



In the Missouri Court of Appeals Eastern District

SOUTHERN DIVISION

JAY PURCELL,)	No. ED92213
)	
Appellant,)	Appeal from the Circuit Court
)	of Cape Girardeau County
v.)	
)	
CAPE GIRARDEAU COUNTY)	Honorable Stephen R. Mitchell
COMMISSION,)	
)	
Respondent.)	Filed: July 21, 2009

Introduction

Cape Girardeau County Commissioner Jay Purcell (Purcell), in his individual capacity, sued the Cape Girardeau County Commission (the Commission) alleging violations of Missouri's Open Meetings and Records Act, commonly referred to as Missouri's Sunshine Law, Sections 610.010 through 610.030, RSMo (2006).¹ The trial court granted summary judgment in the Commission's favor, finding *inter alia*, that the Commission met the requirements of Section 610.022 because a public governmental body is not required to make a detailed agenda of matters to be discussed in closed session. The trial court further found that even if the Commission did not meet the requirements of Section 610.022, its failure to comply with the Sunshine Law was not knowing or purposeful. Purcell appeals the trial court's decision.

This appeal presents the Court with the issue of whether the Commission may be sued as an entity without naming as parties the individual members of the Commission, or whether any

¹ All subsequent statutory references are to RSMo 2006, unless otherwise indicated.

cause of action against the Commission must be brought through the individual members of the Commission. Finding the latter proposition to be required under Missouri law, we reverse the judgment of the trial court and remand with directions that the action be dismissed without prejudice.

Background

Before the Commission held its meeting on April 17, 2008, a meeting notice was posted as required under Missouri's Sunshine Law. The notice stated that the "Commission may, as part of their regular meeting, conduct any such business that may come before the Commission." The notice then listed several specific items included within "Routine Business," "Action Items," and "Discussion Items and Appointments."

The meeting agenda also provided the following statement regarding a "closed" session meeting and adjournment:

Executive Session

(The County Commission may, as part of a regular or special County Commission meeting, hold a closed session to discuss legislation or litigation, leasing, purchasing, sale of real estate, or personnel matters). Authority is Section 610.025.3 and 610.025.1, Revised Statutes of Missouri, as amended.

Adjournment (Action)

Posted: April 16, 2008, at 9:00 a.m.

On April 17, 2008, Commissioners Purcell, Larry Bock, and Presiding Commissioner Gerald Jones conducted a meeting of the County Commission at the Commission's office. After the Commission conducted its routine business, action items, discussion items and appointments, Purcell made a motion to adjourn the Commission meeting to a closed session to discuss the "County Auditor issue" and "the McBryde easement" issue. The motion passed unanimously. During the closed portion of the meeting, the Commission discussed the alleged misuse of county resources by the County Auditor, and the Commission's options to punish the auditor or force him to discontinue his violation of county policies on resource use. In addition, the

Commission discussed the issue of an improperly notarized easement. Cape Girardeau County's prosecuting attorney was present during a portion of the closed meeting. Cape Girardeau County's auditor, an elected official, also was present during some portions of the closed meeting.

Less than a month following the April 17, 2008 meeting, Purcell filed suit against the Commission alleging that the Commission's notice and meeting violated Missouri's Sunshine Law. On August 4, 2008, the parties filed a Joint Stipulation submitting and verifying a true and accurate recording of the entire April 17, 2008 meeting. Purcell then moved for summary judgment. In response, the Commission filed its Answer to Plaintiff [] Purcell's Motion for Summary Judgment (Answer) and suggestions in support of that Answer. The Commission also filed Defendant's Motion to Dismiss and for Declaratory Judgment on September 10, 2008. Purcell filed a Reply to Defendant's Answer to [] Purcell's Motion for Summary Judgment, which included a response to the Commission's Motion to Dismiss and for Declaratory Judgment.

