

RENDERED: SEPTEMBER 12, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002576-MR

ARDIE GREENAMYER

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, SPECIAL JUDGE
ACTION NOS. 99-CI-006915 & 02-CI-007940

LOUISVILLE METRO GOVERNMENT
f/k/a JEFFERSON COUNTY FISCAL
COURT AND LOUISVILLE METRO
SOLID WASTE MANAGEMENT
DISTRICT f/k/a JEFFERSON COUNTY
WASTE MANAGEMENT DISTRICT

APPELLEES

OPINION AND ORDER
DISMISSING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Ardie Greenamyer appeals from an order of the Jefferson Circuit Court entered on November 15, 2006, striking his motion filed

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

under the Kentucky Rules of Civil Procedure (CR) 60.02. Greenamyer sought to set aside or to modify an Agreed Order of the parties entered by the court on February 25, 2003. In denying relief, the court held that Greenamyer's motion was "not a proper motion that can be heard by this Court." (Order of November 15, 2006). Additionally, the court set a deadline at the end of 2006 for Greenamyer to comply with the terms of the Agreed Order. After our review, we are compelled to dismiss this appeal.

From 1994 until 1999, Greenamyer operated a composting and topsoil company at 12900 Avoca Road in Louisville. In 1996, he purchased eighteen acres at that address – five acres of which were dedicated to his business. He sold his business interests in 1999 to Mahoney and Associates, Inc., d/b/a Organic Recycling Solutions. Greenamyer remained the owner of the property during Mahoney's period of occupancy and after Mahoney fell into bankruptcy two years later.

Over a period of several years, Greenamyer had caused and allowed enormous quantities of solid waste to accumulate on the property. As a consequence, the site became an environmental nuisance, a health hazard, and a fire hazard. At least two fires occurred as the result of spontaneous combustion of the decomposing organic matter.

On July 25, 2002, the Jefferson County Fiscal Court and the Jefferson County Waste Management District (which we shall refer to collectively as Jefferson County or Metro Government) issued a Notice of Violation and Order to

Greenamyer, citing the deplorable conditions and public safety dangers as violations of Jefferson County ordinances. On October 21, 2002, Jefferson County brought an action² against Greenamyer in Jefferson Circuit Court to enforce his compliance with the earlier Notice of Violation and Order. Jefferson County claimed that Greenamyer had refused to comply with its numerous requests for him to take remedial action.

The case was consolidated with an earlier action against Greenamyer. Eventually, the parties negotiated an Agreed Order, which the trial court approved and entered into the record on February 25, 2003. The Order set forth a schedule for the removal of all of the waste from the property. According to the terms of the Order, Greenamyer was not to engage in or to allow any composting operations or dumping on the property other than whatever was necessary for the removal of accumulated organic refuse and composting material. He also promised to remove 75% of the existing refuse and composting material from the property by no later than August 30, 2003, and 100% of that material by no later than December 31, 2003. Fines were to be imposed if he failed to comply with these deadlines.

The Order also provided that if Greenamyer did not commence clean-up work by May 1, 2003, he would be required to reimburse Jefferson County for costs of \$2,100.00 that it incurred in cleaning up refuse that had spilled onto Avoca Road from his property. The Order finally provided that if Greenamyer complied

² This action was filed prior to the merger of Louisville and Jefferson County into the Louisville Metro Government. The appellees are now designated as Louisville Metro Government and Louisville Metro Solid Waste Management District.

with its terms and removed the organic refuse and composting material in a timely manner, the action against him would be dismissed. All parties were to assume their own costs and attorneys' fees.

However, this Agreed Order did not settle the matter. Instead, the case was embroiled in litigation for more than three more years at the trial level because Greenamyer failed to comply with the terms of the Order. A series of enforcement hearings commenced in July 2003. On July 14, 2003, the trial court found that Greenamyer had failed to begin to remove refuse from the property by May 1, 2003, and it ordered him to reimburse Jefferson County in the amount of \$2,100.00. On October 20, 2003, the court found that Greenamyer had failed to remove 75% of the refuse from the property by August 31, 2003; it ordered him to pay a fine of \$25.00 per day until 75% of the refuse had been removed.

On March 15, 2004, Jefferson County filed another motion asking the trial court to enforce the Agreed Order and seeking sanctions for his failure to remove 100% of the refuse from the property by December 31, 2003. Before a July 16, 2004, hearing on the motion, the trial court and counsel for the parties discussed the possibility of resolving the matter through a sale of the property. The court issued a detailed order that set forth a schedule and procedures for exploring this possibility on July 29, 2004. Ultimately, however, these efforts were unsuccessful, and a final hearing was held on June 20, 2005, to determine whether Greenamyer had removed 100% of the refuse from the property pursuant to the terms of the Agreed Order.

