RENDERED: SEPTEMBER 8, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001170-MR
NO. 1999-CA-001600-MR

GEORGE A. ELLIS, JR. APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
CIVIL ACTION NO. 98-CI-02002

LEXINGTON-FAYETTE
URBAN COUNTY GOVERNMENT APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: COMBS, HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, Judge: In 1994, the Lexington-Fayette Urban County Government (LFUCG) inspected a structure located at 305 Ash Street in Lexington. Based on the inspection, it issued a condemnation notice to the property's owner, Clarence Person, pursuant to the Lexington-Fayette Urban County Government Code of Ordinances Chapter 12.

Ten months after LFUCG provided notice to Person, Person conveyed the property to Charles E. Combs. One week later, Charles Combs transferred title to Emma and Kelly Combs. As required by

ordinance, the parties to each transaction completed the required transfer of ownership forms, which indicated that the new title holder or holders knew that LFUCG had issued a condemnation notice for the property.

In February 1995, LFUCG attached a placard to the wall of the structure announcing that LFUCG had condemned the structure. At some point in time prior to the demolition of the structure, an unknown person removed the placard. On August 29, Director of the Division of Code Enforcement C.J. Mallory sent a memorandum to the LFUCG Law Department requesting a limited title search to determine the fee owner and any other lien holders.

On October 10, 1995, Kelly and Emma Combs conveyed the property to George Ellis. A transfer of ownership form referring to the condemnation notice was not completed for this conveyance. The next day, LFUCG closed the bidding process for the demolition of the structure on the subject property. On October 25, LFUCG personnel reinspected the property and sent Ellis a letter granting an additional thirty days to repair the structure. LFUCG sent additional notices, including a notice prior to the demolition of the structure. Further details about the notices will be explained in addressing Ellis's arguments.

To demolish the structure, LFUCG accepted the lowest bid of $2,500.00 from Odd Jobs Wrecking Company. In July 1996, LFUCG canceled its purchase order after Odd Jobs defaulted on the contract to perform the demolition. LFUCG then awarded the project to the second lowest bidder, Clem Wrecking Company, which had submitted a bid of $3,650.00. Clem Wrecking demolished the

structure at the beginning of October. On October 7, 1996, LFUCG sent Ellis an invoice for the cost of demolition plus a $100.00 administrative fee. At the same time, LFUCG informed Ellis that it would place a lien on the property if he did not pay the invoice within fourteen days. On May 7, 1997, LFUCG finally placed a lien against the property.

On June 1, 1998, LFUCG filed the present action to enforce the lien against Ellis's property. Ellis counterclaimed alleging: (1) an unconstitutional taking of property under the Fifth Amendment of the United States Constitution and Section 2 of the Kentucky Constitution by demolishing the structure on his property without notice or adequate compensation; (2) negligence by failing to follow the proper procedures for the demolition of a structure; (3) fraud, deceit and misrepresentation by making material misrepresentations of fact or by concealing material facts which it had a duty to disclose; and (4) intentional infliction of emotional and physical distress/outrageous conduct by retaliating against Ellis for filing a discrimination suit with the Equal Employment Opportunity Commission and the Human Rights Commission in February 1995. After limited discovery, both parties moved for summary judgment. The circuit court entered summary judgment for LFUCG and awarded the full amount of the lien to LFUCG. The court denied Ellis's motion pursuant to Kentucky Rule of Civil Procedure (CR) 59.05 to alter, vacate or amend the judgment. This appeal followed.

I. LFUCG'S SUMMARY JUDGMENT MOTION

As we stated in Scifres v. Kraft,[1] "[t]he standard of review on appeal of a summary judgment is 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."[2] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor."[3] As an appellate court reviewing a motion for summary judgment, we owe no deference to the trial court because factual findings are not at issue.[4]

In his brief, Ellis claims that there are material issues of fact in dispute. While he may be correct, he fails to tell us what they are. He instead focuses on the perceived legal problems with LFUCG's action against him.

A. ALLEGED UNCONSTITUTIONAL TAKING OF PROPERTY

First, Ellis avers that LFUCG's actions amounted to an unconstitutional taking of his property. In support of this argument, he relies on Johnson v. City of Paducah[5] and Washington v. City of Winchester.[6]

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[1] Ky. App., 916 S.W.2d 779 (1996).

