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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001818-MR

JAMES WINEBRENNER — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 08-CI-01935

CITY OF INDEPENDENCE — APPELLEE

OPINION
AFFIRMING IN PART;
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is an appeal from a summary judgment granted by the Kenton Circuit Court to the City of Independence in a class action dispute over assessments levied on property owners to pay for a new sewer system. We

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

hold that summary judgment was appropriate only as to some members of the class whose claims are barred by the statute of limitations. Genuine issues of material fact remain concerning the timeliness of the claims of other members of the class. Therefore, we reverse in part and remand for further proceedings.

In the early 1990s, as a consequence of penalties threatened by the Kentucky Division of Water, the City decided to build a wastewater sewer collection system, known as the Fowler Creek Sewer System (FCSS). The estimated cost of the sewer system was $7 million, which the City financed by issuing bonds. To pay for the bonds, the City imposed an assessment of $5,600 on each parcel of property serviced by the FCSS. In 1991, the City passed an ordinance which established an upfront fee of $1,500 for all homeowners in the area affected by the FCSS; then in 1993, it passed an ordinance which replaced the $1,500 fee with a quarterly payment of $70.00. These quarterly payments began to be charged in 1996.

On June 18, 2008, a group of property owners, led by James Winebrenner, filed a class action lawsuit alleging that the City had illegally included assessments and impositions for the sewer on their ad valorem tax bills and thereby subjected the property owners to illegal tax liens. The complaint stated that Winebrenner and other members of the putative class had only paid the assessments and impositions in order to avoid foreclosure and that they were entitled to refunds. The case was ultimately certified as a class action by order of the circuit court.

The basis of the plaintiffs' argument was that the City, in levying the sewer charges, had failed to follow the notice and hearing procedures required by Kentucky Revised Statutes (KRS) 91A.200 to 91A.290. If a city decides to proceed with an improvement by special assessment, Chapter 91A requires the preparation of a comprehensive report regarding the proposed improvement; a public hearing on the report; publication and mailing of an ordinance informing property owners of the proposed assessment; and the provision for a contest of the project by affected property owners. *See* KRS 91A.240; 91A.250; 91A.260 and 91A.270. The plaintiffs contended that the City had not complied with these procedures and that the charges for the FCSS were consequently void.

In response, the City argued that the sewer financing project was governed by the provisions of KRS 96.910 to 96.927. These statutes enable cities to classify sewer users and apply differential charges to collect, treat and dispose of sewage. Chapter 96 provides procedural safeguards similar to those provided in Chapter 91A. They include the publication of an ordinance describing the new charges; a public hearing; publication of a second ordinance if necessary and provision for an appeal by users affected by the ordinance. *See* KRS 96.919; 96.922; 96.923; 96.924 and 96.926.

The City further argued that the plaintiffs' action was barred by the thirty-day limitations periods of both Chapter 91A and Chapter 96. KRS 96.926(1) provides in relevant part that

> Any sewer user, or prospective sewer user, affected by the Second Ordinance may, within thirty (30) days after publication of the Second Ordinance, file an action in the Circuit Court of the county in which the city is situated attacking the validity of the Second Ordinance from the standpoint of whether the governing body acted in conformity with the procedures made mandatory by KRS 96.910 to 96.927.

Similarly, KRS 91A.270(1) provides that

> (1) Within thirty (30) days of the mailing of the notice provided for in KRS 91A.260, any affected property owner may file an action in the Circuit Court of the county, contesting the undertaking of the project by special assessment, the inclusion of his property in the improvement, or the amount of his assessment. . . .
>
> (2) The city may proceed with the improvement with respect to any properties whose owners have not filed or joined in an action as provided in this section or who have contested only the amounts of their assessments, and the provisions of the resolution shall be final and binding with respect to such property owners except as to contested amounts of assessments. After the lapse of time as herein provided, all actions by owners of properties shall be forever barred.

Because the complaint was filed in June 2008, twelve years after the quarterly payments began to be charged, the City contended that the lawsuit was obviously time-barred. The City further argued that even if neither of these thirty-day limitations periods was applicable, the lawsuit was barred by the general ten-year limitations period of KRS 413.160, which provides that "An action for relief, not provided for by statute, can only be commenced within ten (10) years after the cause of action accrued."

The circuit court agreed, ruling that the plaintiffs' action was foreclosed by the thirty-day limitations period of KRS 96.926(1), or, in the alternative, by the general ten-year limitations period of KRS 413.160. An order granting summary judgment to the City was entered on July 8, 2009, and this appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on "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); Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

The appellants argue that summary judgment was improper because genuine issues of material fact remain regarding which of their claims are barred by the limitations periods of the special assessment and sewer user statutes. They argue that questions of fact remain as to whether the procedures that would trigger the thirty-day limitations period either under Chapter 91A (mailing of the notice of the assessment) or Chapter 96 (publication of the second ordinance) were performed by the City, and that the limitations period consequently may have never begun to run. The appellants also argue that questions of fact remain as to

whether their numbers are limited only to "sewer users or prospective sewer users" (KRS 96.926(1) or "affected property owners" (KRS 91A.270(1)), since they include individuals who contend they have been assessed the sewer fees even though their parcels of property are not connected to or serviced by the FCSS. Finally, the appellants argue that many of the issues they have raised go beyond the scope of what can be raised under KRS 91A.270(1) and KRS 96.926(1), such as the allegedly improper recording of liens and the inclusion of sewer assessments in property tax bills.

We agree with the appellants that genuine issues of material fact have been raised that go beyond the scope of the grievance procedures set forth in these sections, and hence some of their claims may not be time-barred. The pertinent statute of limitations to be applied to these claims is five years, accruing with each payment.

> [D]efendant's cause of action, if it possessed any, to recover from the city any of the alleged wrongfully and erroneously paid taxes . . . accrued immediately following the payment of each of them and, unless it took the proper procedure to assert its right to such recovery within the limitations period of five years in which it might be done, the bar accrued and became available to the city in any subsequent action to assert the right.

Ironton & Russell Bridge Co. v. City of Russell, 262 Ky. 778, 91 S.W.2d 1, 5 (1935); *see also Maximum Mach. Co., Inc. v. City of Shepherdsville*, 17 S.W.3d 890, 893 (Ky. 2000)(applying five-year statute of limitations set forth in KRS 413.120).

After the circuit court entered the summary judgment, the plaintiffs filed a motion to alter, amend or vacate with attached affidavits from several plaintiffs stating that the City had imposed the sewer assessment on their property effective in 2007, which could place their claims within the five-year limitations period. The City argues that the affidavits should be stricken from the record because "[a] party cannot invoke [CR 59.05] to raise arguments and introduce evidence that could and should have been presented during the proceedings before entry of the judgment." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301 (Ky. App. 1997). There is no indication whether the circuit court considered the affidavits in granting summary judgment to the City.

> There are four basic grounds upon which a Rule 59(e) motion may be granted. First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Gullion v. Gullion, 163 S.W.3d 888, 893 (Ky. 2005) (footnotes omitted).

There was no showing that the material in the affidavits was newly discovered or previously unavailable. On the other hand, the affidavits create a material issue of fact regarding the potentially unfair imposition of sewer assessments against property owners whose claims may not be time-barred. Because material issues of fact remain as to which members of the class can make

a showing that their claims both (1) are beyond the scope of Chapters 91A and 96, and (2) accrued within the five years preceding the filing of the complaint, we reverse the summary judgment and remand for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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