RENDERED: August 27, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-002243-MR

KEVIN BRUMLEY — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE LARRY RAIKES, JUDGE
ACTION NO. 01-CI-00541, 02-CI-00250

NELSON COUNTY FISCAL COURT; PHYLLIS MATTINGLY, NELSON COUNTY CLERK; DEAN WATTS, NELSON COUNTY JUDGE-EXECUTIVE — APPELLEES

OPINION
AFFIRMING

** ** ** ** ** ** ** **

BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Kevin Brumley appeals, pro se, from an order of the Nelson Circuit Court denying his claims in two causes of action brought by him relating to his election to the position of constable in Nelson County District 2. For the reasons stated below, we affirm.

Section 103 of the Kentucky Constitution requires constables, among other office holders, to give bond and

security as prescribed by law prior to entering upon the duties of their respective offices. See also KRS[1] 62.050(1). KRS 70.310(1) requires every constable to execute a bond in the minimum amount of $10,000 with sureties approved by the fiscal court. On March 13, 1984, the Nelson County Fiscal Court established $25,000 cash as the required bond to be posted by constables in Nelson County.

In November 1998 Brumley was elected District 2 Constable in Nelson County by write-in vote. His term of office was scheduled to begin on January 4, 1999. Prior to January 4, 1999, Brumley tendered a $10,000 bond executed by the United Pacific Insurance Company as surety to the Nelson County Fiscal Court. The fiscal court rejected the bond based upon its March 13, 1984, vote establishing the bonding requirement for a Nelson County constable to be $25,000 cash.

Brumley thereafter filed a pro se action in the Nelson Circuit Court, Action No. 99-CI-00571, in effect seeking a declaration that the fiscal court's bonding requirements for constables was contrary to law. Brumley argued that KRS 70.310(1) provided for a bond for constables of $10,000 and that the bond need not be posted in cash. The fiscal court was the only defendant named in the case.

[1] Kentucky Revised Statutes.

On April 24, 2001, the circuit court entered a judgment in the case holding that because KRS 70.310(1) required that constables post a minimum bond of $10,000, bonds greater than $10,000 were necessarily permissible. However, the circuit court further held that since the statute also provided that the bond could be executed "with good sureties," the statute necessarily precluded a requirement that the bond be posted in cash. No appeal was taken from this final judgment.

In the meantime, Brumley never tendered to the fiscal court the requisite $25,000 bond, either by cash or by surety. Therefore, he never lawfully assumed the office of Constable of District 2. See Kentucky Constitution § 103. As a consequence, presumably because Brumley had never lawfully assumed the seat, a ballot entry for the District 2 constable position was included on the November 1999 Nelson County general election ballot. Extraordinarily, not a single ballot was cast in the November 1999 District 2 constable race, and no one claims to have won the District 2 constable seat in that election. Also, in the meantime, the fiscal court voted to increase the bond requirement for constables from $25,000 to $1,000,000.

On October 18, 2001, Brumley filed a second pro se action in the Nelson Circuit Court, Action No. 2001-CI-00541, related to his 1998 election to constable and its aftermath. In this action the Nelson County Fiscal Court, Nelson County Judge-

Executive Dean Watts, Nelson County Clerk Phyllis Mattingly, and Harp Enterprise, Inc., a/k/a Harp Printing, were named as defendants.[2] Prior to the circuit court's ruling in the 2001 case, on April 23, 2002, Brumley filed a third pro se action in Nelson Circuit Court, Action No. 2002-CI-00250, raising issues associated with his 1998 election to the District 2 Constable office. In this action Brumley again named the fiscal court, Watts, and Mattingly as defendants, and he also named as a defendant "Unknown Defendant."

Since both the 2001 case and the 2002 case involved the circumstances surrounding Brumley's 1998 election to the office of constable and its aftermath, allegations that the defendants had acted unlawfully in addressing the circumstances arising out of his election to the office, and subsequent actions taken concerning the office of constable, the circuit court consolidated the two cases. On October 25, 2002, the circuit court entered its findings of fact, conclusions of law, and judgment holding in favor of the defendants as to all claims brought by Brumley in the 2001 and 2002 actions. This appeal followed.

[2] Harp Printing was the business that printed the ballot for the 1999 election in Nelson County.

Brumley's pro se brief is very confusing and difficult to follow.[3] However, under the section of his brief captioned "Argument," we have identified the allegations of error discussed below.

First, Brumley argues that he is entitled to further litigate the legality of the fiscal court's 1984 vote establishing a $25,000 bond for constables. In the 1999 action, the circuit court determined that the fiscal court properly established the bond at $25,000, but further determined that the fiscal court was without authority to require that the bond be a cash bond. In its October 25, 2002, order the circuit court dismissed all claims relating to this issue on the basis that its April 24, 2001, order in the 1999 case was res judicata with respect to all parties. While Brumley appears to concede that the issue is res judicata as to the fiscal court because it was a party to the 1999 case, Brumley argues that since Judge-Executive Watts and County Clerk Mattingly were not parties to the case, res judicata is not applicable with respect to them.

