

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000889-MR

JAMES ALAN CUMMINS AND
DEBORAH CUMMINS

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 99-CI-01365

SDS SERVICES, INC.

APPELLEE

OPINION AND ORDER

DISMISSING APPEAL

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

DYCHE, JUDGE. James Alan Cummins and Deborah Cummins appeal from orders entered by the Franklin Circuit Court granting summary judgment to appellee, SDS Systems, Inc., and denying a subsequent motion to alter, amend or vacate the summary judgment. Upon review, we hereby dismiss this appeal as being taken from nonfinal orders.

Mr. Cummins was injured on a work site on April 20, 1999, when another worker dropped a piece of plywood on him. On November 19, 1999, Mr. Cummins and his wife filed suit naming only the contractor for the job, Frank Haydon Builders, as defendant. In Frank Haydon Builders' answer, it defended the action claiming that:

- Mr. Cummins's injuries were caused by a negligent third party;
- the Cumminses' alleged damages were caused by a superseding or intervening act or failure to act of someone other than Haydon; and
- the Cumminses failed to join a necessary and proper party.

Notwithstanding these claims, the Cumminses did not pursue any discovery to address these defenses. Later in the litigation, Frank Haydon Builders claimed that an entity named SDS Services, Inc., was the actual employer of the alleged negligent worker.¹ Claiming that they had no prior knowledge of SDS's involvement as an employer, on September 7, 2001, the Cumminses filed a motion for leave to file an amended complaint adding SDS as a defendant; the motion was granted.

SDS filed a motion for summary judgment alleging that the Cumminses failed to initiate this action and state a claim for relief within one year of the injury; pursuant to KRS 413.140, the circuit court granted summary judgment to SDS on

¹ We are not aware of any allegations that SDS and Frank Haydon Builders are legally related entities.

July 2, 2002. The final sentence of the Order and Opinion by the circuit court stated that "[t]here being no just cause for delay, this is a final and appealable order."

On July 15, 2002, the Cumminses filed a motion to alter, amend or vacate. While that motion was pending, on December 10, 2002, they filed a motion for leave to file, and tendered therewith, a second amended complaint wherein they asserted claims for misrepresentation and constructive fraud against SDS. On March 26, 2003, the circuit court denied the Cumminses' motion to alter, amend or vacate the earlier Order granting summary judgment to SDS, but failed to address the motion for leave to file the second amended complaint. The Cumminses filed a Notice of Appeal on April 25, 2003.

This court has jurisdiction over appeals from final judgments or orders of circuit courts. KRS 22A.020(1). "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." CR 54.01. "This court on its own motion will raise the issue of want of jurisdiction if the order appealed from lacks finality." Huff v. Wood Mosaic Corp., Ky., 454 S.W.2d 705, 706 (1970). In fact, we are required to do so. Central Adjustment Bureau, Inc. v. Ingram Associates, Inc., Ky. App., 622 S.W.2d 681, 683 (1981), citing Hook v. Hook, Ky., 563 S.W.2d 716 (1978).

Francis v. Crouse Corp., Ky. App., 98 S.W.3d 62, 64 (2002)

(note omitted).

SDS does not argue finality in its brief.² The Cumminses, however, state in their brief at page 2 that “[t]his appeal, noticed April 25, 2003 (Record 270), was filed as a precautionary measure.” Nothing more is said about the issue.

Although the circuit court stated in its Order and Opinion granting summary judgment to SDS that it was final and appealable, this mere recitation is not determinative.

Preferred Risk Mutual Ins. Co. v. Kentucky Farm Bureau Mutual Ins. Co., Ky., 872 S.W.2d 469, 470 (1994). Instead, we must review the substance of the claims and proceedings to make this determination.

The Cumminses’ motion for leave to file a second amended complaint, alleging that SDS fraudulently concealed and/or misrepresented its role as the employer of the alleged negligent employee, remains pending in the circuit court at this time. These allegations go directly to the heart of the

² It should be noted that this Court earlier denied a motion to dismiss by SDS based on lack of finality. However, the basis of that motion was that there remained pending claims against Haydon Builders alone, and therefore all matters in this litigation were not resolved. SDS’s motion did not address the issue of the Cumminses’ pending motion in the lower court to amend the complaint with regard to allegations of fraudulent concealment and misrepresentation by SDS. The ruling of a motion panel of this Court is not binding upon the “merits” panel. Knott v. Crown Colony Farm, Inc., Ky., 865 S.W.2d 326 (1993). We also pause to note that in the Cumminses’ response to SDS’s motion to dismiss in this Court they point out that they requested that the circuit court remove the finality language in their motion to alter, amend or vacate. However, in the order denying that motion, the circuit court did not address the issue of finality language. Because the mere recitation of finality language is not necessarily determinative on the issue, we are not persuaded either by its inclusion in the order granting summary judgment or by the trial court’s failure to address it in its order denying the motion to alter, amend or vacate.

Cumminses' failure to file suit against SDS within the limitation period; thus, there remain unresolved claims pending against SDS in the lower court. Absent resolution of all related claims against SDS, this Court does not have jurisdiction to review the present matter. Further, we do not review "precautionary" appeals. Therefore, this appeal is hereby dismissed as being taken from nonfinal orders.

ALL CONCUR.

_____/s/ R. W. Dyche_____
JUDGE, COURT OF APPEALS

ENTERED: April 16, 2004

BRIEF FOR APPELLANTS:

Robert E. Reeves
Reeves Law Office
Lexington, Kentucky

BRIEF FOR APPELLEE:

Eileen M. O'Brien
Stoll, Keenon & Park, LLP
Lexington, Kentucky