RENDERED: December 29, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002314-MR

ANNIE MARTIN, ADMINISTRATOR OF THE ESTATE OF LAWRENCE MARTIN; CHRYSTAL KNOX; FOREST MARTIN; WEEDEN MARTIN; ELOISE ISON; DOROTHY FOLEY; BRENDA HOOD; JEAN NOLAN; LULA JEAN NOLAN ABNER; AND JOHN ALLEN NOLAN — APPELLANTS

v.

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 96-CI-00139

SHELBY LOWE AND NORA LOWE, HIS WIFE; J. C. MEANS AND SONIA MEANS, HIS WIFE; REVA MEANS ROSE, A WIDOW; LACY MEANS, A WIDOW; GERTRUDE GASTON AND ROBERT GASTON, HER HUSBAND; JAY MEANS, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM MEANS; LACEY EARL MEANS; WILLIAM EARL MEANS; DARLENE FAULKNER; SHIRLEY JEAN BOWEN; JAMES ANDREW MEANS; AND JELENA ASHLEY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: This is an appeal from an order of the Powell Circuit Court denying the appellants' motion to intervene as party defendants in a quiet title lawsuit. The record shows that the appellants were originally named as defendants in the lawsuit and that a warning order attorney was not properly appointed to

serve process on them. Accordingly, the appellants were not constructively served, and we must reverse and remand.

On June 11, 1996, appellees Shelby Lowe and Nora Lowe, husband and wife, filed a complaint in Powell Circuit Court wherein they sought to quiet title to 50 acres of property located on Cat Creek in Powell County. In the caption of the Acomplaint, the Lowes named as the defendants to the lawsuit the following:

> J.C. MEANS AND SONIA MEANS, HIS WIFE[,] REVA MEANS ROSE, WIDOW[,] LACY MEANS, WIDOW [,] GERTRUDE GASTON AND ROBERT GASTON, HER HUSBAND AND THE UNKNOWN HEIRS OF WEEDEN MARTIN, DECEASED

The complaint did not name any defendants in the body, except to note that the plaintiffs believed that the Gastons lived in Cincinnati, Ohio. In the prayer section of the complaint, the Lowes requested that "a warning order attorney be appointed for Gertrude Gaston and Robert Gaston to notify then [sic] of the nature and dependency of this action[.]" The complaint did not specifically request the appointment of a warning order attorney as to "the unknown heirs of Weeden Martin, deceased."

On the same day the complaint was filed, the trial court entered an order appointing Richard L. Fain as the warning order attorney in the case. The order stated that

> The Defendant Gertrude Gaston, Robert Gaston, heirs of Weeden Martin, deceased [ ] is warned to appear and answer the complaint/petition of the Plaintiff Shelby Lowe and Nora Lowe herein filed against him, not later than fifty (50) days after the date of this order."

> Richard L. Fain , a regular practicing attorney of this Court, is appointed to correspond with the Defendant, and to inform him by mail concerning the pendency and nature of this action, and to file his report in the Clerk's office of this Court within fifty (50) days after the date of this order.

Also on June 11, 1996, a civil summons was executed, directed to

> GERTRUE [sic] GASTON AND ROBERT GASTON, HER HUSBAND AND THE UNKNOWN HEIRS OF WEEDEN MARTIN, DECEASED.

On May 12, 1998, the heirs at law of William Means (Lacy Earl Means, William Earl Means, Darlene Faulkner, Shirley Jean Bowen, James Andrew Means, and Jelena Ashley), appellees herein, filed a motion to intervene in the case as third-party defendants on the basis of their contention that William Means died legally possessing a 1/5 interest in the Cat Creek property. Their motion was subsequently granted.

On September 22, 1998, a mediation conference was held among all the parties represented in the case at that time. As a result of the conference, the parties in attendance executed an agreed order which purported to resolve their disputes. On October 15, 1998, the trial court approved the agreed order.

On May 11, 1999, the warning order attorney filed his report. The report reflected that the warning order attorney had taken two actions. First, he sent a letter addressed to "Robert Gaston and Gertrue [sic] Gaston" of Cincinnati, Ohio, notifying them regarding the pending action and that they had 50 days to file their answer. Second, he placed a legal advertisement in the Clay City Times, a Stanton, Kentucky newspaper, for two weeks. The advertisement stated as follows:

[L]egal [A]dvertisement
Anyone having information concerning the location/address of Robert and/or Gertrue [sic] Gaston should contact Richard L. Fain attorney at law, P.O. Box 710, Stanton, Ky. 40380 or call 606-663-2265 within 15 days.

In the meantime, J.C. and Sonia Means and Reva Means Rose filed a motion to compel the Lowes to comply with the agreed order and the Lowes responded that there was a misunderstanding as to the facts of the agreement. On July 27, 1999, the trial court entered an order requiring that the agreed order entered on October 15, 1998, and the mediation agreement underlying it, be given full force and effect as to the dispute regarding the Cat Creek property.