[2] Id. at 781 (citing CR 56.03).

[3] Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991) (citing Dossett v. New York Mining & Mfg. Co., Ky., 451 S.W.2d 843 (1970); Rowland v. Miller's Adm'r, Ky., 307 S.W.2d 3 (1956)).

[4] Goldsmith v. Allied Bldg. Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

[5] Ky., 512 S.W.2d 514 (1974).

[6] Ky. App., 861 S.W.2d 125 (1993).

Before the events at issue, LFUCG had adopted the 1993 version of the Building Officials and Code Administrators International, Inc., National Property Maintenance Code (BOCA Code) and also revised sections of the code. LFUCG codified the BOCA Code in section 12-1 of the Lexington-Fayette Urban County Code of Ordinances. In order to demolish a structure, the BOCA Code provides, in part:

> **PM-110.1 General:** The code official shall order the *owner* of any *premises* upon which is located any structure, which in the code official's judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation or *occupancy*, and such that it is unreasonable to repair the structure, to raze and remove such structure, of if such structure is capable of being made safe by repairs, to repair and make safe and sanitary or to raze and remove at the *owner's* option . . . .
>
> **PM-110.2 Order:** All notices and orders shall comply with Section PM-107.0.

As amended by LFUCG, PM-110.3 provides:

> Whenever the owner of a property fails to comply with a demolition order within the time prescribed, the code official shall cause the structure or part thereof to be razed and removed, or otherwise disposed of, as deemed appropriate, either through an available public agency or

by contract or arrangement with private persons, and the cost of such razing and removal shall be charged against the real estate upon which the structure is located and shall be a lien upon such real estate.[7]

The BOCA Code also dictates how LFUCG shall provide notice to the owner of the property. The notice must:

1. Be in writing;

2. Include a description of the real estate sufficient for identification;

3. Include a statement of the reason or reasons why notice is being issued; and

4. Include a correction order allowing a reasonable time for the repairs and improvements required to bring the *dwelling unit* or structure into compliance with the provisions of [the BOCA Code].[8]

The BOCA Code further provides that:

> Such notice shall be deemed to be properly served if a copy thereof is (a) delivered to the *owner* personally; or (b) sent by certified or registered mail addressed to the *owner* at the last known address with return receipt requested. If the certified or registered letter is returned showing that the letter was not delivered, a

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[7] Lexington-Fayette Urban County Gov't, Code of Ordinances § 12-1(b) (1994).

[8] Building Officials & Code Adm'rs Int'l, Inc., National Property Maintenance Code PM-107.2 (1993 ed.).

> copy thereof shall be posted in a conspicuous place in or about the structure affected by such notice. Service of such notice in the foregoing manner upon the *owner's* agent or upon the *person* responsible for the structure shall constitute service of notice upon the *owner*.[9]

Under PM-111.1:

> Any *person* affected by a decision of the code official or a notice or order issued under this code shall have the right of appeal to the board of appeals, provided that a written application for appeal is filed within 20 days after the day the decision, notice or order was served.

To determine whether the notice requirements were met in this case, we must examine at length the various notices from LFUCG. LFUCG completed an inspection of the structure on the property on August 4, 1994, and gave the owner, Person, a field inspection report ordering him to remove overgrown trees and brush within fifteen days. On August 5, LFUCG sent Person a condemnation notice directing him to repair the structure within fifteen days. The notice informed Person of his right to appeal within twenty days and told him whom to contact. The notice also explained that Person could not legally convey the property to another party without disclosing the condemnation notice.[10]

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[9] Id. PM-107.3.

[10] The BOCA Code specifically addresses changes in title. It provides:

(continued...)

In February 1995, LFUCG placed a placard on the front of the property, which an unknown party removed at a later date. After the posting of the placard, Person conveyed the property to Charles Combs, who, one week later, conveyed the property to Emma and Kelly Combs. All of the subsequent title holders prior to Ellis were informed about the status of the structure.

On October 25, 1995, LFUCG sent a reinspection notice to Ellis, entitled the final 30-day extension to the original notice and order. It noted that LFUCG had previously ordered necessary repairs on August 5, 1994. The notice also informed Ellis of the penalties for failing to comply and told him how to contact LFUCG.

