

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002221-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY WINCHESTER, JUDGE
ACTION NO. 98-CI-00102

ODA BARGO, A WIDOW; EVERETT BARGO
AND MARTHA ALICE BARGO, HIS WIFE;
DENVER BARGO, DIVORCED; SIDNEY BARGO, JR.
AND LORRIE BARGO, HIS WIFE;
ELIZABETH BARGO BROUDY AND BRUCE BROUDY,
HER HUSBAND; LOLA BARGO GREER AND ROGER GREER,
HER HUSBAND; CAROLYN BARGO BOWMAN
AND G. B. BOWMAN, HER HUSBAND

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (the Cabinet) brings this appeal from an August 23, 1999, judgment of the Whitley Circuit Court. We affirm.

The action herein was filed by the Cabinet seeking to condemn appellees' property for placement of a bridge. Kentucky Revised Statutes (KRS) 177.081; KRS 416.540-690. After lengthy

procedural delays, the circuit court dismissed, with prejudice, the Cabinet's condemnation action. The court found the Cabinet failed to negotiate in good faith with the appellees for the voluntary acquisition of the property. The appeal follows.

The Cabinet maintains the circuit court committed error by concluding it failed to negotiate in good faith for the voluntary acquisition of appellees' property. We disagree.

In Commonwealth v. Cooksey, Ky. App., 948 S.W.2d 122 (1997), the Commonwealth brought an action to condemn landowners' property for alteration or relocation of a highway. The landowners claimed the Commonwealth negotiated in bad faith. The circuit court entered an interlocutory judgment concluding the Commonwealth could properly condemn the subject property. An appeal was taken to our court. Therein, we held:

Clearly the statutory scheme makes no provisions for the jury to consider bad faith or fraud. Any allegation of bad faith or fraud would necessarily have to come before the judge who would decide if it affects the appellant's right to take. See KRS 416.600; KRS 416.610(4). Bad faith or fraud is not a statutory ground for denying the right to take. Courts, however, "[n]ecessarily imply the exercise of good faith by governmental authority in using its power to condemn. . . ." *City of Bowling Green v. Cooksey*, Ky. App., 858 S.W.2d 190, 192 (1992); *Commonwealth Transportation Cabinet Dept. Of Highways v. Taub*, Ky., 766 S.W.2d 49 (1988). A court will deny the right to take only where there has been "[a] gross abuse or manifest fraud." *Kroger Co. v. Louisville & Jefferson County Air Bd.*, Ky., 308 S.W.2d 435, 439 (1957). If the fraud affects the appellant's right to take, KRS 416.610(4) requires the court to enter a final judgment finding the petitioner is not authorized to condemn the property and award costs to the property owners.

Id. at 123.

In this Commonwealth, the power of condemnation is tempered by the requirement of good faith. Before a condemnation action will lie, the condemnor must make a good faith effort to negotiate with the property owners for voluntary acquisition of the sought after property interest. Id.

The Cabinet asserts the circuit court's finding that it engaged in bad faith negotiations was clearly erroneous. The circuit court specifically found:

Before a condemnation action may be filed, a condemnor must first make a reasonable effort to acquire the land by private sale. Where the condemnor makes a take-it-or-leave-it offer which is manifestly inadequate, the condemnor has not complied with the law and the case should be dismissed.

The record reveals that the Cabinet offered the appellees \$200.00 and that no further monetary offers were made. The court appointed appraisers valued appellees' property interest at \$7,500.00. Upon the whole, we cannot say the circuit court erred in finding the Cabinet's "take-it-or-leave-it" offer constituted bad faith negotiations. See Usher and Gardner, Inc. v. Mayfield Independent Board of Education, Ky., 461 S.W.2d 560 (1971).

Indeed, we think there exists substantial evidence of probative value sustaining the circuit court's finding thereupon. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972).

The Cabinet additionally asserts appellees failed to adequately "plead" failure to negotiate in good faith. Appellees filed a pleading styled "Incomplete Answer and Objection to Service" (answer) on April 1, 1999. Therein, appellees alleged

that "[t]he [Cabinet] failed in its obligation to negotiate with the [appellees] in good faith relative to the acquisition of their land." The Cabinet asserts such answer was untimely. KRS 416.600 requires an answer to be filed within twenty days after the summons' date of service. The Cabinet filed several "summonses" which failed to comply with the mandates of KRS 416.590. We do not believe appellees' time for filing an answer was triggered until a proper summons was filed under KRS 416.590. A proper summons was filed on March 19, 1999, and the certificate indicated service was accomplished on March 12, 1999. As such, we deem appellees' April 1, 1999, answer as timely.

The Cabinet also contends the circuit court erred as a matter of law by awarding appellees' attorney fees. In Cooksey, 948 S.W.2d 122, our Court recognized that recovery of attorney fees and costs are appropriate if bad faith is established. Hence, we view the Cabinet's contention without merit.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas J. Roberts
Manchester, Kentucky

BRIEF FOR APPELLEES:

Thor H. Bahrman
Corbin, Kentucky