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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001179-MR

CATHY STONE THROUGH CARL
EDWIN STONE AS EXECUTOR OF
THE ESTATE OF CATHY STONE APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 15-CI-03483

DEAN DAIRY HOLDINGS, LLC
d/b/a DEAN MILK COMPANY, LLC;
AND THOMAS PHILP APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

CLAYTON, CHIEF JUDGE: The executor of Cathy Stone's estate appeals from the Jefferson Circuit Court's order granting a motion to dismiss filed by Dean Dairy Holdings, LLC and Thomas Philp based on the executor's alleged failure to

timely revive the action upon Ms. Stone's death. For the following reasons, we affirm the trial court's ruling.

BACKGROUND

Cathy Stone was employed by Dean Dairy Holdings, LLC ("Dean Milk"), and, on July 15, 2015, filed an action against Dean Milk and Thomas Philp, her former supervisor, based on claims of discrimination, retaliation, and intentional infliction of emotional distress. Dean Milk and Mr. Philp removed the case to the United States District Court for the Western District of Kentucky on August 10, 2015, alleging that Mr. Philp was fraudulently included as a party to the action to prevent the federal court from having diversity jurisdiction.

Thereafter, on September 5, 2015, Ms. Stone passed away. On December 21, 2015, Carl Edwin Stone, Ms. Stone's husband, filed a motion to substitute Mr. Stone as the named plaintiff in the action and in compliance with Federal Rules of Civil Procedure (FRCP) 25(a). In March 2016, the federal court granted Mr. Stone's motion and remanded the case to Jefferson Circuit Court on the basis that Ms. Stone had a colorable claim for retaliation against Mr. Philp.

On September 14, 2016, a few days after the one year anniversary of Ms. Stone's death, Dean Milk and Mr. Philp filed a motion under Kentucky Rules of Civil Procedure (CR) 12.02(f) to dismiss the lawsuit, alleging that Mr. Stone, as executor of Ms. Stone's estate (the "Estate"), had failed to file an application for

revival of the action within one year of Ms. Stone's death as required under Kentucky Revised Statutes (KRS) 395.278. The Estate did not file a motion to revive the action under KRS 395.278 with the trial court until January 26, 2017, over sixteen months after Ms. Stone's death.

The trial court granted the motion, finding that Ms. Stone's claims must be dismissed because the Estate failed to properly revive the action in accordance with KRS 395.278 and in contravention of the statute's one-year statute of limitations. The Estate thereafter filed a motion to alter, amend, or vacate the trial court's ruling, which the trial court denied. This appeal followed.

ISSUES

The Estate argues the following: (1) Mr. Stone was properly substituted under the federal rules while the case was pending in federal court, making a motion for revival under KRS 395.278 unnecessary pursuant to the Rules Enabling Act, 28 U.S.C. § 2072; (2) if it is found that revival was necessary under KRS 395.278, Mr. Stone's motion for substitution under the federal rules was sufficient to revive the action for purposes of KRS 395.278; and (3) if Mr. Stone's motion for substitution under the federal rules was insufficient to review the action, Kentucky's tolling statute applied and extended the time for the Estate to file a separate motion to revive.

ANALYSIS

We begin our analysis of the Estate's claims with a statement of the appropriate standard of review. "Whether an action has been timely revived is a matter of law" and an appellate court "review[s] the trial court's order of dismissal *de novo* and without deference to its conclusions." *Frank v. Estate of Enderle*, 253 S.W.3d 570, 575 (Ky. App. 2008) (citing *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998)). With this standard in mind, we turn to the Estate's contentions of error.

a. **Was KRS 395.278 Displaced by FRCP 25(a)?**

The Estate first argues that, because Mr. Stone was properly substituted under FRCP 25(a) while the lawsuit was in federal court, no further action needed to be taken. Particularly, the Estate contends that KRS 395.278, as a state procedural law, was displaced by FRCP 25(a), a competing federal procedural rule, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072.

