

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000234-DG
AND
NO. 2016-CA-000769-DG

TOWN & COUNTRY BANK AND
TRUST COMPANY

APPELLANT/CROSS-APPELLEE

ON DISCRETIONARY REVIEW FROM NELSON CIRCUIT COURT
v. HONORABLE JOHN D. SEAY, JUDGE
ACTION NO. 15-XX-00001

KHV, LLC

APPELLEE/CROSS-APPELLANT

OPINION
DISMISSING
** ** ** ** **

BEFORE: COMBS, D. LAMBERT AND THOMPSON, JUDGES.

COMBS, JUDGE: This case arises out of a dispute regarding the renewal of a ground lease between Farmers' Bank & Trust Company and Kentucky Home Village Development Company. Effective as of November 16, 1989, the lease was for an original term of twenty years with four five-year renewal terms. The

Appellant/Cross-Appellee, Town & Country Bank and Trust Company (the Bank), is the successor to Farmers' Bank & Trust Company, the tenant under the lease. The Appellee/Cross-Appellant, KHV, LLC (KHV), is the successor to Kentucky Home Village Development Company. We granted discretionary review of an Opinion and Order of the Nelson Circuit Court reversing a judgment of forcible detainer and remanding. Upon our review, we conclude that discretionary review was improvidently granted from a non-final judgment. Therefore, we dismiss this appeal.

On June 4, 2015, the Bank filed a Petition for Declaration of Rights in Nelson Circuit Court, Division II, Case No. 15-CI-00338, *Town & Country Bank and Trust Company v. KHV, LLC*, seeking a determination and an affirmation that it had timely renewed the lease for its second renewal term. According to the Bank's brief, that action remains pending.

On July 8, 2015, KHV filed a Forcible Detainer Complaint in Nelson District Court, Case No. 15-C-00488, *KHV, LLC v. Town & Country Bank and Trust Company*. The forcible detainer was tried on August 20, 2015, before a jury, which found the Bank guilty. The Nelson District Court immediately entered a Forcible Detainer Judgment against the Bank. On August 25, 2015, the Bank filed a Notice of Appeal, which was properly filed in the Nelson District Court. However, it erroneously stated that the Bank was appealing to the Kentucky Court of Appeals. The appeal was nonetheless properly assigned to the Nelson Circuit Court, Division I.

On September 8, 2015, KHV filed a motion in Nelson Circuit Court, Division I, Civil Action No. 15-XX-00001, *Town & Country Bank and Trust Company v. KHV, LLC*, to consolidate the forcible detainer appeal with the declaration of rights action already pending in Division II. KHV argued that the two actions “should be consolidated **into one action**, because both actions involve the same parties, identical facts, and common questions of law. The actions should be consolidated in the interest of judicial economy and to avoid inconsistent rulings.” (Emphasis added). A September 16, 2016, docket sheet order, entered by Judge Simms in Nelson Circuit Court, Division I, reflects that the motion to consolidate was granted and that “[p]ursuant to the longstanding rule in this Circuit, the oldest action controls which is 15-CI-338. Judge Seay to hear both cases.” An October 5, 2015, Order of Consolidation entered by Judge Seay in Division II recites as follows:

the declaratory judgment action . . . and the [Bank’s] appeal to this Court of the jury verdict in the forcible detainer action are consolidated in this Division. However, the two actions shall remain separate actions for purposes of procedure, including any further appeals.

On January 25, 2016, the Circuit Court entered an Opinion and Order Reversing and Remanding for further proceedings after having concluded that the district court erred in instructing the jury in the forcible detainer action. The Circuit Court agreed with the trial court that the Bank was not entitled to an instruction on special circumstances; however:

[W]hen the trial court gave Instruction No. 6 stating what the Bank was required to do under the lease, this court believes the trial court went beyond what it should include in a bare bones instruction. This entitled the Bank to some degree of good faith instruction to maintain judicial fairness. After consideration, the court concludes this constitutes error justifying reversal.

