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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001623-MR

COUNTY EMPLOYEES RETIREMENT SYSTEM
AND THE BOARD OF TRUSTEES
OF THE KENTUCKY RETIREMENT SYSTEMS

APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-01097

FRONTIER HOUSING, INC.
AND HOUSING ORIENTED MINISTRIES
ESTABLISHED FOR SERVICE, INC.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JONES AND NICKELL, JUDGES.

NICKELL, JUDGE: Since 2002, Frontier Housing, Inc. (Frontier) has participated in the County Employees Retirement System (CERS), a public retirement system for county and school board employees created under KRS¹ 78.510 *et. seq.* and

¹ Kentucky Revised Statutes.

administered by the Kentucky Retirement Systems (KRS) (jointly Appellants) through its Board of Trustees (Board). KRS 61.645. Since 2003, Housing Oriented Ministries Established for Service, Inc. (HOMES), has also participated in CERS. Both Frontier and HOMES (jointly Appellees),² became participating employers in CERS only after the Board approved their applications.

In September 2013, citing KRS 418.040, Appellees jointly petitioned the Franklin Circuit Court for a declaratory judgment deeming them ineligible to participate in CERS and allowing them to withdraw therefrom. Each alleged it is neither a “county,”³ nor a “school board.”⁴

Appellants moved to dismiss the petition on multiple grounds including: lack of subject matter jurisdiction under KRS Chapter 418; failure to

² Both Frontier and HOMES are Kentucky non-profit corporations providing low- and moderate-income housing in Eastern Kentucky.

³ “County” is defined in KRS 78.510(3) as:

any county, or nonprofit organization created and governed by a county, counties, or elected county officers, sheriff and his employees, county clerk and his employees, circuit clerk and his deputies, former circuit clerks or former circuit clerk deputies, or political subdivision or instrumentality, including school boards, charter county government, or urban-county government participating in the system by order appropriate to its governmental structure, as provided in KRS 78.530, and if the board is willing to accept the agency, organization, or corporation, the board being hereby granted the authority to determine the eligibility of the agency to participate[.]

⁴ “School board” is defined in KRS 78.510(4) as:

“School board” means any board of education participating in the system by order appropriate to its governmental structure, as provided in KRS 78.530, and if the board is willing to accept the agency or corporation, the board being hereby granted the authority to determine the eligibility of the agency to participate[.]

state a claim on which relief may be granted; and, failure to join an indispensable party under CR⁵ 19. Additionally, Appellants sought dismissal claiming: both Frontier and HOMES represented themselves during the application process as being eligible to participate in CERS—representations on which the Board relied in approving their applications; once participation in CERS begins, applicable statutes require continued participation and prohibit voluntary withdrawal; sovereign immunity; absence of necessary parties; and, lack of an actual controversy subject to determination via a petition for declaration of rights.

After hearing oral argument, and in reliance upon *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833, 841 (Ky. 2013), the trial court denied the motion to dismiss stating sovereign immunity does not apply in declaratory judgment actions. Additionally, the trial court found an actual controversy exists under KRS 418.040 as to whether Appellees were properly admitted into CERS and must continue participating therein; while CR 20.01 allows current and former employees of Frontier and HOMES to participate in this litigation, it does not require them to do so because they are not indispensable parties under CR 19; and, Appellants will adequately represent employees who wish to continue participating in CERS. The trial court determined two questions—an alleged statute of limitations violation and whether continued participation in CERS by Appellees is an on-going statutory violation—are disputed and require fact-finding before a ruling can be made.

⁵ Kentucky Rules of Civil Procedure.

Appellants timely appealed and now challenge the trial court's finding that sovereign immunity does not apply to a petition for declaratory judgment. Upon review of controlling case law, we affirm.

ANALYSIS

Denial of a motion to dismiss is generally interlocutory and unappealable because appellate review is reserved for final judgments. CR 54.01. However, when an appeal is based on a claim of sovereign immunity, immediate *de novo* review is available upon request. *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009). Were we to deny consideration until Appellants have borne the expense and burden of trial they would be denied “meaningful review.” *Id.* at 884. Thus, we have jurisdiction to consider those aspects of the appeal directly related to the claim of sovereign immunity. That, however, will be the extent of our review. Other alleged errors are not properly within the scope of this interlocutory appeal and can be considered by filing an appeal after entry of final judgment.

In *Commonwealth*, the case relied upon by the trial court to find sovereign immunity inapplicable to a petition for a declaration of rights, the Supreme Court of Kentucky recognized three circumstances in which sovereign immunity may be waived. One⁶ of those circumstances—when a declaratory judgment is sought—resolves this appeal. *Commonwealth*, 396 S.W.3d at 838-41.

⁶ The other two situations are breach of contract and assertion of a constitutional claim, *Commonwealth*, 396 S.W.3d at 836-39.

We begin with this caveat:

[s]overeign immunity is founded on the notion that the resources of the state, its income and property, cannot be compelled as recompense for state action that harms a plaintiff through the ordinary suit-at-law process.

Id. at 836. We follow it with this caveat:

a declaratory judgment action is not a claim for damages, but rather it is a request that the plaintiff's rights under the law be declared. There is no harm to state resources from a declaratory judgment. When the state is a real party in interest, the state is merely taking a position on what a plaintiff's rights are in the underlying controversy.

Id. at 838. With the foregoing in mind, Appellees seek a declaratory judgment saying KRS Chapter 78⁷ does not authorize their continued participation in CERS.

As explained in the second caveat quoted above, all the petition will resolve is the position of the Appellees—that alone does “no harm to state resources[.]”

Commonwealth, 396 S.W.3d at 838.

Appellants argue sovereign immunity was neither expressly nor implicitly waived in this case, not even by KRS 61.645(2)(a) which allows the Board to “sue and be sued in its corporate name.” They further argue if Appellees are allowed to cease participating in CERS, their portion of the unfunded liability of CERS will be shifted to other participants and potentially to the state. As a result, Appellants maintain the state's pocketbook is on the line. They also express fear other entities will seek to abandon CERS if Appellees succeed.

We conclude with the following quote:

⁷ Specifically, KRS 78.510 - KRS 78.852.

We do not have a government that is beyond scrutiny. If sovereign immunity can be used to prevent the state, through its agencies, from being required to act in accordance with the law, then lawlessness results. This review is qualitatively different from requiring the state to pay out the people's resources as damages for state injury to a plaintiff. This is the very act of governing, which the people have a right to scrutinize. Thus to say that the state is entirely immune is an overbroad statement.

Instead, it is more accurate to say the state is subject to appropriate scrutiny, because that is part of the governing process. This occurs through elections, public access to records and meetings, public attendance at hearings on proposed regulations, and other means of involving the people in the government. It also includes review by the courts.

Thus it follows that when the state is an interested party in a declaratory judgment action, the state must be a proper party because only legal rights are being declared between the plaintiff and the state. Otherwise, no review would be possible. But it is also true that in subsequent or contemporaneous actions to enforce declared rights, the immunity issue could be relevant if the revenue or property of the state would be affected. As in this case, the underlying merits of any claim . . . are not before the court in a declaratory judgment action.

Commonwealth, 396 S.W.3d at 839.

For the reasons expressed above, the Franklin Circuit Court's denial of a motion to dismiss on grounds of sovereign immunity is AFFIRMED.

ALL CONCUR.

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