

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002151-MR
AND
NO. 2005-CA-002620-MR

INTEGRATED TELECOM
SERVICES CORPORATION

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CI-004610

LINN STATION PROPERTIES, LLC

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING

** ** *

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: This case arises from the breach of a commercial lease between a lessor, Linn Station Properties, LLC (Linn Station), and a lessee, Integrated Telecom Services Corporation (ITS), and ITS challenges the propriety of a default judgment entered in Linn Station's favor by the Jefferson Circuit Court. On direct appeal, ITS contends that the circuit court did not have subject matter jurisdiction over the non-rental

issues, because those issues were subject to arbitration under the terms of the lease, and erred in determining that ITS waived arbitration. On cross-appeal, Linn Station challenges the timeliness of ITS's motion to vacate. We affirm.

In 1997, Caldwell R. Willig, the original owner, and ITS entered into a 5-year lease of improved real property located at 10160 Linn Station Road in Louisville, Kentucky.¹ The term of the lease was from January 1, 1998, through December 31, 2003.² Under the lease, ITS's obligations included paying monthly rent and maintaining and repairing the premises. The lease also provided for and enumerated several events of default and available remedies:

20. DEFAULT AND REMEDIES: Any of the following occurrences, conditions, or acts shall constitute an “Event of Default” under this Lease:

(a) If Tenant: (i) defaults in making payment when due of any rent and the default continues for ten (10) days after Tenant's receipt of written notice from Landlord specifying the default and demanding that such default be cured; or (ii) defaults in the observance or performance of any other provision of this Lease, and the default continues for sixty (60) days after Landlord gives written notice to Tenant specifying the default and demanding that such default be cured. . . .

(b) If the Leased Premises are abandoned (except during times of remodeling or as the result of any casualty or natural disaster) by Tenant for a period of fifteen (15) consecutive days[.]

. . .

¹ Linn Station became the assignee of the lease in 1999.

² Based on our calculation, the term of the lease was actually six years, as opposed to five years as recited in the lease.

If there is any Event of Default, Landlord may (i) terminate this Lease and take possession of the Leased Premises, in which event the rent shall immediately become due and be paid up to the time of said termination; and (ii) Landlord may relet the Leased Premises, either in Landlord's name or otherwise, for a term or terms which may, at Landlord's option, be less than or exceed the then remaining term of this Lease and Tenant shall also pay to Landlord, as liquidated damages for Tenant's failure to observe and perform Tenant's covenants under this Lease, the net present value (calculated at the Prime Rate, as published by The Wall Street Journal) of any deficiency between the rent required by this Lease for the remaining term and the net amount, if any, of the rents set forth in any lease or leases for the Leased Premises for each month of the period which would otherwise have constituted the remainder of the term of this Lease. In computing the liquidated damages, there shall be added to the deficiency all reasonable brokerage expenses that Landlord may incur in connection with the reletting.

Under Paragraph 29, the lease detailed the tenant's obligations upon surrender of possession:

Upon the conclusion, termination or expiration of this Lease, other than by Tenant's exercise of the purchase option granted in this Lease, Tenant covenants to surrender possession of the Leased Premises, and all improvements and fixtures on the Leased Premises to Landlord, in a condition which is, at a minimum, equivalent to the condition at the Commencement Date (subject to the improvements Tenant is allowed to make under this Lease), excepting ordinary wear and tear. Upon the conclusion, termination or expiration of this Lease, Tenant may remove from the Leased Premises, at Tenant's expense, all of Tenant's inventory and all furniture, fixtures and equipment owned by Tenant. If upon the termination of this Lease, Tenant removes the fixtures installed at the Leased Premises by Tenant, then in such event Tenant shall be obligated to install at the Leased Premises fixtures which are functionally equivalent to the fixtures in the Leased Premises

as of the Commencement Date which were removed by Tenant.