The Trial Court's Summary Judgment Ruling

On October 9, 2008, the trial court announced that the Commission's Motion to Dismiss and for Declaratory Judgment would be considered for disposition on the merits as a counter-motion for summary judgment, along with Purcell's Motion for Summary Judgment. The parties proceeded with oral arguments on the issues. The trial court granted each party the opportunity to submit proposed judgments. The trial court found that the public notice and agenda did not mention the discussion of the county auditor, nor the discussion of recording real estate easements for the county. At no time did Purcell object to the closed session, nor did he avail himself of the protections required by Section 610.022.6.²

² Section 610.022.6 provides that if a member of a public governmental body makes a motion to close a meeting and another member believes that such motion, if passed, would cause a meeting to be closed in violation of the

The trial court denied Purcell's motion for summary judgment and granted summary judgment in favor of the Commission, concluding that the Commission's notice complied with the Sunshine Law and that no party purposefully violated the Sunshine Law. The trial court also concluded that the Commission's vote to enter the closed session complied with Missouri's Sunshine Law, and that any discussion off topic during the closed session of the meeting was not a purposeful or knowing violation of the Sunshine Law.

Purcell filed his timely Notice of Appeal on November 19, 2008. This appeal follows.

Points on Appeal

Purcell raises three points on appeal. In his first point, Purcell alleges the trial court erred by granting the Commission summary judgment because the Commission's meeting notice and agenda violated Section 610.020 and Section 610.022. Purcell contends the notice was not reasonably calculated to advise the public of the matters the Commission considered at its April 17, 2008 meeting, and failed to cite to the specific exception of Chapter 610 that allows for the conduct of public business in closed session.

In his second point, Purcell claims that the trial court in erred granting summary judgment in favor of the Commission because the Commission violated Section 610.011 and Section 610.021 during the closed portion of its meeting when it discussed a wide range of topics that were not covered by an exception contained in Section 610.021.

In his last point, Purcell contends the trial court committed error when it granted summary judgment in favor of the Commission based upon its finding that the Commission's violation of Missouri's Sunshine Law was unintentional. Because Purcell does not seek the

Sunshine Law, "such latter member shall state his or her objection to the motion at or before the time the vote is taken on the motion." A vote in opposition to the motion to close the meeting, as entered in the meeting minutes, shall be an absolute defense to any claim filed against the objecting member pursuant to Section 610.027. Section 610.022.6.

imposition of civil penalties in his Sunshine Law claim, he argues that intent is not a required element to prove the Commission's violation of the Sunshine Law.

Discussion

A. Is the Commission a Proper Party to This Action?

Before addressing the merits of this appeal, we first must consider the Commission's argument that Purcell's cause of action must be dismissed because he filed his lawsuit against the Commission only, and did not name as parties the individual members of the Commission in their official capacity. The Commission maintains that it is not a proper party against whom a suit may be brought because the Commission exists only through the commission members, having no right as an entity to hold property, and having no right to sue or be sued in its own name. In support of its position, the Commission cites Best v. Schoemehl, 652 S.W.2d 740 (Mo. App. E.D. 1983), which relies on American Fire Alarm Co. v. Board of Police Commissioners, 227 S.W. 114 (Mo. 1920). In American Fire Alarm, our Supreme Court held that the Kansas City Board of Police Commissioners could be sued only by bringing an action against the individual members of the board in their official capacity.

The question of whether a commission or board may be sued as a separate legal entity has been raised on occasion through the years. However, unlike the precise question before us, this issue has been raised more often in the context of whether a particular board or commission exists as an independent entity with a distinct legal identity, allowing it to sue or be sued separately from the local government with which it is affiliated. See, Jordan v. Kansas City, 929 S.W.2d 882 (Mo. App. W.D. 1996) (Neighborhood and Community Services Department could not be sued as it was not a legislatively created agency, but an administrative arm of Kansas City lacking a legal identity apart from the city); Pippins v. City of St. Louis, 823 S.W.2d 131 (Mo. App. E.D. 1992) (Land Reutilization Authority could be sued as it was expressly declared to be a

corporation by Section 92.875 RSMo (1986) and is an entity separate from the City of St. Louis); See also, Catlett v. Jefferson County, 299 F. Supp. 967 (E.D. Mo. 2004); State ex. rel. Gore v. Wochner, 475 F. Supp. 274 (E.D. Mo. 1979). If a commission is deemed to be a department of an existing local government, our inquiry ends because a department is not capable of being sued as the action then properly lies against the local governmental entity. Jordan v. Kansas City, 929 S.W. 2d at 887-88. However, if, as here, the Commission is not a department of a local government, but is a legal entity distinct and separate from the local government, then our inquiry continues to determine whether the Commission must be sued by naming the individual members who comprise the Commission, or whether we may treat the Commission as an entity capable of being sued in its own name.³

