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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000270-MR (DIRECT APPEAL)
AND
NO. 2004-CA-000395-MR (CROSS-APPEAL)

SAM A. MARS, JR.; SAM A. MARS III; STEVEN A. MARS AND SUZANNE LAMBLIN, D/B/A MARS PROPERTIES — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 97-CI-00195

THE CITY OF MIDDLESBORO, KENTUCKY AND BEN A. HICKMAN, INDIVIDUALLY AND IN HIS CAPACITY AS MAYOR FOR THE CITY OF MIDDLESBORO, KENTUCKY — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: Sam Mars, Jr., Sam Mars III, Steven Mars and Suzanne Lamblin, d/b/a Mars Properties, a Kentucky

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

General Partnership, brought this action seeking compensatory damages against the City of Middlesboro and its mayor, Ben Hickman. In an earlier declaratory judgment action appealed to this court, we found that the city wrongfully issued a "stop order" prohibiting the appellants from continuing the dumping of fill on certain property. In the present action the circuit court found that Mars Properties' claim that its constitutional rights had been violated was barred on the basis of res judicata, and that Hickman and the city were entitled to immunity. We affirm.

Sometime in the late 1980's Mars decided to build a hotel on property owned by the Mars family in Middlesboro. At the time the property was a steep hillside and to develop it, it was necessary to move an estimated 400,000 cubic yards of material – approximately 10,000 truckloads. The estimated cost of the hotel was $3,000,000, and the fill removal was estimated to cost $2,000,000. In an effort to minimize costs, Mars purchased two disposal sites; one was the Green Hills Cemetery, where the fill would create additional burial space, and the second, a low-lying tract in Middlesboro currently being used as a mini-storage facility. Both pieces being within the city's floodplain, it was necessary for Mars to obtain fill permits from the state and the city. Following completion of the required surveying and engineering analysis, the state, through

the Natural Resources and Environmental Protection Cabinet, in early 1993, issued Mars fill permits for both locations. The city issued a permit for the cemetery property and Mars began excavation for the hotel, dumping the fill on the cemetery property. The permit application for the mini-storage property was informally tabled by the mayor, Troy Welch, and by the city's code enforcement office. Later in 1993, and after the election of Mayor Hickman but just days prior to his taking office, the city issued a fill permit for the mini-storage property. In early 1994, Mars commenced fill operations on the mini-storage property.

After commencement of fill operations on the mini-storage property and after hearing concerns expressed by neighboring property owners, Hickman investigated the potential of flooding on nearby property. Mars contacted officials from the Cabinet who assured the city that the fill operations would have little effect on flooding. However, after consulting with the city attorney, the city council decided that in addition to obtaining a fill permit, a city flood prevention ordinance required Mars to obtain a development permit. The city issued Mars a formal notice to immediately cease fill operations on the mini-storage property.

The city filed a declaratory judgment action seeking both a ruling on the validity of the ordinance and an injunction

preventing further development of the property. After the circuit court ruled adversely to Mars, it appealed and in December 1995, in an unpublished opinion, this court reversed holding that since Mars had obtained a valid state permit, it was not required to obtain a city development permit under the city flood ordinance. However, we rejected the complaint under Section 2 of the Kentucky Constitution that Mars had been unfairly treated because other property owners had been authorized to fill. The Supreme Court denied discretionary review.

In 1997, Mars commenced the instant litigation seeking damages suffered as a result of the two-year delay in developing the hotel and mini-storage properties on the basis that the city's and mayor's refusal to permit the work to continue was wrongful, and that it was in violation of Section 2 of the Kentucky Constitution, and that the mayor acted in bad faith. The circuit court held that the mayor and the city are immune from liability and that the Section 2 claim is barred by the doctrine of res judicata.

The Claims Against Local Governments Acts is contained in KRS[2] 65.2003. It was enacted following the court's decision in Gas Service Co., Inc. v. City of London,[3] a case that

[2] Kentucky Revised Statutes.

