conveyance, the Court does not find that Petitioner has pled with sufficient specificity to establish that the sons had the requisite knowledge/notice of fraud or fraudulent intent by Respondent when the transfers which are being attacked were created. Sufficient particularity has not been pled to permit the sons to adequately defend against the claims asserted against them. As such and in light of the same the Court must grant Respondents [sic] motion to dismiss the Third Party Defendants at this time.

The trial court's order noted it was final and appealable with no just cause for delay.

Ms. Etscorn then filed a CR 59.05 motion to alter, amend, or vacate the December 12, 2013 order dismissing the parties. Notably, the motion does not allege any error with the CR 9.02 and 12.02 rulings. Instead, it claims that the sons and the business entities are indispensable parties under CR 19 and, alternatively, asks the trial court to make the dismissal "without prejudice" so Ms. Etscorn can rejoin the parties at a later date.

On May 1, 2014, the trial court entered an order *denying* the CR 59.05 motion. The trial court found no error with its previous order dismissing the parties. It opined that if Ms. Etscorn were to later file a motion pursuant to CR 21 and 19, "the Court would, at a minimum, be required to conduct a hearing to determine whether Respondent's sons are vital to this action as indispensable parties." The trial court did not change its dismissal to "without prejudice,"

however. It also recited that its CR 59.05 order was final and appealable with no just cause for delay.

Ms. Etscorn did not appeal. Instead, many months later Ms. Etscorn filed a motion pursuant to CR 21 and 19 to add the sons and their business entities as indispensable parties. Though the sons and the business entities objected on multiple grounds, including the fact that they had already been dismissed as parties and Ms. Etscorn had not appealed the final and appealable order dismissing them, the trial court nonetheless re-added them as parties.

The sons and business entities eventually moved for summary judgment, which was granted. Ms. Etscorn now appeals the order granting summary judgment. The sons and business entities first claim that the trial court's order granting summary judgment is void *ab initio* as the trial court lacked jurisdiction. They reason that because they were dismissed with prejudice in a final and appealable order that was never appealed by Ms. Etscorn, the trial court lacked jurisdiction to re-add them to the litigation. We agree.

The sons' motion to dismiss was pursuant to CR 9.02 and 12.02(f). CR 9.02 simply requires that in fraud cases "that the claimant set forth facts with sufficient particularity to apprise the defendant fairly of the charges against him or her." *Denzik v. Denzik*, 197 S.W.3d 108, 110 (Ky. 2006). Under CR 12.02(f), "the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?" *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). When a CR 12.02(f) motion to dismiss is granted and the trial court does

not designate the dismissal was without prejudice, then the "dismissal operates as a dismissal *on the merits* for which the doctrine of *res judicata* attaches." *Bartley v. Culbertson*, 365 S.W.3d 593, 597 (Ky. App. 2012) (Nickell, J., dissenting). *See also* CR 41.02(3) ("Unless the court in its order for dismissal otherwise specifies, . . . any dismissal not provided for in Rule 41 . . . operates as an adjudication upon the merits.").

Accordingly, the dismissal was with prejudice. Indeed, Ms. Etscorn understood as much as she argued in her CR 59.05 motion that the trial court should make the dismissal *without* prejudice. "A dismissal with prejudice, of course, acts as a bar to again asserting the cause of action so dismissed. It thus has the effect of a judgment on the merits constituting the cause *res judicata*." *Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. App. 1985). In other words, the order dismissing the sons was, in effect, a judgment in their favor on the claims Ms. Estcorn had raised against them.

In an effort to combat this judgment, Ms. Etscorn claims that the order was interlocutory and not final and appealable. She argues that the May 1, 2014 order denying the CR 59.05 motion left the door open to a CR 21 and 19 motion in the future to re-add the parties, thus making the overall character of the order not final and appealable. To support her argument, Ms. Etscorn cites us to a number of cases in which an appellate court, on direct appeal of an order purporting to be final and appealable with no just cause for delay, found the order was, in fact, interlocutory and not final and appealable.

That is not the issue before us, though, as Ms. Etscorn did not appeal the original order dismissing the sons and the business entities and claim the trial court abused its discretion by making the orders final and appealable. Instead, Ms. Etscorn, knowing both that the trial court had dismissed *with prejudice* the sons, and that the trial court made those orders final and appealable, chose not to appeal the orders. Her decision not to appeal the orders limits our review.

Pursuant to CR 54.02, a trial court may enter judgment in favor of one or more parties to a multi-claim, multi-party litigation. That judgment may be final and appealable if the trial court utilizes the appropriate finality language. When a party appeals such judgment, appellate review is two-fold: first, the appellate court must determine that the trial court rendered a final adjudication upon one or more claims or parties; and second, the appellate court must examine the trial court's certification for abuse of discretion in releasing for appeal a final decision upon one or more, but less than all the claims or parties. *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722, 726 (Ky. 2008).

Under the first prong, there is no question – the trial court's order dismissing the sons utilized the appropriate finality language and dismissed the parties with prejudice. In other words, the trial court rendered a final adjudication in favor of the sons conclusively determining their rights in relation to the claims raised by Ms. Etscorn.

It was incumbent upon Ms. Etscorn, then, to file a notice of appeal and contest that final and appealable order. "In the event, however, that a trial

court exercises its discretion and determines that a party is entitled to immediate appellate review, a party failing to appeal from a final judgment containing the requisite recitals – as occurred here – does so to its peril." *Id.* at 727. "If [Ms. Etscorn] believed that the trial court abused its discretion in certifying [the sons'] claims, [s]he should have filed [her] notice of appeal within thirty days of the trial court's final judgment under CR 54.02 and raised that issue on appeal." *Id*. Having failed to do so, "it would be inappropriate to review the trial court's initial certification for abuse of discretion, the second level of appellate review." *Id*.

In other words, because the order itself was not appealed, we cannot address Ms. Etscorn's substantive argument that the trial court abused its discretion by reciting finality language. The order is facially a judgment on the merits in favor of the sons, and it is an order that could have been – and was – made final and appealable. Because it was made final and appealable, and because Ms. Etscorn did not appeal that order, it operates as a judgment in favor of the sons and constitutes the cause *res judicata*. *Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. App. 1985).

Accordingly, the trial court lost subject matter jurisdiction over the claims against the sons after Ms. Etscorn did not timely appeal the order dismissing the sons with prejudice. *See Pavkovich v. Shenouda*, 280 S.W.3d 584, 587-88 (Ky. App. 2009) ("Unfortunately, the Jefferson Circuit Court lost jurisdiction of the subject matter of [the action] ten days after it entered the order dismissing the . . . claims with prejudice. That order was not appealed. Therefore,

this Court did not obtain jurisdiction to address that dismissal."). The order adding the sons back to the litigation is void. *See Id*. Likewise, the summary judgment order before us is void. We, therefore, dismiss this appeal.

CONCLUSION

Because the sons were dismissed with prejudice pursuant to a final and appealable order that was never appealed, the trial court was without subject matter jurisdiction to add the sons back to the litigation. Accordingly, the order adding the sons to the litigation is void, and the order granting the sons summary judgment is void. It is therefore ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: March 24, 2017

JUDGE, COURT OF APPEALS

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