RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000168-MR and NO. 2002-CA-000274-MR

BOBBY JEAN HALE — APPELLANT

v.

APPEALS FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
CIVIL ACTION NO. 00-CI-00511

COLUMBIA NATURAL RESOURCES, INC. — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: Huddleston, Paisley and Tackett, Judges.

HUDDLESTON, Judge: This appeal resulted from a dispute over the location of a gas pipeline that traverses a tract of land situated in Floyd County, Kentucky, which has been owned and occupied by Bobbie Jean Hale since 1951.[1] The action was precipitated by the refusal of Columbia Natural Resources, Inc.

[1] Hale has resided on the property since 1951 and ultimately inherited the property from her husband.

to accommodate Hale's request to relocate the pipeline in question to increase the value of her property. CNR undertook to replace the existing pipeline between December 1999 and January 2000 in order to address leakage problems which had developed over the years, and the project progressed without incident.

Hale appeals from a Floyd Circuit Court order dismissing with prejudice her complaint alleging that CNR "did not have the right or authority to install the pipeline, and further, erected the pipeline in the most inconvenient manner possible," and "exploited, manipulated and used" Hale's property in the manner "most economically devastating" to her property rights. Hale further alleged that such action constitutes a trespass and an "act of adverse [inverse?] condemnation" and that she is entitled to damages, "including punitive damages," for the diminished value of her property.

Hale also appeals from the summary judgment granted in favor of CNR and the subsequent denial of her motion to alter, amend or vacate the order and summary judgment "and/or enter specific findings of fact and conclusions of law" in support of its decision. Because Hale's appeal is premised on a fundamental misunderstanding of Kentucky property law and a misconception of Kentucky Rules of Civil Procedure (CR) 56.01, we affirm.

Columbia Natural Resources, Inc. is a company engaged in, among other endeavors, the installation, operation and maintenance of natural gas pipelines throughout eastern Kentucky, many of which were previously owned by Inland Gas Company, Inc.. Inland Gas assigned its rights under various pipeline right of way agreements to CNR on October 1, 1992. Included in the assignment were three right of way agreements granted to Inland on March 1, 1928, by Hale's predecessors in title, pursuant to which Inland acquired "the right of way to lay, maintain, operate and remove a pipeline for the transportation of oil or gas, . . ."[2] Together these three agreements provide for the right of way easements[3] utilized for the pipeline at issue.

On or about November 30, 1999, Hale received a letter informing her that CNR would be replacing approximately 3,500 feet of pipeline located on her property.[4] The replacement was

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[2] Inland was also "granted the right, at any time within twenty (20) years from date hereof, to lay additional lines of pipe alongside the first line as herein provided, upon the payment of the price per rod above mentioned . . . ."

[3] A right of way easement is simply the privilege of the owner of one tenement to enjoy the tenement of another. The owner who enjoys the privilege to use another's land is said to possess the dominant tenement, while the owner burdened with the privilege is said to possess the servient tenement. An easement is not an estate in land, nor is it land itself. It is, however, a property right or interest in land. Illinois Central Railroad Co. v. Roberts, Ky. App., 928 S.W.2d 822, 825 (1996).

[4] CNR asserted that the right to "maintain, operate" "clearly gave it the right to replace the pipeline as necessary for the protection of the surface owners, the community, and Columbia as well."

necessary due to the age and condition of the pipeline which had not been replaced since it was installed in 1928. Upon receiving this notification, Hale met with two representatives of CNR on her property and walked the length of the pipeline while discussing its replacement. At that time, Hale requested that the pipeline be moved away from the middle of the bottomland and closer to a creek. CNR denied this request, however, due to concerns about erosion along the creek bank. Hale admittedly understood that CNR would be replacing the existing pipeline rather than constructing a new one and allowed CNR to proceed with this project after CNR declined to relocate the pipeline as requested. The replacement process consisted of digging a ditch to access the pipeline, removing the pipeline and installing its replacement. Upon completion of the pipeline replacement, CNR repaired any damage to the property and restored the land to its previous condition as acknowledged by Hale.

Hale's deposition testimony was consistent with the foregoing summary. Hale also confirmed that her only complaint was that CNR refused to move the pipeline closer to the creek bank which would have enabled her to construct buildings on her bottomland. She conceded that she was unable to construct a house or any other building within twenty-five feet of the pipeline prior to its replacement, and, further, that the

condition of her land was unchanged following the process. According to Hale, there was no damage to her property; any decrease in its value occurred when the pipeline was initially installed in 1928. Despite this admission, however, Hale argued that the value of her property would have increased if CNR had acquiesced and relocated the pipeline. CNR attempted unsuccessfully to reach a compromise with Hale on this issue. It is undisputed that CNR had no obligation to do so under the terms of the agreement. In short, Hale believed and continues to argue that CNR was obligated to "cooperate" with her by moving the pipeline closer to the creek at its expense for the sole purpose of potentially increasing the value of her property.

