RENDERED: JULY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000176-MR

ED RICHERSON; JAMEE RICHERSON;
JAMES T. ERNSPIKER; CLARENCE GAUS, JR.;
ROBERT J. CECIL, SR.; RODNEY BOWMAN;
KATHERIN BOWMAN; THOMAS B. GIVHAN;
ELISE GIVHAN SPAINHOUR; AND ELLEN F. GIVHAN APPELLANTS

APPEAL FROM BULLITT CIRCUIT COURT
v. HONORABLE BRUCE T. BUTLER, SPECIAL JUDGE
ACTION NO. 17-CI-01107

ALBERT CAHOE; MARY ROSE CAHOE; AND
CITY OF MT. WASHINGTON APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND L. THOMPSON, JUDGES.

JONES, JUDGE: In this appeal, the Appellants, a group of Bullitt County property owners, seek reversal of the Bullitt Circuit Court's order dismissing their city zoning complaint/appeal for lack of jurisdiction. The circuit court concluded that

jurisdiction was lacking because Appellants did not effectively name the Mt. Washington City Council ("City Council") as a party in their complaint as explicitly required by KRS[1] 100.347(3). Appellants argue that the circuit court placed form over substance by focusing solely on the fact that they did not technically comply with CR[2] 10.01 by listing the City Council in the caption/style of their complaint. They maintain that the circuit court should have employed the equitable doctrine of substantial compliance to excuse their technical noncompliance with CR 10.01 where the body of their complaint referred to the City Council as a party.

Having reviewed the record in conjunction with all applicable legal authority, we cannot agree with Appellants that the circuit court erred. Appellants did not list the City Council in the caption/style of the complaint *or* cause a summons to be issued in the City Council's name for service on any of its members before expiration of the thirty-day deadline. As such, they did not commence a proper appeal with the circuit court within the required time frame divesting the circuit court of jurisdiction. Accordingly, we affirm the Bullitt Circuit Court's dismissal.

[1] Kentucky Revised Statutes.

[2] Kentucky Rules of Civil Procedure.

I. BACKGROUND

Appellants are owners and occupants of real property in Bullitt County. Appellants' real property is either adjacent or in close proximity to real property owned by Albert and Mary Rose Cahoe. On or about August 5, 2017, the Cahoes applied with the Bullitt County Joint Planning Commission ("Planning Commission") to change the zoning of their property from agricultural and residential to central business. After conducting a hearing and studying the issue, the Planning Commission recommended that the Cahoes' zoning change request be denied. Ultimately, however, on October 23, 2017, the City Council approved the zoning change request.

On November 22, 2017, Appellants filed a complaint/appeal in the Bullitt Circuit Court pursuant to KRS 100.347. The complaint alleges that the City Council's approval of the zoning change was arbitrary because the City Council considered evidence outside of the administrative record. The caption/style of the complaint lists the following as "Appellees/Defendants":

> CITY OF MT. WASHINGTON
> Serve: Hon. Barry Armstrong
> 275 Snapp Street
> Mt. Washington, KY 40047
>
> ALBERT CAHOE
> . . .
> Shepherdsville, KY 40165

MARY ROSE CAHOE
. . .
Shepherdsville, KY 40165

(Record ("R.") at 12).

Appellants' complaint begins with a section labeled "parties." Paragraph 1 lists the individual names and addresses of Appellants and closes with the following sentence: "Each of the Appellants will be injured and aggrieved by the action of the City Council of the Appellees/Defendant, City of Mt. Washington ("Council") as herein set out." (R. at 12-13).

Paragraphs 2-5 of Appellants' complaint state as follows:

> 2. The Council is the legislative body of the City of Mt. Washington (the "City of Mt. Washington") and has final authority to grant zoning map amendments for property in the City of Mt. Washington, including the Property (as hereinafter defined) in question in this case.
>
> 3. Barry Armstrong is the Mayor of the City and is authorized to receive service on behalf of the council and the City of Mt. Washington.
>
> 4. Mt. Washington City Government is the overall government for the City of Mt. Washington, and is responsible for the enforcement of all Ordinances passed in the City of Mt. Washington.
>
> 5. Albert Cahoe and Mary Rose Cahoe (the "Applicants") are all the owners of the subject Property and are the applicants in the subject rezoning case referenced herein.

(R. at 13-14).

