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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001674-MR

FALLS CREEK, INC. APPELLANT

v. APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 07-CI-00059

LOUISA BOARD OF WATER AND
SEWER COMMISSION; AND
LOUISA CITY COUNCIL APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

KELLER, JUDGE: Falls Creek, Inc., has appealed from the Lawrence Circuit Court's August 1, 2007, summary judgment dismissing its action for breach of

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky constitution and KRS 21.580.

contract against the Louisa Board of Water and Sewage Commission ("the Commission") and the Louisa City Council ("the City Council"). We affirm.

This case concerns whether a contract or agreement exists between Falls Creek and the Commission and the City Council regarding the responsibility for maintenance costs for a sewer pumping station on Falls Creek's property in Louisa, Kentucky. In 1989, Falls Creek was developing property in Louisa, a municipal corporation. Because the City of Louisa could not afford to pay to construct a sewer line and pumping station to serve the property, Falls Creek alleges that it agreed to construct both the sewer line and station in exchange for the Commission and the City Council agreeing to pay for the station's maintenance costs and monthly electric bills. Falls Creek then expended $240,000 to construct the sewer line and pumping station. From 1989 to 1995, the City provided for maintenance and paid the monthly electric bills. In 1996, however, the City stopped providing any maintenance to the station, although it continued to pay the monthly electric bills and to collect sewer subscription fees. Over the course of the next ten years, Falls Creek hired contractors to provide this maintenance, expending more than $46,000 to do so. Despite demands for repayment, Falls Creek was never reimbursed for this amount.

On February 19, 2007, Falls Creek filed this action against the Commission and the City Council, alleging breach of contract in their failure to pay for maintenance of the pumping station. In support of its claim that a contract

or agreement existed between them, Falls Creek relied on the minutes from the Commission's June 6, 1996, meeting:

> The Commission discussed maintaining the sewer pumping station that services the Fallscreek developement [sic]. The City Council had brought up questions as to who was responsible for maintenance[,] the property owner or the city. There was nothing in the previous minutes to verify who would accept responsibility. Joe Compton stated his recollection was that the Fallscreek [sic] developers would pay for installing the line and pumping station and the city would accept responsibility for maintenance on the pumping station and pay the electricity bill which averages $35.00 monthly. Joe said he had talked to the previous Commissioners[;] two of them could not recall any particulars on the agreement. Two Commissioners and Joe Compton did recall the City would accept responsibility for maintenance.

In its prayer for relief, Falls Creek requested a judgment for damages in the amount of $46,300 and a declaratory judgment that the Commission and the City Council would be responsible for future maintenance costs.

In their joint answer, the Commission and the City Council argued that they were not legal entities with the legal capacity to sue and be sued; that the complaint failed to state a claim upon which relief could be granted; that Falls Creek had notice that the City could not legally maintain private sewer pumping stations; and that the June 6, 1996, minutes were not sufficient to establish that a contract legally existed.

A few months later, the Commission and the City Council filed a motion for summary judgment, in which they argued four grounds in support of the

dismissal of Falls Creek's action. First, they argued that they (the City Council and the Commission) are not legal entities. Second, they argued that the City could not legally maintain a private sewer pumping station. In support of this argument, they relied upon the May 14, 1996, minutes of the Louisa City Council:

> It was agreed by the Council that the Water and Sewer Co. should not be working on pumping stations they do not own. Attorney Adams stated that if the employees work on private sewer lines, then the Water and Sewer Co. should bill the owners accordingly. Joe Compton stated that he would not allow the employees to work at no charge.

They pointed out that those minutes predate the June 6th Commission meeting and are controlling over any action by the Commission. Third, they argued that the June 6, 1996, Commission meeting minutes are insufficient as a matter of law to establish the existence of the putative agreement. In addition, they asserted the minutes cannot be amended *nunc pro tunc* to establish the existence of an agreement. Finally, they argued that even if a contract existed, it would be terminable at will by either party as it was not for a definite period of time.

