

RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000518-MR

VERA FURTULA

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CI-04556

PNC BANK, NATIONAL ASSOCIATION,
AS SUCCESSOR BY MERGER TO
NATIONAL CITY CORPORATION
D/B/A NATIONAL CITY BANK

APPELLEE

AND

NO. 2015-CA-000525-MR

ANTHONY RAY MILLER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CI-05434

PNC BANK, NATIONAL ASSOCIATION,
AS SUCCESSOR BY MERGER TO
NATIONAL CITY CORPORATION
D/B/A NATIONAL CITY BANK

APPELLEE

OPINION
AFFIRMING
APPEAL NOS. 2015-CA-000518-MR AND 2015-CA-000525-MR

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; JONES AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Vera Furtula brings Appeal No. 2015-CA-000518-MR from a November 19, 2014, order dismissing her action under Kentucky Rules of Civil Procedure (CR) 12.02, and Anthony Ray Miller brings Appeal No. 2015-CA-000525-MR from a March 24, 2015, order dismissing Miller's action under CR 12.02. We affirm Appeal Nos. 2015-CA-000518-MR and 2015-CA-000525-MR.

Furtula and Miller were employees of the University of Kentucky, and both applied for long-term disability benefits provided by the University under the University's Long-Term Disability Plan (Disability Plan). The Disability Plan is funded by a trust, and the trust is administered by PNC Bank, National Association, as trustee.¹ Both Furtula and Miller were ultimately denied long-term disability benefits by the University.

The relevant procedural history for both cases was outlined by the Supreme Court in *Furtula v. University of Ky.*, 438 S.W.3d 303 (Ky. 2014), and we adopt it herein:

Following the rejection of their claims, Furtula and Miller each filed suit in the Fayette Circuit Court against the University alleging that, by rejecting their applications for disability benefits, the University

¹ PNC Bank, National Association, is a successor in interest to the original trustee, National City Corporation, d/b/a National City Bank.

breached a written contract consisting of the Staff Handbook and the associated personnel policy documents that define the disability compensation programs.

In Furtula's case, the University moved for summary judgment, arguing that it was entitled to sovereign immunity because it had no contract with Furtula, and that even if the disability program could be construed as a contract, the action on it was barred because it was not in writing. The Fayette Circuit Court denied the University's motion for summary judgment, concluding that there existed "a material issue of fact with regard to whether there has been a waiver of sovereign immunity for this breach of contract claim by the state legislature pursuant to KRS Chapter 45A [the Kentucky Model Procurement Code]." However, based upon the requirement of KRS 45A.245 that actions brought pursuant to the Model Procurement Code "shall be brought in the Franklin Circuit Court," the Fayette Circuit Court also transferred the case to the Franklin Circuit Court. Before the transfer could be completed, the University filed an interlocutory appeal from the order denying immunity as allowed by *Breathitt County Board of Education v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009).

In Miller's case, the University moved to dismiss on grounds of improper venue and sovereign immunity. The Fayette Circuit Court denied the motion and transferred the case to Franklin Circuit Court pursuant to KRS 45A.245. The Franklin Circuit Court denied the University's motion to dismiss Miller's claim on the grounds of sovereign immunity, though the basis for the decision is unclear. Again invoking *Prater*, the University appealed the rejection of its claim of sovereign immunity.

The Court of Appeals addressed the Furtula and Miller cases together and reversed both circuit court decisions. The court held that the documents establishing the University of Kentucky's employee disability compensation did not create an implied contract under

Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005). Specifically, the Court of Appeals held that “none of the plan documents provided to this Court evidence [the] intent to create a contract on the part of the University.” The Court also noted that, unlike the relevant documents in *Parts Depot*, which used specific and unequivocal contractual language, rather than precatory language, the University documents cited by Furtula and Miller as the basis of their contract claim were replete with precatory language and express contractual disclaimers to the effect that the relevant documents specifically were *not* intended to form a contract. After noting that the University was a state agency entitled to sovereign immunity from suit absent a legislative waiver, the Court of Appeals held that even if the documents gave rise to an *implied* contract, the claims would not be allowed because the state's immunity was waived under KRS 45A.245 only for *written* contracts. And, while the Court of Appeals did not explicitly say so, implicit in its holding is the recognition that an implied contract is not a written contract.

