

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-001904-MR

GREGORY HARRISON;
KELLIE HARRISON

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 99-CI-00457

GLEN MEADOWS HOMEOWNERS
ASSOCIATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE.¹

ROSENBLUM, SENIOR JUDGE: Gregory Harrison and Kellie Harrison appeal from an order of the Oldham Circuit Court requiring them to remove a detached garage constructed on their property in violation of Glen Meadows Subdivision's deed restriction covenants. This Court has previously determined that the deed

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

restrictions provide that the design and plan for construction of a detached garage is subject to the approval of the Glen Meadows Homeowners Association (Homeowners Association), and that the Association had reasonably denied the Harrison's proposed construction plans. For the reasons stated below, we affirm.

In August 1998, the Harrisons entered into a contract to purchase a home in Glen Meadows Subdivision. Prior to closing, the Harrisons were given a copy of the subdivision's deed of restrictions. Among other things, the restrictions reserved to the Homeowners Association the right to approve or disapprove the architectural design and plans of any structure, including garages, prior to placement or alteration. In November 1998, the Harrisons submitted plans for an unattached garage to the Homeowners Association for approval. The Homeowners Association denied approval of the plan, as well as three subsequent plans filed by the Harrisons.

In September 1999 the Harrisons filed a complaint against the Homeowners Association in Oldham Circuit Court charging that the Association's rejection of their plans was arbitrary and capricious. The Harrison's sought a judgment that they were entitled to construct a detached garage in accordance with the plans previously rejected by the Homeowner's Association. Following a trial on the matter, the trial court

determined that the subdivision's deed restrictions did not give the Association the authority to deny the Harrisons' plans on the basis of size or location. The trial court's order gave the Harrisons permission to begin construction of the proposed garage immediately, and the Homeowners Association appealed to this Court (the Harrisons cross-appealed the trial court's denial of punitive damages, reimbursement of costs sustained, and the dismissal of their claim for intentional infliction of emotional distress).

On August 2, 2002, this Court entered an unpublished opinion reversing the trial court (see Glen Meadows Homeowners Association v. Harrison, 2001-CA-000811-MR and 2001-CA-000984-MR). The opinion determined that the Homeowners Association's actions in denying the Harrison's plans were reasonable. The Harrison's petition for discretionary review by the Supreme Court was denied.

In the meantime, following the trial court's determination that the Harrisons were entitled to build a garage, and while the appeal to this Court was pending, the Harrisons constructed a garage of a plan and design which had previously been rejected by the Homeowners Association.

On July 22, 2003, after the Supreme Court had denied the Harrisons' petition for discretionary review, the Homeowners Association filed a motion seeking dismissal of the Harrisons'

petition for declaratory judgment, enforcement of the deed restrictions, and removal of the now completed detached garage. On July 25, 2003, and September 9, 2003, the Harrisons filed motions seeking a new trial on the basis that they did not have an adequate opportunity to present their case at the original trial or, in the alternative, for a new trial based upon newly discovered evidence.

On December 2, 2003, the trial court entered an order denying the Harrisons' motion for a new trial and dismissing their complaint against the Homeowners Association. The order further provided that "the [Homeowners Association's] Motion to Enjoin the construction of any detached garage without the approval of the [Homeowners Association], and direct the [Harrisons] to remove any structure in violation of the Deed Restrictions is hereby denied for the present and [the Harrisons] are entitled to submit plans for modification of the structure to the Homeowners Association for approval. Said plans to be submitted within 30 days of entry of this Order." (Emphasis added.)

The Harrisons subsequently submitted modification plans to the Homeowners Association, which were rejected. On February 3, 2004, the Homeowners Association renewed its motion to require the Harrisons to remove the nonconforming garage from their property. On March 16, 2004, the trial court entered an

order requiring the Harrisons to immediately remove the garage. The Harrisons filed a motion to vacate and/or issue additional findings of fact. On August 25, 2004, the trial court entered an order denying the motion. This appeal followed.

First, the Harrisons contend that the trial court's December 2, 2003, order dismissing the underlying case (which, as previously noted, also deferred the trial court's decision on the Homeowners Association's motion to require removal of the garage) became final 10 days following its entry, after which the trial court lost jurisdiction over the matter. The Harrisons allege that, as a result, the trial court did not have jurisdiction when it entered its March 16, 2004, order requiring them to remove the detached garage.

As a general principle, a judgment becomes final ten days after its entry by the trial court, see Kentucky Rules of Civil Procedure (CR) 52.02, 59.04, 59.05, and it is axiomatic that a court loses jurisdiction once its judgment is final. Mullins v. Hess, 131 S.W.3d 769, 774 (Ky.App. 2004). However, the trial court's order of December 2, 2003, was not a final judgment because it specifically reserved for future adjudication the approval of the Harrison's modification plans or entry of a ruling on the Homeowners Association's motion to remove the nonconforming structure

CR 54.01 defines a final judgment as follows:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order". (Emphasis added).

"[I]f an order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final." Hubbard v. Hubbard, 303 Ky. 411, 197 S.W.2d 923, 924 (Ky. 1946). As the trial court's December 2, 2003, order left something further to be done (i.e., approval of the Harrison's modification plans or entry of a ruling on the Homeowners Association's motion to remove the nonconforming structure), it was not a final judgment, and accordingly the principle that a trial court loses its jurisdiction ten days following the entry of the final judgment is not applicable. It follows that the trial court retained jurisdiction to enter the March 16, 2004, order requiring the Harrisons to remove the unlawful garage.

The Harrisons also argue that the trial court's March 16, 2004, order, in requiring the removal of the garage, went beyond this Court's August 2, 2002, opinion and, in addition,

expanded the powers of the Homeowners Association beyond those granted in the deed restrictions. We disagree.

This Court's Opinion of August 2, 2002, determined that the Homeowners Association's "actions in denying the Harrison's plans were reasonable." Glen Meadows Homeowners Association v. Harrison, supra., Slip. Op. at 10. The Opinion also reversed the trial court's determination that the Harrisons were entitled to construct a garage in accordance with plans previously submitted to, and rejected by, the Homeowners Association. Id. It is accordingly the law of the case that the garage constructed by the Harrisons during the pendency of the appeal is in violation of the Subdivision's deed restrictions. Ellis v. Jasmin, 968 S.W.2d 669, 670 (Ky. 1998) (A final decision of Court of Appeals, whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties and the trial court. It may not be reconsidered by prosecuting an appeal from a judgment entered in conformity therewith.) As such, the garage constitutes an ongoing violation of the Subdivision's deed restrictions.

A Homeowners Association's remedy under the circumstances presented in this case was squarely addressed in Colliver v. Stonewall Equestrian Estates Association, Inc., 139 S.W.3d 521 (Ky. App. 2003). In that case, the Collivers

constructed a detached garage on their property even though their proposed construction plans had been rejected by the Stonewall Equestrian Estates Association. As in the present case, plans for a detached garage were subject to approval of the Homeowners Association. The Stonewall Homeowners Association filed a complaint in Fayette Circuit Court seeking an injunction requiring the Collivers to remove the structure. As in this case, the circuit court ordered the immediate removal of the garage, and the Collivers appealed to this Court. This Court upheld the trial court's order of removal.

The present case is indistinguishable from Colliver, and we construe the case as affording a Homeowners Association the remedy of the compelled removal of a nonconforming detached garage constructed in violation of the subdivisions deed restrictions and in derogation of the Association's right of approval. In upholding the circuit court's removal order in Colliver, this Court stated as follows:

Despite the pending litigation and relief sought, the Collivers continued with the construction of the garage at their own peril. They took an unwise risk and expended a large amount of money in spite of this litigation and the Association's clear disapproval of their garage. Therefore, we affirm the order of the circuit court requiring the Collivers to remove the structure in its entirety immediately.

Id. at 527.

As did the Collivers, the Harrisons unwisely constructed a garage while the circuit court's order approving the construction was on appeal. The Harrisons did so at their own peril.

While the Harrisons attempt yet again on this appeal to challenge the actions of the Homeowners Association in denying their construction plans, that issue is not properly before us. Ellis v. Jasmin, supra. Pursuant to Colliver, we are constrained to affirm the order of the circuit court requiring the immediate removal of the unlawful garage.

For the foregoing reasons the judgment of the Oldham Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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