

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002339-MR

ELDEN GINN TOBACCO WAREHOUSES, INC. APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. McNEILL, III, JUDGE
ACTION NO. 04-CI-00129

EAST KENTUCKY POWER COOPERATIVE, INC. APPELLEE

AND NO. 2004-CA-002340-MR

GERALD WOODS APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. McNEILL, III, JUDGE
ACTION NO. 04-CI-00166

EAST KENTUCKY POWER COOPERATIVE, INC.;
AND FARM CREDIT SERVICES OF MID-AMERICA, FLCA¹ APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: JOHNSON AND TACKETT,² JUDGES; BUCKINGHAM, SENIOR JUDGE.³

¹ Farm Credit Services of Mid-America, FLCA was named in the circuit court as a defendant and on appeal as an appellee because it is a mortgagee of the subject property.

JOHNSON, JUDGE: Elden Ginn Tobacco Warehouses, Inc. and Gerald Woods (hereinafter collectively referred to as "Ginn" unless individual identification is necessary⁴) have appealed from the October 11, 2004, interlocutory judgments of the Mason Circuit Court, which pursuant to the Eminent Domain Act of Kentucky⁵ granted East Kentucky Power Cooperative, Inc. (EKPC), a Kentucky corporation, the right to condemn certain rights-of-way across their respective properties to construct an electrical transmission line from a power production facility in Maysville, Kentucky, to Flemingsburg, Kentucky, and Goddard, Kentucky. Having concluded that the circuit court improperly applied the doctrine of collateral estoppel in making its decision, we reverse and remand.

The facts of this case are not in dispute. EKPC sought to construct a new electrical transmission line from its Spurlock Generating Plant (Spurlock) in Maysville to Flemingsburg and Goddard. According to EKPC, this line is necessary to address three issues related to the integrated

² Judge Julia K. Tackett concurred in this opinion prior to her retirement effective June 1, 2006.

³ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

⁴ Appellants filed a consolidated brief in this matter contesting the circuit court's decisions.

⁵ Kentucky Revised Statutes (KRS) 416.540 through 416.670.

electrical transmission system in northeastern Kentucky. According to EKPC, the first issue involved transmission loading relief on the Kenton-Wedonia electric line owned and operated by EKPC. Secondly, the new line was to address unit stability for generating units #1 and #2 at Spurlock. And finally, the new line would provide an alternative source of electricity to EKPC's Flemingsburg substation which covers approximately 5,400 customers of Fleming-Mason RECC.

Apparently, after receiving petitions from residents in Mason County and Fleming County suggesting alternative routes for the proposed electrical line, the Public Service Commission (PSC) established a case regarding the project and held a public hearing concerning it.⁶ The PSC determined that the project was necessary to provide EKPC with additional transmission capacity, that it did not constitute wasteful duplication, and that it was reasonable.

Thereafter, on May 14, 2004, EKPC filed petitions in the circuit court to condemn the rights-of-way across the property of Ginn and Woods so the electrical line could be constructed. Answers to the petitions were filed on July 23, 2004, challenging EKPC's right to take the property. On August 13, 2004, the circuit court scheduled a hearing date of

⁶ Case No. 2003-00380.

September 7, 2004, for the taking issue and ordered that discovery be completed by September 3, 2004.

On October 11, 2004, the circuit court made its findings of fact, conclusions of law, and interlocutory judgments regarding EKPC's petitions. The circuit court found that the PSC in addressing the questions of the "public use" and "need" for the proposed electrical line had found in favor of EKPC on those issues. The circuit court then concluded that the "determination by the [PSC] is conclusive of the public necessity for the construction of this line. That determination is, by the doctrine of collateral estoppel, binding on this court." The circuit court then ordered that EKPC be allowed to take the property sought for constructing the electrical line.

