

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001848-MR

ROBERT SMITH;  
MICHAEL SMITH

APPELLANTS

v. APPEAL FROM MERCER CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 97-CI-00187

SPRING MEADOWS DAIRY, INC.;  
JOHN D. LAY; JOHN P. LAY;  
EMMA LAY

APPELLEES

OPINION DISMISSING

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BEFORE: TAYLOR, JUDGE; ROSENBLUM,<sup>1</sup> SENIOR JUDGE; MILLER,<sup>2</sup> SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: Robert Smith and Michael Smith appeal from an order of the Mercer Circuit Court which, among other things, granted summary judgment to appellees Spring Meadows Dairy, Inc.; John D. Lay; John P. Lay; and Emma Lay. The order also granted summary judgment to the appellees' codefendants

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<sup>1</sup> Senior Judge Paul W. 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.

<sup>2</sup> Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Farmers National Bank, Valley View Farms, Steve Plenge, Ted Korfhage, and Thomas Hurst. None of the codefendants, however, are named as parties to this appeal.

After the Smiths filed their notice of appeal in this cause, the appellees filed a "Motion to Dismiss Appeal for Failure to Join Necessary and Indispensable Parties." On December 12, 2005, an order was entered passing the motion to this panel for decision. Because we conclude that Farmers National Bank is a necessary and indispensable party to the litigation, we dismiss the appeal.

This case concerns the alleged conversion of cattle belonging to the appellants. Because this is a summary judgment case adverse to the Smiths, we view the record in the light most favorable to them.

John David Lay incorporated his dairy farm operation in Mercer County under the name of Spring Meadows Dairy, Inc. The operation was conducted on two farms. One farm owned by John David Lay, and another owned by John P. Lay, John David Lay's father, located at 900 Talmage-Mayo Road in Harrodsburg, Kentucky. The operation was leased to James Cook pursuant to an agreement, which, among other things, prohibited Cook from bringing any other cattle upon the farms. At the time of the lease agreement, and at all times relevant herein, the cattle

and equipment of Spring Meadows were subject to a security interest held by the Farmers National Bank of Danville.

Robert Smith and his son, Michael Smith, owned dairy cattle, having been in the dairy business in Spencer County, Kentucky, for a period in excess of seven years. Due to the high costs of operating a dairy business, the Smiths decided to close their dairy operation. Around the time they made their decision to close the operation, they were contacted by Cook, who was interested in purchasing their dairy herd.

The Smiths determined that Cook was not financially able to purchase their cattle. At the same time, due to the low market value of dairy cattle in February 1997, the Smiths were reluctant to sell their cattle on the open market. After discussions with Cook, the Smiths decided they would give Cook possession of their dairy herd so that Cook could relieve them from the financial burden of feeding and caring for the herd until the dairy cattle market improved. Cook agreed to take the Smiths' cattle pursuant to an agreement between Cook and the Smiths.

As part of the agreement between Smith and the Cooks, Cook was permitted to cull undesirable cattle during the period they were in his possession. The agreement also provided that any heifer calves born during the time the cattle were in Cook's possession were to remain the property of the Smiths. The

Smiths and Cook agreed that the Smiths could demand that the cattle be returned to them, at any time, at their discretion. According to the Smiths, no agreement was ever reached between the Smiths and Cook whereby the cattle in question were to be sold to Cook. Rather, the cattle belonged, at all times, to the Smiths, who had a right to demand their return at any time.

On February 18, 1997, the Smiths' cattle were hauled from the Smiths' dairy farm to the Cook dairy operation located at the Talmage-Mayo Road farm. It is said that 97 dairy cows and heifers were placed in the possession of Cook. This, of course, was in violation of Cook's lease agreement providing that he should not bring other cattle into the Spring Meadows herd.

In fact, Cook had previously violated his agreement not to place other cattle on the property. Specifically, Cook had previously bought 104 head of cattle from defendant Valley View Farms, a partnership consisting of defendants Steve Plenge and Ted Korfhage, and placed them on the farm. Similarly, Cook also acquired 103 head of cattle from defendant Thomas Hurst under a credit purchase agreement. In connection with these purchases, the sellers retained a security interest in their cattle. All of the cattle, which now consisted of four herds (the Lays', Valley View Farms', Hurst's, and the Smith's) were commingled.

