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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000023-MR

MICHELLE PHILLIPS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 97-CI-00120

CIRCLE T. COAL, A PARTNERSHIP;
EDDIE TAPP; TONY TAPP; AND
GEORGE CRUNK

APPELLEES

AND

NO. 2018-CA-000886-MR

MICHELLE PHILLIPS

APPELLANT

v. APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 18-CI-00157

ESTATE OF TONY LYNN TAPP,
GWENDA SELLERS, EXECUTRIX;
TONY LYNN TAPP, LIVING TRUST,
GWENDA SELLERS, TRUSTEE;
GWENDA SELLERS, POWER OF

ATTORNEY FOR TONY LYNN TAPP;
AND GWENDA SELLERS,
PERSONALLY AND INDIVIDUALLY

APPELLEES

OPINION
VACATING AND REMANDING
APPEAL NOS. 2018-CA-000023-MR AND 2018-CA-000886-MR

** ** * ** * **

BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Michelle Phillips brings Appeal No. 2018-CA-000023-MR from a December 4, 2017, order of the Hopkins Circuit Court dismissing Phillips' counterclaim below and brings Appeal No. 2018-CA-000886-MR from a May 18, 2018, order and a June 1, 2018, amended order of the Hopkins Circuit Court dismissing the case. For the reasons stated, we vacate and remand both appeals.

These cases have a tortuous procedural history spanning over twenty-two years beginning in 1997. For the sake of clarity and brevity, we will recite only those facts necessary for disposition of these appeals. On February 24, 1997, Circle T. Coal, a partnership; Eddie Tapp; Tony Tapp; and George Crunk filed a complaint (Action No. 97-CI-00120) in the Hopkins Circuit Court against Phillips.¹ Therein, Circle T. Coal, a partnership (Circle T) and the Tapps alleged that they borrowed a total of \$60,000 from Crunk as evidenced by two promissory

¹ Circle T. Coal, operated as a partnership with Eddie Tapp and Terry Tapp as partners.

notes - a May 21, 1991, promissory note and a replacement promissory note dated February 3, 1992. According to Circle T and the Tapps, Phillips was named as a payee on both promissory notes at the direction of Crunk, her father, as he was experiencing health issues. Circle T paid Crunk in full satisfaction of the debt and received a release from Crunk. It was claimed that even though payment was made in full satisfaction of the debt, Phillips refused to release a financing statement (No. 238928) encumbering four pieces of large machinery owned by the Tapps, that was purportedly collateral for the loan.

Thereafter, on March 18, 1997, Phillips filed an Answer and Counterclaim. In the counterclaim, Phillips alleged that she independently loaned Circle T and the Tapps \$50,000, which was evidenced by the May 21, 1991, promissory note. Phillips claimed that her father, Crunk, had separately loaned Circle T and the Tapps \$60,000. Phillips also claimed that Circle T and the Tapps were in default per the terms of the May 21, 1991, promissory note and sought to recover the principal plus interest at 15 percent. Subsequently, the record reveals that the parties engaged in limited discovery. On May 3, 2002, the Tapps filed answers to Phillips requests for admission.

There was inexplicability no activity in the case for some fourteen years from May 3, 2002, until January 10, 2017. During that time, Crunk passed away in 1999, and Circle T dissolved in 2002. Ultimately, on January 16, 2016,

Eddie Tapp passed away. On January 10, 2017, Phillips filed a motion to revive the counterclaim and substitute the personal representatives of Eddie Tapp's estate, executrices Judy M. Tapp and Samantha R. Bacon. Phillips also filed a motion to amend the counterclaim and a motion to dismiss plaintiffs' complaint. Tony Tapp subsequently passed away on June 7, 2017, and Phillips filed a motion to revive the counterclaim and substitute Gwenda Sellers, as executrix of the estate of Tony Tapp.

Even though the action was not revived, Samantha and Judy, in their capacities as co-executrices of Eddie's estate, and Sellers, in her capacity as executrix of Tony's estate, (collectively referred to as the executrices) filed a motion to dismiss all claims and counterclaims. The executrices argued that the original complaint was moot and that the counterclaim should be dismissed with prejudice under Kentucky Rules of Civil Procedure (CR) 41.02(1) based upon Phillips' failure to diligently prosecute her claim. Phillips filed a response and objected to dismissal of her counterclaim pursuant to CR 41.02(1). Phillips argued that the action had not been revived; consequently, the executrices were not parties thereto and could not file the motion to dismiss.

By order entered December 4, 2017, the circuit court granted the executrices' motion to dismiss and dismissed the action (No. 97-CI-00120) pursuant to CR 41.02(1). The court also denied Phillips' motion to revive and

substitute. Phillips then filed a notice of appeal (Appeal No. 2018-CA-00023-MR) from the December 4, 2017, order of dismissal.

