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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002053-MR

TIMOTHY YOUNG — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM MCNAMARA, JUDGE
ACTION NO. 06-CI-00272

STEPHANIE DISNEY; CABINET FOR HEALTH AND FAMILY SERVICES; AND KENTUCKY PERSONNEL BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Timothy Young appeals an order of the Franklin Circuit Court that reversed a final order of the Kentucky Personnel Board adopting a hearing officer's recommended order in an employment promotions case in favor of Young. We affirm.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In 2005, Hazelwood, a state-owned and operated facility for developmentally disabled individuals, posted a vacancy for the position of speech and hearing supervisor. The position was becoming vacant due to the retirement of the then current speech and hearing supervisor Judy Prell. A position description was created by Prell and Karen Hicks, the therapeutic services director at Hazelwood. That position description outlined the primary tasks and duties to be performed by the speech and hearing supervisor. Young and Stephanie Disney were both sent a letter of notification, inviting them to apply for the position. Both letters, dated February 14, 2005, had the position description, created by Prell and Hicks, attached to them. Both Young and Disney applied for the position and, according to class specifications maintained by the Personnel Cabinet, both met minimum qualifications for the position. Young was a licensed speech pathologist and Disney was a licensed audiologist. Young and Disney were placed on the register by the Personnel Cabinet and were interviewed by a panel. The position was offered to Disney and she accepted.

Young filed a grievance with the Kentucky Personnel Board on March 14, 2005, naming the Cabinet for Health and Family Services (hereinafter "Cabinet") and Disney as respondents. In his grievance, Young claimed that Disney was not qualified for the position. In support of his argument, Young referenced the position description that was relied upon by both candidates, as well as the interview committee. That description listed specific duties, related to speech/language and dysphagia services, which comprised approximately thirty percent of the job duties for that position. Under her status of a licensed audiologist, Disney was not lawfully able to perform those duties as well as several other duties listed on the position description. Young, due to his

licensing as a speech pathologist, was lawfully able to perform all of the duties in the position description. Young argued that he was entitled to the position as a matter of law because the position description in effect at the time of the selection excluded Disney. He also brought to light that the position description had been rewritten, after placing Disney in her new position, to exclude the speech pathology requirements.

A hearing officer conducted an evidentiary hearing on Young's grievance on July 28, 2005. On November 15, 2005, Young terminated his employment with state government. On December 6, 2005, the hearing officer submitted a recommended order, recommending that Young's appeal be granted. In support of that decision, the hearing officer found that the modification of the position description, after the hiring of Disney, was unlawful. He found that both candidates, as well as the interview panel, had relied upon the position description, and that it could not be modified to accommodate someone if they did not originally meet the requirements of the position. The hearing officer also recommended that Young receive back pay for the position of speech and hearing supervisor;[2] that the appointment of Disney be set aside; and that the position be readvertised.

The Cabinet filed exceptions to the recommended order. Ms. Disney did not file any exceptions. On January 20, 2006, the parties appeared before the Personnel Board to argue the exceptions. On January 24, 2006, the Personnel Board issued its final order approving and adopting the hearing officer's recommendations, unaltered.

On February 23, 2006, Disney appealed to the Franklin Circuit Court, naming the Personnel Board, the Cabinet and Young as respondents. The Kentucky

[2] Because Young had retired at this point, back pay was only ordered from Disney's hire date to Young's retirement date.

Personnel Board filed a motion to dismiss Disney's petition, based on her failure to file exceptions to the hearing officer's order. The Cabinet filed a formal answer in which it sought relief against Mr. Young. Specifically, the Cabinet asked to be reimbursed for the amount it was ordered to pay Young by the Personnel Board. Disney filed a motion to stay the final order of the Kentucky Personnel Board. Young did not file any pleadings in the case. On March 16, 2006, the circuit court heard arguments of the motion to dismiss and the motion to stay. On March 29, 2006, an order was entered denying the motion to dismiss and granting the motion to stay. In the same order, the circuit court set out a briefing schedule, in which Disney was given thirty days from the date of the order to file a brief. The briefs of all respondents were due thirty days thereafter and the reply brief of Disney was due fifteen days thereafter. On April 27, 2006, an agreed order, signed by representatives for Disney, the Cabinet and the Personnel Board, was entered granting Disney an additional 30 days to file her brief. Young did not sign the agreed order, nor was a signature line provided for him to do so. On June 2, 2006, Disney's brief was filed. The Cabinet's brief was filed on July 5, 2006. Neither Young nor the Personnel Board filed briefs. On August 23, 2006, the court met with the parties on a motion to take the matter under submission.[3] At this hearing, an attorney, acting as proxy for Young's attorney, appeared and, via oral motion, moved the court to accept a brief on behalf of Young and Young's attorney, Michael Richardson. At this point in the action, Young had failed to make any appearances or file any pleadings. The court refused to accept the brief, which was almost two months late. A proposed order was created and

[3] This motion is missing from the record on appeal, as well as the circuit court's order to take the matter under submission for a final ruling.

distributed to the court parties. Young filed a motion[4] to clarify the proposed order, which was heard on September 6, 2006. On September 7, 2006, the Franklin Circuit Court entered an order finding the Personnel Board and Young to be in default, reversing the final order of the Personnel Board and ordering Young to reimburse the Cabinet for the back pay he had received. This appeal followed.

