RENDERED: April 23, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000354-MR

CITY OF LOUISVILLE, KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ERNEST A. JASMIN, JUDGE
ACTION NO. 97-CI-006389

SCOTT A. LEHMAN, SR. — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI, HUDDLESTON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. The appellant, City of Louisville, appeals from a decision of the Jefferson Circuit Court granting summary judgment in favor of the appellee on January 8, 1998. After reviewing the record and the applicable law, we vacate and remand.

On October 18, 1996, appellee was promoted from the rank of police officer to the rank of police sergeant. This promotion was subject to a twelve-month probationary period. On or about October 15, 1997, the appellee was demoted from the rank of police sergeant back to his former rank of police officer.

Thereafter, the appellee requested a hearing on the matter and it was denied. On November 5, 1997, the appellee filed an action in the Jefferson Circuit Court alleging that the appellant had demoted him for disciplinary reasons and that he was entitled to a hearing pursuant to KRS 15.520.

The appellant filed a motion to dismiss for failure to state a claim upon which relief could be granted. In its motion the appellant argued that the appellee had been a probationary employee and as such, he was not entitled to a hearing regarding the demotion pursuant to KRS 90.190. The trial court converted the appellant's motion to dismiss into a motion for summary judgment and in its order of January 8, 1998, granted summary judgment in favor of the non-movant/appellee. The appellant filed a notice of appeal on February 6, 1998.

The trial court properly treated the appellant's motion to dismiss as a motion for summary judgment in this case. A trial court may treat a motion to dismiss as a motion for summary judgment and dispose of it pursuant to CR 56 where "matters outside the pleading are presented to and not excluded by the court... ." CR 12.02; Whisler v. Allen, Ky. App., 380 S.W.2d 70 (1964); McCray v. City of Lake Louisville, Ky., 332 S.W.2d 837 (1960). Both the appellant and the appellee in this case attached exhibits outside of the pleadings to their respective motion and response. Therefore, the trial court properly treated the motion to dismiss as a motion for summary judgment.

However, we feel that the trial court's decision to grant summary judgment in favor of the non-movant/appellee was

improper and denied the appellant its opportunity to present a defense. While there appears to be some authority that would allow a trial court to grant summary judgment in favor of the non-moving party, this authority is limited to those situations where: 1) a motion for summary judgment has been made by some party to the action, 2) the judge has all of the pertinent issues before him at the time the case is submitted, and 3) overruling the movant's motion for summary judgment necessarily would require a determination that the non-moving party was entitled to the relief requested. Storer Communications of Jefferson County, Inc. v. Oldham County Bd. of Educ., Ky. App., 850 S.W.2d 340 (1993). Furthermore, the Court in Storer noted that the "rationale for not requiring a formal motion for summary judgment in these limited situations is that there is no prejudice to the party against whom the summary judgment is granted." Id. at 342.

In the present case we do not feel that the trial court had all of the pertinent facts before it at the time it granted summary judgment in favor of the appellee nor do we feel that denying the appellant's motion to dismiss/motion for summary judgment necessarily required a determination that the appellee was entitled to the relief requested. Under CR 56.03, summary judgment is only proper when there are not issues of material fact and the movant is entitled to judgment is a matter of law. In the oft-cited case of Steelvest, Inc. v. Scansteel Service Center, Inc, Ky., 807 S.W.2d 476, 480 (1991), the Kentucky Supreme Court stated that:

> [T]he proper function of summary judgment is to terminate litigation when, as a matter of

> law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.
>
> ...[A] judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances... .
>
> ...
>
> [T]he rule [CR 56.03] is to be cautiously applied. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.

In the present case, once the trial court decided to convert the appellant's motion to dismiss into a motion for summary judgment on behalf of the appellee, it was required to view the record in a light most favorable to the appellant. However, at that time, the record merely consisted of the complaint, the motion to dismiss with memorandum and the response to the motion to dismiss with memorandum. For purposes of its motion, the appellant had been willing to accept the allegations contained in the complaint as true and thus had not filed an answer. Upon converting the appellant's motion to dismiss into a motion for summary judgment for the appellee, the trial court could not have had all the pertinent facts before it to determine whether or not any issue of material fact existed. The record at the time contained only one set of bare bone allegations. There were no facts in the record at that time that could be construed in a light most favorable to the appellant because the appellant

had not yet put its facts into the record and effectively was denied that opportunity.

