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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000642-MR

HEIDI DATILLO AND NICK DATILLO

APPELLANTS

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 10-CI-00898

CHRISTIAN COUNTY
BOARD OF EDUCATION

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Appellants, Heidi and Nick Datillo (hereinafter “the Datillos”), appeal from an order of the Christian Circuit Court granting summary judgment in favor of Appellee, the Christian County Board of Education (“the Board”). Specifically, the Datillos argue that the trial court’s grant of summary judgment lacked sufficient factual findings and erroneously concluded that no genuine issues

of material fact existed regarding their suit seeking enforcement of an agreement to purchase real property and seeking damages for breach of that agreement. Because the Datillos failed to provide affirmative evidence to the contrary, we hold that summary judgment was appropriate. Therefore, we affirm.

Background

I. Factual History

This case concerns two tracts of land which rest side-by-side along U.S. Highway 68 near Hopkinsville. In 2004, Ralph and Janet Collins sold the Board a portion of the undeveloped and previously undivided land. A condition of the purchase agreement between the Collinses and the Board read as follows:

The Buyer shall develop two (2) entrances to the Property from the By-Pass. The Buyer will grant a dedicated easement to the Sellers along the second entrance (located closest to U.S. 68/80) which will allow Sellers access to the remainder of their property. The Buyer will also construct the second entrance and a street, the length of which will be the minimum necessary to access the Buyer's property, in conformity with the minimum requirements for dedication and acceptance by the City of Hopkinsville into its street program.

In 2006, the Collinses sold the remaining tract to the Datillos who planned to develop it.

At some point after the Datillos purchased the adjacent tract, the Board constructed an elementary school on its tract, as well as two entrances from Highway 68. The first entrance served the school. The Board constructed the second entrance within the aforementioned easement. The entrance stretched only

200 feet from the side of the highway and ended just short of the Datillos' property line. Neither the Board, nor any other party sought dedication or acceptance of the entrance from the City of Hopkinsville as a street.

On March 24, 2010, the Datillos submitted a request to the Hopkinsville-Christian County Planning and Zoning Commission (hereinafter "the Commission") for rezoning of the entire seventy-five-acre tract from residential to business. Two days later, the Datillos executed a contract to sell one acre of their tract to a buyer for the purpose of constructing a daycare center. The purchase agreement required the transaction to close within sixty days. On the same day, the Datillos contracted with a second party to build the daycare center for the flat price of \$405,000.

On April 5, 2010, the Commission informed the Datillos that it required the Board's approval of the request for a zoning change because access to the Datillos' land ran exclusively over the Board's tract. At a subsequent meeting of the Board, members voted not to co-sign the request. As a result, the Commission took no further action pertaining to the Datillos' request. Instead, the Datillos submitted a letter to the Board demanding that it comply with the 2004 purchase agreement between it and the Collinses. This proved unsuccessful.

II. Procedural History

On June 25, 2010, the Datillos filed suit against both the Commission and the Board. In their complaint, the Datillos alleged that the Board had breached the 2004 purchase agreement. Specifically, the Datillos alleged that the Board

“failed within a reasonable time, four (4) years, to properly construct, dedicate and have accepted by the City of Hopkinsville a fully compliant street into the City’s street maintenance program....” The Datillos sought compensatory damages, specific performance, as well as both declaratory and injunctive relief. The complaint also made various allegations against the Commission regarding its refusal to rezone the property in the absence of the Board’s approval. Following the defendants’ respective Answers, the trial court remanded the case to the Commission so that it could address “the matters that are the subject of the [Datillos’] complaint.” For reasons which are not abundantly clear from the record, the Datillos did not, in fact, proceed before the Commission.¹

In May 2011, the Datillos sold the entirety of their still-undeveloped property for a profit of more than \$33,000. In October 2012, the trial court dismissed the Datillos’ claims against all defendants except the Board. Subsequently, the Board moved for summary judgment on the claims against it, citing the Datillos’ failure to exhaust their remedies before the Commission, as well as their lack of standing after sale of the property.

In an order entered March 7, 2013, the trial court granted the Board’s motion for summary judgment. In its order, the trial court concluded “[t]here are no genuine issues of fact. Once the Plaintiffs[] sold the property in question to the

¹ It appears that the Datillos sent a document to the Commission seeking clarification of several issues regarding the rezoning of their property. However, the Commission responded by informing the Datillos that the completion of a standard form and payment of a filing fee was first required before the Commission would consider their appeal. The Datillos appear never to have responded to or complied with this request.

current owners, they waived any right to assert claims against Defendant.” The Datillos now appeal from this order.

