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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001655-MR

WILLIAM T. PERKS IV, D.C. APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 09-CI-00849

TERRI J. BYERS-ABSTON, D.C. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; SHAKE,[1] SENIOR JUDGE.

LAMBERT, JUDGE: William Perks, IV, appeals from the Franklin Circuit Court's September 2, 2009, order denying his motion to reconsider the trial court's August 10, 2009, order dismissing his complaint. After careful review, we affirm both of the trial court's orders.

[1] Senior Judge Ann O'Malley Shake 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 April 8, 2009, the Governor of Kentucky, Steven L. Beshear, appointed William T. Perks, IV, D.C. (Dr. Perks) as a member of the Kentucky State Board of Chiropractic Examiners (the Board). Dr. Perks's appointment was entered as Executive Order 2009-344, which was published in the Executive Journal and signed by the Secretary of State. Dr. Perks's term was to expire on March 29, 2012. On April 13, 2009, Dr. Perks received his formal commission, signed by Governor Beshear, the Secretary of State, and bearing the seal of the Commonwealth of Kentucky, along with a letter from the Governor commending him for his service.

On April 22, 2009, Dr. Perks swore his oath of office and filed it in the Executive Journal. On that same day, Governor Beshear entered Executive Order 2009-383, in which he amended Executive Order 2009-344 and appointed Terri J. Byers-Abston (Dr. Byers-Abston) to the Board. The order stated that Dr. Byers-Abston should have been appointed and that Dr. Perks was inadvertently named to the Board previously.

Dr. Perks filed the instant case in the Bullitt Circuit Court on April 28, 2009, against Dr. Byers-Abston. Dr. Perks sought damages from Dr. Byers-Abston and a declaration of his rights in connection with their respective seats on the Chiropractic Board. Dr. Byers-Abston immediately moved for a transfer of venue to Franklin Circuit Court, which was granted by the Bullitt Circuit Court on May 19, 2009. Dr. Byers-Abston then filed a motion to dismiss the action, which was granted by the Franklin Circuit Court on August 10, 2009.

In its order dismissing the complaint, the trial court held that (1) Dr. Perks failed to state any legal basis for his claim for damages; (2) an office established and held for the public good is not a contract, nor is its tenure secured by any binding contract; and (3) Dr. Perks failed to join an indispensable party (Governor Beshear). Further, the trial court held that there was no practical reason for joining Governor Beshear, because the claim for damages no longer remained pending for adjudication, and Dr. Perks's declaratory action lacked sufficient substance to which a joined party could respond.

Dr. Perks filed a motion to reconsider, which the trial court denied on September 2, 2009. This appeal now follows.

We review a trial court's order dismissing a cause of action *de novo*. *See Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). "The [trial] court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

While a plaintiff is afforded considerable latitude in pleading claims under Kentucky's notice pleading standards, the claims must actually contain all necessary elements and must be set forth clearly in order to provide notice to the defendant of what has been pleaded. *See Dalton v. First Nat. Bank of Grayson*, 712 S.W.2d 954, 957 (Ky. App. 1986) ("[S]ome minimum standard in the art of pleading must be met."); *see also Cabbage Patch Settlement House v. Wheatley*,

987 S.W.2d 784, 786 (Ky. 1999) ("Despite the informality with which pleadings are nowadays treated, and despite the freedom with which pleadings may be amended, the central purpose of pleadings remains notice of claims and defenses.") (Internal citations omitted).

The trial court held that Dr. Perks failed to state any legal basis for his claim for damages against Dr. Byers-Abston. Before the trial court, Dr. Perks argued that KRS 446.070 authorizes anyone injured due to a violation of a statute to recover against the offender such damage as they received due to the violation. Dr. Perks argued that under KRS 446.070, he was due damages for a violation of KRS 63.080. KRS 63.080(1) states:

> Except as provided in subsection (2) of this section and otherwise provided by law, any person appointed by the Governor, either with or without the advice and consent of the Senate, may be removed from office by the Governor for any cause the Governor deems sufficient, by an order of the Governor entered in the executive journal removing the officer.

The trial court held that Dr. Perks's reliance on KRS 446.070 was erroneous because application of the statute is limited to where the underlying statute is penal in nature, or where by its terms the statute does not prescribe the remedy for its violation. *See Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). Because KRS 63.080 is not a penal statute, any remedy under KRS 446.070 is prohibited.

Furthermore, the trial court noted that even assuming that KRS 63.080 was an appropriate statute in the context of KRS 446.070, Dr. Byers-Abston was

not the proper party to whom relief for damages could be had. The trial court properly noted that it was the Governor, who exercised the power of removal under KRS 63.080, who allegedly caused Dr. Perks's injury. Because Dr. Perks did not name the Governor as a defendant in his complaint, any claim for damages against Dr. Byers-Abston caused by the Governor must fail.

