RENDERED: OCTOBER 27, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001570-DG

AUGUST PROPERTIES, LLC — APPELLANT

v.

ON DISCRETIONARY REVIEW FROM MERCER CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 15-XX-00002

CITY OF BURGIN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS, AND JONES, JUDGES.

JONES, JUDGE: This case involves an Ordinance adopted by Appellee, the City of Burgin, Kentucky. As amended, the Ordinance imposes liability for delinquent water bills on both the owner and the occupant of the premises that received the water services. The Appellant, August Properties ("August"), owns and rents residential property in Burgin. August filed suit in Mercer District Court

challenging the enforcement of the Ordinance against it. The district court ruled in favor of the City of Burgin. August appealed to the Mercer Circuit Court, which affirmed. We accepted discretionary review to determine whether the City of Burgin's actions violated August's statutory and/or Constitutional rights. After careful review, we affirm the ruling of the Mercer Circuit Court.

I. Factual and Procedural Background

The City of Burgin ("the City") is a fifth-class city, incorporated under the laws of the Commonwealth of Kentucky, located in Mercer County, Kentucky. The City operates a municipal water distribution system, for the benefit of its residents and has done so for many years. August Properties, LLC, owns rental residential properties in the City of Burgin, Kentucky.

The City establishes water rates and amounts for deposits, disconnect fees, tap fees, turn-on fees, penalties, cut-off and billing rates pursuant to Ordinance 269, which was originally amended October 3, 1988.

The City later amended Ordinance 269 to make the owners of rental residential properties liable for delinquent and unpaid water bills of tenants. This amendment was passed on November 5, 2002, and added Section 3, sub-paragraph G(1), which provides:

> The rates and charges aforesaid shall be billed to the Owners or Occupants of the premises, and if the Occupant of any premises is not also the Owner, both the Owner and the Occupant shall be responsible for the payment of the water and garbage bills, which, if unpaid, shall constitute a lien upon the premises. If water service is disconnected by the City by reason of delinquency in

> the payment of any water and garbage bills, reconnecting of such service shall not be made until the Owner or Occupant pays all charges and penalties owed, plus the amount of $50.00 as a disconnection and reconnection charge. If any deadline date falls on a Sunday or legal holiday, such deadline shall not expire until the next secular day thereafter.

Ordinance 269 was amended again on October 7, 2008. Next, on May 10, 2011, Section 2, paragraph C, of Ordinance 269 was amended to establish penalties and revise the provisions for the collection and enforcement of rates and charges for the use of, and services rendered by, the City's municipal water works. Finally, on November 8, 2011, Ordinance 269 was amended to allow the City to charge property owners a $20.00 work order fee to reconnect the water when disconnected for non-payment, or when landlords want to turn the water on and off for cleaning.

The City's water department policies and procedures are briefly described as follows.

The City requires a $50.00 non-refundable turn-on fee from all new customers and an additional, refundable deposit of $75.00 from tenant/lessee/renter water users or $35.00 from all new landlord/lessor/owner water users. Water meters are read by the 19th of each month and a bill is mailed to the customer on the last working day of the month. If the bill is not paid by the 16th of the next month, it is deemed past due and a penalty of 10% is added to the bill. If the bill

continues to go unpaid, the water service is cut off on the 21st of the month, or the next weekday if the 21st falls on a Sunday or legal holiday.[1]

If the water bill becomes delinquent, the delinquency is first debited against the refundable deposit, and the balance of the bill, if any, is mailed to the property owner, or if the property is a rental unit, to the tenant. If a tenant is delinquent, the City does not notify the landlord until someone requests a new service at the property. However, the landlord can inquire to find out the status at any time. Testimony revealed that the City often tries to contact the delinquent tenant for a period of around three months and then, if not successful, the City will bill the landlord/property owner.

If water service is disconnected due to lack of payment, the City will not reconnect the service until the delinquent bill, which includes a 10% penalty, and a $50.00 turn-on fee, is paid. For new customers, a $35.00 property owner deposit or $75.00 tenant deposit is also required.

On November 2, 2011, Mayor Dale Turner sent a letter to all water customers explaining the City's water bill policy and the City's need to enforce its policy on turning off past due water accounts due to the large number of delinquent water bills. This letter provided:

> Dear Customer,
>
> Due to the large number of delinquent water bills the City of Burgin has each month, along with the cost and

[1] Testimony revealed that this was previously not a hard and fast rule, but the City began enforcing this in 2011 due to the time and costs associated with the large number of delinquent water bills.

> time it takes for the Water Department to handle these bills, we are going to have to enforce our policy on turning past due water accounts off.
>
> The Burgin Water Department's policy is that all water bills are due on the 15th of the month. The penalties are put in on the 16th of the month. The cut off day is the 21st of the month, to avoid having your water disconnected your bill must be paid by 8:30am on the 21st of each month. When water has been cut off for nonpayment, service will not be restored until the past due amount is paid along with a $50.00 reconnect fee, in addition, starting December 2011 a $20.00 work order fee will be added to all reconnections. For example, if your water bill is $50.00 and you are turned off for nonpayment, it will cost you an additional $70.00 to have water restored. You will be paying a total of $120.00 for water to be turned back on.
>
> If you are having trouble paying your water bill please contact the Water Department at 748-5220, or if you have any questions. Our office is open Tuesday-Friday from 8:30am to 3:00pm.
>
> Sincerely,
>
> Mayor Dale Turner

As a result of Ordinance 269 and the above described practices, August was charged for several unpaid water bills that accrued to accounts established by its former tenants. As a result, August filed a complaint in the Mercer District Court on September 20, 2013, seeking a refund for all water bills it paid for which the City is "unable to account for [it] being obligated to pay" as well as "an accounting for the water bills for each tenant by which [the City] is claiming [August] is obligated to pay." The City filed an Answer to the Complaint with a Motion to Dismiss on October 9, 2013. August filed a Motion

for Summary judgment on December 20, 2013, which was ultimately denied on May 1, 2014.

A short bench trial was held on August 28, 2014. There, both parties presented testimony and submitted documents. Following the bench trial, both parties filed Proposed Findings of Fact and Conclusions of Law. On February 4, 2015, the court granted the City's Motion for Summary Judgment. The district court found that the City's Ordinance "which respectfully may very well not be liked by the citizens of Burgin and/or the property owners of the City of Burgin, however, [is] not found by this Court as arbitrary, unreasonable, and unenforceable as applied and enforced against the Plaintiff as alleged." The district court further concluded that the Ordinance was "duly constitutional" and that "it did not have the proper authority to declare the City Ordinances of the City of Burgin to be amended to reflect the changes requested by the Plaintiff regarding the procedures for collection and notification of past due water bills."

August appealed to the Mercer Circuit Court on June 19, 2015. On September 18, 2015, the circuit court entered an order affirming the district court. We granted August's petition for discretionary review.

II. Standard of Review

"The 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 is

only proper when "it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. A party opposing a summary judgment motion cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481. In *Steelvest*, the word "'impossible' is used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

Because summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court's decision and must review the issue *de novo*. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the granting of summary judgment by the trial court.

III. ANALYSIS

August argues that the City does not have legal authority to enact and enforce the subject ordinance. Further, August argues that the Ordinance is arbitrary, unreasonable, and capricious as applied and, as such, violates Section 2 of the Kentucky Constitution. In contrast, the City argues that there is nothing extraordinary, unusual, extreme, or punitive about the ordinance. The City argues

that the Ordinance is statutorily authorized, applied equally to all customers who receive its water and garbage services, and does not violate any provision of the Constitution, on its face, or as applied.

A. Validity of the Ordinance

In *Puckett v. City of Muldraugh*, 403 S.W.2d 252 (Ky. 1966), the Court addressed a situation with facts very similar to the case before us. August attempts to dismiss *Puckett's* applicability because it was "decided half a century ago, before technology and methods existed to manage the collection of bills and fees for a water system." While technology may have changed since 1966, the basic constitutional precepts at issue in *Puckett* have not changed. Despite the lapse of time, *Puckett's* precedential value cannot be ignored by us. Because we find *Puckett* to be on point, we will address it in some depth.

Puckett dealt with an ordinance enacted by the City of Muldraugh, a fifth-class city. Muldraugh operated a water system and had an ordinance that provided that water charges shall be billed to the owner of the premises unless the tenant makes application for water services. The Muldraugh ordinance allowed the city to hold a landlord, who had installed separate water meters for each of his rental units, liable for utility bills incurred by the person renting the premises. Puckett, a landlord, challenged the ordinance by arguing that it violated his basic rights by making him the legal guarantor of his tenants' utility bills. *Id.* at 253. Ultimately, the Court held that the ordinance did not deny due process of law, was authorized by statute, and was not arbitrary or unreasonable.