"The doctrine of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the

[3] Brumley's brief contains numerous violations of Kentucky Rules of Civil Procedure (CR) 76.12.

same or any other judicial tribunal of concurrent jurisdiction." Yeoman v. Com., Health Policy Bd., Ky., 983 S.W.2d 459, 464 (1998) (quoting 46 AmJur 2d § 514). "The rule of res judicata is an affirmative defense which operates to bar repetitious suits involving the same cause of action." Id. "The doctrine of res judicata is formed by two subparts: 1) claim preclusion and 2) issue preclusion." Id. Issue preclusion res judicata is applicable in this case.

For issue preclusion to operate as a bar to further litigation, certain elements must be found to be present. First, the issue in the second case must be the same as the issue in the first case. Id. at 465 (citing Restatement (Second) of Judgments § 27 (1982)). Second, the issue must have been actually litigated. Id. Third, even if an issue was actually litigated in a prior action, issue preclusion will not bar subsequent litigation unless the issue was actually decided in that action. Id. Fourth, for issue preclusion to operate as a bar, the decision on the issue in the prior action must have been necessary to the court's judgment. Id.

The issue concerning the legality of the fiscal court setting the bond for constables at $25,000 is the same in both the 1999 and the present litigation. Further, the issue was actually litigated and decided in the 1999 case. Finally, the

decision on the issue was necessary to the judgment in the 1999 case.

Pursuant to issue preclusion, the circuit court's decision in the 1999 case addressing the issue of the legality of the fiscal court's 1984 vote to set the bond for constables in Nelson County at $25,000 is res judicata. The court did not err in its determination that its decision in the 1999 case is res judicata with respect to all parties named in the 2001 and 2002 actions.

Brumley also makes various arguments concerning the proper interpretation of the circuit court's adjudication in the 1999 case. He persists, for various reasons, to argue that the holding did not require him to post a $25,000 bond in order to assume his constable seat. However, the circuit court's April 25, 2001, order stated, in pertinent part, as follows:

> In summary, the Court finds that the Fiscal Court's establishment of $25,000.00 as the amount for constable bonds is in conformity with KRS 70.310(1) and is not, on its face, arbitrary, capricious or in excess of statutory authority. However, the Court further finds that the requirement that such bonds be in cash violates the express statutory language of KRS 70.301(1).

While Brumley urges an alternative interpretation, plainly the circuit court's April 25, 2001, holding required Brumley to have posted a $25,000 bond, albeit with good sureties

approved by the fiscal court rather than cash, in order to have legally assumed his constable seat.

Brumley next argues that the circuit court erred by holding that the increase in the bonding requirement from $25,000 to $1,000,000 was reasonable. The trial court's October 25, 2002, decision does not include a finding, as claimed by Brumley, that this bonding requirement for constables is "reasonable." Instead, the circuit court addressed this issue as follows:

> As held in the 99-CI-00571 decision, Fiscal Court has the right to set bonds for Constables in such sum as it deems appropriate provided the amount is reasonable. There presently is no evidentiary basis for allowing this Court to determine that the $1,000,000.00 is unreasonable. Brumley has made some bare suggestions that the basis for Fiscal Court's establishment of that bond amount was flawed, but he has not presented any factual or legal reason, by way of affidavit, interrogatory answers, or otherwise, which would compel this Court to find such bond amount to be unreasonable <u>per se.</u>

Inasmuch as KRS 70.310(1) requires a minimum bonding requirement for constables of $10,000, a $1,000,000 bonding requirement appears excessive at first impression. However, Brumley's argument is based upon the false premise that the circuit court determined a $1,000,000 bond to be reasonable, which it did not. Rather, the circuit court determined that

Brumley, in his pro se effort to litigate this issue, had failed to build an evidentiary basis to support his argument in opposition to the bonding requirement.

Furthermore, the circuit court addressed this issue of whether the fiscal court's increasing the bond amount for constables to $1,000,000 was reasonable by holding that Brumley was not entitled to challenge the increase because the ten-day notice requirement of KRS 70.310(3)[4] "is designed to protect Constables who have legally assumed their positions and would, perforce be negatively impacted by such proposed action." We agree. Since Brumley had never entered upon the duties of his office by posting the required bond on or before the beginning of the term of office to which he had been elected (see KRS 62.050(2)), the bond increase did not affect him.