The lease also contained an arbitration clause in Paragraph 27:

Other than Landlord's right to institute legal action with respect to a default by Tenant in the payment of rent required by this Lease, any disputes under this Lease shall be referred by the parties to binding arbitration by the American Arbitration Association under its rules relating to commercial disputes. Such arbitration shall be conducted in Jefferson County, Kentucky.

In March 2002, with almost two years remaining on the lease, Linn Station discovered that ITS had failed in its obligation to maintain the premises pursuant to Paragraph 6. Therefore, Linn Station provided ITS with notice of its default and demanded that the default be cured within sixty days. ITS did not cure the default. Pursuant to the arbitration clause, Linn Station filed a Demand for Arbitration with the American Arbitration Association (AAA) on May 2, 2002, serving ITS's registered agent, Rand Parker, and its attorney, John L. Gardner.

Sometime prior to May 2002, Linn Station discovered that in addition to failing to maintain the premises, ITS had actually abandoned the premises. This was confirmed on May 1, when the rent was not paid. On May 8, 2002, Linn Station sent ITS another notice via certified mail regarding the non-payment of rent and the abandonment of the premises. The notice was also served on John L. Gardner, in his capacity as General Counsel for Inter-Tel, Inc., the parent company of ITS. As before, ITS did not cure its default by paying the past-due rent within ten days, and continued to be absent for over fifteen days. Additionally, Linn Station discovered that ITS failed to remove its

obsolete personalty and had removed fixtures present when the lease commenced, but failed to install replacement fixtures as required by the lease.

On May 21, 2002, Gardner sent Linn Station correspondence, the body of which reads as follows:

Pursuant to your letter of May 8, 2002, please be advised of the following. Inter-Tel Technologies, Inc., is the parent company of Integrated Telecom Services Corporation (ITS). ITS, which is the only lessee on the Lease dated December 4, 1997 is now a defunct corporation with no assets. ITS abandoned the space on or about May 31, 2002. For the entire period of time that ITS occupied the space, rental was timely paid. Being defunct and having no assets, there is no need for ITS to participate in an arbitration or legal proceeding. Accordingly, you may take a default against ITS in either proceeding. The parent company neither guaranteed the lease nor agreed to assume liability for same and will not pay the damages claimed.

On June 19, 2002, Linn Station filed a Verified Complaint in Jefferson Circuit Court against ITS, alleging that ITS breached the lease by failing to maintain the property, failing to pay rent, abandoning the premises, and improperly removing and failing to replace fixtures. For those breaches, Linn Station demanded \$193,000 for the net present value of the remaining rent; \$120,000 for the cost to repair the premises; and \$19,900 for the value of the fixtures and improvements removed. ITS was served with process on June 24, 2002, by a special bailiff, but never answered the complaint. Therefore, Linn Station sought and obtained a default judgment in the amount of \$332,900, which was entered on August 12, 2002. Linn Station withdrew its demand for arbitration that November. A few months after the default judgment was entered, Linn

Station sought to depose Inter-Tel's officers, directors or agents about Inter-Tel's relationship with and to ITS. The circuit court eventually limited discovery to a request for production of documents regarding any transfer of assets. In June 2003, Linn Station filed a separate action in Jefferson Circuit Court (03-CI-005485) against ITS and Inter-Tel seeking to impose liability on Inter-Tel for the amount of the default judgment. That action is still pending.

On September 28, 2004, more than two years after the default judgment was entered, ITS moved the circuit court to set aside, presumably pursuant to CR 55.02, the portion of the default judgment awarding Linn Station damages on the non-rental issues, arguing that it had no jurisdiction over those issues.³ Pursuant to the lease, all non-rental issues were subject to arbitration, meaning that those disputes were outside the jurisdiction of the circuit court. In response, Linn Station argued that ITS waived arbitration in the May 2002 letter and that the motion itself was not timely under CR 60.02, as ITS waited two years before seeking relief. The circuit court held a hearing on the motion in December. ITS asserted that the May 2002 letter did not constitute a waiver of arbitration, but only indicated that it had no intention of defending in either action. Furthermore, ITS argued that jurisdiction over the non-rental issues was vested in the AAA once Linn Station filed its notice of demand. Therefore, the circuit court lacked jurisdiction, and the default judgment on the non-rental portion was void *ab initio* as a matter of law. Linn Station, in turn, argued that ITS provided no authority to support its

