RENDERED: SEPTEMBER 21, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002155-MR

SIDI MOCTAR — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 09-CI-009643

YELLOW CAB OF LOUISVILLE, LLC;
LOUISVILLE TRANSPORTATION COMPANY;
AND PRO CARENT, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,[1] SENIOR JUDGE.

STUMBO, JUDGE: Sidi Moctar appeals from the October 29, 2010 order of the Jefferson Circuit Court. That order granted default judgment against Unknown Defendant and further ordered that a prior order of dismissal, in favor of Yellow

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Cab of Louisville, LLC; Louisville Transportation Company; and Pro Carent, Inc. (collectively "Appellees"), was a final and appealable order. Appellant argues that the trial court lacked jurisdiction at the time the judgment was entered and it is therefore null. We affirm.

In September of 2008, Appellant, who was working as an independent contractor as a taxi cab driver, was shot by a customer and robbed. The assailant was never identified. On September 26, 2009, Appellant filed a complaint with the Jefferson Circuit Court, against Unknown Defendant and Appellees. Therein, Appellant alleged that the negligence of the Appellees, in failing to adhere to company policies and procedures, subjected him to the known risk of violent criminal attack.

Appellees filed a motion to dismiss, in which they argued that any negligence was severed by the superseding and intervening criminal acts of Unknown Defendant, which were unforeseeable. The trial court concluded that there was no evidence in the record to support the argument that the attack on Appellant was foreseeable and therefore granted the motion to dismiss on January 11, 2010. Thereafter, Appellant filed a motion for reconsideration, which was subsequently denied on March 2, 2010. Appellant then appealed to this Court and was assigned Appeal No. 2010-CA-000478-MR.

The parties attended a prehearing conference with this Court, after which it was agreed that neither the trial court's January 11, 2010 order dismissing,

nor its March 2, 2010 order denying reconsideration was final and appealable. On October 14, 2010, all parties filed a joint motion with the trial court requesting a default judgment against the Unknown Defendant and an order designating the January 11, 2010 order as a final and appealable order. Thereafter, a trial court order was entered on October 29, 2010, which granted the motion for default judgment against Unknown Defendant and designated both the October 29, 2010 order and January 11, 2010 order as final and appealable.

Appellant filed a second notice of appeal, from the October 29, 2010 order and was assigned Appeal No. 2010-CA-002155-MR. Appellant then filed a motion to consolidate Appeal Nos. 2010-CA-000478-MR and 2010-CA-002155-MR. On February 16, 2011, Appellant's brief was received by this Court and a letter was issued to Appellant's counsel which read:

> As of the date of this letter, the APPELLANT BRIEF was tendered in the Clerk's office of the Court of Appeals. *The document has been tendered rather than filed* for the following reason(s):
>
> APPELLANT BRIEF WAS RECEIVED AND TENDERED, MOTION SCHEDULED TO CONSOLIDATE APPEALS 2010-CA-478 & 2010-CA-2155.

(Emphasis added). On February 23, 2011, this Court passed the motion to consolidate and directed Appellant to show cause why the original appeal, No. 2010-CA-000478-MR, should not be dismissed as interlocutory. Appellant filed a response to the show cause and on July 15, 2011, this Court issued an order in both appeals, in which it acknowledged that Appellant had conceded Appeal No. 2010-

CA-000478-MR was interlocutory and therefore ordered the appeal be dismissed. The Court also directed the parties "to address in their respective briefs the issue of [] whether the trial court retained jurisdiction to enter the October 29, 2010, final order during the pendency of the appeal from an interlocutory order." Additionally, Appellant's brief, which had been tendered, but not filed, was returned to counsel.

