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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0367**

EverStar, LLC,
Appellant,

vs.

Aitkin County Board of Commissioners,
Respondent.

**Filed November 20, 2017
Affirmed
Bjorkman, Judge**

Aitkin County District Court
File No. 01-CV-15-314

Gary A. Van Cleve, Bryan J. Huntington, Larkin Hoffman Daly & Lindgren Ltd.,
Minneapolis, Minnesota (for appellant)

Jason J. Kuboushek, Andrew A. Wolf, Iverson Reuvers Condon, Bloomington, Minnesota
(for respondent)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant landowner challenges summary judgment in its combined drainage appeal and antitrust action arising from respondent county's denial of its petition for partial abandonment of a drainage system. Appellant argues that it satisfied the statutory standard

for partial abandonment, or that genuine issues of material fact preclude summary judgment, and that respondent is not exempt from antitrust liability. We affirm.

FACTS

Appellant EverStar, LLC owns land in Aitkin County between the Mississippi River and the Aitkin Airport. Aitkin County Ditch 24 (CD 24) runs through the EverStar property. In June 2014, EverStar petitioned the county as the drainage authority, to impound and divert waters from—or alternatively, to partially abandon—the section of CD 24 that traverses its property. EverStar explained that, in the four years it had owned the property, it had produced little or no crops and no rent. Accordingly, EverStar sought to convert the agricultural land to a wetland that meets state and federal standards for the sale of wetland credits. EverStar later withdrew its petition with respect to impoundment and diversion, electing to pursue only partial abandonment.

The county held public hearings on the petition over four days. By resolution, the county denied the petition stating:

Based upon the [county's] interpretation of the evidence in the record, the [county] finds that the portion of [CD 24] which is sought to be abandoned does serve a substantial useful purpose as part of the drainage system to any property remaining in the system and is part of a substantial public benefit and utility.

EverStar initiated this action in district court, combining an appeal under Minn. Stat. § 103E.095 (2016) (providing for appeal to the district court from an order dismissing drainage proceedings), with an antitrust claim under Minn. Stat. § 325D.52 (2016). The district court granted the county's motion for summary judgment on both claims, concluding that EverStar had not presented evidence that satisfied the statutory standard

for partial drainage-system abandonment and that the county is exempt from antitrust liability under Minn. Stat. § 325D.55 (2016). EverStar appeals.

D E C I S I O N

I. The county is entitled to summary judgment with respect to EverStar’s drainage appeal.

On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists when there is sufficient evidence that could lead a rational trier of fact to find for the nonmoving party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Summary judgment should be granted for the defendant “when the record reflects a complete lack of proof on an essential element of the plaintiff’s claim.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

EverStar appealed the county’s denial of its petition for partial abandonment of a drainage system pursuant to Minn. Stat. § 103E.095.

[An appeal under Minn. Stat. § 103E.095] must be tried by the court without a jury. The court shall examine the entire drainage proceeding and related matters and receive evidence to determine whether the findings made by the board can be sustained. At the trial the findings made by the board are prima facie evidence of the matters stated in the findings, and the board’s order is prima facie reasonable. If the court finds that the order appealed is lawful and reasonable, it shall be affirmed. If the court finds that the order appealed is arbitrary, unlawful, or not supported by the evidence, it shall make an

order, justified by the court record, to take the place of the appealed order, or remand the order to the board for further proceedings.

Minn. Stat. § 103E.095, subd. 2. Under this standard, EverStar has the burden at trial to overcome the prima facie reasonableness of the county's decision, which is only subject to reversal if it is arbitrary, unlawful, or not supported by the evidence.

EverStar sought partial abandonment of CD 24 under Minn. Stat. § 103E.806 (2016), which provides for abandonment if “part of the drainage system does not serve a substantial useful purpose as part of the drainage system to any property remaining in the system and is not of a substantial public benefit and utility.” Minn. Stat. § 103E.806, subd. 3(b). “Substantial” is not defined in the statute, and has not been interpreted in appellate caselaw in this context. EverStar urges us to apply *The American Heritage Dictionary*'s definition of “substantial,” which is, in relevant part, “True or real; not imaginary” or “Considerable in importance, value, degree, amount, or extent.” *The American Heritage Dictionary* 1738 (5th ed. 2011). But given the evidence and argument presented, the definition of “substantial” does not resolve our inquiry.

In denying EverStar's petition, the county found that “the record shows the property will take longer to drain and the abandonment of the ditch will result in a change in the stage and duration of flooding which will negatively impact properties remaining in the system.” And the county interpreted computer modeling submitted by EverStar to show that CD 24 “does serve a substantial useful purpose as part of the drainage system and that it does have a substantial public benefit and utility.” The district court concluded that “there is no evidence that the existing ditch system has failed to provide drainage to the

area. The record establishes that the existing ditch provides a drainage system to properties in the system and continues to provide this substantial benefit.”

The district court reasoned that EverStar misconstrued the standard for partial abandonment, and that the evidence relied on by EverStar did not overcome the prima facie showing that the county’s denial of the petition was reasonable. We agree. To survive summary judgment, EverStar needed to show—or demonstrate a genuine issue of material fact—that CD 24 does not serve a substantial useful purpose as part of the drainage system to any property remaining in the system and does not provide a substantial public benefit and utility. Minn. Stat. § 103E.806, subd. 3(b). Instead, EverStar submitted evidence to support an argument that its proposed wetland would provide drainage that would be as good, or better, than the existing CD 24.

