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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000209-DG
&
NO. 2009-CA-000926-DG

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLANT/CROSS-APPELLEE

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-XX-00037

L.L. HANKS, JR. & SONS — APPELLEE/CROSS-APPELLANT

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: ACREE, VANMETER, AND WINE, JUDGES.

WINE, JUDGE: The Lexington-Fayette Urban County Government ("LFUCG") seeks discretionary review from an order of the Fayette Circuit Court which affirmed an order of the Fayette District Court awarding attorney fees after a

dismissal of a code-enforcement violation citation against L.L. Hanks, Jr. & Sons ("Hanks"). LFUCG contends that there was no basis for an equitable award of attorney fees. In its cross-petition, Hanks contends that the award was inadequate.

On or about September 12, 2007, an LFUCG code enforcement officer inspected a horse barn located at 4601 Athens-Boonesboro Road. This inspection was apparently done upon a "drive-by" observance of the barn, while the code enforcement officer was traveling down a main thoroughfare in Lexington, Kentucky. The code enforcement officer took photographs of the barn at that time, apparently while stopped on the roadside, which showed that the barn had holes in the roof and walls. On September 17, 2007, the code enforcement officer issued a repair notice to Hanks with the directive that the barn either be repaired and repainted or demolished.

Hanks appealed the repair notice. Hanks' appeal was heard on November 20, 2007, by Hearing Officer Beth Rosdatter. At the hearing, the code enforcement officer presented photographs of the barn. The code enforcement officer also testified to her personal observation of the condition of the barn. In addition, pictures were introduced showing that several sections of the barn had been demolished prior to the hearing.[1]

[1] Apparently there were four separate "wings" to the barn and an open center area, much like one of the stallion barns at the Kentucky Horsepark. It appears from the photo that only one of these "wings" remains. We do not agree with LFUCG that this renders the issue moot, however, as there was still an outstanding code enforcement violation against Hanks which LFUCG refused to dismiss. The fact that a penalty or fee was not associated with the citation is irrelevant. As Hanks had suffered adverse legal action, he was entitled to appeal.

It was noted at the hearing that Hanks was cited for code deficiencies under Chapter 12 of the LFUCG Code of Ordinances ("the Code"), the chapter entitled "Housing." LFUCG testified that Chapter 12 of the Code includes both residential and non-residential structures. Hanks testified, however, that the barn was used as part of an agricultural operation and had housed horses as recently as two months prior to the hearing. Hanks noted that it had contacted LFUCG prior to the hearing and presented the applicability of the "agricultural supremacy clause" found in Kentucky Revised Statute ("KRS") 413.072 which exempted his property from the application of LFUCG's local ordinances. KRS 413.072 provides, in pertinent part, as follows:

> (1) It is the declared policy of the Commonwealth to conserve, protect, and encourage the development and improvement of its agricultural land and silvicultural land for the production of food, timber, and other agricultural and silvicultural products. When nonagricultural land uses extend into agricultural and silvicultural areas, agricultural and silvicultural operations often become the subject of nuisance suits or legal actions restricting agricultural or silvicultural operations. As a result, agricultural and silvicultural operations are sometimes either curtailed or forced to cease operations. Investments in farm and timber improvements may be discouraged. It is the purpose of this section to reduce the loss to the state of its agricultural and silvicultural resources by clarifying the circumstances under which agricultural and silvicultural operations may be deemed to be a nuisance or interfered with by local ordinances or legal actions.
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> (2) No agricultural or silvicultural operation or any of its appurtenances shall be or become a nuisance or trespass, private or public, or be in violation of any zoning ordinance, or be subject to any ordinance that would

> restrict the right of the operator of the agricultural or silvicultural operation to utilize normal and accepted practices, by any changed conditions in or about the locality thereof after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began. The provisions of this subsection shall not apply whenever a nuisance, trespass, or zoning violation results from the negligent operation of an agricultural or silvicultural operation or its appurtenances.
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> . . .
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> (7) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make an agricultural or silvicultural operation or its appurtenances a nuisance per se, or providing for abatement thereof as a nuisance, a trespass, or a zoning violation in the circumstance set forth in this section shall be void. However, the provisions of this subsection shall not apply whenever a nuisance results from the negligent operation of any such agricultural operation or any of its appurtenances.