Soon after this last enforcement hearing, Jefferson County tendered a motion to fully enforce the terms of the Agreed Order and to impose sanctions against Greenamyer for his non-compliance. Jefferson County requested that the trial court: (1) enter a final judgment against Greenamyer for \$2100.00, plus interest, to reimburse the county for clean-up costs that it had previously expended; (2) enter a final judgment against Greenamyer for \$32,850.00, plus interest, in fines due to his failure to meet the waste removal deadlines set forth in the Agreed Order; (3) enter a final judgment ordering Greenamyer to pay a fine of \$50.00 per day, plus interest, for each day after August 15, 2005, that the refuse and composing materials remained on the property; and (4) sentence Greenamyer to confinement in the Jefferson County Jail for contempt pursuant to CR 70 – with the *caveat* that Greenamyer could purge himself of contempt by removing 100% of the waste from the property, by producing receipts to verify removal, and by allowing government officials to inspect the property.

On January 19, 2006, the trial court entered findings of fact, conclusions of law, and an order that granted Jefferson County's motions. The court found that Greenamyer had failed to comply with the terms of the Agreed Order because he had made very little progress in removing waste from the property over a period of more than three years. The court pointed to evidence that rather than removing the refuse, Greenamyer had instead spread the vast majority of it over the expanse of the property. It also noted that Greenamyer had failed to present evidence of any significant removal by producing receipts from contractors

who might have hauled material from the property or receipts from approved sites where Greenamyer himself might have hauled it. Greenamyer utterly failed to demonstrate any efforts to comply with the Agreed Order.

Accordingly, concluding that Greenamyer was subject to the fines set forth in the Agreed Order and in Jefferson County's motion, the court entered a final judgment to this effect. The court also ordered that Greenamyer be sentenced to five days in the Jefferson County Jail for contempt of court because of his repeated and willful failures to comply with the terms of the Agreed Order. The final order of the court was entered on January 19, 2006, bearing the recitation that it was final and appealable. Greenamyer did not file an appeal from this order.

Rather than filing an appeal within thirty days of the order of January 19, 2006, Greenamyer instead waited until the following November and sought to set aside the Agreed Order of February 25, 2003, invoking CR 60.02 on the grounds that: (1) the order was "so vague that it cannot be interpreted without speculation"; (2) enforcement of the order was inequitable because of a change in circumstances; and (3) the government should be estopped from claiming that the condition of the subject property was a nuisance. The order of November 15, 2006, denying Greenamyer's CR 60.02 motion is the subject of this appeal.

We agree that the trial court properly concluded that Greenamyer's CR 60.02 motion was not a proper motion at this stage of the extensive, protracted proceedings. He stated no legitimate basis for the extraordinary remedy provided by CR 60.02.

The purpose of CR 60.02 is to bring before a court errors which (1) had not been put into issue or passed on, and (2) were unknown and could not have been known to the moving party by the exercise of reasonable diligence and in time to have been otherwise presented to the court.

Young v. Edward Technology Group, Inc., 918 S.W.2d 229, 231 (Ky.App. 1995).

All of the issues raised by Greenamyer in support of his CR 60.02 motion either were presented or could have been presented to the trial court soon after the Agreed Order was entered into on February 25, 2003.

More importantly, Greenamyer failed to file a timely appeal from the final court order entered on January 19, 2006. CR 73.02(1)(a) provides that a notice of appeal “shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” It is well established that filing a timely notice of appeal pursuant to CR 73.02 is “mandatory and jurisdictional.”

Burchell v. Burchell, 684 S.W.2d 296, 299 (Ky.App. 1984). Therefore, we lack the jurisdiction to consider an appeal unless it is timely filed. *Id.* That fatal procedural deficiency cannot be cured by recourse to CR 60.02. Greenamyer filed no motions in the trial court seeking to alter, amend, or vacate that order.

We conclude that this appeal must be dismissed. As to the outstanding motions passed to this panel by a previous motion panel of this Court, we hereby GRANT the appellees’ motion to dismiss this appeal and DENY as moot the appellant’s motion to supplement the record.

This appeal is ordered, and is hereby, dismissed.

ALL CONCUR.

ENTERED: September 12, 2008

BRIEF FOR APPELLANT:

Danny Kang
Louisville, Kentucky

/s/ Sara Combs

Chief Judge, Kentucky Court of Appeals

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