

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2011-CA-0001154-MR

VISION DEVELOPMENT, LLC

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT  
HONORABLE STEVE ALAN WILSON, JUDGE  
ACTION NO. 09-CI-01314

BOWLING GREEN MUNICIPAL  
UTILITIES BOARD; CITY OF  
BOWLING GREEN, KENTUCKY

APPELLEES

OPINION AND ORDER  
DISMISSING

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BEFORE: CAPERTON, LAMBERT, AND VANMETER, JUDGES.

LAMBERT, JUDGE: Vision Development, LLC has appealed from the Warren Circuit Court's declaration of rights in favor of the defendants, Bowling Green Municipal Utilities Board ("BGMU") and the City of Bowling Green, Kentucky, finding that BGMU has the authority to recoup Vision Development's share of the

costs associated with the construction of a sewage system pursuant to Kentucky Revised Statutes (KRS) 96.539 and Bowling Green Code of Ordinances Chapter 23 § 2.22(m). Vision Development has also appealed from the order denying its motion to alter, amend, or vacate the declaration of rights. Because of our determination that the orders on appeal are inherently interlocutory, we must dismiss the above-styled appeal.

The underlying action began on July 30, 2009, with the filing of a verified complaint, petition for declaration of rights, and for preliminary and permanent injunctive relief by Vision Development. Vision Development is the owner and developer of real property located between Lover's Lane and Interstate 65 known as Traditions at Lover's Lane ("Traditions"). Traditions was being developed into a traditional residential neighborhood. Prior to December 2005, Vision Development began planning for construction of the infrastructure of Traditions, including a sanitary sewer system. During this same time period, BGMU and Warren County Kentucky Water District ("WCWD") were negotiating to divide and allocate the property that included Traditions, and BGMU wanted to be the entity to provide sewer service to the development. At a meeting in December 2005, BGMU offered to pay the cost of installing the sanitary sewer infrastructure and receive a permanent easement allowing other customers to use and access the sewer as well as other consideration, in exchange for Vision Development permitting BGMU to provide sanitary sewer services to Traditions. To finance the costs of the sewer construction and other projects, BGMU obtained

a federally assisted wastewater revolving loan at 1% interest from the Kentucky Infrastructure Authority. The sewer system ultimately cost more than \$1.6M, and it was built without any input or consent from Vision Development as to design or cost. Prior to January 2007, Vision Development was not notified that BGMU intended to assess any costs against it for the construction of the sewer, with the exception of approximately \$4,250.00 for seventeen connecting taps for residential units in Traditions that would later tie into the sewer.

In January 2007, just prior to completion of the construction, BGMU informed Vision Development that it would not issue a final permit for the sewer or turn on or operate the lift/pumping station until Vision Development signed a letter of agreement and paid a share of the costs of the sewer construction. Vision Development did not agree to this, did not sign or return the agreement, and did not pay any costs. In August 2008, BGMU contacted Vision Development regarding the acceptance letter and costs, and informed it that its portion of the costs was \$692,129.00. At the same time, BGMU provided Vision Development with the proposed agreement letter, which Vision Development contended contained false statements and terms that had never been agreed upon or discussed, including the payment of a share of the costs. Had it known that BGMU intended to assess costs against it, Vision Development stated that it would not have granted BGMU an easement, but would have built its own sewer system pursuant to its preliminary sewer plan. In addition, Vision Development contended that the City of Bowling Green and/or BGMU was withholding the issuance of other building permits to

coerce it into paying its share of the construction costs of the sewer system and had been threatening to refuse to accept the wastewater treatment sewage by Traditions residents.

Based upon that factual background as alleged in its complaint, Vision Development sought monetary damages and a permanent injunction, citing BGMU and the City's lack of authority pursuant to KRS 96.539, due process violations, and breach of contract. In addition, Vision Development sought a declaration that neither the City nor BGMU was entitled to assess or collect any portion of its construction costs for the sewer. Along with its answer to the petition, BGMU filed a counterclaim seeking payment from Vision Development for its share of the costs (\$547,00.00), which it claimed to be empowered to do pursuant to KRS 96.539; for breach of Vision Development's agreement to pay its allocated share once it sought to hook onto the sewer line extension; for the quantum meruit benefit Vision Development received as a result of the sewer line extension; and for an order temporarily restraining Vision Development or any builders on the property from applying for or receiving any further building permits until Vision Development paid its allocated share.

After Vision Development filed its answer, BGMU moved the court for a briefing schedule on the limited issue raised in its counterclaim regarding BGMU's authority to allocate costs for the extension of the sewer onto Traditions. In response, Vision Development indicated that while it was not opposed to bifurcating the issue of BGMU's authority to demand payment of an allocated

portion of the costs from the amount of the costs, it did believe discovery was necessary. By order entered December 9, 2009, the court ordered the parties to complete discovery by February 2, 2010, and then set up the briefing schedule on the limited legal issue of BGMU's authority to require Vision Development to pay an allocated portion of the construction costs.