The *Puckett* court determined that a legislature may authorize a public utility to impose liability for water rents upon the owner of property without implicating due process. *Id*. at 254. The Court explained that, "[t]he matter of legislative authority is not one of due process. It involves the power of the municipality to act." *Id.* KRS[2] 106.210 grants the city extensive powers to do those things necessary for the acquisition, operation, and maintenance of a water system, including the right to charge and collect reasonable rates for services rendered. *Id.* The Court further determined that Puckett's rights were not infringed because the ordinance related to services provided to property that Puckett owned. *Id.* at 253 ("The ordinance does not require a property owner to guarantee or pay his tenant's bills—it simply requires him to pay for those services rendered to premises which he owns. Ultimately we believe the question must resolve itself into the right of a city operating a public utility to treat the owner of property as the consumer.").

KRS 106.210 grants the City general authority to maintain a public water system and

> [c]onstruct, acquire, own, lease, operate, maintain and improve plants or works for the production, pumping, filtration, treatment, distribution or sale of water and may provide water service to any user or consumer within and without the boundaries of said water district or municipality and may charge and collect reasonable rates therefor[.]

[2] Kentucky Revised Statutes.

This statute gives the City extensive powers to do those things necessary for the acquisition, operation, and maintenance of a water system, including the right to charge and collect reasonable rates for services rendered, as established by Ordinance 269.

The *Puckett* Court also addressed whether the ordinance violated Section 2 of the Kentucky Constitution. The underlying principal for August's complaints, as was the case in *Puckett*, is that it is arbitrary and unreasonable to hold one liable for the obligation of another. August argues that a principle of fundamental fairness is that only a consumer of services or goods should be required to pay for the service or goods.

The *Puckett* Court recognized that a property owner may be classified as a consumer. *Id* at 255. The property owner is the consumer to the extent that water is supplied to and used on his premises. *Id*. The property owner benefits from the service even where the tenant is the ultimate consumer. *Id.* The Court explained:

> The water service is furnished to the property owner. He primarily benefits from this service even though the ultimate consumer is one of his tenants. He is the consumer to the extent water is supplied to and used on his premises. If he requests this service or accepts it, he impliedly agrees to pay the service charge as provided in the ordinance. *See Dunbar v. City of New York*, 177 App. Div. 647, 164 N.Y.S. 519. There is nothing arbitrary or unreasonable about such a method of collecting water rents, it is not requiring the owner to pay the debt of another, and there is no taking of his property without due process of law. *See Dunbar v. City of New York*, 251 U.S. 516, 40 S.Ct. 250, 64 L.Ed. 384.

Id. at 252, 255-56.

Here, the City supplies water and garbage services to August's properties. August's rental business benefits from those services. Applying *Puckett*, August may properly be considered the consumer to the extent that water is supplied to and used on his premises.

August focuses much of its argument on the fact that it has no contract with the City for the provision of water and garbage service such that the services are provided in the name of the tenant, the tenant uses the services, and the tenant is billed for the services. However, the *Puckett* Court clearly specified that if the owner connects his property to the waterline, he thereby utilizes the service and properly may be charged therefore. 403 S.W.2d at 256. Thus, by requesting or accepting the services, August impliedly agrees to pay as outlined in Ordinance 269. Importantly, the *Puckett* Court noted, "it is certainly not unreasonable to require property owners to contribute to the support of a system which benefits all property and all inhabitants within the City." *Id.* at 255 (quoting *Cassidy v. City of Bowling Green*, 368 S.W.2d 318 (Ky. 1963)).

In conclusion, the City certainly had the authority to establish policies related to the billing and collection of fees for its water service. August owns properties that benefit from water service. Knowing of the City's policies, August chose to continue to have those properties connected to the City's water. Based on

Puckett, we cannot agree with August that imposing liability on it as the owner of the properties was arbitrary or unreasonable.

B. Unreasonable Burden

Next, August argues that the ordinance results in an unreasonable and unacceptable burden on its business in violation of Section 2 of the Kentucky Constitution.[3] "This much-cherished section of our Constitution is often cited to this court by those who feel that they have been aggrieved by the use of governmental power." *White v. City of Danville*, 465 S.W.2d 67, 69 (Ky. 1971). However, "Section two does not prohibit government using power. Without power governments could not operate." *Id.* Moreover, "Section two of our Constitution does not rule out policy choices which must be made by government." *Id.* at 69-70. "A system of classification founded upon a natural and reasonable basis, with a logical relation to the purposes and objectives of the authority granted, does not offend the principle of equal rights under law." *Louisville & Jefferson Cty. Metro. Sewer Dist. v. Joseph E. Seagram & Sons*, 211 S.W.2d 122, 125 (Ky. 1948).

