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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000938-MR

EDWARD ZUMBIEL AND MICHAEL ZUMBIEL APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 17-CI-00400

BOARD OF ADJUSTMENT FOR THE CITY OF LAKESIDE PARK, KENTON COUNTY, KENTUCKY; AND CITY OF LAKESIDE PARK, KENTON COUNTY, KENTUCKY APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Edward Zumbiel and Michael Zumbiel appeal from the dismissal of their action which appealed the final order of the Board of Adjustment for the City of Lakeside (hereinafter referred to as "the Board"). The trial court

believed Appellants failed to meet the jurisdictional requirements for an appeal from an order of the Board. We believe the trial court erred and reverse and remand for further proceedings.

The facts of this case are not in dispute. Appellants sought to combine two tracts of land they owned in order to develop the properties into a subdivision. Appellants submitted for approval a zoning plat to Planning and Development Services of Kenton County (hereinafter referred to as "PDS"). PDS is the zoning administrator for Kenton County. PDS denied the approval of the plat as violating zoning ordinances of the City of Lakeside Park.

Appellants then appealed this decision to the Board. On February 6, 2017, the Board held a hearing on Appellants' application for a permit to proceed with the development of the subdivision. The Board ultimately voted to deny the application and uphold the decision of PDS. Appellants were also informed they had 30 days in which to appeal.

On March 7, 2017, Appellants filed a complaint in the Kenton Circuit Court to appeal the Board's decision. Appellants also caused a summons to be issued. The Board was named as a party in both the complaint and summons; however, Appellants failed to serve the summons on a member of the Board as is required under the Kentucky Rules of Civil Procedure. Appellants incorrectly served the summons at the address of PDS.

On March 29, 2017, the Board filed a motion to dismiss for lack of subject matter jurisdiction. The Board argued that by failing to serve it with the summons before the expiration of the allotted time for appeal, the circuit court did not have jurisdiction to hear the matter. On April 4, 2017, Appellants filed their objection to the motion and a motion for leave to file an amended summons.[1] On May 3, 2017, the court granted the Board's motion to dismiss. The court did not address Appellants' motion to amend the summons and this appeal followed.

The right to appeal from a decision of the Board can be found in Kentucky Revised Statute (KRS) 100.347(1) which states:

> Any person or entity claiming to be injured or aggrieved by any final action of the board of adjustment shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the action of the board of adjustment, lies. Such appeal shall be taken within thirty (30) days after the final action of the board. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The board of adjustment shall be a party in any such appeal filed in the Circuit Court.

This statute does not specify the method to initiate an action or serve a summons; therefore, "the relevant provisions of the Civil Rules must apply." *Arlinghaus Builders, Inc. v. Kentucky Pub. Serv. Comm'n*, 142 S.W.3d 693, 696 (Ky. App. 2003).

[1] Kentucky Rule of Civil Procedure (CR) 4.16 allows for the amendment of a summons.

CR 4.04(7) states:

> Service shall be made upon a county by serving the county judge or, if he is absent from the county, the county attorney. Service shall be made upon a city by serving the chief executive officer thereof or an official attorney thereof. Service on any public board or other such body, except state agencies, shall be made by serving a member thereof.

It is undisputed that Appellants did not serve the summons upon a member of the Board as is required by CR 4.04(7). The trial court believed that Appellants did not strictly comply with the appeal statute because of this defective summons. The court held that the Board was not named as a party because it was not properly served with a summons.

> There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

Bd. of Adjustments of City of Richmond v. Flood, 581 S.W.2d 1, 2 (Ky. 1978) (citations omitted). As the issue before this Court is purely one of law, our review is *de novo* and we owe "no deference to a trial court's determination[.]" *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

We believe the cases of *Isaacs v. Caldwell*, 530 S.W.3d 449 (Ky. 2017), and *Arlinghaus Builders, Inc.*, *supra*, are directly on point to the case at hand.

In *Isaacs v. Caldwell*, Ken Isaacs and Annetta Cornett attempted to appeal a decision of the Georgetown-Scott County Planning Commission.

