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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001345-MR

COMMONWEALTH DEVELOPMENT
COMPANY, LLC APPELLANT

APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 11-CI-01879

LEXINGTON-FAYETTE URBAN
COUNTY PLANNING COMMISSION APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Commonwealth Development Company, LLC ("CDC"), appeals from an order of the Fayette Circuit Court granting summary judgment in favor of Appellee, the Lexington-Fayette Urban County Planning

Commission ("Commission"). For the reasons set forth herein, we reverse and remand the matter for further proceedings in accordance with this opinion.

In October 2000, CDC acquired ownership of 12.55 acres of property located along Chilesburg Road in Lexington, Kentucky, for the purpose of developing the subdivision now known as Andover Creek. Andover Creek adjoins property owned by the Graham Tucker Trust, the trustee of which is John Tucker. In late 2002 and early 2003, while CDC was in the process of preparing development plans for review and approval by the Commission, CDC's manager was allegedly approached by Tucker who expressed his interest in selling the Tucker property to CDC. As such, Tucker did not want CDC to construct the fence required by Article 6-3(b) of the Lexington-Fayette Urban County Government's Land Subdivision Regulations. Said regulation provides, in pertinent part:

> A standard gauge diamond mesh wire fence, or durable construction, at least 52" in height, set on a7 ½-foot posts with a required 6" top board, shall be constructed by the developer along the boundary line between any residential subdivision and land that is being actively used for agricultural purposes, unless the owner of the agricultural property agrees to an exemption.

In reliance upon Tucker's oral agreement to an exemption, CDC submitted final plats of the subdivision plan that did not include the fence. Further, CDC developed the property and did not replace the existing fence between the properties with the fence described in Article 6-3(b). Subsequently, however, CDC and Tucker were unable to reach a purchase price for the Tucker property.

In October 2003, CDC received a letter from the Commission stating that it was in violation of Article 6-3(b) and ordering it to construct the fence required by the Article. The letter was the result of a complaint filed by Tucker.[1] Although CDC responded that it believed it had been exempted from any obligation to construct the fence by Tucker, it nevertheless agreed to do so and contracted with Tobacco Rose Construction and Development Services, LLC to install the fence. Tobacco Rose then attempted to construct the fence in February 2005, November 2005, and April 2007. Each time, Tucker refused access to the property.[2] Finally, in August 2007, CDC, the Commission and Tucker met at the property for the purpose of marking an agreed upon location for the proposed fence. However, when Tobacco Rose made its fourth attempt to install the fence along the agreed-upon location, Tucker again refused access to the property. A subsequent attempt by CDC, the Commission and Tucker to reach an agreement about the fence through mediation failed.

On April 8, 2011, the Commission filed the instant action against CDC alleging a violation of Article 6-3(b) and seeking a court order directing CDC to construct the fence. Thereafter, in March 2012, the Commission filed a motion for summary judgment, arguing that CDC had failed to meet its burden of proof that

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[1] The Commission also filed criminal complaints against CDC in April 2004 and August 2004, for violations of Article 6-3(b). Both criminal actions were later dismissed due to the fact that the remedies available under the Subdivision Regulations are limited to administrative or civil proceedings.

[2] Significantly, the Andover Creek homeowners were equally hostile, posting "No Trespassing" signs in their yards and denying Tobacco Rose entry to the properties.

an exemption to the fencing regulation applied. The Commission attached no affidavits or other evidence supporting its position. CDC thereafter filed a response, as well as its own motion for summary judgment, arguing that (1) the Commission's action was time barred by the applicable five-year statute of limitations; (2) John Tucker granted CDC an oral exemption from the fencing regulation; (3) the regulation did not apply because the Tucker property was not actively being used for agricultural purposes; (4) the Commission should be estopped from enforcing the fencing regulation; and (5) that the Commission had failed to join indispensable parties who would be affected by the outcome of the matter.

Following a hearing in May 2012, the trial court granted the Commission's motion for summary judgment. In so doing, the trial court found that because the Tucker property was zoned agricultural, Article 6-3(b) was applicable. Further, the court determined that CDC failed to prove that Tucker had agreed to an exemption, noting that it was Tucker who complained in 2003 that the fence had not been constructed. Oddly, although the trial court focused much of its attention at the hearing on the statute of limitations issue, it failed to address such in its judgment. CDC thereafter appealed to this Court. Additional facts are set forth as necessary.

