RENDERED: NOVEMBER 24, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000292-MR

GEOFFREY M. YOUNG — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 08-CI-01812

PUBLIC SERVICE COMMISSION OF KENTUCKY, KENTUCKY UTILITIES COMPANY, LOUISVILLE GAS AND ELECTRIC COMPANY, THE ATTORNEY GENERAL OF KENTUCKY, KENTUCKY INDUSTRIAL UTILITIES CUSTOMERS, THE KROGER COMPANY, THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, COMMUNITY ACTION KENTUCKY, INC./COMMUNITY ACTION COUNCIL FOR LEXINGTON-FAYETTE, BOURBON, HARRISON AND NICHOLAS COUNTIES, INC., ASSOCIATION OF COMMUNITY MINISTRIES/PEOPLE ORGANIZED AND WORKING FOR ENERGY REFORM, THE KENTUCKY POWER COMPANY, DUKE ENERGY KENTUCKY, INC., AND EAST KENTUCKY POWER COOPERATIVE, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

CLAYTON, JUDGE: This is an appeal of a decision of the Franklin Circuit Court which held that the appellant, Geoffrey M. Young's, denial of his request for intervention was interlocutory and, therefore, not ripe for appeal. For the reasons that follow, we affirm the decision of the Franklin Circuit Court.

BACKGROUND INFORMATION

Appellee Kentucky Utilities ("KU") filed a notice of intent to file Public Service Commission ("PSC") Case NO. 2008-33251 on July 1, 2008. It later filed that case on July 29, 2008. Young filed a petition for full intervention pursuant to KRS 278.310 and 807 Kentucky Administrative Regulations (KAR) 5:001 Section 3(8). Young was informed by letter, that due to ethical obligations of the PSC's Chairman and Vice-Chairman, the agency could not rule upon the petition until after December 1, 2008. On December 5, 2008, in dismissing Young's action, the PSC denied Young's motion for intervention in the KU case.

Appellee, Louisville Gas & Electric ("L G & E") filed an application for an adjustment of its rates on July 29, 2008. Young also moved to intervene in this action. On October 10, 2008, Young's motion to intervene in LG & E's case was denied by the PSC.

[1] Senior Judge Michael L. Henry 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.

On October 31, 2008, Young filed a "Complaint for Review of Determinations of the Kentucky Public Service Commission and for Declaratory and Injunctive Relief" with the Franklin Circuit Court. The circuit court found as follows:

> . . . Mr. Young's appeal of the PSC's ruling on his petition for intervention is not ripe for adjudication because it is interlocutory. Though appeals of PSC decisions are not governed by the Civil Rules until the appeal is perfected [*See Board of Adjustments of City of Richmond v. Flood,* 581 S.W.2d 1, 2 (Ky. 1978)], the interests at stake here are identical to those contemplated by the drafters of CR 24.02. Allowing every party who desires permissive intervention in a PSC rate case to file an interlocutory appeal to the Franklin County Circuit Court is unworkable. Halting adjudication of every case before the PSC to await a ruling as to the propriety of each denial of permissive intervention would render most rate cases interminable. The overwhelming time and expense such a ruling would incur are unjustifiable, especially given the right to appeal a denial of permissive intervention upon a final ruling of the PSC. Furthermore, no statute or regulation provides for such appeal.

Young now appeals the dismissal of his case by the circuit court.

STANDARD OF REVIEW

When reviewing the granting of a motion to dismiss, we must determine whether it appeared that the pleading party would be entitled to relief under any set of facts that could be proven in support of his claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). With this standard in mind, we examine the circuit court's ruling.

DISCUSSION

Young first asserts that "[t]he Trial Court committed reversible error by unilaterally redefining [his] complaint and memorandum nearly out of existence, by addressing only one claim, and by completely ignoring all of [his] most serious claims." Appellant's Brief at p. 4. Young filed his complaint in Franklin Circuit Court and, thereafter, amended it. Young attempted to file a second amended complaint; however, the circuit court never granted him leave to do so. Young filed yet another "amended" complaint after the hearing on the motion to dismiss by the court. Again, there was no notice of the motion to amend and such was not granted by the circuit court. We have, therefore, the original and amended complaints which were appropriately filed with the court.

