

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002318-MR

COUNTY OF CAMPBELL, KENTUCKY, EX REL.
TRANSIT AUTHORITY OF NORTHERN KENTUCKY;
AND TRANSIT AUTHORITY OF NORTHERN KENTUCKY APPELLANTS

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 01-CI-00441

BIF, INC.; FIFTH THIRD BANK OF
NORTHERN KENTUCKY, INC.; THE
GOODYEAR TIRE & RUBBER COMPANY, INC.;
PRO TOUCH AUTO DETAILING, INC.; AND
CHALLENGER PIPING, INC. APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: The County of Campbell, Kentucky, ex rel. the Transit Authority of Northern Kentucky and the Transit Authority of Northern Kentucky (collectively, TANK), through the power of eminent domain, began condemnation proceedings against BIF, Inc. (BIF), the owner of real property in downtown Newport, Kentucky. TANK sought to condemn the property for the construction of a

downtown transit center for incoming routes from outlying Campbell County to downtown Cincinnati and Newport, Kentucky, which is undergoing a substantial downtown revitalization. Without conducting an evidentiary hearing on TANK's right to take the property, the Campbell Circuit Court issued an order that summarily determined that TANK could not provide reasonable assurances that the intended use for the property would come to pass. So, the circuit court dismissed TANK'S petition without prejudice. Because the trial court never conducted the evidentiary hearing contemplated by KRS 416.610(4), we vacate and remand for a hearing and findings on TANK's right to condemn the property.

On April 10, 2001, TANK filed a petition under KRS 416.540, et. seq., the Eminent Domain Act, and KRS 96A.080 to condemn certain properties in Newport, Kentucky (the properties). The record owner of the properties was BIF, a Kentucky corporation solely owned by William Fennell, Sr. BIF had various leases on the properties.

In its petition, TANK stated that the condemnation action was "for the public interest, necessity and convenience." And the taking was "necessary for the public purpose of constructing a new transit center." TANK sought an interlocutory judgment under KRS 416.610 finding that it had the

right to condemn the property and authorizing it to take possession of the properties.

BIF filed its answer and challenged TANK'S right to condemn the properties. BIF alleged that TANK had not followed the statutory procedures for instituting condemnation proceedings. In addition, BIF asserted that the properties were being taken under the guise of a public purpose. But BIF believed that the properties were being taken to assist private developers. Finally, BIF alleged that TANK instituted the condemnation proceedings in bad faith because TANK was taking too much land for its stated purpose and did not have the funding to complete the project.

Because BIF filed its answer and placed TANK's right to condemn at issue, the trial court scheduled a hearing under KRS 416.610(4). In the meantime, the parties engaged in extensive discovery.

Before the trial court conducted the right to condemn hearing, BIF made a motion for summary judgment, and TANK filed a motion to amend the petition to revise the property description and name specific lessees who had been identified during the discovery process. TANK named The Goodyear Tire & Rubber Company as an interested party by virtue of an unrecorded lease or rental agreement. The trial court granted TANK's motion to amend its petition. But because TANK filed its motion

to amend the petition one week before the scheduled hearing date, the trial court was compelled to postpone the hearing. Ultimately, the trial court rescheduled the hearing for August 26, 2003.

About a month and half before the rescheduled hearing date, BIF made a motion to dismiss the amended condemnation petition or postpone the hearing. The basis of this motion was that TANK had not yet received approval for federal funding, and TANK had not completed its review under the federal National Environmental Policy Act. The trial court granted BIF's motion to continue the hearing and heard oral arguments on BIF's motion to dismiss.

One month after oral arguments, the trial court determined that TANK had no right to condemn the property it described in its amended petition. In so doing, the trial court relied on the case of Northern Kentucky Port Authority, Inc. v. Cornett, 625 S.W.2d 104, 105 (Ky. 1981) for the proposition that the right to condemn exists where "there is a reasonable assurance that the intended use will come to pass." The trial court found that TANK could not give the court such assurances in light of the fact that TANK could not obtain federal funding for the project. And the court found that the "scope, funding and impact of the transit center project now envisioned by TANK is materially different from the project that was presented to

the Campbell County Fiscal Court when the Fiscal Court voted to approve this lawsuit as required by the statutes." In the end, the trial court held that the changes to the project were so substantial that it must dismiss the condemnation petition. This appeal followed.

TANK presents a number of arguments for our review pertaining to the propriety of the trial court's dismissal of its amended petition. Basically, TANK argues that the trial court failed to follow statutory mandates in disposing of its condemnation petition. Specifically, TANK's fundamental contention is that after BIF filed an answer putting in issue TANK's right to take, KRS 416.610 required the trial court to hear and determine whether TANK had the right to condemn the property. Despite scheduling a hearing at least two times, the trial court never conducted a hearing. Instead, it summarily dismissed TANK's petition without making any of the findings required by KRS 416.610(4). TANK's remaining arguments are based on the findings the trial court did make that TANK contends were outside the scope of KRS 416.610(4).

KRS 416.610(4) is as follows:

If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has

such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered. If the court determines that petitioner does not have such right, it shall enter a final judgment which shall contain, in substance:

- (a) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;
- (b) A finding that the petitioner is not authorized to condemn the property or the use and occupation thereof for the purposes and under the conditions and limitations set forth in the petition, stating the particular ground or grounds on which the petitioner is not so authorized;
- (c) An order dismissing the petition and directing the petitioner to pay all costs.

In this case, for whatever reason, the trial court never conducted an evidentiary hearing on TANK's right to condemn the property. Because an evidentiary hearing is contemplated by KRS 416.610(4) once a property owner has filed an answer putting in issue the right to condemn, the trial court erred in not conducting the hearing and in not making the requisite findings. So, we vacate and remand for an evidentiary hearing on TANK's right to condemn.

We note that TANK's ability or inability to complete the project is not connected to its possession of the power of eminent domain; however, on remand, it may be an important factor in determining whether a public use supports the proposed taking. See 27 Am. Jur. 2d Eminent Domain § 439 (2004). In other words, a taking for a project that cannot be brought to

fruition may not be for a public use. See id. (citing Public Service Co. of Colorado v. Shaklee, 784 P.2d 314, 317 fn. 3 (Colo. 1989)).

In addition, the substantial changes to the project that TANK proposed once it became clear that it had no federal funding may be evidence of gross abuse or manifest fraud on TANK's part, but the trial court did not make such findings in dismissing the petition. See Commonwealth v. Cooksey, 948 S.W.2d 122, 123 (Ky. App. 1997) (holding that gross abuse or manifest fraud are sufficient grounds for denying a condemner's right to take). Thus, while the trial court may reach the same result -- dismissing the petition based upon findings that TANK had no right to take -- it is necessary to allow TANK its day in court to prove otherwise.

BIF argues that all of the parties treated the motion to dismiss as one for summary judgment. So, the effect of the trial court's order of dismissal was to grant summary judgment in favor of BIF. BIF contends that the undisputed facts lead to only one conclusion: TANK did not have the authority to proceed with the project as it was significantly different from the plan that was presented to and approved by the TANK board, the fiscal court and the community. And because the undisputed facts lead to only one conclusion, summary judgment was proper. We believe, however, that this argument loses sight of the trial

court's role, which is to determine whether TANK had the right to condemn the property. Simply, the trial court never issued a judgment deciding this issue.

The order of dismissal of the circuit court is vacated and this matter is remanded for an evidentiary hearing and findings on TANK's right to condemn BIF's property.

DYCHE, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

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