

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000599-MR

HYDEN-LESLIE WATER DISTRICT

APPELLANT

v. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE OSCAR GAYLE HOUSE, JUDGE
ACTION NO. 06-CI-00265

JESSIE HOSKINS AND
PERRY CONSTRUCTION, INC.

APPELLEES

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: DIXON AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: The Hyden-Leslie Water District appeals from a Leslie Circuit Court order which denied the District's motion for summary judgment.

Because this appeal is taken from an interlocutory order, it must be dismissed.

¹ Senior Judges Sheila R. Isaac 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 July 17, 2005, Jessie Hoskins filed a complaint against the District alleging that he had been injured on a bridge which collapsed. He claimed that a cable to the bridge had been damaged when a water line was being installed three to four months before his fall. Hoskins filed suit alleging negligence against the Hyden-Leslie Water District and BP Pipeline, LLC. BP Pipeline was later dismissed as improperly named because it was not the contractor that had performed the water line installation. Hoskins filed a second amended complaint naming Perry Construction, Inc. as a defendant. It appears that Perry Construction was never served with the complaint nor did it file an answer.

The depositions of Hoskins and of Leeman Howard, the manager of the Hyden-Leslie Water District, were taken. The District thereafter moved for summary judgment, contending that the complaint was filed outside the applicable statutory limitations period; that the District is entitled to statutory immunity under Kentucky Revised Statutes (KRS) 65.2003; and that there was lack of proximate cause and lack of notice. Hoskins filed no response. A hearing on the motion was held on November 4, 2009, but neither Hoskins nor his counsel appeared.

The circuit court entered an order denying the motion for summary judgment, stating only that there were “genuine issues of material fact to be tried.” This appeal by the District followed.

The District raises several arguments in an effort to show that this case is an exception to the general rule that “[a]n order denying a motion for

summary judgment is not appealable.” *Gumm v. Combs*, 302 S.W.2d 616, 617 (Ky. 1957). First, because Hoskins did not respond to the District’s motion for summary judgment, the District asserts that the circuit court’s denial of the motion should be reviewable on the grounds that “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Brewster v. Colgate-Palmolive Co.*, 279 S.W.3d 142, 147 (Ky. 2009), citing *Steelvest, Inc. v. Scansteel Service Ctr., Inc.*, 807 S.W.2d 476, 482 (Ky. 1991); Kentucky Rules of Civil Procedure (CR) 56.03. While Hoskins’s failure to respond to the motion was a factor for the circuit court to consider in determining whether summary judgment was appropriate, it does not render the court order reviewable on appeal. Hoskins presented enough evidence in the earlier stages of the proceedings to support the circuit court’s refusal to grant summary judgment.

Second, the District argues that appellate review is permissible under the exception which allows an appeal from the denial of a summary judgment motion when “the only basis of the ruling is a matter of law.” *Ford Motor Credit Co. v. Hall*, 879 S.W.2d 487, 489 (Ky.App. 1994). This exception is inapplicable because the basis of the court’s ruling in this case was its determination that material issues of fact remain to be resolved.

Finally, the Water District argues that summary judgment should have been granted on the basis of the statutory immunity that is provided for local governments under KRS 65.2003, and that the circuit court’s denial of the motion

is reviewable on those grounds. In *Breathitt County Bd. of Educ. v. Prater*, 292 S.W.3d 883, 887 (Ky. 2009), the Supreme Court held that an “order denying a substantial claim of absolute immunity is immediately appealable even in the absence of a final judgment.” In that case, however, the trial court expressly ruled that the defendant school board’s actions were proprietary rather than governmental and so did not come within the scope of the board’s immunity. *Id.* at 885. In the case before us, the circuit court made no such ruling as to immunity. Arguably, by ruling that material issues of fact remain, the court may have already determined that the District is not protected by statutory immunity. We hesitate to impute such meaning to the order, however, and further note that the District did not ask the trial court to clarify its ruling to specify whether the claim of immunity was denied.

Accordingly, this appeal is dismissed.

ALL CONCUR.

ENTERED: March 18, 2011

/s/ Sheila Isaac
SENIOR JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANT:

Jason E. Williams
London, Kentucky

BRIEF FOR APPELLEE JESSE
HOSKINS:

Bill Meader
Hyden, Kentucky

NO BRIEF FILED FOR APPELLEE
PERRY CONSTRUCTION, INC.