RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002621-MR

TERRY FOSTER,
D/B/A DADDIO'S PIZZA — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 04-CI-00903

FIRST FEDERAL LEASING
AND MIDWEST LEASING GROUP — APPELLEES

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.[1]

HENRY, JUDGE: Terry Foster appeals, pro se, from an order of the Bullitt Circuit Court dismissing his action against First Federal Leasing and Midwest Leasing Group. Because we conclude that the order at issue is not final or appealable, we must dismiss the appeal.

[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

When the events leading to this litigation began, Foster - along with his wife, Karen - owned and operated a pizza restaurant in Lebanon Junction, Kentucky. In furtherance of this business, Foster agreed to buy a barbecue cooker from a salesman named Sherman Alex Ollie, who represented that he worked for a vendor named Hickory Equipment Company. To fund this purchase, Ollie contacted Midwest Leasing Group, who sent him a loan application for Foster to sign. Once signed, the application was sent by Midwest Leasing to First Federal for its approval as lessor and funding entity. First Federal approved the application and agreed to fund the purchase; the lease agreement was consequently assigned to First Federal at that time.

On September 21, 1999, Foster signed the lease agreement for a particular "Kook-Rite-Kooker" and also signed a "Delivery and Acceptance Receipt" acknowledging that he had the equipment and was satisfied with it. It does not appear from the record that the cooker had actually been delivered or examined by Foster when he signed these documents, nor does it appear that he reviewed the documents before signing them. The record further reflects that Foster received phone calls from representatives of Midwest Leasing and First Federal during the following days, and that he confirmed to them that he had received the equipment and that it was satisfactory; he also

gave First Federal permission to release the purchase funds to the vendor.

Eventually, Foster discovered that the new "Kooker" with which he was supposed to have been provided was instead a used demonstration model that Ollie had left uninstalled in an outbuilding behind the restaurant, and that the serial number thereon did not match the one in the lease agreement. On November 3, 1999, Foster finally informed First Federal of these facts, but was told that he was still obligated to make his lease payments on the equipment, and that his complaints should be directed to Ollie. However, any efforts by both parties to get Ollie to rectify the problem ultimately failed.

Foster's lease payments subsequently became increasingly delinquent and his lease was eventually referred to a collection attorney. The Fosters filed suit against Ollie and First Federal on January 21, 1998 alleging breach of contract, a violation of KRS[2] 367.170, fraud, and deceit. First Federal counterclaimed for breach of contract and requested as damages the entirety of the amount owed under the lease, as well as costs and attorney's fees. Prior to trial, the Fosters obtained a default judgment against Ollie, but the judgment was left unsatisfied. At trial, the trial court granted directed verdicts dismissing the Fosters' claims for breach of contract

[2] Kentucky Revised Statutes.

and fraud against First Federal; the court also granted a directed verdict on First Federal's breach of contract claim against the Fosters. Foster and his wife were consequently adjudged jointly and severally liable for the entire amount due under the lease and for costs and attorney's fees. The decision was affirmed on appeal by this court, and discretionary review was denied by the Kentucky Supreme Court.

On September 16, 2004, Foster filed another complaint – this time against First Federal and Midwest Leasing. The complaint alleged fraud and deceit by both defendants, in violation of KRS 367.170 and 367.381(2); conspiracy to defraud; defamation; and a violation of KRS 355.2A-201(1)(b). On October 11, 2004, First Federal filed a motion to dismiss Foster's complaint pursuant to CR[3] 12.02(f) "for failure to state a claim upon which relief can be granted based upon the doctrines of res judicata and collateral estoppel." Specifically, First Federal argued that Foster's complaint did nothing more than repeat the allegations made in his first suit against the company; as these matters had already been fully litigated, the aforementioned doctrines prevented him from prosecuting the action again. Midwest Leasing did not file any pleadings with respect to the motion. On November 24, 2004, the trial court entered an order dismissing Foster's action with prejudice "based upon the

[3] Kentucky Rules of Civil Procedure.

doctrines of res judicata and collateral estoppel." This appeal followed.

