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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000903-MR

JAMES DAVENPORT, MIKE FITZPATRICK, BRAD GOLD, ANDREW LEACH, DANIEL MILLER, GREG MOORE, MICHAEL MOORE, DALE PARKINSON, EDDIE SLONE, KYLE SMITH, DOUGLAS TAYLER, JAMES URQUHART, TERRY WICKMAN, and MARC WOOD — APPELLANTS

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00243

JOE NORSWORTHY, SECRETARY OF LABOR, DIVISION OF EMPLOYMENT STANDARDS, APPRENTICESHIP AND TRAINING, LABOR CABINET, AND THE CITY OF FRANKFORT, D/B/A FRANKFORT FIRE AND EMS SERVICE — APPELLEES

AND: CROSS-APPEAL NO. 2002-CA-000946-MR

CITY OF FRANKFORT — CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 02-CI-00243

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OPINION
REVERSING AND REMANDING APPEAL NO. 2002-CA-000903-MR
AND AFFIRMING CROSS-APPEAL NO. 2002-CA-000946-MR

** ** ** ** **

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

BAKER, JUDGE: James Davenport, Mike Fitzpatrick, Brad Gold, Andrew Leach, Daniel Miller, Greg Moore, Michael Moore, Dale Parkinson, Eddie Slone, Kyle Smith, Douglas Tayler, James Urquhart, Terry Wickman, and Marc Wood bring Appeal No. 2002-CA-000903-MR and the City of Frankfort brings Cross-Appeal No. 2002-CA-000946-MR from an April 23, 2002, opinion and order of the Franklin Circuit Court. We reverse and remand Appeal No. 2002-CA-000903-MR and affirm Cross-Appeal No. 2002-CA-000946-MR.

The genesis of this controversy surrounds the proper amount of overtime pay owed by the City of Frankfort (the City) to Davenport and thirteen other firefighter paramedics employed by the City.[1]

Davenport initiated the instant action in the Labor Cabinet (the Cabinet). Ultimately, the Secretary of Labor entered a Final Order which was served upon counsel by mail on January 22, 2002. The order incorporated the hearing officer's Findings of Fact, Conclusions of Law and Recommended Order. From the Secretary's Final Order, Davenport sought judicial

[1] In this opinion, we shall hereinafter refer to Davenport and the other paramedics collectively as Davenport.

review in the Franklin Circuit Court under Kentucky Revised Statute (KRS) 13B.140. On February 18, 2002, Davenport filed a "complaint" with the clerk of the circuit court and addressed one summons to the City of Frankfort, d/b/a Frankfort Fire and EMS Service, 315 W. 2nd Street, Frankfort, KY 40601 and another summons to Joe Norsworthy, Secretary of Labor, Labor Cabinet, 1047 U.S. 127 South, Suite 4, Frankfort, KY 40601. The record indicates that the summonses were duly served upon the parties at the addresses noted above.

Thereafter, the City filed a motion to dismiss alleging that Davenport failed to properly and timely serve it with summons. Specifically, the City maintained that Davenport was obligated to serve either the chief executive officer or an official attorney of the City pursuant to Ky. R. Civ. P. (CR) 4.04(7). Upon receipt of the motion, Davenport filed summonses addressed to the mayor of the City of Frankfort and to the attorney general of the Commonwealth, which were duly served.

Concluding that Davenport failed to properly serve the City and the Cabinet within the thirty day time requirement of KRS 13B.140, the circuit court dismissed the action. The circuit court determined that Davenport was required under KRS 13B.140 to timely serve the City through the chief executive officer or an official attorney and to serve the Labor Cabinet

through the Attorney General of the Commonwealth. CR 4.04(6) and (7). These appeals follow.

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In this Commonwealth, there is no judicial review from an administrative agency's decision as a matter of right under our Constitution; rather, such review is granted by the grace of the legislature. When the legislature has conferred a statutory right of judicial review, our Supreme Court has mandated strict compliance with the terms of the statute. See Board of Adjustments of City of Richmond v. Flood, Ky., 581 S.W.2d 1 (1978).