Our standard of review on appeal of a 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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment shall be granted

"if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper only "where the movant shows that the adverse party could not prevail under any circumstances." *Id.*

CDC first argues that the trial court erroneously found that there was no genuine issue of material fact regarding CDC's obligation to construct the fence required by Article 6-3(b). CDC points out that the Commission submitted no affirmative evidence in support of its motion, nor did it refute the evidence submitted by CDC. Further, CDC contends that the trial court erroneously shifted the burden of proof to CDC to establish that a material issue of fact *did* exist, rather than requiring the Commission to affirmatively prove that there were no disputed issues of fact. After reviewing the record, we must agree with CDC.

In its response to the Commission's motion, as well as in support of its own summary judgment motion, CDC submitted the affidavit of its project manager, John Barlow, who testified that he was approached by Tucker on several occasions during the initial subdivision planning phase. During each encounter, Tucker expressed the desire to sell his property to CDC and explicitly stated that he did not

want the Article 6-3(b) fence to be constructed between the properties. While it is certainly conceivable that when CDC and Tucker were ultimately unable to agree upon a purchase price, Tucker became disgruntled and complained about the lack of a fence, the Commission neither disputed Barlow's affidavit nor produced any evidence that Tucker did not initially agree to an exemption.

Similarly, in support of its argument that Article 6-3(b) was inapplicable because the Tucker property was not being actively used for agriculture purposes, CDC produced the affidavit of Bobby Tucker, John Tucker's brother and a beneficiary of the Tucker Trust. Therein, Bobby Tucker stated that the Tucker property was a fallow grass field completely surrounded by residential development, and that it had not been used for the cultivation of crops or animals since at least 2004. Again, however, at the hearing the Commission did not affirmatively establish that the property was being actively used for agricultural purposes, bringing it within the purview of Article 6-3(b), but rather only that it was zoned agricultural and CDC failed to prove that it was being used otherwise.

It is well-settled that the party moving for summary judgment has the burden of establishing the non-existence of any issues of material fact. *See Robert Simmons Const. Co. v. Powers Regulator Co.*, 390 S.W.2d 901 (Ky. 1965); *Barton v. Gas Service Co.*, 423 S.W.2d 902 (Ky. 1968). In the instant case, the Commission filed the motion for summary judgment and thus bore the initial burden. Furthermore, "'[u]nless and until the moving party has properly shouldered the initial burden of establishing the apparent non-existence of any

issue of material fact,' the non-movant is not required to offer evidence of the existence of a genuine issue of material fact." *Goff v. Justice*, 120 S.W.3d 716, 724 (Ky. App. 2002)(*quoting Robert Simmons*, 390 S.W.2d at 905). Accordingly, in order for CDC to have had the burden of coming forward with evidence as to the existence of a material issue of fact, the Commission would first have had to "shoulder the initial burden" as to the non-existence of any genuine issues of material fact.

The Commission argued at the hearing that CDC failed to produce evidence that it was exempted from constructing the fence. Essentially, the Commission's position was that because Tucker had filed the complaint, he either had not agreed to an exemption or he had changed his mind about such. However, the Commission neither pointed to any evidence of record nor presented any proof in support of that position. Significantly, during the hearing the trial court specifically asked the Commission's counsel: "This is your summary judgment motion. Don't you have some obligation to present some proof, some affidavit to support it?" Nevertheless, the Commission maintained, and the trial court ultimately agreed, that it was CDC's burden to prove its defense.

It is clear from the proceedings that instead of requiring the Commission to come forward with affirmative evidence establishing that there were no genuine issues of material fact, the trial court presumed facts to be true for the purpose of the Commission's summary judgment motion and then forced CDC to produce evidence to rebut those presumptions. In other words, the trial court placed the

summary judgment burden not on the Commission to support its motion but on CDC to prove that there was an issue of material fact. "This shifting of the burden is not supported by case law." *White v. Rainbo Baking Co.*, 765 S.W.2d 26, 30 (Ky. App. 1988).