On May 30, 2000, Hale filed her complaint against CNR and, upon being granted leave by the circuit court, CNR filed a counterclaim on June 8, 2001, seeking a declaration establishing its right to access a segment of the pipeline so as to conduct repairs necessitated by erosion. After Hale and CNR completed the depositions of their respective witnesses,[5] CNR moved for summary judgment. In addition to granting CNR's motion, dismissing Hale's complaint with prejudice and denying her

[5] Hale took the depositions of George Marcum and Dan Stricker, employees of CNR, and CNR deposed Hale. Hale also offered the affidavit of real estate appraiser Gary Endicott in support of her claim that relocating the pipeline would increase the value of her property.

motion to alter, amend or vacate, the circuit court also granted CNR's subsequent motion for summary judgment as to its counterclaim in an order entered on January 18, 2002. Hale appealed from both summary judgments. As the two appeals involve the same dispositive issues, they were consolidated by order of this Court on May 16, 2002, and will be addressed accordingly.

On appeal, Hale contends that a genuine issue of material fact exists as to "whether [CNR] had the right to use [her] property and to construct a pipeline to begin with." In the alternative, Hale argues that even if CNR "can identify the proper right of way easement, said easement has lapsed" and, further, that a genuine issue of material fact exists as to whether CNR "over[]stepped their rights and []inversely condemned [Hale's] property." Hale's final substantive argument is that CNR, as the dominant estate holder, failed to exercise reasonable care with respect to the servient estate, i.e., her property.

Kentucky Rules of Civil Procedure (CR) 56.03 authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary

judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[6] However, "a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial."[7] In ruling on a motion for summary judgment, the circuit 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."[8]

On appeal from a summary judgment, we must determine "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."[9] Since no factual findings are at issue, deference to the trial court is not required.[10]

Hale does not dispute the existence of the easement in question, arguing instead that factual issues regarding the

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6 Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), reaffirming Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985).

7 Hubble v. Johnson, Ky., 841 S.W.2d 169, 171 (1992).

8 Steelvest, supra, n. 6, at 480.

9 Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996).

10 Id.

right of CNR to repair and to replace the pipeline preclude summary judgment in its favor. In support of this contention, Hale relies upon the inability of CNR to specify which right of way agreement empowered CNR to construct the pipeline on Hale's property, an argument which is premised on the mistaken belief that CNR is required to identify the origin of its right to access this segment of the pipeline with such particularity. This argument evidences a complete lack of understanding with respect to both property law in general and the nature of right of way easements specifically.

As confirmed by the testimony of Dan Stricker, CNR's land administrator, a pipeline that occupies property owned by different individuals necessarily requires multiple right of way agreements. The present case illustrates the validity of this assertion as Inland, CNR's predecessor, was able to construct the pipeline only upon being granted a "right of way to lay, maintain, operate and remove a pipeline . . ." by virtue of three different agreements with three different property owners. CNR cited these three agreements that contain identical provisions and refer to the relevant segment of the pipeline. Hale offered no evidence that refutes the position of CNR. "If [Hale] had proof that a genuine fact issue existed, it was [her]

duty to tender some proof to the court."[11] Absent some "affirmative evidence demonstrating a genuine issue of material fact," Hale's argument must fail.

Hale also argues that genuine issues of material fact exist regarding the validity and duration of the right of way agreements in question, specifically whether CNR's right of way easement has lapsed. Hale cites no facts in support of this contention, presumably because the subject agreements are not limited in duration and, further, because the only relevant fact of record, i.e., the existence of the pipeline for over seventy years, undermines this assertion. Hale's argument appears to be based upon a misunderstanding of the provision which explicitly authorized Inland to "lay additional lines of pipe along side the first line as herein provided, . . ." within twenty years, as this is the only reference to duration contained in the agreement. Hale has misconstrued the unambiguous language of this totally unrelated provision to mean that Inland's right to use the actual right of way was restricted to a period of twenty years. Such an interpretation is inconsistent with the terms of the provision and defies common sense. As correctly observed by CNR, "[a]n easement or right of way is not limited in duration, unless specifically created with such a limitation. 'In

[11] Neel v. Wagner-Shuck Realty, Ky. App., 576 S.W.2d 246, 250 (1978).

general, an easement granted without a specified term is considered to be of permanent duration and may continue in operation forever.'"[12] Thus, Hale's argument in this vein necessarily fails.

Equally without merit is Hale's assertion that a genuine issue of material fact exists regarding whether CNR "inversely condemned" or acted beyond its grant of authority in replacing the segment of the pipeline that traverses her property. Noticeably absent from Hale's complaint is any reference to the installation or placement of the original pipeline. To the contrary, Hale denied ever voicing any complaints about the location of the pipeline before CNR began the replacement process.

"The 'reverse [or inverse] condemnation' principle rests on the premise of the taking, destroying or injuring of property by the sovereign without any color of right or title to do so."[13] Hale has not only failed to make the required showing, she testified unequivocally that her property was in no way altered following the pipeline replacement thereby dispensing with the allegation that CNR was responsible for the condition

[12] Internal citations omitted.