Id. at 307-08 (footnotes omitted).

Thereafter, the Kentucky Supreme Court granted Furtula's and Miller's motions for discretionary review. In *Furtula*, 438 S.W.3d 303, 310, the Supreme Court held that neither Furtula nor Miller had “an enforceable contractual claim for benefits under the University[’s] . . . employee long-term disability compensation plans.” As no enforceable contractual claims existed, the Supreme Court concluded that KRS 45A.245 was inapplicable and that the University was entitled to governmental immunity.

In July 2014, Furtula and Miller both filed motions to amend their respective complaints in circuit court.² In the amended complaints, Furtula and Miller sought to add PNC as a defendant and alleged that PNC, in its capacity as trustee, breached various duties by failing to pay them long-term disability benefits. The motions to file the amended complaints were granted, and the amended complaints for Furtula and Miller were filed.

PNC then filed motions in both actions to dismiss the amended complaints for failure to state a claim upon which relief could be granted under CR 12.02. In both actions, PNC argued that it breached no duties to either Furtula or Miller and that the Supreme Court's Opinion in *Furtula*, 438 S.W.3d 303 mandated dismissal of both actions. Additionally, PNC pointed out that it possessed no discretion or authority to determine eligibility for long-term disability benefits or to pay Furtula and Miller long-term disability benefits after being denied same by the University.

By order entered November 19, 2014, the circuit court dismissed Furtula's action in its entirety; and by order entered March 24, 2015, the circuit

² Vera Furtula filed his complaint in the Fayette Circuit Court. As Furtula was raising a claim under Kentucky Revised Statutes (KRS) 45A.245, the action was transferred to Franklin Circuit Court by Order entered April 23, 2009. After the Supreme Court determined that Furtula had no cognizable claim under KRS 45A.245, the Franklin Circuit Court transferred the action back to Fayette Circuit Court by order entered August 6, 2014. The same procedural history occurred in Miller's action except the Fayette Circuit Court's order to transfer the action to Franklin Circuit Court was entered December 29, 2008. And, the Franklin Circuit Court ordered Miller's action transferred back to Fayette Circuit Court by order entered December 17, 2014. For sake of clarity, we will not reference these transfers in our Opinion.

court dismissed Miller's action in its entirety. Both Furtula and Miller filed notices of appeal, and the appeals were consolidated by this Court for our review.³

To begin, a motion for failure to state a claim under CR 12.02 may only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved." *Pari-Mutuel Clerks' Union of Ky. v. Ky. Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977). In considering such motion, the court must view all material facts in the complaint as true and determine if as a matter of law the plaintiff would be entitled to any relief. *Fox v. Grayson*, 317 S.W.3d 1 (Ky. 2010). Our review proceeds *de novo*. *See id.*

In their combined brief, Furtula and Miller contend that the circuit court erroneously granted PNC's motions to dismiss for failure to state a claim upon which relief could be granted. Furtula and Miller argue that PNC, as trustee, breached various duties, including fiduciary duties, owed to them. Essentially, Furtula and Miller seek "payment of benefits from the Trustee as holder of the property from which those benefits are to be paid." Furtula and Miller's Brief at 12. Furtula and Miller emphasize that their claims against PNC are not contractual claims but are trust claims.

In this case, we must accept all factual allegations set forth in the amended complaints as true and view all facts most favorable to Furtula and Miller. *See Fox*, 317 S.W.3d 1. So, it must be taken as true that the University improperly denied Furtula and Miller long-term disability benefits. We also must

³ The appeals were consolidated by Order of the Court of Appeals entered June 25, 2015.

keep in mind the Supreme Court’s holding in *Furtula*, 438 S.W.3d 303, that Furtula and Miller did not possess enforceable contractual claims for such long-term disability benefits.

