

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000882-MR

KENTUCKY RETIREMENT SYSTEMS;
BOARD OF TRUSTEES OF THE KENTUCKY
RETIREMENT SYSTEMS; COUNTY EMPLOYEES
RETIREMENT SYSTEMS; AND KENTUCKY
EMPLOYEES RETIREMENT SYSTEM APPELLANTS

v. APPEAL FROM MCCREARY CIRCUIT COURT
HONORABLE DANIEL BALLOU, JUDGE
ACTION NO. 14-CI-00237

ELMER AUSTIN PRICE, A/K/A AUSTIN PRICE APPELLEE

OPINION
REVERSING AND REMANDING

** **

BEFORE: CLAYTON, JONES, AND NICKELL, JUDGES.

CLAYTON, JUDGE: The Kentucky Retirement Systems (“Retirement Systems”) filed this interlocutory appeal from the McCreary Circuit Court’s order denying its motion to dismiss or, alternatively, to transfer the case to Franklin Circuit Court.

Retirement Systems argues that it is entitled to sovereign immunity or, alternatively, that this case should proceed only in Franklin Circuit Court. Having reviewed the record and the applicable case law, we find Retirement Systems is immune from Price's lawsuit due to sovereign immunity. Thus, we reverse and remand for the trial court to dismiss the Complaint.

FACTS

Elmer Austin Price filed his Complaint in McCreary Circuit Court on December 24, 2014. In the Complaint, Price alleges that he withdrew his retirement account from the Kentucky Employees Retirement System ("KERS") in 1997 after he had obtained 59 months of service credit. In 2013, Price received notice from Retirement Systems that new legislation permitted buying back previously-refunded service credit, which would permit Price to receive favorable retirement terms. The buyback provision was only good through December 31, 2013.

Price then allegedly contacted Retirement Systems via telephone on October 4, 2013, and was informed by Retirement Systems that his oral request was sufficient to meet the December 31, 2013 deadline. It would take approximately three months to calculate Price's buyback. On January 5, 2014, Retirement Systems allegedly left a message for Price on his answering machine.

The next day, Price allegedly contacted Retirement Systems and was informed that an estimate would be sent to Price.

A letter dated January 13, 2014, was then mailed to Price providing the dollar amount required to buy back the service credit. The letter stated, “All amounts are valid until 2/13/2014. If payment is not made by 2/13/2014 you must request an updated cost calculation.”

On January 27, 2014, Price allegedly mailed a letter to TIAA CREF, along with a Retirement Systems Form 4170, requesting TIAA CREF to transfer the required sum from his IRA account to Retirement Systems. TIAA CREF complied, but the check was not received by Retirement Systems until February 24, 2014. Price then received a letter from Retirement Systems dated February 26, 2014, informing him that Retirement Systems had returned the check to TIAA CREF because it was not received on or before February 13, 2014.

Price alleges he contacted Retirement Systems numerous times thereafter requesting a recalculation on his buy back. He claims Retirement Systems “gave him one excuse after another.” Finally, he scheduled a meeting for September 11, 2014, with them at their offices in Frankfort. At this meeting, he was informed that he could only repurchase refunded service credit under what is called Tier II as opposed to Tier I. Tier II benefits pay significantly less than Tier I benefits. Price’s complaint then alleged two causes of action: wrongful and/or

negligent misrepresentation; and breach of contract by denying Price the higher retirement benefits. In response, Retirement Systems filed a motion to dismiss pursuant to Kentucky Rules of Civil Procedure (CR) 12.02,¹ CR 12.08,² Kentucky Revised Statutes (KRS) 61.645(14),³ and KRS 418.040.⁴ Retirement Systems

¹ CR 12.02 provides in relevant part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (a) lack of jurisdiction over the subject matter, . . . (c) improper venue[.]

² CR 12.08 provides:

- (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if it is neither made by motion under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.
- (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits.
- (3) Whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

³ KRS 61.645(14) provides:

Any person adversely affected by a decision of the board, except as provided under subsection (16) of this section or KRS 61.665, involving KRS 16.505 to 16.652, 61.510 to 61.705, and 78.510 to 78.852, may appeal the decision of the board to the Franklin Circuit Court within sixty (60) days of the board action.

claimed: (1) it was immune from suit due to sovereign immunity; (2) Price failed to establish subject matter jurisdiction; and (3) Price failed to file his Complaint in the proper venue.

The trial court denied the motion in a four-page order, construing it as a motion for judgment on the pleadings pursuant to CR 12.03. Retirement Systems then filed a motion to alter, amend, or vacate, claiming the trial court's order erroneously misconstrued its motion as a CR 12.03 motion to dismiss instead of a motion to dismiss pursuant to CR 12.02 and CR 12.08. The trial court then entered a 17-page order denying the motion to alter, amend, or vacate. Retirement Systems appeals both orders.