[13] Commonwealth of Kentucky, Dep't of Highways v. Davidson, Ky., 383 S.W.2d 346, 348 (1964).

of which she complained.[14] Even assuming arguendo that a "taking" did occur, Hale's argument must fail because any taking was authorized by the plain language of the right of way agreements. No credible argument can be made that the right to "maintain" the pipeline does not encompass the authority to replace it in the same location. Because CNR returned the property to its previous condition, Hale suffered no "taking, destruction or injury to [her property] other than authorized by the [agreements]-hence, there can be no 'condemnation in reverse.'"[15]

Given Hale's concession that her property was unaffected by the pipeline replacement, it stands to reason that she could not establish any difference in the value of her property before and after the alleged "taking" as required to support a claim for monetary damages.[16] However, Hale attempts

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[14] In response to an inquiry as to how the land was different prior to December 1999, Hale said: "I wouldn't say that it's any different. It's just that you can't build on it if you wanted to." She went on to acknowledge that she had not been able to build on the land since at least 1951 as far as she knew.

When asked whether the actions of CNR had decreased the value of her property aside from the preexisting inability to build, Hale said: "Other than the little erosion that I told you about earlier, probably not."

[15] Davidson, supra, n. 13, at 348.

[16] Ky. Rev. Stat. (KRS) 416.660 provides that compensation to landowners in a condemnation action shall be awarded in "such a sum as will fairly represent the difference between the fair market value of the entire tract, all or a portion of which is sought to be condemned, immediately before the taking and the fair market value of the remainder thereof immediately after the taking . . . ."

to recover damages for the failure of CNR to increase the value of her property at its expense.[17] Suffice it to say that such a result is both counterintuitive and contrary to existing law.[18]

Hale's final substantive argument is that genuine issues of material fact exist as to whether CNR, as the dominant estate holder, failed to exercise reasonable care toward her property, the servient estate. Implicit in this assertion is the acknowledgement that CNR has a valid easement for the

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[17] The following excerpt from Hale's deposition testimony illustrates her rationale:

Q: Okay. How did the value of the property change because of what CNR did in December or '99?

A: Well, it was there before that time, but it decreased before that time, before they ever laid it again. And I'm saying that if they had cooperated with me and laid it closer to the creek, where I asked them to, that would have brought the value of the property up."

* * *

Q: And that would have been at their expense?

A: Yes. Maybe a thousand dollars more than what they had offered me.

Q: Why do you think CNR should have moved the pipeline?

A: Well, to cooperate with me. I think I had some rights also. And if they had moved it, as we said before, it would have made the value of the property higher.

[18] See Columbia Gas Transmission Corp. v. Limited Corp., 951 F.2d 110 (6th Cir.).

In support of her argument, Hale cites KRS 353.520(2) which expressly prohibits the waste of oil and gas. KRS Chapter 353 is concerned only with the conservation of oil and gas and is not applicable here, Hale's contention that KRS 353.520(2) also prohibits the wasting of her land notwithstanding. Finally, Hale complains that CNR failed to take into account the economic effect on her property which resulted from its action despite the fact she conceded that the pipeline replacement had no effect on the value of her property and, further, that the potential economic impact would have only been a consideration in 1928 when the original pipeline was installed.

segment of the pipeline that traverses Hale's property since a dominant and servient estate are created only upon the granting of an easement. However, the only damage alleged by Hale arises directly from the existence and location of the very easement she has both explicitly and implicitly conceded is valid. Hale has presented no proof that CNR's use of the easement has decreased the value of her property as necessary to support a claim for damages by a servient estate holder. Although this issue arises under the guise of a duty argument rather than a claim of inverse condemnation this time around, the same proof necessarily yields the same conclusion. Awarding damages to Hale and/or requiring CNR to relocate the pipeline simply to increase the value of the property Hale's heirs will inherit would contravene binding legal precedent as well as principles of logic and fairness.[19]

In conclusion, Hale argues that the circuit court erred in failing to make sufficient findings of fact in support of the summary judgments which prompted this appeal. Although knowing the facts upon which a summary judgment is based is helpful for purposes of review, Hale's contention is wholly without merit. To the contrary, it is well established that a

[19] Id.

trial court is "specifically not required to make findings under [CR 56.03]."[20]

Because all of the arguments advanced by Hale lack merit, the circuit court properly dismissed Hale's complaint and granted summary judgment in favor of CNR. Consistent with this determination, CNR is also entitled to the relief sought in its counterclaim and the circuit court properly granted summary judgment in its favor on this basis as well. Accordingly, both judgments are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael S. Endicott
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Christopher A. Dawson
VANANTWERP, MONGE, JONES & EDWARDS
Ashland, Kentucky

[20] Cole v. Thomas, Ky. App., 735 S.W.2d 332, 333 (1987); Pence Mortgage Company v. Stokes, Ky. App., 559 S.W.2d 500 (1977).

Inexplicably, Hale cites CR 52.01 in support of this proposition when the circuit court indisputably granted summary judgment pursuant to CR 56.03.