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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000262-MR

GARY MASTERSON; ROSZELLE MOORE;
ANN WILSON; GENE SNAWDER;
DAVID DOBBS; CLIFFORD AND
CLARA TOLES; DAN GIBSON;
JUNE FIELDS; AND
CONCERNED CITIZENS UNITED,
INC., NOT FOR PROFIT
CORPORATION APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 99-CI-01242

CITY OF WEST POINT APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, MCANULTY AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Gary Masterson, Roszella Moore, Ann Wilson, Gene Snawder, David Dobbs, Clifford and Clara Toles, Dan Gibson, June Fields, and Concerned Citizens United, Inc. (collectively the Appellants) appeal from orders of the Hardin Circuit Court entered November 16, 1999, and December 29, 1999, which dismissed their complaint against the City of West Point (the City). We affirm.

At all times relevant hereto, the City was involved in litigation with Rogers Group, Inc., Holloway & Son Construction, Inc., over the construction and operation of a rock quarry within city limits. In an effort to resolve the dispute, the City began investigating the possibility of settlement. To that end, a regularly scheduled meeting of the West Point City Council (the City Council) was held in a local school gymnasium to better allow members of the public to express their concerns regarding settlement.

It appears that informal notice was given that the City Council would consider a proposed settlement agreement at its regularly scheduled business meeting on June 14, 1999 (the June meeting). On June 11, 1999, Tom Fitzgerald, Director of Kentucky Resources Council, Inc., wrote to Mayor Larry Hall (Mayor Hall) and the City Council and requested that the June meeting "be moved to a larger meeting room, in order to accommodate the many individuals who have expressed an interest in the proposed settlement." Fitzgerald further expressed his opinion that denial of the request to move the June meeting would result in violation of provisions of Kentucky's Open Meetings Act (KRS 61. 805 et seq.)(the Open Meetings Act). On the same date, Mayor Hall received a petition signed by 29 individuals requesting relocation of the June meeting to the school gymnasium.

Despite requests to move the location of the June meeting, it was held at its usual room in City Hall. As a result, everyone who sought to attend the meeting could not fit into the meeting room, and those who could not get into the room

were unable to speak. Additionally, not everyone in the meeting room was permitted to speak, and those who did speak were only given a certain amount of time in which to express their views on the proposed settlement. The City Council voted to approve the proposed settlement at the June meeting, and further ratified the actions taken at the June meeting at its regular meeting on September 13, 1999.

On June 25, 1999, counsel for the Appellants wrote to Mayor Hall pursuant to KRS 61.846[1] "to complain that the . . . City Council acted in a manner that violates the requirements of Kentucky's Open Meeting statutes in the conduct of the City Council meeting on June 14, 1999," and to ask for a declaration that the action taken during the June meeting was void. Counsel for the City responded by letter dated June 29, 1999, and stated his belief that the June meeting was "entirely proper." Pursuant to KRS 61.848(2), the Appellants had sixty days from the date of receipt of the City's written response to file suit. It appears that counsel for the Appellants received the City's response on June 30, 1999.

On August 24, 1999, the Appellants filed a "complaint and petition for declaration of rights" in which they alleged jurisdiction "pursuant to KRS 418.040 and KRS 418.045, where Plaintiffs seek a declaration of rights against the City[.]" The

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[1]Under KRS 61.846(1), a person complaining of violations of the Open Meetings Act "shall submit a written complaint to the presiding officer of the public agency suspected of the violation" which states the basis of the complaint. The public agency then has three days after receipt of the written complaint to decide whether to remedy the alleged violation and respond in writing to the person making the complaint.

