

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000701-MR

GOD'S CENTER FOUNDATION, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 97-CI-01593

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: GARDNER, HUDDLESTON, and JOHNSON, JUDGES.

JOHNSON, JUDGE: God's Center Foundation, Inc. (God's Center) has appealed from the interlocutory order of the Fayette Circuit Court entered on February 26, 1998, which summarily determined that the appellee, Lexington-Fayette Urban County Government (LFUCG), was entitled to condemn its property. We reverse and remand for a trial on the issue of LFUCG's right to condemn the property.

On April 30, 1997, LFUCG filed a petition pursuant to Kentucky Revised Statutes (KRS) 416.540, et seq., the Eminent

Domain Act, and KRS Chapter 67A, to condemn the Lyric Theatre¹ and surrounding property located on East Third Street in Lexington, property owned by God's Center. The petition alleged that the property was "necessary for an African-American cultural project." On May 1, 1997, an order was entered appointing three commissioners, who reported that the fair market value of the proposed taking was \$113,400.

God's Center had its own plans for the Lyric Theatre, see note 1 infra, and did not want it to be taken by LFUCG. In its answer to the petition, God's Center stated that LFUCG did not need a fee simple interest in the property to "accomplish the legitimate needs" of the condemnor, that LFUCG had "instituted" the condemnation proceedings "to fraudulently and illegally deprive [God's Center] of private property rights and to assist political allies, to continue a criminal conspiracy to violate the civil rights of African-American children and to curry favor with said allies[,]'" and that LFUCG had acted in "bad faith in

¹The Lyric Theatre, which opened in 1948 and closed in 1963, was patronized by African-Americans at a time when their access to the other two theatres in town was restricted to the balconies. There is no question that for many years the theatre was a mecca for entertainment for the African-American community and for that reason has historical significance to the community. The building remained vacant for over twenty years before it was purchased in 1984 by William L. Huffman, an attorney. Huffman, in turn, gave the property to God's Center, a non-profit organization, self-described as "an educational foundation dedicated to restoring ethical values and moral education among the populace." God's Center originally intended to use the property as a homeless shelter, although more recently it has contemplated other uses for the building, specifically as the headquarters for A.C.E. (Academic & Cultural Excellence) Academy. While God's Center has made improvements to the building since its acquisition, it has not been successful in making all the repairs necessary to reopen it to the public.

attempting to reach an agreement with [God's Center] regarding the subject property." It further alleged that LFUCG's actions were "arbitrary," violated God's Center's "right of freedom to exercise religious practices," and "subject[ed] [God's Center] to disparate treatment."

Because God's Center had placed LFUCG's right to condemn in issue, LFUCG moved for a hearing pursuant to KRS 416.610(4).² After considerable discovery was obtained, including the depositions of the mayor and vice-mayor, LFUCG moved for summary judgment on the issue of its right to take the property. God's Center argued then, as it does in this appeal, that while LFUCG articulated a public purpose for the taking, LFUCG had ulterior and improper motives for wanting to take over ownership of the Lyric Theatre.

On November 17, 1997, a pre-trial conference was conducted during which LFUCG's pending motion for summary judgment was heard. On November 26, 1997, the Fayette Circuit Court entered its opinion and order granting LFUCG's motion. The trial court determined that God's Center had failed to establish any genuine issues of material fact "indicating an abuse of

²This subsection of the statute reads as follows:
If the owner has filed [an] answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered. . . .

discretion on the part of LFUCG in deciding that there exists a necessity for the condemnation of the Lyric Theater [sic] property." On December 16, 1997, the Fayette Circuit Court denied God's Center's motion for reconsideration of the summary judgment. In that order, the trial court addressed God's Center's concerns that LFUCG was taking the property to give to another private entity and its argument that LFUCG did not need to own the property in fee simple to accomplish its stated purpose. Finally, on February 26, 1998, the interlocutory order and judgment authorizing LFUCG to take possession of the real property was entered. This appeal followed.

The sole issue presented by this appeal is whether the trial court erred in its determination that there was no genuine issue of material fact bearing on the issue of LFUCG's right to condemn God's Center's property. Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996), (citing Kentucky Rules of Civil Procedure 56.03). It is settled in this jurisdiction that a party is not entitled to summary judgment unless it is shown with clarity that there is no room for controversy, and unless it appears impossible for the non-moving party to produce evidence at trial warranting a judgment in his favor. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). "Summary judgment is to be used very cautiously and is not a substitute for trial, nor can it be used to deny the right of litigants to trial if they have a viable issue merely for the sake of expediency or efficiency." Williams v. City of Hillview, Ky., 831 S.W.2d 181, 183 (1992).

