STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

The Darwin Corporation, Inc.,
Plaintiff Below, Petitioner

FILED
June 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-0285 (Monongalia County 09-C-667)

Patriot Mining Company, Inc.,
Defendant Below, Respondent

MEMORANDUM DECISION

Petitioner The Darwin Corporation, by counsel, Bader C. Giggenbach, appeals a January 14, 2011, order from the Circuit Court of Monongalia County that dismissed petitioner's complaint for breach of contract against respondent Patriot Mining Company. Respondent appears by counsel, Amy M. Smith and William J. O'Brien. The circuit court determined that petitioner's complaint was barred by the applicable statute of limitations, West Virginia Code § 55-2-6 (ten-year statute of limitations on breach of contract claims).

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Petitioner owns a forty-three-acre tract of land, including mineral rights, near Morgantown. In the 1970s, the tract was accessible by a state road, State Local Service Route 19/24 ("Route 19/24"), that crossed the tract. This case concerns respondent's destruction of Route 19/24 and its failure to reconstruct it.

On November 21, 1977, petitioner leased the tract to Dippel and Dippel Coal Company ("Dipple") for surface mining. The lease required Dippel to return the land to its nearest contour upon completion of mining. About two years later, on December 17, 1979, Dippel entered into a one-year agreement with the West Virginia Department of Highways ("DOH") to temporarily close Route 19/24 so that Dipple could destroy the road and mine the land. Under the agreement, DOH required Dippel to relocate and reconstruct Route 19/24 when mining was complete. After mining operations commenced, Dippel sold its mining operations to Anker Energy and its current affiliate, respondent Patriot Coal Company.

DOH formally abandoned Route 19/24 on June 10, 1992, almost fifteen years after petitioner leased its land to Dipple. Notice of the abandonment was published in local newspapers.

Although the road had been demolished as early as 1980, it was not until December 10, 1999, that petitioner asked respondent to reconstruct Route 19/24. Respondent replied by letter dated December 21, 1999, that because DOH had formally abandoned the road seven years earlier, respondent was not obligated to reconstruct it.

Almost ten years later, on September 17, 2009, petitioner filed its complaint against respondent for specific performance, asking that respondent reconstruct Route 19/24 in accordance with Dippel's 1979 contract with DOH, and for breach of contract. Petitioner states that until Route 19/24 is reconstructed, its property is landlocked.

Respondent made a motion to dismiss petitioner's complaint and asserted, *inter alia*, that petitioner failed to state a claim under Rule 12(b)(6) because any claims based on Dippel and DOH's 1979 agreement were barred either by West Virginia Code § 55-2-6 (ten-year statute of limitations on breach of contract claims) or by the doctrine of laches.

In its January 14, 2011, order granting respondent's motion to dismiss, the circuit court made the following factual findings:

> This Court believes that the [petitioner] should reasonably have known of its claim long before December 21, 1999. Upon the abandonment by the WVDOH, an order of abandonment was entered on June 10, 1992 by the Commissioner and that order became public record. While the [petitioner] now comes before this Court and states that it was unaware of such order until 1999, this Court finds it difficult to comprehend that the [petitioner] was prevented from knowing of the closure of the only road to its property. Upon the exercising of any degree of diligence, the [petitioner] would have easily discovered the abandonment of the road . . . .

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Both parties dispute whether the circuit court's order was granted as a motion to dismiss under Rule 12(b)(6), or a motion for summary judgment under Rule 56 of the Rules of Civil Procedure. Both parties suggest that the circuit court considered matters outside the pleadings in granting the respondent's motion to dismiss. Therefore, under Rule 56, the respondent's motion to dismiss will effectively be treated as a motion for summary judgment.

This Court reviews a circuit court's entry of summary judgment de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 1, *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001).

The parties agree that the applicable statute of limitations is ten years under West Virginia Code § 55-2-6. Petitioner argues that any issues regarding when the statute of limitations began to

run, and whether any of petitioner's claims are time barred, should have been resolved by a jury and not the circuit court on a motion to dismiss. Petitioner asserts that a jury should have been allowed to decide if it was reasonable for petitioner not to have known until 1999 that Route 19/24 had been abandoned and that respondent did not intend to reconstruct Route 19/24 pursuant to its contract with DOH.

Respondent contends that petitioner's argument – that it did not learn of the destruction and abandonment of Route 19/24 until 1999 – is "specious." There is no evidence in the record to suggest that respondent concealed its actions since the expiration of the year-long, 1979 agreement with DOH to reconstruct the road. Petitioner does not allege that it did not know Route 19/24 had been destroyed and physically abandoned since 1980. The public record establishes that DOH gave public notice that the road was to be formally abandoned in 1992. Petitioner does not explain why it reasonably or prudently would not have known that Route 19/24 was destroyed and abandoned, particularly given petitioner's claims that Route 19/24 was the only ingress and egress to its tract of land.

This Court has examined the record and finds no error in the circuit court's decision. There was no dispute between the parties that Route 19/24 was a valuable means of ingress and egress to petitioner's tract of land; Route 19/24 was demolished as early as 1980; and respondent has made no effort to rebuild the road. The DOH formally and publicly abandoned the road in 1992, yet petitioner did not seek to compel respondent to rebuild the road until September 2009, when it filed the instant action. On this record, petitioner's action was plainly barred by the ten-year statute of limitations in West Virginia Code § 55-2-6. As there was no genuine issue of fact to be tried, and inquiry concerning the facts will do nothing to clarify the application of the law, the circuit court did not err in granting summary judgment to respondent.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 27, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh