

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000688-MR

GOLDEN FOODS, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 02-CI-004398

LOUISVILLE & JEFFERSON COUNTY
METROPOLITAN SEWER DISTRICT

APPELLEE

OPINION
AFFIRMING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOFF, JUDGES.

COMBS, CHIEF JUDGE: Golden Foods, LLC ("Golden Foods"), has appealed from an order entered by the Jefferson Circuit Court on April 1, 2004, which held that the Louisville and Jefferson County Metropolitan Sewer District ("MSD") had properly exercised its power of eminent domain. Accordingly, it determined that MSD was authorized to take possession of permanent and temporary easements across property owned by

Golden Foods in order to construct and operate public sewers and drainage facilities. We are persuaded that the circuit court did not err in concluding that MSD negotiated with the property owner in good faith and that it otherwise complied with the requirements of Kentucky's Eminent Domain Act, KRS¹ 416.540, *et. seq.* Therefore, we affirm.

In the summer of 1997, MSD initiated contact with Golden Foods to discuss the possible acquisition of a private sewer line owned by Golden Foods. Their negotiations went badly, and MSD instituted condemnation proceedings on July 11, 2000. In its answer to MSD's petition, Golden Foods challenged MSD's right to condemn its private sewer line for public use. On May 2, 2001, after a period of discovery, the circuit court conducted a right-to-take hearing pursuant to the requirements of KRS 416.610. Following the hearing, the circuit court entered its findings of fact, conclusions of law, and an opinion and order dismissing MSD's petition for condemnation.

In its order, the circuit court acknowledged that although MSD had stated a sufficient public purpose in seeking condemnation, it had failed to negotiate in good faith for the acquisition of the disputed property prior to initiating condemnation proceedings. Consequently, the court held that MSD

¹ Kentucky Revised Statutes.

was not authorized to condemn the property it sought.² MSD appealed to this court.

In an opinion rendered February 7, 2003, we affirmed the order of the circuit court and held as follows:

As the trial court observed in its opinion, the property to be taken in this case is atypical. Normally, MSD, like other condemners, takes undeveloped property for improvement. In this case, however, the property to be taken consists of a fully functional 45-inch sewer line capable of servicing many residential customers and several industrial users - as well as its owner. In the initial stages of negotiation, when MSD proposed acquiring the existing line for the use of all other local customers and constructing a separate 8-inch line for Golden Foods, MSD appeared to recognize the distinctive nature of the property to be taken. However, its later decision to withdraw all previous offers and to present instead a single, rather suspect, and non-negotiable offer of \$180.00 (later explained as a typographical error and amended to \$4,000.00), tends to evidence a failure to make a reasonable effort to acquire the land by contract of private sale. Moreover, all of the negotiations preceding the final take-it-or-leave-it offer of May 2000 involved MSD's intent to take the existing sewer line in exchange for its construction of a new line exclusively dedicated to Golden Foods's industrial complex. MSD had never discussed or negotiated with Golden Foods with respect to its current intention to condemn the private sewer line for service to all users - the residential customers as well as other

² In a condemnation case involving bad faith, no separate cause of action exists against the condemning authority. However, a landowner may recover attorneys' fees if bad faith is shown. See Commonwealth, Dep't. of Transp. v. Knieriem, 707 S.W.2d 340 (Ky. 1986); Commonwealth, Transp. Cabinet v. Cooksey, 948 S.W.2d 122 (Ky.App. 1997).

industrial users. As a result, the trial court did no err by finding that MSD acted unreasonably, unfairly, and oppressively in its dealings with the [Golden Foods]. Nor did it err by concluding that through its actions, MSD's very right to condemn the disputed property had been implicated and compromised.

Opinion at 8. (Citations omitted). By order of September 10, 2003, the Supreme Court of Kentucky declined to accept discretionary review.

While the first appeal of this matter was still pending, Golden Foods and MSD entered into a new round of negotiations aimed at resolving their differences. In February 2002, MSD presented a written proposal to Golden Foods increasing its cash offer from \$4,000.00 to \$38,200. By letter dated March 22, 2002, Golden Foods flatly rejected the offer.

Again, while the first appeal was still pending and after the issue had been fully briefed, MSD sought a dismissal of the appeal, which we denied. Meanwhile, on June 11, 2002, MSD proceeded to file a second condemnation action. In its petition, MSD alleged that it had cured the deficiencies that had allegedly tainted its earlier negotiations with Golden Foods. Golden Foods filed its answer and challenged anew MSD's right to condemn the property. Golden Foods contended that the conclusions included in the circuit court's opinion of June 13, 2001, should govern in detail the course of any subsequent

negotiations between the parties. Golden Foods also argued that the second condemnation petition was fatally defective since it failed both to name the proper party and to include other indispensable parties.

