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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000855-MR

CITY OF EDDYVILLE, KENTUCKY

APPELLANT

v.

APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
CIVIL ACTION NO. 01-CI-00095

CITY OF KUTTAWA, KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF and HUDDLESTON, Judges.

HUDDLESTON, Judge: The City of Eddyville appeals from a Lyon Circuit Court order granting summary judgment in favor of the City of Kuttawa in its declaratory rights action and enjoining Eddyville "from providing natural gas service to the Kentucky State Penitentiary in the old section of [Eddyville] as well as

the ninety-one other billing accounts in that section of [Eddyville]." In so doing, the court concluded that "Eddyville is at liberty to provide natural gas services to any and all other customers within its city limits, to include the area known as "Old Eddyville."

During the late 1950s and early 1960s, the construction of Barkley Dam near Lake City resulted in the impoundment of Lake Barkley which, in turn, necessitated the relocation of the majority of both Eddyville and Kuttawa to areas now referred to as "New Eddyville" and "New Kuttawa." Those sections of both towns located on high ground were unaffected and are currently known as "Old Eddyville" and "Old Kuttawa." Both the "old" and "new" section of each town are encompassed by a common municipal boundary.

Shortly after the relocations, Eddyville entered into a franchise agreement with Western Kentucky Gas to furnish natural gas to the citizens of Eddyville. However, WKG declined to provide service to Old Eddyville which included the KSP and other residents living on the ridge overlooking the lake, because the provision of service to that area was no longer lucrative or practical. At that time, Kuttawa devised a natural gas system within its municipal boundaries to serve both Old and New Kuttawa and extended the lines across a section of Lake Barkley in order to accommodate those customers in the older

section of Eddyville left "high and dry" by WKG, including the KSP. Kuttawa has continually provided gas service to Old Eddyville for approximately twenty-five years.

Several years later, WKG's twenty-year franchise agreement with Eddyville expired. Eddyville then renewed its agreement with WKG for another twenty years, the maximum allowable period for a franchise under Section 164 of the Kentucky Constitution. In Fall 2000, that franchise agreement expired. At no time since its inception has Kuttawa sought or received a utility franchise from Eddyville or WKG in conjunction with its provision of natural gas to Old Eddyville.

In 1996, Eddyville constructed what is referred to in the city's brief as a "spec" building in its industrial park "in a concerted effort to promote economic development in Lyon County." Pursuant to the "urging and advice" of the Department of Industrial Development, Eddyville undertook to install a large, high pressure, natural gas line in the park to serve the spec building in an attempt to attract industrial tenants. Contemporaneously with this project, Eddyville also extended the high pressure natural gas line to the Lyon County Riverport Authority which is owned by Eddyville and located in the general proximity of Old Eddyville, so as to facilitate industrial development.

Prior to that time, the Kentucky Department of Corrections had installed two 350 horsepower boilers at the KSP in an effort to operate the facility more efficiently. Although these boilers were designed to operate most efficiently with natural gas, Kuttawa's gas line was not large enough to supply even one of the boilers. Thus, the DOC began fueling the boilers with more expensive fuel oil. Upon learning of Eddyville's plan to install a high pressure gas line to the Riverport Authority which is "just over the hill" from the residential area of Old Eddyville containing the KSP, the DOC ostensibly requested an extension of the gas line in order to service its boilers. Although Kuttawa had agreed to provide gas to the KSP, Eddyville believed that it would be at a substantial cost to the DOC and, purportedly extended its high pressure natural gas line into the proximity of the KSP in order to accommodate this request.

On May 10, 2001, Kuttawa filed a petition for declaration of rights and injunction¹ alleging that Eddyville was "in the process of constructing natural gas distribution facilities and pipelines for the purpose of providing duplicative gas service to the residences and the [KSP] in Old

¹ Attached to the petition was a copy of a letter of April 4, 2002, from the mayor of Kuttawa directed to the mayor of Eddyville advising him of the impending duplication of services.

