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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000312-MR

CARL R. COX, LLC; LARRY
AND MARY ANN OGLE, LLC;
AND COX AND OGLE JOINT VENTURE — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC COWAN, JUDGE
ACTION NO. 04-CI-009036

LOUISVILLE JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT
("MSD") — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,[1] CHIEF SENIOR JUDGE.

[1] Chief Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

STUMBO, JUDGE: Carl R. Cox, LLC, et al., appeal from a summary judgment in favor of Louisville Jefferson County Metropolitan Sewer District ("MSD") in their action alleging that they suffered pecuniary loss arising from MSD's breach of an oral agreement to provide sewer service to a residential real estate development. They assert several claims of error in support of their contention that their property was taken without just compensation and that MSD's actions were arbitrary and unreasonable. We conclude that summary judgment was properly entered in favor of MSD and, accordingly, affirm the judgment on appeal.

In August 2003, the Appellants purchased a parcel of real property referred to in the record as "The Lover's Lane Tract" with the intention of building a residential development called Meadowbrook. Prior to purchasing the parcel, they entered into a series of discussions with MSD for the purpose of establishing residential sewer service at the development. As part of that process, Carl Cox of Carl R. Cox, LLC and his engineer met with MSD Senior Development Engineer Roy Flynn. It would later be the Appellants' contention that as a result of the negotiations, MSD made oral representations prior to the Appellants' purchase of the parcel that MSD would permit the most economical means of sewer development, including the use of a pump station.

Cox purchased the property on August 14, 2003. Three days prior to the purchase, Cox filed an application with the Jefferson County Planning Commission ("the Commission") for approval of its preliminary subdivision plan. On August 25, 2003, MSD denied Cox's application for the proposed pump station

after MSD engineer David Johnson determined that the downstream sewers did not have the capacity to handle the increased discharge from the proposed subdivision. Cox met with MSD over the following weeks.

On September 15, 2003, Cox revised the sewer plan to utilize a gravity sewer rather than a pump station. Under the new plan, the gravity sewer would flow from the parcel in a different direction than the proposed pump station and would connect to a sewer line with adequate capacity. Sometime thereafter, the gravity sewer plan was abandoned when rock was discovered on the parcel and problems arose with respect to obtaining easements across all of the tracts through which the gravity system would run. Over the weeks that followed, MSD's Flynn allegedly made at least two informal oral representations that MSD would allow the pump station.

The proposed pump station later met opposition from neighboring homeowners and owners of adjacent undeveloped properties, and Cox would contend that a member of the Metro Louisville City Council threatened to seek injunctive relief if MSD approved the pump station. Ultimately, on February 20, 2004, MSD rejected the proposed pump station and determined that a gravity sewer comported with the long-range development plan for the area called the "Cedar Creek Action Plan 1990." MSD subsequently offered to allow Cox to participate in a recapture agreement to recoup a portion of the system's costs. Ultimately, however, the Appellants would contend that MSD left it with no means

of developing the subdivision because Cox could not obtain all of the easements it needed for the gravity system, and MSD would not allow the pump station.

Cox filed a federal lawsuit against MSD on July 6, 2004, and the instant action the following October. The federal action was dismissed, and Cox sold the undeveloped parcel in 2008 for substantially less than it paid for the parcel. The instant action continued in Jefferson Circuit Court, which culminated in the trial court's January 14, 2010 entry of an Opinion and Order Granting MSD's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment. In granting summary judgment in favor of MSD, the court found in relevant part that MSD had not engaged in an unlawful taking of the Appellants' property without just compensation because MSD had engaged in a valid exercise of its police power under Kentucky law. Additionally, the court determined that even if MSD made oral representations that it would allow the pump station to be utilized, those bare representations alone did not form a contract because the Subdivision Regulations of Louisville Metro's Land Development Code require sewer system approval to follow a four-step written process culminating in a "lateral extension contract." The court was also not persuaded by the Appellants' contention that MSD made intentional or negligent misrepresentations, nor that it was estopped from denying approval of the pump station because it represented to Carl Cox before he acquired the property that the pump station would be approved. In sum, the court cited *Bobbie Preece Facility v. Commonwealth*, 71 S.W.3d 99, 102 (Ky. App. 2001), for the proposition that the

party challenging the governmental action as an unconstitutional taking "bears a rather hefty burden" which the plaintiffs failed to meet. It found no genuine issues of material fact and concluded that MSD was entitled to a judgment as a matter of law. This appeal followed.