A second right-to-take hearing was conducted by the Jefferson Circuit Court on December 5, 2003. (By this time, the Supreme Court of Kentucky had declined discretionary review of our opinion rendered February 7, 2003.) Following the evidentiary hearing, the court entered findings of fact, conclusions of law, and an order granting MSD's petition to acquire the disputed property through eminent domain.

After reviewing the latest phase of the history of the financial negotiations, the trial court ruled that MSD's offer of \$38,200.00 (as distinguished from the original offer of \$4,000) to Golden Foods had been made in good faith. Golden Foods focused on the failure of MSD to negotiate with respect to specific collateral issues: namely, liability for potential business losses and environmental protection concerns. Golden Foods also argued that MSD's demand for attorneys' fees either constituted bad faith or amounted to a breach of the requirements of KRS 416.550 (which references the panoply of rights and responsibilities entailed in a condemnation proceeding.) The trial court disagreed with Golden Foods on both points and issued an order authorizing MSD to take

possession of the property -- subject to exceptions filed by Golden Foods as to the amount of just compensation.³ This appeal followed.

Golden Foods argues on appeal that the circuit court erred by failing to require MSD to model its negotiations on specific standards set forth in the court's order dismissing **the initial petition** for condemnation. Golden Foods contends that the order dismissing the first condemnation proceeding for failure to negotiate in good faith should govern the second condemnation by impliedly requiring MSD also to negotiate with respect to issues other than just compensation for the property to be taken. We disagree.

MSD's authority to condemn property through the sovereign power of eminent domain is carefully circumscribed by constitutional provisions requiring that the taking be for a public use and that the condemnee receive just compensation. Kentucky Constitution, §§ 13, 242; KRS 416.540-680; God's Center Foundation, Inc. v. Lexington Fayette Urban County Government, 125 S.W.3d 295 (Ky. App. 2002). Our courts have imposed an additional duty on the condemning authority to negotiate in good

³ Questions concerning compensation are decided by a statutory dispute resolution process whereby three commissioners are appointed to determine compensation for the taking -- with an appeal to a jury by way of exceptions to the interlocutory judgment. KRS 416.580; 416.610(3); Commonwealth, Transp. Cabinet v. Cooksey, 948 S.W.2d 122 (Ky.App. 1997). In this case, commissioners appointed by the court appraised the property to be taken at \$2,380 and set the value of the temporary easement at \$720.

faith for the acquisition of property prior to initiating condemnation proceedings. City of Bowling Green v. Cooksey, 858 S.W.2d 190 (Ky.App. 1992); Usher and Gardner, Inc. v. Mayfield Independent Board of Education, 461 S.W.2d 560 (Ky. 1971). As the parties are fully aware, a failure of the condemning authority to negotiate fairly may serve as the basis for the dismissal of a condemnation action. Eaton Asphalt Paving Co. v. CSX Transportation, 8 S.W.3d 878 (Ky.App. 1999). That point is not merely academic in this case but is clearly a matter of *res judicata* from the previous appeal.

Nonetheless, we are not persuaded that MSD's duty to negotiate in good faith in this second proceeding was given an expanded dimension by the court order in the first proceeding. In the opinion and order entered following the first right-to-take hearing, the circuit court commented on the reasonable concerns of Golden Foods with respect to issues of potential business interruptions and environmental indemnity matters associated with MSD's presence on the property and occasioned by MSD's original plan to construct a parallel sewer line dedicated to the use of Golden Foods. The court discussed these collateral issues in conjunction with its analysis of MSD's course of conduct. However, the crux of the court's concern was MSD's failure to negotiate in good faith. The collateral

property issues were peripheral concerns rather than the focal point of the holding of the court.

There is no clear mandate in the court's order requiring MSD to address and to resolve the collateral issues as a condition precedent to re-commencing condemnation proceedings. Golden Foods argues that the trial court altered the "good faith negotiations standards" required by law and enhanced or bolstered those standards to encompass these collateral issues, rendering them "the law of the case and ...entitled to preclusive effect." Appellant's brief at 14. We cannot agree that the court's order is quite as encompassing as Golden Foods contends.

In analyzing MSD's first round of negotiations with Golden Foods, the circuit court concluded that MSD had failed to make a reasonable effort to acquire the easement by contract for private sale. The court's dismissal was based on findings of fact supported by substantial evidence and included a correct analysis of existing authority. Consequently, it was affirmed on appeal. As to the parties' subsequent negotiations, the court concluded that MSD was not required to accept the position of Golden Foods with respect to the potential business interruption and environmental indemnity issues before proceeding with the condemnation action.