In response, Falls Creek argued that a contract existed based upon the Commission and the City Council's acceptance and performance under the agreement for six years, and that they had the duty as governmental entities to fulfill the agreement in good faith. Falls Creek attached the affidavit of Mark Clevenger in support of its argument. Clevenger is the Vice President of Falls Creek and was present during the discussions about the construction of the sewer line and pumping station in 1989. He stated that because the City did not have the

funds to pay for the construction, Falls Creek would pay for the construction of the sewer line and pumping station. In return the Commission and the City would pay for maintenance. The Commission and the City Council would continue to benefit by collecting sewer line subscription fees. The Commission complied with the agreement for six years from 1989 through 1995, when it ceased maintaining the pumping station. Falls Creek then had to expend more than $46,000 on contractors to maintain the pumping station, while the Commission and the City continued to collect subscription fees as well as real estate taxes from the twelve businesses that used the pumping station.

The circuit court entertained oral argument on the summary judgment motion at a status conference on July 27, 2007, which focused primarily on whether an agreement existed. On August 1, 2007, the circuit court entered a summary judgment dismissing Falls Creek's claims based on its finding that no contract existed. After summarizing the facts, the circuit court stated:

> The Plaintiff cites to the Court the case of *Carroll Fiscal Court vs McClorey*, 455 S.W.2nd 547 (Ky. 1970). That case is distinguishable in that [it] involved a clearly written and executed contract between the parties in that case. There is no such contract in this case. The Defendant cites to the Court the case of *Brownsboro Road Restaurant, Inc. vs Jerrico, Inc.* 674 S.W.2nd 40 (Ky. App. 1984). The Court stated in that case that when a contract contains no definite period it may be terminated by either party at will. The Court cannot find the existence of any contract in this case. Even if one were determined to be in existence from the minutes of the Water and Sewer Commission, since it contains no definite term, it would have to be construed as terminable at will. The affidavit of Mark Clevenger reflects that the

> city apparently maintained the pump station for about six years, until 1995. Apparently, the city has not maintained the pump station since about 1996, which causes the Court some concern as to why the Plaintiff did not attempt to enforce its purported contractual rights in that long period of time.
>
> It is evident to the Court that there is no binding contractual agreement between the parties. The Court grants the motion for summary judgment.

This appeal followed.

On appeal, Falls Creek contends that the circuit court erred in granting summary judgment. It asserts that a binding agreement existed between the parties, and that as governmental entities, the Commission and the City Council had the duty to make a good faith effort to honor the terms of the contract. Falls Creek also argues that the *Brownsboro* case, relied upon by the Commission and the City Council and cited by the circuit court, is inapplicable here because of the status of the defendants as governmental entities. In their response brief, the Commission and the City Council make essentially the same arguments as they did in their motion for summary judgment.

In *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001), this Court set forth the applicable standard of review for appeals from summary judgments:

> The standard of review on appeal when a trial court grants a motion for 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." The trial court must view the evidence in the light most favorable

> to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." While the Court in *Steelvest [, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991),] used the word "impossible" in describing the strict standard for summary judgment, the Supreme Court later stated that that word was "used in a practical sense, not in an absolute sense." Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*. [Citations in footnotes omitted.]

With this standard in mind, we shall review the matter before us.

It does not appear, and the parties have not argued, that any genuine issues of material fact remain to be decided. Therefore, the only issue we must address concerns a question of law; namely, whether a legally binding contract existed between Falls Creek, and the Commission and the City Council. Falls Creek maintains that the agreement, as referenced in the June 6, 1996, Commission meeting minutes, was established by the acceptance and multiple year performance by the Commission and the City Council. On the other hand, the Commission and the City Council direct our attention to our opinion of *City of Greenup v. Public Service Commission*, 182 S.W.3d 535 (Ky. App. 2005), which states that any

contract must be signed by the mayor and confirms that a municipal corporation may not enter into a contract by implication.

In our view, the opinion of *City of Greenup* is determinative here as it pertains to the formation of contracts. Accordingly, we shall set forth the pertinent parts of that opinion herein:

> Greenup contends that the PSC erroneously determined that a valid contract existed because the alleged agreement with South Shore failed to comply with the statutory procedures for cities to follow in executing contracts.
>
> As there are no facts in dispute, we are faced with but a question of law. Accordingly, our review is *de novo*. *Revenue Cabinet v. Comcast Cablevision of the South*, 147 S.W.3d 743, 747 (Ky. App. 2003).
>
> In its July 24, 2002, order the PSC stated "[w]e find no merit in Greenup's contention that no contract could be entered without the actions of Greenup's mayor." This conclusion of law, however, diametrically conflicts with KRS 83A.130(8), which provides as follows:
>
> > All . . . contracts and written obligations of the city *shall* be made and executed by the mayor or his agent designated by executive order. (Emphasis added).
>
> KRS 446.080(4) prescribes that in construing statutes "[a]ll words and phrases *shall* be construed according to the common and approved usage of language. . . ." (Emphasis added). "In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning." Black's Law Dictionary 1233 (5th ed. 1979). Shall means shall. *Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-796 (Ky. 2003).

