

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001732-MR

DICKIE TODD

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE ROBERT J. HINES, JUDGE
ACTION NO. 07-CI-00729

CITY OF PADUCAH

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dickie Todd brings this appeal from a July 26, 2007, order of the McCracken Circuit Court denying Todd's motions for a restraining order and temporary injunction and dismissing the complaint. We vacate and remand.

On July 10, 2007, Todd filed a verified complaint against the City of Paducah a/k/a City of Paducah Public Improvement Corporation (City) challenging Ordinance Nos. 51-57, commonly referred to as the smoking ban. Therein, Todd

alleged that the smoking ban restricted use of his property and constituted a zoning ordinance in violation of the Paducah Zoning Code. In particular, Todd sought (1) a temporary restraining order enjoining enforcement of the smoking ban; (2) trial by jury; (3) monetary damages; (4) a permanent injunction; and (5) any other relief to which he may be entitled. Todd also filed a memorandum in support of the temporary restraining order with accompanying affidavit. Thereafter, on July 16, 2007, Todd filed a motion for temporary injunction and memorandum in support thereof with accompanying affidavit.

By order entered July 23, 2007, the circuit court denied the motion for temporary restraining order. Following a hearing upon the motion for temporary injunction, the circuit court denied the motion for temporary injunction, again denied the motion for restraining order, and dismissed the complaint on July 26, 2007. In particular, the court held:

In light of the above, the Court hereby rules that the motion for a temporary injunction as well as the motion for a restraining order is DENIED. [Todd's] complaint was limited to a request for injunctive relief. Given the Court's ruling herein, [Todd's] Complaint is hereby dismissed with prejudice.

This appeal follows.

Todd contends that the circuit court committed error by denying the motion for temporary injunction and by dismissing the complaint. For the reasons hereinafter stated, we conclude the circuit court failed to make the necessary

findings in denying injunctive relief and further erroneously dismissed the complaint when ruling upon the motion for temporary injunction.

We begin our analysis by determining the appropriate standard of review. Under Kentucky Rules of Civil Procedure (CR) 65.04(5), the circuit court is required to make specific findings of fact and conclusions of law which constitute the grounds for granting or denying injunctive relief, pursuant to CR 52.01. Accordingly, the “clearly erroneous” standard must be applied by this court in reviewing the circuit court’s findings and conclusions. CR 52.01. In *Rogers v. Lexington-Fayette Urban County Government*, 175 S.W.3d 569, 571 (Ky. 2005), the Kentucky Supreme Court discussed this standard as applied to injunction proceedings as follows:

This standard is set out in CR 52.01 which provides that findings of fact shall not be set aside unless they are clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses. On appellate review, the appellate court may determine that findings are clearly erroneous if they are without adequate evidentiary support or occasioned by an erroneous application of the law. *Cf. Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193 (Ky. 2002).

Having determined the appropriate standard for review, we first turn to the denial of appellant’s motion for temporary injunction. The requirements for considering a motion for injunctive relief were recently discussed by the Supreme Court in *Rogers*, where the Court stated:

[T]he requirements for the issuance of an injunction must be carefully considered. They are explained in the

seminal cases of *Oscar Ewing, Inc. v. Melton, d/b/a Melton's Grocery*, 309 S.W.2d 760 (Ky.1958) and *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky.App. 1978). They are as follows: (1) Has the plaintiff shown an irreparable injury; (2) Are the equities in the plaintiff's favor, considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo; and (3) Does the complaint present a substantial question?

Rogers, 175 S.W.3d at 570-571.

In the case *sub judice*, the circuit court's findings and conclusions failed to address any of the necessary requirements for denying injunctive relief. Based upon the meager record on appeal in this case, we cannot determine if the circuit court considered any of the requirements set forth in *Rogers*.¹ This is clearly erroneous in our opinion and warrants remanding to the circuit court for further consideration.

As concerns the dismissal of the action on the merits, in this Commonwealth, it is well-established that the merits of an action are not before the court when ruling upon a motion for temporary injunction. *Oscar Ewing Inc. v. Melton*, 309 S.W.2d 760 (Ky. 1958)(holding that it is not the function of a motion for temporary injunction to dispose of the case on the merits); *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky.App. 1978)(holding that merits of case are not to

¹ The record on appeal consists of the pleadings, the affidavit of Dickie Todd, the planning commission minutes from January 9, 2006, through September 18, 2006, and videotapes of the hearings on the motions for temporary restraining order and temporary injunction. Conspicuously missing from the record is a copy of the "smoking ban ordinance" which is the subject matter of this litigation. Both parties did place a copy of the ordinance in the Index of their respective briefs, which is prohibited under Kentucky Rules of Civil Procedure 76.12(4)(vii), since the ordinance was not part of the record. Even if we were to address the merits of this case, which we decline to do for the reasons stated in the Opinion, the case could not be properly reviewed without the ordinance being made a part of the record.

be addressed in a motion for temporary injunction.) As such, in the case *sub judice*, the circuit court clearly erred by considering the merits and dismissing the complaint in its order denying the temporary injunction. When a motion for temporary injunction is pending before a circuit court, the court is narrowly confined to ruling upon such motion and may not address the underlying merits of the action. *Id.*

In addressing the merits of the case, the court concluded the complaint was limited to a request for injunctive relief only. Where a court's conclusion is not based upon fact finding, our review is *de novo* for which we owe no deference to the trial court's conclusion. *Blevins v. Moran*, 12 S.W.3d 698 (Ky.App. 2000). Upon review of the Verified Complaint filed in this case, the circuit court's conclusion is clearly in error as a matter of law. The complaint plainly alleges that the Paducah Zoning Code controls the type of conduct prohibited by the smoking ban and thus the ordinance was improperly enacted without first being approved by the local planning commission. Notwithstanding whether an injunction is granted or not, the underlying claim must still be addressed by the circuit court.

In this case, the circuit court apparently reached the merits and ordered dismissal based upon the holding in *Lexington Fayette County Food and Beverage Association v. Lexington-Fayette Urban County Government*, 131 S.W.3d 745 (Ky. 2004), where a smoking ban in Lexington was upheld. However, in the Lexington case, the primary argument presented was whether the local ordinance banning smoking was preempted by the Kentucky Food, Drug and

Cosmetic Act. The case did not address whether the local zoning ordinances enacted pursuant to KRS 100.203 would affect or supersede the passage of a smoking ban, as alleged by Todd. While the result may be the same, the circuit court is nonetheless required to address the issue on the merits and dispose of the same, either by summary disposition or trial.

Accordingly, we vacate and remand this action to the circuit court. Upon remand, the circuit court shall reconsider Todd's motion for temporary injunction following the requirements set forth in *Rogers*, 175 S.W.3d 569 and shall further consider the underlying action on the merits.

We view Todd's remaining contentions of error as moot.

For the foregoing reasons, the July 26, 2007, order of the McCracken Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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ORAL ARGUMENT FOR
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