RENDERED: JULY 8, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001029-MR

JAMES AND CINDY HARRIS — APPELLANTS

v.

APPEAL FROM SHELBY CIRCUIT COURT
HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 13-CI-00526

RYAN LIBKE; MICHAEL FIRKINS; TRIPLE S. PLANNING COMMISSION; GEORGE BEST AS CHAIRMAN; DUDLEY BOTTOM AS COMMISSIONER; JOHN WILLIS AS COMMISSIONER; JAKE SMITH AS COMMISSIONER; LARRY STEWART AS COMMISSIONER; SCOTT MERCHANT AS COMMISSIONER AND QUITIN BIAGI, JR AND TRIPLE S BOARD OF ADJUSTMENTS & APPEALS; SCOTT LECOMPTE AS CHAIRMAN; WAYNE ANDERSON AS BOARD MEMBER; ROB WILSON AS BOARD MEMBER; VIVIAN HAYES AS BOARD MEMBER; AND WAYNE LONG AS BOARD MEMBER — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND TAYLOR, JUDGES.

ACREE, JUDGE: The chief issue presented in this appeal is whether either, or both, of the Appellees, Ryan Libke and Michael Firkins, is entitled to qualified official immunity. The circuit court concluded Libke and Firkins are each cloaked with, and protected by, official immunity. We agree and affirm.

I. Facts and Procedure[1]

Appellants James and Cindy Harris[2] own a farm zoned agricultural in Shelby County, Kentucky. On November 28, 2011, Harris contacted Triple S Planning and Zoning Commission[3] to discuss his intention to operate a saw mill and kiln on his land. He spoke with Libke, the Commission's executive director. Discussions were had, after which Libke informed Harris that his property was zoned agricultural and forestry, and that the operation of a saw mill and kiln business was permitted under the applicable zoning regulations.

Harris subsequently submitted a building-permit application and a business-sign permit application for the erection of a storage building and a

[1] As will be discussed in further detail below, the circuit court dismissed Appellants' complaint for failure to state a claim upon which relief may be granted, finding Libke and Firkins were cloaked with qualified official immunity. Upon review, we must take as true the allegations contained in Appellants' complaint. *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). We therefore narrate the facts of this case from that complaint as if they were undisputed facts.

[2] James Harris is the primary actor involved in this case. For ease of comprehension, we will simply refer to James and Cindy Harris collectively as "Harris" throughout this Opinion.

[3] Triple S Planning and Zoning Commission was created when the cities of Shelbyville and Simpsonville and Shelby County each enacted ordinances to enter into an agreement for a joint planning commission in accordance with Kentucky Revised Statute (KRS) 100.121, *et seq.*

business sign on his property. Firkins is the Commission's zoning-enforcement officer. Firkins also advised Harris that the operation of a saw mill and kiln business was permitted on his property in accordance with the current zoning regulations. Firkins approved Harris's applications and issued the requested permits in December 2011.

Harris constructed and began operating the saw mill. The mill produced kiln-dried, furniture-grade lumber. By all accounts, it was a successful and profitable commercial sawmill operation.

In early 2013, neighbors complained to the Commission about Harris's saw mill being operated in an agricultural zone. Firkins sent Harris a cease-and-desist letter on April 15, 2013, advising him that a commercial saw mill business was not a permitted use in an agricultural zone and he had thirty days to bring his property into compliance. Harris appealed the decision to the Triple S Board of Adjustments and Appeals. It upheld Firkins's decision.

On October 25, 2013, Harris filed a lawsuit in Shelby Circuit Court against Libke and Firkins, in their individual capacities, for negligence in the performance of a ministerial act.[4] The complaint alleged, *albeit* somewhat vaguely, that Libke and Firkins were negligent in: (i) informing Harris of the applicable zoning regulations and the permitted uses of his property; (ii) enforcing

[4] The complaint included other allegations, including claims against Libke and Firkins in their official capacities; an estoppel claim; and an administrative appeal of the Board's decision. However, only the negligence claims against Libke and Firkins are before us today.

the applicable zoning regulations; and (iii) issuing the sign and building permits. Libke and Firkins jointly answered, asserting therein all CR[5]12 defenses.