We are of the opinion the PSC erred in concluding that a contract could be entered into without action by the mayor of Greenup. Pursuant to KRS 83A.130(8), a contract can only "be made" and must be executed by the mayor. The PSC's conclusion that a contract may be formed absent action by the mayor is an erroneous conclusion of law.

Further, we construe the statute as requiring a contract entered into by a municipality to be in written format so that it may be executed by the signature of the mayor. It is uncontested that a written contract executed by the mayor does not exist in this case. This being so, it follows that no valid express contract was formed.

Moreover, KRS 83A.130(8) unambiguously categorizes the making of a contract as an executive function. KRS 83A.130(11) provides that "[t]he council shall not perform any executive functions except those functions assigned to it by statute." The making and execution of contracts is not assigned to the city council by statute. The PSC erroneously concluded that the vote in favor of the application at the April 7, 1998, council meeting was sufficient to bind Greenup to a contract for the provisioning of wholesale water to South Shore.

The PSC determined, as a conclusion of law that, "[t]he resolution of Greenup's City Council, duly recorded, is sufficient action to constitute a binding acceptance." This conclusion of law conflicts with KRS 83A.130(8). Under this statute all contracts must be "made and executed by the mayor." The PSC's conclusion is in direct contravention of the statute.

The statutory provisions concerning the formation of a contract by a municipality must be strictly adhered to. As stated in *City of Princeton v. Princeton Electric Light & Power Co.*, 166 Ky. 730, 179 S.W. 1074, 1079 (Ky. 1915):

> The laws provide how municipalities may bind themselves, and the contracts to be obligatory must be made in the manner the

> laws prescribe. A different rule prevails in regard to municipalities to that which governs private persons and private corporations. The persons who contract with municipal corporations must, at their peril, know the rights and powers of the officers of such municipalities to make contracts and the manner in which they must make them. Any other rule would destroy all the restrictions which are thrown around the people of municipalities for their protection by the statute laws and the Constitution, and would render abortive all such provisions. The rule in certain instances may be harsh, but no other is practical.
>
> The foregoing principle was recognized of late in *Worden v. Louisville and Jefferson County Metropolitan Sewer District*, 847 F.Supp. 75 (W.D.Ky. 1994).
>
> As the statutorily mandated procedure for creating a contract by a city was not followed, a valid and enforceable contract for the provisioning of wholesale water was not formed. The PSC erred in concluding to the contrary. We accordingly reverse the agency's order of July 24, 2002.
>
> The PSC's conclusion that a contract had been formed appears to have been based at least to some extent upon the conduct of the parties, which we construe as invoking the principles of contract by implication. However, it is well established that a municipality may not enter into a contract by implication. *Louisville Extension Water District v. Sloss*, 314 Ky. 500, 236 S.W.2d 265 (1951).

City of Greenup, 182 S.W.3d at 539-41. "It is the rule in this jurisdiction that no municipal corporation may be bound on the theory of implied contract." *Louisville Extension Water Dist. v. Sloss*, 314 Ky. 500, 502, 236 S.W.2d 265, 266 (1951).

We appreciate Falls Creek's attempt to distance the circumstances of this case from *City of Greenup*, in stating:

> [I]t may not [be] advisable for government entities to haphazardly enter into loosely-defined "contracts by implication" with private citizens. Regardless, the Appellants assert that it is more damaging to the fabric of government confidence for government entities to conduct themselves in such a dishonorable manner as the facts demonstrate the Appellees have acted in this instant case, in effect taking advantage of the trust of private citizens.

Obviously, had Falls Creek entered into a properly written contract with the City Council and the Commission in 1989, this action would not have been necessary. However, whether or not we agree that the actions of the City Council and the Commission were less than honorable, we are bound to follow the law on this issue. Accordingly, we must reluctantly uphold the circuit court's summary judgment, as no contract existed.

Because we have affirmed the summary judgment on its merits, we need not address the other issues raised by Falls Creek or the other grounds for affirmance argued by the Commission and the City Council.

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

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

Ned Pillersdorf
Prestonsburg, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEES:

Eldred E. Adams, Jr.
Louisa, Kentucky