In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI EX REL. COMMUNITY TREATMENT, INC., ET AL.,	)	**WD81352**
Appellants,	)	**OPINION FILED: October 2, 2018**
v.	)	
MISSOURI COMMISSION ON HUMAN RIGHTS AND ALISA WARREN, PH.D., IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE MISSOURI COMMISSION ON HUMAN RIGHTS,	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Before Division One: Thomas H. Newton, Presiding Judge, Gary D. Witt, Judge and Anthony Rex Gabbert, Judge

Community Treatment, Inc., Sue Curfman, Gene Bryan, and Judy Finnegan (collectively "Community Treatment") appeal the judgment of the Circuit Court of Cole County, Missouri, dismissing their First Amended Petition for Writ of Mandamus

("Amended Petition"). Community Treatment sought a writ mandating the Missouri Commission on Human Rights (the "Commission") withdraw a right-to-sue letter issued pursuant to section 213.111.1[1] to Danielle Brantley ("Brantley"), who sought to file suit against Community Treatment alleging Community Treatment discharged her in violation of the Missouri Human Rights Act ("MHRA")[2] and the reasons it provided for her termination were pretextual. Specifically, Community Treatment alleges the circuit court erred in granting the Commission's motion to dismiss both because the court improperly considered matters beyond the pleadings but also because it wrongfully concluded that the Amended Petition failed to state a claim upon which relief could be granted. Because we have before us an incomplete record, we dismiss the appeal.

Factual Background[3]

The following facts are alleged in Community Treatment's First Amended Petition for Preliminary and Permanent Writs of Mandamus. Brantley was an employee of Community Treatment, Inc. from October 28, 2013, to February 11, 2016, at which time Community Treatment, Inc. terminated her employment. On August 19, 2016, Brantley filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Commission alleging discrimination and retaliation on the part of Community Treatment, Inc, Sue Curfman and Gene Bryan, and later adding Judy Finnegan

[1] All statutory references are to RSMo 2016, as currently updated through August 27, 2017.

[2] Chapter 213 RSMo.

[3] "When we consider whether a petition fails to state a claim, we accept all properly pleaded facts as true, giving the pleadings their broadest intendment. We construe all allegations favorably to the pleader and determine if the facts alleged meet the elements of a recognized cause of action." *Coleman v. Carnahan*, 312 S.W.3d 377, 379 (Mo. App. E.D. 2010) (internal citation omitted).

("Charge").[4] The Charge was filed 190 days after Brantley's termination. The Commission corresponded with Brantley's attorney by email discussing the timeliness of Brantley's Charge. The Commission "examined the charge and determined that it was untimely under Section 213.075, RSMo, because it was not filed within 180 days of Brantley's termination of employment." The Commission took no further action on the Charge and stopped its processing.

Following a request by Brantley, on May 15, 2017, the Commission issued Brantley a right-to-sue letter indicating that the Commission had not made any determination as to its jurisdiction, but was issuing the letter pursuant to Brantley's request. The Commission's statement in the right-to-sue letter, that it had not yet made any determination as to its jurisdiction, was incorrect because the Commission had already determined the Charge to be untimely filed.

On June 9, 2017, Community Treatment filed a petition for a preliminary writ and a writ of mandamus, which was later amended. Community Treatment sought a writ ordering the Commission to withdraw and vacate the right-to-sue letter and ordering the Commission to dismiss the underlying Charge for lack of jurisdiction. Brantley sought leave to intervene in the proceeding; the court granted her motion. On October 13, 2017, Community Treatment filed Suggestions in Support of its Amended Petition, including the filing of several exhibits. The Commission filed a motion to dismiss the Amended Petition

[4] The Charge was amended on April 4, 2017, to add Judy Finnegan as a Respondent.

on October 20, 2017 ("Motion to Dismiss"). Brantley filed her own motion to dismiss on October 23, 2017.

The court held a hearing on both motions on November 20, 2017 ("Motion Hearing"). Following the hearing, the court entered its judgment ("Judgment") dismissing the Amended Petition and quashing the preliminary writ on December 20, 2017.[5] This appeal followed.

