[Cite as *State ex rel. Nozik v. Mentor*, 2004-Ohio-5628.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO ex rel. ELEANOR S. NOZIK, et al.,	:	**PER CURIAM OPINION**
Relators,	:	**CASE NO. 2003-L-195**
-vs-	:	
CITY OF MENTOR,	:	
Respondent.		October 22, 2004

Original Action for a Writ of Mandamus.

Judgment: Judgment entered in favor of Respondent.

Albert C. Nozik, 7833 Lake Shore Boulevard, Mentor-on-the-Lake, OH 44060 (For Relators).

James A. Climer and *Frank H. Scialdone*, 100 Franklin's Row, 34305 Solon Road, Solon, OH 44077, and *Richard A. Hennig*, Mentor City Law Director, 8500 Civic Center Boulevard, Mentor, OH 44060-2499 (For Respondent).

PER CURIAM

{¶1} This original action is presently before this Court for consideration of the motion of respondent, the City of Mentor, for judgment on the pleadings. As the basis for this motion, respondent maintains that the instant action cannot go forward on the merits because the allegations of relators, Eleanor S. and Albert C. Nozik, support the conclusion that they failed to commence this case in a timely manner. For the following reasons, we hold that respondent is entitled to judgment in its favor under Civ.R. 12(C).

{¶2} At some point before 1973, Albert C. Nozik became the sole owner of 14.4 acres of land located directly adjacent to State Route 2 in the City of Mentor, Ohio. In 1973, Albert quitclaimed the deed to this tract of land to his wife, Eleanor S. Nozik, who continued to be the sole owner of the property until the filing of this action in November 2003. At the present time, the land in question is surrounded on all sides by either the Woodland Glen housing complex or State Route 2. Moreover, no road in the housing complex directly connects the Nozik land to other public streets. Thus, since the land cannot be accessed from State Route 2, both relators have been unable to develop the land for over thirty years.

{¶3} In bringing the instant action, relators essentially assert in their mandamus petition that the present predicament of the 14.4 acres can be attributed to the improper behavior of respondent. According to relators, when the plans for the housing complex were first created in 1973, the developer of the project, Servco Inc., tried to purchase the 14.4 acres from them. When an agreement on the price for the land could not be reached, the corporation entered into a tacit agreement with respondent, under which a corporate officer would retain ownership over a parcel of land in the complex. Relators assert that Servco and respondent ultimately intended for this parcel to be use for a road which would connect the 14.4 acres to another public street, but that such a road would not be built until relators bought that specific parcel from the officer. Relators also allege that, although they tried to purchase the "road" parcel, they could never complete any deal because the officer was asking $100,000 for the parcel.

{¶4} In light of the foregoing, relators state that respondent should be required to purchase the "road" parcel so that a public road could be built connecting their 14.4

acres to another public street. Specifically, in their petition, they request the issuance of a writ ordering respondent to commence an appropriation proceeding in regard to the "road" parcel. In addition, relators seek the payment of compensatory damages for the harm they have incurred as a result of their inability to develop the 14.4 acres.

{¶5} In now moving for judgment on the pleadings, respondent maintains that relators' petition does not state a viable mandamus claim because their own allegations indicate that their claim accrued in 1973 when its city council and zoning commission allegedly made the tacit agreement with Servco. Based upon this, respondent submits that their claim for relief cannot be heard because it is now barred under the six-year statute of limitations for a "taking" cause of action.

{¶6} At the outset of our analysis, this Court would note that, although relators primarily seek the appropriation of the parcel of land supposedly belonging to Servco's corporate officer, this request is predicated upon the underlying assertion that the tacit agreement between respondent and Servco have deprived relators of any economically viable use of the 14.4 acres. Stated differently, relators' entire claim for relief is based upon the allegation that respondent's collusion with Servco constitutes a governmental taking of their private property. Accordingly, even though the ultimate relief they seek is a writ of mandamus, relators' petition states a proper "governmental taking" claim.

