RENDERED: October 11, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001168-MR

CITY OF PIONEER VILLAGE — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 98-CI-00504

KENTUCKY CGSA, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a summary judgment determining that the City of Pioneer Village's license tax for cellular telephone towers in excess of 30 feet was unconstitutional and in violation of KRS 92.281(3). The City of Pioneer Village argues that genuine issues of material fact existed as to whether appellee had standing to challenge the license fee and whether members within the same class are treated differently. Upon review of the record, we agree with the trial court that there are no genuine issues of material fact. Thus, we affirm.

On October 20, 1997, appellant, the City of Pioneer Village, enacted Ordinance No. 97-004 imposing a license tax on various types of businesses within the city limits. The license tax for "Commercial Transmission within The City of Voice, Picture, or data by Non-Land line means using structure 30 feet or more in height" was $4,100. The license tax for all other types of businesses was between $10 and $400. In fact, Ordinance No. 97-004 simply amended the existing license tax to specifically include cellular telephone service providers with towers 30 feet or higher.

On July 9, 1998, "Kentucky CGSA, Inc. D/B/A BellSouth Mobility" filed an action challenging the constitutionality of the ordinance in question on various grounds. The beginning of the complaint stated, "The Plaintiff, Kentucky CGSA, Inc. d/b/a BellSouth Mobility (hereinafter 'BellSouth'), is a commercial mobile radio service provider organized under the laws of the State of Georgia, and authorized to conduct business in the Commonwealth of Kentucky." The remainder of the complaint referred to the plaintiff as "BellSouth". The complaint went on to allege, among other things, that BellSouth: had erected a cellular tower in excess of 30 feet within the city; had paid the 1998 license fee to the city; and, as a public utility, is also subject to state ad valorem taxation under KRS 136.120, which includes a tax on its operating tangible property and its franchise. On July 23, 1998, Kentucky CGSA, Inc. d/b/a BellSouth Mobility amended its complaint to reflect that Kentucky CGSA,

Inc. d/b/a BellSouth Mobility had not, in fact, paid the 1998 license fee to the City of Pioneer Village until July 22, 1998.

Thereafter, on August 12, 1998, the City of Pioneer Village, ("the City") filed a motion to dismiss "for failure to join proper parties, for failure to comply with Chapter 418, or in the alternative to require the plaintiff to plead with more certainty as to its identity and by whom regulated." The City then filed in the record a certification from the Kentucky Secretary of State establishing that Kentucky CGSA, Inc. was a corporation authorized to do business in Kentucky and that no Certificate of Assumed Name for the corporation had been filed. The court denied the City's motion to dismiss on February 16, 1999. On that same date, Kentucky CGSA, Inc. filed its second amended complaint excluding the "d/b/a BellSouth Mobility" from the caption and alleged as follows:

> Louisville CGSA, Inc. (a Georgia corporation) is the predecessor of Kentucky CGSA. On April 2, 1984, BellSouth Mobility, Inc. (a Georgia corporation) entered into an agreement with Louisville CGSA, Inc. under which BellSouth Mobility provided Louisville CGSA, Inc. "All services necessary to commence and provide for the operation, management, and administration of said affiliate's business in providing cellular radio service."

The amended complaint further alleged that "Kentucky CGSA, Inc., through its agent BellSouth Mobility": provides interstate and intrastate telecommunications services; pays an ad valorem tax and state tax on its franchise pursuant to KRS 136.120; erected the cellular tower in question; and paid the City's 1998 license tax under protest. In the remainder of the amended complaint,

Kentucky CGSA referred to itself as "the Plaintiff" or "Kentucky CGSA, Inc."

Subsequently, on October 12, 1999, Kentucky CGSA, Inc. filed a motion for summary judgment with a supporting affidavit of its Assistant Vice President of Taxes, Pamela Cook. The court ultimately granted the summary judgment on March 7, 2000. The City then filed a motion to vacate and reconsider, alleging that Kentucky CGSA: does not own the cellular tower in question; did not pay the 1998 license tax; is not a telephone company; and does not pay tax on its operating property. Kentucky CGSA responded by filing another affidavit of Pamela Cook which reiterated much of what was in her prior affidavit. Cook stated that Kentucky CGSA is a cellular telephone service provider in Kentucky which owns the cellular tower in question. The affidavit also confirmed:

> 5. That, as agent for Kentucky CGSA, BellSouth Mobility, Inc. (an affiliated company) markets cellular telephone service in Kentucky on behalf of Kentucky CGSA;
>
> 6. That Kentucky CGSA has paid the 1998 license tax in dispute through its affiliated company, BellSouth Corporation, . . .
>
> 7. That, since it began doing business in Kentucky, Kentucky CGSA has paid the property tax imposed on public service companies, including cellular telephone companies, under KRS 136.120.

From the order denying the City's motion to vacate or reconsider, the City now appeals.

Summary judgment is proper only where the trial court, drawing all inferences in favor of the nonmoving party, can conclude that there are no genuine issues as to any material fact

and that the moving party is entitled to judgment as a matter of law. CR 56.03; Fischer v. Jeffries, Ky. App., 697 S.W.2d 159 (1985). Summary judgment should be used to terminate litigation when, as a matter of law, it appears it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In determining whether a material fact exists, the trial court is to look at the "pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with any affidavits". CR 56.03. On a motion for summary judgment, the moving party has the initial burden of showing that no genuine issue of material fact exists, and then the other party must refute the contentions of the moving party. Roberts v. Davis, Ky., 422 S.W.2d 890 (1967).

