RENDERED: JULY 25, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001538-MR

CITY OF FALMOUTH APPELLANT

v.

APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 06-CI-00028

CONRAD HARDWARE, INC.;
ALLEN RUSSELL CONRAD; AND
ALLEN WILSON CONRAD LIVING TRUST APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: The City of Falmouth appeals from an order of the Pendleton Circuit Court granting the motion of Conrad Hardware, Inc., et al. (hereinafter

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

collectively referred to as "Conrad") for summary judgment. The City contends that the circuit court erred in concluding that the City granted an irrevocable license or easement by implication to Conrad allowing Conrad to construct and maintain an awning over a public sidewalk. For the reasons stated below, we reverse and remand the order on appeal.

In 1984, the Falmouth City Council voted to allow Conrad to encroach upon the City's sidewalk right-of-way. The City, through counsel, would later acknowledge that the City's action constituted the issuance of a "parol license." Specifically, the City's action allowed Conrad to erect posts on or adjacent to a public sidewalk and eight feet from Conrad's storefront. The apparent purpose of the posts, though not stated in the council's minutes, was to support an awning to shield from the sun merchandise displayed in Conrad's storefront window. After the council's action, Conrad constructed the awning at a cost of between $10,000 and $14,000. The awning remained in use for several years.

In 2003, the City received a Renaissance Project Streetscape Grant from the Commonwealth for the purpose of renovating its downtown district. As part of that project, which included the reconstruction of streets and sidewalks, the City informed Conrad that it was revoking its license to encroach upon the sidewalk. Acting in reliance on the City's 1984 action, Conrad refused to remove the awning.

On February 10, 2006, the City filed the instant action against Conrad seeking injunctive relief. It claimed that its 1984 city council action constituted a parol license which was revocable at any time; that Conrad refused to comply with the revocation; and, that irrevocable harm would result if Conrad was not permanently enjoined from removing the posts and awning. Conrad responded, through counsel, by noting that the city's contractor stated on the record at a June 17, 2005, city council meeting that he could work under the awning without affecting the renewal project, and that Conrad was supportive of the project and willing to place decorative material around the posts to match the new street lights. When the parties were unable to reach an agreement, Conrad answered the complaint and filed a counterclaim.

The matter proceeded in Pendleton Circuit Court, whereupon each party filed a motion for summary judgment. After the motions were heard and proof taken, the circuit court rendered an order on June 26, 2006, which forms the basis of the instant appeal. The court granted Conrad's motion for summary judgment and dismissed the action. As a basis for the order, the court found that the city council's 1984 action constituted a revocable license which became an "irrevocable license or an easement by implication or estoppel" when Conrad relied on it to its detriment by constructing the awning. This appeal followed.

The City now argues that the circuit court erred in granting Conrad's motion for summary judgment. It maintains that the court erred in concluding that Conrad's "detrimental reliance creates an irrevocable license." The City argues

that the law of licenses between individuals or private parties should not apply to a parol license granted by a Kentucky municipal city government, especially one involving the encroachment of a public right-of-way. It directs our attention to KRS 82.082, the so-called "Home Rule Act," which grants to cities broad authority to take action within their boundaries, and contends that even if Conrad is a licensee, the City is still statutorily entitled to control the sidewalks for the public good. It seeks an order reversing the summary judgment.

In response, Conrad argues that the circuit court properly found that an irrevocable license was created when Conrad relied on the 1984 council action allowing Conrad to erect an awning over the public sidewalk. It maintains that because it relied on the council action to its detriment by constructing an awning at a cost of between $10,000 to $14,000, the circuit court properly ruled that an irrevocable license was created and dismissed the City's action by way of summary judgment.

The parties and the circuit court are in general agreement that - at a minimum - the City's 1984 action granted to Conrad a license to install awning posts on the sidewalk. "A license is an 'authority or liberty given to do or forbear any act; permission to do something . . . .'" *Tennessee Valley Authority v. Stratton*, 209 S.W.2d 318 (Ky. 1948). They also properly note that though the general rule is that a license is revocable at any time by the licensor, it may become irrevocable if the licensee detrimentally relies on the license with the licensor's knowledge. *Bob's Ready to Wear, Inc. v. Weaver*, 569 S.W.2d 715 (Ky. App.

1978). It is also uncontroverted that Conrad relied on that license to install an awning that originally cost between $10,000 and $14,000, and which today might cost $20,000 to replace. The awning apparently has been in place for some 24 years.

If the licensor - licensee relationship had developed between private parties, the record might reasonably support the circuit court's conclusion that the license became irrevocable and entitled Conrad to a summary judgment. However, because the licensor is a municipality, the analysis becomes more complicated. As the parties are well aware, KRS 82.082 - the Home Rule Act - grants to cities within the Commonwealth broad authority to "exercise any power" and "perform any function" within their boundaries. It states that,

> (1) A city may exercise any power and perform any function within its boundaries, including the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, that is in furtherance of a public purpose of the city and not in conflict with a constitutional provision or statute.
>
> (2) A power or function is in conflict with a statute if it is expressly prohibited by a statute or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes including, but not limited to, the provisions of KRS Chapters 95 and 96.

Kentucky case law has interpreted this "home rule" notion to find that conflicts between the Commonwealth's legislative enactments and municipal action (such as city ordinances and regulations) will be resolved in favor of the Commonwealth. Stated differently, Kentucky statutes "trump" conflicting municipal action. In

Commonwealth v. Do, Inc., 674 S.W.2d 519 (Ky. 1984), for example, the Kentucky Supreme Court held that a Kentucky lead poisoning statute would supersede conflicting local lead poisoning regulations.[2] Similarly, the Court in *City of Owensboro v. Board of Trustees, City of Owensboro Employee's Pension Fund*, 190 S.W.2d 1005 (Ky. 1945), stated "that municipal ordinances stand inferior to, and are subordinate to the laws of the state, is a basic principle." This concept can be traced back at least 150 years, when the former Kentucky Court of Appeals stated that a "power vested by the Legislature in a city corporation to make by-laws for its government . . . can not [sic] be considered as imparting by implication a power to repeal the laws of the State, or supersede them by any of its ordinances." *March v. Commonwealth*, 12 B. Mon. 25 (Ky. App. 1851). City actions which conflict with state law will be resolved in favor of the state. *See* 56 Am.Jur.2d, *Municipal Corporations,* §§ 374 through 383.

In the matter at bar, the City's 1984 action granting the license did not come in the form of an ordinance or regulation. Nevertheless, we are of the opinion that the underlying principles of the above-cited case law are applicable to the instant facts. The question may be posed as whether the City's 1984 action granting a license - which arguably became irrevocable - is superseded by the legislative authority set out in KRS 82.082 allowing the City to "exercise any power and perform any function . . . in furtherance of the public purpose of the city and not in conflict with a constitutional provision or statute." This question must

[2] In *Do, Inc.*, the local regulation was found not to be in conflict with the state statute.

be answered in the affirmative. Since the Home Rule Act (a statute) is in conflict with the license (a City action), the matter must be resolved in favor of the statute.

The action is before us by way of a summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Civil Rule 56.03. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a 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).

While there may be no genuine issues of material fact, for the aforementioned reasons we cannot conclude that Conrad was entitled to a judgment as a matter of law. Accordingly, we reverse the order of the Pendleton Circuit Court and remand the matter for further proceedings.

ALL CONCUR.

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