

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000629-MR

J & T MUNITIONS, INC.

APPELLANT

v. APPEAL FROM CLARK CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JR., JUDGE
ACTION NO. 15-CI-00534

WINCHESTER-CLARK COUNTY
INDUSTRIAL DEVELOPMENT
AUTHORITY

APPELLEE

OPINION
REVERSING AND
REMANDING

** ** * * * * *

BEFORE: ACREE, COMBS AND D. LAMBERT, JUDGES.

COMBS, JUDGE: J & T Munitions, Inc., appeals from a final judgment entered by the Clark Circuit Court in favor of the Winchester-Clark County Industrial Development Authority (the Industrial Development Authority). The judgment enforced certain restrictive covenants that had expired by their terms. Based upon

our review of the record and the applicable law, we are compelled to reverse and remand.

The facts of this case are not in dispute. On June 3, 1981, the Industrial Development Authority recorded restrictive covenants applicable to the Winchester-Clark County industrial park. The specific covenant at issue in this case concerned the exterior appearance of buildings constructed in the industrial park. The covenant provided, in part, as follows:

Any building constructed on any site . . . shall have exterior walls of durable, attractive material such as brick, stone, exposed aggregate or textured concrete, glass or such other material as may be approved in writing. . .

In October 1988, the restrictive covenants were amended to be made applicable to an expansion of the industrial park. In March 1992, the restrictive covenants were again amended to be made applicable to a second expansion of the industrial park. On November 8, 1993, the restrictive covenants were amended yet again to extend their provisions for a period of twenty (20) years.

In May 2013 -- some six months prior to the expiration of the pertinent restrictive covenant, an architect for J & T Munitions appeared before the Board of the Industrial Development Authority. The architect made a presentation and submitted drawings showing the front view of two industrial buildings, either of

which J & T Munitions (which is referred to in the Board's minutes as "J & T Distribution") proposed to construct in the industrial park.

Within a few days, the Board corresponded with the architect and indicated that construction in the industrial park was governed by recorded restrictive covenants. The Board referred to the specific covenant, quoted above, and explained that it was willing to permit construction of a building at variance with the covenant's exterior requirements. The Board explained that it was willing to permit the use of metal siding along the entire rear exterior and west side exterior of either of the proposed buildings. However, it would require masonry siding on the entirety of the front exterior of the proposed building. Extending down the east side of the building, the Board explained that it would require the same or similar masonry material at least six feet high.

Within days, the Industrial Development Authority deeded a 5.79-acre tract in the industrial park to J & T Munitions. The deed referred to the recorded restrictive covenants.

In September 2013, J & T Munitions was issued a building permit for the construction of a distribution facility upon its property in the industrial park. In October 2013, Jack Starnes, president of J & T Munitions, appeared before the Board. He requested a variance from the exterior requirements of the restrictive covenants with respect to the facility that J & T Munitions intended to build upon its property in the industrial park. After some discussion, the Board approved a

variance from the restrictive covenants. The variance permitted J & T Munitions to utilize metal siding on the entirety of the rear exterior and west side exterior of the building; it permitted metal siding along the front exterior and east side exterior of the building commencing at a point six-feet above the ground.

On October 25, 2013, the executive director of the Industrial Development Authority corresponded with Starnes by e-mail to inform him of the Board's decision. On November 8, 2013, the executive director sent another e-mail to Starnes requesting confirmation that Starnes had received the correspondence of October 25. By e-mail sent on or after November 8, 2013, Starnes confirmed to the Industrial Development Authority that he had received the email advising him that his request for a variance had been granted.

In May 2014 -- some six months after the expiration of the restrictive covenants applicable to the industrial park property, a Board member corresponded with Starnes concerning the facility being built upon the property of J & T Munitions. The Board member noted that masonry fiber board had not yet been applied to the lower portions of the front exterior and east side exterior of the building. In correspondence, Starnes advised that the masonry fiber board that was supposed to be attached to the existing, exterior sheet metal "will be one of the last processes."