Subsequently, on March 9, 2018, Phillips filed another complaint (Action No. 18-CI-00157) in the Hopkins Circuit Court against Sellers, in her capacity as executrix of Tony's Estate; Tony Tapp Living Trust; Sellers, in her capacity as Trustee of the Living Trust; Sellers, in her capacity as power of attorney for Tony; and Sellers, individually. Phillips again sought to collect upon the May 21, 1991, promissory note in the principal amount of \$50,000, and interest in an amount over \$1,000,000. Phillips stated she had filed a claim with the estate of Tony Tapp and that such claim was disallowed.

On March 29, 2018, Sellers filed a motion to dismiss arguing that claim preclusion and issue preclusion barred Phillips from attempting to collect upon the May 21, 1991, promissory note as Phillips' counterclaim in 97-CI-00120 was dismissed with prejudice under CR 41.02(1).

By order entered May 10, 2018, and amended order entered June 1, 2018, the circuit court granted Sellers' motion to dismiss. The court reasoned:

Phillips . . . produced an immense number of filings attempting to prosecute claims related to the 1991 Promissory Note. She initially filed suit directly against the Estate of Eddie Tapp in 16-CI-805 on September 7, 2016, which action was dismissed on May 18 of the following year. This Court reasoned that dismissal was required since the claim was vexatious and duplicative of 97-CI-120 which was still technically on the docket.

Phillips then sought to revive 97-CI-120 and amend her counterclaim in that case. The Court dismissed that action in December 2017 because of the prejudice that would result from allowing Phillips to press claims that she had failed to prosecute for fourteen years against the deceased parties and their long defunct business.

Phillips has now pressed another claim seeking to collect on the promissory note, this time against the Estate of Tony Tapp, the Tony Tapp Living Trust, and Sellers in her individual capacity and as the former power-of-attorney for Tony Tapp. She alleges substantially the same basis for her claim as given in 97-CI-120 and 16-CI-805. Those actions were dismissed for Phillips' impermissible attempt to revive an ancient case which had lapsed long ago due to her failure to prosecute the matter. This above captioned action is barred under the doctrine of issue preclusion because: (1) there are an identity of issues in all three cases, (2) there has been a final decision or judgment on the merits of these issues, (3) the issue in this case was a necessary issue in the prior two cases wherein Plaintiff was provided a full and fair opportunity to litigate, and (4) Plaintiff lost on this issue in the prior two cases. See *Yeoman v. Commonwealth*, 983 S.W.2d 459 (Ky. 1998). . . .

June 1, 2018, amended order dismissing at 2. Phillips filed a notice of appeal (2018-CA-000886-MR) from the May 10, 2018, and June 1, 2018, orders of the Hopkins Circuit Court.

We shall address each appeal separately.

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Phillips contends that the circuit court committed reversible error by granting the executrixes' motion to dismiss and by dismissing Phillips counterclaim under CR 41.02(1) in Action No. 97-CI-00120. Specifically, Phillips points out that her motions to revive and to substitute the executrixes were denied by the circuit court. Consequently, she argues the executrixes were not parties to Action No. 97-CI-00120 and could not file motions to dismiss pursuant to CR 41.02(1). For the following reasons, we must reluctantly agree.

In Kentucky, the law is well-settled that an action cannot be prosecuted upon the death of a party until the action is revived by substituting the personal representative of the deceased party's estate. *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989). And, it must be emphasized that "[a] personal representative does not automatically succeed to his decedent's rights and status as a litigant and thus is not a party to any suit against the decedent unless the action is revived." *Id.* at 72 (citing *Daniel v. Fourth and Market, Inc.*, 445 S.W.2d 699 (Ky. 1968)).

In this case, the record reveals that the circuit court denied Phillips' motion to revive and to substitute the executrixes of Eddie's and Tony's estates. Nevertheless, the executrixes filed several motions and also filed motions to dismiss pursuant to CR 41.02(1), which the circuit court ultimately granted.

As the action was not revived, the executrixes were never legally made parties to the action and thus, could not file a motion to dismiss per CR 41.02(1). It was incumbent upon the circuit court initially to revive the action and substitute the executrixes as parties before the executrixes could properly file motions. In any event, the executrixes were not parties and thus did not have standing to properly file the motions to dismiss under CR 41.02(1).² See KRS 395.278. Consequently, the circuit court committed clear and reversible error by granting the executrixes' motions and dismissing the action under CR 41.02(1).³

We view any remaining contentions of error as moot in that appeal.

Accordingly, we reluctantly vacate the December 4, 2017, order dismissing Action No. 97-CI-00120 pursuant to CR 41.02(1) and remand for the circuit court to reconsider Phillips' motions to revive and to substitute the executrixes of Eddie's and Tony's estates as parties below.

² Had the circuit court granted the motion to revive, the Estate of Tony Lynn Tapp's respective representatives would have been properly before the court and their motion to dismiss could have been properly considered by the court. While we do not address the merits or substance of the circuit court's thorough order dismissing the counterclaims and this case, we acknowledge that the circuit court's legal analysis and conclusion regarding the application of Kentucky Rules of Civil Procedure (CR) 41 to this case was clearly within the court's sound discretion.

