RENDERED: JUNE 27, 2003; 10:00 A.M.
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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000701-MR

INSIGHT COMMUNICATIONS
COMPANY, L.P. AND
INSIGHT KENTUCKY PARTNERS, II,
LP, F/K/A INTERMEDIA
PARTNERS OF KENTUCKY, L.P.
(INSIGHT) APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 00-CI-007100

CITY OF LOUISIVLLE APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BAKER, GUIDUGLI AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Insight Communications Company, L.P. and Insight Kentucky Partners, II, L.P. F/K/A Intermedia Partners of Kentucky, L.P. (“Insight”) appeal from an opinion and order of the Jefferson Circuit Court that dismissed its declaratory

judgment action and granted summary judgment to the City of Louisville, Kentucky ("the City"). We affirm.

Having reviewed the record, written briefs, oral arguments and applicable statutory case law, we believe that the well-written and reasoned opinion and order rendered March 21, 2002, by Jefferson Circuit Court Judge Lisabeth Hughes Abramson, succinctly and sufficiently sets forth the facts leading to the controversy and legal issues presented by the parties. Accordingly, we set forth Judge Abramson's opinion and order as follows:

> This matter is before the Court on a Motion for Summary Judgment filed by Defendant City of Louisville ("the City"). Plaintiffs Insight Communications Company, L.P. and Insight Kentucky Partners II, L.P. f/k/a Intermedia Partners of Kentucky, L.P. ("Insight") brought this declaratory judgment action seeking a determination that the City breached its contract with Insight because a cable television franchise which the City awarded to Knology, Inc. was more favorable than the cable franchise previously granted to Insight. In addition, Plaintiffs claim the award of the Knology franchise violated state law regarding advertising for franchises such as the one awarded Knology. Having carefully considered the pending motion, supporting and opposing memoranda with attachments, and applicable law, the Court grants the City's motion.
>
> **RELEVANT FACTS**
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> In 1973 the City awarded the first cable television franchise in Louisville to

River City Cable Television. In 1978 River City changed its name to C.P.I. of Louisville and continued to operate the franchise. A successor to that entity, Plaintiff Intermedia Partners of Kentucky, L.P. (now known as Insight Kentucky Partners II, L.P.) acquired a renewal franchise effective May 12, 1998 and extending through March 31, 2010 (hereafter "the Renewal Franchise Agreement"). This Renewal Franchise Agreement had a twelve-year term and provide a fifteen-month deadline for replacement of the existing all-coaxial cable plant with a "hybrid fiber/coax" plant using a combination of fiber optic cable and coaxial cable. The Renewal Franchise Agreement contained "Section 38 – Term of Franchise and Renewal" which provides as follows:

> The term of this franchise renewal shall be such that the franchise expires on March 31, 2010. The rights and privileges granted by this ordinance to Operator are not exclusive and nothing herein is intended to or shall be construed so as to prevent the City from granting other and similar rights, privileges and franchises to any other person, firm, association or corporation, provided, however, that such rights privileges and franchises are neither "more favorable" nor "less favorable" if the rights, privileges granted and burdens imposed in the subsequent franchise are substantially similar to those contained in this Franchise Ordinance.

In 1999 Insight acquired control of Intermedia Partners of Kentucky, L.P. and as a consequence with the City's approval became the franchisee.

A competitor, Knology, began discussions with the City in February 2000 regarding the offering of a competing cable franchise which would offer a communications network capable of simultaneously providing voice, video, data and other communications services. The steps preceding the eventual issuance of a franchise to Knology, Inc. are accurately detailed in the City's memorandum as follows:

9. On August 8, the Board reviewed and approved publication of a proposed Invitation For Bid (IFB) Ordinance, Number 0-112-8-00. The IFB Ordinance set forth the terms and conditions under which the City would sell a cable television franchise to an interested bidder. Publication occurred on August 12, 2000, through an advertisement in the Louisville *Courier-Journal* that instructed potential bidders to submit responsive bids by 10 AM of August 21st. On August 14th, Insight sent the Board a letter objecting to several terms and conditions in the IFB Ordinance.

10. On August 17th, by letter to the Director of Public Works, Knology agreed to the terms and conditions in the IFB Ordinance. No other bidder came forward before the deadline of August 21st. Later on August 21st, a committee of the Board conducted a hearing on Knology's financial, technical and legal qualifications and received a letter from Knology's counsel responding to each of the major points that Insight had raised in its letter to the Board dated August 14th.

