

RENDERED: JANUARY 25, 2013; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000121-MR

COPPAGE CONSTRUCTION COMPANY, INC.

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 08-CI-02787

SANITATION DISTRICT NO. 1 AND
DCI PROPERTIES-DKY, LLC

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, LAMBERT AND TAYLOR, JUDGES.

LAMBERT, JUDGE: Coppage Construction Co., Inc. (Coppage) appeals from an order of the Kenton Circuit Court dismissing all of Coppage's contract, statutory, and tort claims against Appellee Sanitation District No. 1 of Northern Kentucky (SD1) on grounds of sovereign immunity. After careful review, we affirm the circuit court's order.

In 2005, DCI Properties-DKY, LLC (DCI) entered into an agreement with the City of Dayton, Kentucky, to build a mixed-use development project known as Manhattan Harbour north of the city's floodwall along the Ohio River. The design for DCI's proposed project required the relocation of an existing combined sanitary sewer line owned by SD1. SD1 is a sanitation district organized under Kentucky Revised Statutes (KRS) Chapter 220 that provides sewer services to a number of communities located within Boone, Campbell, and Kenton Counties.

DCI originally proposed to replace the existing line, which was made up of approximately 7,400 linear feet of pipe ranging from 21" to 27" in diameter, with one of the same size and capacity. However, after DCI submitted its plans to SD1 for approval, SD1 determined that the project presented an opportunity to improve its storm water and sewage storage capacity in that area by expanding the size of the proposed sewer line. SD1 had previously entered into a Consent Decree with the United States Environmental Protection Agency and the Kentucky Environmental and Public Protection Cabinet that required it to make "extensive improvements to its sewer systems to eliminate unauthorized overflows of raw sewage and to control overflows of combined sewage and storm water." SD1 and DCI subsequently entered into negotiations to replace the existing sewer line with an expanded 84" diameter line spanning over 8,000 linear feet.

Because DCI apparently had limited experience in the construction of sewer projects, SD1 and DCI requested a price proposal for labor, materials, and construction from Coppage, which had experience in sewer system construction.

After Coppage provided its proposal, SD1 and DCI entered into a contract on June 21, 2007, under which SD1 agreed to pay \$10,550,000.00 of the project's then-estimated \$14,651,356.00 total cost. This sum was based on the estimated cost to lengthen and upsize the sewer line. The record reflects that SD1 would purchase the sewer line and all associated easements upon completion. Under the contract, DCI was to be responsible for retaining the contractor, purchasing supplies, and entering all other contracts necessary to construct the sewer line. Although Coppage was not listed as a party to the contract, the contract identifies Coppage as the party to perform the work on the project and expressly incorporates Coppage's proposal.

On July 5, 2007, DCI entered into a construction contract with Coppage for Coppage to construct the sewer line. Under this contract, DCI agreed to pay Coppage approximately \$15.4 million to construct the sewer line. The contract further called for Coppage to perform the work and to provide the materials, supplies, and equipment set forth therein. SD1 was not a party to this agreement.

According to Coppage, after it had installed more than half of the line, its work was impacted and suspended for several months beginning in early 2008 due to delay caused by SD1 and DCI, including disputes between SD1 and DCI over engineering issues, the scope of the project, and payments owed to the project's geotechnical engineer. Appellees deny this version of events. Coppage eventually notified SD1 and DCI that it believed its contract with DCI had been breached because of these issues and provided an opportunity to cure. However, on August

7, 2008, DCI terminated its contract with Coppage pursuant to a “termination-for-convenience” provision that permitted either party to terminate the agreement “at any time without cause.”

On September 3, 2008, DCI filed a complaint in Kenton Circuit Court seeking a declaration that Coppage was not entitled to any delay damages, and also seeking damages for breach due to Coppage’s allegedly excessive billing and harm allegedly caused to the Manhattan Harbour project. On September 29, 2008, Coppage filed an answer denying any breach, as well as a counterclaim alleging claims for breach of contract, unjust enrichment, promissory estoppel, and violation of the Kentucky Fairness in Construction Act. Coppage subsequently amended its counterclaim to assert claims for conversion and constructive trust.

On May 11, 2010, Coppage filed a third-party complaint against SD1. The complaint raised a number of contract, statutory, and tort claims against SD1 and alleged, among other things, that SD1 was directly liable to Coppage under Coppage’s contract with DCI pursuant to SD1’s joint venture and/or partnership by estoppel with DCI, and because SD1 so assumed control of the sewer line project that it effected a novation. Coppage also asserted a claim for breach of the contract between SD1 and DCI as an alleged third-party beneficiary. SD1 subsequently moved to dismiss Coppage’s third-party complaint on the grounds that it was entitled to sovereign immunity.¹

¹ SD1 also filed its own lawsuit in Campbell Circuit Court against DCI and Coppage. SD1 settled its claims against DCI fairly quickly but maintained its claims against Coppage.

