

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001838-MR

DELLA HOWARD

APPELLANT

v. APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 07-CI-00046

MASONIC HOMES OF
KENTUCKY, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

CLAYTON, JUDGE: Della Howard (Della), widow of Ernest T. Howard (Ernest), appeals the June 28, 2007, and August 10, 2007, Shelby Circuit Court's orders dismissing a wrongful death action against Masonic Homes of Kentucky, Inc., (Masonic Homes). The court dismissed the complaint because it did not meet the applicable statute of limitations as it had not been filed by Ernest's personal

representative within one year of his death. After careful consideration, we affirm the trial court's order for the following reasons.

Ernest died on January 23, 2006, while a resident of Masonic Homes. Della was appointed executor of his estate on March 13, 2006. Even though Della had qualified as Ernest's personal representative, she and her daughter, Anna M. Dotson (Anna), in their individual capacities, filed a pro se wrongful death action on January 19, 2007. They claimed that Ernest suffered personal injuries and death as a result of the acts of negligence committed by Masonic Homes.

On May 14, 2007, after the running of the one-year statute of limitations, Masonic Homes filed a motion to dismiss, noting that rather than file as Ernest's personal representative, Della and Anna had filed in their individual capacities. Following the full briefing of the issue by both parties, on June 28, 2007, the court ordered the case be dismissed as time barred. Then, on July 3, 2007, Della's counsel made a motion to amend the complaint so that it reflected Della's status as personal representative. The court, on August 10, 2007, denied this motion also because the action had already been found time barred.

First, we will address Kentucky law as it relates to the statute of limitations for wrongful death actions. According to Kentucky Revised Statutes (KRS) 411.130(1), a wrongful death action "shall be prosecuted by the personal representative of the deceased[,]" but KRS 411.130 does not specifically establish a statute of limitations period for wrongful death. Instead, Kentucky case law has determined that KRS 413.180(1) mandates that such a wrongful death action be

“commenced within one (1) year after the qualification of the representative.” *See Conner v. George W. Whitesides Co.*, 834 S.W.2d 652 (Ky. 1992). In *Conner* the Kentucky Supreme Court held that KRS 413.180 applied to wrongful death suits to save an action filed thirteen months after death when the appointment of a representative was accomplished on the same date suit was filed.

This action was commenced by Della and Anna in their individual capacities, and therefore, they did not have standing to file this lawsuit under KRS 411.130. Anna was never qualified as Ernest’s personal representative, and the statute of limitations expired before Della filed the action in her capacity as Ernest’s personal representative.

Applying the law to the present case, we observe that Della filed the wrongful death action within the one-year statute of limitations period. But Della made no attempt to amend the complaint, even after qualifying as Ernest’s personal representative, to reflect that she was suing in her capacity as personal representative. Given the parameters of the law, we do not believe that statutory or case law authorizes the dates to be manipulated here to the extent Della suggests to maintain the action. As the trial court noted in its June 28, 2007, order, no one yet had made any motion to amend the complaint so that the action could be initiated in Della’s capacity as personal representative. Furthermore, while initially the parties were acting pro se, on May 23, 2007, an attorney had filed an entry of appearance for Della. Still, even though Della was then represented by counsel, it

was also well over one year from both Ernest's date of death (January 23, 2006), and also Della's appointment as personal representative (March 13, 2006).

Next, we consider Della's suggestion that because of the liberality of Kentucky Rules of Civil Procedure (CR) 15.01, she should be allowed to amend her complaint. She bolsters this reasoning by citing *Caldwell v. Bethlehem Mines Corp.*, 455 S.W.2d 67 (Ky. 1970). CR 15.01 provides as follows:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

And, the Kentucky Supreme Court has held that amendment to complaint would be allowed absent suggestion that filing of the amended complaint could prejudice defendants or work an injustice. *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489 (Ky. 1983).

Two factors negate Della's line of reasoning. First, the trial court in its June 28, 2007, opinion and order, which granted the motion to dismiss, discussed a similar case, *Richardson v. Dodson*, Ky., 832 S.W.2d 888 (Ky. 1992). In that case, the plaintiff sued the proper defendants within the period of limitations but brought the action in his own name instead of as administrator of

the decedent's estate. That court permitted him to amend his complaint to correct the error after the expiration of the period of limitations. But the judge here distinguished *Richardson* from the case at hand, by highlighting the fact that the plaintiffs never moved the court to amend the complaint. It is axiomatic that courts cannot act *sua sponte* to amend complaints.

The second factor negating Della's reasoning to allow an amendment of the pleadings is the standard of review that we must properly follow. We are mindful of the proposition that the trial court's discretion in refusing amendments will not be disturbed unless it is clearly erroneous. *See Lawrence v. Marks*, 355 S.W.2d 162 (Ky. 1961). Although Della's counsel made a motion to amend the complaint on July 5, 2007, it was after the court issued its June 28, 2007, order dismissing the complaint. The court, following this motion, heard from both parties. Then it entered its August 10, 2007, order, which overruled Della's motion and sustained Masonic Homes' motion to dismiss again. Apparently the court was persuaded by Della's failure to amend the complaint prior to the June 28, 2007, decision. Notwithstanding the court's lack of explanation for the August order, no evidence has been provided demonstrating that the court abused its discretion in any way. The decision of the Shelby Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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