Because the Commission filed a motion for summary judgment on the grounds that CDC failed to prove it was exempted from Article 6-3(b), it bore the burden of proving there was no genuine issue of material fact as to whether the regulation was applicable. Certainly, whether Tucker changed his mind is not relevant to whether he initially agreed to an exemption. Similarly, whether the property is zoned agricultural is not determinative of whether it is being used for such purposes. Nevertheless, even if we concluded that the Commission shouldered its burden of initially establishing the non-existence of any genuine issues of material fact, we believe that CDC produced sufficient evidence of record to establish the existence of such issues. Certainly, we find no evidence refuting the affidavits produced by CDC. Summary judgment is proper when "it is manifest that the party against whom the judgment is sought could not strengthen his case at trial and the moving party would be entitled ultimately and inevitably to a directed verdict." *American Ins. Co. v. Horton*, 401 S.W.2d 758, 760-61 (Ky. 1966)(Citation omitted). We simply cannot conclude that such is the case herein and, as such, summary judgment was improper.

CDC next argues that the Commission's claims are barred as a matter of law. The Commission's complaint set forth a cause of action to enforce Article 6-

3(b) of the subdivision regulations and, as such, is governed by the five-year statute of limitations set forth in KRS 413.120.[3] CDC points out that under Kentucky law, a cause of action accrues, and the limitations period begins to run, when "the plaintiff discovers or in the exercise of reasonable diligence should have discovered not only that he has been injured but also that his injury may have been caused by the defendant's conduct." *Louisville Trust Co. v. Johns-Manville Products Corporation*, 580 S.W.2d 497, 501 (Ky. 1979)(*Quoting Raymond v. Eli Lilly & Co.*, 371 A.2d 170, 174 (N.H. 1977)). As evidenced by the violation letter sent to CDC, the Commission became aware no later than October 2003 that the Article 6-3(b) fence had not been constructed between the Andover Creek Subdivision and the Tucker property. Thus, CDC contends that the Commission's 2011 action is clearly time barred.

In response to CDC's argument in the trial court, the Commission maintained that the five-year statute of limitations was tolled by the provisions of KRS 100.911, which states in relevant part:

> (1) Any person or entity who violates any of the provisions of KRS 100.201 to 100.347 or any of the regulations adopted pursuant thereto for which no other penalty is provided, shall upon conviction, be fined not less than ten ($10) but not more than five hundred dollars ($500) for each conviction. Each day of violation shall constitute a separate offense.

[3] KRS 413.120 provides in pertinent part: "The following actions shall be commenced within five (5) years after the cause of action accrued: . . . (2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability."

Based upon the above language, it is the Commission's position that each day CDC was in violation of Article 6-3(b) constituted a separate offense, thus tolling the limitations period.

Although the majority of the hearing in the trial court focused on the limitations issue, the trial court did not make an explicit ruling on such either from the bench or in its summary judgment. We are of the opinion that the Commission's attempt to invoke KRS 100.991 is misplaced. Based upon its plain language, it is a penalty statute used to determine the amount of penalty after a criminal conviction. *See Ratliff v. Phillips*, 746 S.W.2d 405, 407 (Ky. 1988). There is nothing within KRS 100.991 referencing a statute of limitations or indicating that the legislature intended it to toll the provisions of KRS 413.120.

Nevertheless, we do believe that there is an issue as to when the Commission's cause of action accrued – in 2003 when it became aware of CDC's alleged violation of Article 6-3(b) or in 2007 when the fourth attempt to install the fence failed. Thus, while we are remanding the matter for further proceedings on the merits, the statute of limitations is a threshold issue to be resolved by the trial court.

CDC also contends that the Commission's claims should be barred by the doctrine of estoppel. CDC claims that it detrimentally relied upon the Commission's approval of its development plans and final plats that did not include the fence. Based upon the Commission's approval, the lots in the subdivision were sold, homes were constructed and CDC no longer owns or

controls any of the property. As a result, CDC points out that construction of the fence at this point would be substantially more costly and problematic due to the obvious hostilities of the landowners.

"While it is true that equitable estoppel can be invoked against a governmental entity in unique circumstances, a court must find that exceptional and extraordinary equities are involved to invoke that doctrine." *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government,* 265 S.W.3d 190, 194 (Ky. 2008); *Weiand v. Bd. of Trs. of Kentucky Ret. Sys.*, 25 S.W.3d 88, 91 (Ky. 2000). Estoppel is a question of fact to be determined by the circumstances of each case. *Id.* at 91–92 (citations omitted).

