

RENDERED: OCTOBER 12, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000772-MR

JOSEPH L. CISSELL

APPELLANT

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 10-CI-00648

WOODLAWN SPRINGS
HOMEOWNERS ASSOCIATION

APPELLEE

OPINION
DISMISSING APPEAL

** ** * * * * *

BEFORE: CLAYTON, STUMBO, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Appellant, Joseph L. Cissell, pro se, appeals from two summary judgments granted in favor of Woodlawn Springs Homeowners Association. Because this appeal was untimely filed, we are constrained to dismiss the appeal.

On February 7, 2011, the Nelson Circuit Court entered summary judgment in favor of Woodlawn dismissing Cissell's claims relating to a dispute over a restrictive covenant contained in the deed to Cissell's property. On March 18, 2011, the trial court granted summary judgment in favor of Woodlawn on its counterclaim for unpaid dues. On March 29, 2011, Cissell filed a motion to vacate the summary judgments pursuant to Kentucky Rules of Civil Procedure (CR) 59.05. In an order entered on April 21, 2011, the trial court denied the motion. This appeal followed.

CR 59.05 provides that "[a] motion . . . to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." This Court has stated that "a trial court loses control of a judgment ten (10) days after the entry of the judgment, except to the extent an authorized, timely motion under CR 59 is made." *Marrs Elec. Co., Inc. v. Rubloff Bashford, LLC*, 190 S.W.3d 363, 367 (Ky. App. 2006)(quoting *Kentucky Farm Bureau Ins. v. Gearhart*, 853 S.W.2d 907 (Ky. App. 1993)). When a party fails to timely file a motion pursuant to CR 59.05, the thirty (30) day time period for filing an appeal does not toll. *Id.*; CR 73.02(1)(e).

The final and appealable summary judgment was entered on March 18, 2011. The date of notation of service of the judgment was also March 18, 2011. Cissell filed his CR 59.05 motion on March 29, 2011, eleven (11) days after entry of the judgment. The trial court acknowledged that the motion was untimely filed, but nevertheless entertained the merits of the motion and denied the motion

in an order entered on April 21, 2011. The trial court was without jurisdiction to entertain the untimely CR 59.05 motion. *Marrs*, 190 S.W.3d 363. Therefore, the thirty (30) day time period for filing an appeal began to run on March 18, 2011. Cissell filed his notice of appeal on April 29, 2011, more than thirty (30) days from the date of notation of service of the final judgment. “Filing a notice of appeal within the prescribed time frame is still mandatory and failure to do so is fatal to an appeal.” *Fox v. House*, 912 S.W.2d 450, 451 (Ky. App. 1995).

Accordingly, we must dismiss the appeal as untimely.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph L. Cissell, pro se
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Mark E. Edison
Shepherdsville, Kentucky