

RENDERED: JULY 11, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001919-MR

PATRICIA L. CONWAY; HAROLD MCLAUGHLIN;
PAUL PRICE; AND DAVID CROSS CROSS-APPELLANTS

v. CROSS-APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, SENIOR JUDGE
ACTION NO. 05-CI-01319

SALT RIVER ELECTRIC
COOPERATIVE COOPERATION CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

KNOPF, SENIOR JUDGE: Patricia L. Conway, Harold McLaughlin, Paul Price, and David Cross appeal from a Bullitt Circuit Court opinion and order granting summary judgment in their favor and finding that Salt River Electric Cooperative Corporation (SRECC) had participated in unlawful corporate activity. We affirm.

In 2005, SRECC bought 7.25 acres of land in Bullitt County, Kentucky. SRECC then began the necessary steps to have the property annexed and rezoned in anticipation of selling it to Sabert Manufacturing Company. Appellants filed a complaint in Bullitt Circuit Court and sought an order requiring SRECC to cease development, re-zoning, or any other action that would cause the property to become industrial property and ordering SRECC to dispose of the property. Appellants filed two amended complaints, which essentially sought the same relief in addition to an order requiring SRECC to cease all buying and selling of land. Ultimately, SRECC and the appellants moved for summary judgment. In an order entered on May 24, 2006, the trial court granted the appellants' motion for summary judgment after opining that SRECC's actions were not appropriate under the law governing rural electric cooperative corporations, KRS² Chapter 279.³ Specifically, the trial court found that SRECC did not have the authority to purchase and sell real property to potential electric customers.

SRECC next filed a motion seeking to have the May, 24, 2006, opinion and order made final and appealable or, in the alternative, to alter, amend

² Kentucky Revised Statutes.

³ This Chapter has since been revised.

or vacate said judgment. On August 9, 2006, the trial court entered an opinion and order denying SRECC's motion and ordering them to sell the 75-acre tract of real estate "as soon as reasonably feasible." The trial court also noted that the property had already been rezoned and the parties were involved in a separate proceeding relating to the zone change ordinance. SRECC appealed⁴ and appellants cross-appealed the portion of the trial court's orders that failed to direct SRECC to cease to develop, rezone, or cause the property to become industrial property. SRECC's direct appeal was later dismissed on their motion, in an order entered by the Court on October 25, 2007. Appellants' cross-appeal remains.

The standard of review of a trial court's grant of 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App.1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky.1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in his favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky.1991).

Appellants argue that the trial court committed clear error by permitting SRECC to illegally purchase, hold, develop and rezone land for resale.

⁴ *Salt River Electric Cooperative Corporation v. Patricia L. Conway*, 2006-CA-001865 (Order Dismissing Appeal entered October 12, 2007).

They also argue that the remedy, requiring the property to be sold, constituted an abuse of discretion because it permitted SRECC to complete its illegal scheme. Specifically, appellants argue that the trial court erred by failing to void the purchase of the 75 acres by SRECC, the annexation, and the rezoning. They ask the Court to remand the matter with direction that the trial court void the purchase of the property by SRECC.

By appellants' own admission, the annexation and the rezoning issues are being pursued in other actions.⁵ Appellants have a remedy available to them in those proceedings and therefore it would not be appropriate for the trial court to make a ruling on those issues in a separate proceeding. Accordingly, we will not address those issues.

The only remaining issue, therefore, is the original purchase of the property by SRECC. However, we do not believe this issue to be properly preserved. CR 76.12(4)(c)(v). In their final amended complaint, appellants demanded the following:

1. That an order issue [sic] to [d]efendant that it cease all activities to develop, re-zone or take any action to cause the property . . . to become industrial property.
2. That [d]efendant be [o]rdered to conform all of it's [sic] activities so that it conforms to the provisions of KRS Chapter 279.
3. That [d]efendant be [o]rdered to dispose of the property . . . and any other property it has purchased . . .

⁵ At the time the briefs were submitted to the Court action 07-CI-01303 was pending in Bullitt Circuit Court. The other two actions, 05-CI-1364 and 06-CI-00790, were pending on appeal, *Harris G. White, Jr. v. City of Hillview, Kentucky*, 2006-CA-002482-MR.

4. That [p]laintiffs be awarded all other relief to which they may appear to be entitled including their cost herein expected.

Nowhere in their final or prior complaints, or by motion, did appellants ask that the sales contract between SRECC and the original owner be declared void. When asked about this absence during oral argument, appellant's counsel cited to the language which requests that SRECC "cease all activities" and "conform to the provision of KRS 279." We do not believe this language to be indicative of the appellants' desire to have the sales contract declared null and void. To ask that activities be ceased and that a sales contract/property transfer be declared void are two very different requests. If appellants had wished the sales contract to be declared void, they were provided with ample opportunity to ask as much in the three complaints that were filed in the action.

Appellants also claim that this issue was preserved by a motion filed on March 3, 2006. This motion, however, seeks to have the contract between SRECC and Sabert declared null and void, not the contract between SRECC and the original owner of the property. These two sales contracts occurred at different times with only SRECC as a common party in both actions. Asking for one to be declared void does not result in an all-inclusive request for the other to be declared void.

Lastly, we note that the appellants failed to join the appropriate parties to secure the relief they seek. *See* CR⁶ 19.01. In order to acquire an order voiding

⁶ Kentucky Rules of Civil Procedure.

the original sale to SRECC, appellants should have included all of those parties who were implemental in those acts and which such an order would affect, namely the original owner of the land from which SRECC purchased it. Appellants argue that SRECC failed to raise the defense of failure to join an indispensable party and thus any such argument is waived. We do not agree. The failure of a party to raise the defense of failure to join an indispensable party does not change the fact that the court does not have jurisdiction over those parties. Accordingly, the trial court cannot enter an order to the prejudice of one who is not a party to the action and who has sold the land to SRECC in good faith. Furthermore, appellants' argument is disingenuous, in that they were the party that failed to request the relief that would require the joinder of other parties. Therefore, we do not believe the trial court committed error by failing to enter an order voiding the zoning change, annexation, or sale of the property to SRECC.

For the foregoing reasons, the May 25, 2006, opinion and order and the August 9, 2006, opinion and order of the Bullitt Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
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ORAL ARGUMENT FOR CROSS-
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