

RENDERED: OCTOBER 17, 2003; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001227-MR
AND
NO. 2001-CA-000416-MR

ABDALLAH BADOUAN

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
2002-SC-000613-DG

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 98-CI-04058

LEXINGTON-FAYETTE URBAN
COUNTY HOUSING AUTHORITY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, KNOPF AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Abdallah Badouan appealed from orders of the Fayette Circuit Court denying his two CR¹ 60.02 motions. In an opinion rendered on July 12, 2002, this court affirmed the circuit court's orders. On March 12, 2003, the Kentucky Supreme Court granted discretionary review, vacated our decision, and remanded the case for our further consideration in light of Kurtsinger v. Board of Trustees of Kentucky Retirement Systems,

¹Kentucky Rules of Civil Procedure.

Ky., 90 S.W.3d 454 (2002). Having given further consideration in light of that case, we again affirm.

In 1997 the Lexington-Fayette Urban County Housing Authority determined that the acquisition of property on the north side of Lexington, Kentucky, near Charlotte Court and Georgetown Street was necessary for housing projects in the area. The property being considered for condemnation proceedings included Westside Plaza, business premises owned by Badouan. The area had fallen into general disrepair and had become a haven for criminal activity.

The Housing Authority sought to acquire the property for additional low-income housing. After unsuccessful efforts to negotiate a purchase of Badouan's property, the Housing Authority requested authority to condemn it. Lexington-Fayette Urban County Government (LFUCG) granted such authority. On November 13, 1998, the Housing Authority filed a petition for condemnation in the Fayette Circuit Court. See KRS² 416.570.

On March 31, 1999, the circuit court conducted a hearing concerning the Housing Authority's right to condemn Badouan's property. The hearing led to the entry of an Interlocutory Order and Judgment on April 8, 1999. See KRS 416.610. The Interlocutory Order and Judgment determined that the Housing Authority had the right to condemn the property, set the value of the property for compensation purposes at \$277,100

² Kentucky Revised Statutes.

in accordance with the report of the commissioners, and stated that the Housing Authority's purpose in taking the property was to provide low-cost housing. The order also stated that exceptions to the value to be paid as compensation must be filed within 30 days of the order. See KRS 416.620.

On April 16, 1999, Badouan moved the court for additional findings and to alter, amend, or vacate the Interlocutory Order and Judgment. The motion was filed pursuant to CR 52.02 and CR 59.05. A hearing on the motion was held before the court on April 23, 1999. The court orally denied the motion following the hearing and directed the Housing Authority's attorney to draft an order to that effect. Badouan was represented at the hearing by his attorney, Jerry Anderson, who was present when the court denied the motion and directed the Housing Authority's attorney to draft the order.

When the order was submitted to the judge for signature, the clerk's certificate attached to the order did not list Anderson's name as a person to receive a copy of the order. Rather, the clerk's certificate stated that a copy of the order was sent to Nader Shunnarah, Badouan's original attorney, who was still Badouan's attorney of record.³ Furthermore, the order had not been sent by the Housing Authority's attorney to Anderson for his review as required by the local rules of the Fayette Circuit Court. The order was signed by the judge on April 29, 1999, and

³ The record did not reflect that Shunnarah had withdrawn as Badouan's attorney, although Shunnarah was not present at the April 23, 1999,

was entered by the clerk on April 30, 1999. The clerk's certificate of service was also dated April 30, 1999.

On September 29, 1999, the court entered an order allowing the Housing Authority to take possession of the property. On the following day, September 30, 1999, Badouan filed exceptions to the April 8, 1999, Interlocutory Order and Judgment. The exceptions were obviously not filed within 30 days of the entry of the Interlocutory Order as required by KRS⁴ 416.620(1). No further action was taken in the case until the Housing Authority filed a motion for a final judgment on February 8, 2000. The court granted the motion and entered a final judgment on February 18, 2000.

On February 28, 2000, Badouan filed a motion to alter, amend, or vacate the February 18, 2000, judgment. Further, on March 6, 2000, Badouan filed a motion pursuant to CR 60.02(d) alleging fraud affecting the proceedings and asking the court to vacate its April 30, 1999, order and its February 18, 2000, final judgment. In his CR 60.02 motion, Badouan argued that he was entitled to relief because Anderson's name was intentionally omitted on the clerk's certificate on the April 30, 1999, order and that the Housing Authority did not follow the local rules by tendering a copy of the order to Anderson for his review prior to its entry by the court.

hearing and apparently no longer represented Badouan at that time.

