

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000555-MR

DONALD CARSON, PRESIDENT;
DONALD L. CARSON, A/K/A
DONALD CARSON, A/K/A PETE CARSON,
INDIVIDUALLY, AND AS A
STOCKHOLDER OF HORIZON-421 COAL
COMPANY, INC.; AND DONALD CARSON,
D/B/A HORIZON COAL, INC., 421 COAL,
INC., HORIZON COAL CORPORATION; AND
HORIZON/421 COAL COMPANY, INC.

APPELLANTS

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM T. JENNINGS, JUDGE
ACTION NO. 79-CI-0594

RAYMOND R. BURGESS, SR.;
GEORGE C. DESERN; AND
LAWRENCE L. FREEMAN,
INDIVIDUALLY AND AS
STOCKHOLDERS IN THE
HORIZON-421 COAL COMPANY, INC.,
A KENTUCKY CORPORATION

APPELLEES

OPINION AND ORDER DISMISSING

** ** * * *

BEFORE: GARDNER, MILLER, AND SCHRODER, JUDGES.

MILLER, JUDGE. Appellants filed the Notice of Appeal herein on February 27, 1997. Therein, appellants stated that the appeal was taken from an order of the Madison Circuit Court signed on February 6, 1997, and entered on February 10, 1997. A copy of

the circuit court's order accompanied the Notice of Appeal. Upon review of that order, it appears the appellants had two motions pending before the circuit court: (1) Ky. R. Civ. Proc. (CR) 60.01 and 60.02 motion and (2) CR 59.05 motion to alter, amend, or vacate. Appellants apparently view the February 10 order as overruling both motions. They thus seek our review of the alleged denial of their CR 60.01 and 60.02 motion and the underlying circuit court order of dismissal, which spawned the motion to alter, amend, or vacate.

The February 10 order clearly stated that the "Motion to Alter, Amend or Vacate is OVERRULED." However, the circuit court, in that order, never specifically ruled upon appellants' motion under CR 60.01 and 60.02. We are aware that a motion panel of the Court of Appeals, by order entered April 16, 1997, denied appellees' motion to dismiss the above appeal and concluded that "[t]his appeal was timely taken from the denial of a motion pursuant to CR 60.02." We, however, *sua sponte* reconsider said order and conclude that the order appealed from, entered February 10, did not, in fact, dispose of appellants' pending CR 60.01 and 60.02 motion. Cf. Knott v. Crown Colony Farm, Inc., Ky., 865 S.W.2d 326 (1993) (observing that an interlocutory order is subject to further review, either upon motion or *sua sponte*, until a final decision is entered). Hence, we consider appellants' appeal based upon denial of CR 60.01 and 60.02 relief as premature.

We additionally believe appellants' motion to alter, amend, or vacate was untimely made in the Madison Circuit Court.

The motion sought relief from the circuit court's order of dismissal, which was entered upon and which notation of service was made upon December 2, 1996. Kentucky Rule of Civil Procedure 59.05 requires that a motion to alter, amend, or vacate "be served not later than 10 days after entry of the final judgment." In the case at hand, appellants' motion to alter, amend, or vacate was filed and certified on December 13, 1996, some eleven (11) days after entry of and notation of the order of dismissal. As appellants' motion to alter, amend, or vacate was untimely, the running of time for an appeal from the December 2 dismissal order was not terminated. As such, appellants' Notice of Appeal filed February 27, 1997, was untimely to attack the December 2 dismissal order. CR 76.02.

Being sufficiently advised, this court *sua sponte* ORDERS that this appeal be hereby DISMISSED.

ALL CONCUR.

JUDGE, COURT OF APPEALS

ENTERED:

BRIEF FOR APPELLANTS:

Joe T. Roberts
London, KY

BRIEF FOR APPELLEES:

Guy K. Duerson
Berea, KY