³ ITS did not contest the portion of the default judgment awarding damages related to the non-payment of rent.

proposition that AAA had jurisdiction that would divest the circuit court of jurisdiction and continued to assert that the letter was a waiver. Finally, ITS stated that it did not disagree with the circuit court's statement that a default judgment would have been entered in either instance, although it continued to maintain that the circuit court lacked subject matter jurisdiction to do so.

In an order entered December 14, 2004, the circuit court denied ITS's motion to set aside the 2002 default judgment. After reciting the parties' respective arguments, the circuit court held:

The Court finds that pursuant to the case of Foremost Insurance Company v. Whitaker, Ky.App., 892 S.W.2d 607 (1995), that Motions to set aside default judgment made pursuant to CR 60.02(e) must be filed within a reasonable time. The defendant, in this instance, did not file[] his Motion within a reasonable time and instead waited two (2) years before bringing this to the Court's attention. Additionally, the Court finds that the defendant did waive arbitration as set out in its letter dated May 21, 2002. The defendant has made it clear that even if the plaintiff had proceeded with arbitration, they would have obtained a Default Judgment. The results in this case would have been the same whether the plaintiff had proceeded with this Court or proceeded with arbitration.

The order contains a notation that it was served on counsel for both Linn Station and ITS.

ITS did not seek review of the December 2004 order until almost six months later, when it filed a motion to vacate the order denying its motion to set aside or to make that order final. ITS argued that the circuit court did not address its primary argument, namely, that it lacked subject matter jurisdiction. It further argued that CR 60.02's time limitation does not apply when subject matter jurisdiction is raised, and that

subject matter jurisdiction may be raised at any point. In response, Linn Station asserted that the pending motion to vacate was untimely, as such motions under CR 52.02 must be filed within ten days after the entry of the order sought to be amended. Linn Station also pointed out that a motion filed more than ten days after the entry of a judgment may only be done pursuant to CR 60.02, but that ITS failed to cite any CR 60.02 grounds in its motion. In this case, ITS was almost six months too late in seeking review. Furthermore, Linn Station argued that the December 2004 order was final and appealable upon entry, but no appeal was taken. Finally, Linn Station stated that the December 2004 order did address subject matter jurisdiction, in that the circuit court made a finding that ITS waived its right to arbitrate. In reply, ITS argued that subject matter jurisdiction never vested due to the pending arbitration and that subject matter jurisdiction cannot be waived.

On September 29, 2005, the circuit court entered an opinion and order, in which it essentially granted ITS's pending motion. While it did not specifically vacate the December 2004 order, the circuit court opted to reconsider (and again deny) ITS's original motion to set aside the default judgment. The circuit court first determined that it would entertain the motion despite the timeliness issue Linn Station raised, as it pertained to subject matter jurisdiction. It then concluded that it had subject matter jurisdiction, because ITS never actively participated in the arbitration proceeding and sent correspondence stating that it would not be participating.⁴ Therefore, the circuit court

⁴ We note that the lease requires the parties, not a party, to refer any non-rental disputes to arbitration.

was unable to find any valid reason to set aside the default judgment. It is from this order that ITS has appealed and Linn Station has cross-appealed.

On direct appeal, ITS continues to argue that the circuit court lacked subject matter jurisdiction over the arbitration issues and that the alleged waiver in the May 2002 letter cannot confer such jurisdiction. Linn Station disputes ITS's arguments in its appellee brief and goes on to argue in its cross-appellant brief that the circuit court erred in deciding to reconsider the subject matter jurisdiction argument, as ITS did not timely seek review of the December 14, 2004, order that actually ruled on the issue.

DIRECT APPEAL

We shall first address the propriety of ITS's direct appeal. Having reviewed the procedural history of this case, as well as Linn Station's motion to dismiss the direct appeal and its argument on cross-appeal, we hold that the circuit court erred in considering ITS's June 2005 motion to vacate the December 2004 order. This decision is based upon our conclusions that the circuit court had already ruled on the issue of subject matter jurisdiction and that ITS did not timely seek review of the December 2004 order.

ITS based its June 2005 motion upon the supposition that the circuit court did not address subject matter jurisdiction in the first order, making it proper for the circuit court to rule on that issue as delineated in the second motion. We disagree with this and hold that the circuit court did address subject matter jurisdiction in the December 2004 order when it determined that ITS had waived arbitration in the May 2002 letter. It logically follows from this determination that the circuit court was ruling that it had

subject matter jurisdiction over the dispute. Therefore, the circuit court should not have reviewed its prior ruling on this basis, despite the fact that the issue of subject matter jurisdiction may be raised at any time. Here, the issue had already been addressed, and, as more fully addressed below, ITS failed to timely or properly seek review of the initial ruling.

This leads us to our second conclusion, that ITS's June 2005 motion was untimely. The first order denying ITS's motion to set aside the default judgment under CR 60.02 was entered and served on December 14, 2004. We are instructed that orders denying CR 60.02 motions are final and appealable upon entry. *Good v. Ohio Edison Co.*, 149 F.3d 413 (6th Cir. 1998). *See also Hackney v. Hackney*, 327 S.W.2d 570, 571-72 (Ky. 1959); *Brozowski v. Johnson*, 179 S.W.3d 261, 263 (Ky.App. 2005). Once the December 2004 order was entered, ITS had essentially three options to seek relief: 1) a motion to amend under CR 52.02; 2) a notice of appeal; or 3) a CR 60.02 motion.

First, ITS could have filed a motion pursuant to CR 52.02 and requested the circuit court to make additional findings and amend its judgment. However, such motions must be “made not later than 10 days after entry of judgment[.]” CR 52.02. The same is true for motions filed under CR 59.05. There is no question that ITS failed to seek CR 52.02 relief within ten days.

Second, ITS could have appealed the order to the Court of Appeals. However, a notice of appeal must “be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2).” CR 73.02(1)(a). The Clerk of the

Jefferson Circuit Court noted that the attorneys of record, including William H. Mooney as counsel for defendant, were served with the order on December 14, 2004. While we appreciate ITS's dilemma in that its attorney apparently did not learn of the order's entry until just prior to filing the June 2005 motion, the law is clear that “the time for filing a notice of appeal is triggered not by service but by the date of the clerk's notation on the docket of the service of notice of entry. That date is the date of entry for the purpose of fixing the running of time for appeal.” *Fox v. House*, 912 S.W.2d 450, 451 (Ky.App. 1995). *See also Mollett v. Trustmark Ins. Co.*, 134 S.W.3d 621 (Ky.App. 2003).

Third, and finally, ITS could have sought relief under CR 60.02, which reads as follows:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

We note that “CR 60.02 relief 'is not available for correction of an error or mistake of law by the court.’” *Brozowski*, 179 S.W.3d at 265, *citing James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 93 (Ky. 1957).

ITS did not cite or rely upon any of these Rules in its June 2005 motion, nor are we able to discern any CR 60.02 grounds in the motion itself. For these reasons, the circuit court should not have ruled upon the merits of the June 2005 motion, but should have summarily denied it. The issues ITS raised in its brief are therefore moot, and we shall not address them. However, since the circuit court did not change its initial ruling, we shall affirm.

CROSS-APPEAL

On cross-appeal, Linn Station raises a single argument that addresses the same issue we held to be determinative on direct appeal. While we agree that the circuit court erred in ruling on the merits of the June 2005 motion, we nevertheless hold that this error is harmless, as the ruling did not change the ultimate ruling of the December 2004 order. CR 61.01. Therefore, we affirm.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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