[3] 687 S.W.2d 144 (Ky. 1985).

restricted the doctrine of immunity for municipalities. Although the statute affirms all existing constitutional and common law involving actions against local governments, the statute specifically sets forth claims that are disallowed. Pertinent to the present case, the statute states:

> Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:
>
> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:
>
> > (c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization.[4]

Expressly stated is that a local government is not liable for the denial, revocation, or suspension of a permit. To avoid the express language of the statute, Mars contends that the fill permit was not suspended or revoked by the city but that the prior litigation arose after the city informed Mars that the operation must cease until it obtained a development permit. Mars argues that it never applied for the development permit so that it was never denied, suspended, or revoked. We find this semantic distinction unpersuasive.

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[4] KRS 65.2003(3)(c).

Mars was issued a permit pursuant to which it operated until it received a "stop order" from the city and the declaratory judgment action clearly sought to have the fill permit declared of no force and effect. The actions taken by the city, although clothed in different terminology, had the effect of revoking the permit issued. The revocation of the fill permit, not the failure to apply for the development permit, is the action taken by the city that allegedly damaged Mars. Had it not been for the "stop order," Mars would have continued the development operations.

The final paragraph of KRS 65.2003 states that:

> Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Mars contends that the city's "stop order" did not involve a discretionary act but was purely ministerial. Discretionary acts require deliberation, decision and judgment while ministerial acts require mere obedience to orders or performance of a duty in which there is little or no choice.[5]

The issuance of the "stop order" was a discretionary act.[6] The city, after review of the facts and being advised on

[5] Kea-Ham Contracting, Inc. v. Floyd County Development, 37 S.W.3d 703 (Ky. 2000).

[6] Siding Sales, Inc. v. Warren County Water Dist., 984 S.W.2d 490 (Ky.App. 1998).

the law, made a judgment that, in accordance with the flood damage prevention ordinance, Mars must obtain a development permit and that the fill permit alone was insufficient. The revocation of the permit is expressly listed in the statute as a discretionary act. Moreover, the acts performed by the city were clearly regulatory and liability does not extend to regulatory functions different from those performed by a private person or industry.[7]

The circuit court found that Hickman, at all relevant times, was acting in his official capacity in the performance of discretionary duties. The immunity afforded to municipalities by statute extends to its public officials. A municipal official is not liable for discretionary acts performed when sued in their official capacity.[8] And an official sued in an individual capacity, is not personally liable for acts done within the scope of authority and in the performance of a discretionary duty if the act was a good faith judgment call made in a legally uncertain environment.[9] There is no evidence that Hickman acted with either malicious intent or that he knew, or reasonably should have known, that Mars Properties' rights

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[7] Id. at 493.

[8] Greenway Enterprises, Inc., v. City of Frankfort, 148 S.W.3d 298 (Ky.App. 2004).

[9] Ashby v. City of Louisville, 841 S.W.2d 184 (Ky.App. 1992).

would be violated by the "stop order." As mayor, Hickman, after receiving complaints from citizens, began an investigation into the possible threat of flooding in the area of the mini-storage property and called a special meeting. After consultation with the council and city attorney who advised that Mars was in violation of the ordinance the "stop order" was issued. The circuit court properly granted summary judgment in favor of Hickman in his individual and official capacities.

The final issue addressed concerns the claim that the city violated Section 2 of the Kentucky Constitution when it required Mars to obtain two permits when the city had not required any other citizen in a similar situation to obtain two permits. This issue was raised in the declaratory judgment action, and on appeal, this court stated:

> Mars makes an assertion that it has been unfairly treated because other property owners have been authorized to fill. If such is the case, it would be an egregious violation of Section 2 of the Kentucky Constitution. *See Kentucky Milk Marketing v. Kroger Co.*, Ky., 691 S.W.2d 893 (1985). We have examined the record in detail, however, and find a lack of substantial evidence to support this allegation.

A judgment on the merits in a prior suit precludes relitigation of issues litigated and determined regardless of whether it was based on the same cause of action as the second

suit.[10] This court has previously ruled that there was no Section 2 violation, therefore, the circuit court properly granted summary judgment.

The summary judgments are affirmed.

ALL CONCUR.

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[10] City of Louisville v. Louisville Professional Firefighters Association, 813 S.W.2d 804, 806 (Ky. 1991).