

RENDERED: MAY 16, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001852-MR

CRESTBROOK PROPERTIES, LLC

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 00-CI-02149

NORTHERN KENTUCKY WATER
SERVICE DISTRICT

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Crestbrook Properties, LLC ("Crestbrook"), seeks review of an order of the Kenton Circuit Court granting summary judgment in favor of the Appellee, Northern Kentucky Water Service District ("Water District"), and dismissing Crestbrook's counterclaim. For the reasons set forth below, we vacate the order of the circuit court, and remand.

On October 17, 2000, the Water District, a public water system organized pursuant to KRS Chapter 74, filed a complaint against Crestbrook, a water service customer, in the Kenton Circuit Court, seeking to enjoin it from violating its cross-connection control policy and directing Crestbrook to install a cross-connection control device in compliance therewith.

A copy of the policy, attached to the complaint, reflects that cross-connections are prohibited by 401 KAR 8:020 §2(2) which provides:

All cross-connections are prohibited. The use of automatic devices, such as reduced pressure zone back flow preventers and vacuum breakers, may be approved by the cabinet in lieu of proper air gap separation. A combination of air gap separation and automatic devices shall be required if determined by the cabinet to be necessary due to the degree of hazard to public health. Every public water system shall determine if or where cross-connections exist and shall immediately eliminate them.

The policy further reflects that cross connections are defined at 401 KAR 8:010, § 1(28)¹ as:

[A] physical connection or arrangement between two (2) otherwise separate systems, one (1) of which contains potable water and the other being either water of unknown or questionable safety, or steam, gas, or chemicals, whereby there may be flow from one (1) system to the other, the direction of flow depending on the pressure differential between the two (2) systems.

¹ Now 401 KAR 8:010 §1(32).

On November 6, 2000, Crestbrook filed an answer and counterclaim. Crestbrook explained that it is a Kentucky limited liability company which owns the multi-family dwelling described in the complaint. In its counterclaim, Crestbrook alleged that the Water District's cross-connection control policy, and the enforcement action based upon its policy, constitute arbitrary administrative action. Crestbrook maintained that because similarly-situated (namely, single-family) residential customers were not required to install the devices, the policy violated the equal protection and due process clauses of the 14th amendment of the United States Constitution and §§ 2 and 3 of the Kentucky Constitution. Crestbrook also asserted a statutory cause of action under KRS 446.070 for a violation of KRS 278.170.

KRS 278.170(1) provides:

No utility shall, as to any rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially same conditions.

Crestbrook sought to enjoin the Water District from enforcing the policy and sought a declaration that the policy and actions of the Water District were in violation of the United States and Kentucky Constitutions.

On April 25, 2001, the Water District filed a motion for summary judgment. On June 20, 2001, Crestbrook filed a memorandum in opposition to the motion for summary judgment, contending, *inter alia*, that the circuit court should delay ruling on the motion. Crestbrook explained that on July 29, 2001, it had "sent a Formal Complaint to be filed with the Kentucky Public Service Commission." Crestbrook asserted that the "PSC has 'exclusive jurisdiction over the regulation of rates and services of utilities,' such as the Water District." Crestbrook maintained that the PSC had jurisdiction "to conduct fact-finding as to whether the Water District's policy is unreasonable or discriminatory. . . .However, [the circuit court and] not the PSC retains exclusive jurisdiction over Crestbrook's injunctive and declaratory relief claims that the Water District is violating the U.S. and Kentucky Constitutions." Crestbrook requested that the circuit court delay ruling on the motion for summary judgment until the PSC had completed its fact finding, under the doctrine of primary jurisdiction.

On July 20, 2001, the Water District filed a reply, contending that the doctrine of primary jurisdiction was inapplicable, because Crestbrook's claims were solely constitutional and delay was not required.

On July 25, 2001, the circuit court entered an order granting summary judgment in favor of the Water District:

Plaintiff is entitled to judgment as a matter of law. Defendant is hereby ordered to install a cross connection prevention control device in compliance with Plaintiff's Cross Connection Control Policy. Plaintiff's Motion for Summary Judgment is sustained, at the Defendant's costs.

It is further Ordered that the defendant's Counterclaim is hereby dismissed.

On August 24, 2001, Crestbrook filed a notice of appeal to this Court.² On appeal, Crestbrook asserts that the circuit court erred in granting summary judgment, because: (a) the policy's classification of similarly-situated customers bears no rational relationship to preventing cross-connection contamination of the public water system, (b) real issues of material fact existed on Crestbrook's counterclaims; and (c) Crestbrook should have first had an opportunity to complete discovery. Crestbrook also asserts that it had contested the validity of the Water District's policy, contrary to the circuit court's finding.

