

RENDERED: OCTOBER 21, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000847-MR
and
NO. 2010-CA-000904-MR

CITY OF TAYLORSVILLE

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM SPENCER CIRCUIT COURT
v. HONORABLE STEPHEN K. MERSHON, JUDGE
ACTION NO. 08-CI-00255

HIGHVIEW DEVELOPMENT, LLC
AND GREGG Y. NEAL, ATTORNEY,
NEAL & DAVIS, PLLC

APPELLEES/CROSS-APPELLANTS

OPINION AFFIRMING

** ** * * * * *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

STUMBO, JUDGE: The City of Taylorsville appeals from a judgment of the
Spencer Circuit Court in favor of Highview Development, LLC and attorney

¹ Chief Senior Judge Joseph E. Lambert 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.

Gregg Y. Neal in Highview Development's action alleging breach of contract. The City of Taylorsville contends that the trial court's findings of fact and conclusions of law are not supported by substantial evidence and are clearly erroneous. On cross-appeal, Highview argues that the court erred in setting aside an award of attorney fees and eliminating references to documents from a 2008 hearing. We find no error, and accordingly affirm the judgment on appeal.

Highview Development, LLC ("Highview") is a Kentucky limited liability corporation formed in 2003 for the purpose of developing a residential subdivision in Spencer County, Kentucky. The City of Taylorsville ("the City") is a fifth class city located in Spencer County, which owns and operates the only sewage treatment facility in the county.

On May 3, 2005, the parties entered into a Memorandum of Understanding ("MOU") which provided in relevant part that the City would expand access to sewage treatment to accommodate Highview's plan to develop the subdivision at issue. The MOU stated that Highview would pay a one-time impact fee of \$162,840 to fund expanded access to sewage treatment, and that the funds would be returned to Highview if the City failed to provide the access within 36 months of the MOU's execution. The MOU also provided that the funds would be placed in an interest bearing account to be segregated from the City's other funds.

After the passage of 36 months, the City allegedly had not provided expanded access or otherwise improved its facility in accordance with the MOU.

Additionally, it did not refund the fee to Highview. Highview subsequently filed the instant action against the City alleging that the City improperly failed to refund the fee as provided by the MOU, failed to segregate the funds and otherwise deprived Highview of the use of the funds. A bench trial was conducted on November 12 and 13, 2009, after which the court rendered its Findings of Fact, Conclusions of Law and Judgment in favor of Highview. The court determined that the MOU was a contract, and that the City did not complete the sewage expansion by May 3, 2008. It went on to find that though Highview had not actually needed the expanded access during the pendency of the MOU, the City failed to execute the terms of the agreement when it did not provide additional sewage treatment, failed to segregate Highview's fee in a separate, interest-bearing account and improperly transferred more than \$62,000 of the fee to another budgetary account. Additionally, the trial court found that while the City applied for loans and grants for sewage treatment expansion, no such expansion plans were presented until after litigation commenced. The court awarded judgment of \$162,840.00 plus interest to Highview, as well as attorney fees of \$22,672.00. This appeal followed.

The City now argues that the trial court's findings of fact and conclusions of law were not supported by substantial evidence and were clearly erroneous. It maintains that the trial court improperly determined that the language of the MOU was clear and unambiguous. The City claims that the MOU was susceptible to alternate, reasonable interpretations and was otherwise ambiguous.

For example, the City takes issues with the trial court's conclusion that the project was required under the contract to be completed within 36 months of the MOU's execution, or May 3, 2008. It maintains that this conclusion is not supported by facts or logic, because such an interpretation would require that the fee be refunded to Highview if the project were not completed 36 months and one day after May 3, 2005. The City claims that the MOU did not require the expansion to be "completed" within 36 months, and that the word "completed" does not appear in the MOU at all. It argues that the City did not decline or otherwise fail to expand the system, and directs our attention to Highview's stipulation that it did not actually need the expanded service during the 36-month period. It goes on to note that Paragraph 11 of the MOU allows for completion of the project beyond the 36-month period if approval or funding of the expansion is delayed. Finally, the City argues that the trial court erroneously awarded pre-judgment and post-judgment interest in rates exceeding the amounts agreed upon by the parties. In sum, the City seeks an order reversing the judgment on appeal.

