

RENDERED: OCTOBER 30, 2009; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2009-CA-000184-ME

DEBILL ENTERPRISES, INC.

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 08-CI-01128

CITY OF PIKEVILLE, KENTUCKY

APPELLEE

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

KELLER, JUDGE: This appeal arises from the circuit court's order authorizing the City of Pikeville (Pikeville) to take possession through condemnation of real property belonging to Debill Enterprises, Inc. (Debill). On appeal, Debill argues that the report of the commissioners was inaccurate; that it was not paid just compensation prior to condemnation; and that it did not receive due process. For the reasons set forth below, we affirm.

## FACTS

Debill owns a parcel of real property and a 27,000 square-foot building in Pikeville located adjacent to Thompson Road. Debill leases space in the building to two businesses and also operates a Mr. Gatti's restaurant/game room there. Adjacent to the building is a parking lot that, prior to condemnation, contained 132 parking spaces.

The Pikeville City Commission began a project to widen Thompson Road. In order to do so, Pikeville needed to acquire some property in fee simple and permanent easements across other property adjacent to Thompson Road. In August 2007, Pikeville offered Debill \$103,300.00 for fee simple title to 0.129 acres and for a permanent easement across 0.166 acres. Debill did not respond to Pikeville's offer and, on August 11, 2008, Pikeville filed a petition seeking to take the property through eminent domain. In its petition, Pikeville set out the legal description of the property to be taken and the reason for the taking. Pikeville asked the circuit court to appoint "three impartial housekeepers" to act as court commissioners and for an order and judgment permitting Pikeville to condemn and take possession of the property.

The court appointed Jimmy England (England), Dusty Layne (Layne), and Judy Brooks (collectively referred to as the "Commissioners"), to serve as court commissioners and asked them to review the Debill property in order to determine its fair market value. The Commissioners, following their charge from the court, prepared a report finding that the fair market value of the entire tract of

land was \$1,500,000.00, and the fair market value of the property to be taken was \$132,000.00.

Approximately six weeks after the Commissioners filed their report, Debill filed a motion to dismiss the petition and an objection to Pikeville's right to condemn the property. In its petition, Debill complained that the property description was not accurate; the Commissioners did not view the improvements on the property, thus making their valuation inadequate; and the Commissioners did not act in conformity with the law.

Pikeville filed a response arguing that the property description and Commissioners' report were accurate and adequate. Furthermore, Pikeville filed a motion for interlocutory judgment, seeking permission to enter and possess the property upon payment of the Commissioners' award to either Debill or the Pike County Clerk of Court.

The court scheduled and held an evidentiary hearing on the parties' motions. At the hearing, England testified that he determined the value of the entire tract by looking at recent sales of comparable real property. In making his calculation, England did not go into the building or take any measurements of the building; however, he testified that he had been in the building a number of times and was familiar with it. Furthermore, although England did not have a map of the entire parcel, he testified that the boundaries appeared to be fairly obvious. Finally, England testified that he did not take into consideration how many parking

spaces might be lost as a result of the taking or whether the taking would impede access to the rear of the building.

Layne testified that he also used sales of comparable property in determining the total value of the parcel. Like England, he did not have a map of the entire parcel, but he was familiar with the apparent boundaries. Although Layne did not calculate the number of parking spaces that might be lost or the impact the taking would have on Debill's business, he testified that he was concerned that the easement would impede access to the rear of the building.

Debra Slone (Slone), testified that she is the President and majority shareholder of Debill, which paid \$1,600,000.00 for the property and building. After purchasing the property, Debill made renovations to the building and resurfaced the parking lot. Slone estimated that the taking would result in the loss of twenty parking spaces and that Debill would have to move a sprinkler system near the rear of the building in order to provide access for trucks and buses. Finally, Slone testified that, if she lost parking spaces, Debill's franchise with Mr. Gatti's might be in jeopardy.

We note that neither England nor Layne could state with precision how they arrived at the value they assigned to the property to be taken. However, it appears that value was based on a per-acre value of \$450,000.00. Furthermore, although neither could state at the hearing the acreage of the entire tract, both indicated that, at the time they made their valuation, they knew the total acreage.

Following the hearing, the court entered a judgment in favor of Pikeville. In its judgment, the court first found that Pikeville was authorized to take the property and that the taking was for a public purpose. The court then found that Pikeville acted in good faith in negotiating with Debill regarding purchase of the property. Despite Debill's protestations to the contrary, the court found that the Commissioners' report conformed to the requirements of Kentucky Revised Statutes (KRS) 416.580(1). In doing so, the court noted that the statute does not require the Commissioners to use any particular method in valuing property but that the Commissioners "did more than required by the statute." Finally, the court granted Pikeville's request for an interlocutory judgment and authorized Pikeville to:

take possession of the property for the purpose of designing and constructing a roadway with associated easements as requested in the Petition upon payment to either the owners of the property or to the Pike Circuit Court the amount of compensation awarded by the Commissioners in their report filed therein on September 4, 2008.

Both parties filed exceptions to the Commissioners' report. Debill continued its arguments regarding the deficiency of the process and the inadequacy of the Commissioners' valuation, and Pikeville argued that the Commissioners' valuation was inflated. This appeal followed.

#### STANDARD OF REVIEW

The facts are not in dispute. Debill raises only issues of law on appeal, therefore, our review is *de novo*. *Western Kentucky Coca-Cola Bottling Co., Inc. v. Revenue Cabinet*, 80 S.W.3d 787, 790 (Ky. App. 2001).

## ANALYSIS

We begin by noting that Debill does not contest Pikeville's right to exercise eminent domain over and condemn the property or that the property is designated for a public use. Debill does, however, contest the validity of the condemnation procedure generally and as applied in this case. Therefore, we will limit our analysis to Debill's complaints about that procedure.

