2-10-1977

Board of County Com'rs of Mesa County v. Carter

27531

TABLE OF CONTENTS

I N D E X

TABLE OF CASES

TABLE OF AUTHORITIES

ISSUE PRESENTED FOR REVIEW

Have the plaintiffs, Philip J. Lalena and Constance J. Lalena, in Mesa County District Court Civil Action No. 25625, failed, in a timely manner, to join as indispensable parties defendants Clymers Ranch & Livestock Co., Dudly M. Clymer, Douglas Muth and Thomas M. Wilkinson, pursuant to C.R.C.P. Rule 19 and Rule 106, and the case law decided thereunder, and, does C.R.C.P. Rule 15 apply, and if so, what is the effect of such failure?

SUMMARY OF THE ARGUMENT

C.R.C.P., 106(a)(4) PROVIDES THE EXCLUSIVE REMEDY FOR CHALLENGING A REZONING DETERMINATION ON SPECIFIC LANDS. IN A PROCEEDING CHALLENGING REZONING, PURSUANT TO C.R.C.P. RULE 106(a)(4), THOSE PERSONS WHO SOUGHT AND OBTAINED THE ZONING CHANGE ARE INDISPENSABLE PARTIES, AND FAILURE TO JOIN THEM IN SUCH PROCEEDINGS WITHIN THIRTY (30) DAYS OF THE ACTION CHALLENGED REQUIRES THAT THE COMPLAINT FILED SEEKING REVIEW OR CERTIORARI THEREUNDER BE DISMISSED WITH PREJUDICE.

ARGUMENT

C.R.C.P., 106(a)(4) provides the exclusive remedy for challenging a rezoning determination on specific lands. See, Snyder v. City of Lakewood, ____ Colo. _____, 542 P.2d 371 (1975).

In Hidden Lake Development Company v. District Court In and For The County of Adams, 183 Colo. 168, 515 P.2d 632 (1973) in the same situation as the case now before this Court, it was held that the action should be dismissed with prejudice. The case was initiated by a loosely-knit association of neighboring landowners who brought an action to set aside the rezoning of certain land in Adams County. After the time set for filing to seek review of the County Commissioner's rezoning decision, (i.e. after expiration of the 30-day requirement of Rule 106), plaintiffs therein, by

Amended Complaint, substituted two individual landowners as plaintiffs, and added the successful landowner/applicant for rezoning as a party defendant with the County Commissioners. The trial Court denied a Motion to Dismiss the action. The Board of County Commissioners, and the landowner whose property was subject to dispute, obtained a Show Cause Order to prohibit the trial court from proceeding further, on the grounds that the respondent Court was without jurisdiction to review the decision of the Commissioners because of the failure to join the landowner as an indispensable party prior to the 30-day limitation of Rule 106.

The Court stated at 515 P.2d 635 that:

> The first Complaint failed to name Hidden Lake Development Co. (landowner) as defendant. In Hennigh v. County Commissioners, 168 Colo. 128, 450 P.2d 73, (1969), we held that one whose application for a rezoning is challenged in Court is an indispensable party to that proceeding. . . The rule announced in Hennigh is equally applicable here. Hidden Lake Development was indisputably an indispensable party to the proceeding below. It had a right to the rezoning which was established by the action of the county commissioners. That right cannot be abbregated by judicial action unless the company is before the Court to assert its defenses. . . Due process of law requires that those parties whose interest are at stake be before the Court. . . Colorado is in agreement with those jurisdictions which hold the failure to join an indispensable party to be such an egregious defect that the Court may dismiss the action on its own motion. . . We hold, therefore, that the first Complaint should have been dismissed for failure to join Hidden Lake Development Co. as defendant. The new Complaint was filed too late, and the respondent Court was without jurisdiction to proceed against the petitioner development company.

In a more recent decision, Snyder v. City of Lakewood, supra, the Court reiterated and approved the rule in the above cited case by stating at 542 P.2d 376:

> The failure to bring a Rule 106(a)(4) proceeding within 30 days of the enactment of the Lakewood rezoning ordinance was a jurisdictional defect

> under C.R.C.P. 106(b). Hidden Lake Development Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973). The District Court properly dismissed the original Complaint, and erred in not dismissing the entire Amended Complaint. . .

Again, the case presents a factual situation similar to the one now before this Court. The City of Lakewood had granted a rezoning of certain land within that city, which rezoning was contested by a group of neighboring landowners by seeking a review in the District Court pursuant to C.R.C.P. Rule 106. However, plaintiffs in the case filed their Petition For Review after the 30-day limitation of the rule had expired.

The Snyder case, supra, was recently reaffirmed by the Colorado Court of Appeals in Lorenz v. City of Littleton, ____ Colo. ____, 550 P.2d 884 (selected for official publication, 1976). First, the Court of Appeals restated the rule that the exclusive remedy available to a party who challenges a rezoning of specific property is to bring an action for certiorari review under C.R.C.P. 106(a)(4). Second, the Court of Appeals therein pointed out that a failure to bring such an action, with all indispensable parties named as defendants, within the 30-day requirement of C.R.C.P. 106, fatal to the action, thereby depriving the District Court of jurisdiction to allow any further proceedings.

