RENDERED: AUGUST 19, 2011; 10:00 A.M.

NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001237-MR

ROCKLAND GEORGE APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 04-CI-00495

ESTATE OF MARION DOUGLAS GEORGE, DECEASED; HON. MATTHEW J. WIXSOM, ADMINISTRATOR OF THE ESTATE OF MARION DOUGLAS GEORGE, DECEASED; THE ESTATE OF ELOISE T. GEORGE, DECEASED; JAN THOMPSON, NANCY WOLSKE AND VALERIE BOGDAN, CO-ADMINISTRATRICES AND SOLE BENEFICIARIES OF THE ESTATE OF ELOISE GEORGE, DECEASED APPELLEES

OPINION AND ORDER DISMISSING APPEAL

** ** ** ** **

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

CLAYTON, JUDGE: Rockland George appeals from the May 11, 2010, order of the Boyd Circuit Court, which, after a Kentucky Rules of Civil Procedure (CR) 60.02 motion by the Estate of Eloise George, set aside the portion of its March 28, 2008, order requiring the real estate to be appraised, and then, to provide Rockland with the right to purchase the other owners' one-third (1/3) interest within thirty (30) days or, if he does not, to sell the real estate to pay the debts of the Estate. The estates of Marion Douglas George and Eloise George are the appellees. The issue is whether the trial court erred in vacating its May 11, 2010, order under CR 60.02. We dismiss the appeal as interlocutory.

FACTUAL AND PROCEDURAL BACKGROUND

The disposition of a 110-acre piece of property in the Estate of Marion Douglas George, which is owned one-third (1/3) by Eloise George's heirs and two-thirds (2/3) by Rockland George, is the focus of this action. The genesis of the issue is whether the subject real estate is required to be sold by one set of joint tenants, Eloise's heirs, to another joint tenant, Rockland, based on the $105,000 appraisal amount. To address the primary issue, it is necessary to review the protracted history of the case.

Rockland is the son of the decedent, Marion Douglas "Doug" George (hereinafter "Doug"). Eloise T. George was the second wife of the decedent. Prior to his marriage to Eloise, Doug acquired a farm in Boyd County. His acquisition of the farm was represented by two (2) deeds, dated 1940 and 1946, respectively. The farm of approximately 110 acres is located near the Cannonsburg interchange

with Interstate 64. For some time, Rockland lived on property adjoining the farm. Additionally, after Doug's retirement from farming, Rockland used the farm as his own.

In 1993, a guardianship proceeding concerning the care of Doug was initiated in Boyd District Court. Rockland and Eloise were appointed co-guardians. As a part of the process, an inventory and accounting were required. Rockland was dissatisfied with the inventory and accounting as done by Eloise, and filed exceptions to both. Following a hearing, the district court accepted Eloise's inventory and accounting. At that time the district court also dissolved the co-guardianship. It appointed Rockland the conservator of certain real property and various items of personal property. Eloise, however, remained Doug George's guardian.

On December 24, 1994, Doug died testate. According to Doug's will, his entire estate was to pass to Rockland, but Eloise, as the surviving spouse, renounced the will. *See* Kentucky Revised Statues (KRS) 392.080. Further, during the probate action, Rockland alleged that certain property claimed by the Estate was owned personally by him. The district court, however, determined that the ownership of the property had already been litigated in the guardianship action, and therefore, could not be re-litigated in the probate proceeding. In addition, the district court ordered that Eloise was to receive her statutory one-third (1/3) share of the real property, including the farm.

Next, in May 2004, the administrator of Doug's estate, Matthew J. Wixsom, filed a complaint to settle the Estate in the Boyd Circuit Court. Rockland, as well as other persons, replied to the complaint by stating that they had title to certain items of personal property listed on the above-mentioned inventory and that these items were not the property of the Estate. In response to these claims, the Estate filed a motion for summary judgment. It argued that the issue of ownership had been already decided in the guardianship and probate actions, and thus, the doctrine of res judicata barred re-litigation. On November 1, 2005, the Boyd Circuit Court granted the Estate's motion for summary judgment.

Rockland appealed the court's order of summary judgment to the Court of Appeals. His appeal concerned whether the issue of ownership of personal property was correctly interpreted as res judicata. Our Court determined in case No. 2005-CA-002613 that summary judgment in favor of the Estate was improper and remanded the case for an adjudication of the issue of the ownership of the personal property claimed by the Estate. The reasoning behind the decision was that the mere filing of an inventory in an estate proceeding in district court is not determinative of the ownership interests. Therefore, the district court's prior adjudication of the disputed personal property is not entitled to the preclusive effects of res judicata.

After the decision was rendered, the Estate filed notice to depose both Rockland and Eloise to clarify the ownership of the disputed personal property. But Eloise on several occasions failed to appear for the scheduled depositions.

Ultimately, Eloise, through counsel, informed the court that other than making a list of the property that was on the farm in 1993, she had no additional information regarding the ownership of the property.

On March 17, 2008, the Estate of Doug George moved the court for summary judgment as to the ownership of the personal property and for an order directing the real property be appraised and sold. The basis of the motion to sell the real property was the Estate had insufficient funds to pay the expenses of the Estate. Thereafter, the circuit court, on March 28, 2008, entered an order granting the Estate of Doug George's motion for summary judgment as to the ownership of the personal property. It declared that Rockland and the others who claimed ownership of personal property on the farm inventory were, in fact, the owners. The circuit court noted that besides appearing on the inventory compiled by Eloise, no other evidence was presented indicating that the property belonged to the Estate.

