

RENDERED: AUGUST 17, 2018; 10:00 A.M.  
NOT TO BE PUBLISHED

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

NO. 2017-CA-001233-MR

KEY STAR CAPITAL FUND, L.P.

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT  
HONORABLE SAMUEL TODD SPALDING, JUDGE  
ACTION NO. 16-CI-00052

HRD, LLC; SAH, LLC; JOSEPH P.  
HAYDON; AND NELL R. HAYDON

APPELLEES

OPINION  
AND ORDER  
DISMISSING

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BEFORE: ACREE, KRAMER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Key Star Capital Fund, L.P., brings this appeal from a May 1, 2017, Order of the Washington Circuit Court deciding that a valid and enforceable settlement agreement was reached by the parties. We dismiss this appeal as it was taken from an interlocutory order.

In 2003, SAH, LLC, executed and delivered a promissory note in the principal amount of \$500,000, plus interest, in favor of First Federal Savings Bank and granted a mortgage upon real property located at 1075 Bardstown Road, Springfield, Kentucky, to secure repayment of the indebtedness. Joseph P. Haydon, Nell R. Haydon, and HRD, LLC, each executed guarantees agreeing to repay the promissory note in the event of default by SAH.

In 2006, HRD executed and delivered a promissory note in the principal amount of \$1,120,000, plus interest, in favor of First Federal Savings Bank and granted a mortgage upon real property located at 805 Bardstown Road, Springfield, Kentucky, to secure repayment of the indebtedness. The Haydons also executed guarantees agreeing to repay the promissory note in the event of default by SAH.

In November of 2015, the aforesaid notes were sold and transferred to Key Star Capital Fund, L.P. The mortgages securing the note indebtedness were assigned to Key Star.

On May 2, 2016, Key Star filed a Complaint in Foreclosure in the Washington Circuit Court against SAH, HRD, the Haydons, Springfield, Kentucky, and Washington County, Kentucky. Key Star alleged that the SAH promissory note and the HRD promissory note were in default and sought to

foreclose on the mortgaged real properties located at 1075 Bardstown Road and 805 Bardstown Road.

SAH, HRD, and the Haydons filed answers. Springfield and Washington County filed answers and cross-claims for unpaid real property taxes for the 2016 tax year.

Key Star ultimately filed a motion for summary judgment and for order of sale. HRD and the Haydons subsequently filed a Motion to Enforce Settlement Agreement. HRD and the Haydons alleged that a settlement agreement was reached between them, SAH, and Key Star after the lawsuit was filed. Key Star filed a response and disputed that a settlement agreement existed. Key Star claimed that the parties did engage in settlement negotiations but no settlement agreement had been reached. To determine whether a settlement was reached by the parties, the court thoroughly reviewed and relied upon an email chain between counsel for the parties for the period of June 30, 2016, through August 1, 2016.

By order entered October 20, 2016, the circuit court concluded that a valid and enforceable settlement agreement was reached by SAH, HRD, the Haydons, and Key Star. Consequently, the circuit court denied Key Star's motion for summary judgment and granted the motion to enforce the settlement agreement. The court specifically noted that its order was interlocutory. Key Star

then filed a motion to reconsider or, alternatively, to designate the October 20, 2016, order final and appealable.

By order entered December 1, 2016, the circuit court determined that an evidentiary hearing was necessary to rule upon Key Star's motion to reconsider. The court conducted the evidentiary hearing on January 30, 2017. Following the evidentiary hearing, the circuit court rendered an order on May 1, 2017. Therein, the circuit court again found that a valid and enforceable settlement agreement was reached between Key Star, HRD, SAH, and the Haydons. At the end of the order, the circuit court stated that the order "is final and appealable."

Key Star then filed a Kentucky Rules of Civil Procedure (CR) 52.02 motion for additional findings of fact. By a calendar order dated July 12, 2017, the circuit court denied the CR 52.02 motion and included language that the "case is final and appealable." Key Star filed a notice of appeal on July 27, 2017, from the May 1, 2017, order. Key Star named as appellees HRD, SAH, and the Haydons.

A final and appealable judgment or order is one that adjudicates all the rights of all the parties or is made final under CR 54.02. CR 54.01. In an action involving multiple claims and/or multiple parties, CR 54.02 permits the circuit court to transform an otherwise interlocutory order into a final and appealable order under certain circumstances. However, under CR 54.02, an interlocutory order may only be made final and appealable if the order includes

both certifications: (1) there is not just cause for delay, and (2) the decision is final. Both certifications are strictly required, and a court's failure to include both certifications renders the order nonfinal. *Peters v. Bd. of Educ.*, 378 S.W.2d 638 (Ky. 1964); *Turner Constr. Co. v. Smith Bros., Inc.*, 295 S.W.2d 569 (Ky. 1956); *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008). Additionally, an appellate court is duty bound to, *sua sponte*, determine jurisdiction where an order appealed from lacks finality. *Peters*, 378 S.W.2d 638.

In this appeal, the underlying case involves multiple claims and multiple parties; however, the May 1, 2017, order did not adjudicate all the claims of all the parties. In particular, the cross-claims filed by Washington County and Springfield were not referenced or adjudicated in the May 1, 2017, order. And, we have searched the entire circuit court record and have been unable to locate any order of the court disposing of those cross-claims. *See Midland Guardian Acceptance Corp. of Cincinnati, Ohio v. Britt*, 439 S.W.2d 313 (Ky. 1968) (holding that a circuit court speaks only through written orders entered upon the official record). The cross-claims also were not specifically referred to in the disputed settlement agreement, and neither Washington County nor Springfield participated in the negotiations leading to such agreement.<sup>1</sup>

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<sup>1</sup> Neither the City of Springfield or Washington County were named as parties to the appeal.

In *Watson*, 245 S.W.3d 722, the Kentucky Supreme Court reviewed the purpose and functions of CR 54.02. The Supreme Court discussed the historic policy in this Commonwealth against piecemeal appeals balanced with the practical needs of the cases before the trial court. *Id.* The Supreme Court held that the trial court must thoroughly evaluate each case before deciding to certify the order final and appealable under CR 54.02 and further, should not grant a CR 54.02 final order as a courtesy to counsel. *Id.*

In this case, the court's May 1, 2017, order clearly did not adjudicate all of the claims of all of the parties. Without separate determination by the circuit court that "there is no just cause for delay" this Court is effectively precluded from reviewing whether the circuit court abused its discretion in releasing the appeal upon one or more but less than all of the claims. *Watson*, 245 S.W.3d at 726.

As the cross-claims remain adjudicated, it was incumbent upon the circuit court to include both CR 54.02 certifications in the May 1, 2017, Order to effectuate a final and appealable order. In that order, the circuit court only recited that the order is final and appealable. As the circuit court failed to include both CR 54.02 certifications, the May 1, 2017, Order is interlocutory and nonappealable and

this Court is without jurisdiction to consider the merits of the appeal. *See Turner*, 295 S.W.2d 569.<sup>2</sup>

Now, therefore, be it ORDERED that Appeal No. 2017-CA-001233-MR is DISMISSED as having been taken from an interlocutory order.

ALL CONCUR.

ENTERED: August 17, 2018

/s/ Jeff S. Taylor  
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Richard Boydston  
Cincinnati, Ohio

BRIEF FOR APPELLEE:

David M. Cantor  
Keith J. Larson  
Louisville, Kentucky

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<sup>2</sup> We also note that the parties, by agreement, cannot confer jurisdiction on this Court. *Wilson v. Russell*, 162 S.W.3d 911 (Ky. 2005).