⁴ Kentucky Revised Statutes.

On March 27, 2000, the court entered an order denying Badouan's CR 59 and CR 60.02 motions. On April 5, 2000, Badouan filed a motion pursuant to CR 52.04 and CR 59, seeking to have the court make additional findings of fact and to amend its order denying his CR 60.02 motion. In an order entered on May 1, 2000, the circuit court denied Badouan's motions. Badouan then filed a notice of appeal on May 16, 2000.

Before Badouan's second CR 60.02 motion was filed, the Housing Authority filed a motion to dismiss Badouan's appeal from the order denying his first CR 60.02 motion for failure to timely file a notice of appeal. This court granted the motion by an order entered on October 11, 2000. However, after Badouan moved this court to reconsider, the appeal was reinstated for this panel to consider. We conclude that the notice of appeal from the denial of Badouan's first CR 60.02 motion was timely filed. The order denying the motion was entered on March 27, 2000. Badouan's CR 59 motion was filed on April 5, 2000, and was denied by the trial court on May 1, 2000. The notice of appeal was filed on May 16, 2000. Since the filing of the CR 59 motion tolled the time for filing a notice of appeal until May 1, 2000, the notice of appeal was timely filed. See CR 73.02(1)(e); University of Louisville v. Isert, Ky. App., 742 S.W.2d 571, 573-74 (1987).

Badouan's second CR 60.02 motion was filed on February 12, 2001. Therein, he argued that he was entitled to relief from the court's orders and judgment because the court lacked subject-matter jurisdiction of the case, false testimony regarding the

purpose of condemnation had been given, and additional evidence that he was entitled to a jury trial on the amount to be paid for the property had been discovered. On February 26, 2001, the court entered an order denying the second CR 60.02 motion. Badouan filed a notice of appeal to this court on February 27, 2001. The two appeals have now been consolidated.

Addressing Badouan's appeal of the circuit court's denial of his initial CR 60.02 motion first, we conclude that the circuit court did not err. Badouan's first CR 60.02 motion was filed under section (d) of the rule. That section allows relief for fraud affecting the proceedings, other than perjury or falsified evidence. CR 60.02(d). Badouan argues that he is entitled to relief due to fraud committed on him by the Housing Authority not including Anderson's name on the clerk's certificate of service and in not complying with the local rules by sending a copy of the order to Anderson for his review prior to entry by the court. Badouan did not claim in either his CR 60.02 motion or in his brief that he would have filed an appeal from the Interlocutory Order and Judgment; rather, he claims he would have timely filed exceptions relating to the compensation amount but for the Housing Authority's fraud.

By way of this CR 60.02 motion, Badouan sought the right to file exceptions to the Interlocutory Order and Judgment so that he could have a jury trial to determine compensation for the taking of his property. See KRS 416.620(1). What Badouan ignores, however, is the fact that his lack of knowledge of the

entry of the order overruling his CR 52 and CR 59 motion in no way affected the mandatory requirement of KRS 416.620(1) that exceptions from the interlocutory order be filed within 30 days of the date of the entry of that order. While the filing of the CR 52 and CR 59 motion by Badouan may have tolled the time for his filing a notice of appeal of the interlocutory order, it did not toll the time for filing exceptions to that order.⁵

Furthermore, the language of KRS 416.620 mandates that if no exceptions are filed within 30 days from the entry of the interlocutory order, ~~A~~the circuit court shall make such orders as may be proper for the conveyance of the title to the extent condemned, to the property, and shall enter such final judgment as may be appropriate.@[Emphasis added.] In short, upon entry of the Interlocutory Order and Judgment on April 8, 1999, Badouan had 30 days in which to file exceptions, regardless of whether he also chose to file a CR 52 and CR 59 motion. See Kentucky Utilities Co. v. Brashear, Ky. App., 726 S.W.2d 321, 323 (1987).

