[Cite as *Painesville Mini Storage, Inc. v. Painesville*, 2009-Ohio-3656.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

PAINESVILLE MINI STORAGE, INC.,	:	**PER CURIAM OPINION**
Relator,	:	**CASE NO. 2008-L-092**
- vs -	:	
CITY OF PAINESVILLE,	:	7/24/09
Respondent.	:	

Original Action for Writ of Mandamus.

Judgment: Petition dismissed.

Paul V. Wolf, 50 Public Square, #920, Cleveland, OH 44113-2206 (For Relator).

John T. McLandrich and *Tami Z. Hannon*, Mazanec, Raskin, Ryder & Keller Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Respondent).

PER CURIAM.

{¶1} This action in mandamus is presently before this court for consideration of the Civ.R. 12(C) motion of respondent, the City of Painesville, Ohio. In asserting that it is entitled to judgment on the pleadings, the city maintains that relator, Painesville Mini Storage, Inc., should not be permitted to proceed in the instant matter because it failed to file an underlying case in compliance with the governing statute of limitations. For the following reasons, we hold that the factual allegations in the mandamus petition and the city's answer support the dismissal of this action.

{¶2} The subject matter of the instant case concerns whether the city should be compelled to file an appropriation proceeding regarding certain property interests which relator has in two tracts of land in Painesville, Ohio. The first tract is a parcel that relator owns in its entirety, and is presently used in relator's business of renting storage units to the general public. The second tract is adjacent to the first, and was used as a street or alleyway for approximately forty years. Relator has an easement interest in the second tract, under which the street can be employed as a means of both ingress and egress to its "business" tract.

{¶3} According to relator's mandamus claim, the easement at issue has existed in some form since the late 1920's. Prior to 1952, the "street" tract had belonged to a private owner, Robert V.D. Booth, who had used the tract to access other property upon which he operated a separate business. In that year, though, Booth conveyed the "street" tract to the city. The deed for the conveyance had a provision which recognized Booth's right to employ the existing street as a way to continue to access his other land. The deed also provided that this easement would extend to other property owners in the vicinity whose property likewise abutted the "street" tract.

{¶4} The undisputed facts before this court indicate that the "street" tract was used as a public thoroughfare over the next four decades, and that the provisions of the Booth deed were followed. In the early 1990's, though, the use of the existing roadway for access purposes began to wane. Ultimately, in early 2000, the city chose to convey its interest in the "street" tract to J.B.H. Properties Inc., a private entity that also owned land adjacent to the tract. This conveyance was memorialized in two quit claim deeds executed by the city. The first of these deeds contained a term which stated that J.B.H.

Properties' interest in the tract would be subject to the continuing use of the roadway by the public and the adjacent landowners. However, the second quit claim deed provided that, by conveying its interest in the tract, it was the city's intent to relinquish the existing right to use the roadway as a means for the public to access the general area.

{¶5} J.B.H. Properties purchased the "street" tract for the purpose of enlarging its existing business. As a result, after the second quit claim deed was recorded in June 2000, J.B.H. Properties submitted to the city an application for a building permit. Under the proposed plans, J.B.H. Properties intended to expand its present building and install a new fence. Furthermore, both of these improvements would extend onto the "street" tract and, therefore, would block any subsequent use of the existing roadway.

{¶6} While the "permit" application was pending, the city attempted to negotiate a settlement with relator as to the effect of the conveyance upon pre-existing easement and the continuing use of the roadway. The two parties were never able to finalize an agreement on the matter; thus, three months after the filing of the application, the city granted the building permit. In turn, J.B.H. Properties immediately went forward with the improvements in accordance with its submitted plans.

{¶7} Once the improvements had been completed, relator was no longer able to access its "business" tract through the "street" tract. Based upon this, relator claimed that its property interests had been harmed in two respects. First, its easement interest had essentially been nullified. Second, the value of its "business" tract had decreased as a result of the loss of access via the existing roadway.

{¶8} In an attempt to obtain compensation for the foregoing alleged harm to its interests, relator initially brought a "takings" action in the United States District Court for

the Northern District of Ohio. That particular action was commenced on December 19, 2007. After the case had been pending for nearly four months, the federal district court issued a decision dismissing relator's complaint without prejudice. As the basis for the decision, the district court held that a federal action could not be maintained at that time because relator had not exhausted its possible remedies under Ohio law.