We also note that in his complaint and on appeal to this court, Dr. Perks concedes that the Governor can make a replacement to the Board by virtue of his powers under KRS 63.080(1), but argues that the statute explicitly states that there is an exception to the Governor's power when there are alternate provisions provided by law. Dr. Perks then references KRS 312.045, which states the grounds under which a member of the Board may be *suspended*. Dr. Perks argues that he has not committed any of the grounds for which he may be properly suspended from the Board, and thus the Governor's executive order was in error. Dr. Perks's argument fails to address the fact that he was inadvertently named to the Board and was *not* suspended, but instead was permanently removed. On appeal, Dr. Perks argues that the terms "suspended" and "removed" are interchangeable. We completely disagree. These words have different common meanings with suspension being temporary and removal or replacement being permanent. *See City of Worthington Hills v. Worthington Fire Protection Dist.*, 140 S.W.3d 584, 591 (Ky. App. 2004) (words in a statute should be given their common meaning). Thus, because it deals with suspension, and Dr. Perks was not suspended, KRS

312.045 is not in any way applicable to the case at bar, and Dr. Perks's reliance on it is in error.

Dr. Perks argues for the first time on appeal that he is entitled to damages incident to a *quo warranto* claim. Our review of the record indicates that Dr. Perks did not plead any claims or damages under the theory of *quo warranto* in his complaint, nor were any arguments under this theory presented to the trial court. Accordingly, we will not address such arguments for the first time on appeal. *See Regional Jail Auth. v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). We note that even if we were to address Dr. Perks's *quo warranto* arguments on appeal, he concedes that no Kentucky Court has found it proper to award damages in a *quo warranto* suit relating to a statutory office, such as the Board. Dr. Perks cites *Commonwealth v. Kentucky Jockey Club*, 238 Ky. 739, 38 S.W.2d 987, 1008-09 (1931); however that former Court of Appeals decision actually supports the absence of damages in such a proceeding, holding that "[a] majority of the court is of the opinion that no substantial fine may be imposed in a *quo warranto* proceeding to forfeit the charters of corporations."

Dr. Perks cites to cases from other jurisdictions in support of his argument that *quo warranto* supports his claims, however those cases simply state that the salary or other monetary advantages of the office may be awarded pursuant to a *quo warranto* proceeding in certain instances. However, Dr. Perks's complaint is devoid of any allegation that the Board members are compensated or that there is any monetary benefit to the Board members.

On appeal, Dr. Perks also argues that Governor Beshear is not a necessary party to his claim for declaratory judgment. We disagree. In his complaint, Dr. Perks does not state that Dr. Byers-Abston did anything wrong, instead the complaint speaks only in terms of the Governor's actions. To argue that the Governor does not have an interest in the validity of his own executive appointment or the validity of an Executive Order strains credulity. To be sure, the statutory scheme governing declaratory judgment actions could not be clearer: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." KRS 418.075; *see also* CR 19.01. Thus the trial court properly determined that Dr. Perks mistakenly filed his complaint against Dr. Byers-Abston, when he should have sought declaratory relief in regard to and made any claims for damages against Governor Beshear, the only person he alleges caused him any "injury." However, this is moot, in light of the trial court's determination that the complaint did not allege sufficient grounds to which the Governor could respond, were he properly named as a party.

In his motion for reconsideration of the trial court's order dismissing his claims, Dr. Perks mistakenly relied on CR 76.38, and thus his motion was procedurally flawed. That rule governs only proceedings before this Court as an appellate court. *See* CR 76.38(1) ("Unless otherwise directed, *all orders of an appellate court. . . .*") (Emphasis added); *see also* PHILLIPS, *et al.*, KY. PRAC., R. CIV.

P. ANN. § 76.38(1) ("This Rule governs orders of appellate courts. . . ."). However, a review of the record reflects that Dr. Perks also failed to demonstrate that he was entitled to reconsideration under the proper rules, CR 59.05 or CR 60.02.

CR 59.05 authorizes the trial court to "alter or amend a judgment, or to vacate a judgment and enter a new one" on a motion properly filed by a party within ten days after entry of a final judgment. Recognizing the scope of the power accorded trial courts by CR 59.05, the Kentucky Supreme Court has stated that "a trial court has 'unlimited power to amend and alter its own judgments.' " *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005), *citing Henry Clay Mining Co. v. V & V Min. Co.*, 742 S.W.2d 566 (Ky. 1987). In *Gullion*, the Kentucky Supreme Court cited favorably the four grounds recognized by the federal courts in construing the federal counterpart, Federal Rule of Civil Procedure 59(e):

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Id. at 893 (internal citation omitted). A trial judge's ruling pursuant to CR 59.05 is reviewed by an appellate court under the abuse of discretion standard. *Id.* at 892.