### 1. Accuracy of Commissioners' Report

We first address Debill's argument that the Commissioners' report and valuation were inaccurate. KRS 416.550 provides that, if a "condemnor cannot, by agreement with the owner thereof, acquire the property" needed, the condemnor may condemn the property pursuant to KRS 416.550 through 416.670. In order to do so, the condemnor must file a petition pursuant to KRS 416.570, setting out "[a] particular description of the property and the use and occupation thereof sought to be condemned; and . . . [a]n application to the court to appoint commissioners to award the amount of compensation the owner of the property sought to be condemned is entitled to receive. . . ." The court then must appoint three commissioners who

shall view the land or material sought to be condemned and award to the owner or owners such a sum as will fairly represent the reduction in the market value of the

entire property, all of or a portion of which is sought to be condemned, said sum being the difference between the market value of the entire property immediately before the taking and the market value of the remainder of the property immediately after the taking thereof, together with the fair rental value of any temporary easements sought to be condemned.

KRS 416.580(1).

Debill argues that the Commissioners' report and valuation are flawed because the Commissioners did not take into consideration the improvements to the property when they did their valuation. Having reviewed the record, we do not believe that the evidence completely supports Debill's argument, because both Layne and England testified that they had been in the building a number of times. However, assuming the Commissioners completely ignored the improvements, they were not required by the statute to do otherwise. "Statutory authority rests solely with the court-appointed commissioners to award just compensation to the owners of land being condemned." *Corns v. Transp. Cabinet*, 814 S.W.2d 574, 578 (Ky. 1991). As noted by Pikeville and the circuit court, the statute does not set forth any criteria for the Commissioners to follow in valuing the property, simply stating that the Commissioners "shall view the land or material sought to be condemned." KRS 416.580(1). As the Court noted in *Corns*, if a condemnee is dissatisfied with the valuation, he may "take exception to the amount of the commissioners' award and . . . have that issue determined by a jury." *Corns* at 577.

In this case, Pikeville did not seek to condemn the building; therefore, under the statute, the Commissioners were not required to view the building. They were only required to view that which was being condemned, the land. This they did. Thus, we discern no error in the circuit court's finding that the Commissioners' report met the statutory criteria. Whether the Commissioners' award is adequate is a matter that Debill can address, if it chooses to do so, in a trial of its exceptions to the interlocutory judgment under KRS 416.620.

## 2. Due Process

Debill argues that it was denied due process because: (1) the statute does not provide for an appeal of an interlocutory order giving the condemnor immediate possession; (2) it will not have available to it "just compensation"; and (3) it will be denied the ability to bifurcate its counterclaim alleging bad faith. We will address each of these sub-issues in the order presented.

KRS 416.620(1) provides that a party displeased with the interlocutory judgment may file exceptions to that judgment and receive a jury trial on the issues raised. However, a party may not raise as an issue the right of the condemnor to condemn the property. Debill argues that this prohibition forecloses it from challenging on appeal Pikeville's right to condemn Debill's property. This argument fails for two reasons.

First, Debill raised a number of issues before the trial court, all of which related to the manner in which the condemnation proceeded and the method



and valuation of the property. Debill did not challenge Pikeville's right to condemn the property or that the property was being taken for a public purpose. Because Debill did not raise those issues before the circuit court, whether the statute provides a right of appeal on those issues is irrelevant.

Second, although the statute does not provide Debill with a right to appeal the interlocutory order, the Supreme Court of Kentucky declared that such a right exists. *See Ratliff v. Fiscal Court of Caldwell County, Kentucky*, 617 S.W.2d 36, 39 (Ky. 1981). Therefore, Debill's argument that it does not have a right to appeal the interlocutory order is without merit.

Debill next argues that it will not have available to it "just compensation," alleging that Pikeville did not act in good faith when negotiating for the purchase of the property. In *Commonwealth v. Cooksey*, 948 S.W.2d 122 (Ky. App. 1997), this Court held that a condemnor has the obligation to act in good faith. However, this Court went on to state that a court may "deny the right to take only where there has been '[a] gross abuse or manifest fraud.'" *Id.* at 123 (internal citation omitted).

As noted above, Pikeville offered to purchase the property from Debill for an amount equal to 78 percent of the amount awarded by the Commissioners. Pikeville then waited a year for a response before filing its petition to take the property through eminent domain. Nothing in this fact scenario indicates an absence of good faith on the part of Pikeville in negotiating with

Debill or in filing its petition. Thus we discern no error in the trial court's finding that Pikeville did not act in bad faith.

Finally, Debill argues that it is foreclosed from bifurcating its bad faith claim from its claim for damages. This argument also fails for two reasons. First, as noted above, Debill has not put forth any evidence of bad faith. Second, in *Cooksey*, this Court stated that the time to bring a bad faith claim is prior to the trial court's issuance of an interlocutory order, not afterward. *Id.* at 123. Debill did not present any substantive evidence of bad faith prior to the court's entry of its interlocutory judgment; therefore, it is precluded from doing so now.

### 3. Failure to Pay Just Compensation

Debill argues that its property was taken prior to payment of just compensation. While Debill may dispute whether the compensation was just, the court's order required Pikeville to pay the amount awarded by the Commissioners either to Debill or to the Pike Circuit Court. This is all that is required.

Finally, we note that, although Debill couches its arguments otherwise, it appears that its real issue is with the amount of compensation awarded by the Commissioners. As previously noted, Debill is free to pursue that issue before a jury in a trial based on its exceptions.

### CONCLUSION

For the foregoing reasons, we affirm the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald H. Combs  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Russell H. Davis, Jr.  
Pikeville, Kentucky