The Rules Enabling Act states, in relevant part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072 (West). Pursuant to the Rules Enabling Act, if a state rule or statute conflicts with a federal rule of civil procedure, it must be determined if the federal rule "abridge[s], enlarge[s] or modif[ies] any substantive right." *Hanna v. Plumer*, 380 U.S. 460, 465, 85 S.Ct. 1136, 1140, 14 L.Ed.2d 8 (1965). A rule does so if "it significantly affect[s] the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court[.]" *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109, 65 S.Ct. at 1464, 1470, 89 L.Ed. 2079 (1945). If it does not, then the federal rule controls, as long as it is constitutional. *Hanna*, 380 U.S. at 471, 85 S.Ct. at 1144.

While at first blush the foregoing would appear to be a relatively easy analysis to apply, the United States Supreme Court has noted that "[t]he question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years." *Walker v. Armco Steel Corp.*, 446 U.S. 740, 744, 100 S.Ct. 1978, 1982, 64 L.Ed.2d 659 (1980).

The United States Supreme Court has held, however, that before one must attempt an analysis under the Rules Enabling Act, it must determine whether the federal rule of procedure and the state law actually conflict in the first place. *Hanna*, 380 U.S. at 469-70, 85 S.Ct. at 1143. In *Hanna*, the Court was faced with

determining whether a Massachusetts state law mandating in-hand service on an executor or administrator of an estate governed, or whether a federal rule of procedure which allowed service by leaving copies of the summons and complaint at the defendant's home with any person "of suitable age and discretion" would control. 380 U.S. at 461, 85 S.Ct. at 1138-39 (citing FRCP 4(d)(1)).

The Court explained that it was only where the federal rule and the state law were clearly in conflict that a Rules Enabling Analysis was needed. 380 U.S. at 469-70, 85 S.Ct. at 1143. Because the Court found the conflict between FRCP 4(d)(1) and the applicable state law "unavoidable[,]" as FRCP 4(d)(1) stated "implicitly, but with unmistakable clarity[,]" that "in[-]hand service is not required in federal courts[,]" the Court applied the Rules Enabling Act analysis. 380 U.S. at 470, 85 S.Ct. at 1143.

The Supreme Court further explained the requirement of a "direct conflict" in *Walker*, in which a suit would have been barred in the pertinent state court and the state service statute was held to not directly conflict with the federal rule. 446 U.S. at 749-50, 100 S.Ct. at 1985. In *Walker*, an injury occurred in August 1975 and, while a summons was issued on the same day the complaint was filed in August 1977, service of process was not made until December 1977. 446 U.S. at 741-42, 100 S.Ct. at 1980-81. The Court was tasked with comparing FRCP

3 with an Oklahoma two-year statute of limitations to see which governed. 446 U.S. at 750-51, 100 S.Ct. at 1985.

The Court noted that FRCP 3 simply stated "[a] civil action is commenced by filing a complaint with the court" and merely "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." 446 U.S. at 751, 100 S.Ct. at 1985 (internal citations omitted). On the other hand, the Oklahoma statute was "a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." 446 U.S. at 751, 100 S.Ct. at 1985.

The *Walker* Court explained that "[a]pplication of the *Hanna* analysis [was] premised on a 'direct collision' between the Federal Rule and the state law." 446 U.S. at 749, 100 S.Ct. at 1985. In *Hanna*, the "'clash' between Rule 4(d)(1) and the state in-hand service requirement was 'unavoidable.'" 446 U.S. at 749, 100 S.Ct. at 1985 (quoting *Hanna*, 380 U.S. at 470, 85 S.Ct. at 1143). The Court noted that "[t]he first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies." 446 U.S. at 749-50, 100 S.Ct. at 1985.

The *Walker* Court found that, since the scope of the federal rule was not as broad as the plaintiff would have them believe, there was no direct conflict between the federal rule and the state law, and the Rules Enabling Act analysis, as explained by *Hanna*, did not apply. 446 U.S. at 752-53, 100 S.Ct. at 1985. Instead, "in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action" in which the federal court has diversity jurisdiction. 446 U.S. at 752-53, 100 S.Ct. at 1986. Notably, the Court in *Walker* stated:

> [t]here is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.