² By order of this Court entered January 30, 2002, the appeal was held in abeyance pending an attempt to settle the case. By order of April 4, 2002, the appeal was returned to the active docket, settlement negotiations having been unsuccessful.

Although not brought to our attention by the parties, on March 24, 2003, the Kentucky PSC issued the following order concerning Crestbrook's pending formal complaint³:

On June 22, 2001 Crestbrook Properties, LLC ("Crestbrook") filed a formal complaint against Northern Kentucky Water District ("Northern Kentucky") alleging that Northern Kentucky's cross-connection policy violates KRS 278.170 by establishing an unreasonable difference or classification among residential customers.

Prior to the filing of Crestbrook's complaint with the commission, Northern Kentucky had filed a complaint against Crestbrook in Kenton Circuit Court, n1 [Case No. 00-CI-02149.] seeking a court order requiring Crestbrook to follow Northern Kentucky's cross-connection policy. On July 25, 2001, the Kenton County Circuit Court, finding in favor of Northern Kentucky, granted Summary Judgment and ordered Crestbrook to install a back-flow prevention device. This case is currently before the Kentucky Court of Appeals.

The Commission has original jurisdiction over Crestbrook's complaint. KRS 278.040, KRS 278.260. Specifically, the Commission has jurisdiction to determine whether Northern Kentucky's cross-connection policy, or the application thereof, is unreasonably discriminatory pursuant to KRS 278.170. The end result of an order deciding the issue would be whether Crestbrook must install a backflow-prevention device. However, the Kenton Circuit Court already has ordered Crestbrook to install a backflow-prevention device. In light of this order, we reluctantly conclude that it would be inappropriate to enter a final ruling in this case prior to the determination by the Kentucky Court of Appeals, which currently has the case

³ In the Matter of CRESTBROOK PROPERTIES, LLC, COMPLAINANT v. NORTHERN KENTUCKY WATER DISTRICT, DEFENDANT, CASE NO. 2001-00202, Kentucky Public Service Commission, 2003 Ky. PUC LEXIS 205, March 24, 2003.

before it. Crestbrook Properties, LLC v. Northern Kentucky Water District, 2001-CA-001852.

IT IS THEREFORE ORDERED that this case be held in abeyance pending the ruling of the Kentucky Court of Appeals.
(Emphasis original).

The circuit court never addressed the PSC's jurisdiction or the formal complaint pending before it, but simply ordered Crestbrook to install a cross-connection control device in compliance with the Water District's policy and dismissed Crestbrook's counterclaim. The circuit court's ruling presupposes the validity of the policy under KRS 278.170; however, that is a matter within the exclusive jurisdiction of the PSC.⁴

KRS 278.040 is entitled, "Public service commission -- Jurisdiction - Regulations" and provides at subsection (2):

The jurisdiction of the commission shall extend to all utilities in this state. **The commission shall have exclusive jurisdiction over the regulation of rates and service of utilities**, but with that exception nothing in this chapter is intended to limit or restrict the police jurisdiction, contract rights or powers of cities or political subdivisions.
(Emphasis added)

KRS 278.010 (13) defines service:

"Service" includes any practice or requirement in any way relating to the service of any utility, including the voltage of electricity, the heat

⁴ See *Carr v. Cincinnati Bell*, Ky. App., 651 S.W.2d 126 (1983).

units and pressure of gas, **the purity, pressure, and quantity of water**, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility;
(Emphasis added)

Thus, the relief sought in the case *sub judice* is divided between the jurisdiction of the PSC and the circuit court,⁵ because the PSC cannot determine the constitutionality of the Water District's policy. The doctrine of primary jurisdiction does not apply, because the circuit court does not have subject matter jurisdiction of the matter pending before the PSC. "The doctrine of 'primary jurisdiction' clearly recognizes that the court has subject-matter jurisdiction but as a matter of judicial policy should not exercise it in instances where proper judicial administration requires that action be deferred by the court until the agency has acted"⁶

Nevertheless, the proceedings before the circuit court and the PSC are closely intertwined. It is manifestly unjust to order Crestbrook to comply with the Water District's policy, before the PSC, with its specialized knowledge, determines whether that policy, or the application thereof, is unreasonably discriminatory under KRS 278.170. We believe that the circuit court's failure to delay ruling on the summary judgment motion,

⁵ *Id.*

⁶ *Preston v. Meigs*, Ky. 464 S.W.2d 271, 274-75 (1971).

pending resolution of Crestbrook's formal complaint before the PSC, constitutes substantial error. CR 61.02.

Accordingly, we vacate the order of the Kenton Circuit Court granting the Water District's motion for summary judgment, entered July 25, 2001, and remand this case to the circuit court with direction that it be held in abeyance, pending a final ruling of the Kentucky PSC.

ALL CONCUR.

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