Second, the circuit court ordered that the real estate be appraised and sold in order to the pay the expenses of the Estate. Upon the sale of the real estate, the trial court further required that Rockland George be given thirty (30) days to purchase Eloise's one-third (1/3) share at the appraised value. And the trial court ordered that a hearing would be held to ascertain any additional fees of the Estate and whether Eloise would be required to pay any of Rockland's attorney fees as a result of the misrepresentation of the ownership interest of certain personal property, which had been located on the farm.

A close review of the March 28, 2008, order granting summary judgment reveals that while it cites the language "[t]his is a final and appealable order[,]" it does not contain the language "there is no just cause for delay." As an aside, the real estate was already the subject of a separate land partition law suit in another case (No. 97-CI-00055).

An appropriate appraisal of the farm was obtained by the Estate administrator and submitted to the circuit court. The appraisal valued the property at $105,000. Rockland then tendered one-third (1/3) of the appraised value of the property but before the deed could be executed, Eloise George died on October 14, 2008, and her will was probated on December 12, 2008. The will devised her property to her nieces, Valerie S. Bogdan, Jan Thompson, and Nancy Wolske.

Then, on February 17, 2009, almost one year following the March 28, 2008 order, the attorney for Eloise's estate, filed a motion objecting to the notice of purchase and, on the same day, a CR 60.02 motion to set the order aside. In the CR 60.02 motion, the attorney for Eloise George's estate acknowledged that previously the parties had been unable to agree on the payment of the cost for settling Doug's estate. These costs consisted primarily of attorney fees of approximately $14,000. Eloise, however, had already paid $5,000 directly to the Estate's administrator for her pro rata share of the expenses, but Rockland had not paid any of his pro rata share of the Estate expenses. Further, the attorney for the estate of Eloise explained that her heirs were willing to pay their share of any remaining Estate expense out-of-pocket. They maintain that Rockland will not pay

his share of the costs because he wants to acquire their share of the property at its current appraised value, which, according to them, is unreasonable and does not reflect the true value of the property.

According to Eloise's heirs, the real estate that is the subject of this action is worth much more than the previous appraisal value of $105,000. In fact, Eloise's heirs obtained an appraisal that valued the real estate at $265,500, more than twice the amount of the other appraisal. Reasons for the increased value of the real estate is that it lies along Interstate 64, approximately one (1) mile or less from Exit 185 and is near numerous businesses including a Pilot gas station and an office building. It is the heirs' contention that the court exceeded its authority when it granted Rockland an option to purchase Eloise's interest as the court has no authority to force a fee simple owner to sell to a joint owner. Moreover, it contends that because Eloise paid her share of the Estate expenses, her heirs have the right to proceed in the pending land partition action concerning the property.

On May 11, 2010, after holding a hearing, the circuit court entered an order granting the CR 60.02 motion of Eloise's estate. In essence, the circuit court vacated and set aside the portion of the March 28, 2008 order, which ordered an appraisal and then gave Rockland an option, based on that appraisal, to purchase Eloise's interest, which is now her estate's interest. The circuit court reasoned that the previous order deprived Eloise's heirs of due process, and further, that Eloise's heirs had established that they were able to pay the expenses of the Estate without the sale of the property. The circuit court stated that the sole issue remaining in the

consolidated case was the partition action. If the land cannot be partitioned then no alternative would exist but to sell the real estate. The circuit court denied Rockland's motion to alter, amend or vacate this order, and he now appeals from the May 11, 2010 order.

Here again with regard to the language in the May 11, 2010, order a perusal shows not only a lack of any finality language; that is, it does not contain the notation "[t]his a final and appealable order and there is no just cause for delay," but also the trial court clearly contemplates additional proceedings to resolve the issues in the case.

ANAYLSIS

First, a judgment that adjudicates one but not all claims in an action is interlocutory and may not be appealed. *See Peters v. Bd. of Educ.,* 378 S.W.2d 638 (Ky. 1964). The language of CR 54.02 says:

> (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, 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. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Here, the March 28, 2008, summary judgment only resolved the issues of ownership of the personal property and that the real property should be sold to pay the expenses of the Estate, with Rockland having first right of refusal to purchase the real property. It specifically reserved the additional issue of the administrator and Rockland's attorney's fees. The May 11, 2010 order clearly reflected future actions by the trial court. As noted above, even though the summary judgment stated that it was a final and appealable order, it did not recite that there was no just cause for delay. Moreover, the May 2010 order contained no finality language.

To conclude, a circuit court, however, may transform a judgment into a final one by including the aforementioned recitals. *See Derby Road Bldg Co. v. Louisville Gas & Elec. Co.,* 299 S.W.2d 122 (Ky. 1957). Still, it is well-established that both recitations must be included in the judgment in order that it be final and, thus, appealable. *See Vance v. King*, 322 S.W.2d 485 (Ky. 1959). Therefore, the orders are interlocutory, and we do not have jurisdiction to hear the appeal.

CONCLUSION

Accordingly, upon the Court's own motion, it is hereby ORDERED that the appeal is DISMISSED as being interlocutory.

ALL CONCUR.

ENTERED: August 19, 2011

/s/ Denise Clayton
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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Ashland, Kentucky

BRIEF FOR APPELLEE ESTATE OF ELOISE GEORGE:

John R. McGinnis
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BRIEF FOR APPELLEE ESTATE OF MARION DOUGLAS GEORGE:

Matthew J. Wixsom
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