COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04AP1898 **Cir. Ct. No. 04CV85**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

COMMUNITY DEVELOPMENT AUTHORITY OF THE CITY OF GLENDALE,

PETITIONER-RESPONDENT,

V.

HANCOCK FABRICS, INC.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Appeal dismissed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Hancock Fabrics, Inc. ("Hancock") appeals from a trial court order granting the application for a writ of assistance sought by the Community Development Authority of the City of Glendale ("CDA"). Hancock

argues that the writ of assistance should not have been granted because: (1) the trial court lacked competency to proceed; (2) the trial court should have granted Hancock's motion to stay and compel arbitration; and (3) CDA is bound to the terms of a lease it executed with Hancock. We conclude that the appeal is moot and, therefore, dismiss the appeal.

BACKGROUND

¶2 The trial court order granting the writ of assistance included detailed findings of fact and conclusions of law. The pertinent facts and conclusions include the following. CDA was created and constituted pursuant to WIS. STAT. § 66.1335 (2003-04),[1] one of the statutes governing urban redevelopment. CDA has the authority to condemn in its own name, and may maintain legal actions in its own name pursuant to WIS. STAT. §§ 66.1333 and 66.1335.

¶3 Prior to 2003, the City of Glendale enacted a "relocation order by which it undertook to exercise its eminent domain authority to acquire various parcels of real estate for the public purpose of urban redevelopment, including the real estate which is the subject of this action." CDA created a relocation plan as required by law, which was subsequently approved by the Wisconsin Department of Commerce.

¶4 Pursuant to CDA's plans to redevelop the Bayshore Mall area, CDA, in April 2002, sent relocation questionnaires to various businesses, including Hancock. CDA's relocation consultant also provided businesses with a

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

publication entitled Wisconsin Relocation Rights—Business, Farm and Nonprofit Organizations. In October 2002, CDA's relocation consultant provided Hancock with a relocation eligibility letter, containing additional claims information and forms to apply for reimbursement for all of the mandated benefits available to a displaced business pursuant to Wisconsin law.

¶5 CDA sought to acquire title to real estate located at 5656-5670 North Port Washington Road in the City of Glendale. Wisconsin Kohl's Venture conveyed the property to CDA on or about February 19, 2003, via a sale under threat of condemnation. At the time of the sale, there were three tenants on the property: Kohl's Food Store, Verlo Mattress Store and Hancock. All three tenants continued to occupy the property under agreements with CDA, because CDA did not need to raze the building until 2004.[2]

¶6 CDA and Hancock executed a document on February 20, 2003, entitled "SUBLEASE MODIFICATION AND ATTORNMENT AGREEMENT," which indicated that CDA would take over for Wisconsin Kohl's Venture as landlord.[3] On April 7, 2003, CDA provided Hancock with a ninety-day assurance letter that reiterated relocation assistance rights and advised Hancock that it could occupy the premises until at least December 15, 2003. This date was subsequently modified to January 2, 2004.

[2] Kohl's Food Store subsequently went out of business and CDA relocated the Verlo Mattress Store to another location. The rights of these former tenants are not at issue in this appeal.

[3] Although the trial court's written findings of fact did not discuss this agreement, it is undisputed that the agreement was executed. At issue is the interpretation of that document, and whether the Wisconsin Statutes trump the document.

¶7 Between May 2003 and October 2003, CDA's relocation consultant provided Hancock with nine potential relocation sites. Hancock rejected each site, alleging that none of the sites qualified as a "comparable replacement property" under WIS. STAT. § 32.05(8)(b) and (c), or a "comparable replacement business" under WIS. ADMIN. CODE § Comm 202.01(7).

¶8 On January 5, 2004, CDA applied for a writ of assistance to gain possession of the property, pursuant to WIS. STAT. §§ 32.05(8)(b) and 815.11. Hancock filed a motion to dismiss, or to stay the action and compel arbitration. Hancock argued that: (1) the trial court lacked jurisdiction over CDA's application; (2) if the trial court had jurisdiction, it should stay the action and compel arbitration; and (3) the terms of the lease agreement bar CDA's action. The trial court denied the motion to dismiss, concluding that it had subject matter jurisdiction under WIS. STAT. §§ 32.05(8)(b) and 66.1315(1). The trial court did not directly address the motion to compel arbitration in its written order denying Hancock's motion, but the parties apparently understood denial of the motion as implicit in the trial court's decision. The trial court held an evidentiary hearing for two days in March 2004 on the issue of whether Hancock had been provided a comparable replacement property. The trial court found that Hancock had been provided a comparable replacement property.

