

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001620-MR

EURO TECH, INC.; AND
NEVILLE P.E. BARRETT

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 12-CI-000666

COMMONWEALTH OF KENTUCKY,
KENTUCKY REAL ESTATE COMMISSION;
JULIA A. SMITH; AND PATRICIA A. PARKS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: JONES, LAMBERT, AND STUMBO, JUDGES.

JONES, JUDGE: This matter is on appeal from the Jefferson Circuit Court's order affirming the Kentucky Real Estate Commission's dismissal of a complaint filed by Euro Tech, Inc. and Neville P.E. Barrett, against Julia A. Smith and Patricia A Parks. For the reasons more fully explained below, we reverse.

I. INTRODUCTION

Euro Tech, Inc. owns two residential condominium units in the Villa Condominiums, a condominium complex located in Louisville, Kentucky. Barrett is the president of Euro Tech. Barrett's disabled son lives in one of the units. Sometime in 2007, Euro Tech and Barrett's records regarding payment of the condominium association fees began to diverge from those maintained by Kentucky Realty, the entity managing Villa Condominiums at the time.

In 2008, Parks and Smith took over as property managers for Villa Condominiums. The disputes over the proper amount of fees continued despite the change in management. Eventually, a foreclosure action was instituted on behalf of Villa Condominiums against Euro Tech in Jefferson Circuit Court as related to the allegedly unpaid association dues. The foreclosure action was eventually settled. As part of the settlement, Euro Tech agreed to pay a set amount to the association in exchange for dismissal of the foreclosure. The foreclosure action was formally dismissed by order entered on October 13, 2010.

On October 3, 2011, Euro Tech and Barrett filed an administrative complaint against Parks and Smith with the Kentucky Real Estate Commission ("Commission"). In their complaint, Euro Tech and Barrett alleged that Parks and

Smith violated KRS¹ 324.160(4)-(5).² Specifically, they alleged that Smith and Parks' gross negligence, improper and dishonest dealings, and financial management resulted in a threat of and the filing of unjustified foreclosure proceedings and that their actions were motivated by an illegal, discriminatory intent to evict Barrett's disabled son from one of the units.

The Commission directed Smith and Parks to file an answer to the complaint. Smith and Parks filed their joint sworn answer with the Commission on November 21, 2011. On January 5, 2012, the Commission entered an order dismissing Euro Tech and Barrett's complaint. The order states:

At its December 15, 2011 meeting, the Kentucky Real Estate Commission ("Commission") reviewed and considered the Sworn Statement of Complaint, along with the jointly-filed Sworn Answer to the Complaint, and the jointly-filed Motion for Extension of Time to

¹ Kentucky Revised Statutes

²

The relevant portions of this section provide:

(4) The commission shall impose sanctions set out in subsection (1) of this section against a licensee for:

. . . .

(p) Publishing or circulating an unjustified or unwarranted threat of legal proceedings or other action;

. . . .

(u) Any other conduct that constitutes improper, fraudulent, or dishonest dealing; or

(v) Gross negligence.

(5) Any conduct constituting a violation of the Federal Fair Housing Act, including use of scare tactics or blockbusting, shall be considered improper conduct as referred to in subsection (4)(u) of this section.

Respond filed by Respondent Julia A. Smith and her principal broker, Respondent Patricia A. Parks, seeking an extended filing dealing for their Sworn Answer in this proceeding.

Having considered all of this information and being otherwise sufficiently advised, the Commission FINDS good cause exists to grant the aforementioned motion. Accordingly, the Commission hereby ORDERS that the request for an extension be, and it hereby is, GRANTED. The Commission FURTHER FINDS that a prima facie case of a license law violation does not exist. Accordingly, the Commission FURTHER ORDERS that this case be, and hereby is, DISMISSED.

Appellants filed a timely appeal of the Commission's order with the Jefferson Circuit Court. By order rendered August 14, 2013, the circuit court affirmed the Commission's dismissal order. This appeal followed.