Libke and Firkins then filed a motion to dismiss claiming immunity from liability on the basis of qualified official immunity. They argued their actions were discretionary in nature. Harris opposed the motion. The circuit court entered an order granting the dismissal motion on April 11, 2014. Upon examining the relevant Shelby County Zoning Regulations, the circuit court found that an administrative official, such as Libke and Firkins, must exercise judgment and deliberation, taking into consideration all known facts and the official's interpretation of the zoning regulations, to determine whether to issue a permit to a given applicant. The circuit court concluded that the act of making this determination is a discretionary one insulating Libke and Firkins from liability. The circuit court also noted that Harris had presented no evidence that Libke and Firkins were not acting in good faith or acting outside their authority.

Harris filed a CR 59.05 motion to alter, amend, or vacate the circuit court's decision. The circuit court denied Harris's post-judgment motion. It reiterated that it had made no factual determinations; its analysis focused solely on the nature of the acts performed by Libke and Firkins. Harris appealed.

II. Standard of Review

Whether an individual is entitled to official immunity is a question of law reviewed *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

[5] Kentucky Rules of Civil Procedure.

III. Analysis

Before reaching the merits, we first address a matter of procedure. Harris contends the circuit court lacked a proper procedural basis upon which to dismiss the complaint. We disagree.

Entry of the order of dismissal was procedurally sound.

Harris claims the procedure at the circuit court was "patently unfair" because he "did not know what type of motion he was opposing." (Appellants' Brief at 9). In fact, Libke and Firkins originally cited CR 41.02[6] as the basis of their motion, but later admitted they "mistakenly cited CR 41.02 instead of CR 12.02[.]"[7] We conclude, however, that the mistake did not prejudice Harris. Libke's and Firkins' motion made it clear they were seeking dismissal of the complaint and plainly stated why. Harris was compelled to meet that argument with his own argument and he did so. "Technical accuracy in designating a 12.02 motion is not critical because the substance rather than the form of a defense or objection will control." Kurt A. Phillips, Jr., David V. Kramer, and David W. Burleigh, 6 *Kentucky Practice Series: Rules of Civil Procedure* Rule 12.02, cmt.9 (5th ed. 1995) (updated 2014).

Harris further contends that if, in fact, their motion was brought pursuant to CR 12.02, it was procedurally deficient because it did not comply with

[6] CR 41.02 addresses involuntary dismissals for either failure to prosecute, CR 41.02(1), or failure by the plaintiff to establish his right to relief during a bench trial, CR 41.02(2).

[7] This admission is plainly expressed on the first page of the Appellees' reply to Harris's response to the motion to dismiss before the circuit court.

that rule which requires that a "motion [to dismiss for] failure to state a claim upon which relief can be granted . . . shall be made before pleading if a further pleading is permitted." CR 12.02. Based on that rule, Harris argues Libke's and Firkins' right to the defense has been waived. He is wrong.

CR 12.08 governs the waiver of defenses referenced in CR 12. That rule requires that certain defenses be included in the responsive pleading. However, the rule also states: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits." CR 12.08(2). Kentucky courts interpret this to mean that a motion challenging whether "the plaintiff has failed to state a claim upon which relief can be granted . . . may be made at any time before judgment." *Adkins v. International Harvester Co.*, 286 S.W.2d 528, 530 (Ky. 1956).

Reading Harris's brief generously, we perceive an argument that even if CR 12.08 permits a post-pleading motion to dismiss, the defense must still be preserved by raising it in the responsive pleading – *i.e.*, the answer. If that is the argument, it also fails. To begin, the answer "incorporates by reference . . . all those appropriate defenses set forth in Rules 8 and 12 . . . ." (R. 39-40). Even if this were not so, our highest court has held that where the motion to dismiss is based on the "failure of the plaintiffs to establish a valid claim to relief . . . , it is not significant that the defendant did not plead any affirmative defenses." *Sidebottom v. Mitchell*, 421 S.W.2d 830, 832 (Ky. 1967).

We find no procedural deficiency of such a nature as to justify reversal. The opinion and order dismissing the case was procedurally sound.

The substantive arguments also lack merit.

Having dealt with Harris's procedural objections, we now direct our attention to his arguments for reversing based on substantive grounds. They are two in number. He argues the circuit court: (i) engaged in an improper factual inquiry; and (ii) was incorrect in finding the issuance of a permit was a discretionary act entitling Libke and Firkins to qualified official immunity. For reasons that should reveal themselves in our analysis, we shall address these issues in the reverse order in which they were presented in Harris's brief.

The act of issuing a permit was discretionary.