Based on this statute, Hanks requested, via a letter from counsel, that the Department of Code Enforcement voluntarily dismiss or withdraw the citation.

After the hearing, Hanks made a motion to dismiss the repair notice and a motion requesting an award of attorney fees and costs. The hearing officer ultimately issued an order upholding the repair notice, noting that, although KRS 413.072 was *applicable*, the barn fell within the exception set forth in KRS 413.072(7) because the barn was a nuisance resulting from the negligent operation of an agricultural operation.[2]

Hanks appealed the hearing officer's decision to the Fayette District Court. In the hearing before the district court, the district judge expressed her

[2] Interestingly, no evidence of negligence, much less expert testimony regarding the negligent operation of an agricultural operation, was presented before the hearing officer.

displeasure with LFUCG's actions, noting that the code enforcement officer never actually went onto the property to inspect the barn before citing it, and therefore, that LFUCG could not have actually known whether the barn was structurally unsound. In response, LFUCG's attorney stated: "I can't speak to the policy of what the government is doing. I believe that they're trying to clean up the main arteries into town for the [World Equestrian] Games that are coming here in 2010."

The district court reversed the administrative decision, agreeing with the hearing officer that KRS 413.072 was applicable, but noting that that there was no proof of negligent operation, and thus, that the barn could not be found to fall within the exception set forth in KRS 413.072(7). The district court did not immediately rule on the issue of attorney fees, but instead ordered the parties to mediate the matter. The parties scheduled mediation, but LFUCG cancelled the mediation a few days before it was to occur. The district court later noted its displeasure with LFUCG's disregard of the clear court order to mediate. Thereafter, the district court entered an opinion and order awarding Hanks $6,000.00 in attorney fees based upon the circumstances of the case.

The district court's ordered stated as follows:

> Based upon this Court's thorough review and consideration of the record in this case, and the circumstances presented in this particular case, to-wit; that a citizen of the Lexington Fayette Urban County Government has made a valid objection to an action taken by the Lexington-Fayette Urban County Government's Division of Code Enforcement, and followed it through, and was required to expend an extreme amount of money to try to address the issue.

LFUCG appealed the entire matter (both the substantive ruling and the award of attorneys' fees) to the Fayette Circuit Court. The Fayette Circuit Court affirmed the district court. LFUCG now petitions this Court for discretionary review on the sole issue of the award of attorney fees. LFUCG no longer challenges the underlying issue concerning the propriety of the citation. Hanks filed a cross-petition, arguing that the award of attorney fees was inadequate to cover his actual costs.

The question on review then is whether the equitable award of attorney fees was properly granted. We also consider the issue raised in Hanks' cross-petition –whether the award of attorney fees was adequate.

To begin, LFUCG argues that we should reverse the opinion of the Fayette Circuit Court on the grounds that there is no contract between the parties nor any applicable statute which would allow Hanks to recover attorney fees. LFUCG concedes that the district court had the authority to make an award of attorney fees on equitable grounds. However, LFUCG argues that the record does not support an equitable basis for the award of attorney fees because there was no finding of bad faith.

When reviewing the equitable award of attorney fees, this Court gives deference to the district court because the award of costs and attorney fees is within the discretion of the trial court. *Kentucky State Bank v. AG Services, Inc*. 663 S.W.2d 754 (Ky. App. 1984); *Dorman v. Baumlisberger*, 271 Ky. 806, 113

S.W.2d 432, 433 (1938). As an award of attorney fees is an exercise of the court's discretion, rather than an application of the law, we will not reverse absent an abuse of that discretion. The test for abuse of discretion is whether "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In Kentucky, we follow the "American Rule," which precludes the recovery of attorney fees by the prevailing party unless there is a specific contractual provision or fee-shifting statute which allows recovery. *Kentucky State Bank v. AG Services, Inc*., 663 S.W.2d at 755. However, this long-standing rule does not abolish the equitable principle that a trial court can rely upon its powers in equity to make an award of attorney fees. *Batson v. Clark,* 980 S.W.2d 566, 577 (Ky. App. 1998). Indeed, whether to make an equitable award of attorney fees "is within the discretion of the court depending on the circumstances of each particular case." *Id. at 577*, *quoting Kentucky State Bank v. AG Services*.

While LFUCG argues that a trial court may not award attorney fees on an equitable basis unless there is a finding of bad faith, we do not agree. *See, e.g., Cummings v. Covey*, 229 S.W.3d 59, 62 (Ky. App. 2007) (circumstances justifying equitable award of attorney fees "have never been spelled out."); *Batson v. Clark,* 980 S.W.2d at 577 (whether an equitable award of attorneys fees should be made turns on the particular circumstances of each case). Rather, a trial court *may* consider bad faith in determining whether it should award attorney fees, just as it *may* consider other factors such as whether a suit is frivolous or whether, as here, a

city purportedly cites an individual for violation of an ordinance which is inapplicable and which is unsupported by proper inspection and/or investigation.

While LFUCG cites *Lake Village Water Association, Inc. v. Sorrell*, 815 S.W.2d 418, 421 (Ky. App. 1991) in support of its argument, this case merely notes that the Supreme Court has recognized the power of *federal courts* to award attorney fees in equity as a sanction for bad faith conduct, and noted the *similar* authority of our state courts. However, the tests set forth in the case *Chambers v. NASCO, Inc*., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), which was cited by *Lake Village*, are applicable to the federal courts and do not restrict the ability of the courts of the many states to award fees in equity.

Regardless, the fact that a court may choose to award attorney fees as a sanction for bad faith conduct does not exclude the myriad other reasons upon which one of our courts may choose to award fees for counsel in equity. Moreover, as we have previously stated, such an award is *always discretionary*, and even upon a finding of bad faith, the trial court may elect *not* to make an equitable award of attorney fees. *Golden Foods, Inc. v. Louisville & Jefferson County Metropolitan Sewer District*, 240 S.W.3d 679, 683 (Ky. App. 2007).

Another case cited by LFUCG, *Commonwealth of Kentucky, Dep't. of Transp., Bureau of Highways v. Knieriem*, 707 S.W.2d 340, 341 (Ky. 1986), is also distinguishable from the present case, as it deals with the appellate courts' authority to award attorney fees where the trial court has elected not to make such an award. Although the *Knieriem* case mentions "bad faith," it is discussing the

concept from the stance of when an appellate court may award fees where the trial court has elected *not* to award them. As previously noted, "trial courts are granted broad discretion in awarding attorney fees based on their analysis of the unique facts of each case." *Golden Foods,* 240 S.W.3d at 684. It is not the place of the appellate courts to disturb such discretion absent a finding of abuse.

Here, the district court noted that it was awarding Hanks attorney fees based upon "the circumstances presented in this particular case." The District Court did not go into specifics of all the circumstances which warranted an award of attorney fees, but noted in its August 19, 2008 order that Hanks had "made a valid objection to an action taken by the [LFUCG]'s Division of Code Enforcement, and followed it through, and was required to expend an extreme amount of money to try to address the issue." While the district court's July 25, 2008 opinion and order in favor of Hanks makes clear that it found that no formal complaint had been filed about the barn prior to the citation and that the code enforcement officer did not actually inspect the barn in any formal sense, the district court failed to cite specific reasons in its order for the award of attorney fees.

This Court is not adequately equipped with information from the record and the standard language of the order to make a determination as to whether an award of attorney fees was appropriate in this case. While the trial courts certainly have the discretion to award attorney fees in equity when they

deem such an award proper and the circumstances so warrant, an order granting attorney fees must set out at least some specific reason therefore.

Accordingly, we remand this case to the district court for specific findings to support its award of attorney fees. While there do appear to be some grounds which would support such an award, we cannot speculate as to why the trial court entered its order and award.

As we are remanding on the issue of attorney fees for specific findings to be made, we cannot now address Hanks's claim that the award of attorney fees was inadequate. On remand, the district court shall consider Hanks's claim that attorney fees were inadequate and make any award it deems appropriate. We note that the determination of the reasonableness of an award of attorney fees, much like that determination of whether equitable attorney fees should be awarded in the first place, is within the sound discretion of the trial court. *C.A. Woodall, III v. Grange Mut. Cas. Co.*, 648 S.W.2d 871, 873 (Ky. 1983).

Accordingly, we vacate the award of attorney fees and remand to the Fayette District Court for specific findings to be made supporting the award of attorney fees. The trial court shall consider Hanks' argument that the award was inadequate before awarding any attorney fees.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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