Cite as 2009 Ark. App. 874

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-116

ARKANSAS CONSTRUCTION & EXCAVATION, LLC APPELLANT V. CITY OF MAUMELLE, ARKANSAS APPELLEE	**Opinion Delivered** DECEMBER 16, 2009 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV07-11669] HONORABLE MARY MCGOWAN, JUDGE APPEAL DISMISSED

KAREN R. BAKER, Judge

Appellant, Arkansas Construction & Excavation, LLC, appeals from a decision by the Pulaski County Circuit Court, finding that the case was a review of an administrative decision, dismissing appellant's complaint for declaratory judgment, and affirming the decision of the Maumelle Planning Commission's denial of appellant's request for a waiver regarding the Maumelle Master Street Plan. Appellant brings two arguments on appeal. First, appellant asserts that the trial court erred in finding that this action was a review of an administrative decision because the statute upon which the trial court relied is applicable only to appeals of final actions by the administrative agency. Second, appellant asserts that if the trial court was correct and could affirm the Planning Commission's action, the trial court erred as the action taken was arbitrary, unreasonable, and oppressive and not supported by the facts or authorities. Because

appellant failed to perfect his appeal in the time and manner provided by District Court Rule 9, the trial court did not have jurisdiction to hear the appeal. Accordingly, the order entered by the trial court was void ab initio, and we dismiss.

Appellant, an Arkansas limited liability company and builder, purchased forty acres of land in the unincorporated area of Pulaski County just west of and contiguous to the City of Maumelle to develop the Hunter Heights Subdivision. After purchasing the unincorporated forty acres, appellant learned that the incorporation of the forty acres into Maumelle was subject to obtaining street access to the development. In order to obtain access to the forty acres—which would become the Hunter Heights Subdivision—from Maumelle, Kenneth Norman, owner of Arkansas Construction and Excavation, LLC, discussed the use and purchase of Tract B with Jim Narey, Maumelle's City Planning Director. Tract B was located in the West Pointe Subdivision and was immediately east of the Hunter Heights Addition. Evidence showed that the Bill of Assurance for the West Pointe Subdivision provided restrictions on Tract B, which provided for the use of Tract B for access to the west or a park or recreational area.

Norman testified that he discussed with Narey the use of Tract B, which was fifty feet wide, as a street right-of-way into the forty acres and that he relied on Narey, as the Planning Director, to assure him that his proposed plan for the use of Tract B would be acceptable. After Narey assured Norman that a fifty-foot right-of-way would be acceptable, Norman purchased Tract B. After the annexation had begun, Norman learned that the Planning Commission would require a sixty-foot right-of-way on Tract B, despite the fact that Tract B was only fifty feet wide.

Norman testified that he then withdrew his request for annexation. Narey testified that he and Norman only discussed Norman's ability to use Tract B for access to the Hunter Heights Subdivision and did not discuss the Maumelle Master Street Plan, street classifications, or rights-of-way. Narey testified that he repeatedly told Norman that he would have to build the subdivision in accordance with all city requirements. Norman testified that it was not until he attended an engineering meeting, where various matters on the agenda for the June Planning Commission meeting were discussed, that he learned of the sixty-foot right-of-way requirement for Tract B in the Master Street Plan. Narey then notified Robert Holloway, the engineer who developed the preliminary plat for the Hunter Heights Subdivision, of the sixty-foot right-of-way requirement.

Appellant submitted the preliminary plat to the Maumelle Planning Commission. The City of Maumelle Planning Commission Minutes of May 24, 2007, reflect that Holloway requested that the Planning Commission grant a waiver of the requirement of the sixty-foot right-of-way for the entrance to the Hunter Heights Subdivision. Commissioner Wallace made a motion to deny the waiver request and Commissioner Fisher seconded the motion. The motion to deny the waiver request for Hunter Heights was then passed. The minutes reflect that Commissioner Wyeth then made a motion to approve the Preliminary Plat for Hunter Heights on the condition that all city and county requirements were met. Commissioner Fisher seconded the motion and emphasized the condition that all city and county requirements must be met. The motion for conditional approval was passed.

Appellant then filed a complaint for declaratory judgment in Pulaski County Circuit Court seeking to have the sixty-foot right-of-way voided as arbitrary and without authority. The trial court determined that this action was a review of a final action by the city and affirmed the Planning Commission. Appellant's complaint for declaratory judgment was dismissed.

As appellant's first point on appeal, it asserts that the trial court erred in finding that this action was a review of an administrative decision because the statute upon which the trial court relied is applicable only to appeals of final actions by the administrative agency. The applicable provision, Arkansas Code Annotated section 14-56-425 (Repl. 1998), provides as follows:

> In addition to any remedy provided by law, appeals from final action taken by the administrative and quasi-judicial agencies concerned in the administration of this subchapter may be taken to the circuit court of the appropriate county where they shall be tried de novo according to the same procedure which applies to appeals in civil actions from decisions of inferior courts, including the right of trial by jury.

