IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 3, 2016

WAYNE A. HOWES, ET. AL. v. MARK SWANNER, ET AL.

Appeal from the Circuit Court for Montgomery County
No. MCCCCV00112599 Ross H. Hicks, Judge

No. M2015-01389-COA-R3-CV –Filed February 17, 2016

This is an appeal of the denial of Appellants' Tennessee Rule of Civil Procedure 60.02 motion to set aside the trial court's order granting summary judgment in favor of Appellees. Because the order appealed is not a final judgment, the appeal is dismissed for lack of jurisdiction.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

KENNY ARMSTRONG, J., delivered the opinion of the Court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Jacob P. Mathis, Clarksville, Tennessee, for the appellants, Mark Swanner, and Robin Swanner.

Gregory D. Smith, Clarksville, Tennessee, for the appellees, Wayne A. Howes, and Starlene K. Howes.

MEMORANDUM OPINION[1]

[1] Tennessee Court of Appeals Rule 10 provides, in relevant part, that:

> The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited

On January 15, 2011, a fire damaged the house owned by Wayne A. Howes and his wife, Starlene K. Howes (together, the "Howes," or "Appellees"). Mark Swanner and his wife Robin Swanner (together, the "Swanners," or "Appellants") own and operate a business known as Ultra Clean Restoration a/k/a Ultra Clean Carpet Cleaning. Following the fire, the Howes hired the Swanners to do the clean-up, repair, and restoration of their home. Thereafter, certain disputes arose between the Howes and the Swanners concerning the Swanners' work ethic, workmanship, and lack of a contractor's license.

On October 31, 2011, the Howes filed suit against the Swanners in the Circuit Court for Montgomery County. The Howes' complaint alleged breach of contract, and fraud and/or negligent misrepresentation. The Howes also filed suit against their insurer, State Farm Insurance Company, and its agent, Steve R. Ray. According to the complaint, the Howes hired the Swanners at the "strong and persistent suggestion" of Mr. Ray, who was allegedly acting in his capacity as State Farm's agent. Our record contains no filings by State Farm or Mr. Ray. However, on January 30, 2012, the Swanners filed an answer to the complaint. Therein, the Swanners denied any liability for breach of contract, fraud, or misrepresentation.

Following discovery, on March 9, 2015, the Howes moved for summary judgment. The trial court heard the Howes' motion for summary judgment on May 4, 2015, and by order of May 6, 2015, granted the Howes' motion. The May 6, 2015 order states, in relevant part, that "this order granting summary judgment concludes all matters in this case and is therefore hereby declared a final judgment for appeal purposes."

On May 20, 2015, the Swanners, through newly retained counsel, filed a Tennessee Rule of Civil Procedure 60.02 motion to set aside the trial court's May 6, 2015 order granting Appellees' motion for summary judgment. As the sole ground for their motion, the Swanners asserted that they did not receive notice of the hearing on the Howes' motion for summary judgment.

Although the trial court had previously entered an order on the Howes' motion for summary judgment, i.e., the May 6, 2015 order referenced above, on May 21, 2015, while the Swanners' Rule 60.02 motion was pending, the trial court entered a separate "Final Judgment." The "Final Judgment" provides:

> This matter came before the Honorable Ross H. Hicks, on the 4th day of May, 2015, upon [Appellees'] Tenn. R. Civ. P. 56 motion for summary judgment which was granted. Wherefore, pursuant to the order granting summary judgment,
>
> **IT IS SO ORDERED, ADJUDGED and DECREED that** a final

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or relied on for any reason in a subsequent unrelated case.

> judgment is hereby entered in the amount of $53,296.00 in favor of [Appellees] . . . . This judgment is hereby declared a final judgment that shall enjoy statutory . . . interest . . . . This matter is also declared a final judgment for appeal purposes.

The trial court heard Appellants' Rule 60.02 motion on June 15, 2015, and by order of June 30, 2015, denied the motion.

The Swanners appeal. The sole issue for review is whether the trial court abused its discretion in denying the Swanners' Tennessee Rule of Civil Procedure 60.02 motion to set aside the judgment granting the Appellees' motion for summary judgment. However, we do not reach the substantive issue in this case due to the lack of a final, appealable judgment.

