

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001546-MR

COLLEEN BLOSE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
CIVIL ACTION NO. 04-CI-008296

HUMANA, INC.

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: JOHNSON AND TAYLOR, JUDGES; HUDDLESTON,¹ SENIOR JUDGE.

HUDDLESTON, SENIOR JUDGE: On January 3, 1995, Colleen Blose, who is afflicted with cerebral palsy, began working as a mail clerk in the distribution department of Humana, Inc. in Jefferson County, Kentucky. On January 5, 2001, nearly six years to the day after Humana hired Blose, the corporation closed its distribution department and terminated Blose's employment.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On September 30, 2004, Blose filed suit against Humana claiming that Humana had been guilty of outrageous conduct while she was employed by the corporation and that she had been discriminated against in violation of Kentucky Revised Statutes (KRS) 344.040.² Blose alleged that, starting in 1999 and continuing until her termination in 2001, employees at Humana harassed her causing physical injury, humiliation and emotional distress. Although Blose complained to Humana's management about the harassment, no action was taken to address the problem. In addition, after Humana closed its distribution department, the corporation began hiring employees from that department for other positions. According to Blose, she applied for several new positions with Humana but was refused because she was afflicted with cerebral palsy.

On November 8, 2004, Humana moved, pursuant to Kentucky Rules of Civil Procedure (CR) 12.02, to dismiss Blose's complaint for failure to state a claim upon which relief can be granted. Humana coupled its motion to dismiss with a motion for summary judgment pursuant to CR 56.03.

In support of its motions, Humana claimed that on January 5, 2001, the last day of Blose's employment, she signed

² Ky. Rev. Stat. (KRS) 344.040(1) provides, in pertinent part, that it is an unlawful practice for an employer "[t]o . . . discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because . . . the person is a qualified individual with a disability"

a "Release and Agreement" in which, in exchange for twelve weeks' severance pay and twelve additional weeks of health insurance coverage, she waived any claim against Humana based on federal, state or local law. According to Humana, Blose actually received twelve weeks' severance pay and twelve additional weeks of insurance coverage in consideration for waiving any and all claims against the corporation. Thus, Humana argued, Blose's complaint was subject to summary dismissal.

On December 28, 2004, Blose filed a written response to Humana's motions in which she requested time to conduct discovery and argued that the circuit court would violate CR 56 if it ruled on Humana's motion without giving her the opportunity to complete discovery. She also argued that Humana's motion was not appropriate under CR 12 since a motion under that rule is limited to the facts contained in the pleadings, and Humana had referenced facts outside the complaint in its motion.

Blose also asserted in affidavits that her supervisor never told her that the Release and Agreement contained a waiver of her right to pursue a claim against Humana: the supervisor told her that the document was nothing more than a confidentiality agreement. And, she claimed, she was never given an opportunity to read the Release and Agreement. Blose

also said that she was not allowed to remove the document from Humana's premises, was not given a copy of the document, and had no opportunity to consult with an attorney before signing it. At the termination conference, Blose maintained, her supervisor simply turned to the document's signature page and told her to sign it after insisting that if she did not sign the document, she would not receive her last paycheck or any severance pay. Blose argued, based on her recitation of the facts, that the Release and Agreement was invalid because she was fraudulently induced to sign it. Alternatively, she argued that she signed the Release and Agreement under duress because Humana threatened to withhold her last paycheck if she failed to do so.

On February 24, 2005, the circuit court held a hearing to consider Humana's motions and Blose's response. Blose again asked the court to refrain from ruling on Humana's motion pending completion of discovery. Instead, immediately following the hearing, the circuit court signed an order dismissing Blose's complaint, citing both CR 12 and CR 56. Several months later on June 7, 2005, the order was finally entered. Soon thereafter, Blose appealed to this Court.

On appeal, Blose points out that Humana filed its motion to dismiss relying on both CR 12 and CR 56. According to Blose, a complaint can only be dismissed pursuant to CR 12 when it is certain that the plaintiff is not entitled to relief under

any legal theory that is supported by the facts alleged in the complaint.³ Furthermore, in ruling on a CR 12 motion, the court may not consider any facts outside the pleadings. If matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in CR 56.⁴ As Blose notes, Humana, in its motion to dismiss, referred to matters not found in her complaint and the circuit court based its decision on these additional facts. We agree with Blose that the court clearly erred when it considered matters outside the pleadings to support the dismissal of Blose's lawsuit pursuant to CR 12.

Humana, according to Blose, recognized that dismissal under CR 12 was not appropriate since it simultaneously sought summary judgment pursuant to CR 56. In response to that motion, Blose sought time to conduct discovery, but the circuit court did not accede to the request. Blose asserts that the court should not have granted summary judgment once she requested additional time to conduct discovery.⁵

Blose reminds us that in considering Humana's motion under CR 56, the circuit court was limited to determining whether an issue of material fact regarding the validity of the

³ *Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc.*, 842 S.W.2d 873, 874 (Ky. App. 1992).

⁴ Ky. R. Civ. Proc. (CR) 12.03.

⁵ *See Vance v. United States*, 90 F.3d 1145 (6th Cir. 1996).

Release and Agreement existed. Despite the lack of discovery, Blose insists that the allegations in her complaint, together with the facts set forth in the affidavits she tendered, constituted "some affirmative evidence" that a genuine issue of material fact exists that requires a trial.