The Bullitt Circuit Court Clerk issued summonses for each party listed in the style/caption of Appellants' complaint. The Cahoes were each served by certified mail on November 24, 2017. The City of Mt. Washington was served by certified mail on November 27, 2017. The summons for the City of Mt. Washington states as follows: "City of Mt. Washington[,] SERVE: Hon. Barry Armstrong[,] 275 Snapp Street[,] Mt. Washington[,] Kentucky 40047." The clerk did not issue a separate summons for the City Council nor is there any allegation that Appellants requested it to do so before expiration of the thirty-day appeal period.

The Cahoes filed a joint answer on or about December 12, 2017. In paragraph 8 of their answer the Cahoes pleaded the affirmative defense of "the failure of the Appellants/Plaintiffs to join a necessary party for full adjudication of the issues." On December 15, 2017, the City of Mt. Washington filed a motion to dismiss pursuant to CR 12.02(a) and (f). The City argued the circuit court lacked jurisdiction because Appellants' complaint failed to name the City Council as a separate party as required by KRS 100.347(3).

On or about January 4, 2018, Appellants filed for leave to amend their complaint pursuant to CR 15.01 to add the City Council to the caption/style of their complaint. They included a proposed amended complaint with their motion. The amended complaint is identical to the original complaint except it lists the City

Council in the caption/style.[3] The Cahoes and the City of Mt. Washington objected to Appellants' motion to amend. Each argued that the circuit court did not have jurisdiction to grant an amendment to the complaint because a proper appeal naming the City Council had not been commenced before the statutorily mandated deadline. The circuit court passed Appellants' motion to amend until such time as it ruled on the pending motion to dismiss.

The circuit court ultimately determined that dismissal was in order because it never obtained jurisdiction in the first instance. It was persuaded that because Appellants failed to list the City Council as a party in the caption/style of their complaint as required by CR 10.01 they had failed to commence a proper administrative appeal by the jurisdictional deadline. The circuit court's conclusion that it never obtained jurisdiction rendered the pending motion to amend moot.

Appellants filed a timely motion to alter, amend, or vacate the circuit court's dismissal. In part, Appellants argued that they complied with the statute by

[3] For reasons that are not entirely clear from the record, the circuit court clerk issued a summons in the name of the City Council for service on two of its members before the circuit court took up Appellants' CR 15.01 motion for leave to amend. This was improper. CR 15.01 provides: "A party may amend his pleading once as a matter of course at any time *before* a responsive pleading is served . . . . Otherwise a party may amend his pleading only by leave of court . . . ." (Emphasis added). By the time Appellants moved to amend their complaint, the Cahoes had already served a responsive pleading, their joint answer, on Appellants. Therefore, the amended complaint was only tendered. It was not proper for the circuit court clerk to issue summonses in relation thereto until such time, if any, the circuit court directed the circuit court clerk to enter the amended complaint into the record and deemed it properly filed. Therefore, we reject the notion that a summons was ever properly issued for the City Council or that any of its members have been properly served.

naming the City Council as a party in the body of their complaint, and that they had a summons issued for the City of Mt. Washington in good faith. They explained that their "complaint was properly commenced within the thirty days required under KRS 100.347 because (1) the complaint was filed within the thirty-day appeal period; (2) the summons, though arguably faulty, was issued in good faith within that period of time; and (3) proper summons were issued within a reasonable period of time once Appellants became aware of [the] alleged error." (R. at 324). The circuit court denied Appellants' motion by order entered December 27, 2018.

This appeal followed.

II. STANDARD OF REVIEW

The issue before us requires a determination of whether the circuit court correctly dismissed Appellants' complaint for lack of jurisdiction. "The question of jurisdiction is ordinarily one of law, meaning that the standard of review to be applied is de novo." *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49, 53-54 (Ky. 2007).

III. ANALYSIS

In KRS Chapter 100, our General Assembly delegated zoning authority among local boards of adjustment, local planning commissions, and certain local legislative bodies. By statute, when a property owner proposes to

amend the established zoning map, the matter is first taken up by the local planning commission pursuant to KRS 100.211 or KRS 100.2111. The planning commission process terminates with a recommendation by the planning commission, which includes findings of fact and a summary of the evidence and testimony. When the matter is proceeding under KRS 100.211, as in this case, "[t]he fiscal court or *legislative body* shall take *final action* upon a proposed zoning map amendment within ninety (90) days of the date upon which the planning commission takes its final action upon such proposal." KRS 100.211(8) (emphasis added). "[F]inal action shall be deemed to have occurred on the calendar date when the vote is taken to approve or disapprove the matter pending before the body[.]" KRS 100.347(5). City councils are included in the General Assembly's definition of "a legislative body" capable of taking final action. KRS 100.111(11).