In support of their “trust claims” against PNC, Furtula and Miller point to the University of Kentucky Long-Term Disability Employee Benefits Trust Agreement (Trust Agreement) and argue that PNC is responsible for making long-term disability payments to qualified participants under Section 5.16. Furtula and Miller also point out that PNC has the power to defend, settle, or commence any lawsuits on behalf of the trust per Section 5.18 of the Trust Agreement. However, the Trust Agreement and the Disability Plan are equally clear that the University President or his designee possesses the sole power and authority to determine entitlement to and the amount of long-term disability benefits to be paid to participants, like Furtula and Miller. Disability Plan §§ 6.01, 6.02, 6.03, 6.04; Trust Agreement § 5.16. And, Section 5.16 of the Trust Agreement specifically provides that the trustee “shall be under no obligation to determine the amount of benefit to which participants will be entitled.” Considering the Trust Agreement and the Disability Plan, it is clear that PNC, as trustee, simply does not possess the authority to determine Furtula’s and Miller’s entitlement to long-term disability benefits or to pay Furtula and Miller long-term disability benefits after being denied such benefits by the University. It is within the exclusive province of the University President or his designee to determine entitlement to and amount of long-term disability benefits. Therefore, we conclude that PNC does not owe

Furtula or Miller a fiduciary duty or any other duty under the Trust Agreement to pay long-term disability benefits after being denied same by the University.

Other than the Trust Agreement, Furtula and Miller also cite to the *Restatement (Second) of Trusts* §§ 225 and 265 (1959) as bases of their “trust claims” against PNC. We will address each section of the *Restatement* seriatim.

Section 225 of the *Restatement (Second) of Trust* reads in whole:

- (1) Except as stated in Subsection (2), the trustee is not liable to the beneficiary for the acts of agents employed by him in the administration of the trust.
- (2) The trustee is liable to the beneficiary for an act of such an agent which if done by the trustee would constitute a breach of trust, if the trustee
 - (a) directs or permits the act of the agent; or
 - (b) delegates to the agent the performance of acts which he was under a duty not to delegate; or
 - (c) does not use reasonable care in the selection or retention of the agent; or
 - (d) does not exercise proper supervision over the conduct of the agent; or
 - (e) approves or acquiesces in or conceals the act of the agent; or
 - (f) neglects to take proper steps to compel the agent to redress the wrong.

Furtula and Miller argue that they are pursuing “trust claims” under §225(2)(f) as PNC neglected to compel the University to award them long-term disability benefits. Even if the University President or his designee wrongfully denied them

such benefits, Furtula and Miller have failed to allege that the University President or his designee is the agent of PNC and employed by PNC “in the administration of the trust” as mandated by Section 225(1) of the *Restatement (Second) of Trusts*. This omission is fatal to their claim under Section 225 of the *Restatement (Second) of Trusts*.

As to Section 265 of the *Restatement (Second) of Trusts*, it provides:

Where a liability to third persons is imposed upon a person, not as a result of a contract made by him or a tort committed by him but because he is the holder of the title to property, a trustee as holder of the title to the trust property is subject to personal liability, but only to the extent to which the trust estate is sufficient to indemnify him.

The above section merely codifies the rule that “[w]here . . . the trustee is liable only as holder of the title to the trust property, and where, without fault on the part of the trustee, the trust estate is insufficient to indemnify him, he is liable only to the extent to which the trust estate is sufficient to indemnify him.” *Restatement (Second) of Trusts* § 265, cmt. a (1959). The *Restatement (Second) of Trusts* § 265 does not create a claim of relief; rather, it merely recognizes that an innocent trustee is liable only up to the amount that the trust can indemnify him. So, we do not believe that Section 265 can form the basis of a claim against PNC, as a trustee.

Accordingly, we conclude that Furtula and Miller failed to set forth a viable claim for relief against PNC in their respective amended complaints.

We view any remaining contentions of error to be moot.

In summary, we hold that the circuit court properly granted PNC's motion to dismiss Furtula's and Miller's amended complaints under CR 12.02.

For the foregoing reasons, the orders of the Fayette Circuit Court in Appeal Nos. 2015-CA-000518-MR and 2015-CA-000525-MR are affirmed.

ALL CONCUR.

JOINT BRIEFS FOR APPELLANTS:

M. Austin Mehr
Philip G. Fairbanks
Elizabeth A. Thornsby
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jon Salomon
Abigale Rhodes Green
Louisville, Kentucky