Cite as 2010 Ark. App. 403

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-1170

CARLTON FINNEY
APPELLANT

V.

RICK MEYER, DANNY STEELE, ALLAN DABBS, ED COLLINS, LARRY SMART, KEN GREEN, CAROL "ANN" SANDERS, J.R. LEVART, in their official capacities as aldermen of the Bryant City Council, and PAUL HALLEY, in his official capacity as mayor of the City of Bryant
APPELLEES

Opinion Delivered May 12, 2010

APPEAL FROM THE SALINE COUNTY CIRCUIT COURT
[NO. CV2005-1216-1]

HONORABLE JOHN W. COLE, JUDGE

DISMISSED

LARRY D. VAUGHT, Chief Judge

Appellant Carlton Finney appeals the summary-judgment order entered by the Saline County Circuit Court in favor of appellees Rick Meyer, Danny Steele, Allan Dabbs, Ed Collins, Larry Smart, Ken Green, Carol "Ann" Sanders, and J.R. Levart, in their official capacities as aldermen of the Bryant City Council, and Paul Halley, in his official capacity as mayor of the City of Bryant, Arkansas (collectively, Bryant). Finney argues that as a matter of law Bryant failed to satisfy the annexation-notice provisions found in Arkansas Code Annotated section 14-40-502(b) (Repl. 1998). We hold that Finney failed to comply with Rule 3(e) of the Arkansas Rules of Appellate Procedure—Civil. Therefore, we lack jurisdiction and dismiss the appeal.

In September 2005, Bryant passed an ordinance pursuant to Arkansas Code Annotated

section 14-40-501 *et seq*. annexing certain property into its city limits. Finney (a property owner within the area being annexed) filed suit challenging the annexation. He alleged that Bryant failed to comply with the statutory-notice provisions to landowners of the territory being annexed. The City of Benton through its attorney (who was also representing Finney) filed a motion to intervene in the lawsuit, alleging that Benton and Bryant entered into an agreement in 2005, whereby the cities agreed where their respective planning and annexation boundaries would be situated, and that Bryant's annexation as described in Finney's complaint violated that agreement.

Finney and Bryant filed cross-motions for summary judgment. Finney contended that the undisputed facts established that Bryant did not satisfy statutory-notice provisions, while Bryant contended that the undisputed facts demonstrated that it did. The trial court granted Bryant's motion, denied Finney's motion, and denied Benton's motion to intervene. Only one notice of appeal was filed. In the caption of that notice, Finney was listed as the plaintiff, Bryant as the defendant, and Benton as the intervenor. The notice stated: "Notice is hereby given that the City of Benton, Intervenor, appeals to the Arkansas Court of Appeals from the Order granting Defendants' Motion for Summary Judgment entered on or about July 30, 2009." The notice was signed by counsel identified as "Attorneys for City of Benton, Arkansas."

The appellant's brief was filed on behalf of Finney and contends that the trial court erred in granting summary judgment in favor of Bryant. Bryant argues that Finney's appeal must be dismissed pursuant to Rule 3(e) of the Arkansas Rules of Appellate Procedure—Civil because he failed to file a notice of appeal in this case.

> Rule 3(e) provides in pertinent part as follows:
>
> A notice of appeal or cross-appeal shall specify the party or parties taking the appeal; shall designate the judgment, decree, order or part thereof appealed from and shall designate the contents of the record on appeal.

Ark. R. App. P.—Civ. 3(e). We judge a notice of appeal by what it recites and not what the appellant intended the notice to recite. *Ark. Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 253, 756 S.W.2d 930, 933 (1988); *Garland v. Windsor Door*, 19 Ark. App. 284, 285, 719 S.W.2d 714, 715 (1986). A notice of appeal must state the parties appealing and the order appealed from with specificity, and persons not named as parties to the notice and orders not mentioned in it are not properly before the appellate court. *Shipman*, 25 Ark. App. at 253, 756 S.W.2d at 933. The party taking an appeal is the party specifically recited in the notice of appeal as the appellant. *See Binns v. Heck*, 322 Ark. 277, 281, 908 S.W.2d 328, 330 (1995). However, only substantial compliance with the procedural steps set forth in Rule 3(e) is required. *Duncan v. Duncan*, 2009 Ark. 565, at 4. In dictum, our supreme court said that a notice of appeal that failed to designate the judgment or order appealed from as required under Rule 3(e) was deficient, but such a defect was not necessarily fatal to the notice of appeal. *Duncan*, 2009 Ark. 565, at 4.

Finney claims that *Duncan* answers the jurisdictional question in this case in his favor. There, the supreme court was presented with the certified question of whether a scrivener's error in a notice of appeal—regarding the date of the order appealed from—deprived the appellate court of jurisdiction to hear the appeal under Rule 3(e). The notice stated that the appellant was appealing from an order entered on a specific date; however, no order was entered on that date. *Duncan*, 2009 Ark. 565, at 5. Because the arguments on appeal were "obviously directed" to a

particular order and the notice was timely filed with respect to that order, the court held that the date in the notice of appeal was a scrivener's error, the appellant substantially complied with Rule 3(e), and the notice was not fatally deficient. *Id.* at 5.

Relying upon *Duncan*, Finney argues that the naming of the "City of Benton, Intervenor" as the party taking the appeal in the notice of appeal was merely a scrivener's error and that it is obvious that the appeal was filed on his behalf. He maintains that all of the other components of the notice of appeal are proper and that he substantially complied with Rule 3(e). We disagree.

In *Duncan*, the defect in the notice of appeal did not involve the identification of the party taking the appeal, but rather it involved the identification of the order or judgment from which the appeal was taken. More importantly, in *Duncan*, the order or judgment identified by date in the notice did not exist. Therefore, it was clearly a scrivener's error.[1]

The case at bar is significantly different because it does not clearly involve a scrivener's

[1]Other cases where it was held that a notice substantially complied with Rule 3(e), despite the fact that an appellant identified an incorrect order or judgment in the notice of appeal, are also distinguishable from the instant case for the same reason—they involved the identification of a specific order that did not exist. *Pro-Comp Mgmt., Inc. v. R.K. Enters., LLC*, 372 Ark. 190, 193 n.3, 272 S.W.3d 91, 94 n.3 (2008) (holding that the notice of appeal substantially complied with Rule 3(e), where notice appealed from an April judgment that did not exist, because appellants' arguments on appeal were clearly directed to the June judgment); *Henley v. Medlock*, 97 Ark. App. 45, 47–48, 244 S.W.3d 16, 18–19 (2006) (notice of appeal's reference to the hearing date as the date of the order appealed from rather than the actual date that the order was entered was not fatal to the appeal; also, the correct date of the order was included in another section of the notice); *Farm Bureau Mut. Ins. Co. v. Sudrick*, 49 Ark. App. 84, 85 n.1, 896 S.W.2d 452, 453 n.1 (1995) (notice of appeal's reference to an order that did not exist was not fatal to the appeal where appellant's arguments on appeal were directed at the only order in the case by which the appellant was aggrieved and the notice of appeal was timely filed with respect to that order). In these cases, it was obvious that a scrivener's error occurred.

error. In several places, the notice of appeal identifies the party taking the appeal as someone other than Finney or the plaintiff. It specifically names the "City of Benton, Intervenor" as the party taking the appeal. It lists Benton in the caption as the intervenor. It reflects that the attorney who signed the notice did so in his capacity as "Attorneys for City of Benton, Arkansas," not attorneys for Finney. Because Benton was actually an entity involved in this case, these expressions in the notice of appeal cannot be construed as scrivener's errors. Contrary to Finney's arguments, the notice expresses that the party taking the appeal is Benton—not Finney.

Moreover, in cases where the problem in a notice of appeal was with the identification of one among multiple potential parties, our supreme court has not found substantial compliance with Rule 3(e) and ultimately held that the notice was deficient. *Ozark Acoustical Contractors, Inc. v. Nat'l Bank of Commerce*, 301 Ark. 472, 786 S.W.2d 813 (1990) (dismissing appeal of two parties who were not listed in the only notice of appeal in the record and stating, "While it is proper for two or more parties to file a joint or consolidated appeal, Ark. R. App. P. 3(c), the notice of appeal must 'specify the party or parties taking the appeal . . . '"); *Binns*, 322 Ark. at 281, 908 S.W.2d at 330 (dismissing appellant's appeal because he had no notice of appeal in the record; the only notice of appeal in the record listed another party as the party taking the appeal).

We believe that the instant case is most similar to *Lindsey v. Green*, 2010 Ark. 118, ___ S.W.3d ___, despite the fact that the defect in the notice in *Lindsey* did not involve the naming of the party taking the appeal, but the naming of the order from which the appeal was being taken. In *Lindsey*, Green filed a notice of cross-appeal, appealing from the final order in the case

entered on January 20, 2009. However, on appeal, Green argued that he was appealing the trial court's order denying his motion for costs, which was not included in the final order, but was part of a separate order entered on January 23, 2009. *Lindsey*, 2010 Ark. 118, at 12–13, ___ S.W.3d at ___. Relying upon Rule 3(e), the supreme court held that Green failed to file an effective notice of cross-appeal and dismissed. *Id.* at 13, ___ S.W.3d at ___. In *Lindsey*, the order identified by date in the notice of appeal did exist—it was an entirely separate order that had nothing to do with the issue the appellant argued on appeal. Like *Lindsey*, the notice of appeal filed in the present case identified an entity that does exist, that was in fact involved in the case, and that was listed in the caption.

In sum, we reject Finney's argument that the notice of appeal contains a scrivener's error. The only notice of appeal in the record identifies, in several places, another entity that was involved in the case as the appellant. Therefore, we hold that Finney failed to substantially comply with Rule 3(e), the notice of appeal is fatally deficient as it relates to him, and we dismiss his appeal for lack of jurisdiction.

Dismissed.

GRUBER and GLOVER, JJ., agree.