City was the only named defendant, and the complaint was served on Mayor Hall. In the complaint, the Appellants set forth the requests to move the location of the June meeting and alleged:

> 14. The Mayor and the City Council failed and refused to conduct the meeting in a meeting room large enough to accommodate those citizens who sought to attend and observe and failed to make arrangements to broadcast the meeting to other locations to permit those who could not get into the room a reasonable opportunity to hear the proceedings and failed to afford those present a fair and reasonable opportunity to address the City Council.
>
> 15. The above described actions and failures to act on June 14, 1999, were intended to and did in fact violate the letter and the purpose of the Kentucky Open Meetings Act.
>
> 16. The above described actions and failures to act on June 14, 1999, were preceded by other similar knowing violations of the Kentucky Open Meetings Act and have been followed by additional knowing violations of the Kentucky Open Meetings Act, including the pattern of holding City Council meetings at irregular and unpredictable times, the failure to give proper public notice of City Council meetings that are called specifically, regular and consistent violations of the executive session requirements, on one occasion the removal of all chairs available to the public from the meeting room, on another occasion locking one of the doors to the meeting room while the meeting was in progress, and on another occasion the Mayor attempted to require that only those people who took a number from him would be allowed in the meeting room to observe the City Council. These and other similar knowing and purposeful actions were done in violation of the Kentucky Open Meetings Act, KRS 61.800-850.

The Appellants requested, among other relief, that the trial court:

> a. Enter a declaratory judgment that the actions of the City Council of West Point on

> June 14, 1999, violated the Open Meetings Act;
>
> b. Enter a declaratory judgment that the actions of the City Council before and since the June 14, 1999 [sic] establish a pattern of knowing and willful violations of that Act; [and]
>
> c. Enter a judgment declaring the action of the City Council of West Point on June 14, 1999 to be null and void[.]

On September 14, 1999, the City filed a motion to dismiss pursuant to CR 12 in which it maintained that dismissal was proper because the Appellants failed "to sue the relevant public agency - the West Point City Council - in this statutory action in which the 60 day limitation period has expired, thus leaving no opportunity to amend the Complaint." Specifically, the City maintained:

> Since the June 14, 1999, public meeting complained of was a meeting of the West Point City Council, and since Plaintiffs failed to sue the West Point City Council in the sixty day period expressly set forth in KRS 61.848 . . . the Hardin Circuit Court lacks jurisdiction to proceed.

The City also argued that (1) the Appellants' requested remedy was unavailable based on the allegations of the Complaint; (2) Concerned Citizens United, Inc., (the Corporation) lacked standing to maintain its claims; and (3) the complaint is moot because the actions taken in the June meeting were ratified during the City Council's meeting of September 13, 1999. In their response, the Appellants argued that the City was the proper party defendant because the decision to hold a city council meeting in a different location is the Mayor's to make and that the City Council "has little ability or power to control

the arrangements made to conduct city council meetings, other than to adopt a resolution to direct the mayor concerning the conduct of future meetings." The Appellants also stated that they "had the right to sue the West Point City Council if Plaintiffs determine that it was the City Council that acted or failed to act to afford the Plaintiffs their rights[.]"

In an order entered November 16, 1999 (the November order), the trial court granted the City's motion to dismiss. In so ruling, the trial court stated:

> KRS 61.848 enables any person to bring a court challenge to the validity of a council meeting. It is set out as follows:
>
>> (1) The Circuit Court of the county where the public agency has its principal place of business or where the alleged violation occurred shall have jurisdiction to enforce the provisions of KRS 61.805 to 61.850, as they pertain to that public agency, by injunction or other appropriate order on application of any person.
>
> The definition of "public agency" in KRS 61.805(2)(c) includes a city council. This framework forms the basis of the City's argument that Plaintiffs named the wrong party in their suit. Furthermore, a suit against the City is not the same as a suit against the city council. See, City of Danville v. Wilson, Ky., 394 S.W.2d 583 (1965); City of Madisonville v. Sisk, Ky. App., 783 S.W.2d 885 (1990).
>
> Plaintiffs counter that the City Council did not violate the Open Meetings Act, the Mayor did. The Mayor had been requested to move the meeting to a larger venue because of the high public interest in the proposed settlement. Plaintiffs claim that the Mayor's refusal to do so violated KRS 61.840, which in relevant part provides that "All agencies shall provide meeting room conditions which insofar as is feasible allow