In September 2014, the Board again inquired about the masonry fiber board to be installed on the lower portions of the front exterior and east side exterior of

the J & T Munitions facility. Starnes immediately responded and advised that he anticipated occupation of the facility beginning in December. He indicated that the masonry fiber board “will be the last piece of the puzzle.” J & T Munitions began to occupy its facility in the industrial park in mid-December 2014. Masonry fiber board has never been installed over any part of the building’s exterior metal siding.

On December 11, 2015, the Industrial Development Authority filed a complaint seeking a declaration that the restrictive covenants, as amended, are valid and enforceable and that J & T Munitions is in violation of the covenants by failing to comply with the requirements of the variance granted by the Board. It sought an order requiring immediate compliance with the terms of the variance.

In its answer, J & T Munitions asserted a number of defenses. It also asserted that the complaint failed to state a cause of action upon which relief may be granted.

On February 5, 2016, the Industrial Development Authority filed a motion for judgment on the pleadings. On February 15, 2016, J & T Munitions filed a motion to dismiss the complaint since it failed to state a claim upon which relief may be granted. It explained that restrictive covenants (and variance) upon which the complaint was based had expired by their terms before the construction of its facility at the industrial park had commenced. Consequently, they had never been and could never be enforceable. J & T Munitions also propounded written

discovery. On March 3, 2016, the Industrial Development Authority responded to the discovery requests. Those discovery responses do not appear of record.

On March 10, 2016, the court's order granting a summary judgment in favor of the Industrial Development Authority was entered by the clerk of the Clark Circuit Court. On April 7, 2016, a final declaratory judgment was entered. The court found that the restrictive covenants were enforceable and that J & T Munitions had confirmed its intention to comply with the terms of the Board's variance. The Court concluded that J & T Munitions was required by the terms of the Board's variance to install masonry siding on the lower portions of the front exterior and east side exterior of its industrial park facility. This appeal followed.

On appeal, J & T Munitions argues that the circuit court erred by failing to grant its motion to dismiss because the complaint filed by the Industrial Development Authority indicates that the restrictive covenants were unenforceable. J & T Munitions argues that the restrictive covenants had expired by their very terms. We agree.

CR¹ 12.02 provides, in relevant part, as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

¹ Kentucky Rules of Civil Procedure.

. . . (f) failure to state a claim upon which relief can be granted. . . . If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

While a trial court's reliance on matters outside the pleadings converts a motion to dismiss into a motion for summary judgment, there is no indication in this case that the court considered matters outside the pleadings in arriving at its decision. Instead, the matters that the circuit court relied upon were exhibits attached to the complaint filed by the Industrial Development Authority. These exhibits were central to the claim asserted and did not convert the motion under review to one for summary judgment. *See Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558 (Ky.App. 2017).

“Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead an appellate court reviews the issue *de novo*.” *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010)(citing *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009)). “The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be

proved in support of his claim.” *Pari-Mutuel Clerks’ Union of Kentucky, Local 543, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977).

A party seeking to enforce a restrictive covenant must show that the restrictions are valid and enforceable. However, the complaint filed by the Industrial Development Authority showed unequivocally that the restrictive covenant which it sought to enforce was not enforceable after November 7, 2013. Consequently, there is no set of facts which could be proven in support of the claim it asserted against J & T Munitions. Under the circumstances, the arguments presented by the Industrial Development Authority on appeal are unavailing; *i.e.*, the alleged intention of J & T Munitions to be bound by the expired covenants and the failure of J & T Munitions to include the expiration of the covenants as an affirmative defense in its answer.

We are compelled to reverse the judgment of the Clark Circuit Court and remand for entry of an order consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David G. Perdue
Winchester, Kentucky

BRIEF FOR APPELLEE:

John H. Rompf, Jr.
Winchester, Kentucky