

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002014-MR
AND
NO. 2003-CA-002355-MR

PATRIOT TOBACCO COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 02-CI-00876

COMMONWEALTH OF KENTUCKY,
EX REL. GREGORY D. STUMBO
ATTORNEY GENERAL

APPELLEE

OPINION AND ORDER
DISMISSING APPEALS

** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: Patriot Tobacco Company (hereinafter "Patriot") appeals two orders of the Franklin Circuit Court. The orders in question amended a previous order entered by the court which ordered Patriot to pay civil penalties in the amount of \$255,539.91 for violating KRS 131.602(3). The first order also dismissed Patriot's counterclaim. This Court has consolidated the two appeals. Having thoroughly reviewed this matter, we are

compelled to dismiss Patriot's appeals because they are from non-final and appealable orders. CR 54.02.

On June 28, 2002, the Commonwealth of Kentucky, ex rel. Albert B. Chandler, III, Attorney General (hereinafter "the Commonwealth"),¹ filed a complaint for injunction and other relief against Patriot in the Franklin Circuit Court. The complaint alleged Patriot had violated KRS 131.600, et seq., by selling cigarettes to consumers in Kentucky without paying into a "qualified escrow account" as established by the Master Settlement Agreement (hereinafter "MSA").² Pursuant to the MSA, all non-participating manufacturers (those who did not join in the MSA) selling tobacco within this state must pay a required amount into escrow by April 15 of each year. The escrow amount is based upon the number of cigarette cartons sold by the manufacturer during the preceding year. The Commonwealth sought an injunction ordering Patriot to establish a "qualified escrow fund" and deposit into that fund \$85,179.97 as its escrow liability for 2001 sales. The complaint also sought civil penalties and attorney fees against Patriot pursuant to KRS 131.602(3)(b) and for the court to retain continuing jurisdiction over Patriot to insure compliance with this action

¹ Following the filing of appeal, this Court permitted Gregory D. Stumbo, Attorney General to be substituted for Albert B. Chandler, III.

² The MSA is the agreement reached in November 1998 between the major tobacco companies and the Attorneys General of 46 states.

and future compliance with the statute. Patriot eventually moved to dismiss the Commonwealth's complaint and filed counterclaims requesting the circuit court to declare the escrow statute unconstitutional. The Commonwealth then filed a motion to strike Patriot's answer and counterclaim or in the alternative, to dismiss Patriot's counterclaims.

Each party filed memoranda arguing its position and responding to the other party's arguments. Finally, on May 19, 2003, the Commonwealth filed a motion to submit for a decision. Thereafter, the circuit court entered an opinion and order disposing of the case. In its order, the circuit court discussed Patriot's counterclaims and affirmative defenses and dismissed them. The court then found that Patriot had violated KRS 131.602, determined that Patriot should have placed \$85,179.97 into an escrow account by April 15, 2002, but did not, and assessed civil penalties against Patriot in the amount of \$255,539.91 (three times the 2001 escrow account). Patriot was also ordered to pay the costs and attorneys' fees incurred by the Commonwealth.

Patriot timely filed a motion to reconsider together with a memorandum in support with attached exhibits, which argued that only the motion to dismiss their counterclaim had been submitted to the court. The court viewed Patriot's motion as a CR 59.05 motion to alter, amend or vacate the judgment.

The court agreed with Patriot and on August 20, 2003, entered the following order amending prior opinion and order:

ORDER AMENDING PREVIOUS OPINION AND ORDER

This matter having come before the Court upon Defendant's Motion to Reconsider (treated by the Court as a Motion to Alter, Amend or Vacate a Judgment), the Court having reviewed the motion and the opposing memorandum, and having heard oral argument on August 6, 2003, and for good cause shown, the Court hereby AMENDS its previous Opinion and Order entered on July 16, 2003, maintaining that portion of the Order which dismisses Defendant's Counterclaim, and vacating that portion of the Order which deals with the dismissal of Defendant's defenses, with the finding of liability against Defendant, and with the assessing of penalties and attorneys' fees. The Court further determines that there are factual issues which need to be determined before a decision can be made on liability and damages, and hereby allows the parties an opportunity to engage in discovery with respect to those issues, for the purpose of presenting evidence to the Court at a later date.