Having held that Badouan was required to file exceptions to the Interlocutory Order and Judgment within 30 days of April 8, 1999, regardless of whether he filed a CR 59 motion and regardless of whether he was given notice of the court's denial of that motion, we now turn to the recent Kurtsinger case upon which the Kentucky Supreme Court remanded this case for our

⁵ Badouan asserts that in Hagg v. Ky. Utilities Co., Ky. App., 660 S.W.2d 680 (1983), the court held that a timely CR 59 motion tolls the time to appeal an interlocutory judgment and for filing exceptions. The case clearly does not hold that the time for filing exceptions is tolled by a CR 59 motion.

consideration. In that case the Kentucky Supreme Court reversed an opinion of this court and affirmed the trial court's order granting a CR 60.02 motion which vacated an order denying CR 59 relief because the party seeking CR 59 relief was not served a copy of the order denying the motion due to an error in the judge's office. The court noted that "CR 60.02 addresses itself to the broad discretion of the trial court" and that the granting of the CR 60.02 motion did not constitute an abuse of discretion. Id. at 456-57. Further, the court distinguished Stewart v. Kentucky Lottery Corp., Ky. App., 986 S.W.2d 918 (1998).

We conclude that the circuit court did not abuse its discretion in denying CR 60.02 relief in the case *sub judice*. As we have noted, Badouan's first CR 60.02 motion sought relief in the form of having the April 30, 1999, order vacated and being allowed to file exceptions to the commissioners' award and to have a trial on the issue of compensation. As we explained earlier in this opinion, Badouan was required to file exceptions within 30 days of the entry of the Interlocutory Order and Judgment on April 8, 1999, and his failure to do so preclude his right to challenge the amount of the commissioners' award. Again, we are unpersuaded by his argument that the filing of a CR 59 motion tolled the time for filing exceptions.

Furthermore, we conclude that the trial court did not abuse its discretion in denying CR 60.02 relief because the facts of this case are different from the facts in Kurtsinger. In Kurtsinger the failure to receive a copy of the order denying CR

59 relief was caused by a mistake in the judge's office. In this case, however, the attorney who represented Badouan at the hearing on the CR 59 motion had not entered an appearance of record and Badouan's first attorney had not moved to withdraw as counsel of record. The circuit court found no evidence of fraud, and it is understandable that the clerk's certificate of service would direct that copies be sent to Badouan's attorney of record rather than his second attorney. In other words, just as the Kentucky Supreme Court found no abuse of discretion in the trial court's granting of CR 60.02 relief in Kurtsinger, we find no abuse of discretion in the trial court's denial of Cr 60.02 relief in this case.

By way of his second CR 60.02 motion, Badouan also sought a trial on the issue of compensation. The first argument raised in his motion, which he also raises in this appeal, was that the trial court's judgment should be set aside because the court lacked subject-matter jurisdiction to grant a judgment of condemnation to the Housing Authority. Badouan argues that the Housing Authority was not a party authorized by KRS 416.560 to initiate a condemnation action.

In Privett v. Clendenin, Ky., 52 S.W.3d 530 (2001), the Kentucky Supreme Court described the principles surrounding subject-matter jurisdiction and a party's claim that a court lacked it. The Privett court stated, "Subject-matter jurisdiction refers to a court's authority to determine this kind of case—as opposed to this case." Id. at 532. Furthermore, the

court held that A[d]efects in subject-matter jurisdiction may be raised by the parties or the court at any time and cannot be waived.@ Id. In fact, the court noted that Asubject-matter jurisdiction may be raised for the first time on appeal.@ Id. Also, we note that the circuit court is a court of general jurisdiction having original jurisdiction of all justiciable causes not exclusively vested in some other court. KRS 23A.010(1). Thus, the question is whether a court, other than the circuit court, was vested with subject-matter jurisdiction to determine Athis kind of case@ - a condemnation case.

The Eminent Domain Act of Kentucky requires that the condemnor file a petition in the circuit court of the county in which the property is located. KRS 416.570. Furthermore, condemning property for the purpose of constructing low-cost housing requires that proceedings for condemnation be instituted in the circuit court of the county in which the property lies. KRS 80.150. Badouan's property lies in Fayette County, Kentucky, and the Housing Authority filed the condemnation petition in the Fayette Circuit Court. Based upon the clear language of the statutes, the Fayette Circuit Court had subject-matter jurisdiction to hear Athis kind of case.@ Thus, the orders and judgment of the Fayette Circuit Court were not void for lack of subject-matter jurisdiction.

Although the Fayette Circuit Court had jurisdiction to hear Athis kind of case,@ Badouan's subject-matter jurisdiction argument hinges on the assertion that the Housing Authority

violated the Eminent Domain Act of Kentucky when it initiated the condemnation proceeding in its own name. Badouan asserts that KRS 416.560 requires the Housing Authority to have the proceeding initiated by the LFUCG in its behalf. The statute reads as follows:

Notwithstanding any other provision of the law, a department, instrumentality or agency of city, county, or urban-county government, other than a waterworks corporation the capital stock of which is wholly owned by a city of the first class, having a right of eminent domain under other statutes shall exercise such right only by requesting the governing body of the city, county, or urban-county to institute condemnation proceedings on its behalf. If the governing body of the city, county, or urban-county agrees, it shall institute such proceedings under KRS 416.570, and all costs involved in the condemnation shall be borne by the department, instrumentality, or agency requesting the condemnation.

