

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001591-MR

BLUE SKY SEWER SERVICE  
COMPANY, INC.

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 01-CI-01262

COMMONWEALTH OF KENTUCKY,  
NATURAL RESOURCES AND  
ENVIRONMENTAL PROTECTION  
CABINET

APPELLEE

OPINION

AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.  
SCHRODER, JUDGE. The Blue Sky Sewer Service Company, Inc.,  
(Blue Sky) appeals a summary judgment granted to the Natural  
Resources and Environmental Protection Cabinet (NREPC) enforcing  
an "Agreed Order" and disposing of certain administrative  
violations issued against Blue Sky. We agree with the trial

court that relief, if any, should have been sought below and we therefore affirm.

Blue Sky is a privately owned wastewater treatment plant located in Fayette County operating under a Kentucky Pollution Discharge Elimination System (KPDES) permit issued by the NREPC. Blue Sky was designed to treat domestic sewage but now treats about 125 businesses. Over the years, the wastewater has become more akin to commercial or industrial sewage which is obviously more difficult to treat. This led to increasing discharge problems and numerous notices of violation from the NREPC. In an effort to resolve the notices of violation, Blue Sky entered into an "Agreed Order"<sup>1</sup> with the NREPC whereby Blue Sky would upgrade the plant to comply with its discharge allowances under the KPDES permit. This agreed order provided a time frame for specific upgrades and a civil penalty for delays in the construction as well as penalties for failure to bring the plant into full compliance with its permits. The construction permit provided that there could be no deviations from the plans and specifications submitted with the approved application. The extended date for completion of the construction was April 1, 2001, with a compliance date of June 1, 2001 (for the plant to be up and running within the KPDES permit allowances).

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<sup>1</sup> This was actually the second agreed order.

On June 1, 2001, an inspector from the NREPC visited the plant and discovered four problems, per the trial court's findings:

a bypass of the sewage system taking place because of a leaking intake pipe and that Blue Sky had not notified NREPC as required by 401 KAR 5:015; the Parshall flume had not been installed as required by the construction permit, instead the facility had installed a less expensive device; the clarifier was not installed as required by the permit; KPDES permit levels for the effluent from the plant were also being exceeded in violation of the Agreed Order.

The NREPC filed suit in circuit court to enforce the agreed order. Blue Sky did not disagree that it was not in compliance with the agreed order but sought to defend by justifying its noncompliance. The trial court would not hear excuses and granted summary judgment to the NREPC.

On appeal to this Court, Blue Sky contends the trial court erred in granting summary judgment to the NREPC because Blue Sky was entitled to a trial on why it failed to perform according to the agreed order. First, Blue Sky argues the notice of violation (NOV), which cited Blue Sky for the existence of a "bypass", should not be enforced because there was no "bypass" constructed at the facility, merely an accidental leak in the pipeline that occurred during construction, and that the water was collected in an excavated pit and actively pumped from there into the lagoon for further

treatment. The NREPC counters that on April 6, 2001, the inspector observed the leaking pipe which was still leaking on April 13, 2001, when the inspector returned to the site. In addition, the inspector observed the effluent discharged into a creek, that the discharge was "turbid and odorous", and water samples collected from the plant's discharge point as well as downstream, revealed fecal coliform bacteria colonies too numerous to count.<sup>2</sup> The NOV was issued to Blue Sky on April 30, 2001. The NOV cited Blue Sky for bypassing the requirements of 401 KAR 5:045 and not notifying the NREPC of the leak as required by 401 KAR 5:015. Instead of addressing the violations, Blue Sky contends that under 401 KAR 5:002(36), a bypass is defined as "the intentional diversion of sewage or wastestreams from a portion of the facility or industrial user's treatment facility [,]" and Blue Sky installed no such device. Rather, the waste leaked out. We agree with the trial court that Blue Sky is misstating the facts. Blue Sky is not charged with installing a "bypass" but charged with not reporting the spill and bypassing the treatment requirements. Blue Sky does not contest the fact that there was a leak in the pipe nor the readings by the inspector (although Blue Sky claims it recovered and treated the leak, its own records show the treatment was

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<sup>2</sup> The monthly average for fecal coliform bacteria for April 2001 was 10,810 colonies per 100 milliliters, whereas the 401 KAR 5:045, Section 4 allowance is up to 200 colonies per 100 milliliters during a thirty-day period.

inadequate), nor does Blue Sky deny it failed to report the leak or spill. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 482 (1991), recognized the "original purpose of summary judgment procedure is to expedite the disposition of cases and to avoid unnecessary trials where no genuine issues of material fact are raised." (citations omitted). The Steelvest Court did caution that summary judgment "should not be used as a substitute for trial." Id. at 483. In adopting the Paintsville Hospital Co. v. Rose<sup>3</sup> standard, the Steelvest Court recognized summary judgment should be used only "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Id. at 483, citing Paintsville Hospital. We believe the trial court was correct in finding no real issue regarding a bypass system. Blue Sky was cited for not reporting the spill (leak) and the use of the word bypass was referring to not treating the waste adequately rather than accusing Blue Sky of intentionally installing a "bypass" system.

