

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002348-MR

RONALD E. HINES
AND ARLETA K. HINES

APPELLANTS

V. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
CIVIL ACTION NOS. 99-CI-00113 AND 01-CI-00324

MARTHA COLLARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: The Kentucky Transportation Cabinet settled an eminent domain action with Ronald and Arletta Hines, the property owners, and Martha Collard and her late husband, Carl, the mortgage holders. In a dispute that arose after the settlement, the circuit court found that the Hineses were bound by a concession made by their lawyer in an earlier court hearing to the effect that the Hineses did not contest their obligation under the real estate mortgage to pay the Collards up to \$10,000.00 per condemned acre. The circuit court granted summary judgment for Martha and ordered that the funds from the

condemnation action be held by the clerk of the court be distributed to her with interest. We agree with the circuit court's judgment and we affirm.

The case has had an unusual history. The circuit court's judgment succinctly summarized the background as follows:

The Hines [sic] were served April 22, 199[9] and April 23, 1999. On May 4, 1999, Defendants Hines timely filed an Answer to the Plaintiff DOT's Petition denying DOT's right to take and constitutionality of the Eminent Domain Act KRS 416.540 to 416.990.

Thereafter, an evidentiary hearing was set for June 15, 1999 by Order. A continuance thereof was set by Order for June 29, 1999. A briefing schedule was set by Order entered July 9, 1999. An Interlocutory Order and Judgment was entered September 9, 1999 with the Commissioner's Award ordered paid to the clerk of the court. The \$43,260.00 award was paid to the clerk of the court pursuant to Order entered September 9, 1999.

By Statement of Exceptions filed September 13, 1999, Defendants Hines excepted to the Commissioner's Award.

On September 15, 1999, Defendants/Cross Claimants Collards made motion for judgment against the Hines on their Crossclaim.^[1]

¹ The Transportation Cabinet named both the Hineses and the Collards as party defendants in the condemnation action. The Collards filed a crossclaim against the Hineses, asserting entitlement to the proceeds of the condemnation up to an amount equaling \$10,000.00 per acre of land condemned. The Transportation Cabinet has settled any claims involving it, leaving only the crossclaim between the Collards and the Hineses to be resolved.

On September 22, 1999, the Court entered an Order reflecting a hearing on the Collard[s'] motion for judgment. Counsel for Hines was present. The Order provides

Due to the indication by counsel for Defendants, Ronald Hines and Arleta Hines, his wife, that an appeal would be filed to the Court's Interlocutory Judgment entered September 9, 1999 and that if the said Defendants were unsuccessful on appeal, that the Defendants, Carl Collard and Mary Collard, his wife, **would be entitled to the proceeds up to \$10,000.00 per acre on the amount of real property being taken by eminent domain**, IT IS HEREBY ORDERED that the Defendant Collards' motion shall be held in abeyance pending either the filing of an appeal by Defendant Hines or the ruling of the appellate court on the appeal.

Thereafter, Hines filed a Notice of Appeal entered September 21, 2000. By Order Dismissing Appeal, the Court of Appeals [] dismissed Appellant Hines [sic] appeal. There-after by separate Order Dismissing Appeal filed May 17, 2001, Hines voluntarily dismissed the appeal as "premature."^[2]

[Following dismissal of the appeal, the action was set for trial by jury on March 15, 2002.]

Finally, on January 9, 2002, over thirty-two (32) months from filing of the Collards' Crossclaim, Ronald E. Hines, as Attorney for Defendants Ronald E. Hines and Arleta Hines, mailed to the clerk of the court for filing without leave of court, a late Answer to Crossclaim. Therein, for the first time (contrary to the prior counsel's

² Following the first dismissal of the appeal, the Hineses moved the Court to reconsider its order dismissing the appeal. That motion was granted and the appeal was reinstated.

representation and agreement before the court), Hines asserted the Collards are not entitled to any of the condemnation proceeds because they are not selling the property secured by the Collards' Mortgage.[³] Hines wants to ignore the 9/22/99 Order and argue the "condemnation" does not constitute a "sale" requiring payment of the \$10,000.00 per acre per terms of the mortgage.

On January 11, 2002, Hines moved for a Declaratory Judgment on the Collards' Cross-claim. Collards' counsel filed a Responsive Memorandum on January 29, 2002 asserting the Default in Answering by Hines as a defense to Hines' motion. Mr. Collard died during the pendency of this action leaving Mrs. Collard as the only necessary party on his behalf.

The circuit court did not consider the Hineses' proffered answer to the counterclaim finding that it was not timely filed and without leave of court. It declined to allow retrospectively its submission, finding the delay of nearly three years not to be the sort of excusable neglect contemplated by Kentucky Rules of Civil Procedure (CR) 6.02. It further concluded that the representation in its earlier order that the Collards would be entitled to condemnation proceeds should the appeal be unsuccessful is binding on the Hineses.

