IN THE COURT OF APPEALS OF IOWA

No. 3-374 / 12-1568
Filed May 30, 2013

HAWKEYE LAND CO.,
Plaintiff-Appellant,

vs.

FRANKLIN COUNTY WIND LLC,
Defendant-Appellee.

Appeal from the Iowa District Court for Franklin County, Rustin T. Davenport, Judge.

Plaintiff appeals the district court decision dismissing its suit. **AFFIRMED.**

Jon M. McCright of Jon McCright Law Offices, and Andrew Potter of Midwestern Trading, Inc., Cedar Rapids, for appellant.

Benjamin M. Clark and Dennis L. Puckett of Sullivan & Ward, P.C., West Des Moines, for appellee.

Dawn V. Gibson of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for amicus curiae for Iowa Utility Association (on behalf of its members MidAmerican Energy Company, Interstate Power and Light Company and Black Hills Energy); Iowa Association of Municipal Utilities; Iowa Association of Electric Cooperatives; Iowa Association of Water Agencies; and Iowa Rural Water Association.

Mark R. Schuling, Consumer Advocate (Utilities), John Long, of Office of Consumer Advocate, for amicus curiae Office of Consumer Advocate.

David Lynch and Cecil I. Wright, of Iowa Utilities Board for amicus curiae Iowa Utilities Board.

Heard by Vogel, P.J., and Vaitheswaran and Bower, JJ.

VOGEL, P.J.

The plaintiff, Hawkeye Land Co. (Hawkeye), appeals the district court's order dismissing its action against Franklin County Wind, LLC (FCW), because the court lacked authority to hear the case upon determining administrative remedies were not properly exhausted. Because we agree the agency—the Iowa Utilities Board—should have been given the first opportunity to resolve this case, rather than the district court, we affirm the district court's dismissal.

I. Background Facts and Proceedings

FCW is an indirect subsidiary of Alliant Energy Corporation, which is the parent company of Interstate Power and Light Company, a public utility providing gas and electric services to customers in Iowa. FCW is in the process of building a sixty-turbine wind farm in Franklin County, Iowa, with the power being transmitted to either an individual buyer yet to be determined, or into its regional independent transmission operator, the Midwest Independent Transmission System Operator market. Hawkeye is an Iowa corporation that owns the right to grant easements over certain railroad rights-of-way in Franklin County.

FCW buried conduits containing electrical wires and fiber optic cables across railroad right-of-way property in four locations. Before placing the conduits, FCW notified Hawkeye it sought to cross the property and the parties began to negotiate easement prices.[1] When negotiations failed in March 2012, FCW utilized the procedure provided for in Iowa Code section 476.27 (2011) (the "crossing statute") and the coordinating administrative rules to begin the procedure for a crossing of a railroad right-of-way.

[1] Hawkeye demanded $12,500 per crossing in order to avoid litigation.

There is also another portion of land related to this case owned by Herman and LaVonne Off. The Off property has a similar history of railroad ownership as Hawkeye's property. Hawkeye purchased the property through a series of railroad bankruptcies and then conveyed it to the Offs in 1986. Hawkeye retained the right to grant easements to the Off property. FCW put Hawkeye on notice it intended to cross the Off property pursuant to the crossing statute, and FCW also purchased easements from the Offs.

On May 11, 2012, Hawkeye, ex parte, sought to enjoin FCW from construction at the crossing sites. The district court granted a temporary injunction that same day. FCW moved to dissolve the injunction based on the merits of the injunction. On May 25, the district court dissolved and vacated the temporary injunction finding "Hawkeye Land Co. has not set forth adequate evidence to show that such crossings will result in damage to the railroad, destruction of property, or injury to person." The district court also

> considered Hawkeye Land Co.'s arguments that Franklin County Wind, LLC, cannot utilize Iowa Code chapter 476.27 for authority to have a utility crossing of the railroad line. At this time the court rejects the argument that this statute is unconstitutional. The court also rejects the argument that even in light of the statute that procedure for obtaining a crossing of the railroad somehow does not apply to these parties. There is at least a prima facie case that the statute does apply. The statute must be presumed to be constitutional, and on a temporary basis, the court is unwilling to declare the statute unconstitutional without any further record.

FCW then filed a motion to dismiss asserting the district court lacked authority to hear the case until Hawkeye exhausted its administrative remedies. Hawkeye resisted the motion, arguing FCW waived any objection to both subject matter and personal jurisdiction by its actions in seeking to dissolve the

temporary injunction. It also argued the exhaustion doctrine does not apply because there is no administrative remedy available nor does the statue require exhaustion. FCW responded it was not contesting personal jurisdiction, which is waivable, but rather whether the district court had authority to proceed at this point.

On July 27, the district court agreed with FCW that it lacked authority to hear the case because "the controversy in this matter must be first brought before the Iowa Utilities Board and the district court should hear this matter only after an appropriate appeal from any decision of the Iowa Utilities Board." The district court did not address the waiver argument. Hawkeye filed an Iowa Rule of Civil Procedure 1.904 motion asking the court to clarify or reconsider its ruling on several points, including whether FCW waived the exhaustion argument and consented to district court jurisdiction. However, before the court had the opportunity to address the merits of Hawkeye's rule 1.904 motion, Hawkeye filed its notice of appeal.