Pursuant to KRS 100.347(3), any person aggrieved by the legislative body's final action concerning a map amendment:

> shall appeal from the action to the Circuit Court of the county in which the property, which is the subject of the map amendment, lies. Such appeal shall be taken within thirty (30) days after the final action of the legislative body. *All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. The legislative body shall be a party in any such appeal filed in the Circuit Court.*

(Emphasis added).

It is well established that "[s]trict compliance with the statute[s] on planning and zoning is required." *Evangelical Lutheran Good Samaritan Soc., Inc. v. Albert Oil Co., Inc.*, 969 S.W.2d 691, 694 (Ky. 1998). Additionally, it is equally well established that "[w]hen grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy." *Kentucky Unemployment Ins. Com'n v. Carter*, 689 S.W.2d 360, 362 (Ky. 1985) (citations omitted).

This appeal requires us to determine whether Appellants strictly complied with KRS 100.347(3)'s requirements. To this end, there is no dispute that: (1) the City Council is the legislative body whose final action is at issue; and (2) Appellants were required to make the City Council a party to their action. The dispute concerns whether Appellants complied with the statute by naming the City Council in the body of their complaint before expiration of the thirty-day deadline and seeking to have a summons issued for the City Council, as a separate legal entity, when their mistake was brought to light after expiration of the thirty-day deadline.

We will first address Appellants' failure to name the City Council in the style/caption of their complaint. As Appellants correctly point out, KRS

100.347(3) is silent regarding *how* a party is to be named. The statute says only that "[t]he legislative body shall be a party in any such appeal filed in the Circuit Court." It does not specify that the legislative body must be included in the caption/style of the appeal or otherwise dictate how it should be brought into the action as a party. It simply mandates its inclusion.

Appellants posit that they complied with the strict terms of KRS 100.347(3) by clearly and explicitly stating several times within the body of their complaint that the City Council was a party and that its action in approving the zoning request was at issue. The Cahoes and the City of Mt. Washington disagree. They maintain that CR 10.01's requirement for naming a party in the case caption/style has been strictly applied in administrative actions like the present.

To resolve this conflict, it is important to identify the type of action at issue. Are we dealing with an appeal or an original action in circuit court? While KRS 100.347 uses the term "appeal," the Kentucky Supreme Court has held a party seeking to take an appeal pursuant to KRS 100.347 must follow "precisely the same steps required to commence any other original action in the circuit court." *Isaacs v. Caldwell*, 530 S.W.3d 449, 454 (Ky. 2017). And, while we must apply strict compliance to the statutory mandates, "[e]quitable principles applicable to [o]riginal civil actions are equally applicable to original actions seeking judicial review of a planning commission action." *Id.* at 456. Thus, our task is to parse out

what is statutorily required versus what is required by virtue of the Civil Rules and then determine whether Appellants met those requirements.

CR 10.01 provides:

> Every pleading shall have a caption setting forth the name of the court, the style of the action, the file number, and a designation as in Rule 7.01. *In the complaint the style of the action shall include the names of all the parties*, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Id. (emphasis added).

It is undisputed Appellants did not include the City Council in the caption/style of their complaint. While we have previously held CR 10.01's requirement that a party name be included in the case style must be strictly complied with in administrative matters, most of our prior cases were based, in part, on the assumption that the equitable doctrine of substantial compliance is never applicable in an administrative appeal. *See, e.g., Alcorp, Inc. v. Barton*, No. 2002-CA-001806-MR, 2003 WL 22064248, at *3 (Ky. App. Sept. 5, 2003). However, *Issacs* held that *if* the requirement at issue derives from the Civil Rules as opposed to the administrative statute the equitable principles applicable to ordinary civil actions apply. *Isaacs*, 530 S.W.3d at 454.

In this case, the requirement that the party name be listed in the style/caption derives from the Civil Rules, not the statute. Therefore, we must

consider how CR 10.01 operates in the normal course. There is very little authority applying CR 10.01. The most recent published opinion held that CR 10.01 "must be construed to mean exactly what it says and that a complaint which does not include the names of all the parties in the caption, or style, does not comply with the rule." *McCoy v. Western Baptist Hospital*, 628 S.W.2d 634, 636 (Ky. App. 1981). "[W]here a timely objection is raised to failure to comply with [CR 10.01], the action must be dismissed." *Id.* Based on CR 10.01 and the interpretive case law, we cannot agree with Appellants that designating the City Council as a party in the body of the complaint in the face of objections was sufficient compliance with CR 10.01.

However, while the language in *McCoy* implies that dismissal is the only remedy when an objection is made pursuant to CR 10.01, other case law suggests that automatic dismissal is not favored if the plaintiff seeks to amend the complaint to bring it in compliance with CR 10.01. *See Fuson v. VanBebber*, 454 S.W.2d 111, 113 (Ky. 1970), *overruled on other grounds by Barrett v. Stephany*, 510 S.W.2d 524 (Ky. 1974); *Gideon v. Samaritan Hosp. Lexington*, No. 2001-CA-001925-MR, 2003 WL 1342343, at *1 (Ky. App. Feb. 28, 2003); *Hall v. Creech*, No. 2001-CA-000529-MR, 2003 WL 22927626, at *1 (Ky. App. Dec. 12, 2003).

KRS 100.347(3) does not require the City Council's inclusion in the caption/style of the complaint. The statute only requires the City Council to be

included as a party. We believe Appellants' naming the City Council in the body of the complaint would have been sufficient compliance with KRS 100.347(3) to allow jurisdiction to attach so long as the appeal was otherwise "properly taken" within thirty days. *See Eline v. Lampe*, 275 S.W.2d 64, 65 (Ky. 1955) ("Under that statute no formal 'pleading' of any kind is required, and therefore it need not be captioned as required by CR 10.01.").

Therefore, the real question in this case is whether Appellants otherwise properly filed their appeal as required by statute notwithstanding their failure to technically comply with CR 10.01. Because the rules that determine when a civil action commences determine when an appeal of an administrative action has been taken, we must apply CR 3.01. *Isaacs*, 530 S.W.3d at 454. CR 3.01 provides that "[a] civil action is commenced by the filing of a complaint with the court *and* the issuance of a summons or warning order thereon in good faith." (Emphasis added). "Furthermore, '[i]f the action is commenced by the filing of the petition and the issuance of summons, and only one time period is specified, it must follow that both actions [that is, the *filing* of the petition or other initial pleading and the *issuance* of the summons] must be taken within the period of time provided in the statute.'" *Isaacs*, 530 S.W.3d at 454 (quoting *Metro Medical Imaging, LLC v. Commonwealth*, 173 S.W.3d 916, 918 (Ky. App. 2005)). There is no dispute that the complaint was filed within thirty days of the final legislative

action. The question is whether the required summonses were issued in good faith before expiration of the thirty days.

CR 4.01(1) provides that "[u]pon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons[.]" CR 4.02 provides:

> The summons shall be issued in the name of the Commonwealth, be dated and signed by the clerk, contain the name of the court and the style and number of the action, and *be directed to each defendant*, notifying him that a legal action has been filed against him and that unless a written defense is made by him or by an attorney in his behalf within 20 days following the day on which the summons is served on him a judgment may issue against him for the relief demanded.

CR 4.02 (emphasis added). "[A] summons, to be valid, must name the defendants to be summoned." *Casey v. Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528, 529 (1913).

Three parties were listed in the style of Appellants' complaint as appellants/defendants: (1) Albert Cahoe; (2) Mary Rose Cahoe; and (3) the City of Mt. Washington. Appellants tendered a summons for each of these three individuals/entities; the clerk issued a summons for each; and the summonses were served. Appellants made no attempt to comply with CR 3.01 and CR 4.02 by having a summons issued that was "directed to" the City Council.

Unlike *Issacs*, this is not a situation where the clerk refused to issue a summons for the City Council. Likewise, this is not an instance where Appellants placed an incorrect name on the summons but then served the correct entity or where they simply omitted the name of the correct entity from the caption/style but had a summons issued for that entity. While Appellants alleged in their complaint that the Mayor could accept service on behalf of the City Council, Appellants did not request a summons to be issued in the City Council's name.[4] The summons issued was directed to the City of Mt. Washington. Appellants have acknowledged throughout these proceedings that the City of Mt. Washington is a distinct legal entity, which belies any argument they were simply confused regarding which entity to serve. According to Appellants, they intended to take this appeal against *both* the City of Mt. Washington and the City Council; however, Appellants failed to have a summons issued in the City Council's name before expiration of the thirty-day period to appeal.

