

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001097-MR (DIRECT)
NO. 2001-CA-001197-MR (CROSS)

TRI-COUNTY ANIMAL SHELTER AND
NORA GRUBB

APPELLANTS/CROSS-APPELLEES

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CI-00550

RANDY SKAGGS AND
TRIXIE FOUNDATION

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING DIRECT APPEAL
VACATING IN PART - REVERSING IN PART AND REMANDING CROSS-APPEAL
** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE. Tri-County Animal Shelter and Nora Grubb (hereinafter "the Shelter") have appealed from the February 28, and April 25, 2001, orders of the Greenup Circuit Court dismissing their Petition for Declaration of Rights as untimely filed and denying their motion to vacate, alter or amend. Randy Skaggs and The Trixie Foundation (hereinafter "Skaggs") have cross-appealed from the April 25, 2001, order denying their motion to amend, alter or extend and requiring them to bring a copy machine and paper to make copies of the requested documents.

Having determined that the circuit court properly dismissed the action as untimely, we affirm on direct appeal, and vacate in part and reverse in part and remand on cross-appeal.

On July 31, 2000, Skaggs, the founder and authorized agent of The Trixie Foundation, presented a written application for records pursuant to the Kentucky Open Records Act¹ seeking documents from the Shelter. When the requested documents were not provided, Skaggs initiated an open records appeal with the Office of the Attorney General (hereinafter "OAG") on August 14, 2000. The OAG issued a decision² on September 13, 2000, finding that the Shelter was a public agency pursuant to KRS 61.870(1)(h) and that documents relating to eleven of thirteen categories of records requested must be mailed to Skaggs upon the prepayment of reasonable copying and postage charges. The last paragraph indicated that a party aggrieved by the decision could appeal it pursuant to KRS 61.880(5) and KRS 61.882, which provide that an aggrieved party has thirty days to initiate an action in the appropriate circuit court.

During that thirty-day period for filing an action in the circuit court, Skaggs filed a subsequent open records appeal with the OAG on October 9, 2000, due to the Shelter's failure to respond to his September 18, 2000, open records request. The OAG issued a decision³ on November 9, 2000, directing the Shelter to release the requested documents.

¹KRS 61.870 through 61.884.

²00-ORD-175

³00-ORD-212

On November 14, 2000, the Shelter filed a Petition for Declaration of Rights regarding the September 13, 2000, open records ruling by the OAG. Copies of the August 14, 2000, letter and the September 13, 2000, OAG opinion were attached to the Petition, which did not reference or have attached to it the November 9, 2000, OAG decision. Skaggs filed an answer and a counter-claim on December 6, 2000, arguing that the petition was not timely filed and requesting fees, costs, and penalties for the willful withholding of the requested documents. The circuit court allowed the parties to file briefs on the issue of timeliness and issued an order on February 28, 2001, finding that the Shelter should have appealed within 30 days of the September 13, 2000, OAG decision and that the November 14, 2000, petition was not timely filed. Additionally, the circuit court ordered the Shelter to comply with the September 13, 2000, OAG opinion.⁴

Skaggs filed a motion to amend, alter or extend the order, requesting that the circuit court assess costs, fees, and penalties against the Shelter for failing to allow for the inspection or copying of the records. Likewise, the Shelter filed a motion to vacate, alter or amend, arguing that Skaggs had sought a modification of the September 13, 2000, OAG decision, which thereby tolled the time for taking an appeal and made the November 14, 2000, petition timely. On April 25, 2001, the circuit court entered an order denying both motions. In an

⁴Although the circuit court noted in the order that Skaggs's motion for default was sustained, we note that the circuit court previously denied the motion for default judgment on the counter-claim on January 25, 2001. Therefore, we shall construe that ruling as a dismissal of the action as untimely.

effort to resolve the copying problem, the circuit court also ordered Skaggs to bring his own copy machine and paper to the Shelter to make copies and ordered the Shelter to provide the electricity for the copy machine. The Shelter has appealed from both the February 28, and April 25, 2001, orders, and Skaggs has cross-appealed from the latter order.

