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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001691-MR

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF HIGHWAYS N/K/A THE
KENTUCKY TRANSPORTATION CABINET

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN COMBS, JUDGE
ACTION NO. 93-CI-01553

EVERETT R. THOMPSON, JR. AND
DEBORAH T. HARRIS, AS CO-EXECUTORS
OF THE ESTATE OF EVERETT R.
THOMPSON

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * *

BEFORE: ABRAMSON, GUIDUGLI,¹ AND VANMETER, JUDGES.

ABRAMSON, JUDGE: In 1978, the Commonwealth of Kentucky,
Department of Transportation, Bureau of Highways² initiated

¹ Judge Daniel T. Guidugli concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

condemnation proceedings against real property owned by Everett and Mary Thompson. The Cabinet intended to use the property in conjunction with the construction of US 119 in Pike County, Kentucky. Finally, in 1983, the parties reached a settlement pursuant to which the Thompsons sold 4.869 acres to the Cabinet for the fair market value of \$75,000.00. The parties' agreement gave the Thompsons a first right of refusal to purchase from the Cabinet any portion of the land that was ultimately unused.

On July 1, 1988, the Cabinet offered to sell back to the Thompsons 0.89 of undeveloped acreage for the appraised value of \$106,000.00. In 1993, after failing to reach an agreement with the Cabinet, the Thompsons filed suit in the Pike Circuit Court seeking an order requiring the Cabinet to sell them the 0.89 acres at the same per-acre rate for which the Cabinet had purchased it ten years earlier. The trial court granted summary judgment in favor of the Cabinet and dismissed the Thompsons' case. However, on appeal, the Kentucky Supreme Court reversed and remanded the matter.³

On remand, the trial court granted summary judgment in favor of Everett R. Thompson, Jr. and Deborah T. Harris, as co-executors of the Everett Thompson Estate (collectively the "Thompson Estate"). On August 3, 2000, the court ordered the

² The Appellant is now known as the Kentucky Transportation Cabinet. For clarity, we shall refer to it simply as the "Cabinet" throughout this Opinion.

³ Kelly v. Thompson, 983 S.W.2d 457 (Ky. 1998).

Cabinet to offer the undeveloped property to the Thompson Estate at the price the Cabinet paid for it at the time of the original condemnation. Once again, the trial court's decision was appealed, and, eventually, both this Court and our Supreme Court affirmed the judgment. The Supreme Court's ruling became final on August 21, 2003.⁴

On March 9, 2005, the Thompson Estate filed a "Motion to Enforce Judgment, Damages and Sanctions." The Thompson Estate complained that, in the nineteen months since the Supreme Court's August 2003 ruling, the Cabinet had failed to offer and convey the 0.89-acre tract to it as originally ordered by the trial court. The Thompson Estate alleged that it lost lucrative rental payments that it would have received had the Cabinet deeded the property in a timely fashion.

The trial court scheduled a hearing on the motion for March 25, 2005. Approximately one week prior to the hearing, the Cabinet conveyed to the Thompson Estate a 1.938 tract of property consisting of the disputed 0.89-acre tract as well as additional undeveloped property that had been purchased from the Thompsons in 1983.

After hearing arguments at the March 2005 hearing, the trial court scheduled another evidentiary hearing for May 13, 2005 to address whether the Cabinet should be held in contempt

⁴ Vandertoll v. Commonwealth of Kentucky Transportation Cabinet, 110 S.W.3d 789 (Ky. 2003).

for the nineteen-month delay in transferring the property. The Thompson Estate also wanted to offer proof regarding damages that it allegedly suffered as a result of this delay.

Following the evidentiary hearing and subsequent briefing by the parties, the trial court entered a Memorandum, Opinion and Order on July 19, 2005, finding the Cabinet in contempt.

In the case at bar, the Transportation Department was Ordered to "*offer the property to the Plaintiffs at the price paid by the Commonwealth at the time of condemnation.*" The Department argues that the Plaintiffs should have come back to the Court after publication of the Opinion to seek a time frame upon which the property must be offered back to them by the Department, and until that was done, it was not required to act on the Court's Order. While a definite time period in which to comply with the Court's Order was not specifically set forth in the Order, a reasonable time period to allow for compliance is fair, just and proper to be allowed in such circumstances and is appropriate to be applied in this case.

By taking 19 months, and requiring the Plaintiff's [sic] to seek assistance from the Court, by way of a Motion to Enforce Judgment and for Damages and Sanctions, to formally offer the property or deliver a deed to the Plaintiffs pursuant to an order from this Court and a Supreme Court Opinion confirming that Order, the Department of Transportation caused the Plaintiffs to lose the value of the lease income during that time. A reasonable time in which to survey, prepare and execute the deed is understandable, but 19 months goes well beyond what this Court deems reasonable.

. . .

