

RENDERED: JUNE 14, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001644-MR
AND
NO. 2017-CA-001681-MR

RICHARD L. CLARK

APPELLANT

v. APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 13-CI-004094

LOUISVILLE-JEFFERSON COUNTY
METRO GOVERNMENT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: Richard L. Clark appeals from orders of the Jefferson Circuit Court granting summary judgment to Louisville-Jefferson County Metro Government (Metro) and denying Clark's motions to strike and for leave to amend his complaint.

On August 3, 2013, Clark filed a complaint against Metro in Jefferson Circuit Court alleging that rain water flowing from an elevated area of the Jefferson Memorial Forest was causing significant damage to a pond on his nearby property. According to Clark, the damage was caused by Metro's negligence in failing to maintain an eroded spillway. Metro filed a motion to dismiss, asserting the defense of sovereign immunity. Clark filed a detailed response and supporting documentation. Following a hearing, the trial court entered an opinion on October 22, 2014, denying Metro's motion on the grounds that the applicable standard was governmental, not sovereign, immunity. The trial court held that Metro's duty to maintain its property was ministerial and consequently it could not evoke governmental immunity. The parties thereafter engaged in discovery for over two years, culminating in an unsuccessful mediation on November 4, 2016.

On January 23, 2017, Metro filed a motion for summary judgment, asserting it was entitled to sovereign, rather than governmental, immunity. Clark filed a motion to strike on the ground the question of immunity had already been fully briefed and decided in 2013. Metro responded that motions to dismiss and motions for summary judgment are distinct requests for relief each with its own standard of review and that in any event it was entitled to revisit issues raised in the prior motion as the proof had been developed since then. On March 27, 2017, Metro filed supplemental authority in the form of *Louisville/Jefferson County*

Metro Government v. Cowan, 508 S.W.3d 107 (Ky. App. 2016), an opinion which holds that “Louisville Metro is entitled to sovereign immunity rather than governmental immunity and is thus absolutely immune from suit.” *Cowan* at 109.

The hearing on Clark’s motion to strike was held on April 19, 2017. At the close of arguments, the trial court took the motion to strike under submission and stated that if Clark prevailed, the court would assign a new trial date; if Clark was not successful, the court indicated it would let the litigants know the briefing schedule on the pending dispositive motion, i.e., the motion for summary judgment.

On July 19, 2017, Clark filed a motion to amend his complaint to assert a claim for inverse condemnation and to add as additional parties the Louisville Metro Parks and Recreation Department, Jefferson Memorial Forest, and David Bennett Knox III.

At the hearing on the motion, which was held on August 17, 2017, the trial court inquired whether the parties were awaiting a ruling on the motion for summary judgment. The attorneys informed the court that while waiting for a ruling, Clark’s counsel had made the motion to amend and add parties and Metro had filed an objection. The trial court ruled that in light of the pending motion and objection, it would continue to take these issues under submission and consider them together with the pending motion.

On September 6, 2017, the trial court entered an order denying Clark's motion to strike and granting Metro's motion for summary judgment.

The order was not postmarked to Clark's counsel until thirteen days later, on September 19, 2017. Clark's counsel did not receive a copy of the order until on or about September 21, 2017.

The trial court also denied Clark's motion for leave to amend his complaint and to join additional parties in an order signed by the trial court on September 9, 2017 and entered on September 19, 2017.

On September 27, 2017, Clark filed a motion for additional time to file a motion to alter, amend or vacate the order granting summary judgment and denying the motion to strike along with a tendered motion; a motion to alter, amend or vacate the order denying the motion to amend the complaint; and a motion pursuant to Kentucky Rules of Civil Procedure (CR) 60.02 seeking relief from the order granting Metro's motion for summary judgment and motion to strike. On October 4, 2017, Clark filed a notice of appeal from the denial of the motion to strike and the order granting summary judgment. On the same day, the trial court ordered a hearing on all pending motions. Following that hearing, which was held on October 9, 2017, the trial court entered an order denying the motion to alter, amend or vacate the order denying the motion to amend the complaint. Clark

filed an additional appeal from that order. The two appeals have been consolidated.

Clark contends that by simultaneously denying his motion to strike and granting Metro's motion for summary judgment, the trial court denied him the opportunity to respond on the merits to the summary judgment motion as provided under CR 12.01. He argues that the trial court's action contradicted statements it made at the hearing on April 19, 2017, at which it indicated it would issue a briefing schedule on the summary judgment motion if it denied Clark's motion to strike. Additionally, Clark claims that the trial court violated CR 77.04 by failing to notify him of its ruling on the summary judgment motion in a timely manner, thus depriving him of the opportunity to file a motion to alter, amend or vacate within ten days of entry of the judgment. CR 77.04(1) provides in pertinent part as follows: "Immediately upon the entry in the trial court of a judgment, a final order, an order which affects the running of time for taking an appeal, or an order which by its terms is required to be served, the clerk shall serve a notice of the entry by mail in the manner provided in Rule 5 upon every party who is not in default for failure to appear." In this case, it appears thirteen days elapsed between when the order was signed and entered, and when it was actually mailed.