It is undisputed that CD 24 serves a useful purpose by draining water from upstream properties. EverStar nevertheless challenges the county’s finding that partial abandonment would negatively impact properties remaining in the system, pointing to its experts’ conclusions that implementation of the proposed wetland bank project would not increase the stage or duration of inundation. We are not persuaded. This evidence may have supported a petition for impoundment or diversion, but does not squarely apply to the standard for partial abandonment. *Compare* Minn. Stat. § 103E.227, subd. 3(c) (2016) (providing for impounding, rerouting, or diverting drainage system waters if the project “will not impair the utility of the drainage system or deprive affected landowners of its benefit”), *with* Minn. Stat. § 103E.806, subd. 3(b) (providing for partial abandonment if “part of the drainage system does not serve a substantial useful purpose as part of the

drainage system to any property remaining in the system and is not of a substantial public benefit and utility”).

Viewing the evidence in the light most favorable to EverStar, we conclude that EverStar failed to show either a genuine issue of material fact, or that competent evidence supports a finding that CD 24 does not serve a substantial useful purpose to remaining properties and is not of substantial public benefit and utility. Because the county’s denial of EverStar’s petition for partial abandonment is not arbitrary, unlawful, or unsupported by the evidence, the county is entitled to summary judgment dismissing EverStar’s drainage appeal.

II. EverStar’s antitrust claim fails as a matter of law.

In its amended complaint, EverStar asserts that the county violated Minn. Stat. § 325D.52, which prohibits the actual or attempted “establishment, maintenance, or use of . . . monopoly power over any part of trade or commerce by any person or persons for the purpose of affecting competition or controlling, fixing, or maintaining prices.” EverStar alleged that the county

established, maintained, or used monopoly power over the price of its own wetland credits by using its land use powers to arbitrarily and unreasonably deny EverStar’s petition for partial ditch abandonment, with the purpose and effect of preventing EverStar from creating a wetland bank that would compete with the County’s existing wetland bank as well as from County-owned banks to be established in the future.

EverStar challenges the district court’s conclusion that the county is exempt from antitrust liability under Minn. Stat. § 325D.55, subd. 2(a), which provides, “Nothing contained in sections 325D.49 to 325D.66, shall apply to actions or arrangements otherwise

permitted, or regulated by any regulatory body or officer acting under statutory authority of this state or the United States.” Accordingly, the relevant inquiry is whether the county’s actions were specifically permitted by state law. See *Minn.-Iowa Television Co. v. Watonwan T.V. Improvement Ass’n*, 294 N.W.2d 297, 306 (Minn. 1980) (“[T]he exemption from antitrust laws for government approved activities has generally been limited to activities either required or specifically permitted by the government.”). We conclude that they were because the county is both (1) the drainage authority charged by statute with deciding petitions for partial abandonment of a drainage system, see Minn. Stat. §§ 103E.005, subd. 9, .806, subds. 1, 3 (2016); and (2) the local government unit charged by agency rule with approving applications for wetland banking credits, see Minn. R. 8420.0705, subp. 1 (2015).

EverStar does not challenge these two sources of legal authority but contends that the county’s authority to decide ditch-abandonment petitions and wetland-credits applications does not confer on it the authority to engage in anticompetitive conduct. But this argument collapses the exemption inquiry into the merits of the antitrust claim. The proper focus in applying the exemption is on whether the county’s actions were permitted by state law, not on whether the manner in which the county conducted both authorized actions might violate antitrust laws.

EverStar next asserts that the district court erred by failing to construe the statutory exemption in a manner consistent with the judicially created state-action doctrine, which is applied to determine whether municipal conduct is immune from liability under the federal antitrust statutes. See, e.g., *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 135 S. Ct.

1101, 1109-10 (2015) (explaining doctrine). EverStar cites no authority for applying this federal doctrine rather than the plain language of section 325D.55, subdivision 2(a). Even if the state-action doctrine applies, which we need not and do not decide, the Supreme Court has specifically rejected EverStar's argument that a municipality must show that its allegedly anticompetitive conduct was compelled by—or even intended by—the state. See *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45, 105 S. Ct. 1713, 1720 (1985) (“None of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown.”); see also *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377, 111 S. Ct. 1344, 1352 (1991) (stating that state-action doctrine applies regardless of a municipality's motives for engaging in the challenged conduct). Instead, the state-action doctrine applies if state statutes authorize municipal action with foreseeable anticompetitive effects. *Town of Hallie*, 471 U.S. at 42, 105 S. Ct. at 1718. Although the Supreme Court has intimated that a market-participant exception might be warranted in municipal cases, it has never adopted such an exception. See *Rectrix Aerodome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n*, 534 F. Supp. 2d 201, 206 (D. Mass. 2008) (summarizing Supreme Court intimations but noting lack of authority for market-participant exception).

In sum, the county is exempt from antitrust liability under Minn. Stat. § 325D.55, subd. 2(a), because the county's actions were specifically permitted by state law. EverStar's antitrust claim fails as a matter of law.

Affirmed.