On November 21, LFUCG sent Ellis a reinspection notice that noted some repairs had been satisfactorily completed. LFUCG gave Ellis thirty days from December 4, 1995, to complete the repairs. Besides notifying him how he could contact LFUCG, the notice indicated that it was an extension of the August 5, 1994, notice and order.

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[10] (...continued)

> It shall be unlawful for the *owner* of any *dwelling unit* or structure who has received a compliance order or upon whom a notice of violation has been served to sell, transfer, mortgage, lease or otherwise dispose of to another until the provisions of the compliance order or notice of violation have been complied with, or until such *owner* shall first furnish the grantee, transferee, mortgagee or lessee a true copy of any compliance order or notice of violation issued by the code official and shall furnish to the code official a signed and notarized statement from the grantee, transferee, mortgagee or lessee, acknowledging the receipt of such compliance order or notice of violation and fully accepting the responsibility without condition for making the corrections or repairs required by such compliance order or notice of violation.

Id. PM-107.5.

On December 21, LFUCG sent a reinspection notice to Ellis. The notice stated that the time for an appeal had expired and that it appeared that no improvements had been made to the structure. The notice requested that Ellis "[p]lease contact [LFUCG officials] within 3 days and make an appointment to meet and determine a time period for satisfactory completion of repairs. Such time can be granted in the form of an extension to the original Notice & Order." The notice stated how LFUCG could be contacted.

On January 24, 1996, LFUCG served Ellis with a notice and order for demolition, for which he signed. LFUCG based the notice and order on a January 22 inspection in which it stated:

> X THE STRUCTURE HAS BEEN FOUND TO BE SO OLD, DILAPIDATED OR SO OUT OF REPAIR THAT IT IS DANGEROUS, UNSAFE, UNSANITARY OR UNFIT FOR HUMAN OCCUPANCY OR USE AND AS SUCH REPAIRS ARE UNREASONABLE.
>
> X THE COST OF REPAIRS EXCEEDS ONE HUNDRED (100%) PERCENT OF THE CURRENT VALUE OF THE STRUCTURE. SUCH REPAIRS HAVE BEEN FOUND TO BE UNREASONABLE.

LFUCG ordered him to demolish the structure within thirty days. LFUCG also indicated that he could file an appeal within twenty days. The notice included a violation report that listed the deficiencies in the structure. Ellis did not act on the notice by demolishing the property or contacting LFUCG.

On April 19, 1996, LFUCG filed a lis pendens against the property. In October, Clem Wrecking demolished the structure. LFUCG subsequently notified Ellis of the cost of the demolition and

directed him to pay the costs within fourteen days of the notice. He failed to do so. Pursuant to PM-110.3, LFUCG filed a lien against the property on May 7, 1997.

Ellis argues that the notices were deficient when compared to the technical requirements articulated in the BOCA Code. In addressing Ellis's argument, we must focus on the important issue of whether Ellis ever had notice that the structure had to be repaired or demolished. The clear answer is "yes." LFUCG sent Ellis three notices to repair the structure on his property. In addition, the demolition notice was hand delivered, and Ellis signed for the notice. All of the notices indicated how to contact code officials, and the demolition notice indicated how he could appeal that order. In his deposition, Ellis admitted under oath that he had received three notices and the demolition notice. Ellis took no action until LFUCG filed suit to enforce the lien.

Ellis's reliance on Washington and Johnson to support his argument that the notices were insufficient is misplaced. In Washington, we held unconstitutional an ordinance that required the owner of a structure to demolish it when the cost of repairs exceeded 100% of the structure's current value.[11] In reaching this conclusion, we relied on Johnson, which had struck down on the same grounds a Paducah ordinance that required a structure whose cost of repairs exceeded 50% of its value to be demolished. [12] In both

[11] Washington, supra, n. 6, at 126.

