

RENDERED: JULY 5, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001102-MR

JEFF METCALF D/B/A
JEFF METCALF CONSTRUCTION

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00126

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION AND
KENTUCKY DIVISION OF
UNEMPLOYMENT INSURANCE

APPELLEES

and NO. 2011-CA-001221-MR

KENTUCKY DIVISION OF
UNEMPLOYMENT INSURANCE

CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00126

JEFF METCALF, D/B/A
METCALF CONSTRUCTION

CROSS-APPELLEE

and

NO. 2011-CA-001222-MR

KENTUCKY UNEMPLOYMENT
INSURANCE COMMISSION

CROSS-APPELLANT

v. CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 11-CI-00126

JEFF METCALF, D/B/A
METCALF CONSTRUCTION

CROSS-APPELLEE

OPINION AND ORDER
DISMISSING

** ** * ** * ** *

BEFORE: LAMBERT, NICKELL AND TAYLOR, JUDGES.

NICKELL, JUDGE: Jeff Metcalf d/b/a Metcalf Construction (“JMC”) has appealed from the Franklin Circuit Court’s dismissal of his appeal from an adverse administrative decision due to a lack of jurisdiction. The Kentucky Division of Unemployment Insurance (“Division”) and Kentucky Unemployment Insurance Commission (“KUIC”) have each filed separate cross-appeals from the same order.

JMC filed an original action in the Franklin Circuit Court on January 25, 2011, seeking judicial review of an administrative adjudication by KUIC affirming an administrative determination made by the Division.¹ The complaint was not verified as required by KRS² 341.450(1), resulting in the Division and KUIC filing motions to dismiss. JMC did not respond to either motion. On March 28, 2011, the trial court signed an order granting the motions and dismissing the actions. The order reflects it was entered and notice of the entry was served by the clerk on the same date. No appeal was taken and no post-judgment motions were filed.

On June 14, 2011, the trial court entered an order “on the Court’s own motion”, purportedly pursuant to CR³ 60.02, voiding and setting aside its earlier order after indicating it had been contacted by the parties and informed that notice of entry of the March 28, 2011, order had not been received. The trial court again dismissed the action for a lack of jurisdiction based on the failure of JMC to file a verified complaint. No motion for such relief appears in the record. These appeals followed.

JMC contends the trial court erred in dismissing its action. It alleges its complaint was signed by its attorney and was thus verified for purposes of KRS 341.450. In the alternative, JMC contends any defect in its pleadings was

¹ The underlying issue was related to the unemployment insurance tax liability for JMC.

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

procedural rather than jurisdictional and thus, not fatal to its maintaining the action. Although the Division and KUIC agree with the trial court's dismissal of JMC's action, they argue the trial court erred in *sua sponte* entering the June 14, 2011, order. They contend the trial court lost jurisdiction to amend its prior order ten days after its entry, and no basis for granting relief pursuant to CR 60.02 can exist in the absence of a motion from a party.

Recently in *Young v. U.S. Bank, Inc.*, 343 S.W.3d 618, 621 (Ky. App. 2011), a panel of this Court held the filing of a CR 60.02 motion to be "a necessary prerequisite to the grant of CR 60.02 relief." The Court went on to conclude that in the absence of such a motion, trial courts lack jurisdiction and have "no authority to rule on [their] own CR 60.02 motion." *Id.* Here, the trial court attempted to correct a perceived failure of the parties to receive notice of the entry of its March 28, 2011, order, so as to permit JMC to timely file an appeal to this Court. However, although it acted with commendable motivation, the trial court was without authority or jurisdiction to do so *sua sponte*, most especially under the auspices of CR 60.02. Thus, the June 14, 2011, order was void *ab initio* and of no effect.

Furthermore, CR 77.04(4) states the failure of a party to receive notice of the entry of an order or of the trial court to require such notice be sent "shall not affect the validity of the judgment or order, and does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed." The time for filing a notice of appeal is not triggered by service,

but rather by the date of the clerk's notation of service of notice of the entry of a judgment or order, and that is the date to be utilized for fixing the running of time for an appeal. *Fox v. House*, 912 S.W.2d 450 (Ky. App. 1995) (citing CR 73.02(1) and CR 77.04(2)).

It has long been held that where notice of the entry of an order is not properly effected, the trial court is without authority to vacate the order and re-enter it to save the right to appeal. *Brown v. Harris*, 321 S.W.2d 781, 782 (Ky. 1959). “[I]t is encumbent (sic) upon counsel to check the progress of their cases” *Id.* at 783. The time for filing a notice of appeal in the case *sub judice* began to run with the entry of the March 28, 2011, order. We are therefore compelled to dismiss JMC's appeal as untimely because it was not filed within the appropriate time following entry of the March 28, 2011, order. *See* CR 73.02 (notice of appeal must be filed within 30 days following date of notation of service and failure to do so shall result in dismissal).

For the foregoing reasons, it is hereby ORDERED that the instant appeal be and is DISMISSED. The dismissal renders the cross-appeals MOOT and they are likewise DISMISSED.

ALL CONCUR.

ENTERED: July 5, 2013

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

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