Since God's Center does not question the authority of LFUCG to condemn, the issue is more precisely whether the record demonstrates the existence of a genuine issue of material fact relevant to God's Center's claims that there was no necessity for the taking and that the taking was a result of fraud and/or bad faith on the part of LFUCG. Clearly, the issue of the condemnor's good faith is relevant to its right to take private property. Decker v. City of Somerset, Ky.App., 838 S.W.2d 417, 422-423 (1992). The case law in this area was summarized in Commonwealth, Transportation Cabinet v. Cooksey, Ky.App., 948 S.W.2d 122, 123 (1997), as follows:

Any allegation of bad faith or fraud would necessarily have to come before the judge who would decide if it affects the appellant's right to take. See KRS 416.600; KRS 416.610(4). Bad faith or fraud is not a statutory ground for denying the right to take. Courts, however, "[n]ecessarily imply the exercise of good faith by governmental authority in using its power to condemn. . . ." City of Bowling Green v. Cooksey, Ky.App., 858 S.W.2d 190, 192 (1992); Commonwealth Transportation Cabinet Dept. of Highways v. Taub, Ky., 766 S.W.2d 49 (1988). A court will deny the right to take only where there has been "[a] gross abuse or manifest fraud." Kroger Co. v. Louisville & Jefferson County Air Bd., Ky., 308 S.W.2d 435, 439 (1957). If the fraud affects the appellant's right to take, KRS 416.610(4) requires the court to enter a final judgment finding the petitioner is not authorized to condemn the property and award costs to the property owners.

Having reviewed the record, we agree with God's Center that it has made a sufficient showing to overcome the motion for summary judgment and that it is entitled to the trial contemplated by KRS 416.610(4). There is evidence from which the fact-finder could infer that LFUCG's decision to take the God's

Center's property was a subterfuge to veil its real purpose of giving the property to the Lyric Foundation, a private organization, the members of which have been attempting for several years to obtain the property from God's Center. Members of the Lyric Foundation include two current council members of LFUCG and one past council member. Robert Jefferson (Jefferson), a current councilman and member of the Lyric Foundation, testified that the Lyric Foundation would get the building any way it could. There is evidence that William L. Huffman (Huffman), an attorney who had given the property to God's Center, was threatened by former councilman, Mike Wilson (Wilson), a founding member of the Lyric Foundation. Wilson allegedly told Huffman that he, Wilson, would have the property condemned if God's Center did not sell the theatre to the Lyric Foundation. It was admitted by the mayor that LFUCG has no specific plan in mind for the building, further evidence from which it could be inferred that LFUCG's true purpose is to turn it over to the Lyric Foundation. Further evidence concerning LFUCG's motives include its failure to condemn property involving similar projects and evidence of alleged harassment of God's Center by government entities. While we agree with the trial court's observation that some of the accusations and evidence of wrongdoing by those in authority have no bearing on LFUCG's right to condemn the property³, we nevertheless believe that God's

³ For example, God's Center repeatedly refers to Ronald Berry (Berry), a man it describes as an "aggressive predatory homosexual pedophile" and suggests that he will be able to use the Lyric Theatre to further a "pedophile-ring" in which young
(continued...)

Center is entitled to a trial on the issue of the right to take.

The trial court, relying on Coke v. Commonwealth, Ky., 502 S.W.2d 57 (1974), concluded that "permitting a private company to manage property taken by condemnation does not negate the existence of a valid public purpose." However, the government may not take property and transfer it to specific "private persons under the guise of a public use or purpose." Decker, supra, at 422. Thus, while the trial court may reach the same result after an evidentiary hearing, it is necessary to allow the owner of the property its day in court to attempt to prove the subterfuge it alleges underpins LFUCG's actions.

Accordingly, the judgment of the Fayette Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Hon. Gayle E. Slaughter

BRIEF FOR APPELLEE:

Hon. Rochelle E. Boland

³(...continued)

African-American boys are exploited for sexual purposes. Berry is the director of Micro-City Government, an organization designed to provide jobs for minority youths and to teach them how government works. Micro-City Government is funded in part by LFUCG and in part by the Congress on Racial Equality, a political action group. LFUCG has stated throughout this litigation that it has no plans to involve Berry in the Lyric Theatre project. However, Councilman Jefferson, described by the mayor as the moving party behind the condemnation of the Lyric Theatre, has been on the board of Micro-City Government since the 1960's. This association, as well as evidence that a relative of Berry attempted to involve Huffman in a kick-back scheme involving LFUCG funds and the Lyric Theatre in 1990, cause God's Center to argue that the alleged public purpose for the taking is nothing but a "cover []-up for the whimsical self-enrichment schemes of LFUCG political cronies."

Hon. William L. Huffman
Lexington, KY

Lexington, KY