> Appellants had until July 16, 2012, to appeal the Commission's decision by initiating an action for judicial review in the circuit court. On that afternoon shortly before closing time, in the office of the Scott Circuit Court Clerk, Appellants' counsel filed a pleading titled, "Appeal from Decisions of Scott County Planning Commission" (the Appeal), naming in the caption as "Defendants/Appellees," [developer John] Tackett, [Town and Country] Bank, and the Planning Commission and its individual members.
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> Tackett and the Planning Commission had executed a waiver of formal service of process, which Appellants' counsel filed along with the appeal. The Bank, however, had not waived service of process and so Appellants presented the circuit clerk's office with a summons form for the Bank. The summons form correctly styled the case with the names of the parties, but it did not indicate the name and address of the Bank's agent for service of process, and it did not provide the Bank's street address.
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> Consistent with his customary practice, Appellants' counsel requested the deputy clerk on duty to formally issue the summons and return it to him so that he could arrange to have it served, either by delivering the summons himself or having it done by the sheriff or an authorized constable. That plan went awry when the deputy clerk refused to issue the summons without having the Bank's address and service of process information added to it. Counsel did not have that

information with him, although it was available at his office, which was a short walking-distance away.

Although he disagreed with the deputy clerk's interpretation of her duty regarding the need to fill in the Bank's address before issuing the summons, rather than retrieving the information at his office while the clerk waited, possibly past the clerk's office's usual closing time, the attorney left the clerk's office with the summons unissued. He walked to the office of the Bank's attorney to hand-deliver a copy of the Appeal, hoping to secure the Bank's waiver of service of process. The office of the Bank's attorney had already closed for the day. Consequently, the Appeal was filed in the final few minutes of the limitations period, but the summons for the Bank was not issued by the clerk.

The next day, one day after the filing deadline, counsel returned to the clerk's office where a different deputy clerk issued the summons for the Bank as originally tendered by counsel, without the Bank's address or its registered agent information. Pursuant to counsel's directive, the clerk returned the summons form to counsel as provided by CR 4.01(c). Counsel again visited the Bank's attorney hoping to have him either accept service of process on behalf of the Bank or waive service of process. The Bank declined.

About three weeks later, Tackett moved for dismissal of the action, asserting that the circuit court lacked jurisdiction over the case because the Bank, a statutorily-required party, had not been properly included in the action within the applicable limitations period. Appellants' counsel had retained a constable to serve the summons on the Bank. The constable proceeded to attempt service of the summons and the initial pleading (the Appeal) by handing it to a Bank teller who was not the Bank's registered agent for service of process.

> The Bank then entered a special appearance to challenge the circuit court's jurisdiction to proceed in the absence of valid service on the Bank. After an evidentiary hearing on the motions of the Bank and Tackett to dismiss, the circuit court concluded that it lacked jurisdiction because Appellants had not strictly complied with the provisions of KRS 100.347 by taking their appeal within the statutorily-allotted time period.
>
> Central to the circuit court's analysis was its application of Civil Rule 3.01, which states: "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." The circuit court reasoned that the action was not timely commenced because, although the Appeal was filed within the allotted time period, counsel's failure to diligently effectuate service of the summons on the Bank, an indispensable party, established that the Bank's summons was not issued in good faith. Consequently, the court determined, the action was not commenced before expiration of the statutory limitations period, leaving the court without jurisdiction to grant relief to Appellants. A divided Court of Appeals affirmed the circuit court's decision.

Id. at 452-53 (footnotes omitted).

In affirming the trial court's decision, the Kentucky Supreme Court focused on CR 3.01 which states that a civil action "is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." The Court stated that

> [i]t logically follows that the procedural steps required to "take" an appeal from an administrative agency action are precisely the same steps required to commence any other original action in the circuit court. The rules that determine when a civil action commences, therefore,

> determine when an appeal of an administrative action has been taken.

Id. at 454. The Court did not require that the summons be perfected within the statutory timeframe, only that the summons be issued in good faith per the civil rules. The Court found that the attorney did not issue the summons in good faith because he sought to get the Bank to waive the issuance of the summons instead of trying to diligently effectuate service. Although the Court affirmed the circuit court's decision to dismiss the underlying cause of action, it did so because it found that the summons was not issued in good faith, not because of the lack of a perfected service of the summons.