¶9 The parties provided the trial court with written closing arguments and proposed findings of fact and conclusions of law. The trial court adopted CDA's proposed findings and order as its own. The findings did not specifically address Hancock's arguments with respect to the lease agreement, including the arbitration clause, but the trial court did conclude that CDA had satisfied all jurisdictional requirements entitling it to physical possession of the property. It

appears the parties agree that the trial court implicitly rejected Hancock's argument.

¶10 The order granting the writ of assistance was issued on April 21, 2004. This appeal followed.

¶11 The day before the order granting the writ of assistance was issued, the parties entered into a stipulation pursuant to which Hancock agreed not to oppose the writ of assistance and CDA agreed to forebear executing the writ of assistance through May 15, 2004, and further agreed that Hancock could still claim all statutory relocation expenses to which it was entitled under specific Wisconsin statutes and administrative regulations. Hancock vacated the premises as of May 16, 2004. The building Hancock occupied has been razed.[4]

DISCUSSION

¶12 We conclude that the parties' stipulation, and the subsequent razing of the building in which Hancock had operated its business, render this appeal moot.

¶13 The Wisconsin Supreme Court has defined mootness, as relevant to this case, as follows:

> A moot case … [is] one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none … or a judgment upon some matter which when rendered for any cause

[4] We take judicial notice of the fact that the building in which Hancock operated has been razed. *See* WIS. STAT. § 902.01(2)(a) and (3) (A "court may take judicial notice, whether requested or not" of a "fact generally known within [its] territorial jurisdiction."). This occurred sometime after Hancock vacated the property, which occurred on May 16, 2004.

> cannot have any practical legal effect upon the existing controversy.

State ex rel. La Crosse Tribune v. Circuit Ct. for La Crosse County, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983) (citation omitted).

¶14 Hancock asks us to determine whether the writ of assistance was properly entered. If Hancock were to succeed on appeal, the writ of assistance could not be undone—Hancock could not return to its previous premises. We do not see how a decision on the issuance of the writ of assistance can "have any practical legal effect upon the existing controversy." *See* ***id.***

¶15 As noted earlier, the day before the trial court signed the writ of assistance, Hancock (Respondent in the stipulation) and CDA (Petitioner in the stipulation) entered a Stipulation, apparently anticipating the entry of the writ of assistance, in which they agreed as follows:

> 1. Petitioner has applied to the Court for a writ of assistance in order to secure occupancy and possession of the subject premises at 5656 North Port Washington Road, pursuant to the Court's findings, conclusions and decision of April 8, 2004.
>
> 2. Respondent shall not object to the issuance of the writ of assistance by the Court.
>
> 3. Petitioner shall forebear from execution on the Writ of Assistance through and including May 15, 2004.
>
> 4. On or before May 15, 2004 Respondent shall vacate the subject premises at 5656 North Port Washington Road, and relinquish occupancy and possession to the Petitioner.
>
> 5. If Respondent fails to vacate the premises before May 16, 2004, Petitioner may as of that date undertake execution on the writ of assistance to remove Respondent and Respondent's property from the subject premises.
>
> 6. Respondent may hereinafter claim all statutory relocation expenses to which it is entitled under Chapter 32, Wisconsin Statutes, and Comm. 202, Wis. Admin. Code.

By entering into this stipulation, Hancock has left us with only "an abstract question which does not rest upon existing facts or rights." *See* ***id.***

¶16 Hancock asks this court to: (1) "reverse the circuit court's order to issue the writ of assistance with instruction to dismiss the case for lack of subject matter jurisdiction"; or (2) in the alternative, "reverse the circuit court's order and decision denying Hancock's Motion to Dismiss or Stay Arbitration" and remand with instructions "that the matter be submitted to binding arbitration as the parties contemplated in the Lease and for any other relief as may be appropriate." If we were to grant Hancock's first request, Hancock would still be unable to move back into the building, as it no longer exists. If Hancock's alternative request were granted, given that the building is gone, arbitration of Hancock's asserted right to remain in the building under the terms of the lease is an illusory right. Hancock remains entitled under the stipulation to pursue its claims for statutory relocation expenses, which right it preserved when it entered the stipulation. The amount to which Hancock is entitled is not before this court.

¶17 For these reasons, we conclude that Hancock's appeal challenging the writ of assistance is moot. The appeal is dismissed.

By the Court.—Appeal dismissed.

Not recommended for publication in the official reports.