RENDERED: DECEMBER 1, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001670-MR

BILL DOUGLAS AND
BERNADINE M. FIRKINS — APPELLANTS

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 01-CI-00200

JIMMIE COFFMAN AND
TERESA COFFMAN — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: SCHRODER, JUDGE; KNOPF,[1] SENIOR JUDGE; MILLER,[2] SPECIAL JUDGE.

SCHRODER, JUDGE: This is an appeal from an order and an amended judgment on remand from the Court of Appeals which awarded court costs to appellee, denied appellant's motion to quash the attachment/execution and entered judgment with interest against

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

[2] Retired Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

appellant's surety on his supersedeas bond. We adjudge that the trial court should have quashed the attachment/execution because the original judgment had been reversed in part by this Court in the prior appeal. Hence, we reverse in part and remand for further proceedings. We affirm as to all other arguments.

In 2000, Jimmie and Teresa Coffman, entered into a contract with Bill Douglas for Douglas to construct a house for the Coffmans. The Coffmans moved into the home after construction was completed in September 2000. Shortly after moving in, the Coffmans began to notice structural problems with the home. Because of these defects, the Coffmans withheld payment on the final $8,981.21 that was due under the parties' agreement.

In 2001, the Coffmans filed suit against Douglas in the Casey Circuit Court, alleging that Douglas carelessly and negligently constructed the residence in an unworkmanlike manner. Douglas counterclaimed for the unpaid balance on the parties' agreement. Pursuant to a bench trial, the court entered judgment in favor of the Coffmans in the amount of $13,964.61 for the negligent construction. The court also awarded Douglas $8,981.21 as the remainder of the balance on the contract. Douglas then appealed to this Court and the Coffmans cross-appealed.

In our opinion rendered November 5, 2004, this Court reduced the judgment for the Coffmans to $9,872.61, adjudging that the $4,941 awarded for repair of the home's center beam was excessive and that the value of the repair was shown at trial to be only $849. This Court affirmed in all other respects, including on the Coffmans' cross-appeal. This Court then remanded the case to the circuit court for further proceedings consistent with the opinion.

On February 7, 2005, the Coffmans filed a bill of costs claiming $360.20 in court costs. On February 10, 2005, Douglas filed exceptions to the Coffmans' bill of costs and filed his own bill of costs claiming $857.80 in court costs. The Coffmans filed exceptions to Douglas' bill of costs on February 16, 2005. On June 15, 2005, Douglas filed a motion for entry of an amended judgment in conformance with the Court of Appeals opinion and for rulings on his exceptions and bill of costs. With this motion, Douglas tendered an amended judgment which reduced the Coffmans' judgment to $9,872.61, recognized the $8,981.21 in his favor, and split the total court costs between the parties equally. Based on the calculations in the tendered amended judgment, Douglas deposited with the circuit clerk the sum of $642.54. Douglas' motion was set to be heard on June 29, 2005.

On June 18, 2005, the Coffmans filed objections to Douglas' motion and tendered amended judgment. The Coffmans claimed they were entitled to $1,611.80, which included the full amount of their court costs ($360.20) and interest from the date of the original judgment. The objections also stated:

> If payment of the judgment is tendered to plaintiff, through their counsel, in good funds, as calculated above, before June 29, 2005, they will enter satisfaction of judgment. If counsel is required to travel to Liberty for this hearing he will bring an execution and garnishment for immediate issuance, increasing both costs and embarrassment of defendant.

On the morning of June 29, 2005, before Douglas' motion was heard, the Coffmans obtained issuance of an attachment of Douglas' bank account in the amount of $1,561.80 plus interest, referencing the original judgment of April 10, 2003. A writ of execution was entered of record by the clerk on June 29, 2005, in the amount of $1,661.41, also referencing the original judgment of April 10, 2003.

At the hearing on Douglas' motion on June 29, 2005, the court orally recognized the corrected amounts of the judgments pursuant to the Court of Appeals opinion, refused to allow any court costs to Douglas, and reduced the court costs claimed by the Coffmans. The Court made no ruling with regard to interest on the judgments. However, no written amended judgment was entered at this time. Pursuant to the above

hearing and the court's ruling, the Coffmans' attorney sent a letter to the sheriff asking that the amount of the execution be reduced to $1,365.78 plus interest, plus $49.97 in collection fees.

Upon learning of the attachment of his bank account, Douglas moved to quash the attachment/execution. The hearing on the motion was set to be heard on July 11, 2005. On July 7, 2005, the Coffmans filed a response to the motion to quash the attachment/execution and moved for entry of judgment against Bernadine Firkins, who was Douglas' surety on the supersedeas bond.

