

RENDERED: July 8, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000561-MR

NORWEST BANK MINNESOTA, N.A.

APPELLANT

v. APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NO. 00-CI-00110

ESTATE OF WILLIAM H. DUNFORD,
CAROLYN I. DUNFORD,
THE UNKNOWN SPOUSE OF CAROLYN I. DUNFORD,
MARCUS TONY DUNFORD, PAUL DUNFORD,
THE UNKNOWN HEIRS, ASSIGNEES AND
DEVISEES OF THE ESTATE OF
WILLIAM H. DUNFORD AND THE
COMMONWEALTH OF KENTUCKY INHERITANCE
TAX DIVISION

APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: BUCKINGHAM AND JOHNSON, JUDGES; EMBERTON, SENIOR JUDGE.¹

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

BUCKINGHAM, JUDGE: Bank One, successor-in-interest to Norwest Bank Minnesota, N.A., appeals from an order of the Union Circuit Court dismissing its claim against the estate of William H. Dunford and others. It also appeals from an order denying its motion to vacate that order. Because of procedural errors by Bank One, we dismiss this appeal.

On May 16, 2000, Norwest filed a foreclosure complaint against the estate of William H. Dunford and other persons who may have had, or claimed to have had, an interest in the subject real estate. The following month, Norwest moved the court to substitute Bank One in its place as the plaintiff in the case on the ground that Bank One had become the successor-in-interest to Norwest. The motion was granted, and an order was entered substituting Bank One for Norwest as the plaintiff.²

On October 2, 2001, the court filed a Notice to Dismiss for Lack of Prosecution pursuant to CR³ 77.02(2). Bank One responded with a Motion for Extension of Time, and the court entered an order on November 6, 2001, granting Bank One an extension of time "to properly reflect a re-recording of the

² The notice of appeal filed in this case lists Norwest Bank Minnesota, N.A., as the appellant. As the appellees have overlooked this improper designation by the appellant of its identity, we likewise will overlook it. Apparently, the substitution of parties as plaintiff in the case was due to Bank One purchasing Norwest Bank.

³ Kentucky Rules of Civil Procedure.

mortgage." The order also stated that the case would be reviewed on January 14, 2002.

On April 22, 2003, the court entered a second Notice to Dismiss for Lack of Prosecution. Although the case had not been dismissed, Bank One moved the court to grant it relief from the court's "dismissal order" entered on April 22, 2003. Bank One also filed a Motion for In Rem Default Judgment and Order of Sale. The Dunford estate responded by stating that Bank One's default judgment motion was improper because it had, in fact, filed an answer to the complaint on June 6, 2000. Further, the Dunford estate noted that its answer had raised a defense that the mortgage was an apparent falsification or misrepresentation.

On November 10, 2003, the court entered an order scheduling a hearing on Bank One's motion on December 8, 2003. The Dunford estate responded to the court's order with a motion to set it aside. The motion also requested that the case be "dismissed for lack of cooperation or prosecution by the Plaintiff and for Plaintiff misleading the Court."

The hearing was held on December 8, 2003, as scheduled, and the court entered an order on December 10, 2003, denying Bank One's motion for default judgment on the ground that the Dunford estate had filed an answer. The court further ordered that "this action will be dismissed if Plaintiff does not furnish Defendants with the requested information as promised

within ten (10) days of the entry of this Order."⁴ Although the court stated in the order that both parties were present, Bank One apparently was not. On December 31, 2003, the court entered an order dismissing the case with prejudice "pursuant to the Court's previous Order entered on December 10, 2003."⁵ There is a notation in the record that the clerk notified all counsel of record of the entry of the order by first-class mail on the same day the order was entered.

On January 21, 2004, Bank One served a motion to vacate the dismissal order. Bank One stated in its motion that it had not been given notice of the court's order entered on December 10, 2003, directing it to provide the documents with ten days. The motion acknowledges that the clerk sent the order to Bank One's local counsel on a prior motion, but it further stated that said counsel was not counsel of record for Bank One in the case. Bank One's motion to vacate does not state that it was filed pursuant to any specific civil rule of procedure, although it was obviously a motion to vacate pursuant to CR 59.05.

