

RENDERED: MAY 20, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002664-MR

MALLIE PICKLESIMER, AS
REPRESENTATIVE OF THE LAWFUL
HEIRS OF HENRY HARMON (AS NAMED
IN THE NOTICE OF APPEAL)

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
ACTION NO. 99-CI-00249

WOLF CREEK COLLIERS, INC.,
D/B/A MOUNTAINEER COAL DEVELOPMENT
COMPANY AND POCAHONTAS DEVELOPMENT
CORPORATION

APPELLEES

OPINION DISMISSING

** ** * * * * *

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.¹

HENRY, JUDGE: Mallie Picklesimer, as representative of the
lawful heirs of Henry Harmon, appeals from an order of the
Martin Circuit Court dismissing her action for a lack of

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.95)(b) of the Kentucky Constitution and KRS 21.580.

prosecution. Upon review, we find that Picklesimer's appeal is untimely, and we therefore dismiss it on that ground.

On November 8, 1999, Picklesimer filed suit against Wolf Creek Colliers, Inc. d/b/a Mountaineer Coal Development Company, Pocahontas Development Corporation, and other unknown defendants in the Martin Circuit Court. The suit revolved around real property and mineral ownership rights.

Picklesimer was originally represented by attorney Robert J. Patton; however, he moved to withdraw as counsel in a motion filed on January 5, 2001. Patton's motion was granted, and Picklesimer was subsequently ordered by the trial court to secure new counsel within sixty (60) days. Picklesimer complied with this order and hired Jerry Patton as her attorney.

On February 20, 2002, Patton moved to withdraw as Picklesimer's counsel. This motion was granted, and Picklesimer was again ordered by the trial court to secure new counsel, this time within thirty (30) days. Picklesimer apparently failed to hire a new attorney within this time period, and the defendants filed a CR 41.02(1) motion for involuntary dismissal based upon Picklesimer's failure to comply with the trial court's order. The trial court sustained this motion and dismissed Picklesimer's action without prejudice in a June 3, 2002 order. Picklesimer continued to seek new counsel after this ruling.

On February 19, 2003, attorney Don A. Bailey moved to set aside the trial court's order of dismissal on behalf of Picklesimer.² In support of this motion, Bailey cited to the fact that Picklesimer had met with a prospective attorney in March 2002, but the attorney did not decline representation until May 2002. Another attorney apparently took possession of Picklesimer's file in May 2002 and then held it for six (6) months before declining representation because of a conflict of interest. Picklesimer claims to have been unaware of the motion to dismiss and the trial court's order of dismissal until Bailey himself informed her of it. Nevertheless, the trial court denied the motion to set aside almost nine (9) months later, in an order filed November 12, 2003. This appeal followed.

The only issue raised on appeal is whether the trial court abused its discretion in ordering dismissal of Picklesimer's lawsuit for her failure to comply with the court's February 28, 2002 order requiring her to secure replacement counsel within thirty (30) days. Picklesimer specifically argues that the trial court: (1) abused its discretion in ordering her to be represented by legal counsel and (2) abused its discretion by misapplying the factors set forth in Ward v. Housman, 809 S.W.2d 717 (Ky.App. 1991) for involuntary

² It should be noted that the motion did not identify under which rule, case, or statute relief was being sought. This ambiguity has not been clarified by Picklesimer on appeal.

dismissals pursuant to CR 41.02. Appellee contends that Picklesimer failed to file a CR 59.05 motion within ten (10) days, as required by that rule, and that the trial court did not abuse its discretion in dismissing her case.

Our courts have long held that a dismissal without prejudice is a final and appealable order. Wood v. Downing's Admr., 110 Ky. 656, 62 S.W. 487, 488 (1901); C.I.T. Corp. v. Teague, 293 Ky. 521, 169 S.W.2d 593, 593 (1943); Grubbs v. Slater & Gilroy, Inc., 267 S.W.2d 754, 755 (Ky. 1954). In Wood, supra, it was held that an order dismissing without prejudice "fixed absolutely and finally the rights of the parties in this suit in relation to the subject matter of the litigation, and put an end to the suit. It was a final appealable order." Wood, 62 S.W. at 488.

Under CR 59.05, a final judgment or order may be vacated only in accordance with the ten (10) day provisions of the rule. Thereafter, the trial court loses jurisdiction to act. See Commonwealth v. Gross, 936 S.W.2d 85, 87 (Ky. 1997). Consequently, a party has ten (10) days to move to set aside an order of dismissal and continue under the originally filed complaint, or thirty (30) days to timely appeal from the order of dismissal pursuant to CR 73.02(1)(a). Neither was done here, as the order of dismissal was filed on June 3, 2002, with the motion to set aside and notice of appeal being filed in February

and December 2003, respectively. The trial court had lost jurisdiction to set aside its order well before either of these dates. Moreover, Picklesimer has cited us to no other rules or case law that would afford her relief notwithstanding the provisions of CR 59.05.

Accordingly, we conclude that this appeal is untimely, and we accordingly must dismiss it. Picklesimer's recourse, given that her complaint was dismissed without prejudice, is to refile her suit and issue new process.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian M. Gudalis
Lexington, Kentucky

BRIEF FOR APPELLEE:

J. Scott Kreutzer
Pikeville, Kentucky

John R. Triplett
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