

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-000740-MR

MIKE GOFF

APPELLANT

v.

APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 95-CI-0125

CITY OF BEAVER DAM;
RAY PLUMMER, ;
THOMAS L. JACKSON;
BETTY B. JACKSON;
NOAH PHELPS;
ANNA T. PHELPS;
GLENN S. BERRYMAN;
MARY BERRYMAN;
WILLIAM B. KURTZ;
KURTZ REALTY & AUCTION;
HARTFORD/BEAVER DAM JOINT
PLANNING COMMISSION;
KEITH DALE; WILLIAM PARSLEY;
DWIGHT WESTERFIELD;
LYNN LIKINS; and BARBARA MACKE

APPELLEES

AND:

NO. 1997-CA-000833-MR

RAY PLUMMER;
THOMAS L. JACKSON;
BETTY B. JACKSON;
NOAH PHELPS, JR.;
ANNA T. PHELPS;
GLEN E. BERRYMAN; and
MARY BERRYMAN

CROSS-APPELLANTS

v. CROSS-APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
CIVIL ACTION NO. 95-CI-0125

HARTFORD/BEAVER DAM
PLANNING COMMISSION;
BOB COX; KEITH DALE;
WILLIAM PARSLEY;
DWIGHT WESTERFIELD;
BARBARA MACKE;
LYNN LIKINS;
WILLIAM TICHENOR; and
CITY OF BEAVER DAM

CROSS-APPELLEES

AND: NO. 1997-CA-001601-MR

CITY OF BEAVER DAM

CROSS-APPELLANT

v. CROSS-APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
CIVIL ACTION NO. 95-CI-0125

RAY PLUMMER;
THOMAS L. JACKSON;
BETTY B. JACKSON;
NOAH PHELPS, JR.;
ANNA T. PHELPS;
GLEN E. BERRYMAN; and
MARY BERRYMAN

CROSS-APPELLEES

OPINION
AFFIRMING APPEAL NO. 97-CA-0740-MR
DISMISSING CROSS-APPEAL NOS. 97-CA-0833-MR & 97-CA-1601-MR

* * * * *

BEFORE: GUIDUGLI, JOHNSON and KNOPF, Judges.

GUIDUGLI, JUDGE. Mike Goff (Goff) appeals from an order of the Ohio Circuit Court entered February 28, 1997, which granted summary judgment in favor of the appellees herein. Appellee,

City of Beaver Dam (the City) and appellees, Ray Plummer, Thomas L. Jackson, Betty B. Jackson, Noah Phelps, Jr., Anna T. Phelps, Glen S. Berryman, and Mary Berryman, have filed separate protective cross-appeals. We affirm entry of summary judgment in favor of appellees.

In 1962, Noah Phelps, Jr., Glen Berryman, Thomas Jackson, and Ray Plummer (the developers) formed a partnership to develop a subdivision near Beaver Dam, Kentucky. The land for the subdivision was purchased the same year, and development of the Rolling Hills subdivision began in 1963.

The subdivision property was annexed by the City in 1966. At that time the City had no planing and zoning commission. Rolling Hills developed in stages. At some point in time a plat of the subdivision was drafted by Rayburn Burton (the Burton plat). The Burton plat shows Blocks E, F, G, and H, with proposed streets to the west of Blocks G and H. The Burton plat appears to be dated November 10, 1966, and the record is unclear as to whether the Burton plat was filed with the Planning Commission after its formation.

On July 25, 1991, the Hartford/Beaver Dam Planning Commission (the Commission) adopted the Hartford/Beaver Dam Subdivision Regulations - 1991 (the regulations). Under the terms of the regulations, subdivision developers must provide certain improvements, including water, sewer, and electrical access, or a letter of credit demonstrating an ability to make said improvements. Goff alleges in his brief that compliance

with the regulations must be shown before the Commission can approve the plat.

In June 1993, the developers filed an application for plat amendment for Blocks E, F, G, and H. During a regular session of the Commission on August 19, 1993, the amendment was approved. The minutes of the meeting state "it was agreed that any further paper work to establish the development plan was unnecessary in that it was an extension of a long standing well developed subdivision and was extensively covered in former presentations." No opposition was made to the amendment. The subdivision property was resurveyed in December 1993, to correct errors in the Burton plat as to Blocks E, F, G, and H. The revised plat was certified by the chairman of the Commission to be in compliance with the regulations and filed on November 21, 1994.

In 1994, the developers decided to sell the remaining subdivision lots at auction. The undeveloped portion shown in the Burton plat was surveyed to show Blocks I, J, and K. An application to amend the subdivision plat to include Blocks I, J, and K was made on November 7, 1994. The minutes of the Commission meeting showed that the application was approved, and stated that "[a]s this land was an extension of previous plats there were no valid reasons why the addition should not be approved." The plat was certified and filed on November 17, 1994.

Irvin White (White), the administrative officer of the Commission, gave deposition testimony regarding the plat amendments. White stated that the Commission did not believe that the regulations applied to the subdivision because it existed prior to the adoption of the regulations. He testified that the Commission believed they had no jurisdiction over the subdivision because it had been "grandfathered" in. White testified that the Commission made no investigation of the subdivision because they believed they had no jurisdiction over it.

The remaining lots of the subdivision were sold by auctioneer William B. Kurtz (Kurtz) of Kurtz Auction and Realty on November 26, 1994. Fliers for the auction contained the following statements:

Lots 9E through 17E and lots 2H through 9H on Betty Jane St. have blacktop frontage, city sewer, and water available.

Most of the remaining lots in Block F, G, I, J & K have access to city sewer.

...

Announcements made day of sale take precedence over printed matter.

