

RENDERED: MAY 15, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001196-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 07-CI-00001

BRYAN G. GUESS; REGIONS
BANK, F/K/A/ SALEM BANK,
INC.; AND OLD NATIONAL
BANK, F/K/A WESTERN KY
LOANS BY MORGANFIELD
NATIONAL BANK

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND TAYLOR, JUDGES.

LAMBERT, J. JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways (Transportation Cabinet) appeals from the Crittenden Circuit Court's order dismissing this case and from the court's order denying the Transportation Cabinet's motion to alter, amend, or vacate. After careful review, we vacate and remand for further proceedings.

This is a condemnation case, and the Eminent Domain Act of Kentucky, Kentucky Revised Statutes (KRS) 416.540-KRS 416.670 (the Act) governs. The Transportation Cabinet filed the suit against the Appellees, Bryan Guess, Regions Bank, and Old National Bank on January 2, 2007, to condemn 13.55 acres in fee simple, 15,789 square feet as a permanent easement, and 2,693 square feet as temporary easements for the reconstruction of US 641 from Marion to Fredonia. The Interlocutory Order and Judgment (IOJ) was entered on May 22, 2007, and on May 25, 2007, the Transportation Cabinet deposited the Commissioners' Award of \$30,000.00 with the Crittenden Circuit Clerk pursuant to KRS 416.610(2)(c) and the IOJ. Both the Transportation Cabinet and Guess filed timely exceptions. This case was initially set for trial in February 2008 and was continued pursuant to an agreed order entered on December 21, 2007.

No further action was taken, and the trial court dismissed this case on November 11, 2011, pursuant to Kentucky Rules of Civil Procedure (CR) 77.02(2) for lack of prosecution. The Transportation Cabinet alleges that they did not receive notice that this case was scheduled for a CR 77.02(2) hearing and therefore did not file a response. The construction project was awarded on November 7,

2011, and construction is currently underway. The trial court entered an order on November 10, 2011, dismissing the case without prejudice. Counsel for the Transportation Cabinet timely filed a motion to redocket the case and set it for trial. In this motion, the Transportation Cabinet argued that it had possession of the condemned property, and that, if the case was not redocketed, dismissal would result in dismissal of the exceptions and make the Commissioners' Award final. The Transportation Cabinet contended that the construction contract had been let on November 7, 2011, and that the construction would start soon. Guess contested the Transportation Cabinet's motion to redocket on the grounds that the property would have to be reappraised because of the passage of time from right of entry until 2011. The Transportation Cabinet filed a response explaining that KRS 416.660(2) set the date of valuation, which could not be changed and contended that Guess's argument was invalid.

On February 11, 2013, the trial court entered an order denying the Transportation Cabinet's motion to redocket the case. The trial court based its reasoning on the fact that KRS 416.610(4) requires an "immediate and expedited appeal" for landowners, relying on *Ratliff v. Fiscal Court of Caldwell County*, 617 S.W.2d 36 (Ky. 1981). The trial court further held that KRS 416.620 requires that the case be tried within thirty days. The trial court ruled that Guess had preserved his rights and that his due process rights had been violated by the Transportation Cabinet in failing to try the case within thirty days according to its interpretation of KRS 416.610 and KRS 416.620.

The Transportation Cabinet moved to alter, amend, or vacate the trial court's February 2013 order pursuant to CR 59.05 on the grounds that the trial court had incorrectly interpreted KRS 416.610, KRS 416.620, and *Ratliff*. The Transportation Cabinet argued that the statutory sections cited by the trial court refer to timely contesting the right to take, timely filing exceptions, and the finality of the case if no exceptions are filed. It argues that these do not mandate a trial on compensation within thirty days. Further, the Transportation Cabinet argues that *Ratliff* grants the right to an immediate appeal to landowners adversely affected by a ruling on the right to condemn, not the right to an immediate trial on compensation.