At the July 11, 2005, hearing, the court refused to quash the attachment/execution, but did enter the amended judgment tendered by Douglas which had been redrafted to conform to the trial court's oral rulings of June 29, 2005. At the same time, the court orally ordered that a judgment be entered against Firkins as surety. Upon entry of the amended judgment on July 11, 2005, Douglas deposited with the circuit clerk two checks, one in the amount of $891.40 representing the net judgment, and one in the amount of $296.58 representing the court costs allowed to the Coffmans. Douglas' original check deposited with the clerk for $642.54 was voided and returned to Douglas.

On July 14, 2005, the Coffmans received the checks and demanded interest and additional costs for the garnishment and execution in the amount of $183.35, based on an interest rate of 12%. On July 18, 2005, the court entered an order denying Douglas' motion to quash the attachment/execution and granting the Coffmans' motion to enter judgment against Firkins as surety on the supersedeas bond in the amount of $891.40 plus interest from the date of the original judgment and court costs. On July 20, Douglas paid into court $184.23, the remaining amount due, representing the interest on the judgment. On July 27, 2005, a satisfaction of judgment was entered. On July 29, 2005, the writ of execution was withdrawn because Douglas had paid the judgment in full. Douglas and Firkins now appeal to this Court.

Appellants' first argument is that the trial court abused its discretion by refusing to award any court costs to Douglas who had been partially successful on appeal and whose judgment on his counterclaim was only slightly less than the judgment in favor of the Coffmans. CR 54.04(1) provides that "[c]osts shall be allowed as of course to the prevailing party unless the court otherwise directs; . . . . In the event of a partial judgment or a judgment in which neither party prevails entirely against the other, costs shall be borne as directed by the trial court." The action was initiated by the Coffmans in this case because of Douglas' negligent construction. And

although Douglas did recover the balance on his agreement with the Coffmans, that claim and amount was not contested by the Coffmans in their complaint and was held back only because of Douglas' negligent construction. CR 54.04 is clear that when there is partial recovery by the parties, costs are within the discretion of the trial court. We cannot say that the trial court abused its discretion in awarding costs to the Coffmans and not awarding costs to Douglas.

Douglas next argues that the trial court erred, as a matter of law, by refusing to quash the attachment/execution. Douglas maintains that because the judgment against him was partially reversed on appeal, no execution could issue prior to the entry of an amended judgment in conformity with the opinion of the Court of Appeals. Douglas cites Begley v. Vogler, 612 S.W.2d 339 (Ky. 1981), wherein the Court held that under the old CR 76.30, litigation is still considered pending until the lower court enters a new judgment in conformance with the Court of Appeals mandate in cases where the Court of Appeals directs some additional corrective action to be taken by the trial court. The Coffmans correctly point out that since Begley was rendered, CR 76.30(2)(f) has been amended such that "[n]o mandate shall be required to effectuate the final decision of an appellate court, whether entered by order or by opinion."

In our view, regardless of whether or not an amended judgment in conformance with the Court of Appeals opinion was necessary, the attachment/execution was improper in this case because it referenced the original judgment dated April 10, 2003, which had been reversed in part. The filing of the appeal with the supersedeas bond stays enforcement of the original judgment (CR 73.03; CR 62.03), and because the judgment was reversed in part, it could not serve as the basis for the execution. Thus, it was error for the trial court to deny the motion to quash the attachment/execution.

Douglas also argues that pursuant to KRS 426.030, he had ten days after the amended judgment to satisfy the judgment and no execution should have been issued prior to the expiration of that time. KRS 426.030 provides that "[n]o execution shall issue on any judgment, unless ordered by the court, until after the expiration of ten (10) days from the rendition thereof." While mandates are no longer required to effectuate a decision of this Court under CR 76.30(2)(f), the opinion of this Court remanded the case to the lower court for a judgment reflecting the Court of Appeals decision. Accordingly, we agree with Douglas that he had ten days from the date of the amended judgment to satisfy the judgment. Again we adjudge that the trial court erred in refusing to quash the attachment/execution.

Appellants' remaining argument is that the trial court erred by entering a judgment against his surety on the supersedeas bond where the principal was not in default. Appellants maintain that under CR 73.07, Douglas had 20 days to satisfy the judgment and did, in fact, satisfy the judgment. Therefore, judgment should not have been entered against Firkins as surety. This argument was not raised in the trial court. Thus, it was not preserved for appellate review. CR 59.06.

For the reasons stated above, the order of the Casey Circuit Court is affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:	BRIEF FOR APPELLEES:
Jerry L. Foster Liberty, Kentucky	Richard Clay Danville, Kentucky