Cox first argues that the circuit court erred in failing to conclude that the Appellants' property was clearly taken without just compensation in violation of Sections 13 and 242 of the Kentucky Constitution. Cox maintains that *Bobbie Preece Facility*, upon which the trial court relied in part, is distinguishable from the instant facts because - unlike in the instant matter - the plaintiff in that case had no constitutional interest in a gaming license it was seeking to exercise. Cox points to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), for the proposition that a determination of governmental taking must take into account several elements including the economic impact on the claimant, the character of the governmental action, whether the action was physical in nature, and if judicial review was available. Cox contends that because the impact of MSD's actions foreclosed any opportunity for the Appellants to develop the property or derive any profit from the development, MSD effectively "took" a property interest in the parcel which reduced its value by $297,000.

We have closely examined the record and the law on this issue, and find no error. In *Commonwealth v. Stearns Coal & Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984), the Kentucky Supreme Court adopted the elements set forth by the

U. S. Supreme Court in its landmark takings case of *Penn Central Transportation Co.*, *supra*, when it stated that,

> Such elements are (1) the economic impact of the law on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, (3) the "character" of the governmental action, that is whether the action is a physical invasion versus a public program adjusting the benefits and burdens of economic life to promote the common good, (4) what uses the regulation permits, (5) that the inclusion of the protected property was not arbitrary or unreasonable, and (6) that judicial review of the agency decision was available.

After applying these elements to the facts at bar, the Jefferson Circuit Court found no basis for concluding that MSD's act of denying the Appellants' usage of a pump station was tantamount to an unconstitutional taking of property rights. We find no error in that conclusion. The Kentucky Legislature has granted MSD broad discretion to control sewer systems in Jefferson County for the public good. KRS 76.080; *Louisville & Jefferson County Metropolitan Sewer District v. Douglass Hills Sanitation Facility*, 592 S.W.2d 142 (Ky. 1979). Such exercise of police power is not unconstitutional merely because it deprives a property owner the most beneficial use of the property. *Stearns*, 678 S.W.2d at 382. Rather, the majority of inverse takings involve governmental acts which "completely frustrate" the landowner's rights and deprive him of the use of his property. *Id*. The Jefferson Circuit Court found that while MSD's denial of the Appellants' usage of a pump station was partially responsible for the Appellants' inability to develop the parcel, it is also true that the Appellants' inability to secure access to a gravity

system from adjoining landowners played an equal role. Additionally, it cannot reasonably be argued that MSD's actions were so draconian as to completely deprive the Appellants of any usage of the parcel. The Appellants went on to sell the parcel to a buyer, which the record indicates utilized the property as a tree farm.

As the circuit court properly noted, a "party challenging governmental action as amounting to an unconstitutional taking bears a rather hefty burden." *Bobbie Preece Facility,* 71 S.W.3d at 102. In order for a plaintiff to prevail, the alleged "violation of the Constitution must be clear, complete and unmistakable . . . ." *Id*. The totality of the record demonstrates that MSD's act of denying the Appellants the usage of a pump station was rationally related to its statutory mandate, and we cannot conclude that the Jefferson Circuit Court erred in finding that MSD's acts were not so arbitrary and unreasonable as to rise to the level of an unconstitutional taking.

The Appellants also contend that MSD breached its verbal agreement with them and their engineers by refusing to allow the usage of a pump station. They argue that MSD verbally agreed on multiple occasions that, if various conditions were met, the Appellants would be permitted to utilize a pump station to provide sewer service to their proposed development. They contend that they met those conditions and relied on MSD representations, and that MSD's subsequent denial of their request to utilize a pump station constituted a breach of contract. Additionally, they maintain that MSD should have been estopped from reversing

its conclusion as to the pump station because they reasonably relied on MSD's initial verbal representations. While acknowledging that MSD has denied making any verbal representation that the Appellants could utilize a pump station, they contend that at a minimum the issue is a question of fact, which should go before a jury.

The Subdivision Regulations of Louisville Metro's Land Development Code ("the Regulations") provide that MSD can legally approve a sewer system only by way of a four-step process, which culminates in a written "lateral extension contract." The record reveals that the subdivision plat in which MSD denied Cox's first application for a pump station expressly puts the Appellants on notice of the written contract requirement. Additionally, the Appellants do not maintain that either Cox or his engineers were unaware of this requirement. We agree with the circuit court's assessment that the Appellants either were aware or should have been aware that sewer system approval required a written contract. As such, we find support in the record and the law for the circuit court's conclusion that MSD's alleged verbal representations early on in the negotiation process did not create an enforceable contract, and that as such it would not be possible for the Appellants to prove that MSD breached a contract if the matter proceeded to trial.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id*. Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky. App. 1996).

When viewing the record in a light most favorable to the Appellants and resolving all doubts in their favor, we find no error in the Jefferson Circuit Court's conclusion that there were no genuine issues as to any material fact and that MSD was entitled to a judgment as a matter of law. For the foregoing reasons, we affirm the Jefferson Circuit Court's Opinion and Order Granting MSD's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment.

ALL CONCUR.

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