

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000909-MR

KMM INVESTMENTS, LLC

APPELLANT

APPEAL FROM TRIGG CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL III, JUDGE
ACTION NO. 06-CI-00228

GLEND A RITCHIE AND
FIRST REALTY GROUP, INC.

APPELLEE

OPINION AND ORDER

DISMISSING

** ** *

BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

VANMETER, JUDGE: KMM Investments, LLC (“KMM”) appeals from the May 11, 2012, order of the Trigg Circuit Court declaring the July 29, 2011 and August 19, 2011, orders of the court final and appealable. The orders precluded KMM from seeking damages for lost profits, difference in market value, as well as forfeiture of a sales commission, appraisal costs, closing costs, and attorney’s fees; effectively limiting KMM’s recovery to compensatory damages following a real

estate transaction brokered by Glenda Ritchie and First Realty Group, Inc. (hereinafter collectively referred to as “Appellees”). For the reasons stated herein, we dismiss this appeal for want of jurisdiction because it was taken from interlocutory orders.

KMM’s sole owner, Kristen M. Meyer, contacted Ritchie, a real estate agent and part owner of First Realty Group, in late 2005 seeking to purchase property on Lake Barkley in Trigg County. Thereafter, KMM purchased Lots 473 and 474 of Cumberland Shores Subdivision, as well as a house situated on the property, for \$320,000.

Following the closing, Meyer contacted another real estate agent for the purpose of selling Lot 473. A survey was performed, which indicated that the carport and the driveway of the residence were situated on Lots 473 and 474, thereby preventing the sale of Lot 473 independently of Lot 474.

KMM and Meyer¹ filed the underlying action against Appellees, alleging that Ritchie negligently represented that Lot 473 could be sold independently from Lot 474. Appellees filed a motion for summary judgment, which the circuit court denied; however, in doing so, it also held that KMM could only seek to recover compensatory damages under its negligence claim. In a supplemental order, the court clarified that the only compensatory damages available would be the survey costs, thereby denying KMM’s request to seek lost profits, attorney’s fees, appraisal costs, closing costs, and recovery of Ritchie’s commission earned from

¹ Meyer was later dismissed from the action.

the sale. The circuit court entered an order declaring these prior orders final and appealable, from which KMM now appeals.

CR² 54.01 provides, in part, that “[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under [CR] 54.02.” CR 54.02(1) provides, in pertinent part:

When more than one claim for relief is presented in an action . . . the court may grant a final judgment upon one or more but less than all of the claims . . . only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

However, if an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable. *Druen v. Miller*, 357 S.W.3d 547, 549 (Ky. App. 2011) (citing *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978)).

KMM alleged in its underlying claim that Ritchie negligently violated her fiduciary duties by failing to disclose pertinent facts about Lots 473 and 474. The merits of this claim were not adjudicated in the orders from which KMM now appeals; rather, the orders from which KMM appeals merely limited the damages that could potentially be recovered. To further illuminate the interlocutory nature

² Kentucky Rules of Civil Procedure.

of these orders we need only speculate that Appellees could be exonerated from any liability as to the negligence claim at trial, which would render moot the issues raised in this appeal. KMM finds no refuge in CR 54.02 because no part of the order or severable claim in the action was final and appealable.

Despite this, the parties did not raise the jurisdictional issue and from a reading of the circuit court's May 11, 2012, order, agreed that judicial economy would be served by making these orders final and appealable. However, jurisdiction cannot be conferred by the consent of the parties. *Wilson v. Russell*, 162 S.W.3d 911, 913 (Ky. 2005) (citation omitted). Furthermore, we are required to raise a jurisdictional defect on our own motion when the underlying order lacks finality. *Tax Ease Lien Investments I, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011) (citing *Huff v. Wood-Mosaic Corp.*, 454 S.W.2d 705, 706 (Ky. 1970)). Accordingly, this appeal has been taken from interlocutory orders and must be dismissed for want of jurisdiction.

For the reasons stated, it is hereby ORDERED that this appeal be
DISMISSED.

ALL CONCUR.

ENTERED: July 26, 2013

/s/ Laurance B. VanMeter
JUDGE, COURT OF APPEALS

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