

RENDERED: JULY 19, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001349-MR
AND
NO. 2017-CA-001454-MR

LEXINGTON-FAYETTE URBAN COUNTY
HUMAN RIGHTS COMMISSION on behalf of
Ashley Bradford

APPELLANT/
CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CI-02497

LESLIE WHALEY

APPELLEE/
CROSS-APPELLANT

AND

NO. 2017-CA-001782-MR

LESLIE WHALEY

APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CI-02497

LEXINGTON-FAYETTE URBAN COUNTY

HUMAN RIGHTS COMMISSION on behalf of
Ashley Bradford; AND RAYMOND SEXTON,
INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTIVE DIRECTOR, LEXINGTON-FAYETTE
URBAN COUNTY HUMAN RIGHTS COMMISSION

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

COMBS, JUDGE: The Lexington-Fayette Urban County Human Rights Commission (the Commission), on behalf of Ashley Bradford, filed a notice of appeal from the judgment of the Fayette Circuit Court dismissing its claims against Leslie Whaley pursuant to the provisions of Kentucky Rule of Civil Procedure (CR) 37.02. Whaley filed a notice of cross-appeal. Several months later, Whaley filed a separate notice of appeal of the court's judgment as modified. After our review, we dismiss the appeals and cross-appeal.

Despite our summary resolution of these appeals and cross-appeal, a recitation of the lengthy, convoluted, and acrimonious procedural history of this matter is necessary. Ashley Bradford (Bradford), a resident of Malabu Terrace Condominiums alleged discrimination on the part of: Malabu Terrace Condominiums, (Malabu Terrace); Scott Lyons (president of the Malabu Terrace

Condominiums Homeowners Association); and Leslie Whaley (owner of a Malabu Terrace condominium leased to Ashley Bradford). Bradford claimed that they unlawfully discriminated against her and her three minor children based upon familial status, thereby violating a local ordinance and the provisions of Kentucky's Civil Rights Act codified at KRS¹ 344.010, *et seq.*

On May 19, 2005, the Commission found probable cause to indicate that Malabu Terrace, Lyons, and Whaley did indeed discriminate as Bradford had alleged. Specifically, the Commission found that Malabu Terrace, Lyons and Whaley unlawfully discriminated against Bradford and the children “by requiring [Bradford] to supervise her children when outside at all times, giving her constant complaints about the noise level and behavior of her children and placing rules that forbid riding bicycles on the property.” However, the Commission found **no probable cause** to support Bradford’s allegation that she had been denied a reasonable accommodation based upon her minor child’s disability. Malabu Terrace, Lyons, and Whaley vehemently denied the allegation of any unlawful discrimination.

On July 7, 2015, the Commission filed an action in Fayette Circuit Court against Malabu Terrace, Lyons, and Whaley. The Commission alleged that Bradford had been “subject to harassment because of her children”; that the

¹ Kentucky Revised Statutes.

children had not been “allowed outside the apartment to play or allowed to be in common areas of the condominium complex”; that Bradford had been denied use of a parking space set aside for the disabled “despite authorization”; and that Bradford had suffered embarrassment and humiliation as a result. The Commission sought imposition of a civil penalty, attorney fees, and costs. By order entered by the Fayette Circuit Court on October 24, 2016, the claims against Malabu Terrace and Scott Lyons were dismissed.

Whaley responded to the complaint with a motion to dismiss the lawsuit. In her memorandum in support of the motion, Whaley explained that she had rented her condominium at Malabu Terrace to Bradford (a single parent of three children, including a child with a disability) and that about five months after executing the lease and with rent outstanding, Bradford lodged a charge of discrimination against her. She argued that even if all of Bradford’s allegations were true, Bradford would not be entitled to judgment because Whaley was not in control of the areas in which Bradford alleged she had suffered the alleged unlawful familial discrimination. Additionally, Whaley observed that the Commission made a finding of “no probable cause” with respect to Bradford’s allegation that she had been the subject of unlawful discrimination based upon her son’s disability.

On July 30, 2015, Whaley sent Bradford a notice to vacate the property within 7 days based upon non-payment of rent. Whaley sent a separate notice to Bradford advising that her lease would not be renewed upon the expiration of the term (September 30, 2015). The Commission immediately filed a motion for injunctive relief, contending that the eviction was retaliatory. In response, Whaley explained that Bradford had not paid rent since June 2015 and that she had been late with rent payments on 6 previous occasions. Bradford moved out of the condominium in October 2015, and the Commission withdrew the motion for relief. A year after the Commission's finding of probable cause, Whaley filed an action in the small claims division of the Fayette District Court to recover three-months' rent.

