RENDERED: SEPTEMBER 14, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001517-MR

PROVIDIAN NATIONAL BANK — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 99-CI-01436

JOSEANNAH H. BROWN AND CLAUDE O. BROWN — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge, BUCKINGHAM and McANULTY, Judges.

BUCKINGHAM, JUDGE: Providian National Bank appeals from an order of the Daviess Circuit Court dismissing its complaint against Joseannah H. Brown and Claude O. Brown and an order of the court denying its motion to set aside the order dismissing the complaint. We affirm the trial court.

On December 1, 1999, the bank filed a complaint in the Daviess Circuit Court against Joseannah H. Brown and Claude O. Brown for an alleged credit card debt of $13,407.72 plus accrued interest. The clerk issued summons on both Mr. and Mrs. Brown on the same day. Joseannah H. Brown was served, but the summons issued on Claude O. Brown was returned to the clerk with a

notation on it that Mr. Brown was deceased. An answer to the complaint was later filed on behalf of Mrs. Brown.

On March 6, 2000, the bank moved the court to award it summary judgment against Mrs. Brown. An affidavit indicating the amount of the debt and an affidavit in support of attorney fees accompanied the motion. At the end of the bank's motion, it included a "Notice of Hearing" provision stating that the motion would be brought before the trial court for hearing on March 21, 2000, at 10:00 a.m.

On March 13, 2000, a request for production of documents was filed on behalf of Mrs. Brown. On the same date, a motion to dismiss was filed on her behalf. The motion stated that the bank had failed to produce any document containing or evidencing her signature or agreement to be bound or liable for the debt. The motion cited KRS[1] 371.010(4) which requires an action on a promise to answer for a debt of another to "be in writing and signed by the party to be charged therewith[.]" Brown's motion to dismiss likewise contained a provision noticing it to be heard on March 21, 2000, at 10:00 a.m., the same time the bank's motion for summary judgment was to be heard.

On the date the motions were to be heard, counsel for Brown appeared before the court but counsel for the bank did not. On the same day, the trial court entered an order of dismissal dismissing the bank's complaint against Brown with prejudice. The order did not contain finality language.

[1] Kentucky Revised Statutes.

On May 1, 2000, the bank filed a Motion to Set Aside Order of Dismissal. Said motion was filed pursuant to CR[2] 60.02, and it stated that the bank's attorney had failed to appear at the hearing on the aforementioned motions "due to inadvertent error." See CR 60.02(a). The motion also alleged that Brown's motion to dismiss was without merit and should be set aside. The bank's motion was not verified or supported by an affidavit. After hearing the arguments of counsel, the trial court denied the bank's motion on the ground that it found no evidence to support any of the grounds for CR 60.02 relief stated in the rule. This appeal from both that order and the original order of dismissal followed.

The first issue concerns whether or not the bank may appeal from the order of dismissal. As we have noted, the order was entered on March 21, 2000. The clerk made the CR 77.04(2) notation on the docket on the same day, and the running of the time for appeal began at that time. Pursuant to CR 73.02(1)(a), the bank had thirty days in which to file a notice of appeal. No such notice was filed during that time period, and the bank's motion to set aside the order was also filed after the time period had expired.

Nonetheless, the bank has appealed from the March 21, 2000, order of dismissal on the ground that it was an interlocutory order that did not become final until the court denied its motion to set aside that order. The bank argues that if the order was to be considered final and appealable, then it

[2] Kentucky Rules of Civil Procedure.

should have contained finality language as required by CR 54.02(1) since multiple parties were involved and the order dismissing the claim related only to one party. In other words, the bank argues that Mr. Brown, who was deceased, and Mrs. Brown were both parties and that the order of dismissal related only to Mrs. Brown. Thus, the bank asserts that the order was interlocutory and not subject to appeal.

CR 54.02(1) states in relevant part as follows:

> [W]hen multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision 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.

In response to the bank's argument that the order of dismissal was interlocutory only, Brown argues that the order disposed of the claims against the only party, herself, because Mr. Brown was deceased and not a party. Therefore, the issue before us is whether the order of dismissal was final and appealable. If it was, then we are without jurisdiction to consider the bank's appeal of it because its notice of appeal was not timely filed. See City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990), wherein the Kentucky Supreme Court held that the failure to file

a timely notice of appeal was a jurisdictional defect that could not be remedied. Id. at 957.