11. In an effort to resolve the dispute over the terms and

conditions of the IFB Ordinance, the City, Knology and Insight participated in a mediation with the Honorable Ben Shobe, a retired judge of this Court. During the mediation, Knology agreed to two changes in the IFB Ordinance. First, it agreed to a reduction of the construction deadline from 5 years to 4 ½ years. Second, Knology agreed that, over the next five years, it would make an annual contribution of $100,000 to help improve the City's technological abilities. Notwithstanding these concessions by Knology, Insight refused to waive its "level playing field" objections to the IFB Ordinance.

12. After the IFB Ordinance was amended to incorporate the changes to which Knology had agreed, the Board of Alderman approved it on August 29, 2000, as *Ordinance #114, Series 2000* (As Amended). At the same time, the Board approved *Resolution #187, Series 2000*, which awarded a franchise to Knology pursuant to *Ordinance 114, Series 2000*. The Mayor signed both of these documents on September 12, 2000.

Insight filed its Complaint for Declaration of Rights in this Court on November 2, 2000. Insight seeks a declaration that the 2000 ordinance is void. It also seeks a declaration that the Board of Alderman's resolution selling the cable television franchise to Knology is void and that the City breached the Renewal Franchise Agreement with Insight by awarding this second franchise (the "Knology Franchise") on more favorable terms. Finally, Insight seeks a declaration that the City of Louisville failed to comply with Kentucky

law regarding the publication of an ordinance by changing the ordinance without proper notice to the public.[1]

The City moved for summary judgment in April 2001 and the motion was fully briefed on June 15, 2001. However, the parties later removed the matter from the Court's docket while "meaningful settlement discussions" were underway. In October 2001 the matter was returned to the summary judgment docket for this Court's consideration.

CONCLUSIONS OF LAW

Insight contends that there are four material differences between the Insight franchise and the Knology Franchise which justify Insight's invocation of the "level playing field" provision in Section 38 of Insight's Renewal Franchise Agreement. First, the Insight franchise was for twelve years while the Knology franchise is for fifteen years. Second, the Insight Renewal Franchise Agreement required Insight to complete its reconstruction project within fifteen months while Knology was allowed fifty-four months to build its system. Third, Insight contends that while it was required to perform a "simultaneous build," in all parts of the city Knology was permitted to concentrate its construction in one part of the city each year. Finally, Insight's Renewal Franchise Agreement had a sixty-day notification period to cure any default with the penalties including potential revocation while the City's sole remedy against Knology for failure to meet its construction deadlines for a period of eighteen months was a $600 daily penalty. To establish the materiality of these differences, Insight tenders the affidavit of Henry Sherman, "an expert in the cable

[1] We note that on appeal Insight has abandoned this argument. Judge Abamson's opinion and order addresses this issue on pages 9-12, and we have included the entire order for a more thorough understanding of the case.

industry," who opines on the more favorable terms granted Knology in the length of the franchise, time for construction and penalties for failing to comply with construction timetables. On the "simultaneous build" provision allegedly applicable to Insight but not Knology, Insight apparently does not rely on Mr. Sherman but simply the plain language of the agreements.

The City maintains that the determination of whether the Knology Franchise violates the "substantially similar" requirement of Section 38 is one of law to be made by this Court. Citing case law from other jurisdictions which have dealt with similar issues, the City contends that an item by item comparison is not appropriate to determine whether the competing entities have been granted substantially similar agreements. Thus in United Cable Television Service Corp. v. Department of Public Utility Control, 235 Conn. 334, 663 A. 2d 1011, 1025 (1995) the Supreme Court of Connecticut held that a level playing field inquiry "requires consideration of the entire package of terms and conditions required of both cable providers in order adequately to determine whether one has been favored over the other." Nevertheless, the City insists that even if an item by item comparison is made, it is clear as a matter of law that Insight has not been subjected to terms less favorable than those granted Knology.

Under Kentucky Rule of Civil Procedure CR 56.03 a summary judgment:

> …shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

> any material fact and that the moving part is entitled to a judgment as a matter of law.