Next, Brumley alleges that the circuit court erred by consolidating cases 2001-CI-00541 and 2002-CI-00250. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or

[4] KRS 70.310(3) provides in part that "[w]hen additional security is required of the constable, he should be given ten (10) days notice."

delay." CR[5] 42.01. The decision whether to consolidate is discretionary with the trial court, and we will not disturb the trial court's decision in this regard absent an abuse of discretion. Adams Real Estate Corp. v. Ward, Ky., 458 S.W.2d 622, 624 (1970). The 2001 case and the 2002 cases were interrelated and had common questions of law or fact. As a result, the circuit court did not abuse its discretion in ordering the two cases to be consolidated.

Brumley next argues that the circuit court erred by issuing a ruling before the fiscal court filed an answer in Case No. 2002-CI-00250. Brumley filed the 2002 case on April 23, 2002. The fiscal court responded with a "motion to dismiss" for "fail[ure] to state a cause of action." CR 12.02 permits a defendant to bring a motion for failure to state a claim upon which relief can be granted prior to filing an answer. The fiscal court's motion to dismiss was followed by extensive briefing and argument by both sides on the issues raised in the 2002 case.

Brumley has failed to identify in what way he was prejudiced by the fiscal court's failure to file a pleading captioned "answer" in the 2002 case prior to the circuit court's decision in the case. Because Brumley suffered no apparent prejudice as a result of the fiscal court's failure to file an

[5] Kentucky Rules of Civil Procedure.

answer prior to the circuit court's decision in the case, we discern no reversible error.[6]

Finally, Brumley contends that the issues the circuit court ruled on "were only a fraction that the Appellant asked for in the Declaratory Judgment action[.]" We sympathize with the circuit court in this regard because Brumley's pro se filings in circuit court, much like his brief in this appeal, were disorganized and confusing.

While Brumley implies that there were a considerable number of issues upon which the circuit court did not rule, he calls our attention to only two: that the circuit court failed to rule on his allegation that he had been promised $1,000 per day for each day the judge-executive refused to swear him in if the circuit court ruled in his favor in the 1999 case on the issue of whether the bond was required to be in cash and that the county judge-executive improperly cancelled his bond. Normally, assignments of error not argued in an appellant's brief are waived. Commonwealth v. Bivins, Ky., 740 S.W.2d 954, 956 (1987). Accordingly, to the extent that there are other issues raised by Brumley in the circuit court proceedings that the court did not address, as Brumley has failed to argue those issues in his brief, we will treat those issues as waived. We

[6] At any rate, we fail to see why the fiscal court's failure to file an answer would have been required since its Rule 12 motion was granted. See CR 12.01.

will, however, address the two issues not considered by the circuit court which Brumley has identified in his brief.

Brumley contends that the circuit court failed to rule on his allegation that he had been promised $1,000 per day for each day the judge-executive refused to swear him in in the event the circuit court ruled in his favor in the 1999 case on the issue of whether the bond was required to be in cash. The circuit court's April 24, 2001, order ruled in Brumley's favor on this issue by holding the required bond to be posted by constables need not be in cash.

Brumley alleges that on January 6, 1999, Nelson County Judge-Executive Dean Watts "refused to swear in the Appellant" and "entered into a parol contract at this time to pay $1,000.00 per diem damages if the cash bonding regulation was ruled illegal." The appellees deny this allegation, characterizing the claim as "outrageous."

Accepting for the purposes of this appeal Brumley's allegation that Watts promised him a payment of $1,000 per day in the event the trial court ruled in Brumley's favor on the cash bond issue in the 1999 litigation, nevertheless, "[n]ot every agreement or understanding rises to the level of a legally enforceable contract." Kovacs v. Freeman, Ky., 957 S.W.2d 251, 254 (1997). Under Kentucky law, an enforceable contract must contain definite and certain terms setting forth promises of

performance to be rendered by each party. Id. (citing Fisher v. Long, 294 Ky. 751, 172 S.W.2d 545 (1943)). Mutuality of obligations is an essential element of a contract, and if one party is not bound, neither is bound. Id. (citing Morgan v. Morgan, 309 Ky. 581, 218 S.W.2d 410 (1949)).

The alleged contract for payment identified by Brumley lacks mutuality of obligation. In return for the promised payment, Brumley identifies no mutual promise or other consideration accruing to the benefit of Nelson County. It follows that the alleged contract fails for lack of consideration.

The second issue Brumley contends that the circuit court failed to rule on is whether the county judge-executive improperly cancelled his bond. Based upon the disposition of the 1999 case, in order to assume his constable seat, Brumley was required to post a $25,000 bond. It is uncontested that Brumley failed to post the requisite bond. As the $10,000 bond posted by Brumley was insufficient to entitle him to assume his constable seat, he was not prejudiced by the cancellation of his bond. Brumley was not entitled to assume his constable seat regardless of whether the bond was cancelled.

For the foregoing reasons, the judgment of the Nelson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin Brumley, pro se
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Dave Whalin
David P. Bowles
Landrum & Shouse
Louisville, Kentucky

John S. Kelly
John Pottinger
Nelson County Attorney's Office
Bardstown, Kentucky