On September 18, 2003, Patriot appealed that order (2003-CA-002014-MR). On September 19, 2003, the Commonwealth filed a motion to clarify the August 20, 2003, order as it related to vacating the July 16, 2003, order dismissing Patriot's defenses, especially that of lack of personal jurisdiction. Following another hearing, the Franklin Circuit Court entered the following order on October 20, 2003:

**ORDER AMENDING AUGUST 20, 2003
"ORDER AMENDING PREVIOUS OPINION AND ORDER"**

Upon Motion of the plaintiff to clarify the Court's August 20, 2003[,] Order wherein the Court "maintain[ed] that portion of the [July 16, 2003] Order which dismisses defendant's Counterclaim, and vacating that portion of the Order which deals with the dismissal of defendants defenses, with a finding of liability against defendant, and with the assessing of penalties and attorney fees," the Court hereby amends and clarifies that Order as follows:

1. The Court maintains those portions of the July 16, 2003[,] Order which dismissed the defense of lack of personal jurisdiction, and which dismissed the Affirmative Defenses/Counterclaims raised in Patriot Tobacco Company's Affirmative Defenses two through seven (1-7)[sic]/Counterclaims one through six (1-6).

2. The Court vacates those portions of the July 16, 2003[,] Order which dismissed all other defenses which Patriot Tobacco Company may have to the Complaint and which assessed penalties and attorney fees against Patriot Tobacco Company.

Patriot also timely appealed this order. (Appeal No. 2003-CA-002355-MR). This Court has consolidated the two appeals.

Prior to the briefs being filed in this matter, the Commonwealth filed a motion to dismiss and remand based upon the argument that this Court lacked jurisdiction because the orders appealed from were not final and appealable orders. The motion panel passed this motion to the "merits" panel. Having thoroughly reviewed this matter, we agree with the Commonwealth's argument and thus, are compelled to dismiss

Patriot's appeals and remand the matter back to the Franklin Circuit Court for further proceedings.

CR 54.01 defines a final or appealable judgment as one that "adjudicate[s] all the rights of all the parties in an action or proceeding." CR 54.02 addresses multiple claims including counterclaims. In such actions, the court may grant a final judgment upon one or more but less than all the claims or parties only upon a determination that there is no just cause for delay. However, to be final and appealable, the judgment shall recite that "the judgment is final." CR 54.02 further states:

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.

Patriot's reliance on Ratliff v. Fiscal Court of Caldwell Cty.³ is misplaced. Ratliff dealt with condemnation of property and established an exception to the rule in that the property, if taken, would be materially altered or destroyed if an immediate appeal was not permitted. This distinction was

³ 617 S.W.2d 36 (Ky. 1981).

pointed out in The Lexington Herald-Leader Co. v. Beard,⁴ when the Kentucky Supreme Court stated:

The qualitative distinction between a discovery order and an order divesting a property owner of his property should be readily apparent. An order of immediate possession which irreversibly disposes of the use and possession of property is final in character even though there is another issue in the case, compensation for the taking, which remains to be decided. A discovery order is totally dissimilar. As a general proposition to permit appeals from discovery orders would create intolerable delay and unmitigated chaos in the progress of the litigation.

Id. at 376. Similarly, various cases have reinforced the rule that only final orders are appealable.⁵ As to Patriot's reliance on Rosenblatt v. American Cyanamid Co.,⁶ we believe it to be both factually and legally distinguishable and not relevant to the matter herein.

Reviewing the two orders from which Patriot appeals, it is clear that neither is a final and appealable order. In amending the July 16, 2003, order (which we note was final), the Franklin Circuit Court specifically stated that "there are factual issues which need to be determined before a decision can be made on liability and damages, and [the Court] hereby allows

⁴ 690 S.W.2d 374 (Ky. 1984).

⁵ See Burroughs v. Bake Oven Supply Co., Inc., 434 S.W.2d 33 (Ky. 1968); Hook v. Hook, 563 S.W.2d 716 (Ky. 1978); Franz, Inc. v. Blue Grass Hams, Inc., 520 S.W.2d 313 (Ky. 1975); Lebus v. Lebus, 382 S.W.2d 873 (Ky. 1964) citing four additional cases.

⁶ 86 S.Ct. 1, 15 L.Ed.2d 39 (1965).

the parties an opportunity to engage in discovery with respect to those issues, for the purpose of presenting evidence to the Court at a later date." Since neither order is final, neither order is appealable, and thus we grant the Commonwealth's motion to dismiss the appeals.

ALL CONCUR.

ENTERED: March 25, 2005

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

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