³ A dismissal pursuant to Kentucky CR 41.02(1) cannot be *sua sponte* by the Court, but rather a party must file a motion to dismiss under CR 41.02(1). *Wildcat Prop. Mgmt., LLC v. Reuss*, 302 S.W.3d 89, 92 (Ky. App. 2009).

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Phillips argues that the circuit court erred by dismissing her claims in Action No. 18-CI-00157 as barred by the doctrine of issue preclusion.

In its orders of dismissal, the circuit court pointed out that Phillips raised identical issues in Action No. 18-CI-00157 as in Action Nos. 97-CI-00120 and 16-CI-00805.⁴ The circuit court reasoned that the identical issues raised by Phillips in the previous actions (Nos. 97-CI-00120 and 16-CI-00805) were resolved against Phillips and operated to bar the relitigation of those same issues in Action No. 18-CI-00157.

The record contains a copy of the circuit court's order dismissing Action No. 16-CI-00805. In its May 18, 2017, order, the circuit court stated:

In December, 2016, Phillips filed a Motion to Revive her counterclaim in 97-CI-120 and filed a new complaint in 16-CI-805 naming the Estate of Eddie Tapp, and others as defendants seeking to collect on the same 1991 note that was the subject of her counterclaims in 97-CI-120. In this new suit Phillips claims she is owed \$1,150,000.00, representing the principal \$50,000.00 plus accrued interest.

Currently before the Court are Motions to Dismiss filed by the defendants in 16-CI-805. The basis for the motions are that Phillips is precluded from filing and

⁴ In Action No. 16-CI-00805, Michelle Phillips filed a complaint against Samantha R. Bacon and Judy M. Tapp as executrixes of the Estate of Eddie Tapp, the Eddie D. Tapp Living Trust, Judy Tapp, Tony Tapp, Circle T. Coal and the Judy Tapp Living Trust. In Action No. 16-CI-00805, Phillips again sought recovery upon the May 21, 1991, promissory note allegedly owed by Eddie Tapp, Tony Tapp, and Circle T. This action was dismissed by order entered May 18, 2017.

pursuing this new action when the same issue is pending before this Court in the 97-CI-120 case. The Court agrees. Similar issues have been addressed where identical parties have filed separate actions in different jurisdictions seeking identical recovery. Such actions are deemed vexatious and should be dismissed. *See Rose v. Finley*, 76 S.W.2d 637 (1934).

May 18, 2017, opinion and order at 2-3.⁵ Thus, the circuit court dismissed Action No. 16-CI-00805 because the same issues raised by Phillips therein were then pending in Action No. 97-CI-00120.

Similarly, the circuit court dismissed Action No. 18-CI-00157 under the doctrine of issue preclusion which was within the court's sound discretion, especially given the facts of this case. However, that dismissal was predicated upon the dismissal of 97-CI-00120 which we have vacated and remanded for the circuit court to reconsider Phillips' motion to revive. Because we have vacated the circuit court's dismissal of Action No. 97-CI-00120, we, likewise, must again reluctantly vacate the circuit court's dismissal of Action No. 18-CI-00157 and remand for proceedings consistent with this opinion.

We deem any other contentions of error as moot.

⁵ Action No. 16-CI-00805 was appealed to another panel of this Court in 2018. That appeal was dismissed as untimely filed on May 11, 2018, in Appeal No. 2018-CA-000024-MR. The Kentucky Supreme Court denied discretionary review on June 5, 2019.

For the foregoing reasons, the Orders of the Hopkins Circuit Court in Appeal Nos. 2018-CA-000023-MR and 2018-CA-000886-MR are vacated and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
FOR APPELLANT:

Wendell Holloway
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BRIEF FOR CIRCLE T. COAL, A
PARTNERSHIP; EDDIE TAPP;
TONY TAPP; ESTATE OF TONY
LYNN TAPP, GWENDA SELLERS,
EXECUTRIX; TONY LYNN TAPP,
LIVING TRUST, GWENDA
SELLERS, TRUSTEE; GWENDA
SELLERS, POWER OF ATTORNEY
FOR TONY LYNN TAPP; AND
GWENDA SELLERS,
PERSONALLY AND
INDIVIDUALLY:

Brent R. Baughman
Steven R. Wilson
Rachel A. Washburn
Louisville, Kentucky

ORAL ARGUMENT FOR CIRCLE
T. COAL, A PARTNERSHIP; EDDIE
TAPP; TONY TAPP; ESTATE OF
TONY LYNN TAPP; ESTATE OF
TONY LYNN TAPP, GWENDA
SELLERS, EXECUTRIX; TONY
LYNN TAPP, LIVING
TRUST, GWENDA SELLERS,
TRUSTEE; GWENDA SELLERS,
POWER OF ATTORNEY FOR
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ORAL ARGUMENT FOR ESTATE OF
TONY LYNN TAPP, GWENDA
SELLERS, EXECUTRIX; TONY LYNN
TAPP, LIVING TRUST, GWENDA
SELLERS, TRUSTEE; GWENDA
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