Blue Sky also contends the NOV should not have been issued for not installing a "'new 20' diameter circular Clarifier with a design peak flow of 265,000 GPD", as required by the construction permit. Blue Sky readily admits the

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<sup>3</sup> Ky., 683 S.W.2d 255 (1985).

clarifier was not installed, and that the clarifier was a requirement of the final construction permit. However, Blue Sky wanted a trial to show the clarifier was unnecessary and extraordinarily expensive which made the requirement unreasonable. That argument should have been presented to the NREPC when Blue Sky was negotiating for the "Agreed Order". The trial court was merely enforcing the agreed order. 401 KAR 5:005, Section 7 requires Blue Sky to request and justify a deviation from the "Recommended Standards for Wastewater Facilities, 1990 Edition", which is what the NREPC used. No deviation was requested or authorized.

Further, 401 KAR 5:005, Section 24(4)(b) states: "The following conditions shall apply to all construction permits:

1. There shall be no deviations from the plans and specifications submitted with the application or the conditions specified in this subsection, unless authorized in writing by this cabinet." Again, we must agree with the trial court that there was no issue of fact before it and summary judgment on this issue was proper under Steelvest, 807 S.W.2d 476.

Blue Sky's third contention is that the NOV for failure to install the "Parshall Flume" should not be enforced. Again, the parshall flume was a specification of the permit which was a part of the agreed order. Blue Sky substituted a "90° V-Notch Weir" in the place of the "Parshall Flume". Blue

Sky wanted to prove that its substitution was just as effective as the original specifications, and even offered evidence from NREPC employees that the substitution could do the job.

However, this argument too should have been presented to the NREPC below before signing the agreed order, or in a subsequent request for modification. Blue Sky cannot simply agree to these requirements and then seek relief in court. It must first seek its administrative relief, and if unsuccessful, appeal to circuit court. See Kentucky Labor Cabinet v. Graham, Ky., 43 S.W.3d 247, 254 (2001); Natural Resources And Environmental Protection Cabinet v. Coleman, Ky. App., 876 S.W.2d 614, 616 (1993); and Sobolewski v. Louisville Downs, Inc., Ky. App., 609 S.W.2d 943, 945 (1980).

Blue Sky's final argument is that the issuance of the NOV for "Exceedences" during construction was unfair, inequitable, and should not be enforced. Blue Sky admitted its KPDES permit and the construction permit required compliance with the Clean Water Act<sup>4</sup> during construction of improvements, but contends the plant was in such bad shape that it could not be improved without these exceedences and that the NREPC inferred that it would look the other way during construction in order to get the plant upgraded. The trial court summed up the argument as Blue Sky "offering a myriad of excuses blaming

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<sup>4</sup> 33 U.S.C. 1251, et seq.

everyone except Blue Sky". We must agree. The facility was inadequate before the new construction. There were exceedences before the construction which necessitated the additional construction. Blue Sky cites Weiland v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88, 91 (2000), for the proposition that equitable estoppel can be invoked against a governmental entity in "unique circumstances where the court finds exceptional and extraordinary equities involved." Blue Sky wants the NREPC estopped from trying to enforce the NOV for exceedences. Blue Sky contends the promises are issues of fact that should be tried. The NREPC included the construction permit in the record which required compliance during construction. What initially appears to be an issue of fact is another mere claim or allegation with no evidence to support it. There are no affidavits by anyone from Blue Sky reporting this "promise", or any other evidence of such. An allegation is not enough to overcome a motion for summary judgment. In City of Florence, Kentucky v. Chipman, Ky., 38 S.W.3d 387, 390 (2001), our Supreme Court stated, "The party opposing . . . summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." The Court then cited Hoke v. Cullinan, Ky., 914 S.W.2d 335 (1995), with approval, for the statement "upon the trial court's determination that there are



no such disputed facts, summary judgment is appropriate.”  
Chipman, 38 S.W.3d at 390. Blue Sky presented no evidence of  
promises that could be used to consider the estoppel argument.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Brent L. Caldwell  
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BRIEF FOR APPELLEE:

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