Standard of Review

"This Court reviews the grant of a motion to dismiss *de novo.*" *Jackson v. Barton*, 548 S.W.3d 263, 267 (Mo. banc 2018). "A motion to dismiss a petition for a writ of mandamus for failure to state a cause of action, like any motion to dismiss for failure to state a claim, is solely a test of the adequacy of the relator's petition." *Lemay Fire Prot. Dist. v. St. Louis Cnty.*, 340 S.W.3d 292, 294 (Mo. App. E.D. 2011). The question of whether a petition states a claim for which relief can be granted is a question of law. *Id.* "We review the grant of such a motion in the light most favorable to the relator's claims, assume all of the facts alleged in the pleading are true, construe those facts liberally in favor of the relator, give the relator the benefit of every reasonable intendment favorable to its pleading, and judge the pleading with []'broad indulgence.'" *Id.* "We do not weigh the factual allegations to determine whether they are credible or persuasive."

[5] Initially the court entered its judgment on November 30, 2017, but the judgment was amended on December 20, 2017, and it is the amended judgment before this Court.

Chochorowski v. Home Depot U.S.A., Inc., 295 S.W.3d 194, 197 (Mo. App. E.D. 2009). "The determination of factual questions is not appropriate on a motion to dismiss." *Id.*

Discussion

Community Treatment raises two allegations of error on appeal. In their first point, Community Treatment alleges that the circuit court erred in dismissing the Amended Petition because the court did not either consider solely the allegations in the pleadings or the court failed to comply with the requirements of Rule 74[6] to convert the motion to dismiss into a motion for summary judgment if it considered matters outside of the pleadings. In its second point, Community Treatment alleges that the circuit court erred in dismissing the Amended Petition because the Amended Petition did state a claim upon which relief could be granted.

"In ruling on a motion to dismiss, the trial court can only consider the pleadings, and appellate review is also limited to the pleadings." *Walters Bender Strohbehn & Vaughan, P.C. v. Mason*, 316 S.W.3d 475, 479 (Mo. App. W.D. 2010) (quoting *L.C. Dev. Co. v. Lincoln Cnty.*, 26 S.W.3d 336, 339 (Mo. App. E.D. 2000)). If the court considers matters outside the pleadings, Rule 55.27(a) allows a motion to dismiss to be converted into a motion for summary judgment if certain procedures are followed. *Id.* Rule 55.27(a)(11)(B) states, in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as

[6] All rule references are to Missouri Supreme Court Rules (2018).

> provided in Rule 74.04. All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

"Before a trial court may treat a motion to dismiss as a motion for summary judgment, however, it must notify the parties that it is going to do so and give the parties an opportunity to present all materials pertinent to a motion for summary judgment." *Walters Bender*, 316 S.W.3d at 480 (quoting *Grellner v. Foremost Signature Ins. Co.*, 291 S.W.3d 351, 353-54 (Mo. App. E.D. 2009)). Where there is no evidence that the court notified the parties that it intended to treat the motion as a request for summary judgment or considered matters outside the pleadings it will be treated as a motion to dismiss. *See Manzer v. Sanchez*, 985 S.W.2d 936, 939 (Mo. App. E.D. 1999). "When, however, 'both parties introduce evidence beyond the scope of the pleadings, the motion to dismiss is converted to a motion for summary judgment and the parties are charged with knowledge that the motion was so converted.'" *City of N. Kansas City v. K.C. Beaton Holding Co.*, 417 S.W.3d 825, 830 n.6 (Mo App. W.D. 2014) (quoting *Mitchell v. McEvoy*, 237 S.W.3d 257, 259 (Mo. App. E.D. 2007)); *Energy Creates Energy, LLC v. Heritage Grp.*, 504 S.W.3d 142, 149 (Mo. App. W.D. 2016) (noting Missouri courts have held "when both parties put forward evidence outside of the pleadings and neither party objects, the parties have acquiesced to the motion to dismiss being converted to one for summary judgment without notice from the trial court and the dispensing of the procedural requirements of Rule 74.04.") (footnote omitted).

Community Treatment alleges that Brantley's attorney used three exhibits not attached to the Amended Petition in both her motion to dismiss and at the hearing

conducted on the motion. Community Treatment also alleges that in the Commission's Motion to Dismiss, the Commission improperly relied on the evidence of whether a letter was sent to Brantley by the Commission stating that the administrative process was completed. Community Treatment admits that it also put forward additional evidence in the form of exhibits attached to its Suggestions in Support of the Amended Petition.[7] To properly determine what evidence the circuit court considered and whether the court improperly considered evidence beyond the pleadings when ruling on the Motion to Dismiss, or whether the Motion to Dismiss was properly converted to one for Summary Judgment, we must review the entirety of the record.