Clark was not denied an opportunity to respond on the merits to the summary judgment motion. Presumably as a matter of trial strategy, he chose

instead to file only a motion to strike. Although Clark was unable to file a timely CR 59.05 motion following entry of the summary judgment, he did file a motion seeking relief pursuant to CR 60.02 which re-invested the trial court with jurisdiction over its prior judgment. *James v. James*, 313 S.W.3d 17, 21 (Ky. 2010). Any harm that resulted from the clerk's delay in mailing the order granting summary judgment was mitigated by the fact that the trial court entertained Clark's CR 60.02 motion. The recording of the October 9, 2017, hearing on the CR 60.02 motion is not in the record before us and consequently we do not know the grounds on which the trial court denied it. There is no written order in the record denying the CR 60.02 motion. The appellant is responsible for ensuring that the record on appeal is "sufficient to enable the court to pass on the alleged errors." *Burberry v. Bridges*, 427 S.W.2d 583, 585 (Ky. 1968). "It has long been held that, when the complete record is not before the appellate court, that court must assume that the omitted record supports the decision of the trial court." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985) (citation omitted).

He further argues that the trial court committed palpable error by granting summary judgment to Metro without giving him an opportunity to respond on the merits even though he had relied on the trial court's statement that a briefing schedule on the motion would be established if the motion to strike was denied. In reviewing the trial court's action for palpable error, we must determine

if the substantial rights of a party were affected and if the trial court's action resulted in manifest injustice. *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19, 27 (Ky. 2008), *abrogated on other grounds by Nami Resources Company, L.L.C. v. Asher Land and Mineral, Ltd.*, 554 S.W.3d 323 (Ky. 2018). Clark does not explain what arguments he could have raised to counter the trial court's ruling, pursuant to *Cowan*, that Metro was entitled to sovereign immunity as a matter of law. Nor does he request palpable error review of the trial court's decision to grant summary judgment to Metro as a matter of law on the basis of *Cowan*. Clark has not demonstrated how the trial court's decision to grant summary judgment after two years of discovery resulted in manifest injustice, particularly when we consider the function of sovereign immunity, which "entitles its possessor to be free from the burdens of defending the action, not merely . . . from liability. . . . Immunity from suit includes protection against the cost of trial and the burdens of broad-reaching discovery that are peculiarly disruptive of effective government." *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886 (Ky. 2009) (internal citations and quotation marks omitted).

Clark further argues that by denying the motion to amend his complaint to add a claim of inverse condemnation against Metro, the trial court violated his state and federal constitutional rights.

Pursuant to CR 15.01, . . . "a party may amend his pleading only by leave of court or by written consent of the adverse

party; and leave shall be freely given when justice so requires.” In determining whether to grant a motion to amend a party’s complaint, a circuit court may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself. Other factors include whether amendment would prejudice the opposing party or would work an injustice. Ultimately, whether a party may amend his complaint is discretionary with the circuit court, and we will not disturb its ruling unless it has abused its discretion.

Kenney v. Hanger Prosthetics & Orthotics, Inc., 269 S.W.3d 866, 869–70 (Ky. App. 2007) (internal citations and quotation marks omitted).

As the basis of his claim of inverse condemnation, Clark contends that Metro’s alleged failure to maintain and repair the dam and spillway on its property in accordance with Guidelines promulgated by the Kentucky Natural Resources and Environment Protection Cabinet has caused him to spend significant funds cleaning his pond and replacing the fish which have died as a result of the pollutants flowing into it. As we have stated, over two years elapsed following the trial court’s denial of Metro’s first motion for summary judgment during which Clark was able to conduct discovery and to research the legal basis of his suit. There is no allegation that the facts he presents to support his claim of inverse condemnation were unknown or undiscoverable to him during this lengthy period. It was not an abuse of discretion to deny his motion to amend the complaint.

Clark further argues that the trial court’s refusal to allow him to amend the complaint to add the claim of inverse condemnation violated his federal

and state constitutional rights as an unjust taking. But Clark provides no support for the view that a claim which implicates a constitutional right divests the trial court of its discretion to decide whether to allow the complaint to be amended to include it.

Similarly without merit is his argument that he should have been permitted to amend his complaint to add as a defendant the administrator of Jefferson Memorial Forest, who was not subject to the same absolute immunity standard as Metro. Clark offers no reason why Knox could not have been named as a defendant in the original complaint or added as a defendant during the two years preceding the filing of the second motion for summary judgment. There is no allegation that he was not known to Clark; indeed, Clark concedes that he notified Knox on numerous occasions regarding the damages to his property.

For the foregoing reasons, the orders of the Jefferson Circuit Court granting summary judgment to Metro, denying Clark's motion to strike, and denying his motion to file an amended complaint and to add parties are affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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