II. Standard of Review

The parties disagree on the standard of review. Hawkeye is correct that we review actions in equity, such as an action for injunctive relief, de novo. However, we must look to what Hawkeye is actually appealing—the order dismissing its case because of its failure to exhaust administrative remedies. Our review therefore is for correction of errors at law. *See Keokuk Cnty. v. H.B.*,

593 N.W.2d 118, 122 (Iowa 1999).[2]

III. Iowa Code Section 476.27: the "Crossing Statute"

Iowa Code section 476.27, referred to as the crossing statute, and the administrative rules found at 199 Iowa Administrative Code chapter 42, govern utility crossings of railroad rights-of-way in Iowa. The statute provides a public utility that locates its facilities for a crossing within a railroad right-of-way must pay the railroad a one-time standard crossing fee of $750 for each crossing, unless the utility and railroad otherwise agree or unless special circumstances exist. Iowa Code § 476.27(2)(b); Iowa Admin. Code rs. 199-42.2-.3. This is known commonly as "pay and go."

The Iowa Code provides, "'Railroad' or 'railroad corporation' means a railroad corporation as defined in section 321.1, which is the owner, operator, occupant, manager, or agent of a railroad right-of-way or the railroad corporation's successor in interest. 'Railroad' and 'railroad corporation' include an interurban railway." Iowa Code § 476.27(1)(f). A "railroad right-of-way" has also been specifically defined to encompass a broad group of interests:

"Railroad right-of-way" means one or more of the following:

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[2]The parties and the district court captioned this contested filing as a "motion to dismiss for lack of authority to hear case." Generally, a motion to dismiss must be founded in the allegations of the petition. *Herbst v. Treinen*, 88 N.W.2d 820, 823 (Iowa 1958). If matters not contained in pleadings are relied upon in support of the motion to dismiss, the proper procedure is to treat the motion as one for summary judgment. *Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308, 311 (Iowa 1982). It is not entirely clear from the record if evidence beyond the facts asserted in the initial petition, such as the affidavits filed by Hawkeye, was used by the district court in its July 27 ruling. Any distinction however is irrelevant to this appeal as our review is the same and we look at the case in the light most favorable to the nonmoving party regardless of whether it is a summary judgment or a dismissal. *See In re Eickman's Estate*, 291 N.W.2d 308, 312 (Iowa 1980) (explaining the review for summary judgment); *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 586 (Iowa 2004) (explaining the review for dismissal).

> (1) A right-of-way or other interest in real estate that is owned or operated by a railroad corporation, the trustees of a railroad corporation, or the successor in interest of a railroad corporation.
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> (2) A right-of-way or other interest in real estate that is occupied or managed by or on behalf of a railroad corporation, the trustees of a railroad corporation, or the successor in interest of a railroad corporation, including an abandoned railroad right-of-way that has not otherwise reverted pursuant to chapter 327G.
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> (3) Another interest in a former railroad right-of-way that has been acquired or is operated by a land management company or similar entity.

Iowa Code § 476.27(1)(g).

Public utility has likewise been defined by the legislature:

> "Public utility" means a public utility as defined in section 476.1, except that, for purposes of this section, "public utility" also includes all mutual telephone companies, municipally owned facilities, unincorporated villages, waterworks, municipally owned waterworks, joint water utilities, rural water districts incorporated under chapter 357A or 504, cooperative water associations, franchise cable television operators, and persons furnishing electricity to five or fewer persons.

Iowa Code § 476.27(1)(e).

The crossing statute at subsection four provides that if a party believes a "special circumstance exists for a particular crossing [the party] may petition the [Iowa Utilities] board for relief." Iowa Code § 476.27(4)(a). Administrative rules have been promulgated to "promote the just resolution of controversies." Iowa Admin. Code r. 199-42.17. The intent of the legislature was to encompass all crossings that involve a public utility and railroad right-of-ways. *See* Iowa Code § 476.27(7) ("This section shall apply in *all* crossings." (emphasis added)).

IV. Exhaustion of Administrative Remedies

The first question before us is whether the district court was correct in finding Iowa Code section 476.27 even applies to the parties. Hawkeye argues it

does not as it asserts it is not a railroad as defined in Iowa Code section 476.27(1)(f), nor does it own a "railroad right-of-way" as described in Iowa Code section 476.27(1)(g), nor does the Off property qualify as a "railroad right of way" pursuant to section 476.27(1)(b). Likewise, Hawkeye argues section 476.27 is not applicable to FCW because FCW is not a *public* utility. We find the determination of whether section 476.27 applies to the parties and the land rights at issue is better left with the Iowa Utilities Board in the first instance.[3]

Hawkeye could have sought a proper determination from the agency as specifically provided for in the crossing statute. The pertinent part of the statute provides, "A railroad or public utility that believes special circumstances exist for a particular crossing may petition the board to relief." Iowa Code § 476.27(4)(a). The doctrine surrounding exhaustion is well established:

> All administrative remedies must be exhausted before an aggrieved party is entitled to judicial review of an administrative decision. Iowa Code § 17A.19(1); *Continental Tel. Co. v. Colton*, 348 N.W.2d 623, 626 (Iowa 1984). Two conditions must be met before we apply the doctrine: an adequate administrative remedy

[3] Hawkeye argues FCW waived any exhaustion defense. Regardless of the potential merits of the claim, Hawkeye has not preserved the issue for appeal. The district court's July 25 ruling did not address Hawkeye's waiver argument. It appears Hawkeye attempted to preserve the issue for appellate review by filing a rule 1.904 motion, but it failed to secure a ruling on its motion before filing its notice of appeal, and therefore divested the district court of jurisdiction over the case. Hawkeye's statement the districted court "at least passed on the issue" because it "had not ruled on Hawkeye's motion at the end of the thirty days allowed for appeal" is an incorrect statement of law. A properly filed rule 1.904(2) motion tolls the time for appeal. Iowa R. App. P. 6.101(1)(b). While the district court was given an opportunity to address (and preserve) Hawkeye's issue, Hawkeye took away that opportunity by filing its notice of appeal. *See IBP, Inc v. Al Gharib*, 604 N.W.2d 621, 628 (Iowa 2008) ("When the party who has filed a posttrial motion appeals, no jurisdictional problem arises. Rather, we consider the movant-appellant's appeal as having been taken as a matter of right. However, in these circumstances, the appellant is deemed to have waived and abandoned the posttrial motion. Additionally, once the appeal is perfected, the district court loses jurisdiction to rule on the motion, and any such ruling has no legal effect."). We will not address Hawkeye's unpreserved waiver issue. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

> must exist for the claimed wrong, and the governing statutes must expressly or impliedly require the remedy to be exhausted before allowing judicial review. *North River Ins. Co. v. Iowa Div. of Ins.*, 501 N.W.2d 542, 545 (Iowa 1993); *Pruess Elevator, Inc. v. Iowa Dep't of Natural Resources*, 477 N.W.2d 675, 677 (Iowa 1991). An exception to the doctrine "is applied when the administrative remedy is inadequate or its pursuit would be fruitless." *Alberhasky v. City of Iowa City*, 433 N.W.2d 693, 695 (Iowa 1988).

Riley v. Boxa, 542 N.W.2d 519, 521 (Iowa 1996).

One exception is the statute must expressly or impliedly require that remedy be exhausted before court intervention. *Id.* We agree with the district court, "the code is clearly laying out the standard administrative law procedure whereby appeal to the district court is only appropriate after a disposition at the agency level." Merely because the code contains the term "may" does not mean the exhaustion doctrine does not apply. *See Riley*, 542 N.W.2d at 522. Coupled with the procedure in Iowa Administrative Code rule 199-42.25,[4] the statute requires exhaustion.

Hawkeye focuses the majority of this argument on the other exception—an adequate administrative remedy must exist for the claimed wrong. It argues it "wants its property unmolested and its constitutional rights enforced" and the Iowa Utilities Board cannot provide that. We disagree because the administrative

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[4] This rule provides

> The presiding officer will issue a decision as soon as possible after the conclusion of the hearing. If the board issues the decision, it is final agency action. If a single presiding officer issues the decision, it is a proposed decision, and the rules applicable to appeals from the decision of a presiding officer at rule 199-7.8(476) apply, except that the appeal time may be shortened at the discretion of the presiding officer, and all times set forth in rule 199-7.8(476) may be shortened at the discretion of the board.
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> These rules are intended to implement Iowa Code sections 476.1, 476.1A, 476.1B, and 476.27.

Iowa Admin. Code r. 199-42.25

rules provide for discovery and hearing procedures to address the claims Hawkeye makes. *See* Iowa Admin. Code rs. 199-42.17-.25. The board is able to award additional compensation to Hawkeye if it can establish special circumstances warranting additional compensation in excess of the standard $750 crossing fee. It can also set additional terms and conditions for crossings, if appropriate, and critical to Hawkeye's concern, it can disallow the crossing in a particular place if the circumstances warrant. Iowa Admin Code r. 199-42.5. Allowing the administrative process to be played out may result in the board entering rulings which would avoid a judicial determination regarding Hawkeye's constitutional claims, and we attempt to avoid unnecessary constitutional questions. *See Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 200 (Iowa 2012).

Because Hawkeye did not allow the Iowa Utilities Board the first opportunity to resolve its dispute with FCW through a petition pursuant to Iowa Code section 476.27(4)(a), the district court was without authority to hear its complaint.

V. Conclusion

It should be left to the Iowa Utilities Board to determine whether Iowa Code section 476.27 is applicable to the parties and the property in question by utilizing the procedures provided for in Iowa Code section 476.27(4)(a). The district court correctly found Hawkeye's attempt to bypass the agency's procedure left the court without authority to resolve the dispute. We affirm the dismissal of the action.

AFFIRMED.