A summary judgment is used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at trial warranting a judgment in his favor and against the movant." Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255, 256 (1985), citing Robertson v. Lampton, Ky., 516 S.W.2d 838, 840 (1974). To prevail on a motion for summary judgment, a movant must convince this Court, by the evidence of record, that there are no genuine issues of material fact. Steelvest v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, (1991); Hubble v. Johnson, Ky., 841 S.W.2d 169 1992). A party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. Steelvest, supra at 482. In the analysis, "the focus should be on what is of record rather than what might be presented at trial." Welch v. American Publishing Co. of Kentucky, Ky., 3 S.W.3d 724, 730 (1999).

As the City correctly notes, the interpretation of a contract is typically an issue of law for the Court. Morganfield National Bank v. Damien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992). The proper construction of a contract is a matter which should not be submitted to a jury "unless it depends upon a choice among reasonable inferences to be drawn from extrinsic evidence admissible apart from the application of the parole evidence rule." Cook United, Inc. v. Waits, Ky., 512 S.W.2d 493, 495 (1974). Extrinsic evidence is not considered unless the contract itself is so ambiguous that it is necessary to resort to extrinsic evidence to determine the parties'

intent. Thus, in Central Bank & Trust Co. v. Kincaid, Ky., 617 S.W.2d 32, 33 (1981) the Supreme Court stated:

> First of all we need to determine whether the terms of the [contract] are ambiguous. If they are, then extrinsic evidence may be resorted to in an effort to determine the intention of the parties; if not, then extrinsic evidence may not be resorted to. The criterion in determining the intention of the parties is not what did the parties mean to say, but rather the criterion is what did the parties mean by what they said. An ambiguous contract is one capable of more than one different, (sic) reasonable interpretation.

Applying these principles to the pending motion, it is clear that the issues raised by Insight are properly decided on a motion for summary judgment because there is no ambiguity in the relevant contracts. Insight was promised that "the rights, privileges granted and burdens imposed in the subsequent franchise" would be "substantially similar" to Insight's. As the City correctly notes, the determination of "substantial similarity" is a matter of contract construction and not an issue of fact for a jury.[2]

Comparing the two agreements, it is clear that the fifteen-year term of the Knology Franchise is substantially similar to the twelve-year term awarded to Insight when the "build time" is considered.

[2] If Insight's position were accepted any franchise granted on terms that were not precisely identical to Insight's contract terms would be subject to evaluation by a jury. Clearly, the "substantially similar" language in Section 38 was never intended to require a jury comparison of provisions of competing franchises. (Footnote in original opinion and order).

Indeed, Section 39 of the Knology Franchise states specifically:

> The term of this Franchise shall be fifteen (15) years from the date this franchise is granted to the Operator. The term of this franchise reflects that the City and Operator recognize that Operator will likely only have a completed Cable System for approximately ten (10) years of the franchise.

In this provision the City specifically acknowledged that the construction time for the new system would leave Knology with approximately ten years with a fully operational cable system. Similarly, Insight's twelve-year Renewal Franchise Agreement implicitly recognizes that after a fifteen month reconstruction of its existing cable system, Insight would have slightly over ten years with a fully rebuilt operational cable system. Because both franchises are granted essentially identical franchise terms, i.e. ten years, Insight's attack on this issue must fail.

Similarly, the construction time allowed each franchisee is not dissimilar. While Insight is only allowed fifteen months, as the City aptly points out, new construction and system upgrades are complete different tasks. *Accord* Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC, 1996 W.L. 661818 @ pg. 4. Obviously Insight will have an operational cable system while the upgrade is being completed. Knology, by contrast, will only have a portion of its system operating until construction is fully complete fifty-four months after commencement.

Insight urges the Court to view this particular provision from the standpoint of the number of miles of construction or

rebuild per month which each franchisee will have to accomplish or alternatively the present value of the investment in each franchisees' project. This Court rejects Insight's apparent belief that the "substantially similar" provision in Section 38 of the Renewal Franchise Agreement entitles Insight to know the exact financial burden its competitor will bear so that the relative burdens can be matched or distinguished. Section 38 protects Insight, the incumbent, from a franchisee who has received a substantially more favorable contract; it does not guarantee Insight the right to dissect financially its competitor and then argue that the two competitors' financial burden must match.

The third challenge relates to the so-called "simultaneous build" vis-à-vis "phased construction." The City correctly notes that Section 45(5) of the Knology Franchise states that:

> In planning and undertaking construction, the Operator shall treat all areas and neighborhoods in the City on a substantially equal basis in order that Cable Services will be available to potential subscribers at substantially the same time.

Insight has a comparable provision in Section 44(3) of its Renewal Franchise Agreement wherein it states:

> The construction timetable is such that both low and high income areas will receive the benefits of the upgrade and construction.