[12] Johnson, supra, n. 5, at 516.

cases, we held that the ordinances violated Section 2 of the Kentucky Constitution.[13]

This case has important distinctions from Washington and Johnson. First, LFUCG gave Ellis the opportunity to repair the structure on his property and he chose not to fix it; and second, Ellis never appealed from LFUCG's order to demolish the property. Washington and Johnson do not stand for the proposition that a local government can never require the demolition of a structure; rather, the local government must give the owner the option to either repair the structure or demolish it within a reasonable period of time.[14]

Here, LFUCG gave Ellis, the owner of the property, an opportunity to repair the structure. Ellis never appealed from LFUCG's demolition order. When Ellis did not demolish the structure, LFUCG hired a contractor to demolish it and billed Ellis for the demolition costs. We find no error in those actions. Ellis never contested LFUCG's action to demolish the structure until LFUCG attempted to collect on the lien on the property. In light of our conclusions regarding LFUCG's cause of action, it is

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[13] Washington, supra, n. 6, at 126; Johnson, supra, n. 5, at 516.

[14] Washington, supra, n. 6, at 126 (The owner "should have been given the option to repair within a reasonable time, or demolish the structure." . . . [T]he method of compliance is also the property owner's decision. It's his/her money and far be it from the City to say how a reasonable person should spend his/her money."); Johnson, supra, n. 5, at 516 ("In the circumstances presented, the owner should be afforded a reasonable time to repair his property so as to comply with the building code requirements if he so desires, unless there is present an imminent and immediate threat to the safety of persons or property.").

unnecessary to address Ellis's counterclaims for unconstitutional taking of property and negligence.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Another of Ellis's counterclaims is for intentional infliction of emotional distress. He believes that the trial court should not have granted summary judgment on this counterclaim.

The Kentucky Supreme Court adopted the tort of intentional infliction of emotional distress in Craft v. Rice.[15] After Craft, "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[16] The basic premise of this tort "is a right to be free of emotional distress arising from conduct of another."[17]

In this case, Ellis has failed to come forward with evidence to support this claim. He bases this claim solely on his belief that LFUCG was retaliating for a claim that he filed with the EEOC and the Human Rights Commission. His argument is based on the timing of LFUCG's action to enforce the lien. As the circuit court noted, Ellis had ample opportunity to conduct discovery to support his counterclaims. As this Court said in Smith v. Food Concepts, Inc.,[18] "[m]ere allegations in a counterclaim or

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[15] Ky., 671 S.W.2d 247 (1984).

[16] Id. at 251 (quoting Restatement (Second) of Torts § 46(1) (1965)).

[17] Id.

[18] Ky. App., 758 S.W.2d 437 (1988).

answer are insufficient to resist [the opposing party]'s summary judgment motion."[19] In light of the lack of any genuine issues of material fact, we conclude that the circuit court did not err in granting summary judgment on the intentional infliction of emotional distress claim.

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Ellis claims that he was not required to exhaust administrative remedies because no appropriate administrative remedy exists. In the alternative, he argues, LFUCG is estopped from raising this argument because it represented to Ellis that he had missed his opportunity to appeal.

Section 2 of the Kentucky Constitution provides that "[a]bsolute and arbitrary power over the lives, liberty and power of freemen exists nowhere in a republic, not even in the largest majority." In American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm.,[20] Kentucky's highest court noted that the Kentucky Constitution prohibits the legislature from interfering with a party's recourse to the courts from an adverse administrative decision.[21]

However, in order to obtain relief, a party must exhaust all administrative remedies. As the same court observed in Goodwin v. City of Louisville:[22]

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[19] Id. at 439.

[20] Ky., 379 S.W.2d 450 (1964).

[21] Id. at 456, 457.

[22] 309 Ky. 11, 215 S.W.2d 557 (1948).

> Orderly procedure in cases of public administrative law favors a preliminary sifting process, particularly with respect to matters within the competence of the administrative authority set up by a statute, as where the question demands the exercise of sound administrative discretion. And where an administrative remedy is provided by the statute, relief must be sought from the administrative body and this remedy exhausted before the courts will take hold. The procedure usually is quite simple. Ordinarily the exhaustion of that remedy is a jurisdictional prerequisite to resort to the courts.[23]

Despite this general rule, courts have created exceptions including: (1) "when there are no disputed factual questions to be resolved and the issue is confined to the validity or applicability of a statute or ordinance";[24] (2) "the administrative proceeding probably would be an exercise in futility";[25] or (3) attacking the jurisdiction of the agency when "it is necessary for the judiciary to restrain the agency in order to prevent irreparable injury."[26]

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[23] Id. at __, 215 S.W.2d at 559 (internal citation omitted) (citing Martin v. Board of Council of City of Danville, 275 Ky. 142, 120 S.W.2d 761, 762 (1938)).

