

RENDERED: JUNE 6, 2008; 2:00 P.M.

NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-000739-MR

CORTIS JENKINS AND EDWINA JENKINS,
HIS WIFE; OLLIE JENKINS; CLYDE
JENKINS AND IRENE JENKINS, HIS WIFE;
BONNIE CANTRELL AND ALEC CANTRELL,
HER HUSBAND; ROY JENKINS AND
SECONDA JENKINS, HIS WIFE; AND
LINDA SILVEY AND HER UNKOWN SPOUSE
(NOW IDENTIFIED AS JAMES SILVEY,
HER HUSBAND)

APPELLANTS

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 04-CI-00009

BILLY JENKINS AND JOANNIE JENKINS,
HIS WIFE; DIXIE DANIEL AND GARY
DANIEL, HER HUSBAND; PEGGY WILLIAMS;
KENNY COLVIN AND MALINDA COLVIN,
HIS WIFE; AND DENNIS JENKINS AND
BARBARA JENKINS, HIS WIFE

APPELLEES

OPINION REMANDING

** ** * * * * *

BEFORE: CHIEF JUDGE COMBS; STUMBO, JUDGE; AND KNOPF,¹
SENIOR JUDGE.

¹ Senior Judge William L. Knopf, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: Cortis Jenkins, et al., (Appellants) appeal the denial of their motion to alter, vacate or amend an Agreed Order entered on June 30, 2006, which dismissed their counterclaim and ordered the sale of a tract of real property.

Appellants claim that their attorneys did not have authority to enter into the agreement on their behalf because counsel had been dismissed prior to the signing of the order. They also argue that the trial court should have held a hearing to determine whether an enforceable agreement had been reached. Billy Jenkins, et al., (Appellees) argue that even if Appellants' attorneys had been discharged prior to the signing of the Agreed Order, an enforceable agreement had already been reached, thus binding Appellants. Upon review of the record and applicable law, we hold that the trial court erred in enforcing the agreement without first holding an evidentiary hearing.

The underlying cause of action in this case involves a tract of land jointly owned by Appellants and Appellees, who are siblings. On January 12, 2004, Appellees filed what is generally known as a partition action. As is usual with such actions, the complaint alleged that the property was not divisible without impairing its value and should be sold with the proceeds to be divided among the owners. Prior to the filing of the petition, the parties' elderly father, Joe Jenkins, had conveyed his 75% ownership interest in the property to Appellee Dixie Daniel, who had apparently been his primary caregiver. Appellants believed the deed to Ms. Daniel had been illegally obtained and filed a counterclaim seeking to have the deed set aside and the property divided among its owners. The Appellants hired

the two attorneys, Jeffery N. Lovely of Salyersville, Kentucky, and Toyray Adams of Paintsville, Kentucky, to represent them. Discovery was completed and a trial date was scheduled for June 1, 2006.

Relevant to this appeal are the following events, some of which are clear from the pleadings filed, while others are alleged in the pleadings:

- May 30, 2006: Hon. Jeffery Lovely appears to have contacted counsel for Appellees and stated his client was going to dismiss his counterclaim and that the land should be sold. An agreement was to be drafted to this effect.
- May 31, 2006: Jeffery Lovely was permitted to withdraw as counsel for Appellants by way of agreed order, leaving Toyray Adams as Appellants' counsel of record.
- June 2, 2006: Toyray Adams moved to withdraw as counsel for Appellants, stating as grounds that an agreement had been reached by the parties rendering the scheduled trial unnecessary and requesting that Appellants be granted thirty days to obtain new counsel should it be deemed necessary.
- June 13, 2006: Appellant, Cortis Jenkins, served a handwritten note to both attorneys advising them they had no authority to sign any documents on behalf of Appellants and that they would pursue their counterclaim with a new attorney.

- June 14, 2006: Cortis Jenkins filed a handwritten motion with the court asking for a new date to “hear my case” and advising that he found a new attorney to represent him because the “2 attorneys I had draped (sic) my case 1 day before we went to court.”
- June 26, 2006: The trial court sustained the motion of Toyray Adams to withdraw and an order was entered granting Appellants thirty days to obtain new counsel.
- June 30, 2006: An Agreed Judgment was entered which dismissed the counterclaim with prejudice and ordered the land sold and set forth the division of the proceeds among the parties. This judgment was signed by both Adams and Lovely, although the dates upon which their signatures were set forth are not noted. A handwritten note next to Lovely’s signature states as follows: “I signed this even though I have withdrawn because I was present at a meeting with our clients whereby it was agreed that the counterclaim would be dismissed.” On this same day, Appellants’ new counsel entered an appearance.
- July 10, 2006: Appellants’ initial Motion to vacate the Agreed judgment was filed, stating that the Appellants had not agreed to the judgment and that they had appeared in court to make their disagreement known on June 30. Due to counsel’s inability to attend the first hearing of this motion and subsequent events that required the naming of a special judge for the matter, the motion was passed.

- December 11, 2006: Appellants re-file their Motion to Vacate, setting forth as grounds that they had formally discharged Mr. Lovely on June 13, 2006, and directed him in writing not to sign any pleadings on their behalf, that the previous circuit judge had been advised in open court that the Appellants intended to pursue their counterclaim and were granted thirty days to obtain new counsel, that on June 14, 2006, Appellants filed a written request for a new trial date with the court, and that the trial court erred in accepting an agreement signed by counsel that had been discharged and had withdrawn.
- December 15, 2006: Appellees file a response to the Motion to Vacate that argues a valid oral settlement agreement was reached before Appellants' counsel was dismissed or discharged and that the written agreement reflected that agreement. Appellees pointed out that the agreement was apparently reached before the two attorneys were discharged, and noted that a trial court was permitted to enforce an agreement if it determines that the party seeking to avoid the settlement granted counsel express or actual authority to enter into the settlement.
- March 9, 2007: An Order was entered denying Appellants' Motion to Vacate.

Appellants argue that because their counsel had withdrawn and was told not to sign any documents on Appellants' behalf prior to the signing of the

Agreed Judgment, the judgment cannot be binding. Appellees argue that there was a binding oral settlement prior to the dismissal of Appellants' counsel and that they are estopped from denying its validity. Appellants also argue that no settlement agreement was reached.

Both parties cite similar case law regarding the authority of counsel to act on behalf of a client. In *Clark v. Burden*, 917 S.W.2d 574 (Ky. 1996), the Kentucky Supreme Court remanded to the trial court for a hearing to determine if a client had given his attorney authority to settle his case. “[I]n the event of a dispute as to whether the client has given settlement authority, the trial court shall summarily decide the facts.” *Id.* at 577.

In the case at bar, the trial court had no hearing and, more significantly, made no findings of fact about the validity of the settlement agreement, the authority granted to counsel prior to their discharge and whether, if there was an authorized agreement, the settlement document accurately reflected the agreement.

“If the court finds that such authority was given, the settlement should be enforced. Even if the trial court finds that no such authority was given, if it should also find that appellees were substantially and adversely affected by their reliance upon the purported settlement, enforcement would be appropriate. On failure to find one or the other of the circumstances set forth hereinabove, the court should determine that no settlement came into existence.”

Id.

For the reasons set forth herein, the matter is remanded to the Morgan
Circuit Court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Robert W. Miller
Grayson, Kentucky

BRIEF FOR APPELLEES:

Gordon B. Long
Salyersville, Kentucky