Eddyville." Because the duplication of utility services is "contrary to the public policy of this Commonwealth as manifested in its statutes and at common law," Kuttawa sought a judgment declaring that Eddyville was without authority to establish natural gas distribution lines to service residents of Old Eddyville currently receiving natural gas service from Kuttawa and enjoining the construction of such facilities. In response, Eddyville asserted the affirmative defenses of assumption of the risk, estoppel and illegality and reserved all other defenses available under Kentucky Rule of Civil Procedure (CR) 8.03. Eddyville also argued that Kuttawa failed to state a cause of action, admitting only that Kentucky Revised Statutes (KRS) 96.045 prohibits duplicative utilities.

"As a result of Eddyville's denial of patently truthful allegations," Kuttawa was obliged to submit an affidavit in support of its motion to dismiss, thereby transforming it into a motion for summary judgment. In its accompanying memorandum, Kuttawa argued that KRS 96.045(1) is determinative of the present controversy with the "social philosophy" behind the statute being the avoidance of "destructive competition"² with respect to basic necessities like

² This description was coined by the Supreme Court of Missouri in Electric Co. of Missouri v. Atkinson, 275 Mo. 325, 327, 204 S.W. 897, 899 (1918), cited by Kuttawa in support of its argument. In Atkinson, the Court observed that the act

electricity, gas and water. According to Kuttawa, the only purpose served by KRS 96.538, cited by Eddyville in relation to the term "duplicating," "was to make it clear that the rule laid down in KRS 96.045(1) was as applicable in a newly annexed area [as it] was in any other area."

In response,³ Eddyville emphasized that Kuttawa had failed to "maintain" gas service in Old Eddyville since "the supply line is dangerously and illegally exposed to the elements, has not been maintained in size and capacity to meet the needs of the customers in the area, and on numerous occasions, [Eddyville] has had to cover, protect, and pave over open line repair trenches," all of which is encompassed in

defining the powers of the Missouri Public Service Commission and prescribing its duties is indicative of a policy designed to "substitute regulated monopoly for destructive competition." Elaborating on the reasoning behind this public policy, the Court said:

The spirit of this policy is the protection of the public. The protection given the utility is incidental. The policy covers a particular case when competition would impair or destroy a utility and, as a consequence, eventually entail an increase of rates charged to the public. There are other considerations, of course, but that mentioned forms the principal basis of the rule. A corollary is that, ordinarily, high rates do not call for the introduction of competitive conditions. Id.

³ As correctly observed by the circuit court, although Eddyville opposed the motion for summary judgment filed by Kuttawa, its response in effect requested a summary judgment on its behalf. According to Eddyville, the DOC was requesting a type of service which was not currently being provided by Kuttawa and, therefore, Eddyville would not be providing "duplicative gas service." Further, Eddyville argued that Kuttawa had not "maintained" a gas system in the relevant sense.

maintenance of the natural gas lines at issue. Eddyville's position is that "it is moving forward to provide gas service needs that are not presently being, nor in the past have been, provided by any other supplier." In addition, Eddyville contends that a question of fact exists as to whether Eddyville "contemplates establishment of a duplicative natural gas transmission facility either on the ground that it has a legal right to do so or because its actions without objection may create such a right" as set forth in Kuttawa's complaint.

In its judgment, the circuit court began by observing that it is "obvious from the nature of this very lawsuit that [Kuttawa] has been for some time maintaining utility service in that section of Eddyville." Further, the court correctly noted that any issue regarding the maintenance of the lines in question is not germane to this case. Citing KRS 96.045(1),⁴ the court concluded that the duplication proscribed by the statute goes to the "service area," as opposed to the "service quality" and, therefore, the provision of natural gas service by Eddyville to the disputed area would constitute a duplication of the service provided by Kuttawa in violation of the statute.

⁴ Implicitly adopting the argument of Kuttawa in this regard, the court cites Atkinson, supra, n. 2, for the rationale behind the statute.

Relying upon Grayson Rural Electric Corp. v. City of Vanceburg,⁵ the court determined that "based upon the undisputed material facts of this case, [Eddyville] is estopped from claiming that [Kuttawa] is illegally providing municipal gas service to the [KSP]." Because no genuine issue as to any material fact existed, the court granted summary judgment in favor of Kuttawa and enjoined Eddyville from providing natural gas service to the KSP as well as the other customers currently being served by Kuttawa in the designated area.

