

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002237-MR

PAT HARRIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 97-CI-2510

JEFFREY A. DARLING,
PETER L. ECABERT and
DARLING & REYNOLDS, P.S.C.

APPELLEES

OPINION
VACATING AND REMANDING
** **

BEFORE: BUCKINGHAM, DYCHE AND GARDNER, JUDGES.

GARDNER, JUDGE: Pat Harris (Harris) appeals from an order of the Fayette Circuit Court dismissing her legal malpractice action filed against the appellees. She maintains on appeal that the circuit court erred by dismissing her case, because there were genuine issues of material fact. After reviewing the record below, the facts of this case and the applicable law, this Court must vacate the circuit court's order and remand this case for further proceedings.

Harris had been employed as a staff attorney for the Commonwealth of Kentucky, Department of Financial Institutions

but was terminated from that position in August 1995. Harris claimed that her discharge was retaliatory because she had reported alleged waste and unlawful activity within the department. Harris filed a whistle-blower action in Franklin Circuit Court against the department and certain of its employees. Harris was represented in that action by Jeffrey Darling (Darling) and the firm, Darling and Reynolds, P.S.C.

One party to the whistle-blower suit was Stephanie Robey, an employee of the Department of Financial Institutions. She was represented by her husband, Steve Robey (Robey). In December 1995, Robey served Darling with a set of interrogatories which were due by January 7, 1996. On January 2, 1996, Darling requested Harris's assistance in completing the interrogatories but allegedly did not communicate the date they were to be returned. Around February 20, 1996, Darling sent Harris a copy of the completed interrogatories and instructed her to execute them with a notary and serve certified copies upon opposing counsel. Harris returned the copies to Darling with requests for modifications. She later contended that she had no further contact with Darling concerning these interrogatories.

Robey apparently sent another request to Darling for the interrogatories on April 12, 1996, and stated that a request for sanctions against him would be filed if the discovery materials were not returned by April 19. Darling did not send the materials, and Robey filed a motion to dismiss the case. A hearing on Robey's motion was set for April 29. Darling did not respond to the motion to dismiss but on April 24, filed a motion

to withdraw as Harris's counsel. At the April 29 hearing, the court granted Darling's motion to withdraw as counsel, and later on that day dismissed Harris's action as a sanction for failing to supply discovery materials. The judge ordered Harris to pay \$6,784.60 in attorney fees.

Darling sent Harris a letter by certified mail informing her of his motion to withdraw as her counsel. This letter was returned by the post office as unclaimed with documentation showing that delivery had been attempted on April 26, May 1, and May 11, 1996. Darling maintains that after the April 29 hearing, he sent another letter to Harris by regular mail informing her that the court granted his motion to withdraw and that the court dismissed her action in the whistle-blower case. Harris contends that she never received the letter. On May 10, 1996, Harris received a letter from Robey. Harris believed she was still represented by Darling so she returned the letter unopened and wrote on the envelope, return to sender-unethical. She then sent Darling a fax about Robey's letter but contends Darling never responded to her fax.

Harris has maintained that she first learned of the dismissal of her case on July 16, 1996, when opposing counsel in a related suit told Harris's counsel that he thought the case had been dismissed. On July 17, 1996, Harris checked with the Franklin Circuit Court and confirmed that her case had been dismissed and that Darling had withdrawn as her counsel. Darling in August 1996, filed a motion pursuant to Kentucky Rule of Civil

Procedure (CR) 60.02 for relief from the judgment in the whistle blower case. This motion was denied.

She filed the legal malpractice action against appellees on July 15, 1997. Darling filed a motion to dismiss the malpractice action for failure to state a claim upon which relief could be granted. Darling specifically argued that Harris's claim was barred by the statute of limitations set forth in Kentucky Revised Statute (KRS) 413.245 which limits actions for professional service malpractice to one year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been discovered by the injured party. The court set a hearing on Darling's motion for August 22. On August 21, Harris filed a response to the motion, accompanied by an affidavit. At the hearing on August 22, Darling moved to strike Harris's response for violating Local Rule of Fayette Circuit Court (RFCC) 15(A)(3) which requires that responses to motions be filed at least forty-eight hours before a hearing. The circuit court granted Darling's motion to strike the response and the motion to dismiss Harris's action for failure to state a claim.¹ Harris has appealed from the court's order.

Harris argues that the circuit court erred in granting the appellees' motion to dismiss, because genuine issues of material fact existed. She maintains that the motion to dismiss should have been treated as a motion for summary judgment and

¹The court did not place its reasons for granting the motions in written form in the record. The trial judge began to enunciate its ruling on videotape; however, the videotape abruptly ended, thus preventing this Court from hearing the circuit court's reasoning.

that the affidavit she filed on the day prior to the hearing should have been considered by the circuit court. Based upon the state of the record and the ruling of the trial court, this Court must vacate the court's order and remand for further proceedings.