The central issue in a condemnation proceeding is failure of the parties to reach an agreement to purchase at any price that the condemning authority is willing to pay. (See Coke v. Commonwealth, Dep't. of Finance, 502 S.W.2d 57 (Ky. 1973), holding that the condemning authority is not required to haggle in order to satisfy its obligation to demonstrate good faith in negotiating the purchase of property.) As to the second condemnation action, the court determined that MSD had dealt with Golden Foods in good faith and that it made a reasonable effort to acquire the property at a reasonable price before filing its petition. We hold that the court's findings of fact were supported by substantial evidence, and its legal conclusions were correct as a matter of law.

In a separate argument, Golden Foods cites the re-opening of negotiations during the pendency of the first appeal as constituting additional, independent evidence of a lack of good faith on the part of MSD. We disagree.

Immediately following entry of the court's order dismissing MSD's original petition for condemnation, the parties entered into discussions aimed at resolving the case. Rather than raising an objection to this course of action, Golden Foods voluntarily participated and remained engaged in the discussions for several months. When MSD emphasized that it would not negotiate with respect to the collateral issues of business loss

and environmental concerns, Golden Foods terminated the discussions "on advice of counsel . . . since the matter is now subject to litigation before the courts." Correspondence dated March 22, 2002. Its concern with pending litigation did not impede its willingness to negotiate until it had cause to despair that these extra issues were non-negotiable.

We are aware of no authority holding that a party's renewed attempt at negotiation following the filing of an appeal constitutes bad faith to negotiate as a matter of law. On the contrary, courts look favorably upon voluntary settlements between parties at virtually every stage of litigation -- including the pendency of an appeal. We cannot agree that MSD's renewed negotiations *per se* were tantamount to a failure to negotiate in good faith for a voluntary sale of the property in lieu of proceeding with condemnation. Golden Foods has not shown that MSD failed to negotiate the purchase of the property in good faith.

Golden Foods also argues that the circuit court erred by permitting the condemnation action to proceed when MSD had not yet secured all of the individual easements necessary for its proposed use of the disputed sewer line. Golden Foods believes that by having failed as yet to proceed against the adjacent landowners, MSD cannot now fulfill its stated public purpose of providing sanitary sewers to the area's commercial

and residential customers. Consequently, MSD is without authority to proceed with the condemnation action. We disagree.

In Northern Kentucky Port Auth. v. Cornett, 625 S.W.2d 104 (Ky. 1982), the Supreme Court of Kentucky considered whether a condemning authority could condemn land needed for the construction of a riverport prior to securing approval from the United State Corps of Engineers for the construction of such a project. The court reviewed the positions of other jurisdictions and concluded that the Port Authority could proceed with the condemnation action even though critical phases of the development project had yet to be completed. The Court cited favorably the reasoning of the Supreme Court of Wisconsin in Falkner v. Northern States Power Co., 116 N.W.2d 885 (Wis. 1977) as follows:

. . . There will always be some possibility that a planned improvement will not be completed and put to the use intended. The test cannot be whether it is possible, whether it is conceivable that the project would fail. The test must be whether there is a reasonable assurance that the intended use will come to pass. If there is reasonable probability that the public utility will comply with all applicable standards, will meet all requirements for the issuance of permits, and will not otherwise fail or be unable to prosecute its undertaking to completion, there is a right of condemnation.

Thus, the applicable test is not certainty of completion of a proposed project but the reasonable expectation of its probable consummation.

In this case, MSD contends that it has secured all of the necessary property rights associated with the operation of its planned project. MSD has provided a reasonable assurance that the project will be completed satisfactorily. There is no evidence of bad faith or misrepresentation in this regard. Nothing more is required before the condemnation action can be allowed to proceed. Thus, the circuit court did not err by refusing to dismiss the action.

Golden Foods last argues that the circuit court erred by failing to dismiss the action because a board resolution purporting to authorize the taking was fatally defective. Golden Foods believes that the condemnation petition filed by MSD was defective on its face because it included a board resolution authorizing the taking of "the 45" sewer line and a perpetual drainage easement. . . and a temporary construction easement. . . on and through the property owned by Louisville E.O.P., Inc." According to Golden Foods, Louisville E.O.P. Inc. (its predecessor in interest) no longer exists as a corporate entity. Golden Foods was never substituted as the proper party by way of an amended board resolution. Therefore, Golden Foods

contends that MSD is barred from proceeding with the condemnation.

In response, MSD notes that Golden Foods has repeatedly identified itself in pleadings as "The Louisville E.O.P., Inc. (now Golden Foods, LLC)" and has admitted that it owned the land identified in the petition for condemnation. Moreover, the records of the Jefferson County Clerk show that the property subject to this action is owned by Louisville E.O.P., Inc. This inaccuracy in designation amounts to a clerical error that has resulted in no prejudice to Golden Foods, and a correction can easily be made. We find no reversible error on this issue.

The interlocutory judgment of the Jefferson Circuit Court is affirmed, and this matter is remanded for a determination of just compensation for the taking.

ALL CONCUR.

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