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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000644-MR
&
NO. 2006-CA-000884-MR

ROBERT M. CAUDILL — APPELLANT

v.

APPEALS FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 99-CI-00340

GUS THOMAS — APPELLEE

OPINION AND ORDER DISMISSING APPEALS

** ** ** ** ** ** ** **

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: Robert Caudill has twice attempted to appeal from a January 23, 2006 judgment of the Shelby Circuit Court ordering him to specifically perform a real estate sales contract by conveying a lot and building he owns at 528 Main Street in Shelbyville to Gus Thomas, the appellee. The judgment also awards Thomas damages

found to have arisen from Caudill's refusal to perform the sales agreement. The first issue before us is Thomas's motion to dismiss Caudill's appeals as untimely. Because Caudill's former counsel failed to serve CR 59.05 motions in time to interrupt the running of Caudill's appeal time, and because the trial court's striking from the record a mistakenly entered judgment did not reinstitute the period for appeal, we agree with Thomas that Caudill's attempted appeals are untimely and accordingly must be dismissed.

As noted, following an August 2005 bench trial, the trial court entered findings, conclusions, and a judgment on January 23, 2006. The judgment awarded some, but not all, of the damages Thomas claimed. Apparently Thomas had submitted a proposed judgment that awarded additional damages, and on January 30, 2006 the trial court mistakenly entered that judgment as well, without revoking the prior judgment or indicating that the new judgment was to supersede it. On February 2, 2006, Caudill's counsel filed a motion pursuant to CR 59.05 seeking reconsideration of the January 23rd judgment. Accompanying the motion was counsel's certification that the motion had been served that same day on counsel for Thomas. Caudill's counsel filed a second CR 59.05 motion and certification on February 9, 2006, in response to the January 30th judgment. On March 3, 2006, counsel for Thomas responded to the CR 59.05 motions by asserting that they had not been served within the ten-day limitations period. He averred that he did not receive them until March and submitted their accompanying envelopes, which bore postmarks of February 28, 2006 and March 2, 2006 respectively. On March

8, 2006, the trial court denied Caudill's CR 59 motions as "untimely and otherwise unfounded." Thereupon, Caudill hired new counsel and on March 17, 2006 filed a notice of appeal from both the January 23rd and the January 30th judgments (2006-CA-000644-MR). On March 27th, the trial court entered an order striking the January 30th judgment from the record as having been entered in error and noting that the January 23rd judgment represented the ruling of the court. Finally, on April 26, 2006, Caudill filed a second notice of appeal from the March 27th order (2006-CA-000884-MR). Having considered whether either of Caudill's purported appeals is timely, we agree with Thomas that neither is.

CR 73.02 provides that "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment." Our Supreme Court has held that this rule is to be strictly applied:

> [A] tardy notice of appeal is subject to automatic dismissal and cannot be saved through application of the doctrine of substantial compliance. . . .

Excel Energy, Inc. v. Commonwealth Institutional Securities, Inc., 37 S.W.3d 713, 716-17 (Ky. 2000). Caudill notes that his April 26, 2006 notice of appeal was filed within thirty days of the trial court's March 27th order striking the January 30th judgment, an order which Caudill contends reinstated the January 23rd judgment and so reinstituted the period for filing an appeal. The order striking the January 30th judgment, however, did

not have that effect. The trial court's authority to enter its March 27th order comes from CR 60.01, which provides that

> [c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative.

CR 60.01 rulings do not affect the time for appeal:

> [Because] a motion to correct a clerical mistake does not lead to relief from the underlying judgment . . . . the time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment . . . and not from the entry of an amended judgment.

United Tobacco Warehouse, Inc. v. Southern States Frankfort Cooperative, Inc., 737 S.W.2d 708, 709-10 (Ky.App. 1987) (citations and internal quotation marks omitted). Here, the trial court's March 27th order striking the January 30th judgment did not "reinstate" or otherwise alter the January 23rd judgment, but rather removed a cloud from the record that had been introduced by mistake. It did not, therefore, provide Caudill with a new opportunity to appeal from the January 23rd judgment, and thus his April appeal was untimely.

Even if his April appeal must be dismissed, Caudill contends that his March 17th appeal was timely. He notes that under CR 73.02(1)(e) a timely CR 59.05 motion resets the thirty day appeals clock, which recommences upon entry and service of the order disposing of the motion. His March 17th notice of appeal was within thirty days of the trial court's March 3rd denial of his CR 59.05 motions, and thus, he contends, was

timely. As Thomas points out, however, a motion under CR 59.05 must be "*served* not later than 10 days after entry of the final judgment." (emphasis added). An untimely CR 59.05 motion does not restart the time for appeal. *Arnett v. Kennard,* 580 S.W.2d 495 (Ky. 1979); *Marrs Electric Co., Inc. v. Rubloff Bashford, LLC,* 190 S.W.3d 363 (Ky.App. 2006).

Here, the trial court evidently found that although Caudill's CR 59.05 motions had been filed within the ten-day limitations period they were nevertheless untimely because not served within that period. CR 5.02 provides that service may be made by mail and that "[s]ervice by mail is complete upon mailing." CR 5.03 further provides that proof of service "may be by certificate of a member of the bar of the court." *Huddleson v. Murley,* 757 S.W.2d 216 (Ky.App. 1988). Such proof, however, is not conclusive, and where, as here, it is attacked with evidence tending to show that service was not timely, the trial court may disregard the certification. Although generally findings of fact are not required for the disposition of CR 59.05 motions, CR 52.01, where findings are clearly implied, they may be disturbed on appeal only if clearly erroneous. *Id. Cf. Clark Equipment Company, Inc. v. Bowman,* 762 S.W.2d 417 (Ky.App. 1988) (adopting clearly erroneous standard of review for findings underlying CR 11 ruling). In this case, Thomas's proof that the CR 59.05 motions mailed to his counsel had not been postmarked until February 28th and March 2nd was substantial evidence tending to show that the motions had not been mailed, *i.e.* served, until well after February 2nd and February 9th respectively, the deadlines for service. The trial

court's finding that Caudill's CR 59.05 motions were untimely was thus not clearly erroneous, and consequently Caudill's motions did not restart the time for filing an appeal. Because his March 17th notice of appeal came more than thirty days after the January 23rd judgment, or even the mistakenly entered January 30th judgment, his appeal is untimely.

Finally, Caudill suggests that his untimely CR 59.05 motions should be deemed CR 60.02 motions, the denial of which then commenced a thirty-day appeal period. Caudill's motions did not invoke CR 60.02 or its standards. We reject this suggestion, for not only would such a course tend to undermine the time restraints of CR 59 and CR 73, but it would also tend to blur the distinction between CR 59—which is suitable for addressing appealable errors—and CR 60.02—which provides a means for addressing issues that could not be raised in other proceedings. *Faris v. Stone,* 103 S.W.3d 1 (Ky. 2003).

In sum, though time restraints can operate harshly, they are necessary if judicial proceedings are to have any predictability or finality at all. Caudill's former counsel failed to meet the time restraints of CR 59 and CR 73, and the trial court's striking of the mistakenly entered January 30th judgment did not operate to recommence the time for Caudill's appeal. Accordingly, both of Caudill's appeals are untimely and so both must be, and hereby are, dismissed.

ALL CONCUR.

ENTERED: August 3, 2007

/s/ Lisabeth H. Abramson
JUDGE, COURT OF APPEALS

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