

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001815-MR

AUBREY HALL

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 89-CI-00050

SWAN FORK LAND COMPANY, INC.

APPELLEE

OPINION AND ORDER
AFFIRMING

** ** * ** * ** *

BEFORE: TAYLOR, CHIEF JUDGE; KELLER, JUDGE; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: The heirs of Aubrey Hall appeal from the order of the Letcher Circuit Court overruling their motion to alter, amend or vacate the

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

determination of the court. After our review we affirm the decision of the trial court.

On February 28, 1989, Swan Fork Land Company, Inc., filed a complaint for interpleader and declaratory judgment in the Letcher Circuit Court. In that complaint, Swan Fork noted that it was obligated to pay royalties for coal mining operations related to a specified tract of land. The complaint further noted however that a second lease obligated the payment of royalties to different parties and that the land described in the second lease appeared to be located within the boundaries of the land described in the first lease.

Swan Fork was “uncertain as to whom is entitled to the royalties that may result by the mining of the property” and asked the trial court to “hear the case and determine the person or persons legally entitled to receive said royalties and enter a final judgment directing to whom this Plaintiff shall pay said royalties.” On December 20, 1990, Judge F. Byrd Hogg entered an order certifying need for a special judge assignment as his son and secretary were involved in the case. On December 29, 1990, the Chief Regional Judge of the Mountain Region of Judicial Circuits, Stephan N. Frazier, assigned John R. Morgan to sit as a special judge to preside over the action.

On August 15, 1991, Special Judge Morgan entered an order requiring any money generated by Swan Fork’s mining activities on the disputed property be held in escrow in an interest bearing account. Then, on December 18, 1991, Swan Fork filed a motion seeking to dismiss the action as it had performed all duties

required of it. Special Judge Morgan entered an order on January 10, 1992 dismissing Swan Fork but that order did not specify it was a final order and that there was no reason for delay should an appeal be considered.

The parties, all of whom appeared with counsel for trial, placed on record, a settlement agreement. Special Judge Morgan then entered a judgment pursuant to that agreement on September 20, 1993 determining Pike Letcher Coal Partners owned all coal and mineral rights to the land in dispute and that Aubrey Hall and the heirs had no estate or interest in the coal or mineral rights identified. Their claims were dismissed with prejudice. The judgment further directed the escrowed funds be paid to Pike Letcher Coal Partners. Finally, the court ordered Aubrey Hall and the heirs to execute a quit claim deed but should they fail to do so, the master commissioner was authorized to issue a deed to Pike Letcher Coal Partners. All parties were served a copy of the judgment on September 21, 1993.

The parties did in fact fail to execute a quit claim deed and the master commissioner prepared a deed and executed it on November 18, 1993 granting mineral rights to Pike Letcher Coal Partners. Special Judge Morgan approved that deed on November 26, 1993. On November 23, 1993, Aubrey Hall and the heirs filed a “motion to alter, amend and/or vacate and notice” sixty-two days after service of the judgment. They alleged they were not provided copies of certain deeds prior to the scheduled trial.

On November 22, 1994, Special Judge Morgan entered an order certifying the need for a new special judge. Chief Regional Circuit Judge Stephan

N. Frazier entered an order on December 8, 1994 assigning Bayard Collier to serve as the new special judge. Special Judge Collier scheduled a hearing for February 17, 1995. Special Judge Collier then entered an order on February 23, 1995, overruling the “motion to alter, amend and/or vacate.”

Aubrey Hall and the heirs next filed a motion on April 7, 1995 seeking to have the order from December 8, 1994 assigning a special judge set aside and asked that the case be re-assigned to the regular sitting Judge of the Letcher County Circuit Court. That motion was filed forty-three days after entry and service of the order overruling their motion to alter amend or vacate the judgment and one hundred and twenty-three days after the appointment of the latest special judge.

The record is not clear what caused the case to languish but finally, on September 1, 2004, Judge Frazier, in his capacity as chief regional judge, appointed Perry Circuit Court Judge Denise Davidson to sit as a special judge in the matter. She was succeeded in the office of Perry Circuit Judge by the current judge, William Engle. Special Judge Engle entered an order on June 19, 2008 noting the case had been transferred to Perry County “many years ago and there is no longer a need for a Special Judge[.]” The case was returned to the regular sitting Letcher Circuit Court docket with Judge Samuel Wright presiding.

Judge Wright conducted a hearing on all pending motions on July 9, 2009. By order entered July 21, 2009, the motion to set aside the appointment of Special Judge Collier was overruled. Additionally, the motion to alter, amend

and/or vacate the judgment was overruled because it became “final thirty (30) days after its entry and as a result of the above this Court lost jurisdiction over this case thirty days after the entry of the above Order.” Aubrey Hall and the heirs filed a motion to alter, amend or vacate the order of July 21, 2009 on July 31, 2009. That motion was heard on August 27, 2009 and overruled by order entered September 8, 2009. This appeal followed.

The sole issue brought by this appeal is reliance on the holding of *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407 (Ky. 1992) where it was decided that pursuant to Kentucky Rules of Civil Procedure (CR) 46, a formal exception to the ruling or the order of a court is not required. That rule states:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

CR 46.

Aubrey Hall and the heirs are misguided in their belief that any objection was sufficient regardless of its timeliness or lack thereof. They specifically rely on their objection to the appointment of Special Judge Bayard Collier which they filed on April 7, 1995. What is not addressed is the accurate

determination that the motion was not filed in a timely manner sufficient to preserve the objection.

Judge Collier was assigned as a special judge on December 8, 1994. No objection was heard. At the hearing of February 17, 1995, there was again no objection. It was not until the order entered February 23, 1995 overruling their original motion that Aubrey Hall and the heirs determined an objection was appropriate and so they filed that objection on April 7, 1995. That was four months after the appointment of the special judge. It was eighteen days after the scheduled hearing and twelve days after entry of the order adverse to their position.

“[A] party must timely object or be deemed to have waived any such objection.” *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407, 409 (Ky. 1992). Although involving the appointment of a Special Justice, the Supreme Court’s admonition is just as apropos:

Fairness and good faith toward this Court required any issue regarding the appointment of a Special Justice to be raised at the earliest opportunity and certainly before rendition of an opinion by this Court. [V]oluntary participation, without objection, forecloses it from any retrospective complaint now.

Id.

The order of the Letcher Circuit Court overruling the motions of Aubrey Hall and the heirs is affirmed. Additionally, Swan Fork Land Company filed a motion seeking to dismiss this appeal. It acknowledges in its brief that motion was not well founded in fact. In as much as we have reached a

determination in this opinion on the merits, the motion to dismiss is now moot and is denied.

ALL CONCUR.

ENTERED: May 27, 2011

/s/ Joseph Lambert
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS:

James W. Craft II
Whitesburg, Kentucky

BRIEF FOR APPELLEE:

Charles J. Baird
Pikeville, Kentucky