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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000125-MR
AND
NO. 2005-CA-002413-MR

KENNETH R. HAUSWALD, M.D.; and JAMES R. STATEN, M.D. — APPELLANTS

v.

APPEALS FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 02-CI-01190

RODERICK J. TOMPKINS, JR., M.D.; MARY LEGENZA, M.D.; GARY L. BARKER, M.D.; and WENDELL L. BAILEY, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Drs. Kenneth R. Hauswald and James R. Staten appeal from the judgment of the Boyd Circuit Court adjudicating the dissolution of their real estate

partnership with Drs. Roderick J. Tompkins, Mary Legenza, Gary L. Barker, and Wendell L. Bailey. For the reasons hereafter stated, we affirm.

In 2001, the six medical doctors, all of whom were involved in the practice of general surgery in Ashland, executed a Revised Partnership Agreement (Agreement). This partnership owned the real estate from which the doctors conducted their medical practice, which was set up through a separate corporate entity know as "Surgical Associates of Ashland, P.S.C." At the end of December 2001, Hauswald and Staten withdrew from both the corporation and the partnership. Paragraph 12 of the Agreement expressly provided that upon a partner's withdrawal, "the remaining partners shall have the right either to purchase said partner's interest in the partnership business, allow the partnership to purchase said partner's interest in the partnership business, or to terminate and liquidate the partnership business." If the remaining partners elected to purchase, the withdrawing partners were entitled to receive fair market value for their respective shares of the partnership's assets, with payment for the shares being received in two installments, the first within 90 days after value was determined and the second one year after the first payment. The Agreement provided a mechanism for the use of appraisers if the parties were unable to agree on value. As to the liquidation option, the Agreement provided that if the remaining partners elected not to purchase the withdrawing partners' interests, "the partners shall proceed with reasonable promptness to sell the property owned by the partnership and to liquidate the business of the partnership."

The record is clear that initially, the remaining doctors intended to purchase the interests of Hauswald and Staten. Two events occurred, however, that caused Tompkins, Legenza and Barker to reconsider this option. First, on February 1, 2002, Bailey told Tompkins, Legenza and Barker that, effective May 1, he would be leaving the Ashland area for personal reasons. Second and as the trial court found in its November 30, 2004, order, "[t]he [remaining doctors] began, but never completed, the process of obtaining appraisals for the purposes of a buyout. The amounts of the appraisals demonstrated to the [remaining doctors] that there was no sense in completing the process since the buyout would be financially unwise." As a result, Tompkins, Legenza, Barker and Bailey decided to sell the partnership's property and to liquidate the business of the partnership. Hauswald and Staten objected to this change of course, taking the position that once the remaining doctors decided to purchase the interests of the withdrawing partners, they were precluded from the option of sale and liquidation.

Meanwhile, the remaining doctors formed a new medical practice, Northeastern Kentucky Surgeons, P.S.C., which from January to October 2002 leased the property from the partnership. During that period, monthly lease payments were sufficient to meet the mortgage payments, taxes and other operating expenses of the property. However, after Northeastern moved its practice to another location, the property became vacant. As a result the remaining doctors agreed to contribute to the operating expenses of the partnership, which were approximately $5,000 per month. As

Hauswald and Staten were requested but refused to contribute, the remaining doctors each paid one-fourth of the expenses until the property was ultimately sold in May 2005.

In November 2002, Hauswald and Staten filed this action seeking a judicial determination requiring the remaining doctors to purchase their interests. The remaining doctors filed an answer and counterclaim asserting their right to proceed with sale and liquidation. The trial court, in response to various motions, ordered both that the property be listed for sale and that a third appraisal be performed.