> The essential elements of equitable estoppel are (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. Broadly speaking, as related to the party claiming the estoppel, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Id. (*quoting Electric and Water Plant Bd. of Frankfort v. Suburban Acres Dev., Inc.*, 513 S.W.2d 489, 491 (Ky. 1974)); *see also Sebastian-Voor Properties, LLC.*, 265 S.W.3d at 194-95.

In ruling that estoppel did not apply herein, trial court stated:

> Defendant claims that it had reason to believe that the lack of a fence was acceptable because the Final Record Plats (which did not depict the Fence) were approved. However, Defendant has attempted for a six-year period to install the Fence. Additionally, fences are not generally shown on the final Record Plats. Furthermore, Defendant did not have a lack of knowledge as to the facts in question and Plaintiff's conduct does not amount to a false representation of the facts – both elements required to establish an estoppel defense.

Certainly, if CDC believed that its development plan was approved without the fence, then it did have a lack of knowledge as the facts in question, namely its obligation to construct the fence – at least until it received the Commission's letter in 2003. Moreover, contrary to the trial court's ruling, CDC was not required to show that the Commission falsely represented the facts, only that it engaged in conduct "calculated to convey the impression that the facts are otherwise than, and inconsistent with," those which the Commission now attempts to assert.

What is more troubling, however, is the trial court's apparent adoption of the Commission's assertion that fences are not shown on final plats and would not be considered by the Commission in approving such plats. Specifically, in its reply during the summary judgment proceedings, the Commission stated:

> The conduct of the Commission in approving the Final Record Plats fails to show any representation of material fact as to the fencing. Final Record Plats are regulated by the requirements of Article 5 of the Land Subdivision Regulations, and the required information is not the same as that required for the development plan previously filed, which was governed by Article 6. . . . As a developer, CDC was well aware of the purpose of final

> record plats, and would certainly never have reasonably relied on those approvals to act as a waiver of the Subdivision Regulation requirement on a development plan. Any such waivers by the Planning Commission must be by application and affirmative approval by the Commission.

First, we would note that Article 5 of the regulations, upon which the Commission relies, is not part of the record. Second, we find no requirement of an affirmative waiver within the language of Article 6-3(b). If approval of a waiver, or exemption as it is characterized in Article 6-3(b) was required, the drafter of the Subdivision Regulations could have specifically so provided, as is evidenced by other Articles. (Article 6-8(n)(1) requires sidewalks on both sides of the road unless "a specific waiver is granted by the Commission.")

Clearly, the trial court's analysis of this issue was erroneous. However, we believe that there is insufficient evidence in the record on appeal from which we can make a determination as to whether the Commission should be estopped from imposing the fencing regulation upon CDC. Accordingly, this issue requires further consideration upon remand.

Finally, we would be remiss if we did not comment on the nature of this case. It is apparent to this Court that CDC is in an impossible position. It is quite clear from Tucker's actions that he does not actually want a fence constructed. It is quite plausible, and given the facts herein even probable, that Tucker did give CDC an exemption when the subdivision was initially developed in the hopes of a potential land negotiation. His subsequent complaint to the Commission was filed

only after CDC did not purchase his property. Nevertheless, CDC upon receiving the Commission's violation letter attempted to comply by contracting with Tobacco Rose to construct the fence. The Commission and the trial court characterize this effort as an admission of CDC's guilt. However, we are of the opinion that CDC has gone to great lengths to construct a fence that neither Tucker nor the subdivision homeowners want.

Despite the Commission having knowledge of Tucker's and the homeowners' obstructionist actions, it nevertheless filed a civil action against CDC to force it to do something it had already been unsuccessfully trying to do. The question is why? Article 6-1 of the Subdivision Regulations provides in pertinent part, "A major direction of this article is to promote development that is most harmonious with the existing environment, while providing guidelines and standards to protect the public health, safety and welfare." The Commission has not cited to any public health, safety or welfare concerns. As CDC points out, the subdivision is complete and it has no continuing ownership or control over the property. The record indicates that there is a fence currently separating the subdivision and the Tucker property, and that these properties have apparently co-existed without issue since 2001. As such, we are perplexed as to why time, money and resources have been expended on litigation to compel CDC to do something that by all indications is simply not possible.

For the reasons set forth herein, the order granting summary judgment in favor of the Commission is reversed and this matter is remanded to the trial court for further proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
K. Brad Oakley Lexington, Kentucky	Tracy W. Jones Edward W. Gardner Lexington, Kentucky