On April 26, 2010, after both parties had submitted their briefs, the circuit court entered a declaration of rights in favor of BGMU and the City, holding that BGMU had the authority pursuant to KRS 96.539 and local ordinances to assess Vision Development for its share of the cost of installing a sewer system to serve Traditions. The court stated that the "matter is final and appealable" at the conclusion of the order. Vision Development moved to alter, amend, or vacate the declaration of rights, and the court denied the motion by order entered July 15, 2010. As before, the court indicated that the "matter is final and appealable." Shortly thereafter, Vision Development filed a notice of appeal from both orders (Appeal No. 2010-CA-001440-MR). Vision Development filed a subsequent notice of appeal once the circuit court entered a new order in which the court declared that both orders were final and appealable, and that there was no just reason for delay (Appeal No. 2011-CA-000320-MR). These consolidated appeals were dismissed on jurisdictional grounds.

Once the matter returned to the circuit court, Vision Development moved the circuit court to make the original order denying its motion to alter, amend, or vacate, properly final and appealable. Vision Development also

responded to BGMU's prior motion for a scheduling conference on the issue of damages, arguing that it was the intention of the court to make the original ruling immediately final and appealable so as to finalize the first part of the claim. In response, BGMU argued that the circuit court should consider the damages issue before permitting an appeal of the case. Agreeing with Vision Development, the circuit court entered a new order denying Vision Development's motion to alter, amend, or vacate, and included the final and appealable language as set forth in Kentucky Rules of Civil Procedure (CR) 54.02. In addition, the court denied BGMU's motion for a scheduling conference on the damages issue. This appeal now follows.

Before we may reach the merits, we must address what is a fatal jurisdictional problem with the appeal because it was taken from interlocutory and non-appealable orders which did not resolve the issue of the assessment in its entirety. Although this particular jurisdictional issue was not raised by either party, except by BGMU in the case below in its June 15, 2011, response and at the June 20, 2011, hearing, we are reminded that "the appellate court should determine for itself whether it is authorized to review the order appealed from." *Hook v. Hook*, 563 S.W.2d 716 (Ky. 1978).

Kentucky's Rules of Civil Procedure address what orders are subject to review on appeal. CR 54.01 defines a judgment as follows:

A judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the

rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order”.

CR 54.02, in turn, addresses situations where multiple claims or parties are present:

(1) When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

“The underlying reason for CR 54.02 providing that a final judgment may be granted in one claim for relief where multiple claims are presented only upon determination that there is no just reason for delay, is to prevent staggered appeals or piecemeal proceedings in appellate courts.” *Peters v. Board of Ed. of Hardin County*, 378 S.W.2d 638, 640 (Ky. 1964).

In the present case, the circuit court attempted to invoke CR 54.02 by including the required recitals at the conclusion of the June 21, 2011, order on appeal because it wanted a ruling on the fundamental issue before having the parties incur the additional costs associated with determining damages. This case certainly meets the requirement of CR 54.02 in that it arguably involves multiple

claims and multiple parties. *See Hook*, 563 S.W.2d at 717. However, the law is clear that before CR 54.02 may be applied, “there must be a final adjudication upon one or more of the claims in the litigation. The judgment must conclusively determine the rights of the parties in regard to that particular phase of the proceeding.” *Hale v. Deaton*, 528 S.W.2d 719, 722 (Ky. 1975). “Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable.” *Hook*, 563 S.W.2d at 717.

While *Hook* addressed a domestic relations issue, the procedural situation the Court addressed in *Hook* is analogous to the situation presently before the Court. *Hook* involved the modification of a foreign custody order. The father, a Kentucky resident, filed suit against the mother in Jefferson Circuit Court to modify the original order when the mother brought the child to the Commonwealth. The mother appealed from the circuit court’s ruling that it had jurisdiction. On appeal, the Court of Appeals affirmed the ruling and remanded for disposition of the modification question. The Supreme Court vacated that opinion for dismissal of the initial appeal, holding that the jurisdictional order was interlocutory and therefore not reviewable on direct appeal. *Hook*, 563 S.W.2d at 716-17.

In the present case, the issue of the assessment of the sewer costs to Vision Development had potentially two subparts: 1) whether BGMU had the authority to allocate costs to Vision Development; and 2) if so, what the amount of that allocation of costs should be. Had the court decided in favor of Vision



Development on BGMU's authority to assess the costs, the claim would have been entirely decided and subject to an appeal. But the court decided in favor of BGMU, thereby leaving the issue of the amount of the allocated costs to be decided. And while we appreciate the circuit court's stated reasons for including the finality language, the fact remains that the court has not issued a final adjudication on this claim because the parties still need to litigate the subpart of the issue addressing the amount of the allocated costs. *See Tax Ease Lien Invs. 1, LLC v. Brown*, 340 S.W.3d 99, 102 (Ky. App. 2011) (holding that order determining liability, but reserving amount of damages, was an interlocutory order, notwithstanding inclusion of CR 54.02 finality language). Accordingly, both the declaration of rights and the order denying the motion to alter, amend, or vacate are inherently interlocutory. Until an order ruling on the amount of allocated costs is entered, the court's decision that BGMU had the authority to assess the costs against it is not ripe for review.

For the foregoing reasons, the above-styled is ORDERED  
DISMISSED as interlocutory.

ALL CONCUR.

/s/ James H. Lambert  
JUDGE, COURT OF APPEALS

ENTERED: November 16, 2012

BRIEFS FOR APPELLANT:

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