A party is a natural person, artificial person, or other legal entity that has the capacity to sue or be sued. Werths v. Dir., Div. of Child Support Enforcement, 95 S.W.3d 136, 143 (Mo. App. W.D. 2003). The Commission argues that the “Cape Girardeau County Commission” is the name given to the three natural persons who serve as County Commissioners in Cape Girardeau County, and that the Commission may be sued only by bringing an action against the individual Commission members in their official capacity. Based upon the established precedent set forth in American Fire Alarm, supra, we agree.

Although no Missouri case has addressed the issue raised by the Commission in the context of a county commission created under Section 49.010, the Missouri Supreme Court’s thorough discourse on this issue in the context of the Kansas City Board of Police Commissioners in American Fire Alarm provides us with ample and persuasive guidance. In American Fire Alarm, the Supreme Court concluded that even though the board of police

³ Neither party challenges the existence of the Commission as a legislatively created entity under Section 49.010, nor suggests that the Commission is a mere department or administrative arm of Cape Girardeau County government. The essence of the Commission’s argument is that the Commission, as an entity, does not exist separate from the three County Commissioners who serve as the Commission under Section 49.010.

commissioners was a legislatively created body, it could not be sued in its own name as a distinct entity. 227 S.W. at 118-21. The Court acknowledged difficulty in reaching this decision because “the board of police and the police system of Kansas City do not compose a department of the municipal government, and hence the rule that no action will lie against a department of a municipality does not control the question of the liability of the board of police or the police commissioners of Kansas City to be sued.” Id. at 117.

As part of its analysis in American Fire Alarm, the Supreme Court engaged in a lengthy review of the manner in which boards and commissions for public purposes had been established and the powers conferred upon them. Noting that the plaintiff characterized the board of police commissioners as a quasi-corporation capable of being sued as a corporation, the Court devoted significant attention to that issue. In its analysis, the Court recognized that both courts and commentators have had difficulty defining with precision the term “quasi-corporation.” Id. at 118. In the course of its discussion, the Supreme Court attempted to define a quasi-corporation, and found extravagant the notion that “every officer or body of officers vested with power to make contracts to a limited extent, which are not binding on them personally, is, by that fact alone, made into a corporation.” Id. at 119. In its opinion the Court reviewed examples of boards or commissions established for public purposes in which the Legislature had “pursued a policy of selection in the matter of incorporating them” and thereby bestowing upon them the right to sue or be sued. Included among such boards were the prison commission, the board of agriculture, school districts, special road districts, drainage districts, public reservations, townships, charity boards, and the state's Public Service Commission. Id. at 120. In contrast, the Court called attention to other boards and commissions which the Legislature neither created as corporate entities, nor made capable of suing or being sued by a certain name, including the State Board of Dental Examiners, the State Board of Health, the County Boards of Health, the Barbers

Board of Examiners, the State Board of Education, the Banking Department, the State Board of Charities, the Board of County Visitors, the Tax Commission, the State Board of Equalization, the County Boards of Equalization, and the Boards of Police. Id.