Moreover, we do not feel that in ruling on the appellant's motion to dismiss the trial court was necessarily required to determine that the appellee was entitled to the relief requested. The appellant's sole issue in its motion to dismiss revolved around which statute applied to the appellee's set of facts and whether or not that statute granted the relief sought by the appellee. In determining that KRS 15.520 rather than KRS 90.190 applied to this set of facts, the trial court was not required to determine that the appellee was entitled to a hearing. In the trial court's opinion and judgment of January 8, 1998, the trial court noted that the language of KRS 15.520 "implies that a hearing may not be necessary in all circumstances." (emphasis added). Thus, the determination that KRS 15.520 rather than KRS 90.190 applied to this set of facts did not necessarily require the determination that the appellee was entitled to a hearing. Therefore, the appellant was prejudiced by the trial court's granting of summary judgment in favor of the appellee.

Having determined that the trial court abused its discretion by improperly granting summary judgment to the appellee, we find that the trial court should have either dismissed the action, granted summary judgment in favor of the appellant or denied the motion and allowed appellant to file its answer and the case to proceed. It appears that the trial court ignored the fact that the appellee was a probationary employee

and focused on the appellee's allegation in his complaint that he was demoted on the basis of misconduct. The appellee does not allege and it does not appear from the record that appellant ever charged the appellee with misconduct or took any disciplinary action against him that would entitle him to a hearing pursuant to KRS 15.520.

Instead, the record indicates appellant merely demoted the appellee from the rank of police sergeant to his former rank of police officer during the twelve-month probationary period. The demotion of probationary employees is governed by KRS 90.190. We find the appellant's arguments in this regard persuasive.

Only those employees holding regular appointments are entitled to a hearing concerning a demotion according to KRS 90.190, which states:

> ...employees holding probationary appointments may be dismissed without the appointing authority being required to furnish either the board or the suspended, or dismissed, or demoted employee with a written statement of the reasons for such suspension, dismissal or demotion. Any employee who has been suspended in excess of ten (10) days, dismissed or demoted holding a regular appointment, shall be entitled, upon written demand, to a public hearing by the Board, at which time he shall have the right to introduce evidence on his own behalf, and to be represented by counsel.

KRS 90.190(1). A "regular appointment" is defined by KRS 90.180(1) as that which is given <u>after</u> the probationary period to those probationary employees deemed satisfactory. The appellee held a "probationary appointment" at the time of his demotion and thus was not entitled to a hearing concerning the demotion.

The Kentucky Supreme Court reviewed KRS 90.190 in Louisville Professional Firefighters Ass'n. v. City of Louisville, Ky., 508 S.W.2d 42 (1974), and held that the statute was constitutional and that the promotion is based on privilege, not right. In Louisville Professional Firefighters, a city firefighter was demoted from the probationary appointment of captain to his former rank. He was neither told the reason nor given a hearing. In upholding the circuit court's granting of summary judgment to the city, the Court stated that "[t]he essence of probationary appointment is that the employer have unfettered discretion in deciding whether to retain a probationary employee." Id. at 43.

In the present case, appellant argues: (1) that appellee had not yet completed the probationary period governing the probationary appointment at the time he was demoted; (2) that during this probationary period, the appellant had unfettered discretion in deciding whether to retain the appellee as police sergeant; (3) that since he received a probationary appointment, appellee was not entitled to a hearing regarding his demotion pursuant to KRS 90.190; and (4) that he was not entitled to a hearing pursuant to KRS 15.520 because he was not charged with misconduct nor was any other disciplinary action taken against him. On remand the trial court will have to decide if appellee can overcome these persuasive arguments.

For the foregoing reasons, the decision of the trial court is hereby vacated and this case is remanded to the trial court for proceedings in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Director of Law

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BRIEF FOR APPELLEE:

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