446 U.S. at 753, 100 S.Ct. at 1986.

More recent Supreme Court cases have continued this line of reasoning, as further evidenced in Justice Stevens' concurring opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*:

> [t]he Court must first determine whether the scope of the federal rule is "sufficiently broad" to "control the issue" before the court, "thereby leaving no room for the operation" of seemingly conflicting state law. In some instances, the "plain meaning" of a federal rule will not come into "direct collision" with the state law, and both can operate. In other instances, the rule "when fairly construed," with "sensitivity to important state interests

> and regulatory policies," will not collide with the state law.

559 U.S. 393, 421, 130 S.Ct. 1431, 1451, 176 L.Ed.2d 311 (2010) (Stevens, J., concurring) (internal citations omitted).

Therefore, our first determination must be whether a direct conflict exists between KRS 395.278 and FRCP 25(a), or if, given FRCP 25(a)'s plain meaning, it is "sufficiently broad to control the issue before the Court." *Walker*, 446 U.S. at 749-50, 100 S.Ct. at 1985. To make such a determination, we must review, not only the language of both KRS 395.278 and FRCP 25(a), but the history surrounding KRS 395.278. Pursuant to KRS 395.278:

> An application to revive an action in the name of the representative or successor of a plaintiff, or against the representative or successor of a defendant, shall be made within one (1) year after the death of a deceased party.

As noted by the Kentucky Supreme Court, "[t]he history of KRS 395.278 is important because, '[a]t common law, when the plaintiff died the lawsuit died with him . . . .'" *Hardin County v. Wilkerson*, 255 S.W.3d 923, 925-26 (Ky. 2008) (quoting *Daniel v. Fourth & Market, Inc.*, 445 S.W.2d 699, 701 (Ky. 1968)). The revival statute changed this situation, "allowing the dead (or abated) suit to be revived. Nevertheless, the action in the name of the decedent is dead and cannot be prosecuted; it remains on the docket only as a placeholder for the revived suit in the name of the personal representative of the estate." *Hardin*, 255 S.W.3d at 926;

see also Mitchell v. Money, 602 S.W.2d 687, 688 (Ky. App. 1980) ("[the personal representative] is permitted, by an act of the legislature, to revive an action which dies with the decedent"). Significantly, "a revivor is much in the nature of a new action as distinguished from an act done during the course of a proceeding . . . ." *Daniel*, 445 S.W.2d at 701.

On the other hand, FRCP 25(a)(1) states, in relevant part:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Therefore, FRCP 25(a)(1) "simply describes the manner in which parties are to be substituted in federal court once it is determined that the applicable substantive law allows the action to survive a party's death." *Robertson v. Wegmann*, 436 U.S. 584, 587 n.3, 98 S.Ct. 1991, 1993, 56 L.Ed.2d 554 (1978) (quoting *Shaw v. Garrison*, 545 F.2d 980, 982 (5th Cir. 1977)).

A substantive comparison of KRS 395.278 and FRCP 25(a)(1) reveals that the provisions are not in conflict, and in fact are in harmony with one another. By its own terms, FRCP 25(a)(1) governs substitution of a deceased party "*when the claim is not extinguished[.]*" (Emphasis added.) Therefore, it governs the substitution of a party only once the federal court has ascertained that the actual

claim itself has not been extinguished but does not purport to establish the methods by which the court is to determine whether the claim has been extinguished.

Correspondingly, KRS 395.278 is equally silent regarding substitution, solely addressing the issue of the act of reviving the actual claim. Moreover, the Federal Rules of Civil Procedure do not forbid a party from filing a revival motion in federal court. *See* Fed. R. Civ. Pro. 7(b). The rule and the statute can be read co-extensively – upon the death of a party, the personal representative has one year from the date of death to file a motion with the federal court pursuant to KRS 395.278 reviving the cause of action. Meanwhile, the decedent's representative may give service of a statement noting the death and file a motion for substitution within the 90-day period described in FRCP 25(a)(1). Each of these actions can be performed without running afoul of the other. Therefore, no conflict can be deduced, as FRCP 25(a) and KRS 395.278 "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Walker*, 446 U.S. at 752, 100 S.Ct. at 1986.