A review of the record indicates that while Dr. Perks concedes that he should not have cited KRS 446.070 as a basis for his claims, he has not shown how

the trial court made a manifest error of law or fact in the dismissal of his claims. As one assignment of error, Dr. Perks argues that the trial court mistakenly relied on *Johnson v. Laffoon*, 257 Ky. 156, 77 S.W.2d 345 (1934), as a basis for its determination that he had no legal right to assert his interest in the title to the membership seat on the Board he claims was improperly held by Dr. Byers-Abston. Dr. Perks argues that the case at bar is fundamentally different from *Johnson*, contending that the plaintiff in *Johnson* filed suit against the Governor on the basis that the Governor removed him from office on unconstitutional grounds. To be sure, Dr. Perks then states, "This suit does not question the constitutionality of the Governor's actions. This suit merely seeks to obtain a determination against the usurper of Dr. Perks's seat because she is not rightfully holding her membership to the [Board]." To the contrary, all of Dr. Perks's allegations involve not Dr. Byers-Abston's conduct, but Governor Beshear's, and the trial court properly cited *Johnson* as authority for its ruling that Dr. Perks had no legal right to assert his interest in the title to the membership seat on the Board held by Dr. Byers-Abston.

Dr. Perks's continued insistence that the Governor is not a proper party to a declaratory judgment action does not address the fact that entry of the relief he is seeking would necessarily result in a finding that the Governor's Executive Order appointing Dr. Byers-Abston is invalid. In fact, the only allegations of active conduct in the complaint reference the Governor and Dr. Perks. This clearly gives the Governor—and the Commonwealth—an interest in these proceedings. Thus,

the trial court's finding that the Governor was a necessary party was not an abuse of discretion and was supported by the record.

In his motion to reconsider, Dr. Perks also cited KRS 415.030 for the first time. As stated above, "[a] party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion*, 163 S.W.3d at 893-94. Even if the argument was properly before the Circuit Court, it does not change the Governor's interest in ensuring that his Executive Orders are carried out and that his choices as to membership of state boards are effectuated. Because the Governor was not named in the complaint or joined as a party, the complaint failed to state a cognizable claim for declaratory relief upon which relief may be granted. *See* KRS 418.075.

Taking the remaining recognized grounds under which a trial court may grant a CR 59.05 motion in turn, it is clear that Dr. Perks failed to provide a reason under which the motion to reconsider could be granted. The motion is not based upon newly discovered evidence or previously unavailable evidence; Dr. Perks does not allege that the motion is necessary to prevent manifest injustice; and the motion is not justified by an intervening change in controlling law. Thus, the trial court properly denied the motion to reconsider had it been properly filed under CR 59.05.

We review denial of a CR 60.02 motion for an abuse of discretion also. *See Baze v. Commonwealth*, 276 S.W.3d 761, 765 (Ky. 2009). As with the analysis

under CR 59.05, Dr. Perks's failure to invoke the proper rule in his motion to reconsider is enough to defeat attempts to apply it. *See Berry v. Cabinet for Families & Children*, 998 S.W.2d 464, 467 (Ky. 1999) ("The extraordinary reasons required by Section (f) of [CR 60.02] must be clearly stated in a written motion or petition in order to benefit by it."). Even if the rule was invoked, however, CR 60.02 relief in this instance was not merited by the circumstances, as there is no showing of mistake, inadvertence, surprise or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; perjury or falsified evidence; fraud affecting the proceedings; the judgment is not void; or any other reason of an extraordinary nature justifying relief. *See* CR 60.02. Thus, the trial court properly denied Dr. Perks's motion for reconsideration, were it to be considered under the procedural framework of CR 60.02.

In summation, the trial court properly dismissed Dr. Perks's complaint for failure to state a claim for which relief can be granted and for failure to name an indispensable party. Upon reconsideration, the trial court properly denied Dr. Perks's motion to reconsider mistakenly filed pursuant to CR 76.38. Even considering the motion to reconsider under the framework of CR 59.05 and CR 60.02, the motion to reconsider was properly denied. Accordingly, we affirm the Franklin Circuit Court's order dismissing Dr. Perks's complaint entered on August 10, 2009, and the order denying his motion to reconsider entered on September 2, 2009.

ALL CONCUR.

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