The City argues that there were several genuine issues of material fact as to whether Kentucky CGSA had standing to challenge the constitutionality of the license tax. First, the City claims there were questions of fact as to whether Kentucky CGSA actually owned the cellular tower at issue in the City of Pioneer Village. The City notes that it has affirmatively denied that Kentucky CGSA owns the tower. While neither side has presented a copy of a lease, deed or any other formal document confirming ownership of the tower, Kentucky CGSA alleges ownership of the tower in the second affidavit of Pamela Cook, in its response to the motion to dismiss, and in its answers to the City's interrogatories. In its answers to the City's

interrogatories, Kentucky CGSA states the cost of constructing the tower, the cost to lease the property on which the tower is located, and the cost of improvements made to said property. Through this evidence, we believe that Kentucky CGSA has sufficiently met its burden of proof in showing ownership of the tower for summary judgment purposes, and the City has not rebutted this evidence with any evidence that Kentucky CGSA does not own the tower.

The City next contends that there were questions of fact as to whether Kentucky CGSA paid the license tax at issue. Although the evidence from the City established that Kentucky CGSA had not actually paid the 1998 license tax at the time the complaint was filed, there was evidence that Kentucky CGSA paid the tax on July 22, 1998, and the trial court allowed Kentucky CGSA to amend its complaint to reflect this fact. The affidavits of Pamela Cook stated that Kentucky CGSA paid the tax under protest through its agent, BellSouth, with which it has an agreement whereby BellSouth markets cellular telephone service on its behalf. A copy of the $4,100 check dated July 22, 1998 from BellSouth to the City, together with a copy of the letter stating that said payment was for the 1998 license tax and was being made on behalf of Kentucky CGSA, was also filed in the record. Finally, Kentucky CGSA's response to the motion to dismiss and its answers to the City's interrogatories stated that Kentucky CGSA had paid the 1998 license tax. The City presented no rebutting evidence that Kentucky CGSA was not the real party in interest, i.e. that the agreement between BellSouth and Kentucky

CGSA did not exist or that BellSouth was not really paying the 1998 license tax on behalf of Kentucky CGSA. The City points only to the fact that in the letter accompanying payment of the license tax, BellSouth requests a refund of the tax. However, as noted earlier, the letter clearly states that BellSouth was making said payment on behalf of Kentucky CGSA and, thus, one would conclude that BellSouth was likewise seeking the refund on behalf of Kentucky CGSA. We are not aware of any law which would prevent Kentucky CGSA from having standing to challenge a tax because it had an agent pay said tax on its behalf. Accordingly, we do not see that there were any questions of fact as to whether Kentucky CGSA paid the license tax at issue.

The City also contends there are questions of fact as to whether Kentucky CGSA is a telephone company. Kentucky CGSA has maintained in all of its pleadings that it is a provider of cellular telephone service. As stated earlier, in its second amended complaint, Kentucky CGSA stated that pursuant to an agreement with BellSouth, it provides cellular telephone service through BellSouth, to which Pamela Cook also attested in both of her affidavits. Once again, the City fails to present any rebutting evidence that such an agreement does not exist or that BellSouth is really the party providing cellular telephone service.

The City's final argument regarding standing is that there are questions of fact as to whether Kentucky CGSA also pays tax on its operating property. This issue is relevant because it is well settled that under Section 181 of the Kentucky

Constitution and KRS 92.281(3), if a company pays taxes on its operating property, it is not also subject to local license tax, City of Pikeville v. United Parcel Service, Inc., Ky., 417 S.W.2d 140 (1967); City of Covington v. Cincinnati, Newport, & Covington Transp. Co., Ky., 515 S.W.2d 617 (1974), which was one of the bases of the trial court's decision in the instant case. Kentucky CGSA has maintained throughout the pendency of the action that it has paid tax on its operating property, which includes franchise and ad valorem taxes, pursuant to KRS 136.120. In its answers to interrogatories, Kentucky CGSA lists as one of the taxes it pays "[p]ublic service company property tax: KRS 136.120". In the affidavits of Pamela Cook, she states that Kentucky CGSA has always paid the property tax as a public service company under KRS 136.120. Yet again, the City has not presented any proof to rebut this evidence.

The City's only argument as to the merits of the constitutional challenge is that, contrary to the trial court's finding, there was no evidence that members of the same class as Kentucky CGSA were treated differently under the City's ordinance. We need not address this issue, which pertains to the trial court's conclusion that the ordinance violated Section 171 of Kentucky Constitution. In a case with identical facts, this Court has held that a city's license tax on cellular telephone service providers using towers 30 feet or more is in violation of Section 181 of the Kentucky Constitution and KRS 92.281(3). City of Lebanon Junction v. Cellco Partnership d/b/a Verizon Wireless, Ky. App., 80 S.W.3d 761 (2001). Hence, solely on those grounds,

the trial court in the present case likewise properly found the ordinance to be unconstitutional.

For the reasons stated above, the judgment of the Bullitt Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Norman R. Lemme
Shepherdsville, Kentucky

BRIEF FOR APPELLEE:

Bruce F. Clark
Jennifer S. Smart
Frankfort, Kentucky