Additionally, on November 3, 2016, Whaley filed a counterclaim against the Commission and a third-party complaint against Bradford and Raymond Sexton, individually, and in his capacity as executive director of the Commission. Whaley alleged that she had been fully aware of Bradford's familial status when she decided to rent the Malabu Terrace condominium to Bradford; that Bradford had advised Whaley after she moved into the condominium that multiple neighbors appeared to be upset with her; that Lyons, the president of the Malabu Terrace homeowners' association, had alerted Whaley that Bradford's children left bicycles in the middle of the walkway, broke a common-area light fixture, and

were permitted to run up and down the common stairs very loudly, disturbing other residents. Whaley also alleged that Bradford filed a complaint against her with the Commission only after Bradford began to have difficulty making her rent payments; that the Commission violated the provisions of the Kentucky Civil Rights Act by failing to conduct a timely investigation; that the Commission's investigator, Marjorie Gonzalez, conducted a patently unfair investigation; that Gonzalez determined that there was probable cause to believe that Whaley had unlawfully discriminated against Bradford **without any evidence** to support the allegation; and that Sexton approved the determination by Gonzalez despite the lack of evidence.

Whaley sought an order enjoining the Commission from acting outside its authority; an order enjoining Sexton from further retaliatory conduct; reimbursement of attorney fees, costs, and expenses associated with her defense of the unsupported action against her; damages incurred as a result of Bradford's breach of the lease agreement and her destruction of the condominium property.

The Commission filed a motion to dismiss Whaley's counterclaim and third-party complaint. On December 2, 2016, the trial court denied the motion. Sexton then filed an action against Whaley for abuse of process and for making a claim of retaliation under the provisions of Kentucky's Civil Rights Act.

Discovery commenced.

On February 3, 2017, Whaley filed a motion for sanctions, including dismissal of the action filed against her by the Commission. She also sought attorney fees based upon the Commission's alleged discovery misconduct, including perjury and a repeated failure to comply with the trial court's orders. The Commission responded, arguing that its action should not be dismissed.

After a hearing, and by its interlocutory order entered on March 27, 2017, the circuit court granted Whaley's motion to dismiss the Commission's claims against her pursuant to the provisions of CR 37 (the civil rule dealing with sanctions for failure to comply with discovery orders). The trial court found that in acting on behalf of Bradford, the Commission responded dishonestly on multiple occasions in its verified responses to written discovery; that Bradford testified dishonestly multiple times; that the Commission failed and refused to produce relevant evidence, including the personnel file of Investigator Gonzalez; that the Commission's conduct reflected a pattern of dilatory conduct; that the Commission's counsel had not caused the misconduct; and that the Commission's claims would be difficult to prove. The trial court found that no sanctions short of dismissal would be sufficient. It ordered the Commission's claims of discrimination and retaliation to be dismissed. It also ordered the Commission to produce the outstanding discovery, including Whaley's request for Gonzalez's personnel file. Finally, the trial court concluded that following the submission of

Whaley's bill of costs, "the Court will make an award of fees and costs against Ms. Bradford."

On April 6, 2017, the Commission filed a motion to alter, amend, or vacate the court's order entered on March 27, 2017. On April 10, 2017, Whaley submitted a bill of costs totaling \$27,440.85. On April 19, 2017, she filed her response to the Commission's motion to alter, amend, or vacate.

On April 25, 2017, Sexton filed a motion for summary judgment with respect to the claims brought against him in both his individual and official capacities. Sexton contended that he was entitled to qualified immunity from Whaley's claims because: his official actions had been discretionary; her federal civil rights claims were time-barred; and she did not have a private right of action against him under provisions of the state Constitution.

Whaley challenged Sexton's motion and, on May 21, 2017, she filed a cross-motion for summary judgment. Whaley argued that Sexton acted improperly with malicious intent and exceeded his authority as the Commission's executive director. Whaley contended that Sexton directed the Commission to target her based upon nothing more than a text message that she sent to Bradford in reply to Bradford's query and which was plainly consistent with the Commission's express recommendations for landlords. Whaley contended that Sexton utterly failed to investigate whether any of the Commission's rules had a disparate impact on

families with children; whether Malabu Terrace brought claims for disability discrimination and disparate impact discrimination without cause; and whether the Commission refused to serve as an unbiased fact-finder.

On May 26, 2017, Whaley filed a motion requesting the trial court to modify its order of March 27, 2017, that dismissed the Commission's action against her and awarded her costs and fees against Bradford. Whaley contended that the Commission should be jointly responsible for the costs and fees awarded to her. The Commission opposed the motion.

On June 3, 2017, Bradford filed an answer to Whaley's complaint against her. Bradford also filed a counterclaim asserting retaliatory conduct for Whaley's decision to file a small claims complaint against her for the recovery of unpaid rent. Discovery relative to Whaley's action against the Commission continued.