[24] Harrison's Sanitarium, Inc. v. Commonwealth, Dep't of Health, Ky., 417 S.W.2d 137, 138 (1967). See also Goodwin, supra, n. 22, 309 Ky. at __, 215 S.W.2d at 559 ("[D]irect judicial relief is held available without exhaustion of administrative remedies where the statute is charged to void on its face . . . .").

[25] Harrison's Sanitarium, supra, n. 24, at 139 (citations omitted).

[26] Goodwin, supra, n. 22, 309 Ky. at __, 215 S.W.2d at 559 (citing 28 Am. Jur. Injunctions § 186).

Ellis argues that at least one of the exceptions apply in these circumstances. He claims that there is no appropriate administrative remedy. However, PM-111.1 specifically permits the appeal of an adverse decision to the Board of Appeals, and accordingly, Ellis's reliance on Pinsly v. Thompson[27] is missplaced because the body of law involved — the BOCA Code — provides for an appeal.

Even so, Ellis claims that it would have been futile to appeal. To support this argument, he criticizes LFUCG's handling of the demolition of the structure on his property. However, Ellis fails to show how the Board of Appeals would have not been responsive to his arguments and thus made an appeal futile.

Finally, he claims that LFUCG was acting outside of its authority under the BOCA Code. However, LFUCG does have the power to order the repair of a structure by its owner, and if the owner refuses, LFUCG can order the structure demolished. Ellis fails to show how LFUCG acted outside of its authority.

In response to LFUCG's claim that he could not obtain judicial relief due to his failure to exhaust administrative remedies, Ellis argues that LFUCG is estopped from making that claim because LFUCF notified him that he could not appeal the decision to condemn his property. However, this argument is flawed in that estoppel generally does not apply to governmental units.

[27] Ky., 397 S.W.2d 61 (1965).

As this Court noted in Natural Resources & Environmental Protection Cabinet v. Kentucky Harlan Coal Co.,[28] "the doctrine of equitable estoppel may be invoked against a governmental agency only under exceptional circumstances."[29] "Circumstances that are so exceptional as to allow equitable estoppel against a governmental agency . . . must include some gross inequity between the parties."[30]

In this case, we are asked to apply estoppel to a demolition case. However, Kentucky law is clear: equitable estoppel generally does not apply to governmental bodies. Thus, we conclude that estoppel does not preclude LFUCG from raising the issue. Although one of the notices erroneously informed Ellis that he could no longer appeal, other notices stated the he could appeal. Accordingly, we conclude that Ellis had a responsibility to appeal the administrative action.

III. AMOUNT OF JUDGMENT FOR LFUCG

Finally, Ellis argues that the trial court erred in awarding LFUCG the entire amount of its requested damages. He insists that he was entitled to provide proof that LFUCG had failed to mitigate its damages. We disagree.

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[28] Ky. App., 870 S.W.2d 421 (1993).

[29] Id. at 427 (citing Urban Renewal & Community Dev. Agency v. International Harvester Co., Ky., 455 S.W.2d 69 (1970); Cross v. Commonwealth ex rel. Cowan, Ky. App., 795 S.W.2d 65 (1990); City of Shelbyville ex rel. Shelbyville Mun. Water & Sewer Comm'n v. Commonwealth, Natural Resources & Envtl. Protection Cabinet, Ky. App., 706 S.W.2d 426 (1986)).

[30] City of Shelbyville, supra, n. 29, at 430.

Ellis appears to base this argument on the amount of the bid made by the contractor that demolished the structure on his property. He has failed to offer proof that LFUCG did not follow proper bidding procedures. Rather, he contests the use of the second-lowest bidder in demolishing the structure on his property.

As we said earlier, "[m]ere allegations in a counterclaim or answer are insufficient to resist [the opposing party's] summary judgment motion."[31] Without any proof to substantiate his claims, we must find for LFUCG. Thus, we conclude that the trial court did not err in awarding judgment to LFUCG in the full amount it requested.

IV. CONCLUSION

The judgment is affirmed.

ALL CONCUR.

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[31] Smith, supra, n. 18, at 439.