On December 17, 2010, the Kenton Circuit Court entered an order dismissing all of Coppage’s claims against SD1 on grounds of sovereign immunity. The circuit court concluded that under *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009), whether an entity was entitled to sovereign immunity depended on its “parentage” and whether it performed a function integral to state government. The court concluded that SD1 was entitled to immunity under this test because it “was established by the County Fiscal Courts in accordance with the provisions of KRS Chapter 220” and because “[b]y providing the important and necessary sanitation services to the three counties, [SD1] is providing a vital governmental function.” This appeal followed.

On appeal, Coppage argues that the circuit court erroneously held that SD1 enjoys the same sovereign immunity as a county government because the decision of the Supreme Court of Kentucky in *Calvert Investments, Inc. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133 (Ky. 1991), holds that sanitary sewer service districts do not perform a function integral to state government. Coppage also contends that SD1 is an independent municipal corporation created by petition of non-immune municipalities to perform local services on their behalf; therefore, the application of sovereign immunity is further precluded under *Comair, supra*. Appellees argue in response that SD1 is entitled to sovereign immunity because it performs functions that are integral to state government and because its “parent” entities are all immune by virtue of the extensive control exercised over SD1 by the state and by Boone, Campbell, and

Kenton Counties. Based on the Supreme Court’s reasoning in *Comair*, we agree with the Appellees.

While SD1 styled its motion as a motion to dismiss, the circuit court noted in its December 2010 order that it considered matters outside the pleadings. Thus, the circuit court properly considered the motion as one for summary judgment. Under Kentucky law, summary judgment is proper where there exists no material issue of fact and the movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991); Kentucky Rules of Civil Procedure (CR) 56. We review the circuit court’s application of the law to the facts and the appropriate legal standard *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

“Immunity from suit is a sovereign right of the state.” *Foley Const. Co. v. Ward*, 375 S.W.2d 392, 393 (Ky. 1963). That right is deeply implanted in Kentucky law, and “prohibit[s] claims against the government treasury absent the consent of the sovereign.” *Caneyville Volunteer Fire Dept. v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009) (footnote omitted); *see also Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 344 (Ky. 1997). With this said, “sovereign immunity should be limited strictly to what the Constitution demands[.]” *Calvert*, 805 S.W.2d at 138 (citation omitted).

In *Comair, supra*, the Supreme Court initially noted that state and counties enjoy sovereign immunity but that cities, as municipal corporations, enjoy no immunity for negligent acts committed “outside the legislative and judicial

realms.” *Comair*, 295 S.W.3d at 95. The Court then clarified the analysis that is to be applied in determining whether governmental entities that fall outside of the traditional immunity taxonomy of “city versus state and county” are entitled to sovereign immunity. In such instances, a two-part analysis is utilized to determine immunity. First, the origin of the entity is considered. “This inquiry can be as simple as looking at the ‘parent’ of the entity in question, i.e., was it created by the state or a county, or a city? This amounts to recognizing that an entity’s immunity status depends to some extent on the immunity status of the parent entity.” *Id.* at 99. Next, a consideration is made as to whether the entity carries out an integral state function. Regarding this, the Supreme Court stated:

The focus, however, is on state level governmental concerns that are common to all of the citizens of this state, even though those concerns may be addressed by smaller geographic entities (e.g., by counties). Such concerns, include, but are not limited to, police, public education, corrections, tax collection, and public highways.

Id. at 99. The Supreme Court emphasized that this is not a new revelation since the question of whether an entity performs an integral state governmental function “has been the focus of sovereign immunity analysis from early on.” *Comair*, 295 S.W.3d at 99, *citing Gross v. Kentucky Board of Managers of World's Columbian Exposition*, 105 Ky. 840, 49 S.W. 458, 459 (1899).

In the instant case, SD1 serves the needs of Campbell, Kenton, and Boone Counties. It was established by the County Fiscal Courts in accordance with KRS Chapter 220 and is controlled by the above counties and the state. As such, SD1 is

an “arm” of the counties within its geographical boundaries and its “parents” are the state and the counties it serves. *Comair*, 295 S.W.3d 91.

Thus, the central issue then becomes whether a sanitation district such as SD1 performs an integral state governmental function. As Coppage correctly notes, in *Calvert*, *supra*, the Supreme Court held that because the Louisville and Jefferson County Metropolitan Sewer District was a “special district[] established and structured by statutes enacted by the General Assembly to carry out a limited public purpose in a local area[,]” *Calvert*, 805 S.W.2d at 135, it did not perform a function integral to state government and, therefore, was not entitled to sovereign immunity. *Id.* at 136-37. Consequently, Coppage argues that *Calvert* stands for the proposition that a sanitary sewer service district does not perform an integral state function and is not entitled to sovereign immunity. Because of this, Coppage asserts that *Calvert* is dispositive of the case before us. We disagree.

