

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001081-MR

R.J. CORMAN

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE DARREN W. PECKLER, JUDGE
ACTION NO. 05-CI-00735

SDK CORPORATION; AND
THE NICHOLASVILLE PLANNING COMMISSION
AND ITS MEMBERS IN THEIR OFFICIAL CAPACITIES:
WILLIAM T. BLACK; LOUISE A. BROWN; JOHN
BLANKENSHIP; VICKI CORMAN; ERNEST DEMOSS;
SHAWN MURPHY; AND STEVE WILLIAMS

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

STUMBO, JUDGE: This is an appeal from a summary judgment entered against R.J.

Corman (Appellant). Mr. Corman filed a complaint and appeal in the Jessamine Circuit

Court. The combined complaint and appeal stemmed from a decision made by the

Nicholasville Planning Commission (hereinafter "Commission") to approve SDK

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Corporation's construction plans for a residential subdivision which adjoined Mr. Corman's land. The complaint and appeal combined the statutory appeal from the Commission's decision with a claim for nuisance and for the enforcement of a City of Nicholasville Ordinance prohibiting the point discharge of water onto his property. SDK filed a motion for summary judgment which was granted as to all claims. We hold that the decision by the Commission is unable to be properly reviewed by the courts for arbitrariness because there were no recorded findings of fact. We also hold that the summary judgment was premature as to the nuisance claim because Appellant was not permitted to develop any evidence other than the Commission record. As for the ordinance enforcement claim, we cannot decide that issue in the absence of the Commission's findings of fact. Because the Commission may find that the ordinance is being complied with, this claim could become moot.

SDK owns real property located within the city limits of Nicholasville. This property is zoned for residential use and is adjacent to property owned by Mr. Corman. Mr. Corman's property is at a lower elevation than SDK's, which causes water to naturally drain down SDK's property onto that of Mr. Corman. The water then flows across Mr. Corman's property into Jessamine Creek, which meanders through it.

SDK's construction plan is for a residential subdivision which will include a storm and surface water collection and drainage system. It will allow water to be collected into a series of pipes and then be discharged near Mr. Corman's property. The water will ultimately continue to drain across Mr. Corman's property as it has done

previously. As it stands now, water naturally flows across Mr. Corman's land in a manner described as sheet flow, which is dispersed across the surface of the land. Point discharge water is water that is discharged through a pipe or other outlet that is concentrated in a stream, like water flowing from a faucet. Because this water is concentrated, its flow is more forceful and can cause erosion of the land nearby. Mr. Corman's concern is that this erosion will damage his land. Because point discharge water can cause damage to land, it has been prohibited by the City of Nicholasville Code of Ordinances.²

Before SDK could begin construction, it had to submit subdivision plans to the Commission for approval. These plans incorporated devices called level spreaders, which are dam-like structures that purportedly catch the point discharge water and spread it out into an even, more natural flow. In order to determine if the construction plans and the level spreaders complied with the City Ordinances, the Commission held a hearing on June 27, 2005. Mr. Corman appeared by counsel to object to the construction plans and the use of level spreaders. Both his counsel and SDK brought engineers to give testimony on the effectiveness of level spreaders in ameliorating the harmful effects of point discharge water. The evidence submitted by both parties was in direct conflict. The Commission tabled the action in order for Mr. Corman and SDK to attempt to reach an agreement. It would revisit the matter on August 22, 2005, if no agreement could be reached. On August 22, both parties returned to the Commission meeting without having

²Article I, Section 19-1, Section IV, City of Nicholasville General Specifications for the Construction of Water Facilities, Sewerage Facilities and Storm Drainage Facilities.

reached an agreement. At that point the Commission voted to approve the construction plans and the use of level spreaders.

Mr. Corman appealed this decision and filed a combined Complaint and Appeal. When Mr. Corman filed his first set of interrogatories, SDK filed a motion for summary judgment stating that the Commission's decision was dispositive of the issue and that the nuisance and ordinance compliance claims were directly related to the Commission's decision and were therefore moot. The trial court granted the motion stating that the Commission's decision was not arbitrary as it was supported by substantial evidence. *Allen v. Kentucky Horse Racing Authority*, 136 S.W.3d 54 (Ky. 2004); and *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (Ky. 1964). The court also found that the Commission had determined that the use of level spreaders was in conformity with the City Ordinance regarding point discharge water and that there was no factual or legal basis in the Commission's records to support the assertion of future harm to Mr. Corman's property.