KRS 13B.140[2] authorizes and governs judicial review of final orders of the Labor Cabinet. The terms of the statute provide for the filing of a petition in the circuit court and for service of the petition "upon the agency and all parties of record." KRS 13B.140. Conspicuously absent from the terms of KRS 13B.140 are the specific procedures by which service is to be accomplished. When a statute authorizing judicial review

[2]Kentucky Revised Statute (KRS) 13B.140 reads in relevant part:
(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

from an administrative decision fails to provide specific procedures for service, we think such procedures should be gleaned from the Kentucky Rules of Civil Procedure (Civil Rules).[3] Thus, we look to the Civil Rules to furnish the specific procedures for service under KRS 13B.140.

To decide which Civil Rules apply to KRS 13B.140, we must initially determine whether judicial review under KRS 13B.140 is properly viewed as an original action or as an appeal. This determination is essential because of the different service procedures applicable to appeals and original actions under the Civil Rules.

KRS 13B.140 itself speaks in terms of "institut[ing] an appeal by filing a petition in the Circuit Court . . . ." Even though the statute utilizes the term "appeal," we think the judicial review contemplated thereunder is more properly characterized as an "original action."[4] See Commonwealth Transportation Cabinet v. City of Campbellsville, Ky. App., 740

[3] This opinion should not be misconstrued as holding that the Kentucky Rules of Civil Procedure in any way supersede applicable Kentucky Administrative Regulations.

[4] We are cited to Cosmos Broadcasting Corp. v. Commonwealth Transportation Cabinet, Ky. App., 759 S.W.2d 824 (1988) and to Board of Adjustments of the City of Richmond v. Flood, Ky., 581 S.W.2d 1 (1979) for the proposition that the Kentucky Rules of Civil Procedure (Civil Rules) do not apply to judicial review of an administrative agency's decision. In Cosmos, the statute relied upon, KRS 183.620, has long since been repealed. Thus, we do not view Cosmos as controlling. In Flood, the statute, KRS 100.347 which authorizes judicial review, specifically provided that the Civil Rules were to govern only after the appeal "is taken." Thus, we view Flood as clearly distinguishable.

S.W.2d 162 (1987). We are buttressed in our conclusion by KRS 23A.010(4) which provides in part:

> The Circuit Court may be authorized by law to review the actions or decisions of administrative agencies, special districts or boards. **Such review shall not constitute an appeal but an original action.** (Emphasis added).

In KRS 23A.010(4), the legislature clearly and unambiguously signaled its intent that judicial review from a decision of an administrative agency shall be considered an original action. Hence, we are of the opinion that judicial review under KRS 13B.140 is properly viewed as an original action.

In this Commonwealth, a civil action (including an original action) is commenced upon the filing of a complaint (or petition) and the issuance of summons (or warning order) in good faith under CR 3.01.[5] CR 4.04 delineates precise procedures for properly effectuating service of the summons and complaint (or petition). Therefore, we hold that CR 3.01 and CR 4.04 provide the proper procedures for accomplishing service under KRS 13B.140.

In the case at hand, CR 4.04(6) and (7) mandate that the Labor Cabinet be served through the Attorney General and

[5] We note that Michie's Kentucky Rules Annotated published by LexisNexis designates this rule as CR 3; whereas, the Kentucky Rules of Court published by West Group designates it as CR 3.01. In this opinion, we use the West designation and refer to the rule as CR 3.01.

that the City be served through the chief executive officer or official attorney. Because Davenport failed to timely serve the aforementioned parties, it is clear that Davenport did not adhere to the specific service procedures of CR 4.04(6) and (7). We, nevertheless, do not think such failure fatal to judicial review.

CR 3.01 requires summons be issued in good faith; the good faith provision has been held to mean that summons be issued with a "good faith" intention that it be immediately served or served in due course. See Roehrig v. Merchants Businessmen's and Mutual Insurance Company, Ky., 391 S.W.2d 369 (1965). The City urges us to hold the good faith provision of CR 3.01 inapplicable to judicial review of administrative decisions under KRS 13B.140. Indeed, the circuit court reached such a conclusion by relying upon the strict compliance rule enunciated in Flood, 581 S.W.2d 1 (1979); however, we believe the circuit court misconstrued the holding in Flood. Flood simply held that a party must strictly comply with the terms of a statute authorizing judicial review; Flood did not address the issue of a party's strict compliance with the Civil Rules applicable to such a statute. Accordingly, we think the circuit court improperly applied the strict compliance rule to bar the good faith provision of CR 3.01.

