

RENDERED: MARCH 24, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000801-MR

THORNBERRY ENTERPRISES, INC.

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CI-00227

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART
AND REMANDING

** ** * * *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: Thornberry Enterprises, Inc., appeals from an order of the Montgomery Circuit Court that addressed the duration and amount of interest to be paid on a condemnation proceeding jury award. Thornberry maintains that the court improperly reduced the interest award from 12% to 6%, and abused

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.

its discretion by denying interest during the pendency of an appeal. For the reason stated below, we affirm the order in part, vacate in part and remand the matter for additional findings of fact.

Thornberry owned a 20-acre parcel of commercial real estate situated in Montgomery County, Kentucky, where it operated a lumber mill. In 2000, the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways instituted a condemnation proceeding to acquire approximately 1.21 acres of the parcel for the purpose of improving Highway 460.

A panel of three commissioners was convened for the purpose of establishing a fair market value of the condemnation. After hearing proof, it awarded to Thornberry the sum of \$543,480, representing the value of the condemnation plus the fair rental value of temporary easements.

Thornberry and the Department of Highways each filed exceptions to the commissioners' report. A jury trial followed on August 5 and 6, 2002. On September 19, 2002, the Montgomery Circuit Court entered a final judgment reflecting a jury award in favor of Thornberry Enterprises. The jury determined that the difference in the fair market value before and after the condemnation was \$900,000. Because the Department of Highways had previously deposited with the court clerk the sum of \$543,480, the Department of Highways was ordered to pay

Thornberry Enterprises an additional \$356,520 to satisfy the jury award.

As part of the judgment, the Department of Highways was ordered to pay interest at the rate of 6% from April 5, 2001, to September 11, 2002 (the date of judgment), "and thereafter at the legal rate until paid." Thornberry appealed from the judgment, which was affirmed by a panel of this Court on December 30, 2004.

Thereafter, the Department of Highways evidenced its intention to pay interest at the rate of 6%, and not to pay interest for the period during which Thornberry's appeal was being prosecuted. In response, Thornberry filed a motion to show cause why the September 11, 2002, judgment should not be executed. That is to say, Thornberry contended that the "legal rate" set forth in the judgment was 12%. It also argued that it was entitled to interest during the pendency of the appeal.

On April 2, 2005, the circuit court entered an order addressing the show cause motion. The court stated that interest was to be calculated at the rate of 6% pursuant to KRS 416.620(5). It also ruled that Thornberry was not entitled to interest during the pendency of its original appeal. This second appeal followed.

Thornberry first argues that the trial court erred in fixing the interest calculation after the date of judgment at 6%

rather than 12%. In support of this contention, it points to the judgment language stating that interest was to be calculated "at the rate of 6% from April 5, 2001, until the date of this judgment and thereafter at the legal rate until paid."

Thornberry maintains that the phrase "the legal rate" means 12% interest, and that this rate became the law of the case at the time of judgment and could not subsequently be amended by either the circuit court or an appellate tribunal.

We are not persuaded by this argument. Thornberry has cited no case law or statutory law in support of the assertion that the phrase "the legal rate" means anything other than the 6% figure cited by the circuit court in the order on appeal. In reaching its decision, the circuit court relied on KRS 416.620(5), which clearly fixes the rate at 6%. Nothing in KRS 416.620 or the record leads to any other conclusion. Since the burden rests with an appellant to overcome the strong presumption that the trial court's rulings are correct,² and because Thornberry has offered nothing to overcome that presumption, we find no error on this issue.

Thornberry also argues that the circuit court erred in failing to order the accrual of interest during the pendency of the appeal. It maintains that it is entitled to interest throughout the appeal irrespective of the fact that the appeal

² City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

was not successful, and argues that equity is not served by punishing it for exercising its right to appellate review. Thornberry seeks a reversal of the circuit court's order denying the accrual of interest during the appeal.

Again, Thornberry has cited no case law or statutory law in support of its claim of error, and it falls well short of meeting its burden of proving that the trial court's ruling on this issue was erroneous. Nevertheless, we have previously held that the filing of an appeal from judgment does not toll the accrual of judgment interest in the absence of an unconditional tender of the award by the judgment debtor. We stated in Grange Mutual Casualty Co. v. Hollon³ as follows:

[W]e hold that an unsuccessful appeal from a favorable judgment deemed by the appealing party to be inadequate does not toll the running of interest on the initial award in the absence of an unconditional tender of the award to the appealing party. In the alternative, the judgment debtor may deposit the award into court subject to unrestricted withdrawal by the party prosecuting the appeal, that is, the judgment creditor.

While the Hollon case addressed interest arising from a tort judgment, we find no legal or equitable distinction barring the application of this rule to the instant facts. The dispositive point of Hollon, which is applicable herein, is that an appealing party is entitled to interest during the pendency

³ 816 S.W.2d 663, 666 (Ky. App. 1991).

of the appeal if the judgment debtor has not made the funds immediately available for withdrawal.

In the matter at bar, the record indicates that the Department of Highways deposited \$440,100.32 on February 25, 2005, a time that post-dates Thornberry's first appeal. Because the record does not reveal if the award and interest were made available to Thornberry prior to the appeal, we must remand the matter to the circuit court for further findings on this issue.

On remand, if the Department of Highways made "an unconditional tender of the award"⁴ or deposited "the award into court subject to unrestricted withdrawal" by Thornberry, then Thornberry is not entitled to the accrual of interest during the pendency of the appeal. Conversely, if the award and interest were not made available by the Department of Highways to Thornberry prior to the appeal, then Thornberry is entitled to interest during the pendency of the appeal.

For the foregoing reasons, we affirm in part the order of the Montgomery Circuit Court to the extent that it ruled that Thornberry was entitled to 6% interest, and vacate in part and remand the matter for additional findings of fact and a ruling on the issue of interest accrual during the pendency of the first appeal.

⁴ "A tender requires more than just an offer; it requires the actual production of the funds which are admitted to be due by draft, check, cash or otherwise." Hollon, 816 S.W.2d at 665, quoting Faulkner v. Smith, 747 S.W.2d 592, 593 (Ky. 1988).

ALL CONCUR.

BRIEFS FOR APPELLANT:

Michael de Bourbon
Pikeville, KY

BRIEF FOR APPELLEE:

Pam Clay-Young
Lexington, KY