

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001662-MR

STEPHEN PALMER, TRUSTEE IN BANKRUPTCY
FOR BIGGS FARM, INC.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-04762

DONI BIGGS; EATON SALES, INC.;
EATON FARM, INC.;
EATON FARMS MANAGEMENT, LLC

APPELLEES

OPINION
AND ORDER
DISMISSING APPEAL

** ** *

BEFORE: HOWARD AND KELLER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

KELLER, JUDGE: Stephen Palmer, Trustee in Bankruptcy for Biggs Farm, Inc.

("Palmer"), appeals from an Order denying his motion to substitute as a party for Biggs

Farm, Inc. ("Biggs Farm"), and to amend the complaint filed by "Doni Biggs d/b/a/ Biggs

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

Farm, Inc." The circuit court denied Palmer's motion on the grounds that Biggs Farm was never a party to the action; therefore, Palmer could not be substituted for Biggs Farm. The Appellees, Doni Biggs;² Eaton Sales, Inc.; Eaton Farms, Inc.; and Eaton Farms Management, LLC (hereinafter referred to as "Eaton"); argue that the appeal is premature as the order is not final and appealable and that, if the order is final and appealable, the circuit court correctly denied Palmer's motion. Finally, Eaton asks for attorneys' fees and costs because it was required to respond to this appeal. For the reasons set forth below, we dismiss Palmer's appeal as premature and deny Eaton's request for attorneys' fees.

FACTS

We will briefly set forth the salient facts in this case. In her Complaint, which she filed *pro se*, Doni Biggs (Biggs) alleged that she sent a number of thoroughbred horses to Eaton for boarding and preparation for the November and January Keeneland sales. In November of 2001, Eaton returned the horses to Biggs, claiming that the horses had developed "strangles" while at Biggs Farm or at Hagyard Davidson McGee Associates, P.S.C. Biggs alleges that other horses had developed strangles while at Eaton, and she filed the subject lawsuit alleging that Eaton was negligent in accepting horses from Biggs for boarding and in the care and boarding of Biggs's horses. Because she was filing the Complaint *pro se*, Biggs filed it in her name "d/b/a Biggs Farm, Inc."

² Although Doni Biggs is named as an appellee, she has not filed a brief in this matter. All arguments made in opposition to Palmer's appeal have been made by Eaton entities.

She did not otherwise file the Complaint in the name of Biggs Farm or make any allegations specific to Biggs Farm.

Eaton filed an Answer denying that it had been negligent. Eaton also filed a counterclaim alleging that Biggs had shown photographs of an injured horse to potential buyers at the September 2002 Keeneland sale; that Biggs had distributed those photographs to others by mail in December of 2002; and that Biggs attributed the injuries depicted in the photographs to Eaton. Eaton made claims based on false light and defamation and sought compensatory and punitive damages. Eaton later amended its counterclaim alleging that Biggs owed Eaton in excess of \$75,000 plus interest for services rendered by Eaton prior to the return of the horses in November of 2001.

On April 4, 2003, Eaton filed a motion for summary judgment. In its motion, Eaton asserted that Biggs was not a part owner of any of the horses in question. Rather, the horses were owned by partnerships and Biggs was not a partner in the partnerships. In support of this assertion, Eaton pointed to various loan documents, court documents in a lawsuit that had been filed against Biggs and Biggs Farm in Bourbon County, and documents from the Jockey Club. Eaton also alleged a number of delays occasioned by Biggs's failure to respond to Eaton's counterclaim and amended counterclaim and discovery requests. When Biggs failed to respond, the circuit court issued an order dismissing Biggs's complaint and granting judgment to Eaton based on its counterclaims.

Biggs obtained counsel and filed a motion to set aside the circuit court's order granting Eaton's motion for summary judgment and motion for default judgment. The circuit court denied the motion to set aside the default judgment, but granted the motion to set aside the summary judgment.

At some point in the intervening years, Biggs and Biggs Farm filed for bankruptcy protection. On June 15, 2005, Palmer, as trustee in bankruptcy for Biggs Farm, filed a motion to amend complaint and to be substituted as a party for Biggs Farm. On June 16, 2005, Biggs moved to amend her complaint. In her amended complaint, Biggs noted that she was the sole shareholder of Biggs Farm and was personally liable for most of the debts of Biggs Farm. Biggs also alleged that the horses in question were either partially or wholly owned by Biggs Farm.

In its response to the motion to amend by Biggs and the motion to substitute and amend by Palmer, Eaton stated that Biggs had disavowed any ownership interest in the horses in the Bourbon County case. Furthermore, Eaton argued that Biggs Farm was never a party to this lawsuit and therefore, the trustee could not substitute for that non-party.

In an order entered on July 21, 2005, the circuit court denied Palmer's motion to amend and to substitute as a party for Biggs Farm because Biggs Farm was not a party to this action. However, the order did not recite that it was final and appealable nor did it state that there was no just reason for delay.

ANALYSIS

We will first address the issue of whether the circuit court's order is final and appealable. CR 54.02(1) provides that:

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.

Biggs has alleged that Eaton was negligent with regard to its care of the horses Biggs and/or Biggs Farm sent to Eaton. Eaton has alleged that Biggs defamed it or placed it in a false light by circulating photographs of an injured horse and attributing those injuries to Eaton. Therefore, there are multiple claims for relief. The circuit court's order did not dispose of all of the claims between the parties. Therefore, pursuant to CR 54.02, the circuit court was required to make a determination that there was no just reason for delay and that the order as to Palmer was final. The circuit court did neither. As noted in *Peters v. Board of Education of Hardin County*, 378 S.W.2d 638 (Ky. 1964), when the circuit court fails to recite that the judgment is final and that there is no just

reason for delay, this Court cannot entertain an appeal as this Court lacks jurisdiction. *Id.* at 639-40.

As to Eaton's request for attorneys fee, CR 73.02(4) provides that:

If an appellate court determines that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that it is so totally lacking in merit that it appears to have been taken in bad faith.

Having reviewed this matter, and the complicated procedural history, we hold that Palmer's appeal was not so totally lacking in merit as to have been taken in bad faith.

CONCLUSION

Based on the above, it is ORDERED that this appeal be, and it is, DISMISSED. Furthermore, Eaton's request for attorney's fees is denied.

ALL CONCUR.

ENTERED: _____

JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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