What we must determine is whether that failure prevented jurisdiction from attaching within the statutory time period. To this end, the Kentucky Supreme Court has held that equity cannot be used to toll or otherwise extend the

[4] While the Mayor presides over the City Council's meetings, he is not a member of the City Council. Therefore, the Mayor is not a proper person to accept service of process on behalf of the City Council. However, we do not have to delve into whether jurisdiction would have attached had the Mayor accepted service for the City Council because no summons for the City Council was issued before expiration of the appeals period. The summons directed to the Mayor was issued for the City of Mt. Washington, not the City Council.

statute of limitations where the delay in issuance of the summons was caused by counsel's failure to locate the proper party and not because of "inaction on the part of court personnel[.]" *See Williams v. Hawkins*, 594 S.W.3d 189, 194 (Ky. 2020).

Appellants assert that to the extent we believe their failure to have a summons issued for the City Council within the statutory period is relevant, we should remand this matter to the circuit court for findings of fact regarding whether they acted with a good faith intent. "The good faith essential for the commencement of the action has long been construed to require a contemporaneous intention on the part of the initiating party to diligently attend to the service of the summons." *Isaacs*, 530 S.W.3d at 456. "The 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." *Roehrig v. Merchants & Businessmen's Mut. Ins. Co.*, 391 S.W.2d 369, 371 (Ky. 1965). In this case, however, no summons was issued for the City Council. Appellants could not have had a good faith intention to serve a summons they never requested the circuit court clerk to issue.

This case is starkly different than the situation we encountered in *Zumbiel v. Board of Adjustment for City of Lakeside Park, Kenton County*, No. 2017-CA-000938-MR, 2018 WL 5778786, at *1 (Ky. App. Nov. 2, 2018). In

Zumbiel, the appellants filed an appeal in Kenton Circuit Court. The statute at issue, KRS 100.347(1), mandated that the board of adjustment shall be a party to any appeal in circuit court. The appellants named the board of adjustment as a party in the complaint and had a summons in its name. However, they failed to serve the summons on a member of the board of adjustment as required under the Kentucky Rules of Civil Procedure. Instead, they served the summons that was issued for the board of adjustment at the address for the Planning and Development Services of Kenton County. On appeal, we reversed the circuit court's dismissal for lack of jurisdiction. In doing so, we noted a perfected summons is not required to commence an action; rather, CR 3.01 simply requires issuance of the summons in good faith. Importantly, we explicitly noted that "[e]ven though the Board was not properly served with the summons, *a summons was issued in the name of the Board*." *Id.* at *4 (emphasis added). *Zumbiel* is in accord with other opinions excusing improper service of an otherwise properly issued summons. *See Arlinghaus Builders, Inc. v. Kentucky Public Service Com'n*, 142 S.W.3d 693, 697 (Ky. App. 2003).

In this case, unlike *Zumbiel*, a summons was *not* issued in the name of the City Council within thirty days of its final action. Instead, we are confronted with a situation far more analogous to *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978), wherein the Court affirmed dismissal of a

complaint where the required party had not been named as a party in the complaint or had a summons issued in its name. *See also Leger v. Elkins*, No. 2019-CA-001483-MR, 2020 WL 2510529, at *1 (Ky. App. May 15, 2020) (holding that an action was time barred where a summons was not issued for the correct party until after the statute of limitations had expired). Appellants' failure to have a summons issued in the name of a required defending party means they did not properly commence their action. They could have amended or corrected the deficiency before expiration of the thirty-day appeal period. However, they failed to do so. After the thirtieth day passed without a summons having been issued in the City Council's name, the circuit court lost jurisdiction. And, the case law is clear that equity cannot be used to salvage an administrative complaint that is jurisdictionally barred. *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990).

While we would much prefer to take up the merits of this appeal, we are bound by precedent and cannot carve out exceptions on an *ad hoc* basis based solely on whether we believe an appeal is substantively meritorious. Try as we might, we have not located any authority that would permit an administrative appeal to proceed where the plaintiff failed to request a summons to be issued in the name of a required party before expiration of the statutory appeal period. Accordingly, we have no choice but to affirm the dismissal.

IV. CONCLUSION

For the reasons stated above, we affirm the Bullitt Circuit Court's order of dismissal.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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