According to the transcript of announcements made on the day of the auction, Kurtz told the bidders:

Now lots 1 thru 4-A on Madison are zoned Commercial, lots 9-E thru 17-E and lots 2-H thru 9-H on Betty Jane have black topped frontage, city sewer and water available. And most of these remaining lots in F, G, I, J and K have only access to sewers. They do not have sewers, they have simply access.

...

Each tract sells subject to a 5 foot sideline, 15 foot rear line utility easement and that would be for the benefit of bringing in any utilities such as sewer, gas, water or whatever may need to be brought in to the lots.

Kurtz also told the bidders that all lots were sold on an "as is" basis.

According to White's deposition testimony, Goff came to his office three times before the auction. Approximately seven to twelve days before the sale he inspected the subdivision plat, and returned to the office two to three days before the sale and looked at the plat again. At that time he asked White what he thought the lots would sell for and White stated that he told Goff that he did not know but that the lots with no utilities would probably be cheaper. Goff admitted that he visited the property two or three weeks before the auction and that he was present before the auction began.

Goff bought lots 2K, 6K, 7K, 1K, 3G, 7F, 14E and 8F for \$20,700. The real estate contract provided that the sale was subject to the easements as set forth supra and that all of the lots sold "subject to whatever streets and utilities that are presently available." Goff's deed also provided for the utility easements and provided that the lots were "sold subject to the streets as they presently exist, and the grantors shall not be obligated for the upgrading thereof."

Goff filed suit against the various appellees herein on May 24, 1995. In his complaint, Goff alleged that the members of the Commission breached their duties by failing to ensure compliance with the regulations; that the Commission members violated certain parts of the Kentucky Consumer Protection Act; that the developers committed several breaches of the warranty deed; and that Kurtz acted negligently in making certain representations in regard to the property. Summary judgment was entered in the appellees' favor on February 28 1997, and this appeal followed.

I. DID THE TRIAL COURT HAVE SUBJECT
MATTER JURISDICTION OVER GOFF'S CLAIMS?

All of the appellees argue on appeal that the trial court lacked subject matter jurisdiction over Goff's claims. In support of their argument, they cite KRS 100.347, which provides in pertinent part:

...

- (2) Any person or entity claiming to be injured or aggrieved by any final action of the planning commission shall appeal from the final action to the Circuit court of the county in which the property, which is the subject of the commission's action, lies. Such appeal shall be taken within thirty (30) days after such action. Such action shall not include the commission's recommendations made to other governmental bodies. All final actions which have not been appealed within thirty (30) days shall not be subject to judicial review. Provided, however, any appeal of a planning commission

action granting or denying a variance or conditional use permit authorized by KRS 100.203(5) shall be taken pursuant to this subsection. In such case, the thirty (30) day period for taking an appeal begins to run at the time the legislative body grants or denies the map amendment for the same development. The planning commission shall be a party in any such appeal filed in the Circuit Court.

...

- (5) For purposes of this chapter, final 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.

Goff admitted that he did not file an appeal with the Ohio County Circuit Court within the thirty days following the Commission's approval of both plat amendments. Appellees also contend that Goff failed to appeal the Commission's action within thirty days following his actual knowledge of the Commission's actions. In support of their allegation, appellees cite to a letter dated February 20, 1995, from Goff's attorney to counsel for the Commission stating that his investigation showed that the Commission approved plat amendments which did not comply with the regulations. We agree with the appellees that the trial court lacked subject matter jurisdiction.

In Board of Adjustments of City of Richmond v. Flood, Ky., 581 S.W.2d 1 (1978), which addressed a similar issue, the Court focused on the fact that there is no appeal to the courts

from an administrative action as a matter of right, and that when a statute provides the basis of an appeal from an administrative decision, strict compliance with its terms is required or the court will not have jurisdiction to entertain the appeal. Flood, 581 S.W.2d at 2. In construing KRS 100.347, the Court held that the lower court lacked subject matter over the appellant's claims when the appellant failed to properly perfect the appeal within thirty days. Id.

Here, Goff admitted that he did not appeal either of the Commission's decisions approving amendments to the plat within the thirty days required by KRS 100.347(2). The fact that Goff may not have had notice of the Commission's actions until well after the decisions became final does not require a different outcome. In Taylor v. Duke, Ky. App., 896 S.W.2d 618 (1995), this Court held that where the appellants did not appeal from a decision of a planning commission within thirty days from the time that they had actual notice of the decision of the Commission, there was no subject matter jurisdiction. Taylor, 896 S.W.2d at 621. Here, the evidence establishes that Goff had actual notice of the Commission's actions by February 20, 1995, the date of his attorney's letter to counsel for the Commission. As Goff's complaint was not filed until May 24, 1995, well outside the thirty day limit, the trial court lacked subject matter jurisdiction over the action.

Having considered the parties' arguments on appeal, the order of the Ohio Circuit Court is affirmed. As our affirmation

of the Ohio Circuit Court's order renders the claims contained in No. 97-CA-833-MR and 97-CA-1601-MR moot, those cross-appeals are dismissed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brian Schuette
Bowling Green, KY

BRIEF FOR APPELLEES,
HARTFORD/BEAVER DAM PLANNING
COMMISSION, LYNN LIKINS,
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TICHENOR, WILLIAM PARSLEY, BOB
COX, KEITH DALE, & DWIGHT
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BRIEF FOR APPELLEES, RAY
PLUMMER, THOMAS L. JACKSON,
BETTY B. JACKSON, NOAH,
PHELPS, JR., ANNA T. PHELPS,
GLEN S. BERRYMAN & MARY
BERRYMAN:

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BRIEF FOR APPELLEE, CITY OF
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BRIEF FOR APPELLEE, WILLIAM B.
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