This Court is limited by the Constitutional separation of powers doctrine from substituting its judgment for that of an agency designated by statute to decide the matter, and its review is confined to the determination as to whether the Planning Commission's decision was arbitrary. *Id.* Mr. Corman argues that because the Commission made no findings of fact supporting its approval of the construction plans, that decision cannot be properly reviewed by the court and should be reversed. SDK

argues that findings of fact are not necessary for matters that are purely ministerial. SDK cites *Wolf Pen Preservation Association, Inc. v. Louisville and Jefferson County Planning Commission*, 942 S.W.2d 310 (Ky.App. 1997) as support. While that case does so hold, we find that it does not apply to the matter at hand. We believe that this was not a purely ministerial matter.

The Kentucky Supreme Court held in *Pearl v. Marshall*, 491 S.W.2d 837, 839-840 (Ky. 1973), that:

[i]t is the opinion of the court that findings of fact are essential to support the orders of administrative agencies, at least where the order issued by the agency rests upon a factual determination . . . The goal of the administrative process must be to insure uniformity of treatment by administrative agencies to all persons who are similarly situated. Without the application of uniform standards, uniformity of treatment is difficult to achieve. Without specific findings of fact it is difficult, if not impossible, upon review to determine whether the administrative agency has acted arbitrarily or within its powers.

While it appears that the approval of a construction plan may be a ministerial matter, there was an additional element in this case which required a factual determination. The use of level spreaders had never previously been considered by the Nicholasville Commission and, before it could accept SDK's construction plan, it needed to determine that the level spreaders would eliminate the point discharge water on the specific property at issue. This determination regarding the use of level spreaders is a "factual determination." Had SDK used tried and tested methods for eliminating point discharge water, we could see how approving the construction plan must be merely ministerial.

But, since we apparently have an issue of first impression before the Commission, a factual determination that level spreaders would be effective in preventing damage to Appellant's land was necessary. Because this case rests on a factual determination as set forth in *Pearl*, we find that the Commission must make findings of fact regarding the use of level spreaders in the construction plan in order for a trial court to appropriately review its decision.

Mr. Corman also argues that the court erred by granting the summary judgment on his nuisance and enforcement claims based solely on the administrative record of the Commission. We agree. *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, 602 S.W.2d 427 (Ky. 1980), and *Bartman v. Shobe*, 353 S.W.2d 550 (Ky. 1962), establish that a party can both appeal a decision by an administrative agency and bring an independent claim. SDK would have us affirm the trial court's summary judgment because Mr. Corman's nuisance claim is too speculative or because the issue of nuisance was determined by the Commission's approval of the construction plan. We find otherwise. SDK cites case law which states that an injunction will not be granted when a claim for a future nuisance is too speculative. While an accurate statement of the law, the speculative nature of a nuisance claim can only be determined after some evidence has been taken by the trial court. The only evidence utilized by the trial court in granting a summary judgment was the Commission's record.

Summary judgment should only be used to "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce

evidence at the trial warranting a judgment in his favor and against the movant.”

Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 483 (Ky. 1991) *citing* *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Here, Mr. Corman was not allowed to develop any evidence. The motion for summary judgment was filed and granted while Mr. Corman’s interrogatories remained unanswered. Further, the Commission’s decision is not dispositive of the nuisance issue. That decision simply accepts the proposed construction plan that incorporates the use of level spreaders without any findings as to their effectiveness. We find that the record of the Commission is insufficient for the purposes of granting summary judgment and hold that Mr. Corman should be allowed to develop and submit evidence in support of his nuisance claim in addition to the Commission’s record.

Mr. Corman’s final argument is that the trial court erred in granting summary judgment against him on his claim for enforcement of Nicholasville’s point discharge ordinance. We find it essential that the Commission make its findings of fact before the issue of ordinance compliance can be addressed by any court.

For the above reasons, we reverse the trial court’s summary judgment on all issues and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF AND ORAL ARGUMENT FOR
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