Calvert is distinguishable and lacks precedential value here because the sewer district at issue in that case was created via KRS Chapter 76, which governs metropolitan sewer districts, and not Chapter 220, which applies to sanitation districts such as SD1. Pursuant to the latter chapter, a sanitation district’s functions are to prevent pollution of streams, regulate the flow of streams for sanitary purposes, provide collection and disposal of sewage and provide for the management of onsite sewage disposal facilities. *See* KRS 220.030. Upon creation of a sanitation district, KRS 220.110(1) provides that such a sanitation

district shall be considered “a political subdivision . . . with power to sue and be sued, contract and be contracted with, incur liabilities and obligations”

The record indicates that SD1 performs functions integral to state government. Providing and maintaining sewer facilities are functions of state-wide concern and are a necessary government function. Thus, the differences between metropolitan sewer districts and sanitation districts are significant under the analysis adopted in *Comair*, such that *Calvert* does not control in the instant case.² Because SD1’s parents are immune from suit and because it performs an integral state function, the circuit court properly determined that SD1 was entitled to sovereign immunity regarding Coppage’s tort claims. Finding no error as a matter of law, we affirm the circuit court’s entry of summary judgment in this regard.

Next, Coppage argues that even if SD1 is entitled to sovereign immunity as a “county,” such immunity would not insulate it from enforcement of its contract obligations, and the entry of summary judgment on its contract claims should be reversed. Again, our review indicates that the circuit court properly granted summary judgment in this regard.

Coppage cites *Illinois Central Gulf Railroad Co. v. Graves County Fiscal Court*, 676 S.W.2d 470 (Ky. App. 1984), arguing that in that case, this Court recognized a common law limitation on counties’ sovereign immunity in actions to

² For example, KRS Chapter 76 addresses itself solely to the provision of “adequate sewer and drainage facilities” in a metropolitan area, KRS 76.010, while KRS Chapter 220 addresses sewage and drainage matters while also allowing a sanitation district created under that Chapter to take on the expanded responsibility of storm water management as a result of the federal Clean Water Act. KRS 220.030; *Wessels Co., LLC v. Sanitation Dist. No. 1*, 238 S.W.3d 673, 675 (Ky. App. 2007).

enforce a lawfully created contract, which arises from the common law rule that “sovereign immunity does not apply to suits seeking to compel administrative officers to satisfy a liability lawfully created by them.” *Id.* at 471. This Court observed that while this common law limitation was abolished in suits against the state by *Foley Construction Co. v. Ward*, 375 S.W.2d 392 (Ky. 1964), “[t]he *Foley* decision made no mention of the application of sovereign immunity to lawful contracts made by counties[.]” *Illinois Central Gulf Railroad Co.*, 676 S.W.2d at 472.

Thus, under *Illinois Central*, a county’s sovereign immunity does not preclude actions to enforce the terms of lawful contracts which the county had authority to make. However, Coppage is not seeking to recover for breach of an express contract between Coppage and SD1 that was properly authorized by SD1. If SD1 had intended to enter a contract for Coppage to construct the sewer line, then, as Coppage properly points out, that contract would have had to comply with KRS 220.290. That statute requires, *inter alia*, that such a contract would have to be in writing, adopted by the SD1 board, and signed by the board president and by Coppage as the contractor. Coppage does not allege that it was a party to any such properly authorized, written contract by SD1. Instead, Coppage alleges that SD1, through its actions and communications, effectuated a novation of the Construction Agreement pursuant to which SD1 replaced DCI as the party that employed Coppage to construct the sewer line and made Coppage a third-party beneficiary of the SD1 contract. Coppage also alleges that the actions of SD1 and DCI created a

joint venture or partnership by estoppel between them, making SD1 liable to Coppage for DCI's alleged breaches of the Construction Agreement. None of these putative claims satisfies the *Illinois Central* exception, however, because Coppage was not a party to a lawfully created contract that complied with KRS 220.290. In cases of implied contracts, such as what Coppage is essentially arguing here, immunity has been upheld. *See Commonwealth v. Whitworth*, 74 S.W.3d 695 (Ky. 2002). Because there was no express written contract between Coppage and SD1, the circuit court properly granted SD1's motion for summary judgment based on sovereign immunity grounds.

In summary, the circuit court properly determined that SD1 was entitled to sovereign immunity in defense to Coppage's tort claims under *Comair* because its parent counties are immune and because it performs an integral state function. SD1 is entitled to the defense of sovereign immunity on Coppage's contract claims, as there was no valid written contract between the two parties. Accordingly, we affirm the December 17, 2010, order of the Kenton Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sheryl G. Snyder
Griffin Terry Sumner
Jason Renzelmann
Louisville, Kentucky

William T. Robinson III
Florence, Kentucky

BRIEF FOR APPELLEE
SANITATION DISTRICT
NO. 1:

Jeffrey C. Mando
Jennifer H. Langen
Covington, Kentucky

BRIEF FOR APPELLEE
DCI PROPERTIES-DKY, LLC

Robert B. Craig
Covington, Kentucky