With regard to the board of police commissioners, the Supreme Court found that the Board had the authority to contract, and in fact had entered into contracts for certain purposes. In doing so, the board acted similar to a quasi-corporate or corporate body. However, the Court further noted the lack of any legislative authority that gave the board of police commissioners a distinctive name, authorized the board to use a seal, or allowed the board to sue or be sued as a corporation or quasi-corporation. Id. at 120-21. The absence of such legislative authority was a determining factor in the Supreme Court's finding that the board of police commissioners could not be sued as a distinct entity, and that any actions against the board must be instituted in the name of the members in their official character. Id. at 121. This Court noted the precedent of American Fire Alarm when we stated in Best v. Schoemehl, 652 S.W.2d at 742, that “[i]t has long been established that the St. Louis Board of Police Commissioners may only be sued by bringing an action against the individual members of the Board in their official capacity.”

While we recognize a county commission is created under different legislative authority than the Kansas City and St. Louis Board of Police Commissioners, we find no legal significance in this distinction, and further find no basis for departing from the well established and clear precedent of American Fire Alarm. We note that, like the board of police commissioners, the Commission is not expressly empowered under its legislative authority to sue or be sued in the name of the County Commission. Under Section 49.300, “. . . the county commission may institute proceedings in the circuit court of the county *in the name of the county* . . .” (emphasis added). Additionally, Section 49.287 provides that a county commission may lease property only owned by the *county*. And Section 49.525 authorizes a *county*, rather than a county

commission, to borrow money and issue negotiable bonds. Furthermore, nowhere in Chapter 49 did the Legislature specifically and expressly authorize the Commission to “sue or be sued.” Given these statutory directives, we find that the Commission's powers and responsibilities, like those of the board of police commissioners, fall short of those allocated to a corporate or quasi-corporate legal entity that may be sued. Accordingly, following the precedent of American Fire Alarm, 227 S.W. at 121, we hold that an action may be brought against the Commission only by naming in such action the individual members of the Commission in their official capacity.⁴

B. Applicability of Chapter 610

In further support of his action against the Commission, Purcell suggests that the Commission is a proper party to the action because the Commission falls within the Chapter 610 definition of a “public governmental body.” Section 610.010(4) defines a public governmental body as “any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order, including . . . (d) [a]ny other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power.” Purcell argues that this definition includes a county commission that is supported in whole or in part from state funds, and that because Section 610.027 provides for remedies against “public governmental bodies” for violations of the Sunshine Law, this action falls outside of the mandate of American

⁴ As the Missouri Supreme Court explained in Reifschneider v. City of Des Peres Public Safety Comm’n, 776 S.W. 2d 1, 2 (Mo. banc 1989), American Fire Alarm addresses the question of whether a particular administrative body may initiate or be named as a defendant in a civil suit without naming as parties the individual members of the commission when the action, like here, originates in the trial court. We note that for proceedings which are in the nature of administrative review, and are not an independent action originating in the trial court, there is no requirement that individual members of a board or commission be named as parties. Hubbard v. Bd. of Adjustment of the City of St. Louis, 779 S.W. 2d 26 (Mo. App. E.D. 1989).

Fire Alarm. Without providing any supporting judicial authority, Purcell asks this Court to carve out an exception that would allow actions to be brought against “public governmental bodies” as defined by the Sunshine Law, without regard to the well established common law regarding the status of governmental bodies as legal or non-legal entities. We are not persuaded by Purcell’s argument, and decline to do so.

We fully acknowledge that the Sunshine Law provides remedies against “public governmental bodies” for violations of the statute. However, such remedies must be pursued in the proper form. Applying the precedent of American Fire Alarm to an action brought under the Sunshine Law does not deny Purcell his right to seek relief for the Commission's alleged violations of the Sunshine Law. Purcell is merely required to file his action against the Commission in the manner and form required by law. Because the Commission is not legislatively endowed with corporate attributes, such as the ability to sue or be sued in a distinctive corporate name, actions against the Commission, even under Chapter 610, may be instituted only in the names of the members in their official character.

Because the Commission as a stand-alone entity is not a proper party to this action, we find that the trial court erred when it allowed the action to proceed against the Commission without the individual commission members named as defendants in their official capacity.

Conclusion

We hereby reverse the judgment of the trial court and remand this matter with directions that the action be dismissed without prejudice.

Kurt S. Odenwald, Judge

Nannette A. Baker, C.J., Concurs
Patricia L. Cohen, J., Concurs