The court briefly addressed the Bank's remaining grounds for appeal -- should they arise after remand -- and determined: (1) that it was within the District Court's discretion to deny abatement and hold a trial on a matter for which it had sole, original jurisdiction; (2) that the evidence presented at trial was sufficient to support the jury's verdict; and (3) that the addendum to the lease did not require KHV to give 120 days' notice before filing the forcible detainer action. There was no recitation that it was a final order or that there was no cause for delay.

On February 23, 2016, the Bank filed a precautionary Motion for Discretionary Review both to address the merits and to prevent issue preclusion -- or application of the law-of-the-case doctrine -- in the event that the Bank were to lose again in the trial court. By Order of May 11, 2016, this Court granted the Motion and ordered that the appeal be prosecuted as an appeal taken as a matter of right. On May 24, 2016, KHV filed a Cross-Motion for Discretionary Review. By Order of July 22, 2016, this Court granted KHV's Motion and ordered that the two cases be heard together.

Because we conclude that discretionary review was improperly granted from a non-final order, we shall not reach the merits of parties' arguments.

In *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995), our Supreme Court examined the term “judgment” as used in CR¹ 76.20(2)(a),² setting forth the guidelines for filing a motion for discretionary review from a judgment of a circuit court in the Court of Appeals.

The main question to be addressed by this Court is to determine what is meant by the word “judgment” in CR 76.20. To answer this question we turn to CR 54.01 which states that “[w]here the context requires, the term ‘judgment’ as used in these Rules shall be construed ‘final judgment’ or ‘final order.’ ” We find that in this case “the context requires” that the term “judgment” in CR 76.20(2)(a) be construed as a *final* judgment

Id. at 588. (emphasis original).

CR 54.01 provides that:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. 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 Rule 54.02. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order”.

And finally, as to the Civil Rules, we note that CR 54.02(1) provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a

¹ Kentucky Rule[s] of Civil Procedure.

² CR 76.20(2)(a) provides that “A motion for discretionary review by the Court of Appeals of a circuit court judgment in a case appealed from the district court shall be filed within 30 days after the date on which the judgment of the circuit court was entered, subject to the provisions of Rule 77.04(2) and Criminal Rule 12.06(2).”

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.

In *Melone v. Morgan*, 676 S.W.2d 805 (Ky. App. 1984), we reviewed an action that had been consolidated with another. It had been adjudicated separately without CR 54.02 recitations. This question was whether it was or whether it became a final and appealable judgment upon consolidation. *Id.* at 806. This Court held as follows:

CR 42.01 governs the consolidation of civil actions. Under that rule the actions may be consolidated for a specific purpose such as trial, or they may be consolidated generally. When the actions are consolidated for a specific purpose, the actions remain otherwise independent. When they are consolidated generally, they have become one action.

In the case before us, the order consolidating the appellant's actions does not consolidate the actions for trial or other purpose, but merely orders the actions consolidated. The order dismissing appellant's complaint would have to include CR 54.02 recitations to be a final and appealable judgment.

Id. at 806-07.

The case before us involves the very issue discussed in *Melone, supra*. There is a Division I docket order granting KHV's Motion to Consolidate and a

subsequent Order of Consolidation entered in Division II. In rather confusing (if not contradictory) terms, the Order of Consolidation states that the actions “shall remain separate actions for purposes of procedure, including any further appeals.” The Order does not state that the cases were consolidated for a specific purpose. Therefore, in the absence of a named specific purpose, we construe the order as consolidating the cases generally. Thus, pursuant to *Melone*, they would additionally need CR 54.02 recitations in order to be deemed final.

Additionally, the Circuit Court’s Opinion and Order Reversing and Remanding does not adjudicate all the rights of all the parties as required by CR 54.01. Nor, as noted, does it contain the finality recitation required by CR 54.02(1). Accordingly, it is not a final and appealable Order.³

Therefore, we vacate the Orders granting the Motion and Cross-Motion for Discretionary Review and dismiss this appeal.

ALL CONCUR.

³ And it is not the law of the case. *H.R. ex rel. Taylor v. Revlett*, 998 S.W.2d 778, 780 (Ky. App. 1999) (crucial requirement of the law-of-the-case doctrine is that appellate court enters a final decision on the issue rather than merely commenting on it).

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