At the motion hour on March 14, 2013, one year after construction had started on the project, the trial court asked Guess's attorney why his client had never taken any action to stop construction. Counsel for Guess replied that he had advised his client not to attempt to stop construction because the Commonwealth had the right of eminent domain, and there was no reason to interfere with the project. The issue, according to Guess, was not the right of eminent domain, but valuation. The Transportation Cabinet then moved the court for Guess to elect his remedy: either redocket the case or have it made final. Guess stated that the case was dismissed. The Transportation Cabinet then moved to dismiss the exceptions, make the IOJ final, and order the Master Commissioner of the Court to execute a deed conveying the condemned property to the Commonwealth for the amount of the Commissioners' Award. The trial court entered an order on June 10, 2013,

denying the Transportation Cabinet's motion to alter, amend, or vacate. This appeal now follows.

On appeal, the Transportation Cabinet argues that the trial court abused its discretion when it dismissed the case pursuant to CR 77.02(2) and further failed to dismiss the exceptions and to make the case final pursuant to KRS 416.620. We agree that the issues in this case are questions of law, and questions of law are to be decided *de novo*. *Manning v. Lewis*, 400 S.W.3d 737, 740 (Ky. 2013).

The Transportation Cabinet contends that it has consistently argued throughout this case that it has possession of the condemned property pursuant to the statutory scheme outlined in KRS 416.610 and KRS 416.620. KRS 416.610 states:

(1) After the owner has been summoned twenty (20) days, the court shall examine the report of the commissioners to determine whether it conforms to the provisions of KRS 416.580. If the report of the commissioners is not in the proper form the court shall require the commissioners to make such corrections as are necessary.

(2) If no answer or other pleading is filed by the owner or owners putting in issue the right of the petitioner to condemn the property or the use and occupation thereof sought to be condemned, the court shall enter an interlocutory judgment which shall contain, in substance:

(a) A finding that the petitioner has the right, under the provisions of KRS 416.550 to 416.670 and other applicable law to condemn the property or the use and occupation thereof;

(b) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(c) An authorization to take possession of the property for the purposes and under the conditions and limitations, if any, set forth in the petition upon payment to the owner or to the clerk of the court the amount of the compensation awarded by the commissioners;

(d) Proper provision for the conveyance of the title to the land and material, to the extent condemned, as adjudged therein in the event no exception is taken as provided in KRS 416.620(1).

(3) Any exception from such interlocutory judgment by either party or both parties shall be confined solely to exceptions to the amount of compensation awarded by the commissioners.

(4) If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered. If the court determines that petitioner does not have such right, it shall enter a final judgment which shall contain, in substance:

(a) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(b) A finding that the petitioner is not authorized to condemn the property or the use and occupation thereof for the purposes and under the conditions and limitations set forth in the petition, stating the particular ground or grounds on which the petitioner is not so authorized;

(c) An order dismissing the petition and directing the petitioner to pay all costs.

KRS 416.620 provides:

(1) Within thirty (30) days from the date of entry of an interlocutory judgment authorizing the petitioner to take possession of the property, exceptions may be filed by either party or both parties by filing with the clerk of the Circuit Court and serving upon the other party or parties a statement of exceptions, which statement shall contain any exceptions the party has to the award made by the commissioners. The statement of exceptions shall be tried, but shall be limited to the questions which are raised in the original statements of the exceptions, or as amended, but the owner shall not be permitted to raise any question, nor shall the court reconsider any question so raised, concerning the right of the petitioner to condemn the property. All questions of fact pertaining to the amount of compensation to the owner, or owners, shall be determined by a jury, which jury on the motion of either party shall be sent by the court, in the charge of the sheriff, to view the land and material. After a jury trial, and if possession previously has not been taken by the condemnor of the land and material condemned, it may do so upon the payment to the owner or to the clerk of the Circuit Court the amount of the compensation adjudged by the Circuit Court to be due the owner.

(2) Appeals may be taken to the Court of Appeals from the final judgment of the Circuit Court as in other cases except that an appeal by the owner shall not operate as a supersedeas.

(3) The payment by the condemnor of the amount of compensation awarded and the taking possession of the lands and material condemned shall not prejudice its right to except from the award of the commissioners or the judgment of any court, nor shall the acceptance by the owner of the amount of the compensation awarded prejudice his right to except from the award of the commissioners or the judgment of any court.

(4) All costs in the Circuit Court shall be adjudged against the condemnor.

(5) If the condemnor takes possession of the property condemned and the amount of compensation is thereafter increased over that awarded by the commissioners, the condemnor shall pay interest to the owner at the rate of six percent (6%) per annum upon the amount of such increase from the date the condemnor took possession of the property. If the condemnor takes possession of the property condemned and the amount of compensation is thereafter decreased below that awarded by the commissioners, the condemnor shall be entitled to a personal judgment against the owner for the amount of the decrease plus interest at the rate of six percent (6%) per annum from the date the owner accepted the amount of compensation the condemnor paid into court or to the owner. If the owner at all times refuses to accept the payment tendered by the condemnor, no interest shall be allowed in the judgment against the owner for the amount of the decrease.

(6) Upon the final determination of exceptions, or upon expiration of thirty (30) days from entry of the interlocutory judgment if no exceptions are filed, the Circuit Court shall make such orders as may be proper for the conveyance of the title to the extent condemned, to the property, and shall enter such final judgment as may be appropriate.

The Transportation Cabinet argues that once possession is granted to the condemning authority, the authority cannot be dispossessed of the condemned property. In *Foster v. Sanders*, 557 S.W.2d 205, 208 (Ky. App. 1977), the Court stated “[u]nder the Eminent Domain Act, the condemnor is entitled to take possession of the property at such time as the amount of compensation awarded by the commissioners is paid to the owner or to the clerk of the court.” Thus, we agree that at the time the Transportation Cabinet tendered the compensation to the

Clerk, it possessed the property in question. At this point, the question became whether or not the compensation or valuation was appropriate. Per the language of KRS 416.620, Guess was entitled to a jury trial as to valuation. The statute clearly states that if exceptions are filed, they should be tried before a jury and that the jury is to determine the appropriate compensation.

In the instant case, the exceptions were set to be tried, but both parties agreed to a continuation. When nothing occurred in the case, the trial court dismissed it for lack of prosecution. While we agree with the trial court's reasoning that Guess is entitled to a prompt trial on the issue of the condemnation itself under KRS 416.610, the fact of the matter is that KRS 416.620 is silent as to a specific amount of time in which a trial on the exceptions and compensation is to be held. While we agree that the Transportation Cabinet has given no reasonable explanation for its delay in handling the case, we are hesitant to hold that dismissal in its entirety is warranted under the statutory scheme at issue here.

Furthermore, the record reflects that at several points, Guess conceded that the Transportation Cabinet had the right of eminent domain. The Cabinet argues that the right to condemn was never properly contested in this case, because no such objection was filed or preserved in Guess's answer, other than a general denial, which does not put in issue the right to condemn. *Commonwealth Dep't of Highways v. Cardinal Hill Nursery, Inc.*, 343 S.W.2d 842, 845-46 (Ky. 1961). We agree that under the current statutory scheme, the IOJ specifically overrules any objections to the right to condemn. We also agree that Guess preserved his right to

contest the amount of compensation by filing exceptions, which were never tried.

See Bianchi v. City of Harlan, 274 S.W.3d. 368, 372 (Ky. 2008).

While it seems unfair that the Transportation Cabinet sat on its laurels for an extended period of time, the fact of the matter is that construction on the property has started, and Guess did not contest the right of the Cabinet to take the property, but instead contested the valuation. The Transportation Cabinet tendered the Commissioners' Award, and Guess never contested the right of the Commonwealth to take the property. Rather than dismissing the case in its entirety, the trial court should have set the matter for a jury trial on compensation or made the IOJ final and appealable.

Accordingly, we vacate the trial court's February 11, 2013, order and remand for a jury trial on compensation, as required by KRS 416.620.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ann Myre
Paducah, Kentucky

BRIEF FOR APPELLEE BRYAN
GUESS:

Stephen M. Arnett
Morganfield, Kentucky