In this Court's view the competitors have similar obligations regarding service throughout the city. Although Knology is allowed a phased construction approach, there is not the considerable latitude to

ignore or delay servicing portions of the City's residents which Insight would have this Court believe.

Finally, Insight complains that it has only sixty days to cure any default in meetings its construction timetable while the City cannot terminate the Knology Franchise for eighteen months in the event of a delay in meeting construction deadlines, but must limit itself to a $600 daily penalty. Again, the differences in an incumbent upgrading an existing system and a new entrant constructing an entirely new system justify some difference in the penalty provision. Indeed in Knology's Franchise, Section 45(6) specifically notes that construction deadline extensions may be required "for good and sufficient cause based upon events beyond the control of Operator, including but not limited to compliance by Louisville Gas & Electric Company, BellSouth Telecommunications, Inc. and Insight Communications Company, L.P. or their successors and any other providers of access to public right-of-way by pole attachment or other conduit…." Insight does not have a comparable provision presumably because those same issues have been dealt with for years by Insight and its predecessors in the construction and maintenance of its current fully operational cable system.

There will never be an apple-to-apple comparison for Insight and other franchisee simply because Insight is the incumbent which in its own right and through its predecessors has been the exclusive provider of cable television services in the City of Louisville for almost thirty years. No new cable television franchisee can ever be in the same position as a thirty-year veteran. Whether viewed individually or as a package, it is clear to this Court that the terms of the Knology Franchise are substantially similar to those accorded Insight and,

consequently, Insight's request for a declaration that the City has breached the Renewal Franchise Agreement must be denied.

The final issue raised by Insight parties to the Invitation for Bid (IFB) Ordinance which set forth the terms and conditions under which the City would sell a cable television franchise to an interested bidder. Insight claims that the City violated Section 164 of the Kentucky Constitution and KRS Chapter 424 when it improperly advertised the subject franchise. In its summary judgment motion the City first contends that Insight does not have the requisite standing to raise the alleged violation of the advertising requirement.

KRS 424.30 provides that any ordinance which is adopted without compliance with the publication requirements of KRS Chapter 424 is "voidable by a court of competent jurisdiction" upon suit brought by "any citizen of this state." The complaint reflects that Insight Communications and Insight Kentucky are Delaware limited partnerships, although Insight Kentucky has a business office in Louisville and is licensed to conduct business in the Commonwealth of Kentucky. Certainly this latter fact would qualify Insight Kentucky as a Kentucky citizen for purposes of federal court jurisdiction. Assuming arguendo that Insight Kentucky is a Kentucky citizen the City raises other challenges to Insight's standing.

Specifically, the City cites Health America Corporation of Kentucky v. Humana Health Plan, Inc., Ky., 697 S.W.2d 946 (1985) for the proposition that a disappointed competitor has no standing to judicially contest the award of a public contract to another entity. However, Insight is not in this case simply a disappointed competitor. Insight is the existing franchisee and thus potentially

will suffer "injury distinct from that of the general public." Fish v. Elliott, Ky.App., 554 S.W.2d 94 (1977). This Court is persuaded that the City is most likely correct in its assertion that any standing conferred on Insight by virtue of Section 38 of the Renewal Franchise Agreement is simply standing to raise a breach of contract claim and not standing to challenge compliance with state statutes. However, whether the type of injury Insight has is sufficient to confer standing need not be decided because regardless of Insight's capacity to bring the claim, the challenge pursuant to KRS 424.380 fails on substantive grounds.

As the City correctly notes, the IFB Ordinance was amended as a result of objections raised by Insight. The amendments reduced the construction deadline from five years to four and one-half years and required the successful bidder to make an annual contribution of $100,000 in each of the first five years to help improve the City's technological abilities. These amendments made the IFB Ordinance more burdensome and therefore less attractive to potential bidders. Under the principle enunciated in Cumberland Telephone & Telegraph Co. v. City of Hickman, Ky., 111 S.W. 311 (1908), a change which benefits the City and is less favorable to the potential franchisee need not be re-advertised. The cases relied upon by Insight, City of Owensboro v. Evansille & Ohio Valley Transit Company, Ky., 448 S.W.2d 335 (1969) and City of Princeton v. Princeton Electric Light & Power Company, Ky., 179 S.W. 1074 (1915), do not require a contrary result. In fact, those cases simply stand for the general proposition that a city cannot sell something which is "materially different" from what was advertised. City of Princeton, 179 S.W. 1075. In this case the IFB Ordinance as amended was not materially different from the original ordinance which was advertised.