Tennessee Rule of Appellate Procedure 3(a) provides:

> In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

As noted above, the Howes filed suit not only against the Appellees, but also against State Farm and its agent, Mr. Ray. Although Appellees' brief states that "[t]he Howes also sued Steve Ray and State Farm Insurance, but that aspect of this case is now concluded," there is nothing in our appellate record indicating disposition or dismissal of the claims against Mr. Ray or State Farm.

The instant appeal is not interlocutory in nature, i.e., a non-final, order appealed pursuant to Tennessee Rules of Appellate Procedure 9 or 10. Accordingly, the trial court's order is not appealable to this Court, under Tennessee Rule of Appellate Procedure 3, unless it (1) adjudicates all claims against all parties, or (2) is properly certified as final pursuant to Tenn. R. Civ. P. 54.02. ***In re Estate of Henderson***, 121 S.W.3d 643, 645 (Tenn. 2003); ***Andrews v. Fifth Third Bank***, 228 S.W.3d 102, 108 (Tenn. Ct. App. 2007). As noted in ***Henderson***,

> there is a mechanism, found in Rule 54.02 of the Tennessee Rules of Civil Procedure, by which a party may appeal an order that adjudicates fewer than all of the claims, rights, or liabilities of fewer than all the parties [under

Tennessee Rule of Civil Procedure 54.02].

Rule 54.02 of the Tennessee Rules of Civil Procedure provides as follows:

> Multiple claims for relief.-When more than one claim for relief is present in an action, whether as a claim, counter claim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon express direction of the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all of the claims and the rights and liabilities of all the parties.

In ***Fox v. Fox***, 657 S.W.2d 747, 749 (Tenn.1983), the Supreme Court held that:

> Rule 54.02 requires as an absolute prerequisite to an appeal the certification by the trial judge, first, that the court has directed the entry of a final judgment as to one or more but fewer than all of the claims, and, second, make an express determination that there is no just reason for delay. Such certification by the trial judge creates a final judgment appealable as of right under Rule 3 T.R.A.P. In the absence of such direction and determination by the trial judge, the order is interlocutory and can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties. ***Sidham v. Fickle Heirs***, 643 S.W.2d 324, 325 (Tenn.1982).

Although there is nothing in the record from which we can determine whether or how the lawsuit against State Farm and Mr. Ray "concluded," the trial court declares both its May 6, 2015 order granting Appellees' motion for summary judgment and its May 21, 2015 "Final Judgment" "final . . . for appeal purposes." As noted by this Court in ***Cooper v. Powers***, No. No. E2011-01065-COA-R9-CV, 2011 WL 5925062, at *5 (Tenn. Ct. App. Nov. 9, 2011), "the mere recitation that an order is final, without more, does not, *ispo facto*, bestow jurisdiction on us over an otherwise interlocutory order." The order in the present case does not comply with Rule 54.02 as that "mechanism" was described in ***Henderson*** and ***Fox***. First, there is no "express determination that there is no just reason for delay." Tenn. R. Civ. P. 54.02; ***Fox***, 657 S.W.2d at 749; ***Henderson***, 121 S.W.3d at 646; the trial court's orders are completely silent on the matter. The second problem with the trial court's orders is the lack of any "certification by the trial judge ... that the court has directed the entry of a final

judgment as to one or more but fewer than all of the claims ..." ***Fox***, 657 S.W.2d at 749. Although the case against State Farm and Mr. Ray may be "concluded," as noted above, our record does not reflect that these parties are no longer in the lawsuit. In other words, as the record stands, there has been no adjudication of the claims against State Farm and Mr. Ray. In the absence of any dispositive filing *vis-à-vis* State Farm and Mr. Ray, there should be something in the trial court's order(s) to inform the reader that the trial court intends to treat what would otherwise be an interlocutory order as final under the mechanism provided in Tenn. R. Civ. P. 54.02. The orders before us make no mention of Rule 54.02, and they do nothing to inform the reader that the trial court has ruled on any of the claims made against Mr. Ray and State Farm, or that it intends to treat what would otherwise be an interlocutory order as a final order. Therefore, we are required to dismiss the appeal for lack of jurisdiction. Tenn. R. App. P. 3(a).

The appeal is dismissed, and the case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellants, Mark Swanner, Robin Swanner, and their surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE