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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001181-MR

COMMONWEALTH OF KENTUCKY,
ENERGY AND ENVIRONMENT CABINET — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-01007

JEFFERY LANCE BOWLING
AND JOHN BAUGHMAN — APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JONES, JUDGES.

ACREE, JUDGE: The Energy and Environment Cabinet appeals the Franklin Circuit Court's July 27, 2016 order directing the Cabinet to pay a receiver his costs in the amount of $27,005.00. The Cabinet argues it should not be responsible for the receiver's shortfall. We agree. Accordingly, we reverse that order.

FACTS AND PROCEDURE

The facts are not in dispute.

David Bowling and his son, Jeffrey Lance Bowling, were involved with a company called Appalachian Waste Control. The company operated five waste water treatment facilities[1] in Johnson County, Kentucky. Jeffrey was the holder of a Kentucky Pollutant Discharge Elimination System (KPDES) permit for each treatment facility.

In 2004, 2005, and 2006 the Cabinet repeatedly issued notices of violations of waste water regulations resulting from Appellees' inadequate operation and maintenance of the treatment facilities. In July 2005, the Cabinet filed a complaint and motion for an injunction seeking to enjoin Jeffrey, as the operator, from ongoing environmental degradation. The complaint also requested that Jeffrey "be required to retain a Kentucky licensed wastewater operator to operate the plants at issue or, in the alternative, a receiver be appointed to take possession of the facilities in question, receive the assets attendant thereunto including the monthly payments of the residents of the subdivisions and any and all other duties attendant and necessary to said appointment." (R. 7).

[1] The treatment plants included: the Burkeshire Development Subdivision plant; the Neal Price Subdivision plant; the Paradise Village Valley plant; the Preston Estates Subdivision plant; and the Richmond Hills Subdivision plant.

The circuit court entered a temporary injunction enjoining Jeffrey from discharging or allowing to be discharged from the treatment facilities untreated sewage waste, constituents, or pollutants in excess of the limits permitted by the KPDES permits. A few months later, the Cabinet moved to hold Jeffrey in contempt for failing to abide by the temporary injunction. Jeffrey failed to appear at the contempt hearing, and a bench warrant was issued for his arrest.

In December 2006, at the request of the Cabinet, the circuit court appointed a temporary receiver "to collect rates for the" treatment facilities and directed the Cabinet to "petition the Public Service Commission to take the necessary steps to appoint a permanent receiver to take over" the treatment facilities. (R. 226).

On December 28, 2006, the Cabinet initiated abandonment proceedings with the Commission pursuant to KRS[2] 278.021. The Commission held a hearing to determine if the treatment facilities were, in fact, abandoned. Neither David nor Jeffrey appeared at the hearing. On December 18, 2007, the Commission issued an order directing the Commission's general counsel to "take all actions necessary to obtain, pursuant to KRS 278.021(1), an order from Franklin Circuit Court attaching the assets of Appalachian Waste Control and placing them under sole control and responsibility of a receiver."

[2] Kentucky Revised Statutes.

By order entered May 7, 2007, the circuit court appointed Prestonsburg City's Utilities Commission as operator to operate the treatment facilities at issue for one year, as well as a temporary receiver to collect fees from the customers and to pay the operator. In September 2009, John Baughman was appointed substitute receiver to take over operation of the waste water treatment facilities at issue.

After more than three years of the receivership's operation by the Commission, the receiver filed a motion seeking to relieve the residents of the Neal Price subdivision of their obligation to pay for sewage treatment due to the "almost totally dysfunctional treatment plant." (R. 538). The circuit court granted that motion. Between 2009 and 2013, the receiver filed numerous motions with the circuit court requesting that Jeffrey assist with the shortfall the receiver was experiencing; the circuit court had previously ordered Jeffrey to pay $1,000 per month toward the operation and administration of the treatment facilities. (R. 309). The circuit court routinely granted the receiver's motions.