Moreover, applying KRS 395.278 and FRCP 25(a) in a compatible manner achieves the goal of state law claims proceeding in federal court not reaching a result inconsistent with a result reached in the applicable state court. *See Walker*, 446 U.S. at 753, 100 S.Ct. at 1986. As in the *Walker* case, "in the absence of a controlling federal rule" an action which would be barred in the state

court by the applicable statute of limitations should not be allowed to progress through a federal court "solely because of the fortuity that there is diversity of citizenship between the litigants." *Id*.

In support of its proposition that FRCP 25(a) and KRS 395.278 conflict, the Estate relies primarily on *Boggs v. Blue Diamond Coal Co.*, a case decided by a federal trial court in the Eastern District of Kentucky. 497 F. Supp. 1105 (E.D. Ky. 1980). In *Boggs*, the Court opined that, because FRCP 25(a) and KRS 395.278 are "in direct conflict with respect to the time allowed to effect a substitution for a deceased party[,]" FRCP 25(a) governs substitution in federal courts and displaces any requirements contained in KRS 395.278 for revival of a decedent's claims pursuant to a Rules Enabling Act analysis. *Id*. at 1124.

However, as the trial court noted, the *Boggs* decision is problematic for a number of reasons. First, the *Boggs* Court offered no explanation for its reasoning that there was a direct conflict between FRCP 25(a) and KRS 395.278, other than to seemingly equate the provisions of KRS 395.278 with Kentucky's rule of procedure governing substitution of a party upon death, CR 25.01. Nor did the Court in *Boggs* engage in any significant discussion regarding the differentiation between substitution and revival under Kentucky law. We agree that, consequently, the *Boggs* opinion does little to convince us that a Rules Enabling Act analysis is appropriate in this situation.

We find this case to be in line with the *Walker* decision. As in *Walker*, we are dealing with a state's statute of limitations. *See Hammons v. Tremco, Inc.*, 887 S.W.2d 336, 338 (Ky. 1994) ("[KRS 395.278] operates as a statute of limitations"); *Daniel*, 445 S.W.2d at 701 ("[KRS 395.278] is a statute of limitation and not a law 'relating to pleading, practice and procedure . . . .'"); *Snyder v. Snyder*, 769 S.W.2d 70, 72 (Ky. App. 1989) ("We hold that KRS 395.278 . . . is a statute of limitation, rather than a statute relating to pleading, practice or procedure, and the time limit within this section is mandatory and not discretionary . . . ."); *Mitchell v. Money*, 602 S.W.2d 687, 688 (Ky. App. 1980) ("Within this jurisdiction, it is a well-recognized rule of law that any statute relating to the revivor of an action is a statute of limitation, rather than a statute relating to pleading, practice, or procedure."). Also, as in *Walker*, this case involves a federal rule of civil procedure that is not broad enough to directly conflict with the state statute, only prescribing time periods for claims that have not been extinguished. Therefore, we find that, because KRS 395.278 and FRCP 25(a) do not conflict, any analysis pursuant to the Rules Enabling Act is unnecessary, and the Estate was required to file a motion pursuant to KRS 395.278 to revive the claim.

b. <u>Was Mr. Stone's Motion for Substitution Under the Federal Rules Sufficient for Purposes of KRS 395.278?</u>

The Estate next argues that, because the only purpose of KRS 395.278 is to provide a specific time period for the representative of an estate to be substituted for a decedent, thus giving notice to the remaining litigants and the court that the action will continue, Mr. Stone's motion for substitution under FRCP 25(a) was adequate to serve as an application for revival under KRS 395.278.