As expressed in Harris's complaint, Libke and Firkins were employed by the planning and zoning agency for Shelby County. Therefore, both were entitled to assert the defense of qualified official immunity, having been sued in their individual capacities. *See Yanero v. Davis,* 65 S.W.3d 510 (Ky. 2010). To be entitled to the shield of qualified official immunity, a public official must be performing a discretionary act as opposed to a ministerial act. A discretionary act is one "involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment." *Id.* Qualified official immunity is applicable to a discretionary act performed by a public official when made in good faith and within the scope of the official's authority. *Id.*

We will address the scope of employment and good faith elements later. For now, we focus on whether the act of issuing a permit is ministerial or discretionary.

The circuit court ruled that the zoning ordinances required the making of a "'determination,' or decision regarding whether a permit may be issued . . . . Libke and Firkins [were] involved in the interpretation of Zoning Regulations . . . to determine whether a permit should be issued . . . [T]his determination is a discretionary act." (R. 173). We agree.

In 1988, the Kentucky legislature codified the common law regarding the immunity from liability of local governments. *Ashby v. City of Louisville*, 841 S.W.2d 184, 186-87 (Ky. App. 1992), *modified on other grounds by Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014). Included among that codification is the following statutory language:

> [A] local government shall not be liable for injuries or losses resulting from:
> . . . .
> Any claim arising from the *exercise of* judicial, *quasi-judicial*, legislative or quasi-legislative authority or others, *exercise of judgment or discretion* vested in the local government,[8] which *shall include* by example, but not be limited to: . . . (c) The *issuance*, denial, suspension, revocation *of*, or failure or refusal to issue, deny, suspend or revoke *any permit*, license, certificate, approval, order or similar authorization . . . .

[8] "Local government" means any city incorporated under the law of this Commonwealth, the offices and agencies thereof, any county government or fiscal court, any special district or special taxing district created or controlled by a local government." KRS 65.200(3).

KRS 65.2003(3)(c) (emphasis added). Although the circuit court does not rely on KRS 565.2003, its ruling is entirely consistent with it.

In this case, Harris sued Libke and Firkins in their individual capacities based on certain conduct; but that conduct is immune from suit if it constitutes the defendants' "exercise of . . . quasi-judicial . . . authority [and the] exercise of judgment or discretion . . . which [the legislature expressly stated] shall include . . . issuance . . . of . . . any permit, license, certificate, approval, order or similar authorization . . . ." *Id.* The legislature, as part of its statutory scheme delineating liability of local governments and government officials, determined that issuing a permit is a discretionary act. Whether we apply the common law or the statute that codified it, we must conclude that Harris bases his claims against Libke and Firkins on conduct that was discretionary in nature.

Nevertheless, Harris could still defeat the claim of qualified official immunity if he had pleaded and presented evidence that: (1) Libke and Firkins were not acting within the scope of their employment at the time they engaged in this discretionary act; or (2) did not act in good faith. *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001).

The rule regarding when an employee is acting within the scope of his employment is generally stated as follows: "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control." Restatement (Third) Of Agency § 7.07 (2006) (Tentative Draft No. 5, 2004, cited in *Patterson v. Blair*, 172

S.W.3d 361, 369 (Ky. 2005)). Harris does not allege that either Libke or Firkins was acting outside the scope of their respective employment. In fact, Harris asserts there was an employment relationship between the local government[9] and Libke and Firkins, and also that their actions, upon which Harris claims liability, were conducted in their official capacities. He presented no evidence to the contrary. Therefore, taking the complaint as true, Libke and Firkins were acting within the scope of their employment at the time they issued the permit.

That leaves the question of good faith, or more appropriately, the necessity to find proof of bad faith.

> "[B]ad faith" can be predicated on a violation of a constitutional, statutory, or other clearly established right which a person in the public employee's position presumptively would have known was afforded to a person in the plaintiff's position, *i.e.,* objective unreasonableness; or if the officer or employee willfully or maliciously intended to harm the plaintiff or acted with a corrupt motive. 63C Am.Jur.2d, *Public Officers and Employees,* § 333 (1997).

Yanero v. Davis, 65 S.W.3d 510, 523 (Ky. 2001). So, who must establish one of these circumstances?

Generally, courts do not expect a party to prove the negative of an issue. "The party holding the affirmative of an issue must produce the evidence to prove it." CR 43.01(1). Consequently, when it comes to proving bad faith in the context of qualified official immunity, our Supreme Court has said this:

> Once the officer or employee has shown *prima facie* that the act was performed within the scope of his/her

[9] As defined by KRS 65.200(3).

> discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith. *Wegener v. City of Covington,* 933 F.2d 390, 392 (6th Cir.1991), *as modified by, Cox v. Kentucky Dept. of Transp.,* 53 F.3d 146 (6th Cir. 1995).

Id. The record demonstrates a *prima facie* showing that Libke and Firkins acted within the scope of their employment, thereby shifting the burden to Harris.

Harris never alleged bad faith in the performance of this discretionary act; he only alleged negligence in the performance of a ministerial one. When confronted with a motion to dismiss, he had the opportunity to remedy that litigation posture. He also had the obligation under *Yanero* and CR 43.01(1) to come forward with some evidence of bad faith. Instead, Harris said in his response to the motion to dismiss: "the issue of good faith is irrelevant[,]" (R.116-17), and continued to assert that the act complained of was ministerial. This is not enough to defeat such a motion to dismiss. *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) ("the Godmans have the burden to show that the public officials were not acting in good faith").

We conclude Libke and Firkins were entitled to qualified immunity from the claims made in Harris's complaint.

The circuit court made no factual findings.

Harris claims the circuit court resolved several issues of fact in favor of Libke and Firkins. If this occurred, it would be contrary to law because, "[f]or the purpose of testing the sufficiency of the complaint[,] the pleading must not be

construed against the pleader and the allegations must be accepted as true." *Pike v. George*, 434 S.W.2d 626, 627 (Ky. 1968). In the foregoing analysis, we applied that rule; we conclude the circuit court applied it, too.

Harris asserts that the circuit court specifically found Firkins and Libke had acted in good faith when they issued the permit. That is incorrect.

The circuit court repeatedly stated it was making no findings of fact. More importantly, the court ruled that "Harris has not presented any evidence which suggest [sic] that Libke and Firkins were not acting in good faith in making the determination to issue Harris the requested permits. There is no indication of bad faith in the record before the Court."

As we discussed above, a finding of good faith was not necessary in order to grant dismissal. It was not Libke's and Firkins' burden to prove good faith. Rather, it was Harris's burden to come forward with evidence of bad faith. Harris failed to do so and even failed to allege it.[10] A circuit court is entitled to conclude either that a party failed to plead an element of a claim, or that he failed to adduce at least enough evidence to create a genuine issue as to an element of a claim. Either conclusion is necessarily a legal determination, not a factual finding. CR 12.02; CR 56.03; *see also Harstad v. Whiteman*, 338 S.W.3d 804, 810-11 (Ky. App. 2011) ("If the plaintiff fails to adduce such evidence sufficient to create a

[10] The motion to dismiss under CR 12.02 would have been treated as a motion for summary judgment under CR 56.03 if Harris had presented such evidence and had the circuit court considered it.

genuine issue of fact, qualified privilege remains purely a question of law under the summary judgment standard.").

Harris also contends that the circuit court accepted Libke's factual assertion that Harris informed him [Libke] during their discussions in November 2011 that he [Harris] intended to operate a "hobby saw mill."[11] Harris claims he made no such statement, and that he clearly notified Libke that he intended to operate a commercial saw mill business.

The existence of a conflict as to this fact is irrelevant. Properly, the circuit court expressly stated on more than one occasion that it was by no means deciding this dispute or making *any* factual determinations. Resolution of this factual stalemate was not necessary to a determination whether Libke and Firkins were entitled to qualified official immunity. "Under KRS 65.2003(3)(c), [permit] approval . . . does not subject the [Local government or its officials] to *any* liability, even if some ministerial aspects are involved in the decision." *Greenway Enterprises*, *Inc. v. City of Frankfort*, 148 S.W.3d 298, 302 (Ky. App. 2004).

Factual findings were not made and were not necessary to the circuit court's decision to grant the motion to dismiss. We find that ruling sound.

IV. Conclusion

[11] Harris repeatedly declares in his brief that the term "hobby saw mill" is a term fabricated by Libke and/or Firkins to justify the issuance of the permits. However, Harris himself stated under oath: "And, yes, it started as a hobby. I like woodworking." (R. at 139).

For the foregoing reasons, we affirm the Shelby Circuit Court's April 11, 2014, Opinion and Order finding Libke and Firkins are entitled to qualified official immunity.

NICKELL, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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