{¶7} In considering mandamus actions involving an alleged "taking" of private land, the Supreme Court of Ohio has held that the six-year statute of limitations under R.C. 2305.07 is applicable to such claims. In *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, the court first noted that, under its prior precedent on this issue, the statute of limitations for a claim to compel an appropriation proceeding had

been set at twenty-one years. This prior holding had been based upon the conclusion that a claim to compel an appropriation proceeding was similar in nature to an action to recover possession of land wrongfully held. In overruling its prior precedent, the *R.T.G.* court concluded that an "appropriation" claim should be viewed as an "implied contract" claim because, when the state takes private property for a public purpose, it is implicitly promising to compensate the private owner for the land. In light of this, the *R.T.G.* court held that the six-year statute of limitations for bringing an implied contract claim, as set forth in R.C. 2305.07, was also applicable to an "appropriation" claim.

{¶8} In responding to the motion for judgment on the pleadings, relators do not acknowledge that the *R.T.G.* holding clearly applies to the allegations in their petition. Instead, they merely argue that, since the right to compensation for a governmental taking is predicated upon a constitutional provision, their claim for relief should not be subject to any statute of limitations. However, in making this general argument, they have not cited any specific precedent for the proposition that an action based upon a constitutional provision cannot be barred under a statute of limitations. Furthermore, there is simply no valid reason why the purpose of a statute of limitations, i.e., to protect a party from "stale" claims, would not be served in this instance. Therefore, since relators' request for a writ of mandamus stems from an allegation of a taking of private property, the viability of their claim would be governed by the six-year statute of limitations under R.C. 2305.07.

{¶9} In light of the foregoing analysis, the next issue before this court concerns the date upon which relators' appropriation claim accrued. In *R.T.G.*, the Supreme Court stated that such a claim for relief accrues when the governmental entity makes

the final decision which results in the taking of the real property. Id., at ¶26. In their petition, relators expressly alleged that they have not been able to use the 14.4 acres for any purpose ever since 1973, when respondent's city council and zoning commission approved the plan under which the corporate officer would retain ownership of the "road" parcel. Thus, relators' own allegations support the conclusion that their appropriation claim accrued in 1973 because the taking of the 14.4 acres occurred when the decision to approve the "road parcel" plan was approved. Under such circumstances, their appropriation claim would be barred regardless of whether the applicable statute of limitations is six or twenty-one years.

{¶10} As an aside, this court would note that relators also allege in their petition that, when respondent approved Servco's plan for the entire housing complex, some of its officials made promises to relators that the issue of access to the 14.4 acres would be addressed in the future. As a general proposition, this court would agree that the statement of a promise to rectify a situation could delay the accruement of a claim under some circumstances. Nevertheless, in responding to the motion for judgment on the pleadings, relators have not placed any emphasis upon the alleged promises made by the city officials. Moreover, in their petition, they do not allege that the promises in question were made over a sustained period; instead, their allegations support the inference that the promises were only stated in 1973 when the officials made the tacit agreement as to the "road" parcel. As a result, this court concludes that relators' allegations about the promises made by the city officials have no effect upon our analysis on the "statute of limitations" issue.

{¶11} In ruling upon a motion for judgment on the pleadings under Civ.R. 12(C),

a court must determine whether the nature of the pleadings are such that, as a matter of law, the plaintiff/relator in a civil action will not be able to prove a set of facts under which he will be entitled to prevail on his claim for relief. *Lin v. Gatehouse Constr. Co.* (1992), 84 Ohio App.3d 96, 99. In applying the foregoing standard, a court must construe the pleading in a manner most favorable to the plaintiff/relator and must draw all reasonable inferences in his favor. *Brown v. Wood Cty. Bd. of Elections* (1992), 79 Ohio App.3d 474, 477.

{¶12} Pursuant to the foregoing analysis, this court holds that respondent has met the standard for the granting of judgment under Civ.R. 12(C). That is, respondent has established beyond a reasonable doubt that relators will not be able to prove a set of facts under which their claim to compel the filing of an appropriation case can satisfy the applicable statute of limitations. Stated differently, relators' allegations are legally insufficient to demonstrate that they brought the instant mandamus action in a timely manner.

{¶13} Accordingly, respondent's motion for judgment on the pleadings is granted. It is the order of this court that judgment is hereby entered in favor of respondent as to relators' entire mandamus claim.

DONALD R. FORD, P.J., JUDITH A. CHRISTLEY, J., WILLIAM M. O'NEILL, J., concur.