In *Arlinghaus Builders, Inc. v. Kentucky Pub. Serv. Comm'n*, Arlinghaus Builders, Inc. sought to appeal a decision of the Public Service Commission. KRS 278.410(1) indicated the steps necessary to initiate such an appeal. That statute required that

> [a]ny party to a commission proceeding or any utility affected by an order of the commission may, within thirty (30) days after service of the order . . . bring an action against the commission in the Franklin Circuit Court to vacate or set aside the order or determination on the ground that it is unlawful or unreasonable . . . Notice of the institution of such action shall be given to all parties of record before the commission[.]

Arlinghaus, 142 S.W.3d at 696 (quoting KRS 278.410(1)).

> Arlinghaus filed an action in the Franklin Circuit Court requesting that the PSC's order be vacated. The PSC was

> named a party-defendant in the action, and Arlinghaus designated Hon. J.R. Goff, a PSC staff attorney, to receive service of process. SprintCom was also named as a party-defendant in the action. Arlinghaus directed its service of process to Hon. Mark W. Dobbins, an attorney in private practice who had represented SprintCom at the administrative proceedings before the Commission. However, Dobbins was not SprintCom's registered agent for service of process, and Arlinghaus had no reason to believe that Dobbins was authorized to accept service on behalf of SprintCom.
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> Both SprintCom and the PSC moved to dismiss the action. They argued that neither of them had been properly served with process and that the court lacked jurisdiction to go forward. Moreover, they argued that since the 30-day time period for filing an action against the Commission had expired, the action could no longer be maintained. On October 29, 2001, more than two months after the PSC entered its final order, Arlinghaus requested leave to file an amended petition. Through its motion, Arlinghaus sought an opportunity to cure "these technical defects" related to its failure to effect proper service upon the parties.
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> The PSC and SprintCom argued that the amended petition as tendered was not really an attempt to augment the petition but rather that it was an artifice to correct two failures of Arlinghaus: (1) its failure to serve the Attorney General on behalf of the PSC as required by CR 4.04(6) and (2) its failure to serve SprintCom's registered agent for service of process. Nonetheless, Arlinghaus was permitted to file the amended petition, subsequently serving the Attorney General and SprintCom as directed under the Civil Rules.

Id. at 694-95.

The circuit court ultimately dismissed the case. The court held that Arlinghaus' failure to properly serve SprintCom or the Attorney General within the 30-day period set forth by the statute was fatal to the cause of action. Arlinghaus then appealed to this Court. This Court reversed the circuit court and held that a perfect service of the summons was not required, only that the summons be issued in good faith within the 30-day period. The Court relied heavily upon CR 3.01 and cases interpreting that rule in finding that if a summons is defective, a cause of action may still be properly commenced if the summons was issued in good faith. We believe th due to the incorrectly served summons. In order to bring an appeal from a decision of the Board, KRS 100.347(1) requires that the action be taken within 30 days of the Board's final decision and that the Board be named as a party. Here, the complaint and summons were filed with the circuit court within 30 days and the Board was named on both documents. Even though the Board was not properly served with the summons, a summons was issued in the name of the Board. Pursuant to CR 3.01, *Isaacs*, and *Arlinghaus*, a complaint filed with the proper court and the issuance of a summons in good faith are all that is required to designate the Board as a party to this action.

The case law relied upon by the trial court and Appellees is distinguishable from the case at hand. In *Bd. of Adjustments of City of Richmond v. Flood*,

> Exxon and Cracker Barrel filed an application before the Board of Adjustments of the City of Richmond seeking a height variance for a sign. The application was heard by the Board on June 17, 1976. The application was granted and the Floods and the Burnams appealed to the Madison Circuit Court on July 14, 1976 naming as appellees the Board, Exxon and Cracker Barrel. On July 30, 1976, Exxon and Cracker Barrel filed a motion to dismiss the appeal to the circuit court asserting the failure to include the Richmond, Kentucky, Planning and Zoning Commission as a party.
>
> On August 24, 1976, sixty-eight days after the final action of the Board on June 17, the Floods and the Burnams joined the Commission as a party and had summons issued for it. The Madison Circuit Court held that the failure to make the Commission a party within thirty days was a fatal jurisdictional fault and dismissed the appeal.