EKPC, as a rural electric cooperative corporation, has been granted under KRS 279.110(4) the right to exercise eminent domain as provided by the Eminent Domain Act of Kentucky⁷ to take property for a public purpose. Under KRS 416.610(4), when a property owner has filed an answer putting the right to condemn in issue, the circuit court is required to hear the matter and to determine whether or not the petitioner has the right to condemn the property sought and to make findings regarding that right. In making such determination, the circuit court must consider two basic questions: (1) the authority of the

⁷ KRS 416.540 through 416.670.

petitioner to condemn the property; and (2) the public necessity in using that authority.⁸ Further, the condemning body is given broad discretion regarding the amount of land to be taken and in determining whether the taking is a necessity. The party challenging the condemnation bears the burden of establishing a lack of necessity for the taking, an absence of public use, or an abuse of discretion.⁹

In this case, the circuit court correctly found that EKPC had the authority to condemn by virtue of KRS 279.110(4), which permits rural electric cooperative corporations to exercise the right of eminent domain. However, the circuit court did not make proper findings regarding the public necessity for EKPC to exercise its power of eminent domain in regard to the Ginn properties. It was error for the circuit court to merely conclude that the determination of the PSC was binding upon it based upon the doctrine of collateral estoppel because all of the elements necessary to apply that doctrine were not present.

Collateral estoppel is a subsidiary of the rule of res judicata which prohibits parties from relitigating issues that

⁸ Duerson v. East Kentucky Power Cooperative, Inc., 843 S.W.2d 340, 343 (Ky.App. 1992).

⁹ God's Center Foundation, Inc. v. Lexington Fayette Urban County Government, 125 S.W.3d 295 (Ky.App. 2002).

were determined in a prior proceeding.¹⁰ The doctrine is applicable where there is an identity of issues, an identity of parties or their privities, and a final decision or judgment on the merits.¹¹ In this case, the decision of the PSC regarding EKPC's proposed project did not constitute collateral estoppel because the PSC did not, and could not, consider EKPC's claimed right to take the property. The PSC order, entered on December 30, 2003, clearly stated that the purpose of the PSC investigation was to ensure that the construction of the proposed line would not result in wasteful duplication. The action before the PSC did not address EKPC's authority to take the Ginn properties for the purpose of constructing the electrical line or any of Ginn's challenges under KRS 416.610 that the taking was not necessary nor for a public purpose. Further, Ginn and Woods were not parties to the proceedings before the PSC, or involved in any manner other than perhaps being among the more than 60 residents and local officials who sent letters and petitions opposing the location of the new power lines.¹²

Therefore, the circuit court erred by concluding that EKPC had established that the taking of the Ginn properties was

¹⁰ Gregory v. Commonwealth, 610 S.W.2d 598 (Ky. 1980); Sedley v. City of West Buechel, 461 S.W.2d 556 (Ky. 1970).

¹¹ Sedley, 461 S.W.2d at 559.

¹² Six residents were granted intervention in the PSC proceeding, but they are not identified in the record on appeal.

for a public necessity and purpose as required by the Eminent Domain Act.¹³ Likewise, by relying upon the determination of the PSC, the circuit court failed to address Ginn's claims that EKPC had acted fraudulently and/or in bad faith in its determination to take their properties for the electrical-line project. These questions must be addressed by the circuit court through proper findings of fact and conclusions of law.

Ginn also alleges that it was denied due process when the circuit court denied its motion to continue the September 7, 2004, hearing on EKPC's motion for interlocutory judgment because it was not afforded sufficient time to obtain an expert witness to rebut EKPC's claim that the taking was necessary and for a public purpose. Although Ginn did not file a written motion for a continuance of the hearing, its counsel did orally move the circuit court for a continuance prior to the hearing. However, Ginn has failed to show what efforts it made to obtain an expert witness or any inability to do so as a result of the circuit court's discovery schedule. We note that KRS 416.610(4) requires the circuit court to "proceed forthwith to hear and determine whether or not the petitioner has such right" to condemn property. However, because we are remanding this matter to the circuit court for further proceedings, Ginn may address

¹³ KRS 416.610.

to the circuit court its desire to present expert testimony in rebuttal to EKPC's claim to take the property at issue.

Based upon the foregoing, we reverse the order of the Mason Circuit Court and remand this matter for further proceedings consistent with this Opinion.

ALL CONCUR.

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BRIEF FOR APPELLEE, FARM CREDIT SERVICES:

No brief filed.