Although affirmative defenses ordinarily are not allowed to serve as the basis for a motion to dismiss, Kentucky has allowed the statute of limitations to be used to dismiss a claim when the issue is raised on the face of the complaint. See Carr v. Texas Eastern Transmission Corp., Ky., 344 S.W.2d 619, 621 (1961). A dismissal will not be granted if the complaint also alleges facts to excuse the delay. See Forman v. Gault, 236 Ky. 213, 32 S.W.2d 977, 979 (1930). If on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented, the motion shall be treated as one for summary judgment and disposed of as provided in CR 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by CR 56. CR 12.02. Under CR 56.03, the party opposing a motion for summary judgment, prior to the day of the hearing, may serve opposing affidavits.

In the instant case, Harris alleged in her complaint that the statute of limitations should not apply to the date that her legal injury occurred, but rather the court should apply the date when the injury was discovered. Because the alleged date of discovery is within the applicable statute of limitations, the complaint does not demonstrate a violation of the statute of limitations on its face. Therefore, Darling's motion should not

have been heard as one for dismissal, but should have been ruled upon as a motion for summary judgment. Further, the circuit court did not err by refusing to consider Harris's response to Darling's motion to dismiss pursuant to local FRCC 15(A)(3) since this local rule did not conflict with the Kentucky Rules of Civil Procedure. The court however did err by apparently refusing to consider Harris's accompanying affidavit, because CR 56.03 specifically allows such documents to be filed on the day prior to a hearing to consider a motion for summary judgment. The local rule cannot be used to eliminate this allowance. See Newdigate v. Walker, Ky., 384 S.W.2d 312, 313 (1964).

Furthermore, our review of the circuit court's decision is hampered because the videotape abruptly ends as the circuit court began to rule. The record indicates that the trial court did not treat Darling's motion to dismiss as a motion for summary judgment and also did not consider Harris's affidavit which she filed with her response. Therefore, this Court must vacate the circuit court's order dismissing Harris's action and granting Darling's motion to strike Harris's response. Upon remand, the circuit court must hear the motion to dismiss as one for summary judgment, and it must consider Harris's affidavit.

Further, summary judgment should only be used to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his or her favor against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), quoting Paintsville Hospital Co. v.

Rose, Ky. 683 S.W.2d 255 (1985). Summary judgment is properly granted only when there is no genuine issue as to any material fact, and the movant is entitled to prevail as a matter of law. Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). The movant bears the burden of showing that there is no genuine issue of material fact, and the court must review the record in the light most favorable to the party opposing the motion. Id.

In the case at bar, the record reveals that genuine issues of material fact existed concerning whether Harris knew of or should have known about the dismissal of her whistle-blower action. The record indicates that the post office attempted three times to deliver Darling's certified letter to Harris, but it is apparently conceded that this letter simply notified Harris of Darling's withdrawal from the case.² Darling later sent Harris a letter by regular mail which stated that her case had been dismissed. Harris maintains that she never received this letter, thus establishing a factual issue to be resolved. Harris maintains as well that Darling ignored a fax she sent him later regarding Robey's letter, and that she did not learn of the dismissal of her case until speaking with an attorney representing her in another case. She then contacted the court herself and learned that the case had been dismissed. The record contains no indication that the Franklin Circuit Court sent

²This letter was not made part of the record, and the only information that Darling explicitly maintains the letter contained was his motion to withdraw as counsel in the case. A mere motion to withdraw as counsel does not show that Harris's case had been dismissed. Appellees have shown no authority that a motion to withdraw places someone on notice of a possible malpractice claim.

Harris notification that it had dismissed her whistle-blower action. These factual matters need to be taken into consideration by the trial court upon remand as it rules on the summary judgment motion and determines whether Harris's action was barred by the statute of limitations set forth in KRS 413.245. Under that statute, the legal issue in this case is whether the one year statute of limitations runs from the date Harris actually discovered that her whistle blower case had been dismissed or from the date she reasonably should have discovered the dismissal.³

For the foregoing reasons, the Fayette Circuit Court's order is vacated, and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert L. Treadway
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jeffrey A. Darling
Lexington, Kentucky

³As part of her argument, Harris maintains that her filing of a CR 60.02 motion tolled the running of the statute of limitations and that the statute did not begin running until the circuit court in the whistle-blower action ruled on the motion. Harris asks this Court to carve out a special exception based upon the specific facts of this case. Harris has shown this Court no authority for the proposition that an unsuccessful CR 60.02 motion before the trial court which is not appealed from would toll the statute.