RENDERED: DECEMBER 29, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2009-CA-002162-MR

JOHN T. HOLLAND APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE DANNY P. CAUDILL, JUDGE
ACTION NO. 05-CI-00946

GERALD FRASURE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: John T. Holland appeals from the Floyd Circuit Court's order and judgment entered October 22, 2009, correcting an earlier judgment granting summary judgment on liability in favor of the plaintiff below, Gerald Frasure. The corrected judgment awarded Frasure $3,258.00, along with pre- and post-judgment interest, related to his suit to enforce an agreement. We affirm.

We shall briefly set forth the facts in the case, keeping in mind that we are reviewing the entry of a summary judgment. In 2003, Frasure and Holland entered into an agreement regarding the lease/purchase of a 1999 coal trailer. The record contains a short document entitled "Lease purchase agreement" signed by the parties on May 3, 2003. The terms of the agreement are as follows: "I GERALD FRASURE agree to pay the sum of $600.00 per month for the lease of one coal trailer 1999 USTS. The sum of which is to be deducted on the purchase price of the trailer." Shortly after the parties entered into the agreement and Frasure had taken possession of the trailer, Frasure wrecked the trailer and the truck to which it was attached. Frasure filed a claim with his insurance company, Adriatic Insurance Company, which covered damages to both the truck and the trailer. The insurance company approved the claim, and on June 24, 2003, it issued a check for the damages, less the deductible, in the amount of $6,458.00. The check was made payable to both Frasure and Holland.

The parties then entered into the agreement that became the subject of the underlying lawsuit. The agreement states: "I John Holland Agree to refund Three Thousand Two Hundred Fifty Eight to Gerald Frasure on the Adriatic Insurance Co. check #089354. Upon Check Clearing and 1999 USTS Trailer repair Owned by Holland." Holland signed the agreement on July 8, 2003. At that point in time, Holland retook possession of the trailer and used at least a portion of the funds from the insurance proceeds to pay for repairs to the trailer. However, Holland did not refund any portion of the funds to Frasure.

In September 2003, Frasure filed suit against Holland in Floyd District Court seeking $3,258.00, the amount named in the agreement. In his answer, Holland denied that the agreement constituted a contract, as it lacked consideration and was demanded under duress. Along with his answer, Holland filed a counterclaim against Frasure seeking damages for the funds he expended to repair the trailer as well as the loss of value to the trailer as a result of the accident. Over the course of the next two years, the parties engaged in limited discovery, and both parties completed depositions.

On September 16, 2005, the district court transferred the case to the Floyd Circuit Court because the amount of money in controversy exceeded its jurisdictional limitation. The matter lingered in circuit court until the court issued a *sua sponte* notice to dismiss for lack of prosecution in early 2008. The parties responded, and the court granted Frasure's motion to retain the case on the active docket, but it ordered the parties to take substantial steps to prosecute the action within ninety days.

Months later, Frasure filed a motion for summary judgment arguing that the agreement was fully enforceable, and was not the result of extortion, coercion, or duress. In response, Holland asserted that Frasure never made a payment on the trailer pursuant to the earlier agreement, nor did he pay the repair bills for the trailer. Therefore, Holland argued that Frasure was not entitled to any portion of the insurance proceeds. In reply, Frasure contends that there never was an agreement to purchase the trailer, only one to lease the trailer. He states that he

paid the lease amount of $600.00 to Holland as evidenced by a receipt. He further states that Holland's argument concerning the lease/purchase agreement is moot, as it is not the contract sought to be enforced. Rather, it is the July 8, 2003, agreement concerning the insurance proceeds that is at issue.

On December 4, 2008, the circuit court entered an order ruling on Frasure's motion for summary judgment. The order reads as follows:

> This cause having come on for hearing upon the motion of the Plaintiff, Gerald Frasure, for Summary Judgment and with the Court being otherwise fully and sufficiently advised;
>
> IT IS HEREBY ORDERED that the Plaintiff's Motion for Summary Judgment is GRANTED. This case is hereby dismissed with prejudice with each side responsible for its own costs. This is a final order with no just cause for delay in its entry.

Because of the inconsistency in the order that his attorney prepared and tendered to the court, Frasure filed a motion for corrected judgment pursuant to Kentucky Rules of Civil Procedure (CR) 61.01 on December 16, 2008. In the motion, Frasure requested an appropriate order from the court awarding him a judgment for a specific sum ($3,258.00), his recoverable costs, and interest. Holland objected to Frasure's motion, pointing out that the motion was actually a request to alter, amend, or vacate the original order. He asserts that the motion was filed one day too late so that the court had lost jurisdiction to amend the order. Holland further argued that the order was correct as entered and went on to argue the merits of the case. Specifically, Holland argued that Frasure had no legal right

to the insurance proceeds because he never purchased the trailer. In reply, Frasure argued that he timely filed his motion on December 15, not December 16.

On October 22, 2009, the circuit court entered an order and judgment granting Frasure's motion for a corrected judgment and awarding him $3,258.00, interest, and costs. This appeal follows.[1]

On appeal, Holland continues to argue that Frasure's motion for a corrected judgment was untimely and that, accordingly, the circuit court lacked jurisdiction to enter the October 22, 2009, order. Holland also addresses the merits of the summary judgment motion, including the existence of material issues of fact, the statute of frauds, Frasure's failure to fulfill the requirements of the purchase contract, and lack of consideration. In his brief, Frasure argues that Holland is limited to arguing the jurisdictional issue as that was the only issue preserved in his prehearing statement. Therefore, Frasure only addressed that issue. In his reply brief, Holland urges this Court to treat Frasure's failure to address his remaining arguments as a waiver of any objection and to accept his statements of the facts and applicable law.