We now address whether Davenport acted in good faith pursuant to CR 3.01. It is well established that service of process is completed in good faith if, "when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment." Roehrig, 391 S.W.2d at 371. Considering the good faith provision of CR 3.01, our Supreme Court specifically commented:

> What is the meaning of "good faith" . . . ? It can be, and usually is, something less than perfection or complete accuracy. Above all, it means not to take advantage of, not to deceive, not to be underhanded.

Id. at 370.

In the case at hand, the record indicates that Davenport served a generic address at the City of Frankfort and served the Secretary of Labor. Upon receiving the City's motion to dismiss, Davenport immediately corrected his mistake and filed summonses addressed to the proper parties under CR 4.04. We think the facts of this case mirror those of Jones v. Baptist Healthcare System, Ky. App., 964 S.W.2d 805 (1997), Crowe v. Miller, Ky., 467 S.W.2d 330 (1971), and Roehrig, 391 S.W.2d 369. In each of these cases, the Court held that appellant's inadvertent service of process on the wrong party did not, in and of itself, constitute a lack of good faith when immediate efforts were made to remedy same. For instance, in Roehrig, the controlling statute required that process be served upon the Commissioner of Insurance. Appellant, however, mistakenly served

the agent of the insurance company. When the error was discovered, a summons was reissued for the proper party. The court concluded that mere misdirection of the original summons did not constitute "a lack of good faith." Id. at 371; see also Hausman's Adm'r. v. Poehlman, 314 Ky. 453, 236 S.W.2d 259 (1951).

Undoubtedly, Davenport should have been aware of the service requirements of CR 4.04. However, failure to follow CR 4.04 is not tantamount, per se, to a lack of good faith. Although Davenport's attempts to serve the City and the Cabinet were less than perfect, we cannot say it was intended to defraud or to seek an unconscionable advantage. Furthermore, when the summonses were issued, we think Davenport intended they be served "presently or in due course or without abandonment." Roehrig, 391 S.W.2d at 371; see also Louisville & N.R. Co. v. Alexander, 277 Ky. 719, 127 S.W.2d 395 (1939).

We also view the argument presented by the City that Davenport's efforts constituted "bad faith" as misdirected. The City argues that Davenport acted in bad faith by failing to address the summons to the mayor. We believe this failure is not, itself, indicative of a lack of good faith, but more akin to mere negligence. As the Kentucky Supreme Court held, "negligence, rather than bad faith, in the execution and issuance of a summons will not bar a cause of action." Jones, 964 S.W.2d at 807. In sum, we are of the opinion that Davenport acted in good faith under CR 3.01; consequently, we conclude the circuit court erred by dismissing the action.

Cross-Appeal No. 2002-CA-000946-MR

On cross-appeal, the City contends that Davenport's failure to file exceptions to certain portions of the hearing officer's Findings of Fact, Conclusions of Law, and Recommended Order (hearing officer's findings) deprived the circuit court of jurisdiction and rendered judicial review "moot." The record reveals that Davenport did, in fact, file exceptions to the hearing officer's findings. As Davenport filed exceptions to the hearing officer's findings, we are of the opinion that jurisdiction was proper because Davenport exhausted all administrative remedies before seeking judicial review. See Swatzell v. Commonwealth, Ky., 962 S.W.2d 866, 869 (1998).

The City also challenges the sufficiency of Davenport's exceptions. By only excepting to certain findings of fact and conclusions of law, the City maintains that Davenport "fails on the merits to state a claim upon which relief may be granted." Brief for City of Frankfort at 25. We think the sufficiency of exceptions is better left for a determination upon the merits of a controversy. As the circuit court dismissed this action without considering the merits, it is premature for this Court to reach such issue.

For the foregoing reasons, the opinion and order of the Franklin Circuit Court is affirmed in part and reversed in

part, and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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