Simply stated, a civil complaint which names a deceased person as a party defendant is a nullity to that extent since a circuit court may not acquire jurisdiction over deceased persons. A similar situation was addressed by the Kentucky Supreme Court in Gailor v. Alsabi, Ky., 990 S.W.2d 597 (1998). In that case, two vehicles were involved in an automobile accident, and the driver of one of the vehicles filed a civil complaint against the driver of the other vehicle. However, prior to the complaint being filed, the driver of the other vehicle had died of natural causes. Summons was issued against the deceased person, and the summons was returned with a notation that the defendant was deceased. The plaintiff in the case did not move that the public administrator be appointed to administer the deceased person's estate and did not amend his complaint substituting the public administrator as a party defendant until after the applicable statute of limitations had expired.

The trial court in Gailor granted summary judgment in favor of the administrator on the ground that the action was barred by the statute of limitations. After the Kentucky Supreme Court granted discretionary review of an opinion of this court reversing the trial court, it upheld the trial court's summary judgment in favor of the administrator. In doing so, the court stated that "[s]ince the complaint did not name a party defendant over whom the circuit court could acquire jurisdiction, the complaint was a nullity." Id. at 600.

In Ratliff v. Oney, Ky. App., 735 S.W.2d 338 (1987), this court was faced with another set of circumstances where a deceased person was named as a party defendant in a civil complaint. Therein the court held:

> It is incumbent upon a plaintiff, when he institutes a judicial proceeding, to name the proper party defendant. It is fundamental to our jurisprudential system that a court cannot, in an in personam action acquire jurisdiction until a party defendant is brought before it. The party defendant must actually or legally exist and be legally capable of being sued.

Id. at 341. Likewise, this court held in Mitchell v. Money, Ky. App., 602 S.W.2d 687 (1980), that a civil action filed against a deceased person "was a nullity, there never being a party-defendant to it." Id. at 689.

Therefore, in the case *sub judice* the court had jurisdiction over only one defendant, Mrs. Brown. When the trial court entered its March 21, 2000, order of dismissal of the complaint filed against her, the order was final and appealable in that it disposed of all claims against all parties. See Security Federal Savings & Loan Ass'n of Mayfield v. Nesler, Ky., 697 S.W.2d 136 (1985), wherein the Kentucky Supreme Court held that "[a]n order is final . . . if the order adjudicated all of the claims of all of the parties before the court at the time the order was entered." Id. at 138. Because the bank did not appeal from that order within thirty days of its entry as required by CR 73.02(1)(a), we are without jurisdiction to consider its appeal from that order at this late date. City of Devondale, supra.

The remaining issue concerns whether the trial court abused its discretion in denying the bank's Motion to Set Aside Order of Dismissal. The bank argues that it is entitled to relief pursuant to CR 60.02(a) due to "inadvertence" because of an error on the part of the Ohio firm handling the case for the bank in not having a local attorney appear at the hearing on the motions. In Fortney v. Mahan, Ky., 302 S.W.2d 842 (1957), the court held that "CR 60.02 addresses itself to the sound discretion of the trial court." Id. at 843. The court also held that "[t]he trial court's exercise of discretion will not be disturbed on appeal except for abuse." Id.

The bank argues that this court should follow our reasoning in Bargo v. Lewis, Ky. App., 305 S.W.2d 757 (1957), and order the trial court to grant relief under CR 60.02. In Bargo, the court held that the trial court did not abuse its discretion in setting aside a default judgment where a local attorney misunderstood the request of the defendant's out-of-town attorney concerning the filing of an answer to a civil complaint. Id. at 758. The Bargo court held that the trial court did not abuse its discretion in granting CR 60.02 relief due to inadvertence or excusable neglect. Id. It noted that default judgments were not favored and that the defendant had meritorious defenses. Id.

As we have noted, the bank's Motion to Set Aside Order of Dismissal was not supported by an affidavit indicating the facts concerning why it was not represented at the hearing on Brown's motion to dismiss. Further, we found no documentation in the record indicating that Mrs. Brown was liable for the credit

card debt. In fact, when the bank orally argued its motion to set aside the dismissal order to the trial court, it conceded that it could find no documentation which would support its argument that Mrs. Brown would be liable for the debt. Under these circumstances, we conclude the trial court did not abuse its discretion in denying CR 60.02 relief.

The order of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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