

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000857-MR

MOBLEY, JOHNSON & ERVIN, PLLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN EWING, JUDGE
ACTION NO. 97-CI-05312

SHEA & GARDNER,
A PARTNERSHIP

APPELLEE

OPINION AND ORDER
DISMISSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Mobley, Johnson & Ervin, PLLC (Mobley) appeals from several orders of the Jefferson Circuit Court which dismissed its claims against Shea & Gardner, a Partnership (Shea). Having reviewed the record on appeal, we find that the orders appealed from are not final and appealable, hence dismissal is in order.

On September 16, 1997, Mobley filed a complaint against Shea and Jeffrey Wigand (Wigand) seeking to collect \$21,341.39 in attorney's fees it alleged entitlement to. Mobley sought a

judgment against Shea and Wigand jointly and severally for the amount claimed. While the record shows that Shea was served with a copy of the complaint it appears that service on Wigand was not obtained.

On October 24, 1997, Shea filed a motion to dismiss Mobley's complaint. Among the grounds raised for relief, Shea argued that "[t]he suit against a partnership in the partnership name, and the absence of any retention of the named Plaintiff as counsel, are fatal procedural flaws." In its response to Shea's motion, Mobley indicated that it intended to amend its complaint to name all of Shea's partners individually. On December 12, 1997, Mobley filed a motion seeking permission to file an amended complaint against "Shea & Gardner, John D. Aldcock, Partner and all other unknown or unidentified partners of the Shea & Gardner Partnership and Jeffery S. Wigand."

On February 18, 1998, the trial court entered an order granting permission to Mobley to file its amended complaint. On the same date, the trial court entered a separate order dismissing Mobley's complaint as to Shea & Gardner, a Partnership only. There was no finality notation on the order of February 18. Mobley's motion to vacate the order of February 18 was denied by the trial court on March 10, 1998. That order indicated that it was a final and appealable order with no just cause for delay. On April 3, 1998, Mobley appealed both orders to this Court.

On June 2, 1999, this Court filed an order directing Mobley to show cause as to why its appeal should not be dismissed

on the ground that it was taken from an interlocutory order. Although our order focused primarily on Wigand's continued presence in the action, in its response to the show cause order Mobley pointed out that both Wigand and the individual partners of Shea were still parties to the action and agreed that the orders it sought relief from were interlocutory in nature. Mobley requested that its appeal be dismissed and that the matter be remanded to allow the suit against the remaining parties to proceed on the merits.

On June 23, 1999, Shea filed a motion with this Court seeking leave to reply to Mobley's response to the show cause order. Shea based its motion on two grounds: (1) Mobley's assertions that it did not intend to proceed against Wigand; and (2) the propriety of Mobley's attempt to proceed against Shea's individual partners.

The jurisdiction of this Court is limited to appeals from final orders and judgments only. Lebus v. Lebus, Ky., 382 S.W.2d 873 (1964). Under CR 54.01, "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02."

The dismissal of Shea in its capacity as a partnership cannot be deemed to be a final and appealable order under CR 54.01. Although the effect of the order does adjudicate the rights of Shea in its capacity as a partnership as Mobley points out, its causes of action still exist against Shea's individual partners and Wigand under the terms of the amended complaint.

Because there was no final adjudication of all the rights of all the parties by the dismissal of the Shea partnership, there is no finality.

As to Shea's allegation that the orders are final by application of CR 54.02, that argument is also without merit.

Under CR 54.02(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 right and liabilities of all the parties.

However, "mere recitation of the 'final and appealable' provision of CR 54.02 is not determinative of the matter." Preferred Risk Mutual Ins. Co. v. Kentucky Farm Bureau, Ky., 872 S.W.2d 469, 470 (1994). "Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable." Hook v. Hook, Ky., 563 S.W.2d 716, 717 (1978). Our review of the record shows that the dismissal of Shea was carried out in light of Mobley's acknowledgment that it could not proceed against Shea in its capacity as a partnership and its subsequent amendment of the complaint to replace Shea

with its individual partners. As there was no adjudication of the actual claims asserted by Mobley against Shea, its partners, or Wigand by the dismissal of Shea, the trial court's order is not final and appealable and the tacking on of the CR 54.02 language does not make it so.

As to Shea's motion to respond, it appears that any response on behalf of Shea will be an attempt to argue the propriety of allowing the case to continue against the individual partners.¹ First, dismissal of Mobley's appeal in favor of allowing its claims to proceed is not and should not be taken as some kind of endorsement of this Court as to the validity of Mobley's claims. Instead, it is merely a recognition that there are outstanding issues which are in need of resolution before this matter is ripe for appeal. Secondly, as there is no ruling from the trial court regarding the propriety of Mobley's claims against Shea's individual partners, there is nothing for this Court to review.

Based on the foregoing, Mobley's appeal is dismissed on the above-stated grounds and this matter is remanded to the Jefferson Circuit Court for further proceedings on Mobley's outstanding claims. Shea's motion to respond to Mobley's response to this Court's show cause order of June 2, 1999, is denied.

¹Shea's motion reads in part: "Appellant's Response is a preview of the tortured arguments that will be made to any trial court if this appeal is dismissed. Clearly, Appellant intends to use any dismissal of this appeal as ratification of its intent to pursue a cause of action against the individual partners of [Shea], not Wigand." (emphasis omitted).

ALL CONCUR.

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ENTERED: September 10, 1999

BRIEF FOR APPELLANT:

Peter F. Ervin
Louisville, KY

BRIEF FOR APPELLEE:

Ann B. Oldfather
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