On November 9, 2004, Tompkins, Bailey, Legenza and Barker filed a motion for partial summary judgment on the basis that the matter before the trial court was "solely one of interpretation and application of the parties' partnership contract," specifically whether the remaining partners were required to buy Hauswald's and Staten's interests, or whether they could sell and liquidate. The motion was noticed to be heard on November 19. In response, Hauswald and Staten offered two primary objections: that ten days' notice had not been provided as required by CR[1] 56.03, and that discovery had not been completed, as the depositions of Tompkins, Bailey, Legenza and Barker had not been transcribed,[2] and the depositions of Hauswald and Staten had not been taken.

After a November 23 hearing the trial court ruled, as a matter of law, that the partnership agreement gave the remaining doctors the option either to purchase the withdrawing doctors' shares, or to dissolve the partnership and liquidate its assets. The

[1] Kentucky Rules of Civil Procedure.

[2] These four depositions which are a part of the record on appeal, contain date stamps indicating that they were filed in the Boyd Circuit Court on November 15, 2004 (depositions of Tompkins and Bailey) and November 17, 2004 (depositions of Barker and Legenza).

trial court expressly provided that the order was interlocutory. After Hauswald and Staten filed a motion to alter, amend or vacate, the trial court amended the order to provide that it was final and appealable. Appeal No. 2005-CA-00125-MR followed. However, over Hauswald and Staten's continuing objection, the court permitted the case to proceed with regard to Tompkins, Bailey, Legenza and Barker's counterclaim concerning their right to proceed with a sale and liquidation.

In early 2005, Tompkins, Bailey, Legenza and Barker contracted on behalf of the partnership to sell the property. Net sale proceeds of approximately $100,000 were paid to the Boyd Circuit Court Clerk to be held pending a court order. At a final hearing on September 1, 2005, the court heard testimony from Hauswald and Staten, from David Legenza[3] who served as the partnership's office manager after Hauswald and Staten withdrew, and from a number of bookkeepers and accountants. John Baldock, C.P.A., testified that since Hauswald and Staten had not made any contributions to the operating expenses of the property after October 2002, they had negative capital accounts in the partnership of approximately $10,000 each, whereas Tompkins, Bailey, Legenza and Barker each had positive capital accounts of approximately $30,000. Following the hearing, the trial court ordered Hauswald and Staten to pay the amounts of their negative accounts to Tompkins, Bailey, Legenza and Barker, to be divided equally among those four partners, and additionally ordered the court clerk to pay the amount held by the clerk equally to Tompkins, Bailey, Legenza and Barker. The end result of these payments was

[3] David Legenza is Dr. Legenza's husband.

that each doctor ended with a capital account in the partnership of approximately $0.[4] Appeal No. 2005-CA-002413-MR followed. The two appeals were subsequently consolidated.

On appeal, Hauswald and Staten argue that the motion for partial summary judgment was improperly granted in that less than ten days notice was given, discovery had not yet been completed, and the trial court failed to consider the depositions of Tompkins, Bailey, Legenza and Barker. We disagree.

As to the timing of the notice of hearing of the motion for partial summary judgment, under CR 56.03 a motion is required "to be served at least 10 days before the time fixed for the hearing." In this case, even if the notice was technically deficient, the trial court did not hear the motion until November 23, which was actually 14 days after the motion was tendered. The trial court did not err in hearing the motion on that day.

Next, Hauswald and Staten argue that the trial court granted partial summary judgment "without acknowledging that [it] failed to consider the depositions noticed and transcripts taken." While we are not sure exactly what Hauswald and Staten are arguing, their argument appears to be that the trial court failed to take into consideration the depositions of Tompkins, Bailey, Legenza and Barker, which were filed in the record, as well as the fact that their own depositions had yet to be taken. We disagree. First, while the depositions of Tompkins, Bailey, Legenza and Barker had not

[4] By making payments to the other partners, Hauswald and Staten increased the amount of their negative capital accounts to $0. By receiving those payments of approximately $20,000 (*i.e.*, approximately $10,000 from each Hauswald and Staten), plus approximately $100,000 from the circuit court clerk, Tompkins, Bailey, Legenza and Barker each had their capital accounts of approximately $120,000 (i.e., $30,000 each) reduced to $0.