Flood, 581 S.W.2d at 2.

Flood concerned a previous version of the statute at issue *sub judice*. That version indicated that the Planning Commission must be named as a party to the appeal to the circuit court; therefore, naming the Planning Commission as a party was required to invoke the circuit court's jurisdiction over a decision of the administrative agency. The Kentucky Supreme Court held that failing to name the Planning Commission as a party within the 30-day window was fatal to the appeal. Because the Floods and the Burnams failed to name the Planning Commission as a party to the appeal within 30 days, the trial court correctly dismissed the case for lack of jurisdiction.

In *Metro Med. Imaging, LLC v. Commonwealth*, 173 S.W.3d 916 (Ky. App. 2005),

> Metro Medical Imaging (MMI) operate[d] diagnostic imaging facilities at locations on Dupont Circle, Newburg Road and Dixie Highway in Louisville. The Cabinet for Health and Family Services determined that MMI [was] not exempt from either the Certificate of Need or licensing requirements of KRS Chapter 216B, and must therefore apply for a Certificate of Need and obtain a license in order to continue in operation. MMI attempted to appeal the Cabinet's ruling pursuant to the provisions of KRS 216B.115(2).
>
> . . . MMI filed a petition for review of the Cabinet's ruling in the Franklin Circuit Court within thirty days after notice of the final decision, but failed to cause summons to be issued on the petition until the thirty-fourth day after notice of the final decision. The circuit court granted the appellees' motion to dismiss[.]

Id. at 916-17 (footnote omitted).

The statute at issue in *Metro Med.* indicated that in order to appeal a decision of the Cabinet for Health and Family Services, a petition must be filed within 30 days of the Cabinet's final decision and that "[*s*]*ummons shall be issued upon the* petition directing the adverse party or parties to file an answer within twenty (20) days after service of summons." KRS 216B.115(2) (emphasis added). The Court of Appeals held that issuance of a summons was a jurisdictional requirement set forth by the statute and strict adherence was required in order for MMI to avail itself of the circuit court's jurisdiction.

As previously indicated, we believe *Flood* and *Metro Med.* are distinguishable from the case at hand. In *Metro Med.*, no attempt to issue a summons was taken until after the 30-day limitation period had lapsed. Additionally, the issuance of a summons was specifically mentioned in that statute. In the case before us, the issuance of a summons is not mentioned in the statute; therefore, as previously stated, "the relevant provisions of the Civil Rules must apply." *Arlinghaus*, 142 S.W.3d at 696. Appellants did issue a summons within the timeframe set out in KRS 100.347, albeit incorrectly addressed and served.

In *Flood*, the Planning Commission was required to be named as a party to the appeal within 30 days after its final decision; however, it was not named as a party nor was it issued a summons until more than 60 days after its final decision. Here, the Board was named in both the complaint and the summons and a summons was issued within 30 days.

We believe that pursuant to *Arlinghaus* and *Isaacs*, the Board was properly named as a party so long as Appellants complied with CR 3.01. Appellants are not, however, free and clear to immediately pursue their appeal of the Board's decision. We are unable to say if Appellants' cause of action was properly commenced within the timeframe set forth by statute. Appellants moved to amend the summons, but that motion was not ruled upon by the trial court. Instead, the trial court held that failing to properly serve the Board was fatal to the

action and dismissed the case. As we have stated, perfect service of the summons is not required and if the summons was issued in good faith, the cause of action may continue. CR 3.01; *Isaacs*, *supra; Arlinghaus*, *supra*. The trial court's decision hinged on the perfect issuance of the summons and it did not rule on the good faith issuance issue. We believe such a ruling is necessary. We therefore reverse and remand for the trial court to determine if Appellants' action commenced within the 30 days set forth by the statute. In other words, the circuit court must determine if the summons was issued in good faith. If so, the Board was timely named a party and Appellants' cause of action may continue.

D. LAMBERT, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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