Kentucky Rules of Civil Procedure (CR) 6.04 (1) provides that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served a reasonable time before the time specified for the hearing[.]" The amended complaint filed with the circuit court sought relief regarding KU and LG&E rate cases. As set forth above, the trial court first had to determine whether Young's appeal was interlocutory.

In *Ashland Public Library Bd. Of Trustees v. Scott*, 610 S.W.2d 895, 896 (Ky. 1981), the Court held:

> The provisions of CR 54.02(1) do not encompass orders denying intervention. Applicants for intervention are not parties to an action and do not present claims for relief in an action unless and until they are permitted to intervene. Rather, they seek to become parties so that they may then assert a claim or defense in the action. CR 24.03. Consequently, recitation of a determination that

> there is no just reason for delay and that the order is final is neither a condition precedent to appellate review of a denial of intervention sought as a matter of right, nor a vehicle to authorize appellate review of a denial of permissive intervention prior to judgment disposing of the whole case.

Clearly precedent supports the trial court's conclusion that the denial of Young's motion to intervene was interlocutory and that any appeal of the denial must occur after final adjudication in the underlying case. In *Inter-County Rural Elec. Co-op. Corp. v. Public Service Commission*, 407 S.W.2d 127, 130 (Ky. 1966), the Court held that 807 KAR 5:001 Section 3(8) "reposes in the Commission the responsibility for the exercise of a sound discretion in the matter of affording permission to intervene. Intervention as a matter of right is not specifically defined in the regulation."

The PSC had denied Young's motion to intervene in the KU and LG&E cases. Having determined that the appeals were interlocutory, the court then properly found it had no jurisdiction over them. We find the circuit court did not err in making this determination.

Young also contends that the trial court failed or refused to rule on any of his motions to amend his complaint and memoranda, thereby negating the intent of CR 15.01 and CR 15.04. CR 15.01 provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served[.]" In this case, the trial court did just that. CR 15.01 goes on to provide that "[o]therwise a party may amend his pleading only by leave of the court or by

written consent of the adverse party; and leave shall be freely given when justice so requires."

Young argues that because Complaint 4 was submitted for the purpose of making several claims for relief within the time frame specified by the governing statute, justice required the trial court to allow him to amend his pleading. In any event, he contends, the trial court addressed only Complaint 4 in its opinions and orders. Specifically, Young states that while the trial court did not set forth which version of the complaint was addressed in its opinion and order, it was clear that Complaint 4 was the one since it referred to a December 2008 decision of the PSC which was after the date of the filing of the first three complaints. Complaint 4, he asserts, included the claims arising in part from the denial of that order.

As set forth above, CR 15.01 clearly provides that it is within a court's discretion as to whether a second amended complaint may be filed. We find no reason to hold that the circuit court abused its discretion in this instance.

Finally, Young contends that the jurisdiction of the Franklin Circuit Court over his complaint had attached. He argues that the trial court's opinion and order in this civil action did not include any language that would indicate that subject matter jurisdiction had not attached. Language in the court's opinion is not important in determining whether or not the court had jurisdiction. The Franklin Circuit court correctly held that it did not have jurisdiction over an interlocutory order.

Thus, the trial court was correct in holding that the denial of Young's motion to intervene was interlocutory and, consequently, not subject to appellate review. We therefore affirm the trial court's decision dismissing the action.

ALL CONCUR.

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NO BRIEF FILED FOR APPELLEES THE ATTORNEY GENERAL OF KENTUCKY, KENTUCKY INDUSTRIALUTILITIES CUSTOMERS, THE KROGER COMPANY,THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, COMMUNITY ACTION KENTUCKY, INC./COMMUNITY ACTION COUNCIL FOR LEXINGTON-FAYETTE, BOURBON, HARRISON AND NICHOLAS COUNTIES, INC., ASSOCIATION OF COMMUNITY MINISTRIES/PEOPLE ORGANIZED

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