been filed at the time the motion for partial summary judgment was filed, they were filed in the record nearly a week prior to the court's hearing or the motion. The four depositions are not voluminous, as they are comprised of a total of 250 double-spaced pages, and Hauswald and Staten make no showing that the trial court did not, in fact, read the depositions. Second, although Hauswald and Staten complain that discovery had not been completed as their depositions had not been taken, they offered no affidavit or other evidence that any factual issue existed with respect to the interpretation of the partnership agreement. *See Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992) (once movant presents to the trial court proper support to show that a genuine issue of material fact does not exist, opponent must present affirmative evidence to show the existence of a genuine issue of material fact).

The issue in this case, as framed by Tompkins, Bailey, Legenza and Barker, was whether the partnership agreement permitted the alternative methods of compensating withdrawing partners. It hardly needs citation that "[t]he construction as well as the meaning and legal effect of a written instrument, however compiled, is a matter of law for the court." *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992). Since the court here was presented with an issue of law, Hauswald and Staten were required to demonstrate to the court that a genuine issue of material fact existed in order to defeat Tompkins, Bailey, Legenza and Barker's summary judgment motion. As they failed to do so, the trial court properly granted summary judgment.

Finally, Hauswald and Staten argue that the trial court erred in continuing to exercise jurisdiction after it made its initial partial summary judgment final and after Hauswald and Staten filed their first notice of appeal on January 18, 2005. Specifically, they complain about the fact that the trial court considered Tompkins, Bailey, Legenza and Barker's motion for clarification, filed on December 21, 2004, and then continued to adjudicate the remaining controversy after the appeal from the partial summary judgment was filed.

We note that in an action involving more than one claim, or in an action involving multiple parties, "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." CR 54.02. However, a recitation of finality does not necessarily make an order or judgment appealable. *Francis v. Crounse Corp.*, 98 S.W.3d 62, 65 (Ky.App. 2002). To be appealable, "there must be a final adjudication upon one or more of the claims in litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding." *Id.*

At its essence, this matter concerns the dissolution of a real estate partnership. In the trial court's December 1, 2004 order, it initially, and correctly, noted that the judgment was interlocutory. Only in response to Hauswald and Staten's motion to alter, amend or vacate did the trial court append finality language. However, at that point the property had not been sold, and the action remained one seeking dissolution of

the partnership and the allocation to all the partners of their respective shares.[5] In fact, in its December 1 order, the trial court expressly stated that "[i]n light of the fact that the Defendants have a pending counterclaim for dissolution of the partnership, IT IS HEREBY ORDERED that this action will remain on the docket for further disposition of any issues related thereto." Although the trial court had adopted the interpretation of the Agreement urged by Tompkins, Bailey, Legenza and Barker, it had not, through its orders and judgments, "conclusively determine[d] the rights of the parties[.]" *Francis,* 98 S.W.3d at 65. Thus, Hauswald's and Staten's initial appeal, filed January 18, 2005, was from a nonfinal order. It follows that the trial court did not lose jurisdiction over the remaining claims, and that it properly proceeded to adjudicate those claims.

The Boyd Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

David O. Welch
Ashland, Kentucky

BRIEF FOR APPELLEES:

Gordon J. Dill
Ashland, Kentucky

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[5] A review of the trial court's Final Order and Judgment, entered November 16, 2005, clearly demonstrates the numerous issues which still had not been resolved by the trial court in December 2004: whether Tompkins, Bailey, Legenza and Barker had authority to sell and convey the property without Hauswald's and Staten's consent; whether Hauswald and Staten were obligated to contribute to the monthly expenses of the partnership after their withdrawal in December 2001; whether Tompkins and Bailey were entitled to a one-sixth interest due to their period of participation in the partnership; whether certain attorney and accounting fees were properly chargeable to the expenses of liquidating the partnership; and, whether goodwill was properly expensed or amortized.