Despite the fact that the Department of Transportation knew or should have known that the plaintiffs had potential tenants interested in executing the lease agreements for the subject property, and despite the fact that it had a Pike Circuit Court Order and a Supreme Court Opinion directing it to offer the property to the Plaintiffs, it still failed to comply with the Court's Order until 19 months after the Supreme Court Opinion was published and after the Plaintiffs were forced to file a Motion to Enforce the Judgment with this Court. This Court is of the opinion that the Department of Transportation's failure to comply with the Court's orders in a timely fashion is inappropriate. The Court recognizes that a reasonable amount of time must be allowed to comply with any order and believes that 4 months is a more than reasonable amount of time in which to obtain a survey description, draft the deed, and have the deed signed and delivered.

Memorandum, Opinion and Order, Record on Appeal (R.A.) pp. 175-77 (emphasis in original).

Though the Cabinet had transferred the subject property prior to the trial court's finding of contempt, the court nonetheless found that the Thompson Estate was entitled to compensatory damages in the amount of \$75,000.00 (\$5,000.00 lost rent per month x 15 months of unreasonable delay). This appeal followed.

The Cabinet first argues that the trial court abused its discretion because the August 3, 2000, order requiring the

Cabinet to "offer the property to the [Thompson Estate] at the price paid by the Commonwealth at the time of condemnation" was silent as to any required time for compliance. Thus, according to the Cabinet, the order was not sufficiently precise to put it on notice that compliance was required within four months following the finality of the Kentucky Supreme Court's decision.

Kentucky law imposes no requirement that a judgment set forth a deadline for compliance. Rather, the party against whom a judgment is rendered has a duty to comply with the judgment in good faith. Barrett v. Barrett, 152 S.W.2d 610 (Ky. 1941) (contempt not warranted where party makes good faith attempt to comply with judgment but it is impossible to do so). If a party attempts to comply in good faith but finds it is unable to do so, it must "clearly and categorically" demonstrate the impossibility and prove that it took all reasonable steps within its power to insure compliance. Blakeman v. Schneider, 864 S.W.2d 903 (Ky. 1993); Campbell County v. Commonwealth of Kentucky, Corrections Cabinet, 762 S.W.2d 6, 10 (Ky. 1988); Commonwealth ex rel. Bailey v. Bailey, 970 S.W.2d 818 (Ky. App. 1998).

In the present matter, the trial court conducted a full evidentiary hearing for the specific purpose of allowing the parties to support their respective positions concerning the length of time involved in offering and transferring the subject

property. Based on the evidence presented to it, the trial was required to decide at what point, if any, the Cabinet's failure to transfer the property became unreasonable. The trial court's decision on this question is a factual finding which will not be set aside unless it is clearly erroneous. Campbell County, *supra* at 15 (whether Kentucky Correction Cabinet's compliance with orders to take prisoners into custody was impossible was a factual determination reviewed under the clearly erroneous standard).

Granting the trial court the deference to which it is entitled, we find no error in its decision. The Cabinet offered testimony regarding its reasons for taking nineteen months to transfer the subject property to the Thompson Estate. These reasons included a change in the Cabinet's executive leadership during an election year and the difficulty in devising new procedures relative to the resale of property. After taking all of the evidence into consideration, the trial court found that "4 months [was] a more than reasonable amount of time in which to obtain a survey description, draft the deed, and have the deed signed and delivered." Memorandum, Opinion and Order, R.A. p. 177. The mere fact that the Cabinet disagrees with this conclusion does not render it clearly erroneous, and we find no evidence of record which would require us to set it aside as clearly erroneous.

The Cabinet further argues that the trial court was without authority to award damages to the Thompson Estate *after* the Cabinet had already purged itself of the matter that formed the basis of the contempt charge. However, a civil contempt proceeding can serve two distinct purposes. First, the court can use its contempt power to coerce compliance with the court's orders. See, e.g., Blakeman v. Schneider, *supra*. Second, as this Court held in White v. Sullivan, 667 S.W.2d 385 (Ky. App. 1983), a trial court has the authority to award compensatory damages in a civil contempt proceeding to a party who has suffered financial injury as a result of the contemnor's actions. Such is the case now before us.

Having acknowledged that a trial court may award compensatory damages in a contempt proceeding, the question then becomes whether that court may impose such a sanction *after* the contemnor has already purged itself of the contempt. The Cabinet argues that because it conveyed the property at issue prior to the trial court's finding of contempt, the court abused its discretion in awarding damages to the Thompson Estate⁵. Notably, the Cabinet cites no case authority for the proposition that compliance, however late, precludes a compensatory damage award. If a contemnor could avoid liability for compensatory

⁵ As noted above, the Cabinet conveyed the property approximately one week before the hearing on the Thompson Estate's Motion to Enforce Judgment, Damages and Sanctions."

damages by waiting until the injured party seeks judicial intervention and then obeying the outstanding order, the trial court's contempt powers would be seriously undermined.

Moreover, in Smith v. City of Loyall, 702 S.W.2d 838-39 (Ky. App. 1986), this Court held:

The purpose of civil contempt authority is to provide courts with a means for enforcing their judgments and orders, and trial courts have almost unlimited discretion in applying this power.

In that case, the issue presented was whether a trial court abused its discretion by *refusing* to impose contempt sanctions as the result of a city's tardy compliance with an order to repair a sidewalk. This Court ultimately found no abuse of discretion in the trial court's decision not to impose sanctions for contempt, noting: "[c]ourts possess inherent discretionary powers enabling them to gain compliance with their orders." *Id.* at 839.

In this matter, the Cabinet did not comply with the trial court's order for nineteen months after it became final. Following the evidentiary hearing, the trial court found that four months was a reasonable time for compliance. The court further found that the Cabinet's failure to comply resulted in the Thompson Estate being deprived of rental amounts to which it would have been entitled had it received title to the property in a timely manner. Under these circumstances, where one party

(the Thompson Estate) was injured due to an unreasonably lengthy failure of the other (the Cabinet) to comply with a judgment, the trial court did not abuse its discretion by awarding compensatory damages after the contempt had been purged.

The Cabinet further argues that the trial court erred by awarding compensatory damages to the Thompson Estate because it was the Thompson-owned S-corporation, Sped, Inc.⁶ which suffered financial injury as the result of the delayed property transfer. When the Thompson heirs eventually repurchased the property, they transferred it to Sped, Inc., which then leased the property to Community Trust Bank. As lessor, Sped, Inc. would have received the earlier rental payments for which damages were awarded to the Thompson Estate. However, the Cabinet's position misses the point. While a corporation must sue or be sued in its own name, KRS 271B.3-020, the issue herein is not the assertion of a claim either on behalf of or against a corporation, but rather the authority of the trial court to compensate litigants for injuries they sustained as a direct result of dilatory compliance with the court's order. The Thompson Estate (and thus the Thompson heirs), not Sped, Inc.,

⁶ Sped, Inc., a subchapter S corporation, was incorporated on November 13, 2002. Everett Thompson, Jr. and Deborah T. Harris, the co-executors of the "Thompson Estate", are two of the officers and shareholders of the corporation. We are unable to discern from the record whether these two individuals are the *sole* owners of Sped, Inc. In fact, the record is devoid of evidence that they own any Sped, Inc. stock. However, as the Cabinet does not dispute that Thompson and Harris are shareholders, we likewise find no reason to question this.

was deprived of the opportunity to purchase the property in a timely manner. The Thompson heirs' decision to create an S-corporation for purposes of the ground lease with Community Trust Bank has no bearing on the fact that they were the parties entitled to a timely conveyance of the property and thus were the injured parties entitled to compensatory damages. The trial court did not err in awarding damages to the Thompson Estate.

Although the trial court properly awarded damages to the Thompson Estate, the damages awarded were excessive. As the Cabinet correctly notes, the measure of contempt damages adopted by the trial court was derived from the terms of the lease to Community Trust Bank. The ten-year lease from Sped, Inc. to the bank provided for \$5,000.00 monthly rental payments. However, the lease also provided that Community Trust Bank, Inc. would pay only a \$1,500.00 stipend for the eight-month period preceding the ten-year lease. Thus, because the lease terms providing the basis for the court's damage award specifically included the initial stipend period, we find that the trial court erred in assessing damages at \$5,000.00 per month for the first eight months of the delay period when the "lost" rental amount for that entire period actually totaled only \$1,500.00. For this reason, we reverse that portion of the court's judgment.

Additionally, as the Cabinet correctly argues, while the total size of the property conveyed to the Thompson Estate (and subsequently leased to Community Trust Bank, Inc.) was 1.938 acres, the property which was the subject of the trial court's August 3, 2000, judgment and which later formed the basis of the court's contempt order was only 0.89 acres. Because of this, it was error for the court to subsequently award contempt damages based on a lease value applicable to the entire 1.938-acre parcel of property, instead of 45.9% of that parcel (.89 divided by 1.938 = 45.9%). The Cabinet was under no order to sell any property in excess of the original 0.89 acres, and it cannot be held in contempt for any delay relative to transferring the additional 1.048 acres. The trial court erred by failing to award contempt damages relative only to the original 0.89 acres that was the subject of the court's August 3, 2000, order. Consequently, on remand the judgment must be modified to reflect not only the reduction in damages for the first eight months, but also the 45.9% of the total damages attributable to the .89 acres which the Cabinet belatedly conveyed.

As a final matter, the Cabinet asserts that sovereign immunity bars an award of interest on the damages awarded by the trial court. It is well established in Kentucky that KRS 360.040, the statute providing for interest on judgments, does

not apply to judgments against the Commonwealth or any of its subdivisions. Commonwealth, Dep't of Transportation, Bureau of Highways v. Lamb, 549 S.W.2d 504 (Ky. 1976); Kenton County Fiscal Court v. Elfers, 981 S.W.2d 553 (Ky. App. 1998); Powell v. Board of Educ. of Harrodsburg, 829 S.W.2d 940 (Ky. App. 1991). State agencies are not liable for interest "unless there is statutory authority or a contractual provision authorizing the payment of interest." Powell, *supra* at 941. In this matter we can find no authority that would allow a circuit court to require the Commonwealth to pay interest on an award of contempt sanctions. For this reason, to the extent that the trial court's judgment against the Cabinet provides for such interest, it must be reversed.

For the reasons set forth above, the order of the Pike Circuit Court is affirmed in part and reversed in part, and this case is remanded for entry of a judgment in conformity with this Opinion.

ALL CONCUR.

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