The Smith's cattle were cared for by Cook until May 29, 1997, at which time he was evicted from the property and his management of the Spring Meadows Dairy was ended. Thereafter, John David Lay and John P. Lay took possession of all cattle located on the farm. According to the Smiths, as of May 29, 1997, there were at least 84 head of cattle, which belonged to them. According to the Lays, at this time a few of the cattle had died, some were dying, there was no feed on the farm, and all cattle were in poor condition for lack of feed and proper care. The situation was reported to Farmers Bank, and it issued a letter stating that "it is absolutely necessary that the Bank's collateral be safeguarded and protected."

On May 29, 1997, Cook advised the Smiths that he had been evicted from the Talmage-Mayo Road farm and that he no longer had possession of the Smiths' cattle. Thereafter, Robert Smith drove to the Lays' farm and saw some of the cattle belonging to him and his son. Robert Smith advised John P. Lay that he and Michael owned cattle upon the Lays' property and demanded the return of same. According to the Smiths, John P. Lay acknowledged that they had an interest in some of the cattle upon the Lays' property, but he refused to return possession of the cattle to the Smiths, including cattle readily identifiable as their property.

Based upon the claims of liens and claims of ownership of the various parties, there should have been significantly more cattle on the farm than were actually present. According to the Smiths, John P. Lay assured Robert Smith that the cattle would not be sold until all issues of ownership were resolved. However, the cattle were sold two days latter.

Upon seeing the critical state of the cattle and the disparity between the number of cattle that should have been on the farm and the number actually there, it was determined that the cattle could not be cared for on the farm and should be sold to prevent further loss. The sale of the cattle yielded a total of \$114,591.86. The Smiths did not receive any of the proceeds from the sale of the cattle.

On July 1, 1997, the Smiths filed a Complaint in Mercer Circuit Court. The Complaint sought a declaratory judgment that the Smiths were the sole and rightful owners of any cattle belonging to them which were sold, and for money damages for the wrongful and illegal sale of their cattle. The Complaint was later amended to assert a claim that the Lays wrongfully and unlawfully took possession of the Smiths' cattle and "converted them to their own use and benefit."

After a lengthy period on the circuit court docket, on August 8, 2005, the circuit court entered an order granting

summary judgment to all defendants in the case. The order stated, in relevant part, as follows:

. . . there is no genuine issue as to any material fact that Farmers National Bank held a perfected security interest in and to all cattle placed upon the Lay farms in Mercer County . . . .

In their appeal from the order granting summary judgment to all defendants, the Smiths named only Spring Meadows and the Lays. Because the order granting summary judgment adjudged Farmers National Bank as having a perfected security interest in all cattle upon the farm, we conclude that the Bank is a necessary and indispensable party to the appeal.

As noted above, in its order granting summary judgment, the circuit court stated that "there is no genuine issue as to any material fact that Farmers National Bank held a perfected security interest in and to all cattle placed upon the Lay farms in Mercer County[.]" Because the Smiths failed to challenge this adjudication in this appeal by naming Farmers National Bank as a party, we deem the issue to be waived or abandoned. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 815 (Ky. 2004). The Bank is indeed an indispensable party. Complete relief cannot be granted to the Smiths in its absence.

It is well-established that failure to name an indispensable party in the notice of appeal requires dismissal. Ky. R. Civ. P. 19.02; City of Devondale v. Stallings, 795

S.W.2d 954 (Ky. 1990). The failure to name an indispensable party in the notice of appeal is considered a jurisdictional defect. Id. We accordingly grant the appellees' motion to dismiss the appeal for failure to name a necessary and indispensable party.

For the foregoing reasons, IT IS HEREBY ORDERED that this appeal be DISMISSED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Dean  
Shelbyville, Kentucky

BRIEF FOR APPELLEE:

Merele C. Clark  
Danville, Kentucky