II. STANDARD OF REVIEW

Where administrative decisions are being considered, our standard of review is the same as the trial court's standard. We are limited to the question of arbitrariness. An administrative decision may be considered arbitrary if: (1) it was not within the scope of the agency's granted powers; (2) the agency failed to provide procedural due process; or (3) the agency's decision was not supported by substantial evidence. *Commonwealth Revenue Cab. v. Liberty Nat'l Bank of Lexington*, 858 S.W.2d 199, 201 (Ky. App. 1993). "If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found." *Kentucky Unemployment Ins. Comm'n v. Landmark Comm'ty Newspapers of Kentucky, Inc.*, 91 S.W.3d 575,

578 (Ky. 2002) (citing *Southern Bell Tel. & Tel. Co. v. Kentucky Unemployment Ins. Comm'n*, 437 S.W.2d 775, 778 (Ky. 1969)).

III. ANALYSIS

A. *Procedural Due Process*

Appellants contend that the Commission acted arbitrarily by failing to provide them with an opportunity to amend their complaint prior to dismissal and by dismissing their complaint before a hearing on the merits in violation of its statutory duties. We disagree.

We begin our review with the relevant statute, KRS 324.151 (1)-(3); this statute governs the complaint and answer process before the Commission. It provides:

(1) All complaints against licensees shall be submitted to the commission on forms furnished by the commission. The complaint shall state facts which, if true, would constitute a prima facie case that the licensee has violated the provisions of KRS 324.160. If the complaint does not constitute a prima facie case, the commission shall allow the complainant ten (10) days to revise and supplement the complaint in order to cure any defect. If the complainant fails to respond within ten (10) days or if the revised and supplemented complaint does not constitute a prima facie case that the licensee has violated the provisions of KRS 324.160, the commission shall dismiss the matter without requiring the licensee to file or serve a response.

(2) If the complaint constitutes a prima facie case that a licensee has violated the provisions of KRS 324.160, a copy of the complaint, exhibits attached thereto, and any subsequent pleadings, shall be served on the licensee, by the commission, at the licensee's last known address and

shall show certification that there has been service by writing to the last known address.

(3) If the commission serves the complaint upon the licensee, the licensee shall file with the commission an answer to the complaint, properly notarized, on forms secured from commission offices. The answer shall be returned to the commission within twenty (20) days. The licensee shall deliver to the complainant at his or her last known address a copy of the answer, exhibits attached thereto, and any subsequent pleadings. All further pleadings in the matter filed with the commission by either party shall show that a copy has been furnished to the opposing party or parties.

Our inquiry does not end with the statute, however, because the General Assembly directed the Commission "to promulgate administrative regulations." KRS 324.281(1). Pursuant to its statutory authority, the Commission adopted 201 KAR³ 11:190, which sets forth the rules of practice and procedure before it. These regulations are binding. "Administrative regulations of any kind which have been duly adopted and properly filed have the full effect of law." *Flying J Travel Plaza v. Com., Transp. Cabinet, Dept. of Highways*, 928 S.W.2d 344, 347 (Ky. 1996).

In relevant part, the regulations provide:

(2) If the commission staff review determines the Sworn Statement of Complaint does not allege a prima facie case of a specific violation of KRS 324.160, the aggrieved party shall file a Sworn Supplement to Complaint in accordance with KRS 324.151.

(3) A respondent shall file a Sworn Answer to Complaint if a complaint is filed against him in accordance with the requirements of KRS 324.151(3). The answer shall: (a)

³ Kentucky Administrative Regulations

Identify the respondent; (b) State his responses to the complaint; (c) Be notarized by a notary public; and (d) Include a copy of the following documents: 1. Listing contract; 2. Purchase contract; 3. Seller's disclosure form; 4. Agency disclosure form; and 5. Settlement statement.