In a motion to reconsider, the Hineses argued that their attorney acted beyond his authority in making this

³ The mortgage documents contained language that \$10,000.00 per acre would be due to the Collards in the event of a sale of the property. The Hineses' theory is that condemnation does not equal a "sale" as contemplated by the mortgage.

representation, that he had not informed them of it, and that he was ultimately disbarred for similar behavior in other cases.⁴ But the circuit court rejected the motion. It found that the Hineses did have adequate notice of the proceedings in which their former attorney participated.⁵ It further rejected the Hineses' claims of excusable neglect premised on the idea that even if there had been a problem with Zimmerman's actions in representing the Hineses, Ronald Hines, an attorney himself, should have brought it to the court's attention sooner than 32 months after the fact and after the court's explanation of its summary judgment in favor of the Collards in which it elaborated on the Hineses' failure to answer the Collards' crossclaim.

On appeal, the Hineses present several arguments challenging the circuit court's summary judgment, some of which should be dealt with summarily.

As an initial matter, there is no merit to the Hineses' argument that the court was unable to enter judgment in favor of the Collards. The Hineses moved the court for judgment

⁴ See Kentucky Bar Ass'n. v. Zimmerman, Ky., 69 S.W.3d 465 (2001).

⁵ The court pointed to the check written by Ronald Hines's Professional Service Corporation for the appellate filing fees as tangible evidence that the Hineses had actual knowledge of the proceedings.

as a matter of law,⁶ which the court acted upon. That the decision was not in the Hineses' favor is not in itself error.

The Hineses' contention that the court should not have granted the Collards' oral motion for summary judgment is similarly lacking in merit. The Hineses are referring to the hearing on September 22, 1999, in which the court explained that the Hineses' attorney conceded that if the appeal taken at that time⁷ was unsuccessful, the Collards would be owed \$10,000.00 per acre. However, contrary to the Hineses' assertion in their current appeal, the court did not grant the Collards' summary judgment at that time. Rather, the court held the matter in abeyance pending the outcome of the appeal and only entered judgment in favor of the Collards in response to a motion by the Hineses.

The Hineses' argument that the Collards' claim was abated misunderstands the nature of the proceedings and the law

⁶ Their motion was styled as a motion for declaratory judgment. However, in that this was not truly a declaratory action, that title is something of a misnomer. The circuit court was correct to treat the motion as one seeking summary judgment under CR 56 in that the Hineses were, in essence, seeking a judgment as a matter of law.

⁷ While their brief does not explain the basis for this appeal, we infer that it was concerned with the Transportation Cabinet's right to take the land through condemnation.

of abatement. The Hineses cite various authorities⁸ for the proposition that multiple lawsuits cannot be prosecuted for the same cause and that the usual rule is that the later-filed action will be abated. Their argument is that because the Collards filed another crossclaim asserting the same theory of relief in a different condemnation action, the instant action was somehow abated.

Where the Hineses' argument must fail is that it does not recognize that the two actions involve different parcels of land. Although the legal theory is the same, thereby allowing a court to consolidate the actions in the interest of convenience or judicial efficiency, the subject matter differs. Simply put, when different parcels of land are sought to be condemned, different causes of action are undertaken with respect to each parcel. Therefore, abatement is inapplicable to the present case.

The Hineses' strongest argument is that their attorney lacked the authority to bind them by his representation that the Collards would be owed in the event the appeal was unsuccessful. They are correct that as a general rule, an attorney lacks the

⁸ *E.g.*, 1 C.J.S. Abatement and Revival § 16 (1985); Himler Coal Co. v. Kirk, 210 Ky. 28, 275 S.W. 371 (1925); White v. Wulschner, 13 Ky. Law Rep. 974 (1982)

ability to bind a client absent the express consent of the client.⁹ However,

... we can conceive of circumstances in which the rights of third parties might be substantially and adversely affected by an attorney possessing apparent authority but who lacked actual authority. If such a contention were made, a court of equity would be empowered to fix responsibility where it belonged to prevent injustice. In most circumstances, however, express authority will be required and in the event of a dispute as to whether the client has given settlement authority, the trial court shall summarily decide the facts.¹⁰

Here, the circuit court found that it would be inequitable and prejudicial to the Collards to set aside a representation made by the Hineses' attorney nearly three years before its final ruling. Furthermore, it decided, as a factual matter (as it was empowered to do under Clark), that it did not accept the Hineses' representations made as part of their motion to reconsider.

Even ignoring their attorney's representation, the Hineses would still be liable to the Collards under a theory of default. The circuit court was not required to accept their untimely counterclaim but had discretion to accept or reject

⁹ Clark v. Burden, Ky., 917 S.W.2d 574, 577 (1996).

¹⁰ *Id.*

it.¹¹ We cannot say the circuit court abused its discretion in refusing to accept a pleading which was nearly three years late. Furthermore, as the court noted, Ronald Hines is himself an attorney, so the court found it implausible that the lengthy delay in filing the answer was due solely to his attorney's malfeasance and remained unknown to him.

Accordingly, the circuit court's judgment is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANTS:

Ronald E. Hines
Elizabethtown, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Donald W. Cottrell
Leitchfield, Kentucky

¹¹ CR 6.02; 15.01.