

RENDERED: March 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000474-MR

ANTHONY BRAY AND KAREN BRAY

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 01-CI-00796

ESTATE OF LULA MAUPIN, DECEASED;
ANGELA KIRBY, FORMER ATTORNEY
IN FACT FOR LULA MAUPIN

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Anthony Bray and Karen Bray have appealed from the Warren Circuit Court's February 3, 2004, order denying Karen's motions to terminate execution proceedings and to quash garnishment proceedings. Having determined that the issue raised in this appeal pertaining to the effect of Anthony's

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

agreed order of release should properly have been raised earlier, we dismiss the above-styled appeal.

In 2001, Angela Kirby filed a verified complaint on behalf of her grandmother, Lula Maupin, alleging fiduciary misconduct on the part of Anthony (Kirby's half-brother and Maupin's grandson) and Karen, his wife. Through their attorney Stephen C. Todd, Anthony and Karen filed a response and a counter-claim to recover damages from the loss of the sale of real property. The matter was assigned to Judge Thomas R. Lewis, and eventually proceeded to trial the next February, during which the parties reached a settlement. Apparently having seen the proposed trial order and judgment, Kirby moved the trial court to set aside the settlement agreement and redocket the case for trial. One week later, counsel for Anthony and Karen moved to withdraw. The same counsel filed a response to Kirby's motion to set aside, requesting that the trial court refrain from ruling on the motion until new counsel had the opportunity to respond. However, the trial court entered the trial order and judgment on May 6, 2002, attaching to it the transcript of statements made at the bench regarding the terms of the settlement. Pursuant to those terms, Anthony and Karen were ordered to quit-claim their interest in the subject real property in Alvaton to Kirby and to continue to make payments on a promissory note secured by that real

property. Karen's father, Jim Pedigo, was ordered to execute an assignment paying Kirby \$17,000, any unpaid amount of monthly payments on the note, and 12% interest. The requisite finality language was included.

Anthony and Karen, still through attorney Todd, filed a motion for relief pursuant to CR 60.02(f), citing their attorney's pending motion to withdraw and Karen's recent automobile accident. Prior to ruling on the pending motions, the trial court entered an order directing the Master Commissioner to sign the deed. In July, Curtis Hamilton filed a notice of substitution of counsel for Anthony and Karen, and he also filed a memorandum in support of the motion to set aside the judgment. In the memorandum, Anthony and Karen argued that Kirby was a non-party to the action, being simply the next-friend of Maupin, so that she individually should not have been awarded any part of the judgment. The trial court finally granted attorney Todd's motion to withdraw in August and then denied the CR 60.02 motion on August 13, 2002. Anthony and Karen filed a timely notice of appeal from the May 6, 2002, trial order and judgment as well as from the August 13, 2002, order denying their CR 60.02 motion for relief.²

During the pendency of the appeal before this Court, Kirby initiated garnishment proceedings against Anthony and

² Appeal No. 2002-CA-001934-MR.

Karen and the sheriff levied on their automobiles. Kirby also filed a motion for sanctions against Karen for her failure to appear at a discovery of assets deposition. In October, Karen moved the trial court to quash the garnishment proceedings, arguing that they had quit-claimed the real property to Kirby and were keeping the payments current on the note. However, they argued that Jim Pedigo was ordered to pay the \$17,000 through an assignment, although the funds had already been distributed before the assignment was received. The following January, the trial court granted Kirby's motion to clarify the judgment to establish that the previously awarded \$17,000 and interest were to be recovered from Anthony and Karen. Later that January, Anthony and Karen moved the trial court to substitute the real party in interest and to transfer the interest in the judgment and the real property. Maupin had died testate the previous July and Anthony had been named the executor of her estate in August. He was also the sole heir under her will.

On March 12, 2003, the trial court entered an Agreed Order releasing Anthony from any responsibility for the payment or satisfaction of the judgment. This came about in conjunction with the settlement of a will contest Kirby initiated. The Agreed Order provided that the judgment terms "shall be deemed settled and satisfied." Kirby was then substituted as the

executrix of the Estate. At this point, Anthony and Karen filed a motion to dismiss their pending appeal, which was granted in May. They also moved to dismiss the case below as settled, arguing that the release and satisfaction as to Anthony also applied to Karen, citing Penrod v. Devine.³ In response, Kirby argued that the release made no mention of Karen so that it did not act as a release to her, citing Richardson v. Eastland, Inc.⁴ By an order entered May 29, 2003, the trial court denied the motion to dismiss, refusing to limit Richardson's application to pre-litigation releases only. Rather than initiating an appeal from this order, Karen filed a Petition for Writ of Prohibition in this Court on July 25, 2003, requesting that Judge Lewis be prohibited from permitting any further collection efforts, as the judgment had been settled. This Court denied relief, and Kirby continued with her execution proceedings.