On August 16, 2011, Appellant filed a "response to order" in which he cites to his "filed" brief and also cites to a portion of his previous response to show cause which addressed the issue of the trial court's jurisdiction at the time of the October 29, 2010 order. Appellees thereafter filed a response to "Appellant's response to order" in which it was noted that Appellant was instructed to resubmit his brief, which had been tendered and returned, and to address therein the issue of jurisdiction, but had failed to do so. This Court issued a new order, on November 7, 2011, in which Appellant was ordered to file a brief, within ten days, in compliance with the July 15, 2011 order. Thereafter, Appellant filed a brief on November 16, 2011, and the appeal proceeded.

Appellant's only argument on appeal is that the filing of Appeal No. 2010-CA-000478-MR divested the trial court of jurisdiction, thereby making the October 29, 2010 order a nullity. We do not agree. Traditionally, a timely filed notice of appeal divests jurisdiction from the trial court and vests it in the appellate court. *See, e.g., Young v. Richardson*, 267 S.W.3d 690 (Ky. App. 2008). However, the question presently before us is: do all appeals, regardless if they are appropriately

brought, divest the trial court of its jurisdiction? As an issue of first impression, we hold that they do not.

In support of his argument that the October 29, 2010 judgment is void, Appellant cites to the unpublished Kentucky Supreme Court memorandum opinion of *Linden v. Cunningham*, 2010-SC-000152-MR, 2010 WL 5258474 (Ky. 2010). The facts of *Linden* involve the appeal of an interlocutory appeal of an order denying arbitration. *Id.* The Court held that "the filing of a notice of appeal by the Defendants regarding Linden's claims for injunctive relief divested the circuit court of jurisdiction to rule on those claims while the appeal was pending." *Id.* However, the case presently before us is distinguishable from *Linden*. *Linden* filed an appropriate interlocutory appeal, from an order denying arbitration, pursuant to Kentucky Revised Statutes (KRS) 417.220. However, Appellant's Appeal No. 2010-CA-000478-MR is not an appeal from an order denying arbitration. Instead, Appellant conceded that the appeal was an improper interlocutory appeal and it was therefore ultimately dismissed by this Court. The law is clear that only certain appeals are timely and appropriately brought. *See* CR 73.02; KRS 22A.020; KRS 417.220. When an appeal is inappropriately brought, the trial court is not divested of its jurisdiction during the time between the filing of the notice of appeal and the appeal's dismissal. To find otherwise would allow parties to purposefully file inappropriate interlocutory appeals for the sole purpose of delaying final judgments from the trial court. This is not a practice which the Court is interested

in advancing. Accordingly, in the case presently before us, the trial court possessed the requisite jurisdiction to enter the October 29, 2010 judgment.

Although no additional arguments were raised in Appellant's brief, Appellees' brief addresses the substance of the October 29, 2010 order and further argues that Appellant has waived arguing against the same. Thereafter, in his reply brief, Appellant makes several new arguments. He first maintains that Appellees' brief was untimely and that it should therefore be stricken. However, no motion to strike Appellees' brief has been filed with this Court. Accordingly, that argument is without merit. Appellant next argues that he has already addressed the substantive issues of the October 29, 2010 order in "a brief filed on February 15, 2011," and that he has acted in perfect compliance with this Court's July 15, 2011 order by filing a brief addressing only the jurisdictional issue. We disagree.

It has been made clear to Appellant that the February 15, 2011 brief was tendered and never filed with this Court. A letter, dated February 16, 2011, was sent to counsel clearly stating that the brief had not been filed. Thereafter, the brief was returned to counsel, with clear instructions that a new brief was to be submitted. Although we ordered that the new brief include discussion of the jurisdictional issue, it was never stated that it should address *only* the jurisdictional issue. Additionally, Appellees filed a response to Appellant's August 16, 2011 "response to order," in which it was again clearly, and accurately, stated that the February brief had never been filed and had, in fact, been returned to Appellant. This Court then issued another order instructing that Appellant file a brief. Our

record is very clear that no brief, other than the November 16, 2011 brief, has been *filed*. Accordingly, any arguments that were not raised in Appellant's November 16, 2011 brief are not presently before this Court and are thereby waived.

For the foregoing reasons, the October 29, 2010 order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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