(4) Upon completion of an investigation following the submission of a complaint and answer, the commission shall: (a) 1. Dismiss the case without an administrative hearing if the facts or evidence do not indicate a prima facie case for a violation of KRS Chapter 324; or 2. Schedule an administrative hearing pursuant to KRS Chapter 13B, 324.151, and 324.170; and (b) Notify the complainant and respondent of its decision in writing. The notification shall include a brief statement explaining the commission's reasons for the decision.

Both KRS 324.151 and 201 KAR 11:190 make clear that upon receiving a complaint, the Commission's first duty is to review the complaint and determine whether it alleges a prima facie "case that the licensee has violated the provisions of KRS 324.160." If so, the Commission must cause a copy of the complaint to be served on the respondents, who then have 20 days to file an answer. If the Commission determines that the complaint does not allege a prima facie cause of action, it must notify the complainant and allow him/her 10 days to "revise and supplement the complaint in order to cure any defect."

Upon receipt of the answer, the Commission is required to complete an "investigation." 201 KAR 11:190 (4). The Commission may conduct a number of activities while investigating allegations of alleged unlawful practices:

- (a) Issue subpoenas to compel attendance of witnesses and the production of books, papers, documents, or other evidence;
- (b) Administer oaths;

- (c) Review evidence;
- (d) Enter the office or branch office of any principal broker for the purpose of inspecting all documents required by the commission to be maintained in the principal broker's office or branch office which relate to the allegations of practices violating the provisions of this chapter;
- (e) Examine witnesses; and
- (f) Pay appropriate witness fees.

KRS 324.150 (1).

After completion of its investigation, the Commission can either "dismiss the case without an administrative hearing if the facts or evidence do not indicate a prima facie case for a violation of KRS Chapter 324; or 2. Schedule an administrative hearing."

With this framework in mind, we turn to the instant appeal. In this case, the Commission received the complaint on October 4, 2011. The administrative record indicates that on October 18, 2011, the Commission sent letters to Parks and Smith via certified mail enclosing the complaint and directing them to file answers within 20 days. Parks and Smith filed a joint sworn answer. Attached to their answer, they included electronic mail correspondence dated August 1, 2008, showing that Euro Tech's unit was one of five units in Villa Condominiums that Smith directed the group's attorney to place a lien on for unpaid dues.

On January 5, 2012, the Commission issued its final dismissal order. The order states that the Commission had considered "all the information" and determined that a "prima facie case of license law violation does not exist."

Contrary to Appellant's assertion otherwise, we do not believe that the Commission erred when it dismissed their claim on January 5, 2012, without providing them with an opportunity to supplement their complaint. The administrative regulations make clear that the right to supplement only arises in cases where the Commission determines that the complaint is so deficient that it is subject to dismissal *prior to service* on the respondents.

Appellants' complaint met this first minimal hurdle and the Commission served it on Smith and Parks with instructions for them to answer the complaint. After the answer was received, the Commission was required to undertake an "investigation," but not conduct a hearing. The regulations plainly give the Commission two options after conducting its investigation; it can either dismiss the complaint or it can schedule a hearing. Procedural due process does not mandate a hearing for every administrative complaint received by the Commission because the applicable regulations do not extinguish the plaintiff's right to seek further judicial review in the courts. Furthermore, the Rules of Civil Procedure do not apply in the administrative context, unless otherwise specified.

The statute sets forth a number of actions that the Commission may take while investigating a complaint of unlawful action including reviewing the evidence, issuing subpoenas, examining witnesses, and reviewing documents. The General Assembly used the permissive term "may" and not the mandatory term "shall" in describing these activities. As a result, we conclude that which of these activities the Commission decides to undertake, in a particular case, is

discretionary. In some cases, the Commission may need to take every step to determine whether there is probable cause to believe that a violation has occurred and, therefore, that a hearing is required. In other cases, the Commission may be able to make its determination from reviewing the pleadings and other attached documentation.

