

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000365-MR

DONALD STACY

APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 06-CI-00170

ALLSTATE INSURANCE COMPANY

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Donald Stacy brings this appeal from a January 22, 2007, partial summary judgment of the Scott Circuit Court dismissing Stacy's claim for uninsured motorist benefits against Allstate Insurance Company. We dismiss.

This case originated when Kim Szajka filed a complaint in the Scott Circuit Court against Allstate and Shelter Mutual Insurance Company. Szajka had rented a motor vehicle from ABC Rent-A-Car Company (ABC) and named Donald

Stacy as an additional driver. While Stacy was driving the rented vehicle, the vehicle was struck by an uninsured motor vehicle. As a consequence, the rented vehicle suffered property damage in the amount of \$13,237.26. Szajka was insured by a motor vehicle insurance policy with Allstate, and Stacy was insured by a motor vehicle insurance policy with Shelter.

In the complaint, Szajka claimed that ABC was seeking to recoup from her the \$13,237.26 in property damage to the rented vehicle. Szajka claimed that both Allstate and Shelter were responsible for payment of the property damage to the rented vehicle under the respective insurance policies. Szajka also asserted that Allstate and Shelter violated the Unfair Claims Practices Act and sought damages thereunder.

Shelter filed a motion to dismiss the complaint and argued that Szajka lacked standing to bring the instant action. Shelter alleged that it owed no duty to Szajka as its insurance policy was with Stacy.

On May 26, 2006, Stacy filed a motion to intervene and to file a third-party complaint. Stacy sought to assert a claim for uninsured motorist benefits against Shelter and also sought recovery from Allstate.

Allstate then filed an answer to Szajka's complaint and also filed a cross-claim against Shelter. In the cross-claim, Allstate claimed that Shelter was "responsible for some or all of the amounts which . . . [Allstate] has paid to ABC Rent-a-Car's subrogee Zurich Insurance Company (Empire Fire & Marine) and is

further liable to . . . [Allstate] for the amounts, if any, for which it may be adjudged liable in the above-captioned action.”

Szajka ultimately settled all claims against Allstate and Shelter. An agreed order of dismissal was entered on November 9, 2006.

On November 20, 2006, the circuit court granted Stacy’s motion to intervene and to file a third-party complaint. Therein, Stacy alleged that he was entitled to recover from Allstate and Shelter the \$13,237.26 in property damage to the rented vehicle. Stacy also asserted that Allstate and Shelter violated the Unfair Claims Practices Act and sought damages.

Allstate filed a motion for summary judgment seeking dismissal of Stacy’s claim, while Shelter filed an answer to Stacy’s third-party complaint.

By partial summary judgment entered on January 22, 2007, the circuit court dismissed Stacy’s claims against Allstate.

By notice of appeal filed February 15, 2007, Stacy brought this appeal to the Court of Appeals from the circuit court’s January 22, 2007, partial summary judgment.

By show cause order entered May 6, 2008, this Court ordered the parties to show good cause why the appeal should not be dismissed as having been taken from an interlocutory order. Stacy filed a response to the show cause order. Therein, Stacy stated that he had filed a Motion To Enter Final And Appealable Judgment *Nunc Pro Tunc* in the circuit court.¹ Stacy requested the circuit court to

¹ The motion was attached as an exhibit to the response and bore a “filed” stamp dated May 19, 2008. The motion further states that a hearing is scheduled on the motion in Scott Circuit Court

add the recitation “[t]here is no just cause for delay” by entry of a *nunc pro tunc* order. Stacy argued that such a *nunc pro tunc* order would cure any jurisdictional defect and transform the January 22, 2007, partial summary judgment into a final and appealable order. For the reasons hereinafter stated, we disagree with Stacy and dismiss this appeal.

A final and appealable judgment is one that adjudicates all the rights of all the parties or is made final under Kentucky Rules of Civil Procedure (CR) 54.02. CR 54.01. In an action involving multiple claims and/or multiple parties, CR 54.02 permits the trial court to make an otherwise interlocutory order final and appealable in certain circumstances. However, under CR 54.02, an interlocutory order may only be made final and appealable if the order includes both recitations – (1) there is no just cause for delay and (2) the decision is final. It is well-recognized that strict compliance with the rule is required. *Peters v. Bd. of Educ.*, 378 S.W.2d 638 (Ky. 1964). A court’s failure to include both recitations in a judgment renders it interlocutory and nonappealable. *Turner Constr. Co. v. Smith Bros., Inc.*, 295 S.W.2d 569 (Ky. 1956). The Kentucky Supreme Court has recently upheld the requirement that both recitations must be made by the trial court to make an otherwise interlocutory order final. *Watson v. Best Fin. Servs., Inc.*, 245 S.W.3d 722 (Ky. 2008).

The underlying case involves multiple claims and multiple parties. It is clear that the January 22, 2007, partial judgment did not adjudicate all the rights

on June 5, 2008.

of all the parties as required by CR 54.01. Rather, Allstate's cross-claim against Shelter remains adjudicated, and Stacy's third-party claims against Shelter also remain adjudicated. Moreover, the January 22, 2007, partial summary judgment did not contain both recitations that there is no just cause for delay and that the judgment was final. The partial summary judgment only provided that "[t]his is a final and appealable order."

Thus, the partial summary judgment is plainly interlocutory and nonappealable.

In his response to our show cause order, Stacy claims that the subsequent entry of a *nunc pro tunc* order adding the missing finality recitation under CR 54.02 will cure any jurisdictional defect and breathe finality into the January 22, 2007, partial summary judgment. Our court has previously looked with displeasure upon such a practice and specifically reasoned that "'a *nunc pro tunc* order cannot retroactively vest finality upon a judgment which was interlocutory when the notice of appeal herein was filed.'" *Copass v. Monroe Co. Med. Found.*, 900 S.W.2d 617, 619 (Ky.App. 1995). We view such reasoning as sound and, likewise, hold that the subsequent entry of a *nunc pro tunc* order adding CR 54.02 finality recitations cannot "retroactively vest finality upon a judgment which was interlocutory when the notice of appeal . . . was filed." *See id.*

Now, therefore, be it ORDERED that Appeal No. 2007-CA-000365-MR is DISMISSED as being taken from an interlocutory order.

ALL CONCUR.

ENTERED: May 30, 2008

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

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