

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000007-MR

THE OHIO CASUALTY INSURANCE COMPANY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 99-CI-02458

RICHARD WILSON; PEGGY WILSON;
AND ERPENBECK COMPANY

APPELLEES

OPINION AND ORDER DISMISSING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: The Ohio Casualty Insurance Company brings this appeal from a November 14, 2005, order of Kenton Circuit Court denying Erpenbeck Company's motion to enforce a foreign judgment. We dismiss as being taken from an interlocutory order.

On December 17, 1999, Richard Wilson and Peggy Wilson (Wilsons) filed a complaint against the Erpenbeck Company (Erpenbeck) in the Kenton Circuit Court.

Apparently, the Wilsons contracted with Erpenbeck for the purchase of a lot and construction of a home. After closing upon the property, a landslide occurred upon the rear of the Wilsons' property. In the complaint, the Wilsons alleged breach of contract, fraudulent and negligent misrepresentation, negligent construction, violation of the consumer protection act, and violation of express and implied warranties.

Erpenbeck eventually responded and filed an answer on January 18, 2000. On November 23, 2004, Ohio Casualty moved to intervene as a defendant. Apparently, Ohio Casualty had issued a policy of insurance to Erpenbeck. Ohio Casualty also filed a cross-claim and counterclaim seeking a declaration that its policy of insurance issued to Erpenbeck did not provide or excluded coverage for all claims arising from the Wilsons' complaint. Thereafter, Ohio Casualty filed a motion to enforce foreign judgment. Therein, Ohio Casualty sought recognition by the circuit court of a judgment of the Court of Common Plea in Butler County, Ohio (Ohio court). In that foreign judgment, the Ohio court determined that Ohio Casualty's policy of insurance issued to Erpenbeck did not provide coverage for various claims in that litigation, including a claim by the Wilsons.

Ohio Casualty claimed that the Ohio court's judgment was entitled to full faith and credit in this Commonwealth. *See* Kentucky Revised Statutes (KRS) 426.955. On November 14, 2005, the circuit court entered an order denying Ohio Casualty's motion to enforce the Ohio court's judgment. For sundry reasons, the circuit court concluded that the Ohio court's judgment was not entitled to full faith and credit. Upon motion, the circuit court entered an order stating that “this Court's Order of November 14,

2005 is certified pursuant to CR 54.02 as final and appealable, and there is no just cause for delay.’’

Pursuant to Ky. R. Civ. P. (CR) 54.01, a final and appealable judgment adjudicates all the rights of all the parties or is made final under CR 54.02. In an action involving multiple claims or multiple parties, CR 54.02 permits a trial court to make an otherwise interlocutory order final and appealable under some circumstances. However, it is axiomatic that “[w]here an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable.’’ *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1978).

The November 14, 2005, order appealed from is by its nature interlocutory as it does not dispose of a claim between the parties. Rather, it merely ruled upon Ohio Casualty's motion to enforce the Ohio court's judgment. In its counterclaim and cross-claim, Ohio Casualty sought a declaration that its insurance policy issued to Erpenbeck did not extend coverage to the claims asserted by the Wilsons. However, the November 14, 2005, order did not adjudicate this claim; it merely denied Ohio Casualty's motion to enforce a foreign judgment. Consequently, the November 14, 2005, order is by its very nature interlocutory and inclusion of the CR 54.02 recitals by the circuit court was of no effect.

Ohio Casualty has cited to *Preferred Risk v. Kentucky Farm Bureau*, 872 S.W.2d 469 (Ky. 1994) for the proposition that the November 14, 2005, order was amenable to being made final and appealable under CR 54.02. This authority was also

relied upon by the circuit court in rendering its order final and appealable pursuant to CR 54.02. However, we view *Preferred Risk* as distinguishable. In *Preferred Risk*, the circuit court adjudicated the question of whether an insurance policy issued by Kentucky Farm Bureau actually provided coverage to the insured and ultimately answered the question affirmatively. *Id.* The Supreme Court held that a judgment conclusively determining the question of insurance coverage may be made final and appealable by a circuit court under CR 54.02. *Id.* By contrast, the November 14, 2005, order did not conclusively adjudicate the question of whether Ohio Casualty's insurance policy extended coverage to the Wilsons but merely denied a motion to enforce the Ohio court's judgment. This is clearly distinguishable from the issue adjudicated in *Preferred Risk*.

Now therefore be it ORDERED that Appeal No. 2006-CA-000007-MR is DISMISSED as being taken from an interlocutory order.

ALL CONCUR.

ENTERED: August 24, 2007

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Richard J. Rinear
Cincinnati, Ohio

BRIEF FOR APPELLEES RICHARD
WILSON AND PEGGY WILSON:

Joseph E. Conley, Jr.
Crestview Hills, Kentucky