The Commission's dismissal order states that the Commission reviewed the sworn pleadings before it and having done so determined that the complaint failed to state a prima facie claim. While the Commission certainly could have taken more investigatory steps, the statute does not require it to do so. The Commission, having reviewed the evidence and determined that it did not support a prima facie case, acted within its statutory authority in dismissing Appellant's complaint prior to a full evidentiary hearing. *See, e.g., Haslett v. Fischer*, No. 2006-CA-001255-MR, 2007 WL 3227122, at *3 (Ky. App. Nov. 2, 2007) ("[T]he Commission may, after conducting an investigation, schedule a hearing. However, it is not required to do so.").

B. Substantial Evidence

The Appellants next contend that even if the Commission did not procedurally err, its dismissal is nonetheless erroneous as it is not supported by substantial evidence. We disagree.

As an initial matter, we reject Appellants' argument that in determining dismissal for purposes of 201 KAR 11:190 (4) the Commission is limited to determining only whether the complainant alleged facts that, if true,

would support a viable cause of action as would be the case in analyzing a complaint under CR⁴ 12.02(f). In using the term "investigation" the Commission plainly meant for its members to consider and initially weigh, to some extent, evidence beyond the complaint in determining whether sufficient evidence exists to justify a hearing. Otherwise, every time the Commission ordered a complaint served, it would also order a hearing to be set.

The basis of Appellant's complaint is set forth on page five of Barrett's sworn statement, attached to their complaint: "[Euro Tech] maintains that the entire purpose behind all of these proceedings was an attempt by the Association and their management company (Prudential) to force a 'problem' disabled tenant to leave by foreclosing on the landlord-[Euro Tech]. There can be no explanation for their totally ludicrous and indefensible actions." The email attached to Smith and Park's answer shows that Euro Tech's unit was one of several that they placed liens on during the relevant time period. The trial court found that this evidence refutes Euro Tech's speculative allegations that it was singled out and targeted due to its tenant's disabled status and, therefore, comprises substantial evidence upon which the Commission was entitled to rely and which supported its dismissal order.

While this may be the case, we are simply unable to determine from the face of the order why the Commission dismissed the complaint. Pursuant to 201 KAR 11:190(4), the Commission was required to notify Appellants of any dismissal and that notification must explain "the Commission's reasons for the

⁴ Kentucky Rules of Civil Procedure

decision." While the Commission's order sets out a legal conclusion that no prima facie claim was stated, it is devoid of any reasoning to support this conclusion.

While we do not believe that the Commission is required to set out detailed factual findings, we do believe that due process requires some minimal rational explanation to support the ultimate conclusion. Otherwise, the trial court, and in turn this Court, are transformed into reviewing an entire record and guessing what evidence *might* support the administrative body's conclusions. "A court's function in administrative matters is one of review, not reinterpretation." *Pizza Pub of Burnside v. Com., Dept. of ABC*, 416 S.W.3d 780, 787 (Ky. App. 2013) (quoting *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky.App.2002)).

Upon review, we conclude that the Commission's order lacks the requisite explanation for its decision to permit any meaningful judicial review. Accordingly we must vacate this matter and remand it. We point out that on remand, the Commission is not required to conduct an additional investigation or alter its ultimate conclusion. However, it must, at a minimum, explain in some fashion its reasoning. We also observe that although it is not statutorily mandated to do so, it would be helpful for the Commission to affirmatively set out in its dismissal orders the steps it undertook with respect to its investigatory obligations.

IV. CONCLUSION

In conclusion, for the reasons set forth above, we reverse the Jefferson Circuit Court and remand for action consistent with this Opinion.

ALL CONCUR.

ORAL ARGUMENT AND
BRIEF FOR APPELLANT:

John R. Tarter
Louisville, Kentucky

BRIEF FOR APPELLANT:

Kyle P. Williams
Louisville, Kentucky

ORAL ARGUMENTS AND
BRIEFS FOR APPELLEES:

Virginia L. Lawson
Lexington, Kentucky

Ronnie Harris
Louisville, Kentucky

BRIEFS FOR APPELLEES:

Y. Denise Payne Wade
Louisville, Kentucky

Vincent J. Eiden
Lexington, Kentucky