

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2002-CA-001473-MR

ROBERT DUNCAN and wife, DONNA DUNCAN

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 00-CI-00089

KENTUCKY PETROLEUM EQUIPMENT, INC

APPELLEE

OPINION AND ORDER
DISMISSING

** **

BEFORE: KNOFF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE¹.

KNOFF, JUDGE: Robert and Donna Duncan appeal from a June 7, 2002, order of the Harlan Circuit Court granting a judgment to Kentucky Petroleum Equipment Company and other lien-holders and ordering the encumbered real property sold by the commissioner. The Duncans do not contest any matters adjudicated in that judgment, contesting only the trial court's later order

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

confirming the commissioner's sale. Because the Duncans failed to separately appeal that order and because the Duncans failed to name all necessary parties, their appeal is dismissed.

The essential facts of this action are not in dispute. The Duncans owned and operated a small grocery store on three adjoining tracts in Wallins Creek, Harlan County, Kentucky. Beginning in 1999, the Duncans employed several contractors to help expand their business to include a gasoline station. Specifically, they hired Brothers Construction, Inc. and Harlan Honey, Inc. to excavate and install the gasoline tanks, and Kentucky Petroleum to install the pumps and electronic registers and to build a metal canopy over the gas pumps. CitiFinancial, Inc. had a pre-existing mortgage on the property.

In February of 2000, Kentucky Petroleum filed this action to enforce its liens against the property. Thereafter, Brothers Construction, Harlan Honey, and CitiFinancial each filed cross-claims against the Duncans, also claiming an interest in the property. The Duncans disputed the validity of the mechanics' and materialmen's liens.

In its findings of fact and conclusions of law entered on June 7, 2002, the trial court granted judgments to CitiFinancial on its mortgage and to Kentucky Petroleum on its lien. The trial court also ruled that Brothers Construction's and Harlan Honey's liens were not filed in conformity with KRS

376.010, but further found that they were entitled to an equitable lien against the property. The trial court ordered the tracts sold by the master commissioner and the sale proceeds applied toward the liens and judgments.

In response to the judgment and order of sale, the commissioner appointed appraisers to value the real property. On June 19, 2002, the commissioner filed separate appraisals which placed a combined value of \$44,500.00 on the three tracts. Thereafter, on July 15, 2002, the tracts were sold at a commissioner's sale for \$37,000.00. The Duncans filed exceptions to the commissioner's report of sale, asserting that the real property and improvements had previously been appraised for \$178,000.00, and that the \$37,000.00 sale price was well less than two-thirds of the appraised value. In separate orders entered on October 7 and November 1, 2002, respectively, the trial court overruled the Duncans' exceptions and confirmed the commissioner's report of sale and deed.

The Duncans argue that they were deprived of their right of redemption. KRS 426.530 provides that if real property is sold by an order of the court and does not bring two-thirds of its appraised value, the defendants may redeem it within a year of the date of sale by paying the original purchase money plus interest. The Duncans again point to the earlier appraisal which valued the real property at \$178,000.00 and they dispute the

value placed on the property by the court-ordered appraisers. Consequently, they assert that they were entitled to an evidentiary hearing to determine the value of the property.²

However, there is another matter which we must address before we can consider the merits of the Duncans' appeal. On July 3, 2002, before the commissioner's sale had taken place, the Duncans filed their notice of appeal from the trial court's June 7, 2002, order. They named only Kentucky Petroleum as appellee. Subsequently, the Duncans attempted to amend their notice of appeal to name Brothers Construction and Harlan Honey as appellees. However, in an order dated December 11, 2002, this Court denied their motion and dismissed the amended notice of appeal. This Court also held that CitiFinancial is not a party to this appeal.

Kentucky Petroleum argues that the Duncan's appeal should be dismissed because they failed to appeal from the circuit court's order confirming the commissioner's sale. The Duncans respond that they were entitled to, and indeed required to file their notice of appeal from the trial court's June 7, 2002, judgment and order of sale. Because they timely appealed from the judgment and order of sale, they assert that their notice of appeal should relate forward to include the subsequent order confirming the commissioner's sale.

² Burchett v. Bank of Josephine, 474 S.W.2d 66 (Ky., 1971).

We agree with the Duncans that an order of sale may be considered final and appealable.³ When an order adjudicates all of the claims of all of the parties before the court at the time the order was entered, then it is a final order as to the necessity of a sale and, when the sale is affected, the title of the purchaser.⁴ However, an order confirming or refusing to confirm a judicial sale is also a final and conclusive judgment.⁵ Moreover, the order confirming the report of sale is distinct from the order of sale and it must be separately appealed.⁶

Furthermore, the relation-forward rule does not save the Duncans' appeal. If a party prematurely files a notice of appeal, the notice will relate forward to entry of the final judgment.⁷ In this case, the Duncans' notice of appeal was not premature. They timely appealed from the trial court's June 7,

³ Security Federal Savings & Loan Association of Mayfield v. Nesler, 697 S.W.2d 136, 138 (Ky., 1985).

⁴ Alexander v. Springfield Production Credit Association, 673 S.W.2d 741, 743 (Ky.App. 1984); Cerwin v. Taub, 552 S.W.2d 675, 678 (Ky.App. 1977).

⁵ Maynard v. Boggs, 735 S.W.2d 342, 343 (Ky.App. 1987); *citing* Moore v. Waltman's Adm'x., 288 Ky. 258, 156 S.W.2d 100 (1941).

⁶ Hunter v. Hunt, 296 Ky. 769, 178 S.W.2d 609, 612 (Ky., 1944).

⁷ Johnson v. Smith, 885 S.W.2d 944, 949 (Ky., 1994).

2002, judgment and order of sale. But the Duncans do not contest any of the matters adjudicated in that judgment. They do not dispute the trial court's findings regarding their liability; the judgments for Kentucky Petroleum, Brothers Construction, Harlan Honey, or CitiFinancial; or even the trial court's order directing the sale of the property. The only issues which the Duncans raise in this appeal concern the trial court's order confirming the commissioner's sale and denying their claimed right of redemption. This matter relates exclusively to the trial court's order confirming the commissioner's sale. Because the Duncans did not separately appeal from this order, the issue is not properly presented to this Court.

Lastly, even if the notice of appeal related forward to the court's order confirming the commissioner's sale, the Duncans have failed to name all necessary parties to this appeal. The Duncans ultimately seek to set aside the judicial sale by exercising their right of redemption under KRS 426.530. However, the purchaser of the property is an essential party to the appeal and without that party their requested relief is impossible.⁸ Therefore, we agree with Kentucky Petroleum that the Duncans' appeal must be dismissed.

⁸ Gordon v. Elliott, 439 S.W.2d 87, 87-88 (Ky., 1969).

IT IS HEREBY ORDERED that this appeal be DISMISSED because the Duncans do not seek relief from the judgment from which they appealed, they did not separately appeal from the order from which they seek relief, and they failed to name all necessary parties to this appeal.

ALL CONCUR.

Entered: _____

 \s\ William L. Knopf
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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