> effective public observation of the public meetings." Since it is the Mayor who the Plaintiffs claim violated the Act, the City is the proper party to this suit.
>
> The Plaintiffs claim that the City, through the Mayor, was the wrongdoer here, not the City Council. The City argues that the statute makes the City Council the proper defendant. There is no Kentucky case law dealing with this issue under the Kentucky Open Meetings Act, and the statute itself is not crystal clear. The Court finds that the City Council is the proper defendant.

The trial court also dismissed the Corporation, finding that it lacked standing. The trial court ended the November order by observing:

> The Court is very familiar with the City of West Point. West Point is a small town hemmed in by the Ohio River, Salt River, the boundaries of the Fort Knox Military Reservation, and Muldraugh Hill. It is a small town and with most small towns everyone knows each other and everyone's business.
>
> The controversy over the operation of a rock quarry had gone on for many months. The debate was well publicized by the news media. This Court is satisfied that the Mayor and City Council knew everyone who was for it and knew everyone who was against it. As set forth in the letter of June 11, 1999 of the Kentucky Resources Council, Inc. Tom Fitzgerald, the City Council held its prior meeting in the school gym where all the residents had the opportunity to observe and participate.
>
> The follow up meeting after the meeting in the school gym was a regular meeting in the City Council Chambers at City Hall. As set forth in his complaint, the Plaintiff in this action, Gary Masterson, President of the now formed Concerned Citizens United, Inc., was present and made his presentation to the City Council as did other residents of West Point.
>
> The complaint alleges that the City Council meeting on June 14, 1999 was part of a consistent pattern of knowing violations of

> the Kentucky Open Meetings Act. However, the complaint ignores the meeting held in the school gym as set forth in the letter of Tom Fitzgerald. It appears to this Court that the residents of the City of West Point were given every opportunity by the City Council to express their opinions as to the rock quarry at the meeting at the school gym and later at the regular City Council meeting at City Hall.
>
> In summary, the Court finds that the City Council would be the appropriate defendant and the corporation . . . has no standing to bring this action. The City Council complied with the Kentucky Open Meetings Act by holding its meeting prior to the June 14 meeting at the school gym to accommodate any and all residents interested in the rock quarry issue. The President of [the Corporation] spoke for the group at the June 14 meeting. The Court does not find a violation of the Open Meetings Act. Any violation, if such, was removed by the City Council ratifying its action on September 13, 1999, after the filing of this law suit[.]

Following entry of the November order, the Appellants filed a motion to alter, amend, or vacate pursuant to CR 59, arguing that the trial court considered matters outside the pleadings and then erred by failing to treat the City's motion as one for summary judgment under CR 56 pursuant to CR 12.03. In an order entered December 29, 1999 (the December order), the trial court stated:

> Civil Rule 12.02(f) allows a case to be dismissed on motion for failure to state a claim on which relief can be granted. In its prior order of November 16, 1999, the Court found that Plaintiffs failed to state a claim upon which relief can be granted by failing to name the proper party as Defendant. The Court ruled that under KRS 61.848(1), the City Council was the proper Defendant in this action. The Court made this ruling because the Plaintiffs complained that the City Council's actions violated the Kentucky Open Meetings Act, and the Plaintiffs sought

> relief against the City Council. The Court sees no reason to alter its interpretation of the statute.
>
> The Plaintiffs' failure to name the West Point City Council as Defendant is a sufficient ground for the Court to grant the motion to dismiss on the pleadings.

This appeal followed.