It is not disputed that under the subject Ordinance, no notice is initially provided to August or to any landlord/property owner when a tenant becomes delinquent. August may inquire as to the status of his tenant's water bills at any time. Testimony revealed that the City attempts to bill the tenant for around

[3] "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." Ky. Const. § 2.

three months, and then, if unsuccessful, it bills the landlord or property owner. Thus, after the delinquent tenant has moved out, if a new tenant moves in and wants to receive water services, the landlord must pay the delinquent bill before the City will provide services to the new tenant. It goes without saying that this system of collection is not the most convenient one for landlords, like August. However, we cannot agree that its application fundamentally violates due process.

The *Puckett* Court acknowledged the inconvenience such an ordinance may impose on a property owner; however, the Court found that an inconvenience was not enough to render the ordinance illegal. In that regard, the Court stated:

> We may acknowledge that this method of charging and collecting water bills is not the one customarily adopted by public utilities. We may further recognize that it may result in the changing of lease provisions and in many instances cause inconvenience to property owners. We have before us, however, a legal question. The property owner must take the position that it is unlawful for a municipality to charge him for a public utility service furnished to his premises. Wherein lies the illegality of such a regulation?

403 S.W.2d 252, 254-55.

There is nothing unlawful about Ordinance 269 or the way in which the City enforces it. The City has provided all customers with notice of the ordinance and their procedures. While we sympathize with August's argument, we hold that under *Puckett* and the City's statutory authority, there is nothing invalid about Ordinance 269 or the way in which the City enforces it against landlords

such as August.[4] We find no exercise of arbitrary power in violation of Section 2 of the Kentucky Constitution.

C. Amendments

Finally, August argues that the Ordinance has been improperly amended. August argues that the City is an entity subject to statutes and requirements and as such must adhere to the requirements for legally amending an ordinance as set forth in KRS 83A.060. August argues the City has made changes in substance and administrative enforcement to the ordinance without following the statutory procedure to amend.

KRS 83A.060(3) provides:

> No ordinance shall be amended by reference to its title only, and ordinances to amend shall set out in full the amended ordinance or section indicating any text being added by a single solid line drawn underneath it. Text that is intended to be removed shall be marked at the beginning with an opening bracket and at the end with a closing bracket. The text between the brackets shall be stricken through with a single solid line.

Id.

[4] We offer no opinion on whether the City could lawfully deny a new tenant water service based on a prior tenant's unpaid water bill. We do note, however, that some authority suggests that while a city may pursue payment from the landlord, it may not refuse "water service to an unrelated, unobligated third party, whether that third party be the new tenant or any other stranger to the prior service agreement." *Golden v. City of Columbus*, 404 F.3d 950, 962 (6th Cir. 2005) (quoting *O'Neal v. City of Seattle*, 66 F.3d 1064, 1067–1068 (9th Cir.1995)). *Golden* involved an action by a tenant after the city refused to provide water service to her based on the fact that the there was an unpaid water bill for services provided to a prior tenant. The Sixth Circuit concluded that the city's action violated the Equal Protection Clause of the United States Constitution. Here, we are dealing with a landlord, not a tenant, and August has not raised Equal Protection objections to the Ordinance.

The City has made an internal change to not hold landlord properties liable for more than two months of past due bills. Further, the City has made a change in requiring a lease agreement and a copy of a driver's license for a new tenant to obtain water service. These "changes" are not represented to be amendments. Rather, they are current practices that August admits have not been applied to it. If anything, these internal policies, to the extent they are inconsistent with the actual Ordinance, are simply null and void. However, they do not affect the validity of the underlying Ordinance.

IV. CONCLUSION

Much like the Ordinance at issue in *Puckett*, Ordinance 269 requires the owner of a property to pay for those services rendered to premises which he owns. Under *Puckett*, a property owner and his tenant are both consumers and can be held liable for payment for services rendered to the property. Accordingly, we find nothing extraordinary, unusual, extreme or punitive about the Ordinance before us. It is statutorily authorized, applied equally to all land owners, and does not violate any provision of the Kentucky Constitution on its face, or as applied.

For these reasons we AFFIRM the ruling of the Mercer Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Noel Mark Botts
Harrodsburg, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Wanda M. Dry
J. Thomas Hensley
Danville, Kentucky