KRS 416.560(1).

On the other hand, the Housing Authority argues that it properly initiated the condemnation proceeding without urban-county government assistance. It relies upon the following statute:

If it becomes necessary to condemn property for the purpose of constructing any low-cost housing, or securing rights of way leading thereto, the authority may, by resolution reciting the need, order the condemnation of any land or improvement or interest in land, that it deems necessary. Proceedings for the condemnation shall be in the circuit court of the county in which the property lies, and shall be conducted in the name of the authority. The city attorney shall conduct the proceedings, for the authority. The judgment of the court

shall vest title in fee simple to the property condemned in the authority. In all other respects the form and manner of the proceedings shall be the same as that provided in the Eminent Domain Act of Kentucky.

KRS 80.150. We agree with the Housing Authority that it properly initiated the condemnation proceeding under that statute rather than having the action initiated by the LFUCG under KRS 416.560(1).

It is presumed that the legislature is aware of all laws existing at the time it enacts a new law and that it would not enact a new law in conflict with existing laws. Brewer v. Commonwealth, Ky., 922 S.W.2d 380, 381 (1996). Furthermore, the Kentucky Supreme Court stated in Commonwealth v. Phon, Ky., 17 S.W.3d 106 (2000), as follows:

When there appears to be a conflict between two statutes, as here, a general rule of statutory construction mandates that the specific provision take precedence over the general. Moreover, it is the Court's duty to harmonize the law so as to give effect to both statutes. Finally, statutes should be construed in such a way that they do not become meaningless or ineffectual. [Footnotes omitted.]

Id. at 107-08.

Were we to determine that the Housing Authority had to proceed through the LFUCG under KRS 416.560(1), the portion of KRS 80.150 which allows the Housing Authority to proceed in its own name would be rendered ineffectual. In short, KRS 416.560(1) governs the initiation of a condemnation procedure as it relates

to entities in general, while KRS 80.150 sets out the procedure as it relates to housing authorities specifically. According to the clear language of KRS 80.150, the Eminent Domain Act of Kentucky is applicable except to the extent stated in KRS 80.150. The statutes are reconciled in this manner.

Also, Badouan cites Petrey v. Cain, Ky., 987 S.W.2d 786 (1999), to support his argument that the circuit court did not have subject-matter jurisdiction because the action was not instituted by the LFUCG in accordance with KRS 416.560. In Petrey, the Kentucky Supreme Court held that the circuit court did not have subject-matter jurisdiction over a motion to modify child custody because the movant did not file at least two supporting affidavits as required by statute. Id. at 788. However, the facts of the case *sub judice* as more closely related to those in Underwood v. Underwood, Ky. App., 999 S.W.2d 716 (1999). As in Underwood, the failure of the plaintiff to satisfy statutory requirements for bringing the suit did not affect the subject-matter jurisdiction of the court. Id. at 720. Furthermore, Kentucky Unemployment Ins. Comm'n v. Providian Agency Group, Inc., Ky. App., 981 S.W.2d 138 (1998), cited by Badouan in his reply brief, lends no support to his argument. In the case *sub judice*, the alleged failure to meet the statutory requirement did not affect the power of the court to exercise jurisdiction over the case.

In the second argument of his second CR 60.02 motion, Badouan claimed to have discovered Anew evidence showing that

the Housing Authority agreed to a jury trial on the value of the property. He claimed that the Housing Authority conducted settlement negotiations with him after the court entered its April 8 and April 30, 1999, orders and that the Housing Authority agreed to allow a jury trial even though exceptions were not timely filed. In addition, Badouan claimed that he paid \$2,000 for an appraisal which indicated that the value of his property was approximately \$500,000 to \$550,000 rather than the \$277,100 recommended by the commissioners.

In support of his argument that the Housing Authority agreed to a trial, Badouan pointed to a letter and a chart sent to the Department for Housing and Urban Development (HUD) by Austin Simms, the Housing Authority director.⁶ The first letter was written in July 1999, and it states in pertinent part as follows:

The LHA has received an Interlocutory Order and Judgment that approves condemnation of this site and permits the Authority to take possession of this property upon payment of the Commissioner's award of \$277,100. It is understood that future legal proceedings and negotiations may occur that will increase the purchase price.

