

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001763-MR

CLEVELAND "BO" HINKLE

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 04-CI-00467

LORETTA SICINSKI

APPELLEE

OPINION
DISMISSING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Cleveland Hinkle appeals from an order of the Knox Circuit Court denying his motion to alter, amend, or vacate a judgment entered against him in favor of Loretta Sicinski on March 22, 2005. Hinkle contends that the trial court abused its discretion when it declined to vacate the judgment. Sicinski argues that Hinkle's

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

appeal is fatally flawed and that this court lacks jurisdiction to consider it on the merits.

We agree that Hinkle's appeal is untimely and must be dismissed.

On September 27, 2004, Sicinski filed a civil action against Hinkle alleging that Hinkle had abused the process of the Knox District Court resulting in a false and malicious prosecution against her. Sicinski was arrested on charges of terroristic threatening at seventy-seven years of age. She claimed that Hinkle had acted with malice and oppression toward her. She requested compensatory damages for wrongful arrest, intentional infliction of emotional distress, false and malicious prosecution, abuse of process, and harassment. She also sought attorneys fees and punitive damages.

Summons issued and was executed by the Knox County Sheriff's Office on October 19, 2004. On October 26, 2004, Hinkle, acting *pro se*, filed an answer, motion to dismiss, and counterclaim. The summons directed that Hinkle be served at Highway 6 in Woodbine, Kentucky. However, Hinkle's combined answer, motion, and counterclaim reflected that his address was 283 Hyde Park Lane, Corbin. On October 27, Sicinski served Hinkle at his Corbin address with copies of her motion for a pre-trial conference; her motion to strike offensive portions of Hinkle's pleadings; and her motion to dismiss his counterclaim. On November 5, Sicinski served Hinkle at his Corbin address with a re-notice of her motions to strike and to dismiss.

On November 8, 2004, the circuit clerk entered the trial court's pre-trial order. The order assigned the matter for a pre-trial conference to be held at 11:00 on January 7, 2005. The clerk directed a copy of the order to be mailed to Hinkle at

Highway 6, Woodbine, Kentucky. The order was immediately returned to the clerk's office by the postal service with a notice that the envelope bore an insufficient address.

Although Hinkle did not attend the court's pre-trial conference held on January 7, the case was docketed for trial at 9:00 on March 16, 2005. The circuit clerk entered the court's order and indicated that distribution had been made to Hinkle at 283 Hyde Park Lane, Corbin. On February 15, 2005, Sicinski served Hinkle at his Corbin address with her pre-trial compliance material.

On March 16, the matter was called for trial. Although Hinkle did not appear, Sicinski presented her evidence and proved the elements of her causes of action and damages. On March 22, 2005, the court entered its judgment. Sicinski was awarded \$5,000.00 for compensatory damages; \$10,00.00 for punitive damages; and \$1,250.00 for attorney fees.

The circuit clerk indicated that a distribution of the judgment was made to Hinkle at 283 Hyde Park Lane, Corbin. However, the judgment was eventually returned to the clerk's office by the postal service again with a notice that the envelope bore an insufficient address. The address printed on the envelope by the circuit clerk was Highway 6, Woodbine, Kentucky.

On March 23, 2005, Sicinski served Hinkle at his Corbin address with a notice of judgment lien. A copy of the court's judgment, entered the day before, was attached and served with the notice. On April 25, Sicinski served Hinkle at his Corbin address with a notice of post-judgment deposition. Hinkle appeared and participated in

the deposition. On May 9, Sicinski served Hinkle at his Corbin address with a motion for contempt.

On May 12, 2005, Hinkle filed a motion to set aside the judgment, contending that he had not been properly notified by the clerk's office of "appearance dates." He attached an envelope postmarked January 10, 2005, and addressed to him at Highway 6, Woodbine, Kentucky. Hinkle contended that he had found the empty envelope on top of the kitchen refrigerator at his father's home in Woodbine.

On June 23, 2005, Hinkle, now represented by counsel, renewed his motion to vacate, alter, or amend the court's judgment of March 22. On July 5, 2005, Sicinski filed a memorandum in response to Hinkle's motion. Sicinski argued that Hinkle had been properly served with each and every motion in the matter; that he had received proper, timely, and actual notice of the proceedings -- despite the circuit clerk's error; that he had elected not to participate in the action after filing his answer and counterclaim; and that he should not now be heard to complain.

On July 27, 2005, the trial court denied Hinkle's motion to vacate. The court concluded that despite the clerical errors, Hinkle had been provided adequate notice that Sicinski was continuing to pursue her action against him. The court held that Sicinski had properly served Hinkle with each of her motions and other pleadings and that his receipt of this information had put Hinkle on inquiry notice with respect to the trial date. The court concluded that Hinkle had declined to participate in the proceedings. Moreover, the court noted that although Hinkle had received timely and **actual** notice of

the judgment entered against him on March 22, he had failed to take any action to protect his interests until May 12. He waited until August 24, 2005, to file his notice of appeal.

In his brief, Hinkle argues that the court erred by permitting the trial to proceed under circumstances indicating that he had not received notice of the date and time of the proceedings and that it also erred by failing to grant his post-judgment motion to alter, amend, or vacate the judgment. Sicinski responds that because Hinkle's motion to vacate was filed out of time, it was barred. She also contends that the motion failed to state a sufficient basis for relief; consequently, it lacked substantive merit. Accordingly, Sicinski argues that Hinkle's appeal was not timely filed and that this court lacks jurisdiction to entertain his arguments.

We shall first consider Sicinski's contention that we lack jurisdiction to consider the merits of Hinkle's appeal. Kentucky Rule of Civil Procedure (CR) 73.02(1) requires that a notice of appeal must be filed within 30 days after the date of the clerk's notation of service of the judgment pursuant to the provisions of CR 77.04(2). The rules permit the trial court to extend the time for appeal by ten days upon a showing of excusable neglect based on the failure of a party to learn of the entry of the judgment. CR 73.02(1). However, the failure of the clerk to serve notice of the entry of any judgment (or the failure of a party to receive notice) does not affect the validity of the judgment and does not affect the time to appeal. CR 77.04(4). Under those circumstances, the trial court cannot relieve a party from the failure to appeal within the time allowed. *Id.*

The trial court's judgment in this case was entered on March 22, 2005. Sicinski served Hinkle with a copy of the judgment **the following day**. Hinkle does not deny that he received actual and seasonable notice of the entry of judgment against him. Yet the record shows that he took no steps to object to the entry of judgment until May 12, 2005, when he filed an untimely motion to set aside the judgment. Hinkle's notice of appeal was filed on August 24, 2005, well after the time to appeal from the judgment had expired. At that point, the trial court lost jurisdiction to relieve Hinkle of his failure to file a timely notice of appeal.

Hinkle contends that the civil rules presume that all parties were present during the proceedings and that they participated at trial. He argues that these provisions of the civil rules cannot bar his appeal since he never had proper notice of the trial date or the entry of judgment against him, contending that proper notice of the trial date is essential to fundamental fairness. In support of his position, Hinkle relies chiefly on the decision of the Supreme Court of Kentucky in *Wiley v. Adkins*, 48 S.W.3d 20 (Ky. 2001).

In *Wiley*, the Supreme Court reversed and remanded a decision of this court affirming the trial court's judgment that awarded money damages in an action for fraud against Excel College, an independent business school. Wiley, the owner of Excel College, was sued in 1990 by a group of former students. A savings and loan association that had made federally insured student loans to the students was later added as a party defendant. Wiley's attorneys withdrew from the representation in 1992. Wiley did not retain new counsel but moved to Texas; he did not inform anyone of his new address.

In August 1997, the trial court docketed the matter for trial on November 17, 1997, and the order was duly entered. No attempt was made to serve Wiley with notice of the motion for trial. In October, the court ordered that the trial set for November would address only the liability of the savings and loan.

Four days before the trial date, Wiley acting *pro se*, filed a motion for continuance claiming that he had not received proper notice and that he was not represented by counsel. The trial court denied the motion and the proceedings continued without Wiley. On the second day of trial, the savings and loan association settled with the plaintiffs. Without notice, the trial court then granted a default judgment in favor of the plaintiffs on the issue of Wiley's liability. Wiley appealed.

The Supreme Court reversed the judgment. It concluded that the trial court had erred by requiring Wiley to proceed to trial on the issue of liability when the order of the trial court had carefully recited that the case would be tried solely on the issue of the bank's liability. The court held that Wiley had not received “seasonable notice which was reasonable or appropriate to the complex nature of the case.” Since Wiley had received insufficient notice of trial, the court held that default judgment against him had been entered erroneously.

There is scant similarity between the *Wiley* case and the facts and circumstances currently before us. There is no indication in the procedural history in *Wiley* to suggest that there was a dispute as to the timeliness of the appeal. Moreover, the court's holding was based on its conclusion that the defendant had been afforded

absolutely no notice that questions involving his liability were to be resolved and adjudicated at the scheduled trial.

It is axiomatic that parties are entitled to adequate notice of an upcoming trial date and the entry of judgment. However, we are persuaded that Hinkle had sufficient actual notice of the proceedings and of the entry of judgment against him. While Hinkle objected to the clerk's failure to serve notice of the entry of the judgment, the civil rules expressly provide that the failure does not affect the validity of the judgment or the time to appeal it. Furthermore, "it is a familiar rule that parties litigant, once in court, either for themselves or through their attorneys, must keep track of their cases" *Burns v. Brewster*, 338 S.W.2d 908 (Ky.App. 1960). Once a party has actual notice of the proceedings, he may be estopped from raising an objection as to how he came by the information. *Id.*

Hinkle was served with every pleading and motion filed by Sicinski. He was aware that she was pursuing the matter and that she was actively seeking a trial date. He was aware that a motion to set a trial date was imminent, and he was obliged to keep abreast of developments in the litigation. Although he was served with documents describing the nature of the testimony of Sicinski's proposed witnesses along with a list of her proposed trial exhibits, Hinkle failed to make an inquiry with the court. As distinguished from *Wiley*, Hinkle had no reasonable basis to believe that Sicinski's action against him would not be tried. On the contrary, the circumstances should have put Hinkle on guard to focus his immediate attention on the pending litigation. Most

significantly, although Hinkle had actual notice of the trial court's judgment against him within a few days of its entry, he nonetheless failed to take timely action to raise any alleged error before the trial court. His notice of appeal was wholly untimely.

Since we lack jurisdiction to consider whether the trial court abused its discretion by failing to grant Hinkle's motion to alter, amend, or vacate, the appeal must be and is hereby DISMISSED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert Stivers
Manchester, Kentucky

BRIEFS FOR APPELLEE:

David O. Smith
Marcia A. Smith
Corbin, Kentucky