Standard of Review

The standard of review governing an appeal of a summary judgment is well-settled. Because a summary judgment involves no fact-finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

“The 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, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary judgment appropriate only “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 a judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

Analysis

The trial court based its decision to grant summary judgment in favor of the Board on the Datillos’ apparent lack of standing following their sale of the

property in question. On appeal, the Datillos argue that the trial court's order lacked sufficient factual findings. They further argue that summary judgment was inappropriate due to the fact that genuine issues of material fact remained regarding the Board's contractual duty to the Datillos, its breach of that duty, and the damages the Datillos incurred as a result.

Also on appeal, the Board raises an issue not addressed in the Datillos' brief. The Board argues that, upon receiving the Planning Commission's letter declining to rezone the property without the Board's approval, it was incumbent upon the Datillos to appeal that decision before the Commission and exhaust their administrative remedies prior to filing suit in the circuit court. We address this threshold issue first.

I. The Datillos' Obligation to Exhaust Administrative Remedies

The Board argues fervently that the Datillos' breach of contract claim is barred because they did not first assert their appellate rights before the Hopkinsville Planning Commission. The Board is mistaken on the law.

Kentucky law is indeed clear that a plaintiff must first exhaust her administrative remedies before seeking judicial relief from an administrative agency's decision. *See, e.g., Parrent v. Fannin*, 616 S.W.2d 501, 504 (Ky. 1981) (citing *Tharp v. Louisville & Nashville Railroad Co.*, 210 S.W.2d 954 (Ky. 1948)); *see also* 5 Ky. Prac. *Methods of Practice* § 37:9 (West, 2013). However, the Board seems to overlook the phrase "from an administrative agency's decision." The

Datillos' claim against the Board in circuit court does not appeal an administrative agency's decision; it asserts an original claim for breach of contract seeking to recover the alleged damages stemming from that breach. Hence, the Board incorrectly asserts that the Datillos' claim is barred by their failure to appeal the zoning decision which adversely affected their ability to develop their land.

II. Sufficiency of the Trial Court's Order

We also briefly address and dispose of the Datillos' argument that the trial court's failure to include sufficient findings of fact in its March 7, 2013 order merits reversal. CR 52.01 requires specific findings of fact in "all actions tried upon the facts without a jury." However, the rule specifically states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." Therefore, the trial court's order on the Board's CR 56 motion is expressly exempt from the requirements of CR 52.01.

III. Standing

Having dispensed with the extraneous issues each party raises on appeal, we now address the issue upon which the trial court based its decision to grant summary judgment. In its brief order, the trial court held that the Datillos lacked standing to bring their claims against the Board. The court stated, in part, "[t]here are no genuine issues of fact. Once the Plaintiffs[] sold the property in question to the current owners, they waived any right to assert claims against Defendant." On appeal, the Datillos apparently concede that their 2011 sale of the property divested them of the right to seek declaratory relief or specific

performance of the purchase agreement. However, they contend that the sale did not divest them of standing to seek consequential and delay damages associated with the Board's alleged breach of that agreement.

We agree with the trial court and the Board that sale of the property rendered moot the questions of specific performance and injunctive relief. However, we agree with the Datillos that the sale of their tract does not so automatically preclude them from seeking damages stemming from the alleged prior breach of the 2004 purchase agreement. For that reason, on the sole matter of damages, we proceed under the aforementioned standard to determine whether summary judgment was appropriate.

IV. Sufficiency of Claim of Damages

The Datillos contend that they “can and would have shown that they suffered damages as a direct and proximate result of the breach of contract[.]” that breach being the Board's failure “to properly dedicate and have accepted by the City of Hopkinsville a compliant street[.]” They assert that these damages include delay damages sustained because the Board failed to comply with the terms of the 2004 purchase agreement, as well as “lost profit” that would have accrued from the planned development of their land.

However, a party opposing summary judgment cannot successfully defeat such a motion without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial. *See Steelvest*, 807

S.W.2d at 482; *Godman v. City of Fort Wright*, 234 S.W.3d 362 (Ky. App. 2007); *O'Bryan v. Cave*, 202 S.W.3d 585 (Ky. 2006). A review of the Datillos' 2012 Response to Motion for Summary Judgment, as well as the record as a whole, reveals no such affirmative evidence regarding the Datillos' entitlement to any measure or amount of damages. While it is indisputable that the Datillos realized a profit of more than \$33,000 from the sale of their tract, there is no evidence in the record which affirmatively establishes how that profit compares with the profit the Datillos could have realized after fully developing the land. This was a crucial, and a fatal, omission.

Though the summary judgment standard is a low bar for an opposing party to overcome, more was required to do so in this instance. Overall, the Datillos fail to demonstrate that they pled their damages in a manner sufficient to create a genuine issue of material fact for trial as required under Kentucky law. Therefore, their general claim of damages is insufficient to prevent summary judgment, and we detect no error in the trial court's decision to that effect.

The decision of the Christian Circuit Court is affirmed.

DIXON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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