Young argues the following circuit court errors: 1) the grant of summary judgment when genuine issues of material fact were present; 2) consideration of unpreserved issues; 3) failure to consider the entire record; 4) the grant of relief for one respondent against another; 5) substitution of hearing officer's judgment when the record held substantial evidence to support the hearing officer's finding of facts; and 6) failure to cite any actual defect in the reasoning of the hearing officer or any specific failure to follow judicial guidelines.

In support of his argument that default judgment was improper, Young references CR[5] 55.01, which provides, in relevant part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply to the court therefore. If the party against whom judgment by default is sought has appeared in the action, he, or if appearing by representative, his representative shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. The motion for judgment against a party in default for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default.

[4] This motion is also missing from the record on appeal.

[5] Kentucky Rules of Civil Procedure.

Because Disney failed to file a motion for default judgment as well as a notice to the parties that a default judgment was sought, Young maintains that the requirements of CR 55.01 were not fulfilled. We disagree. CR 55.01 requires notice only for a party who has appeared in the action. This court has defined appearance, for purposes under CR 55.01, to mean

> not whether the defendant has submitted himself to the jurisdiction of the court, but whether or not he has so participated in the action as to indicate an intention to defend. There must be some act which would signify that the defendant is contesting liability rather than admitting it, and therefore would be likely to contest the motion for judgment if given notice.

Smith v. Gadd, 280 S.W.2d 495 (Ky. 1955). Young failed to appear in the action in any manner that would imply he intended to defend. He did not participate in any of the motion hearings and he failed to file a response, a brief or any other pleadings. An attorney did not appear on his behalf until six months after the action had been initiated and approximately two months after his brief was due. Young argues that his involvement in the Personnel Board proceedings served as proof of his intent to defend. We do not agree. Involvement in a lower proceeding does not constitute involvement in all subsequent proceedings. There was no indication that he intended to participate in the action and therefore the CR 55.01 notice requirement was waived. *See also Williams v. Dotson,* 291 S.W.2d 41 (Ky. 1956) and *Pound Mill Coal Co. v. Pennington*, 309 S.W.2d 772 (Ky. 1958).

Young further argues that any motion for a default judgment was made by the Cabinet and not Disney. We do not believe this point to be relevant. Any change in the party seeking a default judgment would not change Young's status as a defaulting

party. It has long been held that default judgments are at the discretion of the trial court and may be set aside for good cause. *See Harris v. Commonwealth*, 688 SW2d 338 (Ky.App. 1984) and CR 55.02. Although default judgments are not favored, this court will not disturb them absent an abuse of discretion by the trial court. *Howard v. Fountain*, 749 SW2d 690 (Ky.App. 1988).

> A party seeking to have a default judgment set aside must show good cause; *i.e.,* the moving party must show (1) a valid excuse for the default; (2) a meritorious defense to the claim; and (3) absence of prejudice to the non-defaulting party.

PNC Bank, N.A. v. Citizens Bank of Northern Kentucky, Inc., 139 S.W.3d 527, 530-531 (Ky.App. 2003) (internal citation omitted). Young has failed to show us good cause why the summary judgment was not proper and we therefore find that it was within the discretion of the trial court.

Young's final argument regarding the summary judgment is that it is improper because it failed to follow KRS 13B.150, which mandates that:

> (1) Review of a final order shall be conducted by the court without a jury and shall be confined to the record, unless there is fraud or misconduct involving a party engaged in administration of this chapter. The court, upon request, may hear oral argument and receive written briefs.
>
> (2) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
> (a) In violation of constitutional or statutory provisions;
> (b) In excess of the statutory authority of the agency;
> (c) Without support of substantial evidence on the whole record;
> (d) Arbitrary, capricious, or characterized by abuse of discretion;

> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
> (g) Deficient as otherwise provided by law.

Young argues that it is the circuit court's role to review the record below, accept the findings of fact made below and then determine if the Personnel Board's decision is clearly deficient. While we agree, we do not believe KRS 13B.150 to be in conflict with the circuit court's default judgment. When a party fails to respond and default judgment is granted, those allegations in the record are taken as true. *See Justice v. Boggs*, 31 Ky.L.Rptr. 465, 102 S.W. 827 (Ky.App. 1907). "In a default judgment situation, the defaulting party admits only such allegations on the pleadings as are necessary to obtain the particular relief sought by the complaint." *Howard v. Fountain*, 749 S.W.2d 690 (Ky.App. 1988) (footnote omitted) *citing Wilson's Administrator v. Wilson*, 288 Ky. 522, 156 S.W.2d 832 (1941). In her petition, Disney alleges that the Personnel Board's final order is arbitrary, capricious and not supported by substantial evidence and lists multiple other reasons why the order is deficient according to law. In light of the default judgment, these allegations, which comply with the reversal requirements of KRS 13B.150, are accepted as true.

In the alternative, Young makes an argument against the decision of the court as a summary judgment. The final order of the court specifically finds Young in default as part of its judgment and the record on appeal identifies the case disposal method as a default judgment. For these reasons, it is our belief that the Franklin Circuit Court's judgment was a default judgment. Therefore, Young's argument regarding summary judgments is inapplicable and will not be addressed.

Young next argues that the issues which Disney presented in her petition had not been properly preserved at the administrative level and thus could not be heard by the court. This exact argument was made by the Personnel Board in the circuit court action, in its motion to dismiss. It is undisputed that Disney did not file any exceptions to the hearing officer's recommended order. However, the Cabinet did file exceptions. The circuit court found that because exceptions had been filed by the Cabinet, that those issues addressed by the exceptions had been properly preserved for any party to appeal. Young argues that Disney needed to be the specific person filing the exceptions in order for them to be properly preserved. Whether we agree or disagree with Young's argument is irrelevant because his argument fails both ways. Obviously, if we were to disagree with Young, then the exceptions filed by the Cabinet would be sufficient as issue preservation for Disney's action. However, if we were to agree with Young's reasoning, we would also be forced to conclude that Young did not properly preserve this particular issue for appeal, and therefore it is improperly before us. Young did not file any pleadings in the circuit court action. Therefore, it was a co-defendant (the Personnel Board) and not Young who raised this issue at the trial court level. Applying Young's own theory as to issue preservation, he may not raise this argument.

Young further argues, in the alternative, that if the Cabinet's exceptions were sufficient to allow Disney to appeal the final order of the Personnel Board, then her claims should be limited to those found in the Cabinet's exceptions. We agree. Disney requested that the Personnel Board order be reversed based on the grounds found in the Cabinet exceptions as well as some new grounds. We do not, however, see any proof that any new claims of Disney were specifically influential on the circuit court's decision

to find in her favor. The circuit court's opinion was a default judgment, arising from Young's failure to participate, not from the substance of Disney's petition. Assuming, arguendo, that we found Disney's new issues to be impermissible, it would not delete from Disney's petition those issues previously preserved by the Cabinet's exceptions. Therefore, any error of the trial court to not strike or otherwise address the portions of Disney's petition that had not been preserved was harmless.

Young argues that the circuit court erred by granting one co-respondent relief against another co-respondent. CR 13.07 states, in part:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

The Cabinet failed to file a pleading seeking reimbursement from Young and instead sought relief in their brief. However, in her petition, Disney sought a reversal of the Personnel Board's order. While we find error in allowing the Cabinet to seek relief from Young in their brief, we find it also to be harmless. The circuit court, in conformity with Disney's petition, ordered that the Personnel Board's order be reversed. Reversal of the Personnel Board's order would naturally include reversing that portion which awarded money to Young. Therefore, the Cabinet's request for those sums was unnecessary and their failure to properly plead harmless.

Young's final three arguments are that the circuit court erred: 1) by failing to consider the entire record of the Personnel Board before issuing its final order; 2) by substituting its judgment for that of the hearing officer; and 3) by failing to cite any specific defects in the Personnel Board's final order. Young seems to keep forgetting that

the circuit court action was disposed of by a default judgment. If he had properly defended the matter, these arguments may all be valid and perhaps even correct. However, Young failed to participate in the circuit court action, meaning Disney received her judgment as a matter of law. There was no need for the circuit court to consider any part of the Personnel Board record or cite any specific error, because those allegations made in Disney's petition were never refuted by Young or the Personnel Board and thus considered true by virtue of the default judgment. Furthermore, none of these arguments, or any others, were presented by Young during the circuit court action, and therefore have not been properly preserved for appeal.

For the foregoing reasons we affirm the September 7, 2006, order of the Franklin Circuit Court.

CAPERTON, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS IN RESULT.

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