

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001721-MR

ALBERT ROBINSON AND
LUCILLE ROBINSON

APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 06-CI-00972

WINDSTREAM COMMUNICATIONS, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CLAYTON AND WINE, JUDGES.

CLAYTON, JUDGE: This is an appeal of the granting of summary judgment to a utility in a trespass action.

BACKGROUND INFORMATION

On April 25, 2007, Windstream Communications, Inc., (Windstream) filed a motion for summary judgment with the Laurel Circuit Court. The court

denied its motion, finding that no discovery had taken place in the case. Almost three years later, on October 30, 2009, Windstream filed a second motion for summary judgment. The court granted this motion on March 2, 2010. The Robinsons contend that this was due to the lack of preparation by their attorneys. Windstream, however, argues that it was entitled to summary judgment because the Robinsons may not bring an action for trespass against it under the facts of this case. The Robinsons filed a motion to vacate the order granting summary judgment, but the trial court overruled their motion. This appeal of the entry of summary judgment followed.

STANDARD OF REVIEW

In reviewing the granting of summary judgment by the trial court, an appellate court must determine 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.” Kentucky Rules of Civil Procedure (CR) 56.03.

The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’

Community Trust Bancorp, Inc. v. Mussetter, 242 S.W.3d 690, 692 (Ky. App.

2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue de novo. *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

DISCUSSION

This case was the result of an action involving the taking of property by the Commonwealth pursuant to eminent domain. Windstream had a contract with the Commonwealth to construct utility lines on the property. When Windstream entered the property to install the lines, the Robinsons brought an action for trespass against them.

The Robinsons first contend that the trial court should not have granted summary judgment because no discovery had taken place. They argue that, because of the underlying condemnation action, this action was being held in abeyance until the other dispute was resolved. Windstream contends that reverse condemnation is the landowners' sole remedy for encroachment by a utility, regardless of whether the utility is a governmental entity or a private company with condemnation power. It goes on to assert that the well established rule in Kentucky is that where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy is under Section 242 of the Kentucky Constitution which provides that "just compensation for property taken [shall be made]."

269 (Ky. 1967)(*overruled on other grounds*) the Court held that:

The rule is that where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that “just compensation for property taken” shall be made. This remedy is frequently referred to as “reverse condemnation.” The measure of damages is the same as in condemnation cases. Separate recovery of punitive damages is prohibited. (Internal citations omitted).

Windstream contends that it is a contractor of the Commonwealth of Kentucky Transportation Cabinet and that, in accordance with their contract, it acted upon the request of the Kentucky Department of Transportation and made the changes to the Robinsons’ property. The Robinsons do not dispute the existence of a contractual relationship between the Commonwealth and Windstream. We agree with Windstream and the decision of the trial court that under Kentucky law, the Robinsons’ only remedy against Windstream was a reverse condemnation action. Since they brought an action under trespass, it was proper for the trial court to grant summary judgment.

For the foregoing reasons, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Russell W. Burgin
London, Kentucky

BRIEF FOR APPELLEE:

Michael E. Hammond
Lexington, Kentucky