We shall first address the timeliness of Frasure's motion for a corrected judgment. Frasure concedes in his brief that the motion was a CR 59.05 motion to alter, amend, or vacate. CR 59.05 provides as follows: "A motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be *served* not later than 10 days after entry of the final judgment." (Emphasis added.) The

[1] We note that Holland's counterclaim is still pending; therefore, the circuit court included the necessary language to make the judgment final and appealable pursuant to CR 54.02.

operative date in the statute is clearly the date the motion was served, not the date the motion was filed. *See also Huddleston v. Murley*, 757 S.W.2d 216 (Ky. App. 1988).

In the present case, the circuit court clerk entered the order at issue on December 4, 2008. At that point, the ten-day period began to run. CR 6.01 addresses the computation of time and provides, in pertinent part:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by an applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

The tenth day was December 14th, which was a Sunday that year. By operation of CR 6.01, Monday, December 15th was the tenth day for purposes of any computation of time. The certificate of service on Frasure's motion for a corrected judgment shows that it was served on December 15, 2008. Therefore, pursuant to CR 59.05 and CR 6.01, the motion was timely served, and it was properly filed on December 16, 2008. Accordingly, the circuit court retained jurisdiction to amend its initial judgment.[2]

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[2] Despite our ruling on this issue, we must express our concern with the apparent actions of the clerk in stamping the motion with inconsistent filing dates. However, that issue is rendered moot in light of our holding that the date of service controls in this instance, and we note that there is no discrepancy in the record as to the date the motion was served. Because the motion was timely served pursuant to CR 59.05, the circuit court retained jurisdiction to rule on the motion. Had the date of filing been an actual issue and not mooted by operation of the applicable civil rule, we likely would have been compelled to vacate this matter to the circuit court for a determination of the correct filing date and the circumstances surrounding the discrepancy in the date the motion was filed.

This issue is also the subject of a motion to correct the record on appeal, which was passed to the merits panel on July 16, 2010. Based upon our holding that the motion was timely served on December 15, 2008, Frasure's motion to correct the record is unnecessary. Therefore, we have denied as unnecessary the passed motion to correct the record by separate order entered this date.

Next, we shall address Frasure's argument that Holland is limited to arguing the jurisdictional issue (whether the motion for a corrected judgment was timely filed), as he claims it is the only issue Holland properly preserved for review in his prehearing statement. CR 76.03(8) states that "[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." The Supreme Court of Kentucky in *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), stressed that "failure to observe strict compliance with CR 76.03 is not jurisdictional. This being so, the question is one of substantial compliance with appropriate sanctions primarily dependent upon whether and what prejudice resulted to the opposing party." *Id*. at 197. The Court went on to state that the sanctions provided for in the rule do not "justify a hypertechnical reading of the statement of issues requirement in CR 76.03(3)(i) [now (h)]." *Id*. However, an appellant is still required to actually list the issues that are to be raised in the brief in order to substantially comply with the rule.

In *Sallee v. Sallee*, 142 S.W.3d 697 (Ky. App. 2004), this Court reviewed a judgment in a domestic case. The appellant listed four issues for appeal in his

prehearing statement, which addressed whether the trial judge should have recused himself, the split in custody, the method of child support payment, and the Friend of the Court function. The sole issue the appellant addressed in his brief was whether the trial court abused its discretion in awarding maintenance. The Court held that, "[s]ince that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for 'good cause shown,' CR 76.03(8), this matter is not properly before this court for review." *Id*. at 698. *See also Florman v. MEBCO Ltd. P'ship*, 207 S.W.3d 593 (Ky. App. 2006).

In the present case, Holland presented the following language as his "[b]rief statement of facts, claims, defenses and issues litigated": "Holland sold trailer to Frasure. Frasure didn't pay for trailer. Trailer was wrecked. Frasure demanded ½ the insurance proceeds to endorse check. Frasure sued for ½ of check, Holland sued for price of trailer." In the section directing him to list "issues proposed to be raised on appeal," Holland stated: "Judgment on Frasure's claim was entered in Holland favor. Eleven days later Frasure moved to alter amend or vacate. Court was correct the first time, lost jurisdiction." Frasure contends that Holland's listing of the issues on appeal was not sufficient to preserve anything but the jurisdictional issue. While admitting that the prehearing statement was "perhaps not artfully stated," Holland contends that the prehearing statement as a whole adequately encompassed issues relating to the merits of the summary judgment ruling as well as the jurisdictional issue.

This is a close call, but we hold that Holland has not substantially complied with CR 76.03(8) and, therefore, has failed to preserve his argument relating to the merits of the summary judgment ruling by merely including the phrase "Court was correct the first time[.]" In fact, Holland even admitted in his reply brief that he had "not artfully stated" the issues in his prehearing statement. In order to adequately preserve those issues, Holland should have specifically stated that he was appealing the merits of the circuit court's ruling, in addition to the timeliness issue, which had been properly preserved in his prehearing statement. Accordingly, we decline to review the remaining issues in Holland's brief.

For the foregoing reasons, the order and judgment of the Floyd Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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