Kentucky courts have held that a representative seeking to revive an action must file both a KRS 395.278 revival motion and a CR 25.01 substitution motion pursuant to Kentucky's rule of civil procedure governing substitution of a personal representative or risk dismissal of the claim. *Koenig v. Public Protection Cabinet*, 474 S.W.3d 926, 930 (Ky. App. 2015). In *Koenig*, a plaintiff died before the conclusion of litigation pertaining to a declaratory judgment action. *Id*. at 929. Within one year of the decedent's death, her estate filed a motion to substitute the administrator of the estate, which the court granted. *Id*. Although the administrator of the estate had been substituted, a panel of this Court directed the estate to show cause why the appeal should not be dismissed for failure to comply with KRS 395.278. *Id*. In its response, the estate argued that the trial court's order substituting the decedent's personal representative complied with CR 25.01 and was therefore adequate to revive the action. *Id*. The Court disagreed, reiterating

the "mandatory notice of filing both a CR 25.01 and a KRS 395.278 motion . . . ." *Id*. at 929. Although the claims were ultimately dismissed because of the lack of a justiciable controversy following plaintiff's death, the Court further concluded that the estate had not satisfied the statutory revival requirements in KRS 395.278, in part because the notice of substitution did not reference KRS 395.278. *Id*. at 930.

We find this logic to be persuasive and extend it to whether a FRCP 25(a) motion serves to revive a claim under KRS 395.278. The revival statute does not solely provide notice of a party's death to the other litigants, but rather allows the decedent's personal representative to "succeed to [the] decedent's rights and status as a litigant." *Snyder*, 769 S.W.2d at 72. Again, we return to the fact that Kentucky courts have consistently highlighted that KRS 395.278 creates a substantive right to pursue an action where one did not previously exist at common law, rather than as a simple procedural rule for notice, as the Estate argues. *Daniel*, 445 S.W.2d at 701 (the revival statute was not "just a matter of procedure[,]" and "the creation of a right of action where none would exist otherwise is a matter of substance and not procedure . . . ."). As discussed in the previous section, because FRCP 25(a) does not deal with the same fundamental issues as KRS 395.278, it cannot serve as the proper procedure for revival under Kentucky law. Revival can only be acquired through adhering to the requirements

of KRS 395.278. *See Daniel*, 445 S.W.2d at 701 ("revivor is not a simple matter of straightening up the record of a lawsuit").

c. <u>Did Kentucky's Tolling Statute Apply?</u>

The Estate next argues that Kentucky "saving statute," KRS 413.270, tolled the one-year requirement while the case was removed to federal court. KRS 413.270(1) states, in applicable part, the following:

> If an action is commenced in due time and in good faith in any court of this state and the defendants or any of them make defense, and it is adjudged that the court has no jurisdiction of the action, the plaintiff or his representative may, within ninety (90) days from the time of that judgment, commence a new action in the proper court. The time between the commencement of the first and last action shall not be counted in applying any statute of limitation.

Therefore, pursuant to its express language, KRS 413.270 only applies where the court in which the case was originally filed dismisses the case for lack of jurisdiction. This case was not filed in the wrong jurisdiction. It was filed in Jefferson Circuit Court, which resumed jurisdiction upon remand from the federal court. Additionally, the Estate did not take any measures that could be described as commencing a new action in the proper court within ninety days of remand.

Moreover, the Kentucky Supreme Court has held that KRS 395.278's one-year time limit cannot be extended by a tolling statute. *Wilkerson*, 255 S.W.3d at 929. In *Wilkerson*, the Court considered whether another statute, KRS 304.36-

085, tolled the one-year revival period under KRS 395.278. *Id*. at 925. The Court, after reviewing the history of revival in Kentucky, held that KRS 304.36-085's stay provision could have no effect on an action that had not yet been revived, stating "[t]he abated action is not a 'proceeding' unless it is revived. Thus, only upon revival could the stay be enforceable." *Id*. at 926. Accordingly, in this case, KRS 413.270 could not have tolled the un-revived action.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Jefferson Circuit Court dismissing the Estate's claims.

ALL CONCUR.

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