STATE OF MICHIGAN

COURT OF APPEALS

KATHERINE FLANAGAN,

Plaintiff-Appellee,

v

MACOMB COUNTY EMPLOYEES RETIREMENT SYSTEM,

Defendant-Appellant.

UNPUBLISHED
October 25, 2012

No. 305754
Macomb Circuit Court
LC No. 2010-003943-CK

Before: OWENS, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court opinion and order denying defendant's motion for summary disposition of plaintiff's breach of contract claim, pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). We reverse and remand.

Plaintiff brought this action against defendant, alleging claims of breach of contract and constitutional violations[1], based on defendant's revocation of plaintiff's disability retirement benefits. Plaintiff started working for Macomb County in 1995 and worked until 2006 when she developed hydrocephalus. As a result of this condition, plaintiff underwent 17 neuro-surgical procedures and 14 shunt revisions to install and repair a shunt which pulls fluid from her brain, runs along the carotid artery, and drains through her abdomen. She has also had four open heart surgeries and a double-mastectomy. Defendant approved her for disability retirement benefits in October 2006. However, the Macomb County Employees Retirement Ordinance required that plaintiff submit to annual reexaminations to determine her continued eligibility for those benefits. Defendant terminated plaintiff's benefits as of April 6, 2009 after three separate physicians chosen by defendant examined plaintiff and determined she was no longer disabled and could return to work for Macomb County in her former capacity. Plaintiff filed the present lawsuit.

Defendant filed a motion for summary disposition. It argued that its decision to terminate plaintiff's disability retirement benefits was based on substantial and competent record evidence

[1] The court granted defendant's motion for summary disposition, brought under MCR 2.116(C)(8), as to plaintiff's claims of constitutional violations.

and was not arbitrary, capricious or unreasonable. Defendant asserted it did not abuse its discretion and that its decision complied with the law. For these reasons, it argued, plaintiff's breach of contract claim must be dismissed.

In response, plaintiff disputed defendant's assertion that the standard of review applicable to reviews of administrative agency decisions applies here. Regardless, she argued, defendant's decision did not satisfy that standard. She pointed to evidence she presented to challenge the conclusions of the physicians who examined her at defendant's request.

The trial court reviewed the competing evidence presented by the parties. It found that plaintiff "met her burden in order to defeat Defendant's motion for summary disposition" pursuant to MCR 2.116(C)(10) for her breach of contract claim. It found that there exist genuine issues of material fact precluding summary disposition and denied defendant's motion.

The Court of Appeals reviews decisions granting or denying motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiffs claim. The Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties. MCR 2.116(G)(5). A motion may be granted under MCR 2.116(C)(10) where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Defendant argues that the trial court erred when it failed to apply the proper standard of review when it denied defendant's motion for summary disposition, because defendant is an agency and entitled to have its decisions reviewed under the substantial evidence test. We agree.

Macomb County enacted what is known as the "Macomb County Employees Retirement System Ordinance." Section 3 of that ordinance creates "a Retirement Commission in whom [sic] is vested the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of [the] Ordinance."

Section 32 of the Ordinance provides:

> At least once each year during the first five years following the retirement of a member with a disability retirement allowance, and at least once in each three-year period thereafter, the Commission may require said retirant to undergo a medical examination by or under the direction of the medical director. . . . If, upon such medical examination of a retirant, the medical director reports to the commission that the retirant is physically able and capable of resuming employment with the County, and his/her report is concurred in by the Commission, the disability retirement allowance shall terminate.

Presumably pursuant to sections 3 and 32 of the ordinance, defendant adopted the Disability Retirement Re-examination Procedure. Paragraph 8 of the Disability Retirement Re-Examination Procedure provides:

> The retirant may appeal the Retirement Commission's determination and request a hearing. The appeal shall be in writing filed with the Commission within 90 (ninety) days of the determination and shall contain a statement of the reason(s) for believing the decision to be improper. The Commission shall schedule a hearing of the appeal before the Commission within 60 (sixty) days of receipt of the appeal. The individual will have the ability to present any new information to the Commission which may be forwarded to the Medical Director for consideration. A final decision on the matter being appealed shell [sic] be made by to [sic] Retirement Commission.

No further means of appeal are provided by the Ordinance.

In *In re Payne*, 444 Mich 679, 687; 514 NW2d 121 (1994), our Supreme Court stated: "[d]ecisions of municipal civil service commissions are reviewed through original actions for superintending control." Superintending control is employed as the means of review in such matters "[b]ecause the Legislature has not provided for appeal from municipal service boards." *Id*. Superintending control is appropriate where the respondent has failed to perform a clear legal duty and no adequate legal remedy is available. *Cadle Co v Kentwood*, 285 Mich App 240, 246; 776 NW2d 145 (2009).

Payne referenced *Beer v Fraser Civil Service Comm'n*, 127 Mich App 239, 243; 338 NW2d 197 (1983). In *Beer*, this Court explained: "A superintending control order enforces the superintending control power of a court over lower courts or tribunals. A circuit court has jurisdiction to issue orders of superintending control over administrative tribunals of a judicial or quasi-judicial nature." *Id*. The *Beer* Court noted that when a civil service commission decides an appeal brought by an employee, it acts in a quasi-judicial capacity. *Id.*

The circuit court indicated that plaintiff alleges a claim for breach of contract, and it dismissed a claim based on alleged constitutional violations. However, it appears that what plaintiff actually seeks is a reversal of defendant's decision to revoke her disability retirement benefits. There is nothing to suggest that her breach of contract claim is independent from the revocation of her disability retirement. In fact, the circuit court acknowledged in its August 2, 2011 opinion and order: "[b]ecause Plaintiff has exhausted all the administrative remedies available to her, she filed a Complaint on September 9, 2010, comprising allegations of breach of contract and constitutional violations."

In making a determination regarding plaintiff's continued eligibility for disability retirement, defendant acted in a quasi-judicial capacity. Because neither the Ordinance nor defendant's disability retirement re-examination procedure provides for an appeal from defendant's decision, plaintiff's avenue for relief was by superintending control. Some of the cases defendant relies upon in support of its position were initiated by way of a complaint for superintending control: *Hempstead v Charter Twp of Waterford*, unpublished opinion per curiam of the Court of Appeals, issued 04/20/2006 (Docket No. 259408) (action against Waterford's retirement system); and *In re Foushee*, unpublished opinion per curiam of the Court of Appeals, issued 11/02/1999 (Docket No. 208136) (action against Wayne County's Retirement System). In another case, initiated by an employee against Monroe County's Employee Retirement System, this Court noted that the plaintiff filed it as an original action and the parties moved for summary

disposition. It approved the circuit court's consideration of the case as an administrative appeal. *Diekman v Monroe County Employees Retirement System*, unpublished opinion per curiam of the Court of Appeals, issued 03/29/2005 (Docket No. 251575).

We conclude that this action should proceed as a complaint for superintending control and that the common-law standard of review of defendant's factual findings should be applied. See *Payne*, *supra* 444 Mich at 688. That standard is the substantial evidence test. *Id*. *Payne* explained: "[C]ircuit courts should assume superintending control over a municipal civil service board . . . when the record of the adjudicative hearing does not contain substantial evidence to support the finding." *Id*. at 690.

We decline to address defendant's remaining issue, as the trial court has not yet reviewed the matter under the substantial evidence test.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder