RENDERED: MARCH 14, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002423-MR

BETHEL FELLOWSHIP, INC.
D/B/A BETHEL FELLOWSHIP
CHRISTIAN ACADEMY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE SAM G. MCNAMARA, JUDGE
ACTION NO. 06-CI-01175

COMMONWEALTH OF KENTUCKY,
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Bethel Fellowship Inc., d/b/a Bethel Fellowship Christian Academy ("Bethel") brings this appeal from a November 7, 2006, order of the Franklin Circuit

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

Court dismissing its action seeking review of an adverse decision of the Environmental and Public Protection Cabinet ("Cabinet"). We vacate and remand.

The Cabinet issued Bethel a notice of violation on October 24, 2002, for failing to abate asbestos found in a school that it operated in Breckinridge County, Kentucky. Bethel failed to comply with the notice, and the Cabinet thereafter filed an administrative complaint against Bethel. Eventually, the secretary of the Cabinet issued an amended final order on July 27, 2006. It directed Bethel to correct all violations contained in the notice of violation and fined Bethel a civil penalty of $10,000.00.

On August 23, 2006, Bethel filed an action in the Franklin Circuit Court seeking review of the Cabinet's decision. Bethel filed a document entitled "Complaint and Petition for Review" (complaint) and requested the Franklin Circuit Court Clerk to serve the complaint on Greg Stumbo, the Kentucky Attorney General, by certified mail. The clerk complied and mailed the complaint to the office of the Attorney General, which was received on August 24, 2006. Thereafter, on September 12, 2006, the Cabinet filed a motion to dismiss claiming that Bethel failed to serve the secretary of the Cabinet as mandated by Kentucky Revised Statutes (KRS) 224.10-470.[2] By order entered November 7, 2006, the circuit court dismissed the instant action, thus precipitating our review.

Bethel contends the circuit court committed error by dismissing its action. Bethel argues that it substantially complied with the requirements of KRS 224.10-470 by serving the Attorney General and that the circuit court erred by concluding that strict compliance was required.

[2] The Attorney General's Office forwarded the complaint and summons to the Public Service Commission who then forwarded the documents to the Environmental and Public Protection Cabinet's Office of Legal Services on August 30, 2006. To date, the secretary has not been served as required by KRS 224.10-470.

KRS 224.10-470 states, in relevant part:

> (1) Appeals may be taken from all final orders of the Environmental and Public Protection Cabinet. Except as provided in subsection (3) of this section, the appeal shall be taken to the Franklin Circuit Court within thirty (30) days from entry of the final order. The party or parties affected by the final order shall file in the Circuit Court a petition which states fully the grounds upon which a review is sought and assign all errors relied on. The cabinet shall be named respondent, and service shall be had on the secretary.

Under the terms of the above statute, an appeal may be taken to the Franklin Circuit Court by an aggrieved party from a final order of the Cabinet. However, KRS 224.10-470 specifically states that the Cabinet "shall" be named as a respondent and that service "shall" be had on the secretary of the Cabinet. The Cabinet was named as a party to this action.

It is well-established that judicial review of an administrative agency's decision is generally not a matter of right but one of legislative grace. *Metro Medical Imaging, LLC v. Com.*, 173 S.W.3d 916 (Ky.App.2005); *but see Am. Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Comm'n*, 379 S.W.2d 450 (Ky. 1964). When the right to judicial review has been conferred by statute, strict compliance with the terms of the statute is required. *Bd. of Adjustments of the City of Richmond v. Flood*, 581 S.W.2d 1 (Ky. 1978). Contrary to Bethel's arguments, strict compliance with statutory requirements regarding judicial review of administrative decisions has not been abandoned by the Kentucky Supreme Court.

In this case, it is beyond cavil that KRS 224.10-470 required Bethel to serve the secretary of the Cabinet. However, Bethel served the Attorney General and has never effectuated service upon the secretary. The facts of this case are similar to those of *Com.,*

Transp. Cabinet, Dept. of Highways v. City of Campbellsville, 740 S.W.2d 162 (Ky.App. 1987). In that case, KRS 151.186(1) required that "service shall be had on the secretary" to seek review in the circuit court. The transportation cabinet timely served the Attorney General and later untimely served the secretary. In determining that the action should not be dismissed for failure to timely comply with the service requirements of KRS 151.186(1), the Court reasoned:

> Interpreting the foregoing statute, we deem neither the issuance of summons nor actual service of same upon the secretary is a condition precedent to the commencement of an action challenging an order of the cabinet. Under statute (KRS 23A.010(4)), an appeal to the circuit court from an order of an administrative agency is not a true appeal but rather an original action. *See Sarver v. County of Allen*, Ky., 582 S.W.2d 40 (1979). Under our system, civil actions are commenced by (1) the filing of a complaint (petition), and (2) the issuance of summons (or warning order) in good faith. KRS 413.250 and Kentucky Rules of Civil Procedure (CR) 3. Service upon "the Commonwealth or any agency thereof" is had by serving the attorney general or any assistant attorney general. CR 4.04(6). CR 4.01 directs the clerk to forthwith issue summons upon the filing of a complaint, at the direction of the initiating party. Here, when the petition was filed, the clerk was directed to serve the attorney general, and only later directed to issue service upon Secretary Baldwin. While we do not hold that issuance of summons upon the secretary would not have commenced the action, we do hold that issuance of summons upon the attorney general, as per the foregoing statutory and civil rule provisions, did in fact commence the action. Once commenced, the mere delay in serving the secretary did not defeat the action. *Cf. Commonwealth, Dept. of Highways v. Parker*, Ky., 394 S.W.2d 899 (1965).

City of Campbellsville, 740 S.W.2d at 163-164. Essentially, the Court held that the issuance of summons upon the Attorney General "commenced" the action in the circuit

court and that the mere delay in serving the secretary under KRS 151.186(1) was not fatal. *See also Metro Medical Imaging, LLC v. Com.*, 173 S.W.3d 916 (Ky.App. 2005).

In our case, it is undisputed that Bethel served the Attorney General but has never caused service to be effectuated upon the secretary. Under the authority of the *City of Campbellsville*, 740 S.W.2d 162, we believe that Bethel properly commenced the action for judicial review of the Cabinet's decision in the Franklin Circuit Court. However, KRS 224.10-470(1) clearly requires that the secretary of the Cabinet be served, and Bethel has not yet directly served the secretary, notwithstanding that the Cabinet subsequently received a copy of the complaint from the Attorney General's Office. While Bethel did properly commence the action in the circuit court, the action may still be dismissed if Bethel fails to cause service to be issued upon the secretary as mandated by KRS 224.10-470. Upon remand, Bethel shall have a reasonable time, not to exceed twenty days, to effectuate service upon the secretary of the Cabinet as required by KRS 224.10-470. If Bethel fails to do so, the Franklin Circuit Court shall dismiss this action for failure of Bethel to comply with KRS 224.10-470.

We view Bethel's remaining contentions to be moot or without merit.

For the foregoing reasons, the order of the Franklin Circuit Court is vacated and this cause is remanded for proceedings not inconsistent with this opinion.

STUMBO, JUDGE, CONCURS. HENRY, SENIOR JUDGE, CONCURS AND WRITES SEPARATE OPINION.

HENRY, SENIOR JUDGE, CONCURRING. I concur with the reasoning and the result of the majority opinion, and I write separately only to address what is to me the most puzzling aspect of this case, namely, the fact that as of this writing Bethel

Fellowship still has not caused a summons to be issued and served upon the Secretary of the Environmental and Public Protection Cabinet as required by KRS 224.10-470.

The question of when an action such as this is commenced, so that a court has jurisdiction, has often been considered by the courts. Discussing a number of similar cases the former Kentucky Court of Appeals observed that:

> [t]he rule seems to be that if, when the summons was issued, the plaintiff had a bona fide, unequivocal intention of having it served presently or in due course or without abandonment, the summons was issued in good faith. (citation omitted).
>
> That the original summons . . . was misdirected . . . [has been] held not to constitute a lack of good faith.

Roehrig v. Merchants & Businessmen's Mut. Ins. Co., 391 S.W.2d 369, 371 (Ky. 1965). As pointed out in the majority opinion, if the complaint and the original summons are timely issued in good faith, delay in serving the proper party has been held not to be fatal to the action. *Com., Transp. Cabinet, Dept. of Highways v. City of Campbellsville*, *supra.* While the safest and most prudent course of action would have been to have had the summons issued and the proper party served as soon as the mistake was discovered, there was no showing of bad faith in the failure to do so in this case. If I have read our decision correctly, it is based upon a line of cases which preceded the "substantial compliance" doctrine of *Ready v. Jamison,* 705 S.W.2d 479 (Ky. 1986), rather than having been derived from that doctrine.

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