

RENDERED: AUGUST 24, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000942-MR

DAVID NOEL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWIINE, JUDGE
ACTION NO. 07-CI-05436

PEOPLES EXCHANGE BANK OF
BEATTYVILLE, KENTUCKY, INC.;
ARMSEY-BLANKENSHIP, LLC;
HAROLD ARMSEY; BETTY ARMSEY;
BILL BLANKENSHIP; BARBARA
BLANKENSHIP; ESTATE OF PAUL
ROSS, JR.; ESTATE OF PAUL
DONALDSON ROSS, SR.; AND
JOYCE WARD ROSS, EXECUTRIX
OF THE ESTATE OF PAUL
DONALDSON ROSS, SR.

APPELLEES

OPINION AND ORDER
DISMISSING APPEAL

** ** * ** * ** *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: David Noel has appealed from the Fayette Circuit Court's denial of his motion for summary judgment and from its order dismissing Peoples Exchange Bank of Beattyville, Kentucky, Inc.'s (the Bank) claims pursuant to Kentucky Rules of Civil Procedure (CR) 41.01(2). Because we hold that Noel's appeal is not properly before this Court, we must dismiss the above-styled appeal.

The underlying consolidated action arose as a result of an enforcement action filed by the Bank to recover funds pursuant to a 2004 promissory note signed on behalf of Armsey-Blankenship, LLC. In 2007, the Bank filed a complaint against Armsey-Blankenship, Harold Armsey, and Betty Armsey (collectively the Armsey Group) seeking \$234,441.23 as well as interest, representing the indebtedness owed pursuant to the promissory note. In early 2008, the Armsey Group filed a counterclaim alleging fraud, negligence, and breach of contract and the duty of good faith and fair dealing. Later that year, the Bank filed a professional negligence suit against the Estate of Paul Ross, the attorney and notary involved with the real estate transaction. The two lawsuits were then consolidated. The Armsey Group also filed a third party complaint against Bill Blankenship, Barbara Blankenship, the Estate of Paul Ross, and David Noel. The Blankenships are the former members of Armsey-Blankenship and David Noel is an appraiser who provided the value of a property at issue. In an amended complaint, the Bank also alleged claims against the Blankenships and Noel.

In November 2009, Noel filed a motion for summary judgment on both the amended complaint and the third party complaint, arguing that there were no disputed issues of material fact and that he was entitled to a judgment as a matter of law. In support of his motion, Noel asserted that the Bank either did not rely upon his valuation of the property or that its reliance was unreasonable, and that there was no evidence that he inflated the value of the lot or committed professional malpractice. Noel contended that the report of Woodrow Wilson, the expert witness identified by the Bank and the Armsey Group, was deficient and irrelevant. In response, the Bank argued that genuine issues of material fact existed regarding its reliance on Noel's valuation, the reasonableness of its reliance, and whether Noel overvalued the property or committed malpractice. The Armsey Group argued that the motion was certainly premature, noting that Mr. Wilson had not completed his report at that time. The court heard arguments from the parties on November 20, 2009, and orally ruled that summary judgment was not appropriate because issues of fact needed to be developed before it could consider whether any liability existed regarding Noel's actions. The court did not enter a written order ruling on this motion.

In 2010, the parties reached an agreement settling all claims except those against the Blankenships. As a part of that settlement, Noel was to pay the Bank \$5,000.00, which he did, but he later refused to sign the settlement agreement. Pursuant to CR 41.01(2), the Bank then moved to dismiss, with prejudice, all claims that were or could have been asserted among the parties to the

action, with the exception of its and the Armsey Group's claims against the Blankenships. At the hearing on April 16, 2010, Noel's attorney withdrew as counsel, and Noel informed the court that he did not agree with the wording of the settlement agreement and that he wanted another attorney to review it, although he acknowledged that he had already paid his portion of the settlement. The court stated that there was no reason for another attorney to review the agreement if the Bank wanted to dismiss its claims. Accordingly, the court granted the motion to dismiss. This appeal now follows.

On appeal, Noel argues that the circuit court improperly dismissed the case pursuant to CR 41.01(2) and that it should have granted his motion for summary judgment. The appellees have disputed Noel's arguments in their briefs.

The Armsey Group and the Ross Estate appellees have also moved to dismiss Noel's appeal, arguing that the issues raised in the appeal are not properly before this Court. We agree.

Regarding the summary judgment issue, we hold that the circuit court's ruling was inherently interlocutory, even if it had been reduced to a written order. In *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky. App. 2004), this Court addressed the interlocutory nature of an order denying a motion for summary judgment:

It is well settled in this Commonwealth that the denial of a motion for summary judgment is interlocutory and is not appealable. In [*Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36 (Ky. App. 1988)], this Court held: "The general rule under CR

56.03 is that a denial of a motion for summary judgment is, first, not appealable because of its interlocutory nature and, second, is not reviewable on appeal from a final judgment where the question is whether there exists a genuine issue of material fact.” There is, however, an exception to this general rule, which was also addressed in *Leneave*: “The exception applies where: (1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom.” [Footnotes omitted.]

The circuit court denied Noel’s motion for summary judgment specifically because issues of fact existed, making his motion premature. Accordingly, Noel is precluded from appealing this ruling.

Regarding the dismissal order, we also agree that this issue is not properly before the Court, first, because Noel is disputing the settlement agreement, not the actual motion to dismiss, and second, because of the holding in *Stairs v. Riley*, 306 Ky. 645, 647, 208 S.W.2d 961 (1948). In *Stairs*, the former Court of Appeals stated:

‘If appellant's position be correct, and the judgment should be reversed, there would be nothing to try upon the return of the case to the circuit court, since the settlement would be a bar to the further prosecution of the action. A reversal would accomplish nothing; an affirmance would benefit nobody.

‘The courts do not try academic questions where neither party will be affected by the result.’

We see no reason why the rule applied in the above case should not be applicable here. The compromise extinguished appellee's cause of action and the judgment. If this judgment was reversed, appellants would not be entitled to a return of the \$2,500, since there were

valuable considerations for the compromise. On the other hand, if the judgment was affirmed, appellee could not benefit thereby because her rights under the judgment have been relinquished. We have before us then nothing but an academic question, the judicial determination of which would affect the rights of neither party.

Id., at 962-63. We believe that the facts of this case fit squarely into the situation described in *Stairs v. Riley, supra*.

Accordingly, having considered the passed motion to dismiss, the supplement to the motion to dismiss, and the responses thereto, the motion to dismiss is GRANTED and the above-styled appeal is ORDERED DISMISSED.

ALL CONCUR.

/s/ James H. Lambert _____
JUDGE, COURT OF APPEALS

ENTERED: AUGUST 24, 2012

BRIEFS FOR APPELLANT:

Lee Van Horn
Lexington, Kentucky

BRIEF FOR APPELLEES ESTATE
OF PAUL ROSS, JR.; JOYCE WARD
ROSS, EXECUTRIX OF THE
ESTATE OF PAUL DONALDSON
ROSS, SR.; ESTATE OF PAUL
DONALDSON ROSS, SR.;
ARMSEY-BLANKENSHIP, LLC;
HAROLD ARMSEY; AND BETTY
ARMSEY:

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Gary W. Thompson
Lexington, Kentucky

Ashley K. Brown
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BRIEF FOR APPELLEE, PEOPLES
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Scott T. Rickman
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