In their cross-appeal, Highview and attorney Neal contend that the court erred when it set aside that portion of the judgment which awarded attorney fees to Highview. They contend that the City's conduct was so egregious that the court abused its discretion in failing to award the attorney fees. Highview also briefly argues that the court erred when it amended the judgment so as to eliminate references to documents from a December 11, 2008 hearing, because those documents were already in evidence.

We have closely examined the record and the law, and find no error in the trial court's judgment in favor of Highview or its determination that Highview was not entitled to an award of attorney fees. The focus of the City's claim of error centers on its assertion that the MOU did not require the City to complete the sewer project within 36 months, and that the court erred in failing to construe the contract to effectuate the intentions of the parties. We are not persuaded by this argument. The MOU, to which the parties bound themselves in Paragraph 12, states in Paragraph 6 that,

The parties agree that the impact fee of \$162,840.00 shall be the sole property of the City and Highview shall have no claim to it, under any regulation or ordinance, including the City's Sewer Rebate Ordinance, No. 141, as amended, *except under the following circumstances:*
a. The City declines or fails to expand its sewer system to provide service to Highview Estates, within thirty six (36) months of the execution of this agreement
(Emphasis added).

This provision is subject to but one interpretation.

Additionally, it is uncontroverted that no expansion to the sewer system was made, nor even attempted, during the 36 months at issue. The trial court found that the City did not spend any money to improve aeration pursuant to Paragraph 11 of the MOU, and did not complete the sewage expansion by May 3, 2008. These findings are supported by the record.

An agreement must be construed as a whole, giving effect to all parts and every word, *Cantrell Supply Inc. v. Liberty Mutual*, 94 S.W.3d 381 (Ky. App. 2002), and the primary object in construing a contract is to

effectuate the intentions of the parties. *Deerfield Insurance Company v. Warren County Fiscal Court*, 88 S.W.3d 867 (Ky. App. 2002). Further, a contract should be strictly enforced according to its terms. *Codell Construction Company v. Commonwealth*, 566 S.W.2d 161 (Ky. App. 1977). In applying these principles to the MOU, the trial court determined that the language of the MOU was clear and unambiguous. This determination is supported by the record and the law. The MOU evinced the parties' intent that expansion of the sewer be completed within 36 months of the execution of the MOU. Not only was the work not completed, the City did not secure any loan and did not service any debt for which the impact fee was intended pursuant to the MOU. According to the testimony of the City's contract engineer, the expansion plans were not drawn up until July 2008, and were revised the following year. The City also transferred \$62,247.28 from the impact fee account to the City's Operation and Maintenance account in violation of the terms of the MOU.

Based on the foregoing, the trial court concluded that the City had not completed – or even initiated – the project during the 36 months at issue, thus depriving Highview of both the benefit of the MOU and its usage of the impact fee during that period. The record supports this conclusion.

As to Highview's contention that it was entitled to attorney fees, we note the principle that in equity an award of attorney fees is within the discretion of the trial court. *Batson v. Clark*, 980 S.W.2d 566 (Ky. App.

1998). We have no basis for concluding that the trial court abused this discretion in its April 23, 2010 order rescinding its prior award of attorney fees. Additionally, we find no error with the trial court's determination that Highview was entitled to pre-judgment interest accruing at the rate of 8%. "A judgment may be for principal and accrued interest," KRS 360.040, and such interest may accrue at the rate of 8%. KRS 360.010. Herein, the trial court awarded pre-judgment interest of 8% from May 3, 2008, until the date of judgment. This award was in conformity with the record and the applicable statutes, and as such, we find no error. Highview's argument is moot on the issue of the court's alleged improper failure or refusal to refer to documents from the December 11, 2008 hearing.

For the foregoing reasons, we affirm the Findings of Fact, Conclusions of Law and Judgment of the Spencer Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Samuel B. Carl
William F. Stewart
John D. Dale, Jr.
Taylorsville, Kentucky

BRIEF FOR APPELLEES/
CROSS-APPELLANTS:

Gregg Y. Neal
Shelbyville, Kentucky