> Finally, Kentucky Constitution Section 164 is similarly unavailing for Insight on this issue. There is certainly no basis for concluding that the City of Louisville was "giving away, or disposing of at inadequate prices, the rights and privileges which belong to its citizens" the evil sought to be avoided by the public advertisement requirement. E.M. Bailey Distributing Company v. Conagra, Inc., Ky., 676 S.W.2d 770, 773 (1984).
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> In sum, Insight's procedural attack on the IFB Ordinance and resulting Knology Franchise cannot survive the City's Motion for Summary Judgment. Even if Insight has the requisite standing, the claim fails substantively given the nature of the amendments made to the previously advertised IFB Ordinance. The circumstances presented are simply not such as would warrant this Court voiding the ordinance pursuant to KRS 424.380.
>
> **ORDER**
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> On the Motion for Summary Judgment filed by Defendant City of Louisville,
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> IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Summary Judgment should be, and hereby is, granted.
>
> IT IS FURRTHER ORDERED AND ADJUDGED that the Complaint of Plaintiffs Insight Communications Company, L.P. and Insight Kentucky Partners II, L.P. f/k/a Intermedia Partners of Kentucky, L.P. should be, and hereby is, dismissed.

On appeal, Insight maintains that the circuit court erred in granting summary judgment to the City since determination of whether the granted franchises are

"substantially similar" is an issue of fact to be determined, following extensive and complete discovery, by a jury. Insight also argues, in the alternative, that if this determination is a matter of law, then the trial court erred in its findings, opinions and conclusions upon which it based its order. We disagree.

Section 38 of Insight's Franchise does not require the terms of any subsequent franchise agreement to be identical, only "substantially similar." As Judge Abramson's order sets forth, the Knology Franchise or any future franchise can never have identical terms as Insight and its predecessors. Insight has a thirty (30) year history while any future franchise must start from square one. Thus, Section 38 requires only that the terms granted to a new franchise cannot be "more favorable" or "less favorable." The review of the terms is not to be considered by comparing "apples to apples" but rather by reviewing the entire franchise agreement to see if the rights and privileges as well as the burdens imposed are substantially similar. We agree with the circuit court's review that they are. We do not believe the trial judge erred in her review of the terms or in her findings which form the basis of her opinion and order.

We further agree that summary judgment was appropriate in that there was no genuine issue of material fact and that the

City was entitled to judgment as a matter of law. The franchise agreements were not ambiguous. The terms and conditions were meticulously negotiated and set forth by experienced and skilled lawyers. As the trial court noted, "the interpretation of a contract is typically an issue of law for the Court. Morganfield National Bank v. Domien Elder & Sons, Ky., 836 S.W.2d 893, 895 (1992)." There are no genuine issues of fact. While the parties agreed that the terms of the franchise agreements were not identical, they did agree on the four areas which Insight contends Knology received more favorable terms: (1) Length of franchise – 15 years vs. 12 years; (2) Construction time – 4 ½ years vs. 18 months; (3) Penalty provision – 60 days to remedy default vs. 18 months with a $600 daily penalty, and; (4) "cherry-picking" – Insight must develop all areas at same time vs. Knology must develop all areas by end of construction date. There was no dispute that these four terms formed the basis for Insight's complaint of unfavorable treatment. Insight argues that it needed more discovery to expose these differences and that a jury must be given the opportunity to interpret the factual evidence. The facts were not in dispute, just the application of those facts to the unambiguous contracts entered by the parties hereto.

In that we believe the circuit court properly applied the law to the undisputed facts before it and in that we believe the circuit court committed no error in its findings, we affirm.

For the foregoing reasons, the circuit court's opinion and order granting the City summary judgment and dismissing Insight's complaint for declaration of rights is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Laurence Zielke
James David Ballinger
Janice M. Theriot
Louisville, KY

ORAL ARGUMENT FOR APPELLANTS:

Laurence Zielke
Louisville, KY

BRIEF FOR APPELLEE:

James Baller
E. Casey Lide
Washington, D.C.

William C. Stone
Director of Law
Louisville, KY

Lisa A. Schweickart
Louisville, KY

ORAL ARGUMENT FOR APPELLEE:

James Baller
Washington, D.C.