On July 30, 1999, the appellants filed a motion pursuant to CR[1] 24.01 and CR 24.03 to intervene as party defendants, alleging that they had an interest in 50 of the 100 acres of the Cat Creek property. The appellants are the heirs of Lawrence Martin, deceased, and Zannie Nolan, deceased, who, in turn, were the heirs of Weeden Martin. Also on July 30th, the appellants filed a motion pursuant to CR 59.05 requesting that the trial court reconsider its order of July 27, 1999, requiring the agreed order to be given full force and effect. Also on July 30, the Lowes filed a "Motion to Review and Modify Judgment."

On September 3, 1999, the trial court entered an order denying the pending motions.[2] The appellants' motion to

[1]Kentucky Rules of Civil Procedure.

[2]The order denied "[t]he Plaintiffs' motion to reconsider" and "[t]he Plaintiffs Motion to Intervene[.]" Even though the appellants were not the plaintiffs in the circuit court lawsuit,

(continued...)

reconsider was denied on the basis that it "should have been filed within ten (10) days of [the] October 15, 1998 [ ] Powell Circuit Judgment." The appellants' motion to intervene was denied on the basis that "[t]he above styled Plaintiffs' right to bring in other parties is barred by the Judgment entered on October 15, 1998 [ ] and the heirs of Lawrence Martin have no standing in the above-captioned case."[3]

On September 24, 1999, the appellants filed their notice of appeal. The notice was amended on October 1, 1999. The notice identifies the appellants as "the unknown heirs of Weeden Martin," and it is apparently uncontested that the appellants are, in fact, the heirs of Weeden Martin.

First, the appellants contend that since they were not properly served with process, the trial court erred in denying their motion to intervene and their motion to reconsider. The caption of the Lowes' complaint filed on June 11, 1996, named "the unknown heirs of Weeden Martin" as defendants in the case. The appellees did not contest in the trial court, and do not contest on appeal, that the appellants are, in fact, the heirs of Weeden Martin, or that the identity of the appellants was

---

(...continued)
it is apparently understood by the parties that these rulings intended to refer to the appellants' motions.

[3]The motion under consideration was filed by the appellants, i.e. the Weeden Martin heirs, not "the plaintiffs," i.e. the Lowes. The record discloses that the appellants sought intervention at their own initiative. The record does not contain a motion by the Lowes "to bring in other parties." Further, the order refers only to the heirs of Lawrence Martin as having "no standing." It is apparently understood by the parties that the order intended to also include the heirs of Zannie Nolan as having "no standing," i.e. all the heirs of Weeden Martin.

"unknown" to the Lowes' at the time of the filing of their complaint. In summary, the record reflects that it is uncontested that the appellants, as the unknown heirs of Weeden Martin, were named as defendants in this case in the original complaint.[4]

CR 4.05(e) provides that "[i]f a party sought to be summoned is: . . . (e) an individual whose name or place of residence is unknown to the plaintiff [then] the clerk shall forthwith . . . make an order upon the complaint warning the party to appear and defend the action within 50 days."[5] CR 4.07 provides that the warning provided for by CR 4.05(e) is to be made by means of the appointment of a warning order attorney, whose obligation it is to seek to inform the unknown defendant of the action.

Apparently because of a misinterpretation of the ambiguous caption of the complaint, the order entered on June 11, 1993, appointing the warning order attorney applied only to "Gertrude Gaston [and] Robert Gaston, heirs of Weeden Martin deceased[.]"[6] The record reflects that a CR 4.05 warning order was never issued for "the unknown heirs of Weeden Martin, deceased." Based upon the CR 4.05 order that was entered, the warning order attorney in this case understandably did not seek

---

[4] See CR 4.15 and CR 10.01.

[5] See also CR 4.06 and CR 4.15.

[6] It is not clear from the record whether Gertrude and Robert Gaston are, in fact, actually heirs of Weeden Martin, or whether their interest in the Cat Creek property is derived from some other source.

to inform "the unknown heirs of Weeden Martin" of the pending litigation.

Based upon the foregoing, we conclude that CR 4.05 was violated and, as a result, CR 4.06 and CR 4.07 were not complied with. Consequently, although the appellants were named as unknown defendants in the complaint, proper efforts to constructively serve them were not made and they were, in fact, not constructively served.

The warning order rules provide for constructive service on a person unknown to the plaintiff.[7] Strict compliance with the constructive service rules is required.[8] "Appointment of a warning order attorney is a procedural device permitting an action to proceed, in certain circumstances, unknown to the defendant."[9]

In the case sub judice, the warning order rules were not strictly complied with in regard to the appellants, "the unknown heirs of Weeden Martin." We are persuaded that, absent this compliance, it was not proper for the lawsuit to proceed, and that trial proceedings taken in absence of proper compliance with this procedural device must be set aside.[10]

---

[7]Nolph v. Scott, Ky., 725 S.W.2d 860, 861 (1987) (citing CR 4.05, 4.06, and 4.07).

