

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000562-MR

PAUL RICHMOND, AS ADMINISTRATOR
OF THE ESTATE OF MYRTLE RICHMOND, AND
PAUL RICHMOND, INDIVIDUALLY AND AS
HEIR TO THE ESTATE OF MYRTLE RICHMOND

APPELLANTS

v. APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE DANIEL R. SPARKS, JUDGE
ACTION NO. 98-CI-00051

SALLY ANN PATTON AND
DONALD G. PATTON

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Appellants, Paul Richmond, as administrator of the Estate of Myrtle Richmond, and Paul Richmond, individually and as an heir to the estate of Myrtle Richmond,¹ bring this

¹The notice of appeal states that "[t]he name of the Appellant is PAUL RICHMOND, AS ADMINISTRATOR OF THE ESTATE OF MYRTLE RICHMOND and PAUL RICHMOND, INDIVIDUALLY and AS HEIR TO THE ESTATE OF MYRTLE RICHMOND" (hereinafter "Richmond"). In the circuit court, Richmond initiated this action only in his capacity as administrator of the estate of Myrtle Richmond. Thereafter, Richmond attempted to amend the complaint to be named in his capacity as heir to the estate of Myrtle Richmond. The circuit court never ruled upon same; nevertheless, Richmond
(continued...)

appeal from a December 22, 1999, summary judgment of the Johnson Circuit Court.

On February 4, 1998, Richmond, in his capacity as administrator of the estate of Myrtle Richmond, filed a complaint in the Johnson Circuit Court against appellees, Sally Ann Patton and Donald G. Patton (hereinafter referred to as "the Pattons"). It appears that the decedent, Myrtle Richmond, conveyed a certain tract of real property to the Pattons on or about April 12, 1997. Richmond claimed that the deed should be set aside based upon decedent's mental incapacity and the Pattons' undue influence.

On November 9, 1999, the Pattons filed a motion for summary judgment. Ky. R. Civ. P. (CR) 56. On December 16, 1999, Richmond filed a motion to amend the complaint. Richmond wished to also assert the action in his individual capacity as beneficiary and sole devisee of the land under Myrtle's last will and testament. On December 17, 1999, Richmond filed a response to the motion for summary judgment. An order and amended order granting summary judgment was entered on December 21 and 22, 1999, respectively. They are in substance the same except the latter contains the language that it is "final and appealable."² In the December 22 amended order granting summary judgment, the

¹(...continued)
brought this appeal in his capacity as heir to the estate of Myrtle Richmond. Although we harbor grave doubt as to whether such is proper, we shall not address this issue as it has no bearing upon our resolution of this appeal.

²We do not understand the inclusion of Ky. R. Civ. P. 54.02 language as the December 21st order dismissed the entire case. We think this, however, is of no moment inasmuch as if the appeal time expired from December 22nd, it *a fortiori* expired from December 21st.

court determined that there was no material issue of fact presented in the case and that:

"[t]he plaintiff [appellant] has failed to establish a single act which would suggest that Myrtle Richmond lacked sufficient capacity to enter into the subject deed, in fact testimony was made to the Court that the plaintiff [appellant] knew of Myrtle Richmond's plans regarding the conveyance of the property."

On December 29, 1999, Richmond filed a motion to alter, amend, or vacate the December 22 amended order pursuant to CR 60.02. Therein, Richmond argued that material issues of fact exist and thus summary judgment was improper. On February 15, 2000, the circuit court denied Richmond's "Motion to Reconsider the Summary Judgment Order," thus precipitating this appeal.

Richmond filed the notice of appeal with this Court on March 2, 2000. Therein, Richmond states that he was filing the notice of appeal from an order of the Johnson Circuit Court entered February 15, 2000. The February 15, 2000, order of the Johnson Circuit Court merely denied Richmond's CR 60.02 motion to alter, amend, or vacate the December 22 amended order. We do not believe the February 15, 2000, order was an appealable order; rather we view the December 22 amended order granting summary judgment as the final and appealable order in this case.

CR 73.02(1)(a) requires the notice of appeal be filed within thirty days after the date of notation of service of the final judgment or order. The notation of the December 22 amended order was, in fact, December 22, 1999. As a CR 60.02 motion will not toll the running of time for bringing a direct appeal, we must conclude that Richmond was required to file a notice of

appeal thirty days after the December 22 amended order.³ See CR 73.02(e); United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., Ky. App., 737 S.W.2d 708 (1987).

The record clearly reflects that Richmond's notice of appeal was not filed until March 2, 2000. As such, we are of the opinion that Richmond's notice of appeal was untimely filed, thus depriving this Court of jurisdiction over the matter. See Electric Plant Board of the City of Hopkinsville v. Stephens, Ky., 273 S.W.2d 817 (1954).

For the foregoing reasons, the appeal is hereby ORDERED DISMISSED.

ALL CONCUR.

ENTERED: December 22, 2000

/s/ John D. Miller
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANTS:

William W. Tinker, III
Paintsville, Kentucky

BRIEF FOR APPELLEES:

Mitchell D. Kinner
Prestonsburg, Kentucky

³Ky. R. Civ. P. 60.02 specifically states: "A motion under this rule does not affect the finality of a judgment or suspend its operation."