CR 56.03 authorizes a 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

⁵ Ky., 4 S.W.3d 526 (1999). In Grayson, the Kentucky Supreme Court was confronted with the question of which utility provider had a superior right to furnish retail electrical service to new customers in the disputed area. Relying on principles of estoppel, the Court held that Grayson was entitled to service new customers within its certified territory in the contested area and the Vanceburg Electric Plant Board was entitled to serve its existing customers in that area. In so doing, the Court reasoned as follows:

. . . since Grayson chose not to compete for the existing non-municipal customers being served by EPB and its predecessor VUC, we find that Grayson has acquiesced in and is estopped from contesting Vanceburg's EPB's current service rights in the disputed area. Until Grayson and East Kentucky Power Company learned of the potential industrial customer, neither utility ever sought to serve the 20-mile corridor. Id. at 530.

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

Pursuant to KRS 96.056(1):

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.

No municipality, in which there is located an existing electric, water or gas public utility plant or facility shall construct or cause to be constructed any similar utility plant or any similar public utility facility duplicating such existing plant or facility or to obtain or acquire any similar public utility plant or facility other than by the purchase of the existing plant or facility or by the acquisition of such existing plant or facility by the exercise of the power of eminent domain.

As correctly observed by both Kuttawa and the court, the rationale or "social philosophy" behind this statute is to protect the public by avoiding "destructive competition." Because this provision is implicated on the current facts which, in turn, involve exactly the evil this provision was designed to remedy, our analysis begins and ends with its language.

As we agree with the circuit court's interpretation and application of KRS 96.056(1), we adopt its reasoning as follows:

[Eddyville's] argument in regard to "duplication" is an ingenious one. However, it is not sufficient to [remove] the action by Eddyville [from] the [ambit] of the proscriptive statute. [Under Eddyville's]

interpretation of the term "duplication," [even the] slightest variance in the method [by which] the interloper [provides] services would remove it from the dictates of the statute.

The duplication proscribed by the statute [refers] to the "service area," not to "service quality."

Consistent with the foregoing, the court concluded that the provision of natural gas service by Eddyville to the disputed area currently being serviced by Kuttawa would necessarily constitute a duplication as prohibited by the plain language of the governing statute. We agree.

In the alternative, the court reasoned that Eddyville is estopped¹¹ from claiming that Kuttawa is illegally providing natural gas service to the KSP, citing Grayson as authority. Under the court's reasoning, Eddyville has known for some time that Kuttawa provides natural gas service to Old Eddyville and has not previously challenged its right to do so. Further,

¹¹ In Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Inc., Ky. App., 870 S.W.2d 421 (1993), we outlined the elements of equitable estoppel before reiterating that the doctrine of equitable estoppel may be invoked against a governmental agency "only under exceptional circumstances." Id. at 427. Given our resolution of the statutory inquiry, we do not reach the question of whether the current facts qualify as "exceptional circumstances."

Eddyville's contention that only WKG has standing to challenge Kuttawa's service lacks merit as WKG did not lose its franchise until Fall 2000. Accordingly, Eddyville should have raised any challenged to the right of Kuttawa to service the disputed area at that time.

Drawing a parallel with Grayson, the court emphasized that Eddyville never sought to service Old Eddyville until learning of the DOC's special needs. In short, "the law dictates that [Eddyville] is entitled to serve new customers within the old section of [Eddyville's] city limits, but [Kuttawa] is entitled to continue [serving] its existing customers in that area, [including] the KSP." Although we agree with the court's logic, the statutory analysis is dispositive of the sole question presented for review rendering further discussion of the estoppel issue unnecessary.

Because the circuit court properly determined that Eddyville is precluded from duplicating the natural gas service currently being provided to Old Eddyville by Kuttawa under KRS 96.056(1), the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marvin Lee Wilson
CHOAT & WILSON, P.S.C.
Eddyville, Kentucky

BRIEF FOR APPELLEE:

Burke B. Terrell
SHEFFER & SHEFFER, LLC
Paducah, Kentucky