Following oral argument, the circuit court granted Sexton's motion for summary judgment and entered an interlocutory order on July 20, 2017.

The court concluded that Whaley's federal civil rights action was time-barred; that Sexton was immune from Whaley's state constitutional claims; and that Sexton's actions had not been undertaken in bad faith or with a reckless disregard for Whaley's rights. The court also granted Whaley's motion for summary judgment

with respect to Sexton's claims against her for abuse of process and unlawful retaliation in violation of Kentucky's Civil Rights Act.

On July 26, 2017, another interlocutory order was entered. This order was substantially similar to the order entered on March 27, 2017, dismissing the Commission's action against Whaley and awarding fees and costs against Bradford.

On August 10, 2017, yet another interlocutory order was entered. The order granted, in part, Whaley's motion to modify the court's order of July 26, 2017. The Commission was ordered to pay a portion of the attorney fees awarded to Whaley in the court's order of July 26.

On August 18, 2017, the Commission filed a motion to vacate the August 10 award of attorney fees. Several days later, the Commission filed a notice of appeal of the court's judgment entered on July 26, 2017. The appeal is designated by this Court as 2017-CA-001349-MR.

On August 31, 2017, Whaley filed a notice of her cross-appeal of the court's order entered on July 26, 2017. This cross-appeal is designated as 2017-CA-001454-MR.

On September 20, 2017, the Commission filed a motion re-noticing its motion to vacate the award of attorney fees made by the trial court through its order entered on August 10, 2017. The Commission argued that as a matter of law,

an award of attorney fees could not be made against the Commonwealth as a discovery sanction. Whaley opposed the motion, arguing in part that the trial court no longer had jurisdiction over the matter because the order was now the subject of the Commission's appeal and her cross-appeal.

Through its order entered on October 16, 2017, the trial court vacated (in part) its order of August 10, 2017-- essentially granting the Commission's motion of August 18, 2017.

On November 1, 2017, Whaley filed her notice of appeal of the court's order entered on July 26, 2017, as modified by the orders entered on August 10, 2017, and October 16, 2017. This appeal is designated as 2017-CA-001782-MR.

The parties filed numerous and voluminous briefs. On May 14, 2018, we ordered the appeals and cross-appeal consolidated to the extent that they would be considered by a single panel of the court. The panel has considered the appeals and cross-appeal. After our review, we are compelled to dismiss them as having been taken from a non-final order of the trial court.

This Court is required to raise a jurisdictional issue on its own motion if the underlying order lacks finality. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 101 (Ky. App. 2011) citing *Huff v. Wood-Mosaic Corp.*, 454

S.W.2d 705, 706 (Ky. 1970). The order from which this appeal is taken clearly lacks finality.

“A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02.” CR 54.01. The order from which the Commission and Whaley seek to appeal did not adjudicate all the rights of all the parties in the case because there were claims remaining against the Commission, against Whaley, and against Bradford. Consequently, the judgment was not final and appealable unless it was made so pursuant to the provisions of CR 54.02.

CR 54.02 provides, in pertinent part, as follows:

- (1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
- (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of

that date and in the same terms all prior interlocutory orders and judgments determining claims which are not specifically disposed of in such final judgment.

CR 54.02(1)-(2).

Although the court's order entered on July 26, 2017, stated that it was final and appealable, and due to the fact that not all claims had been finally adjudicated, the trial court did not treat it as such. Moreover, the order did not recite that a determination had been made that there was no just cause for delay. In the absence of such language, the appeal must be dismissed. *See Stillpass v. Kenton County Airport Bd., Inc.*, 403 S.W.2d 46 (Ky. 1966), and *Beasley v. Trontz*, 677 S.W.2d 891 (Ky. App. 1984).

Finally, we note that both parties present lengthy arguments related to the order of the trial court entered on July 20, 2017. As summarized above, through the order entered on July 20, 2017, the circuit court granted Sexton's motion for summary judgment with respect to Whaley's federal civil rights claims and state constitutional claims. The court also granted Whaley's motion for summary judgment with respect to Sexton's claims against her for abuse of process and unlawful retaliation in violation of Kentucky's Civil Rights Act. This order, too, **was designated as interlocutory** and did not contain the finality language required by the provisions of CR 54.02(1). Critically, however, it is not the subject of either of the notices of appeal or the notice of cross-appeal.

It is hereby ORDERED that this appeal be DISMISSED for lack of jurisdiction because it is an appeal from a nonfinal judgment that was not made final by the language required by CR 54.02(1) and because it did not adjudicate all the claims of all of the parties.

ALL CONCUR.

ENTERED: July 19, 2019

/s/ Sara Combs
Judge, Court of Appeals

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