This appeal, however, does not contain the full record for this Court to determine what evidence was presented to or considered by the circuit court in reaching its decision. The circuit court held the Motion Hearing to take up the Motion to Dismiss. However, no transcript of the Motion Hearing was provided to this Court and thus we are left with the inability to determine if the parties consented or objected on the record to have the motion treated as one for summary judgment. Nor can we determine what evidence, either through testimony or documentary exhibits, was offered by the parties, considered by the court or what if any objections were raised to any of the exhibits by any party. "Rule 81.12 specifies the record which must be provided by an appellant on appeal and imposes upon an

[7] Suggestions in support of a writ of mandamus as well as the exhibits that are "essential to an understanding of the matters set forth in the petition" are required by Rule 94.03. Yet, in its Reply Brief, Community Treatment itself takes the position that such documents are irrelevant because they are not a part of the pleadings in the case, effectively conceding the point that all parties presented the court with evidence beyond the pleadings.

appellant the duty to file the transcript and prepare a legal file so that the record contains all evidence necessary to make determinations on the issues raised." *Bank of New York Mellon Trust Co., N.A. v. Jackson*, 484 S.W.3d 814, 816 (Mo. App. W.D. 2015) (quoting *Reno v. Reno*, 461 S.W.3d 860, 865 (Mo. App. W.D. 2015)). "Claims attacking the trial court's conclusions cannot be reviewed without consulting the *entire record* to determine if the trial court's result was correct, even if the reasoning was erroneous." *Indep. Taxi Drivers Ass'n, LLC v. Metro. Taxicab Comm'n*, 524 S.W.3d 157, 160 (Mo. App. E.D. 2017) (noting that a transcript of the trial court proceedings is necessary so that this Court can verify factual statements and verify which exhibits were admitted into evidence).[8] Lacking a transcript, this Court has no way of knowing what evidence was presented by the parties at the Motion Hearing nor whether any party raised an objection to the consideration of evidence beyond the scope of the pleadings.[9] Thus, this Court cannot make a determination as to whether the Motion to Dismiss was properly converted into a summary judgment motion.

"If an appellant fails to provide this court with a record containing everything necessary to determine all questions presented to this court, the appeal must be dismissed."

[8] This is not merely a theoretical point. Community Treatment states in its briefing that: "Counsel for both the Commission and Brantley appeared at the same hearing and argued their motions--including extensive argument about matters outside the pleadings." This statement is made without citation to the record--because the transcript was not filed with this Court--and this Court has no ability to verify this statement or determine what matters outside the pleadings may have been considered by the court.

[9] At oral argument it was Community Treatment's position that the Motion Hearing was held in the courtroom but off the record. The counsel for the Commission had no recollection as to whether the Motion Hearing was held on or off the record. This Court is hard pressed to understand how a hearing on a motion to dismiss could be held in the courtroom but somehow was "off the record." Regardless, a transcript of that hearing is critical to this Court's analysis of the legal issues presented and the lack of a transcript prevents this Court from properly considering the issues raised by Community Treatment on appeal.

Id. at 162. While we are aware we have a duty to provide a review of the merits of a case when possible, this principle "presupposes a record upon which this court can act with some degree of confidence in the reasonableness of its review, without resort to speculation and conjecture as to the controlling facts of the case." *Id.* (quoting *City of St. Clair v. Cash*, 579 S.W.2d 763, 764 (Mo. App. E.D. 1979)).

Community Treatment's first point on appeal asks us to determine whether the circuit court erred in improperly considering matters outside the pleadings when dismissing the Amended Petition. We cannot make such a determination without knowing what evidence and matters were discussed by the parties and the circuit court, nor what objections were raised at the Motion Hearing. We would be left to speculate as to what evidence and matters were properly or improperly considered. Given the record before us, this Court is unwilling to entertain such speculation.

Even if we were to enter into speculation, the limited record we have would appear to support a conclusion that the court properly converted the Motion to Dismiss into one for summary judgment because the parties both relied on evidence beyond the face of the petition. "Where no transcript is filed, such evidentiary omission will be taken as favorable to the trial court's ruling and unfavorable to the appellant." *In re Estate of Abbott*, 944 S.W.2d 279, 284 (Mo. App. S.D. 1997).

