

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2014-CA-001461-MR

DOUGLAS W. AYERS  
AND BARBARA A. AYERS

APPELLANTS

v.

APPEAL FROM BOYLE CIRCUIT COURT  
HONORABLE DARREN W. PECKLER, JUDGE  
ACTION NO. 12-CI-00066

RICHARD W. SANDERS

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE; CHIEF JUDGE, CLAYTON AND KRAMER, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Boyle Circuit Court's dismissal without prejudice of an action to recover on promissory notes. Based upon the following, we affirm the decision of the circuit court.

## BACKGROUND SUMMARY

The Appellee, Richard W. Sanders, filed a complaint in the Boyle Circuit Court asserting that Appellants, Douglas and Barbara Ayers, were liable to him on two promissory notes. The first promissory note was in the amount of \$100,000.00 with interest at the rate of 7% per annum, with all principal and interest due and owing on or before February 1, 2012. The second promissory note was in the amount of \$50,000.00 with an interest rate of 7% per annum, with all principal and interest being due and owing on or before March 12, 1997. The promissory notes each contained a provision that provided that the applicable law that would govern the agreement was the law of Missouri.

In their answer, the Appellants set forth a defense of the running of the statute of limitations. Specifically, Kentucky Revised Statutes (KRS) 355.3-118 provides that there is a six-year statute of limitations regarding promissory notes. The circuit court determined that this applied to Sanders's action and granted summary judgment. The Missouri statute of limitations, however, is ten years. The circuit court dismissed the action without prejudice.

The Appellants then moved the circuit court to amend the order and make it a dismissal with prejudice. A dismissal with prejudice would act as a bar to Appellees from filing a new action in Missouri. The circuit court denied the Appellants' motion and this appeal followed.

## STANDARD OF REVIEW

This is an appeal of an issue of law and we, therefore, review it *de novo*. *Osborne v. Commonwealth*, 185 S.W.3d 645 (Ky. 2006).

### ANALYSIS

Prior to a decision of whether the circuit court erred in dismissing the case without prejudice, we must determine whether the case is correctly before our Court. Sanders contends that the Appellants got all they sought from the circuit court and that they do not have a right to an appeal under *Maddox v. Giltner*, 226 Ky. 578, 11 S.W.2d 426 (1928). *Maddox* states that:

When a litigant succeeds in obtaining all he asks in the trial court having jurisdiction of the cause, he no longer has a grievance to be corrected by an appeal to a reviewing court, whose chief duties are to correct abuses in the trial court, whereby the rights of a litigant were prejudiced and he was thereby deprived of his just dues under the law.

*Id.*

In this case, however, the Appellants were not given all they asked for at the circuit court level. While they did obtain a dismissal, as they requested, they did not receive the dismissal with prejudice that they sought. A dismissal with prejudice and a dismissal without prejudice have very different legal ramifications for the litigant. Thus, we hold that *Maddox* does not apply and will examine the merits of the Appellants' argument.

Kentucky Rules of Civil Procedure (CR) 41.02 provides, in relevant part that:

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this Rule, and any dismissal not provided for in Rule 41, **other than a dismissal for lack of jurisdiction**, for improper venue, for want of prosecution under Rule 77.02(2), or for failure to join a party under Rule 19, operates as an adjudication upon the merits. [Emphasis added.]

This case involved a dismissal for lack of jurisdiction because the statute of limitations which was applied was six years on the promissory notes. Pursuant to CR 41.02, dismissals for lack of jurisdiction are adjudicated on the merits.

Under the notes, however, the law of Missouri should have been applied. In a final order dated October 16, 2012, the circuit court specifically upheld the applicability of the Missouri ten (10) year statute of limitations. In part, the court held:

Defendants agree that the store closed in mid-2002, that both of them made monthly interest-only payments on the note in one check made to the plaintiff, and that payments were made throughout the lifetime of the business. The store closed in mid-2002, and the action was filed February 16, 2012. As such, it was timely filed. The court would further point out that at least some of the checks that were issued by the defendants to the plaintiff were never cashed. This Court would find that aforementioned is not fatal to the issue of the statute of limitations. The fact that the checks [sic] were tendered by the defendants is sufficient to toll the statute of limitations and allow the action to proceed.

This order is FINAL and APPEALABLE and this Court finds there is no just cause for delay.

That denial was not appealed and is no longer applicable since the court had determined that the Missouri statute allowed the action to proceed, the trial court

was correct to dismiss without prejudice. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ephraim W. Helton  
Danville, Kentucky

BRIEF FOR APPELLEE:

Richard Clay  
Danville, Kentucky