In January, Karen filed a motion to terminate execution proceedings, again arguing that Anthony's release and satisfaction also acted to release her from paying the judgment. On February 3, 2004, the trial court, now under Judge Steven Alan Wilson, entered an order denying Karen's motions to terminate execution proceedings and to quash garnishment proceedings. However, Kirby was ordered to suspend her collection efforts until January 24, 2004, to allow Karen to

³ 301 Ky. 629, 192 S.W.2d 817 (Ky. 1946).

⁴ 660 S.W.2d 7 (Ky. 1983).

obtain a *supersedeas* bond. Kirby's attorney was also ordered to present to the court the amount still due and payable under the judgment. It is from this order that Anthony and Karen take the present appeal.

On appeal, Anthony and Karen continue to argue that the release and satisfaction as to Anthony also acted as a release and satisfaction as to Karen, so the trial court should have granted her motion to terminate execution proceedings. After pointing out that Anthony and Karen failed to provide ample references to the record on appeal, Kirby similarly continues to argue that the Agreed Order did not serve as a release for Karen. We also note that Kirby filed a motion to dismiss this appeal prior to the filing of briefs, arguing that Anthony and Karen were attempting to revive an earlier defense that had been decided by this court and that the order on appeal did not contain the issue raised. This Court denied the motion, but indicated that the issue could be raised in the briefs.

We agree with Kirby that Anthony and Karen are precluded from raising the release and satisfaction issue in the present appeal. Rather than petitioning this Court for a writ of prohibition, they should have filed an appeal from the order denying the motion to dismiss. We disagree with their assertion in their Petition that the May 29, 2003, order was interlocutory; if that order was interlocutory, which we cannot

hold that it was because it was entered post-judgment, then the present order on appeal would be equally interlocutory. Of course, they did file an appeal from that order rather than filing another petition. Because Anthony and Karen failed to perfect an appeal from the proper order that originally ruled on the release and satisfaction issue, that issue is final and they are precluded from raising that issue here. As an aside, we also note that the original appeal to this Court from the Trial Judgment and Order and the order denying the CR 60.02 motion should probably only have been dismissed as to Anthony, rather than as to both him and Karen as they requested. As Anthony and Karen only argued the release and satisfaction issue in their brief to this Court and did not raise any other issue, this appeal must be dismissed.

Even if we were to review the order from which the appeal was taken, our review would be hindered because of a lack of information in the record concerning what is currently due and owing, if any, on the judgment awarded. There is nothing in the record to establish the value of the settlement between Kirby and Anthony, and there is nothing to establish the value of assets and money that have been levied or garnished. Therefore, there is no information to determine whether the judgment has been satisfied.

For the foregoing reasons, the above-styled appeal is ORDERED DISMISSED.

EMBERTON, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

DATE: March 4, 2005

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

TAYLOR, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I agree with the majority that appellants should have appealed the May 29, 2003, order of the circuit court which denied appellants' motion to dismiss. This motion had been filed after Anthony reached some type of settlement regarding his obligation on the judgment. The order held that an agreed order of release entered on March 12, 2003, as to Anthony only, did not release Karen from liability on the judgment. However, the language in the May 29, 2003, order indicates that the judgment may have been paid or satisfied in full rather than Anthony having only paid the judgment in part. If paid in full, there would exist no remaining claim on that judgment against Karen.

The order on appeal is the circuit court's order entered on February 3, 2004, entered by Judge Wilson, who succeeded Judge Lewis who rendered the May 29, 2003, order. I

would remand this case to the circuit court to determine whether, in fact, the judgment has been satisfied. Judge Wilson's order of February 3, 2004, addressed this issue as there apparently exists confusion as to whether the settlement with Anthony Bray satisfied the judgment in whole or part. If in fact the judgment has been satisfied in full, the circuit court should compel an entry of satisfaction in the circuit court record pursuant to Ky. R. Civ. P. (CR) 79.02(2).

I believe there is a clear distinction under Kentucky law as to whether a judgment has been satisfied versus paid in part. Satisfaction implies payment in full or some other arrangement that extinguishes the judgment debt. Once a judgment has been satisfied in full, a party may not commence further proceedings thereon. 50 C.J.S. Judgments § 685 (1997). In my opinion, the record in this case is unclear as to whether the judgment has been satisfied in full.

For the foregoing reasons, I would remand for further proceedings to determine the status of the judgment.

BRIEF FOR APPELLANT:

Curtis J. Hamilton III
Henderson, KY

BRIEF FOR APPELLEE:

Jerry F. Safford
Bowling Green, KY