In reviewing the briefs and the record, an issue that becomes of immediate concern to us is whether the order entered below is a final order from which an appeal lies. The issue is of utmost importance because, without a "final" order or judgment, we do not have the jurisdiction to consider an appeal. Wilson v. Russell, 162 S.W.3d 911, 913-14 (Ky. 2005). Although this issue was not addressed by either the parties or the trial court, as it concerns our jurisdiction we are obliged to consider it. Id. at 913; see also Hubbard v. Hubbard, 303 Ky. 411, 197 S.W.2d 923, 923 (1946).

CR 54.01 provides as follows:

> A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. **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.** Where the context requires, the term "judgment" as used in these rules shall be construed "final judgment" or "final order."

(Emphasis added). The trial court's order of dismissal here reads, in its entirety, as follows: "On Motion of the Defendant, FIRST FEDERAL LEASING, and the Court being otherwise sufficiently advised; IT IS HEREBY ORDERED that this action be and is hereby DISMISSED WITH PREJUDICE based upon the doctrines

of res judicata and collateral estoppel." While the trial court's order is obviously applicable to First Federal - as it was the moving party and a defendant in Foster's first lawsuit – it does not address the fact that Midwest Leasing is also a party-defendant here even though it was not involved in the previous action.[4]

This fact is of particular note because the grounds for the court's order of dismissal were res judicata and collateral estoppel. We have long held that "a res adjudicata estoppel is not available unless the parties to the judgment relied on as such were the same, or that they stand in privity with those who were actual parties to the first judgment." Wolff v. Employers Fire Ins. Co., 282 Ky. 824, 140 S.W.2d 640, 643 (1940), overruled in part on other grounds by Shatz v. American Sur. Co. of N. Y., 295 S.W.2d 809 (Ky. 1956); see also Gish Realty Co. v. Central City, 260 S.W.2d 946, 950 (Ky. 1953) ("As a general rule res judicata can be invoked only where the subsequent litigation is between the parties to the former judgment or their privies, and where their interests were adverse in the prior proceeding."). As collateral estoppel, or "issue preclusion," is a subpart of the doctrine of res judicata, involvement of the same parties is a necessity there

[4] We also note that Midwest Leasing failed to tender any pleadings with respect to First Federal's motion to dismiss and did not file a brief on appeal.

as well. See Buis v. Elliott, 142 S.W.3d 137, 139-40 (Ky. 2004).

As Midwest Leasing was not involved in the first lawsuit and has not been designated as being in privity with First Federal, we must conclude that Foster's action against it cannot be dismissed on the grounds of res judicata or collateral estoppel given the record as it stands before us. Consequently, as the judgment against Foster here was applicable only to First Federal, we are not presented with a situation in which "all the rights of all the parties" have been adjudicated pursuant to CR 54.01. Accordingly, in order for this matter to be appealable as a final judgment, the requirements of CR 54.02 must be satisfied.

CR 54.02(1) provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, **the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final**. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before

> the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Emphasis added). Since the judgment here did not adjudicate the claims between Foster and Midwest Leasing, the order was required to clearly indicate that its judgment for First Federal was final and that a determination was made "that there is no just reason for delay." The omission of even one of these requirements is fatal. Hale v. Deaton, 528 S.W.2d 719, 722 (Ky. 1975). As neither of these requirements was met here, the judgment was therefore not made final under CR 54.02. Id. Accordingly, it was interlocutory and the appeal must be dismissed as premature. McCreary County Bd. of Ed. v. Stephens, 454 S.W.2d 687, 688-89 (Ky. 1968).

It is therefore ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: July 14, 2006

/s/ Michael L. Henry
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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Shepherdsville, Kentucky

BRIEF FOR APPELLEES:

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