The Appellants maintain that the trial court erred in dismissing their complaint on the ground that they failed to name the City Council as a defendant. The Appellants argued that they were not required to include the City Council as a defendant because "public agency" as defined for purposes of the Open Meetings Act includes "[e]very county and city governing body, council, school district board, special district board, and municipal corporation." KRS 61.805(2)(c). Under the Appellants' reasoning, the inclusion of municipal corporations in the definition of "public agency" should allow their claim to proceed despite the fact that they failed to include the City Council as a party defendant. We disagree.

Under KRS 61.848(1), circuit courts are given "jurisdiction to enforce the provisions of [the Open Meetings Act], as they pertain to that public agency, by injunction or appropriate order[.]" Although the Appellants are correct in arguing that the definition of "public agency" for purposes of the Open Meetings Act includes cities as well as city councils, they lose sight of the fact that the entity they seek to charge with wrongdoing under the terms of their complaint is the City Council, not the City. It is this flaw which requires dismissal of the Appellants' complaint. It has been recognized that a suit

against a city council is not the same as a suit against a city. City of Danville v. Wilson, Ky., 395 S.W.2d 583, 585 (1965). We see no reason to fail to recognize the converse of that holding, and find that a suit against a city is not the same as a suit against a city council.

The Appellants' citation to E.W. Scripps Company v. City of Maysville, Ky. App., 790 S.W.2d 450 (1990), Blair v. City of Winchester, Ky.App., 743 S.W.2d 28 (1987); and Reed v. City of Richmond, Ky.App., 582 S.W.2d 651 (1979) in support of their argument that the City is the proper defendant to their complaint is misguided. While a review of those cases indicates that the cases were allowed to proceed despite the fact that the cities were the named defendants, we agree with the City that "[a] close examination of these opinions shows no evidence that the proper parties issue was raised or that the appellate courts ruled on the issue of whether the respective legislative body was the proper party. As a result, they do not support reversal."

Alternatively, we agree with the City that the trial court's dismissal of the Appellants' complaint is also proper under statutes pertaining to declaratory judgments. Under KRS 418.075, "all persons shall be made parties who have or claim any interest which would be affected by the declaration [of rights], and no declaration shall prejudice the rights of persons not parties to the proceeding." Once again, we note that the Appellants claimed that the City Council, not the City, violated the Open Meetings Act but failed to include it as a defendant. Since the City Council was not named as a defendant, "[t]he

Circuit Court's judgment could not be binding upon it." Eitel v. John N. Norton Memorial Infirmary, Ky., 441 S.W.2d 438 (1969).

The Appellants maintain that the trial court erred in deciding the City's CR 12 motion to dismiss on the pleadings by considering evidence outside the pleadings without treating the motion as one for summary judgment under CR 56, and by making findings on the merits of their claims. Specifically, the Appellants argue that the trial court erred by:

> accepting as true the unproven assertions made in the motion to dismiss, relying on his own knowledge to find certain facts not in evidence and contrary to the Appellants [sic] verified complaint, making findings regarding a meeting in the "school gym" that were clearly wrong, yet leaving the finding unchanged when confronted with verified evidence of the error, and finding the ultimate fact in an Open Meetings Act claim by finding, in effect, that in this small town, everybody already knew what everybody was going to say.

The trial court specifically found in its December order that the Appellants' failure to include the City Council as a named defendant "is a sufficient ground for the Court to grant the motion to dismiss on the pleadings." It is apparent that the trial court only considered the complaint itself in ruling on this issue. While the trial court may have alluded to facts outside the pleading in dicta and while the trial court may have improperly ruled that the meeting was not violative of the Open Meetings Act in ruling on the City's CR 12 motion, the December order makes it clear that it based its decision only on the Appellants' failure to name the City Council as a defendant.

Having considered the parties' arguments on appeal, the orders of the Hardin Circuit Court are affirmed.[2]

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANTS:

W. Henry Graddy, IV
Midway, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Thomas E. Cooper
Elizabethtown, KY

[2]Because we have affirmed the trial court's dismissal of the entirety of the Appellants' complaint, we need not address the Appellants' arguments pertaining to the dismissal of the Corporation.