

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001498-MR

WILLIAM STEVE GIBSON
d/b/a GIBSON BODY SHOP

APPELLANT

v. APPEAL FROM McCREARY CIRCUIT COURT
HONORABLE PAUL BRADEN, JUDGE
ACTION NO. 96-CI-498

DONALD POWELL

APPELLEE

OPINION AND ORDER DISMISSING

** ** * * *

BEFORE: BUCKINGHAM, GARDNER AND KNOX, JUDGES.

GARDNER, JUDGE: William Steve Gibson (Gibson) doing business as Gibson Body Shop (Gibson) appeals from a judgment of the McCreary Circuit Court for Donald Powell (Powell). Gibson argues in part that the trial court's judgment was interlocutory and thus was not final and appealable. After reviewing the record and the judgment below, this Court must agree, and must dismiss Gibson's appeal.

Powell filed an action in November 1996 against Gibson, alleging that Gibson breached a contract between Powell and

Gibson by failing to timely repair Powell's vehicle and by failing to return Powell's vehicle parts and money. On the day Powell filed suit, the court granted Powell a writ of possession authorizing the retrieval of Powell's vehicle parts from Gibson's property. On the following day, the writ was executed, and some of Powell's property was returned to him.

In December 1996, Gibson filed an answer and counterclaim wherein he alleged that Powell made misrepresentations in the discussions leading to the contract and provided inadequate and inappropriate parts impeding his performance of the contract and causing him to incur extra time and expense in trying to fulfill the contract. Gibson specifically sought in excess of \$2,500.00 for the additional work and expense caused by Powell's alleged misrepresentations and in excess of \$2,500.00 for the parts allegedly belonging to Gibson which Powell converted to his own use and possession.

Discovery proceeded, and in April 1997, Powell and Gibson testified in depositions. The court assigned the case for jury trial to be held on July 10, 1997. On June 18, 1997, Gibson's counsel filed a motion to withdraw. On June 24, 1997, the court granted counsel's motion to withdraw and granted Gibson ten days to obtain substitute counsel.

On July 10, 1997, neither Gibson nor counsel for him appeared at trial. The court held a bench trial and stated that it would consider Powell's earlier deposition testimony. The court questioned Powell regarding his damages. In a July 29, 1997 judgment, the court ruled that Powell was entitled to

judgment as a matter of law. The court awarded Powell \$3,500.00 plus interest based upon the amount Powell paid Gibson, \$3,000.00 plus interest for the value of the burned truck that Gibson allegedly disposed of, \$2,100.00 for attorney's fees, \$151.50 for the cost of depositions, and \$50.00 for tow truck expenses. It also awarded Powell a writ of possession to secure the remaining parts that Gibson possessed. The judgment did not directly address Gibson's counterclaim. Gibson subsequently filed a motion to vacate and to set the case for trial. As part of his arguments, he maintained that the trial court's judgment was interlocutory and thus not appealable. The trial court denied Gibson's motion. Gibson has now appealed to this Court.

On appeal, Gibson argues that the trial court's judgment was interlocutory and not appealable, because it did not dispose of his counterclaim and failed to include language required by Kentucky Rule of Civil Procedure (CR) 54.02 and applicable caselaw. He maintains that the interlocutory judgment should be set aside and the issues joined by the complaint, answer and counterclaim set for trial. We have concluded that the trial court's judgment was interlocutory and therefore not appealable.¹

CR 54.02(1) provides,

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,

¹Powell maintains that Gibson failed to adequately preserve this issue below. Gibson raised this issue in his motion to vacate. Therefore, we conclude Gibson adequately preserved the issue.

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.

When the parties present more than one claim for relief in an action, a judgment upon less than all of the claims shall become final and appealable only if the court states in the judgment that it is final and that there is no just reason for delay. Ball v. Beatrice Foods Co., Ky., 395 S.W.2d 594, 595 (1965). This rule applies where a judgment fails to dispose of a counterclaim. Trumbo v. Parsley, Ky., 461 S.W.2d 67 (1970); O'Nan v. Broadus, Ky., 316 S.W.2d 220 (1958).²

In the case at bar, the trial court's judgment did not dispose of Gibson's counterclaim. While the court ruled for Powell and awarded him damages, it did not rule regarding the damages sought by Gibson. Further, while the judgment contained the final and appealable language, it did not state that there was no just reason for delay, as required by CR 54.02 and applicable caselaw. Thus, the trial court's judgment was

²Security Federal Savings & Loan Association of Mayfield v. Nesler, Ky., 697 S.W.2d 136 (1985), relied upon by Powell, is factually distinguishable from the instant case.

interlocutory and not appealable.³ For the foregoing reasons this Court ORDERS that Gibson's appeal is hereby DISMISSED.

ALL CONCUR.

ENTERED: November 24, 1999

/s/ John A. Gardner
JUDGE, COURT OF APPEALS

³We find it unnecessary to address Gibson's other arguments.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Austin Price
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