On December 13, 2013, the receiver filed a motion to terminate receivership and pay costs. The receiver explained that through the coordinated efforts of the receiver, the Commission and the City of Paintsville, through the Paintsville Utility Commission, all of the waste water treatment facilities which were the subject of this action had been transferred to and are currently operated by

the Paintsville Utility Commission. The receiver stated it had completed the obligations required by the circuit court's Order of Appointment and no further duties or obligations were apparent. The receiver also alerted the circuit court that the receivership's expenses exceeded its collections by $27,005.00 and sought reimbursement. The receiver requested a hearing to determine which party – Jeffrey or the Cabinet – should be responsible to pay the balance owed. By order entered July 27, 2016, the circuit court directed the Cabinet to pay the receiver's costs. It reasoned:

> The issue remaining is whether the Receiver's costs should be paid by the Plaintiff ("the Cabinet"), or by the Defendant, Jeffrey Lance Bowling. Having reviewed the memoranda filed by the Cabinet and the Receiver the Court concludes it has the authority to order the Plaintiff to pay the Receiver's costs pursuant to AP IV, Section 1(3). The Court finds the Defendant is responsible for the payment of the costs herein, but further finds and recognizes the difficulty of the Receiver collecting a Judgment from this individual defendant. Accordingly, the court directs and orders the Cabinet to pay the Receiver his costs in the amount of $27,005.00. Upon payment of the Receiver's costs by the Cabinet, it shall be awarded a Judgment against the Defendant, Jeffrey Lance Bowling, in the same amount.

(R. 719). From this order, the Cabinet appealed.

The Cabinet does not dispute the amount owed to the receiver or the quality of work the receiver performed. It argues that Jeffrey, not the Cabinet, is

responsible for the receiver's deficiency. The Cabinet contends the taxpayers should not bear the costs for the receiver's shortfall. We agree.

ANALYSIS

"[T]he cost of receivership" is appropriately "taxed as a part of the costs" of a civil action. *Dulworth & Burress Tobacco Warehouse Co. v. Burress*, 369 S.W.2d 129, 133 (Ky. 1963) (citation and internal quotation marks omitted); *see also* KRS 453.050 ("[C]osts . . . include . . . all fees of officers . . . ."). "[T]he receiver . . . is . . . an officer of the court appointed on behalf of all parties[.]" *Crump & Field v. First Nat. Bank*, 229 Ky. 526, 17 S.W.2d 436, 439 (1929). Consequently, to the extent the receiver's expenses exceed collections, those expenses may be taxed as "costs." CR[3] 54.04(1).

However, a special rule applies when one of the parties is the Commonwealth or one of its agencies. "It is true that '[i]n actions involving the Commonwealth, the trial court may assess costs against the State, its officers, and its agencies, but the fees shall be imposed *only to the extent permitted by law.*'" *McCracken County Fiscal Court v. Graves*, 885 S.W.2d 307, 314 (Ky. 1994) (adding emphasis and quoting *Department for Human Resources v. Paulson*, 622 S.W.2d 508, 509 (Ky. App. 1981) (citing CR 54.04)). A circuit court simply lacks

[3] Kentucky Rules of Civil Procedure.

the authority to "assess a fee against the Commonwealth in excess of the amount established and funded by the legislature." *Paulson*, 622 S.W.2d at 509.

We know of nothing that authorizes the circuit court to impose upon the Cabinet as costs this receiver's expenses. When we examine the order assessing those costs, we see the only authority cited by the circuit court is "AP IV, Section 1(3)." This reference is to Kentucky's Administrative Procedures of the Court of Justice, Part IV, Sec. 1(3). That rule says:

> No local rules, practices, procedures, orders, or other policies of any circuit may conflict with or controvert these rules; further, to the extent that any such policies are inconsistent or otherwise conflict with these rules, these rules shall prevail.

AP IV, Sec. 1(3). We find nothing in this rule to authorize assessing costs against the Cabinet; the circuit court was prohibited from doing so by CR 54.04(1).

Furthermore, the Cabinet is the successful party in this case. It is atypical of our jurisprudence to require the prevailing party to bear the costs of the action but, instead awards costs *to that party*. "KRS 453.040(1)(a) provides that the successful party in any action shall *recover* his costs, unless otherwise provided by law. CR 54.04(1) provides that costs shall be allowed as of course *to* the prevailing party . . . ." *Cummins v. Cox*, 763 S.W.2d 135, 136 (Ky. App. 1988).