Badouan claimed that the reference to *A*future legal proceedings and negotiations*@*that *A*will increase the purchase price*@* illustrated the existence of an agreement to conduct a jury trial on the issue of compensation.

⁶ The letter and chart arose from discovery conducted by different attorneys in a separate condemnation proceeding against other property. Badouan acquired copies of the letters and a deposition of Simms and attached them to his second CR 60.02 motion.

As additional support for his argument, Badouan pointed to a chart contained in a letter Simms sent to Cindi Demitros, a grant's manager for HUD. The chart listed Approximate costs of an Off-Site Acquisition Plan. For Westside Plaza, the chart indicated Approximate costs of \$500,000 - \$550,000. Badouan claimed this illustrated the existence of an agreement to conduct a valuation hearing and the existence of the Housing Authority's expectation that the purchase price would be \$500,000 - \$550,000.⁷

Given the high standard for granting a CR 60.02 motion, the trial court's ruling on the motion receives great deference on appeal and will not be overturned except for an abuse of discretion. Barnett v. Commonwealth, Ky., 979 S.W.2d 98, 102 (1998). While it is true that the Housing Authority may have conducted negotiations with Badouan after the expiration of the time for him to file exceptions, we see little evidence that there was an agreement by the Housing Authority that it would agree to a jury trial to determine the value of the property. In fact, Simms' letter of July 1999 to HUD stated that future legal proceedings and negotiations may occur. At any rate, it does not appear that such an agreement was proved with reasonable certainty. See Brown v. Brown, Ky., 796 S.W.2d 5, 8 (1990). In short, we conclude that the trial court did not abuse its

⁷ However, the Approximate costs may be the estimated total cost of acquiring the property including items of cost other than the value of the property. For example, costs incurred to relocate businesses operating in Westside Plaza as well as to eliminate environmental contamination might be included in the estimate.

discretion in refusing to grant Badouan's second CR 60.02 motion on the asserted ground of new evidence.

In the final argument of his second CR 60.02 motion, Badouan argued that the reason the Housing Authority stated for condemning the property was not its real reason for doing so. At the initial condemnation hearing on March 31, 1999, Simms testified that the condemnation of Westside Plaza was for the purpose of low-income housing. Badouan argued in his CR 60.02 motion that the real reason for condemnation was urban renewal, a purpose for which a housing authority does not have power to condemn property. According to Badouan, Simms' deposition taken on August 3, 2000, indicates that Simms admitted that the real reason for condemnation of Westside Plaza was urban renewal. Badouan argued that Simms' testimony at the initial condemnation hearing therefore constituted perjury or falsified evidence. See CR 60.02(c).

Badouan failed in his brief to this court to direct us to the portion of the Simms' deposition where Simms supposedly stated that the real reason for condemnation was urban renewal. We have reviewed that deposition and note that Simms directed attention to the July 1999 letter he wrote to HUD. Simms stated in the deposition that Acquisition of this site and the redevelopment as low-income elderly public housing duplexes is an integral part of the Charlotte Court Hope VI redevelopment project. Further, the specific question and answer segment of the deposition cited by Badouan as contradictory to Simms'

testimony before the circuit court did not relate to Westside Plaza but to other property (Lincoln Terrace). In short, we conclude that the trial court did not abuse its discretion in refusing to grant CR 60.02 relief on this ground.

The orders of the Fayette Circuit Court denying Badouan's two CR 60.02 motions are affirmed.

KNOPF, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SCHRODER, JUDGE, DISSENTING. I have two problems with this case. First, the ruling on the motion to reconsider the interlocutory order that determined the Housing Authority had the right to condemn was sent to the wrong attorney. Both sides agreed that Jerry Anderson represented the appellant, but the order was sent to Nader Shunnarah, the appellant's original attorney. Until Anderson has notice, I would toll the 30-day period for filing exceptions under KRS 416.620(1).

The second problem is with the Housing Authority's attorney filing the case. KRS 80.150 does authorize the Housing Authority to file suit in its name, but by the city attorney, not the Housing Authority's attorney. Unless the Housing Authority's attorney was appointed a special city attorney, he had no authority to file the case. I would reverse and remand the case and require the Housing Authority to start over.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

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BRIEF FOR APPELLEE:

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