On February 16, 2004, the court entered an order denying Bank One's motion to vacate. Norwest Bank (Bank One)

⁴ The "requested information" referred to in the order was apparently loan documents. Also, the "requested information" had not been formally requested by way of discovery requests under the civil rules.

⁵ There was nothing, affidavit or otherwise, in the record to indicate whether Bank One did or did not comply with the order to furnish "the requested information." Apparently, the court entered the order dismissing the case after being notified that Bank One had not complied.

then filed its notice of appeal on March 17, 2004. The appeal was from both the court's order entered on December 31, 2003, dismissing the case, and from the court's order of February 16, 2004, denying Bank One's motion to vacate.

Concerning Bank One's appeal from the December 31, 2003, dismissal order, we note that Bank One had 30 days from that date to file its notice of appeal. See CR 73.02(1)(a). Further, the rule provides that "[t]he failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial." CR 73.02(2). "Compliance with the time requirements of CR 73.02 is mandatory and jurisdictional." United Tobacco Warehouse, Inc. v. Southern States Frankfort Coop., Inc., 737 S.W.2d 708, 710 (Ky.App. 1987). Therefore, because the appeal from the dismissal order was not filed within 30 days of December 31, 2003, as required by the rule, we are without jurisdiction to consider the appeal unless the time was tolled by the filing of the CR 59.05 motion. See CR 73.02(1)(e) and University of Louisville v. Isert, 742 S.W.2d 571, 573 (Ky.App. 1987).

CR 59.05 requires that a motion to alter, amend, or vacate must be served not later than ten days after the entry of the final judgment or order. See Huddleston v. Murley, 757 S.W.2d 216, 217 (Ky.App. 1988). After the ten-day period has passed without the serving of a CR 59.05 motion, a judgment of

dismissal may not be altered, amended, or vacated pursuant to the rule. See James v. Hillerich & Bradsby Co., 299 S.W.2d 92, 93 (Ky. 1956). Because Bank One served its motion to vacate approximately three weeks after December 31, 2003, the motion was not timely served and could not be considered by the court. Further, because the motion was not timely filed, it did not toll the running of the 30-day period during which an appeal from the dismissal order could be filed. See CR 73.02(1)(e) and Merrick v. Commonwealth, 132 S.W.3d 220, 222 (Ky.App. 2004). We conclude that Bank One did not file a timely notice of appeal from the December 31, 2003, dismissal order. Thus, the portion of Bank One's appeal from that order must be dismissed for lack of jurisdiction.

While Bank One did not refer to any rule of procedure when it filed its motion to vacate, it attempts in its brief for the first time to characterize its motion as one filed pursuant to CR 60.02 rather than pursuant to CR 59.05. This characterization is improper for several reasons. First, the motion to vacate failed to state CR 60.02 grounds to support it. The issues raised in the motion were all appealable issues and were proper for consideration by way of a CR 59.05 motion. "Although CR 60.02 provides authority for reopening or vacating a judgment after ten days, this Rule is not available for correction of an error or mistake of law by the court." James,

299 S.W.2d at 93. See also Arnett v. Kennard, 580 S.W.2d 495, 497 (Ky. 1979). As the court noted in United Bonding Ins. Co., Don Rigazio, Agent v. Commonwealth, 461 S.W.2d 535 (Ky. 1970), “[a] party may not resort to CR 60.02 to gain an additional extension of time to prevent the application of CR 73.02.” Id. at 536. In short, we lack jurisdiction to consider Bank One’s appeal from the dismissal order.

As we have noted, Bank One also appealed from the order denying its motion to vacate. “[A] ruling on a CR 59.05 motion is not a final or an appealable order.” Mingey v. Cline Leasing Serv., Inc., 707 S.W.2d 794, 796 (Ky.App. 1986). See also Hagg v. Kentucky Utils. Co., 660 S.W.2d 680, 682 (Ky.App. 1983), citing Marshall v. City of Paducah, 618 S.W.2d 433, 434 (Ky.App. 1981). Therefore, this portion of the appeal must also be dismissed.

It is hereby ORDERED that Bank One’s appeals from the orders of the Union Circuit Court are DISMISSED.

ALL CONCUR.

ENTERED: July 8, 2005_____

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

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J. Quentin Wesley
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