[8]Id. (citing Potter v. Breaks Interstate Park Commission, Ky., 701 S.W.2d 403 (1985)).

[9]Id. at 861-61 (citing Leathers, "Rethinking Jurisdiction and Notice in Kentucky," 71 Ky.L.J. 755, 780 (1982-83)).

[10]If the appellants had been constructively served, their rights in the Cat Creek property could have been adjudicated pursuant to CR 4.11.

Next, the appellants contend that the trial court erred when it ruled that their CR 59.05 motion to reconsider filed on July 30, 1999, was not timely filed. The trial court's order of September 2, 1999, denied the appellants motion to reconsider its July 27th order on the basis that "[t]his motion should have been filed within ten (10) days of October 15, 1998[.]"

As noted above, it was not proper for the lawsuit to proceed absent strict compliance with the warning order rules. Therefore, although the appellees settled their disputes through mediation, the entry of the order on October 15, 1998, purporting to settle all issues in the lawsuit was a premature and improper order. The trial court erred insofar as it relied upon the entry of the agreed order on October 15, 1998, as a basis for denying the appellants' motion to reconsider.

Finally, the appellants contend that the trial court erred when it ruled that the appellants did not have standing to intervene in the lawsuit. We agree. The trial court's order entered on September 2, 1999, denied the appellant's motion to intervene filed on July 30, 1999, on the basis that their right to intervene was "barred by the Judgment entered on October 15, 1998 [ ] and the heirs of Lawrence Martin [and Zannie Nolan] have no standing in the . . . case."

In order for standing to exist, a party must show a legally "'recognizable interest in the subject matter of the suit.'"[11] Furthermore, the party's interest must be determined

[11]General Drivers, Warehousemen & Helpers Local Union No. 89 v. Chandler, Ky. App. 968 S.W.2d 680, 683 (1998) (citing

(continued...)

to be present and substantial as opposed to a mere expectancy.[12] Whether a party has standing is to be decided on the facts of the case.[13]

As noted above, the agreed order entered on October 15, 1998, was not a valid judgment because the warning order rules had not been complied with as to the appellants. Consequently, that "judgment" cannot be used as a basis to deny relief to the appellants, who were, after all, named as defendants in the initial complaint. Moreover, the appellants have standing to intervene as a matter of right because they claim an interest relating to the property which is the subject of the action, the disposition of the action without their participation may impair their ability to protect their interests, and their interests are not adequately represented by the other parties to the action.[14] The trial court erred by denying the appellants' motion to intervene.

In their brief, the appellees contend (1) that the trial court should be affirmed on the basis that Weeden Martin had, in fact, conveyed his interest in the Cat Creek property years before the present lawsuit was initiated; and (2) that the "partial judgment should not be subject to modification" pursuant

---

(...continued)
HealthAmerica Corp. of Ky. v. Humana Health Plan, Inc., Ky., 697 S.W.2d 946, 947 (1985)).

[12]Id.

[13]Id. (citing Plaza B.V. v. Stephens, Ky., 913 S.W.2d 319, 322 (1996)).

[14]See CR 24.01.

to the multiple party rules of CR 54.02(1), or, in the alternative, if CR 54.02(1) was not complied with, then the appeal must be dismissed as interlocutory.

Whether the appellants will ultimately prevail in their claim to an interest in the Cat Creek property is a question to be resolved on remand after the issue has been properly litigated. Whether the appellees' factual assertions regarding the disposition of Martin Weeden's interest in the property is correct is not an issue in this appeal. These assertions have not been litigated. If, however, upon remand, it is determined that the appellants in fact have no interest in the Cat Creek property, the trial court may enforce the September 1998 mediation agreement and the October 1998 agreed order. The appellants' intervention in the case, in and of itself, does not vitiate the agreement between the other parties. For the agreement to be set aside for the other parties, the appellants would have to be deemed to have an interest in the Cat Creek property.

Finally, the order entered on September 3, 1999, was not interlocutory and is final and appealable since it purported to resolve all issues among all the parties and, further, since it included the finality language of CR 54.02.

In summary, we reverse the trial court's order of September 2, 1999, and remand this matter with instructions that the appellants should be permitted to intervene in the case to litigate their interest in the Cat Creek property. If it is subsequently determined that the appellants in fact do not have

an interest in the property, the trial court may thereafter enforce the 1998 mediation agreement and the corresponding agreed order.

SCHRODER, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Robert Graham King
Stanton, KY

BRIEF FOR APPELLEES:

Donna R. Hale
Stanton, KY

Mark H. Metcalf
Lancaster, KY