INTERLOCUTORY APPEAL

We initially note that the appeal before us is interlocutory. Though interlocutory appeals are not typically permissible, Retirement Systems claims it is absolutely immune from Price's lawsuit due to sovereign immunity. Such a claim of absolute immunity is one of the narrow and rare exceptions to the interlocutory appeal bar. *Breathitt County Bd. of Ed. v. Prater*, 292 S.W.3d 883, 885-87 (Ky.

⁴ KRS 418.040 provides:

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

2009). Thus, we will review the sovereign immunity claim *de novo* as it is a legal claim. *Id.*

ISSUE

Retirement Systems raises two issues in the alternative: (1) the trial court erred by finding sovereign immunity does not apply to Retirement Systems; and (2) the trial court erred by not transferring the case to the proper venue at Franklin Circuit Court. As we find the trial court erred by finding sovereign immunity did not apply to Retirement Systems, we reverse and remand on that issue and do not address the venue claim.

I. Sovereign immunity does apply to Retirement Systems.

Whether Retirement Systems is entitled to sovereign immunity was squarely addressed by the Kentucky Supreme Court:

Sovereign immunity is a concept that applies to the state, but not necessarily to an agency, that may be waived by the state. *See Kentucky Center for the Arts Corp. v. Berns*, 801 S.W.2d 327, 328 (Ky. 1990). As this Court has repeatedly held, most recently in *Comair, Inc. v. Lexington–Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 98 (Ky. 2009), whether an agency of the state is entitled to the immunity of the state is determined by whether the agency performs an integral state function. Clearly, Retirement Systems does perform that integral state function through the administration of the various retirement systems, which is essential to the personnel function of state government and the state's political subdivisions, **and thus is entitled to immunity under sovereign immunity law unless waived.**

Only the state, via the legislature, may waive immunity. Ky. Const. § 231. Simply stated, if there is a waiver of immunity for Retirement Systems, it is the state that has made that waiver, not Retirement Systems.

Commonwealth v. Kentucky Retirement Systems, 396 S.W.3d 833, 837 (Ky. 2013)
(emphasis added).

Retirement Systems is thus entitled to sovereign immunity unless waived by law. The legislature has chosen to waive sovereign immunity for the Kentucky Retirement System under: KRS 61.645(2), which provides that the Retirement Systems Board may sue and be sued; KRS 61.645(14), which provides that a person adversely affected by the Board's decision may appeal that decision to the Franklin Circuit Court; and KRS 61.645(16), which provides that a person adversely affected by an order from the Retirement Systems may request a KRS Chapter 13B hearing, the result of which may then be appealed to the Franklin Circuit Court. It has also chosen to waive sovereign immunity from suit under the Declaratory Judgment Act. *Kentucky Retirement Systems*, 396 S.W.3d at 838.

Price's Complaint alleges wrongful and/or negligent misrepresentation, and breach of contract claims. Neither of Price's causes of action against Retirement Systems fall into these exceptions to sovereign immunity. Thus, the trial court erred by finding Retirement Systems was not subject to sovereign immunity.

Price attempts to salvage his claims by arguing on appeal that a host of constitutional violations have occurred because Retirement Systems has not permitted him to purchase his buyback credit. He further claims he cannot request a KRS Chapter 13B hearing, nor can he appeal to Franklin Circuit Court, because Retirement Systems has not issued any written order concerning his desire to purchase his buyback credit.

As to the constitutional issues, we will not address those as they were not raised in his Complaint below. *Dever v. Commonwealth*, 300 S.W.3d 198, 202 (Ky. App. 2009) (reiterating that an appellant cannot feed one can of worms to the trial judge and another to the appellate court).

Concerning Price's claim that he can neither request a KRS Chapter 13B hearing nor can he appeal to the Franklin Circuit Court because there has been no order or opinion by the Retirement Systems, Price is not without recourse. Price can file a declaratory judgment action in Franklin Circuit Court.

Commonwealth v. Kentucky Retirement Systems, 396 S.W.3d 833, 838-39 (Ky. 2013). Or, Price can seek a writ of mandamus against an officer at Retirement Systems to have an order or opinion entered in his case so he can then seek remedies under KRS 61.645(14) or (16). *Cf. Hamblen ex rel. Byars v. Kentucky Cabinet for Health and Family Services*, 322 S.W.3d 511 (Ky. App. 2010). As

currently pled and filed in the McCreary Circuit Court, however, Retirement Systems is entitled to dismissal due to immunity from suit.

CONCLUSION

Our decision today does not address the merits of Price's Complaint nor whether Retirement Systems should permit Price to purchase his buyback credit. We simply hold that, as currently pled, Retirement Systems is entitled to immunity from suit under the sovereign immunity doctrine. We reverse and remand for the McCreary Circuit Court to enter an order dismissing the Complaint.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Leigh A. Jordan Davis
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Austin Price, *pro se*
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