Finally, the general rule in Kentucky is that "the receiver's compensation and expenses are payable from the funds in his hands, no part

thereof being taxable against the party at whose instance the receiver was appointed." *Crump & Field v. First Nat. Bank*, 229 Ky. 526, 17 S.W.2d 436, 437–38 (1929). The Administrative Procedures of the Court of Justice, which treats master commissioners and receivers equally, AP IV, Sec. 17(1), presumes as much. AP IV, Sec. 10(1) ("Each master commissioner shall account . . . for all fees collected, and *for all expenses deducted*. . . ."; emphasis added). Such a presumption is not only logical, but experience-based, because it is the receiver who is in the best position to know and to report on the health and prosperity of the receivership from which he is to be compensated.

But what if expenses do exceed collections? We acknowledge there are exceptions to this general rule, making it "equitable to require the parties, at whose instance a receiver of property was appointed, to meet the expenses of the receivership, when the fund in court is ascertained to be insufficient for that purpose." *Crump & Field*, 17 S.W.2d at 439 (quoting *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 28 S.Ct. 406, 52 L.Ed. 528 (1908)). In this case, there is no dispute that the treatment facilities at issue failed to generate sufficient funds to cover the receiver's costs and fees. The receiver turned to the circuit court to shift the burden of bearing the receivership's losses to the parties. But as between these two parties, Jeffrey and the Cabinet, the jurisprudence is reasonably clear.

As framed by the Supreme Court of the United States in *Atlantic Trust Co. v. Chapman*:

> Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?

208 U.S. at 364. The Supreme Court answered, "No," the plaintiff or complainant is not liable for the receiver's unpaid costs and fees. The Court first emphasized that "[n]o such liability could arise from the simple fact that it was on plaintiff's motion that a receiver was appointed to take charge of the property pending the litigation." *Id.* at 370. "To hold the [plaintiff] liable for indebtedness thus created would be most inequitable, and would not, we think, be in accord with sound principle." *Id.* at 373.

The circuit court freely acknowledged that, as between the parties, Jeffrey *should* be responsible for the outstanding balance, but questioned the receiver's ability to collect from him. On that basis alone, it ordered the Cabinet to pay the receiver his costs of $27,005.00.[4] This was error.

[4] The inequities of this judgment, borne ultimately by the taxpayers, are not offset by the circuit court's simultaneous award of a second judgment in favor of the Cabinet, against Jeffrey,

While we find no fault in the circuit court's conclusion that the receiver should not be deprived of his fees and expenses, we cannot agree that those costs should be imposed upon the Cabinet simply because of the ease of collecting. Jeffrey was owner and operator of the treatment facilities, responsible for violations of state law necessitating the receiver in the first place. Jeffrey, not the Cabinet, should bear this cost directly. In the absence of legislation, the courts cannot make the Cabinet, as a steward of the taxpayers' money, a guarantor or co-obligor or financier for Jeffrey. It may be more difficult for the receiver to collect from Jeffrey, but it is not impossible.

Summarizing, "[w]e do not think that the mere insufficiency of the property or fund to meet the expenses of a receivership entitled the receiver to hold the plaintiff in the suit personally liable, if all that could be said was that he instituted the suit and moved for the appointment of the receiver to take charge of the property and maintain and operate it pending the suit." *Crump & Field*, 17 S.W.2d at 439 (quoting *Chapman*, 208 U.S. at 375). This is particularly true when the plaintiff is a state agency responsible for nothing more than regulating the entities involved. In addition to finding the order under review to be violative of CR 54.04(1), we agree with the Cabinet that it is inequitable to require it, and Kentucky taxpayers, to bear these costs.

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conditioned upon the Cabinet's payment to the receiver. In fact, this compounds the inequity by requiring the Cabinet to incur additional costs collecting a judgment from Jeffrey.

For the foregoing reasons, we reverse the Franklin Circuit Court's July 27, 2016 order requiring the Cabinet to pay the receiver his costs in the amount of $27,005.00.

ALL CONCUR.

BRIEFS FOR APPELLANT:

John S. West
Daniel Cleveland
Frankfort, Kentucky

BRIEF FOR APPELLEE, JOHN BAUGHMAN:

John B. Baughman
Frankfort, Kentucky