Relying on *Smart v. Gillette Co. Long-Term Disability Plan*⁶ and *Finz v. Schlesinger*,⁷ as well as other federal cases, Blose argues that a fact finder (either the circuit court or a jury) was required to evaluate the validity of the Release and Agreement under the totality of the circumstances to determine whether she signed it knowingly and voluntarily. Based on the affidavits she tendered in opposition to Humana's motion, Blose insists that there is a material issue of fact for a fact finder to resolve as to whether Humana fraudulently induced her to sign the agreement containing the waiver, and, she insists, her complaint and affidavits establish the elements of fraud, at least to such an extent that her complaint can withstand a motion for summary judgment. In the alternative, Blose argues that there is a material issue of fact as to whether she signed the Release and Agreement under duress which rendered the waiver void and unenforceable.

⁶ 70 F.3d 173, 181 (1st Cir. 1995).

⁷ 957 F.2d 78, 82 (2nd Cir. 1992).

In the rather perfunctory order granting dismissal, the circuit court cited both CR 12 and CR 56. Since the court apparently considered facts outside the pleadings, it was required to treat Humana's motion under CR 12 as one for summary judgment under CR 56 and to dispose of it accordingly.⁸

When considering a motion for summary judgment, the court was required to view the record in a light most favorable to Blose, the party opposing the motion, and was required to resolve all doubts in her favor.⁹ On her part, Blose was required to present, at the very least, some affirmative evidence demonstrating the existence of a genuine issue of material fact that requires a trial.¹⁰ The court was not authorized to grant summary judgment if any issue of material fact exists.¹¹ We, on the other hand, must determine whether the circuit court correctly found that no genuine issue of material fact exists and that, as a matter of law, Humana was entitled to judgment in its favor.¹² Since findings of fact are not in issue, we review the circuit court's decision *de novo*.¹³

⁸ See *Ferguson v. Oates*, 314 S.W.2d 518 (Ky. 1958).

⁹ *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

¹⁰ *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

¹¹ *Steelvest, Inc. v. Scansteel Service Center, Inc.*, *supra*, note 9.

¹² *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

¹³ *Id.*

In *Roberson v. Lampton*,¹⁴ Kentucky's highest court said that "every litigant must have the opportunity to search for and secure whatever evidence may be necessary to perfect [her] case, and unless it is manifestly impossible for [her] to produce it [she] cannot be forced to a premature showdown in that respect by a motion for summary judgment." Later, this Court addressed *Roberson*, stating that

we believe that *Roberson* must be interpreted narrowly as holding that **summary judgment may not properly be entered before the respondent has had an opportunity to complete discovery**, rather than that a movant must show that it would be impossible to produce evidence. It is not necessary to show that the respondent has actually completed discovery, but only that respondent has had an opportunity to do so.¹⁵

This narrow interpretation has been followed in at least three other cases: *Hollins v. Edmonds*,¹⁶ *Hasty v. Shepherd*¹⁷ and *Pendleton Brothers Vending, Inc. v. Commonwealth, Finance and Administration Cabinet*.¹⁸

In the present case, Blose filed her complaint on September 30, 2004. Thirty-nine days later, Humana filed its

¹⁴ 516 S.W.2d 838, 840 (Ky. 1974).

¹⁵ *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (emphasis supplied and citations omitted).

¹⁶ 616 S.W.2d 801 (Ky. App. 1981).

¹⁷ 620 S.W.2d 325 (Ky. App. 1981).

¹⁸ 758 S.W.2d 24 (Ky. 1988).

motions to dismiss for failure to state a claim upon which relief can be granted and for summary judgment. In her December 28, 2004, response and at the hearing held on February 24, 2005, Blose requested time to conduct discovery. Given the rapid chain of events, Blose did not have an adequate opportunity to complete discovery. Thus, the circuit court acted precipitously when it granted summary judgment before discovery reasonably could be completed.¹⁹

Since we vacate because the circuit court ruled on Humana's motion for summary judgment before Blose had an opportunity to complete discovery, we find it unnecessary to address Blose's other assignments of error. However, we direct the circuit court's attention to this Court's decision in *Curtis v. Belden Electronic Wire and Cable*.²⁰ In *Curtis*, the employer, Belden Electronic, terminated Curtis' employment on June 30, 1985. Curtis subsequently filed a complaint, pursuant to KRS 344.040(1), with the Kentucky Commission on Human Rights alleging age discrimination. On June 4, 1985, Curtis and Belden had entered into a contract in which Curtis agreed to waive any action based upon age discrimination in return for sixteen weeks' severance pay and sixteen additional weeks of insurance coverage. The Commission dismissed Curtis' complaint, and Wayne

¹⁹ *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, *supra*, note 15.

²⁰ 760 S.W.2d 97 (Ky. App. 1988).

Circuit Court dismissed his petition for review. On appeal to this Court, we agreed with Belden Electronic that

the waiver was a binding contract. It is also indisputable [we continued] that when [Curtis] filed his action for age discrimination he placed himself in breach of the contract. Nevertheless, Belden's remedy for the breach should have been an original action or counterclaim for recovery of damages incurred as a result of the breach. [Curtis] still had a statutory right to file his civil rights action, although his doing so subjected him to a suit for breach of contract.²¹

In the present case, since the circuit court prematurely granted summary judgment, the validity of the Release and Agreement remains at issue. If, however, on remand the fact finder determines that the Release and Agreement is valid and enforceable, the circuit court must still apply the law as declared in *Curtis*.

We vacate the order of dismissal and the summary judgment from which this appeal is prosecuted and remand this case to Jefferson Circuit Court for further proceedings. Upon remand, the court shall afford Blose a reasonable opportunity to complete discovery before ruling on Humana's motion for summary judgment.

ALL CONCUR.

²¹ *Id.* at 98, citing *Duff v. Chaney*, 291 Ky. 308, 164 S.W.2d 483, 487 (1942).

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