

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001100-MR

WAYNE GORDON AND
BRENDA GORDON

APPELLANTS

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 06-CI-00256

ALAN KASSOFF AND KAROLYN KASSOFF,
HUSBAND AND WIFE; AND
SIRVA MORTGAGE, INC.

APPELLEES

OPINION AND ORDER
DISMISSING

** ** *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

DIXON, JUDGE: Wayne and Brenda Gordon (the Gordons) appeal from an order of the Boyle Circuit Court, which granted summary judgment in favor of Alan and Karolyn Kassoff (the Kassoffs) and CitiMortgage, Inc. (CitiMortgage). Because this Court does not have jurisdiction over CitiMortgage, an indispensable party, we dismiss this appeal.

In February 2004, the Gordons entered into an oral agreement with DR Builders for the construction of a custom built home in Boyle County for \$215,000. The Gordons paid DR Builders \$192,000 when construction began. A dispute arose

between the Gordons and DR Builders during construction. The Gordons occupied the residence for one year before relocating to Virginia; however, the house was not conveyed to them and they paid no additional money to DR Builders.¹ On May 31, 2006, the Gordons filed a complaint against DR Builders seeking monetary damages for breach of contract and unjust enrichment. Contemporaneously, the Gordons recorded a lis pendens notice against the property with the county clerk. The next day, June 1, 2006, the Kassoffs purchased the home from DR Builders, secured by a mortgage from Sirva Mortgage, Inc. (Sirva).

In January 2007, the Gordons filed an amended complaint naming the Kassoffs and Sirva as defendants. However, Sirva had assigned its interest in the property to CitiMortgage. CitiMortgage filed an answer, and the parties informally agreed CitiMortgage would participate in the litigation as Sirva's successor in interest. Neither party made a formal motion to substitute CitiMortgage as a defendant.

On April 2, 2007, the Kassoffs and CitiMortgage moved for summary judgment and release of the lis pendens. The Kassoffs and CitiMortgage claimed the lis pendens was improper because the Gordons' complaint sought monetary damages for breach of contract, which did not affect title to the property. On May 10, 2007, following a hearing, the circuit court granted the motion for summary judgment and released the lis pendens.

The Gordons filed a notice of appeal on May 25, 2007, naming the Kassoffs and Sirva as Appellees. Thereafter, on July 9, 2007, the Gordons filed a motion to amend the notice of appeal to name CitiMortgage as an Appellee. On July 23, 2007, the Kassoffs filed a response to the Gordons' motion to amend and filed a motion to dismiss the appeal for failure to name CitiMortgage as an indispensable party.

¹ The Gordons allege they paid an additional \$17,000 to subcontractors on behalf of DR Builders.

On August 1, 2007, the Gordons filed a response to the motion to dismiss. On September 18, 2007, by order of this Court, the pending motions were passed to this panel for consideration.

The Gordons claim that, because there was no formal substitution of parties, their notice of appeal substantially complied with the Kentucky Rules of Civil Procedure (CR) 73.02 by naming Sirva as an Appellee. However, in *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990), our Supreme Court held that the policy of substantial compliance was inapplicable to a defective notice of appeal. *Id.* at 957.

CR 73.03(1) states “[t]he notice of appeal shall specify by name all appellants and all appellees.” In *Stallings*, the Supreme Court affirmed this Court’s dismissal of an appeal for failure to name an indispensable party. *Id.* The notice of appeal, though timely filed, failed to name two intervening parties in the trial court as appellees. *Id.* at 956. Fifty-five days after filing its notice of appeal, the movant filed a motion to amend to name the additional parties. *Id.* at 957. The Supreme Court noted, “A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court.” *Id.* at 957 (citation omitted). The Court concluded that the amendment was not proper where the time for filing the notice of appeal had expired. *Id.* Relying on CR 73.02, the Court found that dismissal of the appeal was appropriate. *Id.*

Although the Gordons contend otherwise, we find *Stallings* controlling under the circumstances presented here. The record shows that the parties agreed that CitiMortgage would participate in the litigation. The Gordons did not dispute that CitiMortgage obtained Sirva’s interest in the property, and the summary judgment order specifically granted relief in favor of CitiMortgage and the Kassoffs. Despite participation by CitiMortgage below, the Gordons named Sirva in the notice of appeal

and then waited nearly one month after the filing deadline to move to amend. Finally, we note that CitiMortgage, as the lien holder, must be a necessary party since the underlying action sought to divest CitiMortgage of its security interest in the property. “An indispensable party is one whose absence prevents the court from granting complete relief among those already parties.” *Commonwealth v. Blincoe*, 34 S.W.3d 822, 824 (Ky. App. 2000).

We conclude the Gordons’ failure to name CitiMortgage as a party to this appeal is a fatal defect. Consequently, the Gordons’ pending motion to amend is denied, and this appeal is ORDERED dismissed.

ALL CONCUR.

ENTERED: August 15, 2008

/s/ Donna L. Dixon
JUDGE, COURT OF APPEALS

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