Were this Court to *sua sponte* review the propriety of the Judgment as a grant of a motion for summary judgment--an argument not raised--Community Treatment would not

be entitled to relief.[10] Appellate review of summary judgment is *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The judgment will be upheld if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. *Id.* at 377. We will review the record in the light most favorable to Community Treatment as the party against whom judgment was entered. *Id.* at 376.

The basis for Community Treatment's request for a writ of mandamus was that the Commission had made a "determination" as to the timeliness of Brantley's Charge, and therefore a determination that the Commission had no jurisdiction over this matter, prior to issuing the right-to-sue letter. The sole support for this contention was e-mail correspondence between the members of the investigative team at the Commission, an investigator with the EEOC, and Brantley's attorney. These e-mails were attached to Community Treatment's Suggestions in Support of its Amended Petition as Exhibits A and B. The over 100 pages of e-mails and their contents are uncontroverted, the parties instead disagree as to their ultimate legal effect. Community Treatment sees them as official notification of a formal finding by the Commission that they had made a determination that the Charge was untimely and stopped processing the Charge, thus ending Brantley's right to receive the right-to-sue letter. The Commission argues that the e-mails are insufficient to meet the statutory and regulatory requirements for completion of the administrative

[10] If the motion to dismiss was properly converted to a motion for summary judgment, this court can review the judgment "if it is apparent that the parties and the court were informed of the issues, and there is no genuine factual dispute with respect to the evidence submitted to support the motion . . . ." *City of N. Kansas City*, 417 S.W.3d at 830 n. 6.

process and notification of that finding to a party and thus the Commission had no choice but to provide the right-to-sue letter to Brantley.

Section 213.111.1 states in relevant part that if "the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice against the respondent named in the complaint." The regulations governing the closing of the administrative process state that when dismissal or administrative closure is deemed to be appropriate "[t]he parties shall be notified by mail of the commission's dismissal or administrative closure and of complainant's right to appeal." 8 CSR 60-2.025(7)(C).[11] This notification is necessary because "[a]ny person aggrieved by dismissal of a complaint" has only "thirty (30) days after the mailing or delivery of the notice of dismissal" to file an appeal. 8 CSR 60-2.025(7)(E).

The emails cited by Community Treatment as a "determination" of untimeliness do not meet the regulatory requirements for the end of the administrative process or for providing a party notice of that determination. At best, they indicate that the Commission had identified a potential issue as to timeliness and corresponded with Brantley's attorney to better understand and evaluate the issue. While questions were raised, the emails do not make any final determination. Based on these documents, the last correspondence from

[11] All regulatory references are to the Missouri Code of State Regulations as currently updated unless otherwise indicated.

any employee of the Commission to Brantley's attorney, prior to Brantley's request for a right-to-sue letter, contained a question seeking clarification of the EEOC's actions. Even viewing the correspondence in a light most favorable to Community Treatment, we find that to the extent a "determination" was made by anyone employed by the Commission, it is preliminary in nature. They were merely e-mails from an investigator employed by the Commission, there is no indication that the Commission itself considered or acted on the Charge in any fashion.

Even if this did reflect that the Commission had made a final determination, the relevant inquiry is not the "determination" but whether the administrative process was complete. At the close of the administrative process the regulations require specific notice be mailed to the aggrieved party formally notifying such party of the determination and informing the aggrieved party that they have ninety days to initiate an appeal. The e-mails put forward by Community Treatment contain no such information which would serve as notification that the administrative process was complete. Therefore, even if this Court were to address the merits of the appeal, the lack of transcript requires us to presume that the case was properly converted to summary judgment and, when reviewed through the lens of review of summary judgment, we would conclude that the circuit court did not err in granting judgment in favor of the Commission.

Community Treatment's second point on appeal alleges that the circuit court improperly dismissed the case because the Amended Petition did state a claim upon which relief could be granted. Either, this point suffers from the same lack of record as discussed

above and we must dismiss, or the point is moot because the Judgment was ultimately a grant of summary judgment and thus a discussion of a motion to dismiss is irrelevant. We find that we cannot accurately review either point on appeal without first determining what type of motion was properly considered by the circuit court and that determination cannot be properly reviewed without a transcript of the hearing. Thus, we have no choice but to dismiss the appeal for want of a complete record.

Conclusion

Because this Court lacks the entire record that was before the circuit court, specifically the transcript of the Motion Hearing, we cannot properly decide the issues raised by Community Treatment on appeal. We dismiss the appeal.

Gary D. Witt, Judge

All concur