DIRECT APPEAL

The Shelter's direct appeal is limited to whether the Petition for Declaration of Rights was timely filed with the circuit court. The Shelter argues that it was timely filed as the action taken by Skaggs in filing a second open records appeal with the OAG served to toll the time for seeking relief from the circuit court. In essence, the Shelter argues that Skaggs sought to amend the September 13, 2000, OAG opinion during the thirty-day period, likening this action to the filing of a CR 59 motion to alter, amend or vacate, which would toll the time to appeal. Skaggs disagrees, arguing that the second open records appeal, decided on November 9, 2000, was a separate and discrete action and that its filing did not toll the time for filing an appeal with the circuit court.

Pursuant to KRS 61.880(5), an aggrieved party has thirty days from the rendition of the OAG's opinion to seek an appeal. In particular, KRS 61.880(5)(b) provides that "[i]f an appeal is not filed within the thirty (30) day time limit, the Attorney General's decision shall have the force and effect of law" Here, the Shelter was required to file an appeal with the circuit court on or before thirty days from September 13, 2000. The declaration of rights action was not filed until

November 14, 2000, well past the thirty-day deadline. The fact that Skaggs filed a separate open records appeal with the OAG neither changed the date nor tolled the time for filing an appeal from the September 13, 2000, decision. Additionally, the Court notes that the Shelter did not reference or attach a copy of the second OAG opinion to its petition, negating its claims that the September 13, 2000, OAG opinion was not properly appealable upon its rendition.

Therefore, the circuit court properly dismissed the Petition for Declaration of Rights as untimely.

CROSS-APPEAL

On cross-appeal, Skaggs argues that the circuit court erred in requiring him to take his copy machine and paper to the Shelter in order to make copies of the requested documents. Additionally, he argues that the circuit court erred in failing to consider awarding fees, costs, and penalties against the Shelter. The Shelter did not file a responsive brief to the cross-appeal.

As to the copying issue, KRS 61.872(3)(b) provides that "[t]he public agency shall mail copies of the public records to a person whose residence or principal place of business is outside the county in which the public records are located after he precisely describes the public records which are readily available within the public agency." If requested, the records custodian is to mail the copies once the fees and cost of mailing are received. Although we appreciate the circuit court's attempt to resolve the matter, we note that the statute specifically provides the method for copying and distributing the requested

documents. However, because we have already determined that the Shelter's Petition for Declaration of Rights was untimely filed, the circuit court lacked jurisdiction to enter its ruling regarding the method by which the document copies would be provided. We must therefore vacate the portion of the April 25, 2001, order requiring Skaggs to bring a copy machine and paper to the Shelter and the Shelter to provide electricity and the parties should hereinafter comply with the statutory requirements of KRS 61.872(3)(b).

As to the issue of the circuit court's failure to consider awarding fees, costs and penalties, we agree with Skaggs that the circuit court erred in not properly reviewing this matter. KRS 61.882(5) provides that:

Any person who prevails against any agency in any action in the courts regarding a violation of KRS 61.870 to 61.884 may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded costs, including reasonable attorney's fees, incurred in connection with the legal action. . . . In addition, it shall be within the discretion of the court to award the person an amount not to exceed twenty-five dollars (\$25) for each day that he was denied the right to inspect or copy said public record. Attorney's fees, costs, and awards under this subsection shall be paid by the agency that the court determines is responsible for the violation.

Here, Skaggs prevailed before the circuit court as the Shelter's petition was dismissed, and Skaggs clearly requested fees, costs and penalties throughout the action. However, the circuit court did not make any findings as to whether the Shelter's withholding of the records was willful or whether the award of sanctions was appropriate. Therefore, we reverse the portion of the April 25,

2001, order denying Skaggs's motion to amend, alter or vacate and remand the matter for a hearing as to whether the Shelter was willful in its withholding of the records and whether the imposition of any further penalty is appropriate.

CONCLUSION

For the foregoing reasons, the February 28, 2001, order dismissing the Petition for Declaration of Rights is affirmed, the portion of the April 25, 2001, order regarding the copying directions is vacated, and the portion of the April 25, 2001, order denying Skaggs's motion to amend, alter or extend is reversed and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James W. Lyon, Jr.
Greenup, KY

No Brief Filed by Cross-
Appellees

BRIEF FOR APPELLEES/CROSS-
APPELLANTS:

Robert L. Caummisar
Grayson, KY