

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000121-MR

THERESA GERSTLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN McDONALD, JUDGE
ACTION NO. 05-CI-007957

THOMAS CLAY (HON.)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON AND TAYLOR, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: This is an appeal from an Order of the Jefferson Circuit Court dismissing a civil action seeking recovery for malicious prosecution. We find dismissal to have been premature and reverse and remand this matter to the trial court for further actions consistent with this opinion.

This case originates with a disagreement between Gerstle and members of the condominium association board where she lived. Gerstle did not like a decision made

¹Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

by the board and that disagreement resulted in her being the defendant in an action for defamation. In that original action, the plaintiffs were represented by Honorable Thomas Clay. He filed the defamation suit and ultimately won a jury verdict for his clients. That judgment was, however, reversed by this Court in the unpublished opinion of *Gerstle v. Moore*, 2002-CA-001403-MR, 2004 WL 259213 (Ky. App. 2004).

On the day the statute of limitations was to run, Gerstle filed a *pro se* lawsuit against Clay claiming losses arising from malicious prosecution. The pertinent details of that litigation begin when Clay filed a motion to dismiss stating Gerstle had “failed to name the proper party.” The trial court issued an order dismissing the action, with prejudice but then, six days later, on Gerstle's oral motion, set aside that dismissal and continued the matter for a hearing. That order also required Gerstle to appear with counsel for the hearing. Gerstle then filed a *pro se* motion to amend the complaint by substituting “Thomas E. Clay, P.S.C.” for the originally named “Thomas E. Clay”. She additionally retained counsel, Honorable Frank Yates, Jr.

Yates did not appear at the scheduled call of the case and the judge dismissed the action. The record does not clearly indicate the reason the case was dismissed. Yates then filed a timely motion to reconsider where he explained that he had just recently been retained, had a prior commitment and arrived in the court after his client's case had already been called and dismissed. That motion was overruled. Gerstle now seeks review of the denial of the motion to reconsider and the ultimate dismissal of her action.

The central question in this matter is whether the proper party is Clay as an individual or Clay, P.S.C. An individual attorney may organize a business under the umbrella of a professional service corporation. KRS 274.005(2). There is nothing within the record regarding this except Clay's assertion that he had so organized his business. The professional service corporation, if it exists, could be liable for the actions of its employee under certain conditions. *Fayette County Farm Bureau Fed'n v. Martin*, 758 S.W.2d 713 (Ky. App. 1988).

Gerstle initially filed her action against Clay as an individual. He signed for the delivery of the complaint as Clay and not as Clay, P.S.C. He admits that the complaint was filed within the time allowed by the statute of limitations. It is only if Clay himself is liable individually that his actions may be imputed to the corporation. *See Cohen v. Alliant Enterprises, Inc.*, 60 S.W.3d 536 (Ky. 2001). Gerstle was free to choose from among both Clay and the corporation for relief.

Clay signed various documents both individually and for the corporation. There is no question that he was put on notice both as an individual and for the corporation. An amendment was appropriate to either name the corporation in addition to Clay individually or to substitute the corporation for Clay individually. CR 15.03. The central purpose of pleadings is notice of claims and defenses, despite the informalities associated with them and the manner in which they are amended. *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995). Clay's motion to dismiss was not a responsive pleading and Gerstle was entitled to amend her complaint. *See Kentucky Lake Vacation Land, Inc. v.*

State Property and Bldgs. Com., 333 S.W.2d 779 (Ky. 1960). Clay did not show any prejudice by Gerstle's failure to initially name the corporation.

We next turn to the order requiring Gerstle to appear with counsel. She has now retained counsel and we presume she will continue being represented. The issue is now moot. We must note however that counsel is not a requirement for entry into the justice system. *See Osborn v. Bank of the United States*, 22 U.S. 738 (1824). Justice shall be administered without sale or denial. Ky. Const. Sec. 14.

Finally, we must examine the dismissal of the action. The order lacks any findings of fact or conclusions of law and we are unable to determine the basis for the dismissal. We are required to give great deference to the decisions of a trial judge. *See Sanborn v. Commonwealth*, 975 S.W.2d 905, 909 (Ky. 1998). A reviewing court cannot substitute its judgment for that of the trial judge unless the decision is clearly erroneous. *Davis v. Graviss*, 672 S.W.2d 928, 932 (Ky. 1984). Those decisions must be grounded in both the facts and the law. With a silent record, we are left with the view that the decision may have been arbitrary and improper.

Whether Gerstle will succeed or fail with her claim is not before us. It is clear however that she should enjoy the opportunity to attempt to effectively pursue her claim. The dismissal occurred before she was able to fully develop her case. We reverse and remand this matter to the trial court for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Frank Yates, Jr.
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas E. Clay
Louisville, Kentucky