STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
September 23, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Patricia Jones (formerly Akers),
Plaintiff Below, Petitioner

vs) No. 101327 (Kanawha County Case No. 10-C-746)

West Virginia Public Employees Retirement System, A Corporation D/B/A West Virginia Public Consolidated Retirement Board; and Judy Vannoy Akers, Defendants below, Respondents

MEMORANDUM DECISION

Petitioner Patricia Jones (formerly Akers) appeals from an order entered by the Circuit Court of Kanawha County dismissing her complaint for failure to state a claim, pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure.* Upon consideration of the standard of review, the record on appeal, the briefs of the parties, and the oral arguments, the Court finds no substantial question of law has been presented. For these reasons, a memorandum decision rather than an opinion is appropriate under Rule 21(d) of the Revised Rules.

As set forth below, we find that the Petitioner did state a proper claim, and reverse the circuit court's order and remand the case for further proceedings.

I.

The Petitioner was married to Danny Akers for 31 years before seeking a divorce. Mr. Akers was a state employee during the marriage, and he was vested in a retirement pension from the Respondent, the West Virginia Public Employees Retirement System ("PERS").

The Petitioner and Mr. Akers agreed to the division of Mr. Akers's retirement pension in their divorce. A final divorce order approving the agreement was entered by the Family Court of Mercer County on June 30, 2008.

On June 4, 2009, a "Qualified Domestic Relations Order" (QDRO) was entered by the family court further formalizing the parties' agreement. The QDRO followed a form

order prepared by the West Virginia Public Consolidated Retirement Board, with the addition of a new paragraph numbered "7(f)." The QDRO named the Petitioner as the "Alternate Payee" and Mr. Akers as the "Participant" as it applied to his retirement account. The family court's QDRO ordered, in paragraph 7(f):

> The Participant shall designate the Alternate Payee as the surviving spouse or the surviving beneficiary of his retirement benefits and shall elect a Joint Survivor Annuity and name the Alternate Payee as the beneficiary thereof.

The Petitioner sent the QDRO to the West Virginia Public Consolidated Retirement Board ("the Board") requesting that it be accepted and honored as a valid QDRO. Prior to the Board deciding whether the QDRO would be accepted and honored, Mr. Akers changed the name of his surviving beneficiary to his fiancée (and later wife), Respondent Judy Vannoy Akers, in violation of the parties' agreement, the family court's divorce order, and the family court's QDRO submitted to the Board. This was done without the knowledge of the Petitioner or her lawyer. Further, nothing in the record or briefs indicates that the Board knew of Mr. Akers' change of the surviving beneficiary.

The Board rejected the Petitioner's QDRO, ostensibly because the petitioner added paragraph 7(f) to the Board's model QDRO, which the Board felt made the QDRO internally inconsistent. Thereafter, Mr. Akers remarried and then died before receiving any retirement or disability benefits. After Mr. Akers died, the Board paid the benefits due under Mr. Akers' PERS account to Mr. Akers' new wife, rather than to the Petitioner.

The Petitioner then brought the instant suit seeking a writ of mandamus and injunctive relief against the Board and Judy Vannoy Akers. The complaint requested an order compelling the Board to honor the QDRO and enjoining any payment to Mr. Akers's new wife. The Board moved to dismiss the complaint pursuant to Rule 12(b)(6) for its failure to state a claim upon which relief could be granted, declaring that the Petitioner did not allege the requisite elements of either mandamus or injunctive relief in her complaint. In an order dated June 11, 2010, the Circuit Court of Kanawha County granted the Board's motion to dismiss the complaint. The circuit court found, without making any findings of fact or conclusions of law based solely upon the complaint, that there was no valid QDRO in place at the time of Mr. Akers' death and, therefore, that the Petitioner had no clear right to the relief requested. The Petitioner appeals the circuit court's dismissal order.

II.

We review a trial court's order granting a motion to dismiss under a *de novo* standard. Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

The family court's QDRO was sent to the Board in compliance with the Board's regulations. 162 CSR 1-6 states that the only way to divide the marital property portion of a PERS member's benefits in a divorce is by a QDRO. The Board reviews the submitted QDROs and decides whether to accept and honor the QDRO. In essence, the Board decides whether the tendered QDRO meets the Board's requirements.

The family court's QDRO, for the most part, was the Board's model QDRO to aid drafters. The model contains boilerplate language allowing the Participant a choice between different payment plans and annuities. The Board, however, rejected the family court's QDRO because paragraph 7(f) was different from the boilerplate language of its model QDRO. Paragraph 7(f) required Mr. Akers to elect a joint survivor annuity, such that upon his disability or retirement, the Petitioner would receive 50 % of the marital property portion as of the date of their separation, and the Petitioner was named the survivor beneficiary of his retirement benefits. The Petitioner and her lawyer deny receiving any notice from the Board that it had rejected the family court's QDRO.

In her complaint, the Petitioner alleged that the Board, by not honoring the family court's QDRO, breached a nondiscretionary duty and acted under a misapprehension of law. This language sufficiently states a cause of action in a complaint seeking mandamus relief. In *State ex rel. DHHR v. W.Va. Public Employees Retirement System*, 183 W.Va. 39, 393 S.E.2d 677 (1990), this Court held that mandamus will lie to compel performance by the Board of a nondiscretionary duty, though another remedy may exist, and where the Board acted under a misapprehension of law. The complaint specifically alleged that the Board violated a nondiscretionary duty and acted under a misapprehension of law when it rejected the QDRO.

Before the circuit court, the Board contended that the Petitioner failed to state a claim because her complaint did not specifically allege each of the requisite elements for mandamus relief. The Board contended that *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), was controlling as to the elements necessary to sustain a writ of mandamus. *Kucera* set forth three elements necessary for traditional mandamus relief: (1) a clear legal right of the petitioner to relief, (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel, and (3) the absence of another adequate remedy. The circuit court, applying the standard articulated in *Kucera*,

granted the motion, holding that the complaint did not allege the requisite elements for mandamus relief.

By applying *Kucera*, the Circuit Court used the wrong standard in determining if the Petitioner's complaint alleged, on its face, elements for mandamus relief. Syllabus Point 4 of *State ex rel. DHHR v. Public Employees Retirement System, supra*, states:

> Mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him.

In accord, Syllabus Point 4, *Walter v. Ritchie*, 156 W.Va. 98, 191 S.E.2d 275 (1972). Clearly, the complaint alleged the Board breached a nondiscretionary duty and acted under a misapprehension of law. Accordingly, the circuit court erred in dismissing the complaint for failing to allege the necessary elements to sustain a mandamus action.

Further, the circuit court did not give any reasons for dismissing the part of the complaint seeking an injunction, other than to hold that at the time of Mr. Akers' death, "there was no valid QDRO in place." The motion to dismiss did not ask the circuit court to rule on the validity of the QDRO. This is a finding of fact outside the four corners of the complaint, and beyond the relief requested by the Respondent. When the court considers whether to dismiss for failure to state a claim under Rule 12(b)(6), it cannot go outside the parameters of the pleading to determine whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his, her, or its claim which would entitle him . . . to relief." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995). A trial court must liberally construe the complaint so as to do substantial justice. *Cantley v. Lincoln County Comm'n*, 221 W.Va. 468, 655 S.E.2d 490, 492 (2007).

The circuit court erred in making a factual finding that "there was no valid QDRO in place" in ruling on the sufficiency of the claims in the Petitioner's complaint.

III.

The circuit court's June 11, 2010 order is reversed, and the case is remanded for hearings on the merits of the Petitioner's complaint.

Reversed and remanded.

ISSUED: September 23, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh