

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001722-MR

WINCHESTER COATINGS, INC. and
HERITAGE MUTUAL INSURANCE COMPANY

APPELLANTS

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 00-CI-00043

BEC-STEEL BUILDINGS SYSTEMS, INC.,
LEWIS BRASHEAR, JR., and
UNITED STRUCTURES OF
AMERICA, INC.

APPELLEES

OPINION & ORDER
DISMISSING APPEAL

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Winchester Coatings, Inc., appeals from a summary judgment of the Clark Circuit Court dismissing its complaint against BEC-Steel Buildings, Inc., and Lewis Brashear, Jr. Winchester asks us to determine that its appeal is from a nonfinal order and to dismiss it for lack of jurisdiction. BEC-Steel and Brashear ask us not to dismiss the appeal but to

affirm the judgment on its merits. We agree with Winchester that its appeal is from a nonfinal order. Therefore, we dismiss the appeal for lack of jurisdiction.

On February 6, 1998, a major snowstorm hit Clark County, Kentucky, dumping a considerable amount of snow on the area. A building used by Winchester collapsed from the weight of the snow on its roof. Winchester had insured the building and its contents against loss in an agreement with Heritage Mutual Insurance Company. Winchester and Heritage sued United Structures of America, Inc., BEC-Steel Building Systems, Inc., R. E. Purnell Construction, Inc., and Lewis Brashear, Jr., in the Clark Circuit Court for damages. Purnell Construction was dismissed from the suit on its summary judgment motion, leaving claims against United Structures, BEC-Steel, and Brashear. Later, the circuit court awarded summary judgment in favor of BEC-Steel and Brashear, leaving only a claim against United Structures. Winchester and Heritage appealed from the summary judgment in favor of BEC-Steel and Brashear, but we must dismiss the appeal for lack of jurisdiction¹ because it is an appeal from a nonfinal order.

"A final or appealable judgment is a final order

¹ This court has appellate jurisdiction only of final orders and judgments of circuit courts, subject to enumerated exceptions that are not relevant in this case. See Kentucky Revised Statutes (KRS) 22A.020(1) and Webster County Soil Conservation Dist. v. Shelton, Ky., 437 S.W.2d 934, 936 (1969).

adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.” CR²

54.01. The summary judgment in favor of BEC-Steel and Brashear did not adjudicate all the rights of all the parties in the case because there were claims remaining against United Structures. Therefore, the judgment was not final and appealable unless it was made final and appealable under CR 54.02.

The pertinent part of CR 54.02 states as follows:

- (1) 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 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.

CR 54.02(1). Although the summary judgment in favor of BEC-Steel and Brashear stated that it was final and appealable, it

² Kentucky Rules of Civil Procedure.

did not contain language stating that a determination had been made that there was no just reason for delay. In the absence of such language, the appeal must be dismissed. See Stillpass v. Kenton County Airport Bd., Inc., Ky., 403 S.W.2d 46, 47 (1966), and Beasley v. Trontz, Ky. App., 677 S.W.2d 891, 893 (1984).

Uniquely, the appellants seek to have this court dismiss their appeal, and the appellees oppose it.³ The appellees (BEC-Steel and Brashear) urge this court not to dismiss the appeal but to address the appellants' arguments on their merits and to affirm the court's summary judgment. BEC-Steel and Brashear cite two cases to support their argument, both of which are distinguishable based on their facts.

BEC-Steel and Brashear first rely on Preferred Risk Mut. Ins. Co. v. Kentucky Farm Bureau Mut. Ins. Co., Ky., 872 S.W.2d 469 (1994). In a 4-3 decision in that case, the Kentucky Supreme Court reversed a trial court decision declaring in an automobile accident case that Farm Bureau provided coverage under its policy for the owner of one of the vehicles. Although the judgment did not adjudicate all the rights of all the parties, it did contain finality language. Therefore, our supreme court refused to dismiss the appeal as being one from a

³ Normally, it is the appellees rather than the appellants who seek to have an appeal dismissed as being from a nonfinal order.

nonfinal order. Id. at 470. There is no indication in the Preferred Risk case that the finality language of the trial court's order failed to contain all language required by CR 54.02, including language that "there is no just reason for delay." Therefore, that case has no applicability to the resolution of this case.

BEC-Steel and Brashear also cite Security Fed. Sav. & Loan Ass'n of Mayfield v. Nesler, Ky., 697 S.W.2d 136 (1985), in support of its argument that the judgment in this case was a final and appealable judgment. In that case the court held that the finality language required by CR 54.02 did not apply because the judgment from which an appeal was taken adjudicated all the rights of all the parties on all the claims. Id. at 138-39. Like the Preferred Risk case, the Nesler case is distinguishable from this case on its facts.

It is hereby ORDERED that this appeal be DISMISSED for lack of jurisdiction because it is an appeal from a nonfinal judgment that was not made final with the language required by CR 54.02(1).

ALL CONCUR.

ENTERED: October 15, 2004

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

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