Our supreme court has interpreted Arkansas Code Annotated section 14-56-425 to incorporate the appeal procedure found in District Court Rules 8 and 9. *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006) (citing *Ingram v. City of Pine Bluff*, 355 Ark. 129, 133 S.W.3d 382 (2003)); *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 984 S.W.2d 418 (1999) (discussing *Board of Zoning Adjustment v. Cheek*, 328 Ark. 18, 942 S.W.2d 821 (1997)). In particular, the version of District Court Rule 9 then in effect provided in part:

> (a) *Time for Taking Appeal.* All appeals in civil cases from district courts to circuit court must be filed in the office of the clerk of the particular circuit court having jurisdiction of the appeal within 30 days from the date of the entry of judgement. . . .
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> (b) *How Taken.* An appeal from a district court to the circuit court shall be taken by filing a record of the proceedings had in the district court. Neither a notice of appeal nor an

> order granting an appeal shall be required. It shall be the duty of the clerk to prepare and certify such record when requested by the appellant and upon payment of any fees authorized by law therefor. The appellant shall have the responsibility of filing such record in the office of the circuit clerk.
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> (c) *Unavailability of Record.* When the clerk of the district court, or the court in the absence of a clerk, neglects or refuses to prepare and certify a record for filing in the circuit court, the person desiring an appeal may perfect his appeal on or before the 30th day from the date of the entry of the judgement in the district court by filing an affidavit in the office of the circuit court clerk showing that he has requested the clerk of the district court (or the district court) to prepare and certify the records thereof for purposes of appeal and that the clerk (or the court) has neglected to prepare and certify such record for purposes of appeal. A copy of such affidavit shall be promptly served upon the clerk of the district court (or the court) and the adverse party.

The filing requirements of Rule 9 are mandatory and jurisdictional, and failure to comply prevents the circuit court from acquiring subject-matter jurisdiction. *Combs v. City of Springdale*, 366 Ark. 31, 233 S.W.3d 130 (2006) (citing *Douglas v. City of Cabot*, 347 Ark. 1, 59 S.W.3d 430 (2001)). As in *Night Clubs, Inc. v. Fort Smith Planning Comm'n*, 336 Ark. 130, 134, 984 S.W.2d 418, 421 (1999), our supreme court has held that "[a]ny interpretation of a statute by this court becomes a part of the statute itself."

However, because section 14-56-425 only permits appeals from a final action of the Planning Commission, as in *Combs*, *supra*, we must determine, as a threshold matter, if the denial of appellant's request for waiver of the sixty-foot right-of-way was a final action under the terms of the statute. Appellant argues that this was not a final action and cites as support the case of *Stromwall v. City of Springdale Planning Comm'n*, 350 Ark. 281, 86 S.W.3d 844 (2002). In *Stromwall*, our supreme court addressed the "final action" language of section 14-56-425 in detail. Specifically, the court stated:

> Under this section, only final actions taken by a planning commission are appealable. Thus, as a threshold matter, we must determine whether the action taken by the Commission on April 3, 2001, is a final action subject to appeal.
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> . . . .
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> Section 14-56-425 does not define the term "final action." However, this court has previously addressed that term in the context of a civil-rights claim. In *Ford v. Arkansas Game & Fish Comm'n*, 335 Ark. 245, 979 S.W.2d 897 (1998), this court held that the appellant's claim was not ripe because the commission had not taken any final action regarding his hunting and fishing licenses. This court relied on the Supreme Court's discussion of final administrative action in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). There, the Court wrote that "the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury[.]" *Ford*, 335 Ark. at 253, 979 S.W.2d at 901 (quoting *Williamson*, 473 U.S. at 193, 105 S.Ct. 3108).
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> In other contexts, this court has held that the test of finality and appealability of an order is whether the order puts the court's directive into execution, ending the litigation or a separable branch of it. *Farm Bureau Mut. Ins. Co. v. Running M Farms, Inc.*, 348 Ark. 313, 72 S.W.3d 502 (2002). Thus, for an order or action to be final, it must terminate the action, end the litigation, and conclude the parties' rights to the subject matter in controversy. *Id*; *Beverly Enters.-Ark., Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000). Where further proceedings are contemplated, which do not involve merely collateral matters, the order or action is not final. *Harold Ives Trucking Co.*, 341 Ark. 735, 19 S.W.3d 600.

Stromwall, 350 Ark. at 283–84, 86 S.W.3d at 846. There, the court held that, based on the principles of finality, the approval of a preliminary plat was not a final action under section 14-56-425 because further actions in the matter were contemplated, and there were still outstanding issues to be determined before the plat was finally approved.

Unlike *Stromwall*, here, there was no further action contemplated and no outstanding issues to be determined concerning the sixty-foot right of way requirement. It is undisputed that

at the May 2007 Maumelle Planning Commission Meeting, the Commission considered and unanimously denied appellant's request for a waiver of the sixty-foot right-of-way requirement for the entrance of the Hunter Heights Subdivision. Following the Planning Commission decision, appellant could either submit a final plat with a sixty-foot road or appeal the no-waiver decision. The Commission's decision ended the controversy and left no issues to be resolved as to the sixty-foot right-of-way requirement. Thus, we hold that the Commission's decision was a final action under section 14-56-425.

Because the Commission's decision was a final action under section 14-56-425, appellant was required to comply with the directives of Rule 9 in filing an appeal. The Commission denied appellant's request for a waiver and gave conditional approval of the plat contingent upon compliance with the Master Street Plan on June 24, 2007. Appellant did not file his complaint until September 10, 2007, which was more than thirty days after the Commission's decision. Failure to comply with the requirements of Rule 9 prevented the circuit court from acquiring subject-matter jurisdiction. *See Combs*, *supra.* Because the circuit court never acquired subject-matter jurisdiction, the order entered by the trial court is void ab initio. Therefore, this court lacks jurisdiction, and we must dismiss.

Dismissed.

ROBBINS and MARSHALL, JJ., agree.