

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001568-MR

PATRICIA RAGLAND MCGEHEE AND
RICHARD MCGEHEE

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 06-CI-01508

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CLAYTON AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Hardin Circuit Court finding the property of the appellants, the McGehees, to be condemned by the Commonwealth. The McGehees appeal arguing two issues: (1) that they were not properly served, and (2) that the trial court erred in allowing the condemnation

of their property. Based upon the following, we affirm the decision of the trial court.

BACKGROUND INFORMATION

The McGehees own property in Hardin County, Kentucky. On August 21, 2006, the Transportation Cabinet Department of Highways (the “Cabinet”) filed a petition with the Hardin Circuit Court to condemn a portion of their property. The Cabinet contended that it was necessary to condemn the property in order to effectuate the construction, alteration, relocation, and/or extension of KY 3005 to the Western Kentucky Parkway. This is known as the “Ring Road Extension.”

The McGehees defended this action by arguing that they were not properly served by the Cabinet and that it was an abuse of discretion for the trial court to allow the condemnation of the property. After a hearing before the trial court at which time the parties called witnesses and presented evidence, the trial judge entered an interlocutory order condemning the property. The McGehees now appeal that decision.

DISCUSSION

In *Com. Transp. Cabinet Dept. of Highways v. Taub*, 766 S.W.2d 49, 51 (Ky. 1989), the Kentucky Supreme Court acknowledged that in enacting Kentucky Revised Statutes (KRS) 177.081, “the Legislature delegated broad authority to the bureau of highways (Department of Transportation) to determine necessity and condemn land for an adequate system of highways.” It continued to

reiterate that “[u]pon a determination of necessity, the Commonwealth’s right of acquisition may be defeated only by proof of fraud, bad faith or abuse of discretion, and the landowner opposing condemnation bears the burden of proof.” With this standard in mind, we will review the condemnation proceedings.

In the present case, the McGeehees start by asserting that they were not properly before the trial court as they had not been properly served. Kentucky Rules of Civil Procedure (CR) 4.01 provides that when a complaint is filed, the clerk shall issue the summons and (as relevant here):

(b) Cause the summons and complaint (or other initiating document), with necessary copies, to be transferred for service to any person authorized, other than by paragraph (1) of this Rule, to deliver them, who shall serve the summons **and accompanying documents**[.] (Emphasis added).

The McGehees contend that when they filed their answer and counterclaim, they had not been served with Exhibit A, which was referenced in and attached to the complaint. Thus, they contend they were not properly served and that the action should have been dismissed against them for this reason.

The Commonwealth contends that the McGehees were properly served and that such service was also in accordance with the Kentucky Eminent Domain Act, KRS 416.570. Said statute requires the filing of a verified petition and a “particular description of the property” which is the subject of the petition to condemn. The Commonwealth also argues that the cases cited by the McGehees in support of their argument (*Potter v. Breaks Interstate Park Com’n*, 701 S.W.2d

403 (Ky. 1985); *R. F. Burton & Burton Tower Co. v. Dowell Division of Dow Chemical Co.*, 471 S.W.2d 708 (Ky. 1971); *Miller v. McGinty*, 234 S.W.3d 371 (Ky. App. 2007); and *Cornett ex rel. Cornett v. Smith*, 446 S.W.2d 641 (Ky. 1969)), did not involve personal jurisdiction where the defendants were served with the initiating documents.

We agree with the Commonwealth that the cases cited can be distinguished. None of the factual situations was similar enough to the instant case to be controlling. The facts here involve both defendants being served with the initiating complaint which set forth a description of the property involved. While the plans which made up Exhibit A were not served upon the McGehees in the beginning, they eventually received them. The purpose of service is to provide one with notice of a suit. The McGehees had ample notice through the service of the complaint as to what the action was and the property which was involved. We consider this to be proper service under CR 4.01.

The final issue before us involves the merits of the condemnation. Specifically, the McGehees contend that the decision to condemn their property was arbitrary and that the trial court erred in finding that they did not meet their burden of proof. KRS 177.081(1) provides, in relevant part, that:

The official order of the Department of Highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion.

Thus, the McGehees had to have proven either fraud, bad faith or an abuse of discretion to the trial court in order to overturn the Cabinet's decision. They did not prove any of these conditions.

The McGehees attacked the condemnation arguing that it was not a necessity and, therefore, it is constitutionally forbidden. They contended that the condemnation of the property was not for a public use but was, rather, for a private one. Specifically, the McGehees asserted that the Cabinet wanted to expand the road project to allow for access to private subdivisions and businesses. This, they argue, is not constitutional.

In *City of Owensboro v. McCormick*, 581 S.W.2d 3, 5 (Ky. 1979), the Kentucky Supreme Court held that:

The Kentucky Constitution, particularly Section 13 and 242, has been interpreted repeatedly to prohibit the taking of private property for public use without compensation, and this prohibition has been consistently construed to forbid the taking of private property for private uses.

The use of a road to expand development in areas or to relieve congestion in areas in which growth is predicted is not for private use.

The testimony of Gary Valentine, the Cabinet's Manager for Pre-Construction and a licensed engineer, was that a 1987 study had been made and that it indicated that the Ring Road Project needed to be extended to US 62 from the Western Kentucky Parkway. The road would then be extended to Interstate 65 and eventually to US 31W. The reasons cited by Valentine for this extension were

the elimination of traffic in Elizabethtown, Kentucky, as well as opening up new areas of industrial expansion, residential growth and the additional need to alleviate traffic to and from Fort Knox. Clearly, these are valid public uses.

The necessity requirement which was statutorily mandated was clearly met in this case. There was no fraud, bad faith nor abuse of discretion in the condemnation and, therefore, it was constitutionally sound. As a result, the trial court did not err in entering an interlocutory order condemning the property.

Finally, the McGehees contend that the trial court erred in failing to make detailed findings of fact regarding the condemnation. They assert that it was a violation of CR 52.01 and CR 52.04 when the trial court failed to cure this error after they timely made a motion requesting that it do so. We disagree. CR 52.01 provides that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12

or 56 or any other motion except as provided in Rule 41.02.

After the McGehees moved the trial court for further findings, the trial court ruled that:

. . . in a condemnation case such as this, the Court is directed by statute to make findings in conformity with KRS 416.610, which lists very specifically what information is essential to the Interlocutory Order and Judgment. It is this Court's belief that its Order of June 2, 2008 complies with KRS 416.610.

The Court agrees that a great deal of information was presented, but believes strongly that no compelling evidence of fraud, bad faith or abuse of discretion was heard. While there always can be disagreement in condemnation cases, as here, on the severity of the need and possible alternate routes, (and in this case historical and environmental concerns were raised as well) the Court simply heard nothing which it believed met the [McGehees'] burden in any of its multiple arguments.

We agree with the trial court that its findings conformed to KRS 416.610 which provides, in relevant part:

(4) If the owner has filed 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. If the court determines that petitioner does not have such right, it shall enter a final judgment which shall contain, in substance:

(a) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(b) A finding that the petitioner is not authorized to condemn the property or the use and occupation thereof for the purposes and under the conditions and limitations set forth in the petition, stating the particular ground or grounds on which the petitioner is not so authorized;

(c) An order dismissing the petition and directing the petitioner to pay all costs.

We find the following to be in conformity with the above statute:

(1) . . . that the Defendants failed to prove that the Plaintiff abused its discretion, acted in bad faith, or committed fraud in deciding its need to acquire portions of the property of the Defendants; that the Defendants' challenge to the Plaintiff's right to condemn is dismissed because the Defendants failed to prove the Plaintiff abused its discretion, acted in bad faith, or committed fraud in deciding it needed to acquire portions of the property of the Defendants; that it is necessary that the Plaintiff acquire the property described in the Petition and again below; and that the Plaintiff has the authority to condemn the said property;

(2) That the Plaintiff under provisions of KRS 416.540-416.680 is entitled to condemn the lands and materials hereinafter described;

(3) That the Report of Commissioners conforms to the provisions of KRS 416.580[.]

Order and Judgment entered June 4, 2008.

Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

W. Henry Graddy, IV
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Midway, Kentucky

ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT
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