The rule holds firm in other contexts. In Western Paving Construction Co. v. District Court In And For The County of Jefferson, 183 Colo. 174, 515 P.2d 465 (1973), the Court ruled that holders of a special permit relating to the extraction of rock, sand and gravel were indispensable parties to a proceeding in the District Court which resulted in revocation of that special permit granted by the County Commissioners, and failure to join them in such proceedings rendered the judgment a nullity

and therefore void. In other words, the failure to join an indispensable party in proceedings for review of the County Commissioner's action in granting the permit resulted in an unenforceable judgment. The decision cited Hennigh v. County Commissioners, supra, and Hidden Lake Development Company v. District Court, supra.

The filing of a complaint in which the proper parties appear must occur before the expiration of 30 days or the complaint must be dismissed. Civil Service Commission v. District Court, 186 Colo. 308, a case decided on October 7, 1974, and modified and rehearing denied on November 4, 1974, states on Page 311:

> We have firmly established in several cases (three quite recently) that any challenge to an agency action under C.R.C.P. 106 (a)(4) must be perfected within the 30-day limitation of C.R.C.P. 106(b). Perfection includes the correct joinder of indispensable parties as required by C.R.C.P. 19. If other peoples rights are going to be affected, they should be made parties from the beginning when an agency action may be stayed and the proper parties can within apt time frame the issues and defend their rights.

Further, on Page 312, the Court states:

> Neither Rivera nor Goff joined these men as indispensable parties in their original complaints, nor did they amend to include them within the 30-day mandate of C.R.C.P. 106(b).

In the above case of Civil Service Commission v. District Court, supra, the Court, as in this matter, entered its Order permitting the petitioners to amend and add indispensable parties.

On Page 313 of said opinion, the Court states:

> Our conclusion in this case follows naturally from Civil Service Commission, Hidden Lake Development vs. District Court, supra, Western Paving Construction Company v. District Court, supra, and Hennigh. There we held that failure to join indispensable parties in the original complaint and attempted amendment after 30 days

> is improper. The Trial Court cannot proceed in the action or issue orders for belated joinder. Accordingly, we hold that since indispensable officers were not joined as parties to the original complaint within the 30-day time demand of C.R.C.P. 106(b), the Trial Court should be prohibited from proceeding further.
>
> This case points up the wisdom of requiring strict adherence to the deadline imposed by C.R.C.P. 106(b).

In the case of City and County of Denver v. District Court, Colorado Lawyer, Vol. 4, No. 11--November, 1975, Pages 2257 and 2258, the Court again considered, by opinion dated September 22, 1975, application of C.R.C.P. 106(a)(4). Again, in this case the District Court permitted the petitioner to amend the complaint to add indispensable parties. And the Court stated:

> The amendment to join the council to review its action in assessing the property was too late. An appeal must be perfected as well as commenced within the time period established. Part of the perfection of an appeal requires the joinder of indispensable parties.

In the matter of Columbine State Bank v. The Banking Board of Colorado, 34 Colo. Appeals, 11, decided April 16, 1974, holds that Rule 15 relative to amendments is not applicable to this proceeding. In this case the Court states:

> Petitioner alleges that all requirements of Rule 15(c) have been met in this case, and therefore the amended petition should relate back to the time of filing the original petition. The effect of applying Rule 15(c) would be to permit petitioner to add parties to the action after the statutory time for filing the appeal had expired. In two recent cases, the Supreme Court has held that this result is not permitted. Western Paving Construction Company v. District Court, 183 Colo. 174, Hidden Lake Development Company v. District Court, 183 Colo. 168. In both cases the Court held that, in an action in District Court to review administrative proceedings, the failure to join indispensable parties prior to the expiration of the statutory time for appeal is a fatal defect which deprives the Court of jurisdiction to entertain the action. We must conclude, therefore, that Rule 15(c) of C.R.C.P. is not applicable to proceedings such as this and that the amended petition did not accomplish timely joinder of the applicants.

CONCLUSION

C.R.C.P. 106 is now the exclusive remedy to challenge a rezoning determination in the State of Colorado, that C.R.C.P. 15 is not applicable to this proceeding. Further, an appeal under C.R.C.P. 106 must be perfected as well as commenced within the time period established as a part of perfection of appeal and requires joinder of indispensable parties. The District Court of Mesa County, Colorado, is therefore without jurisdiction to proceed to hear such a Petition For Review.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Opening Brief herein by depositing a true and correct copy thereof in the United States mail at Grand Junction, Colorado, postage prepaid, the 9th day of February, 1977, addressed to:

Honorable James J. Carter
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