{¶9} In light of the dismissal of its federal "takings" claim, relator filed the instant proceeding for a writ of mandamus. Prior to answering the mandamus petition, the city moved this court to dismiss the entire matter on the grounds that relator had waited too long to assert its "takings" claim. That is, the city contended that it was unnecessary to decide whether a separate appropriation case was warranted because the federal case had not been brought within the applicable statute of limitations.

{¶10} The city's basic argument in its prior motion to dismiss can be summarized in the following manner: (1) pursuant to R.C. 2305.09, relator was obligated to assert its "takings" claim within four years of the date upon which it accrued; (2) because the city's final decision on the "permit" application was made at some point in the 2001 calendar year, any claim relator might have for compensation accrued at that time; and (3) since relator's federal "takings" proceeding was not filed until December 2007, the four-year limit for such an action had not been satisfied.

{¶11} In opposing the city's motion to dismiss, relator did not challenge the first two prongs of the foregoing summary; i.e., there was no dispute that the claim for relief had accrued when the building permit had been granted, and that the four-year limit of R.C. 2305.09 was applicable. Despite this, relator still contended that its "takings" claim was not totally barred because the city's acts regarding the "street" tract had resulted in

a “continuing violation” of its constitutional right to just compensation. Relator took the position that, since the decisions to convey the tract and allow the new construction had had an ongoing effect upon its ability to use the easement, it was entitled to recovery for the damages it had sustained over the last four years.

{¶12} On November 19, 2008, this court released a judgment entry in which we overruled the city’s motion to dismiss. At the outset of our legal discussion, we rejected relator’s contention that it had been subjected to a continuing violation; i.e., we held that any harm to relator’s property interests had only occurred at the time the city had made its ruling on the “permit” application. However, in the second part of our discussion, this court concluded that a final determination on the “statute of limitations” argument could not be rendered at that point because two disputes still needed to be resolved. First, we noted that a question existed as to whether the four-year limit of R.C. 2305.09 was the correct statute of limitations to follow in this instance. As to this point, our entry stated that the General Assembly had enacted the four-year limit in 2004; thus, it was arguable that the prior six-year limit was applicable. Second, we emphasized that the distinction between a four-year and six-year limit could be critical because neither side had given a definite statement regarding when the final ruling on the building permit had been made. That is, the materials before us at that time had only indicated that the permit had been issued at some point in 2001.

{¶13} Within twenty days following the issuance of our decision on the motion to dismiss, the city submitted its answer to the mandamus petition. In relation to relator’s allegations about the granting of the building permit, the city not only admitted that it had made such a ruling, but also indicated that the permit had actually been issued to J.B.H.

Properties on September 15, 2000. In addition, the city attached to its answer a copy of the purported building permit. The text of this document stated that the building permit was to be effective from September 15, 2000 until September 15, 2001.

{¶14} Approximately one month after answering, the city filed its present motion for final judgment on the pleadings, pursuant to Civ.R. 12(C). As the sole basis for the new motion, the city again maintains that any claim relator may have for the taking of a property interest is barred because it was not timely asserted. In directly responding to the two issues raised in our prior judgment entry, the city first restates that its decision on the building permit application was not made at some point in 2001, but instead was finalized on September 15, 2000. Based upon this, the city contends that it is no longer necessary to resolve the issue of whether the four-year or six-year statute of limitations is applicable to relator's claim. That is, the city argues that, given that over seven years elapsed between the issuance of the building permit and the filing of relator's federal "takings" proceeding, relator's submission was not timely regardless of which limitation applied.

{¶15} In responding to the city's latest motion, relator has again not challenged the factual predicate of the city's "statute of limitations" contention. Relator freely admits that the three key events took place on the following dates: (1) the city's conveyance of the "street" tract was completed in June 2000; (2) on September 15, 2000, the decision on J.H.B. Properties' proposed improvements was finalized through the issuance of the building permit; and (3) relator did not commence its "takings" action in the district court until December 19, 2007. Despite this, relator states that it is still entitled to, at the very least, a partial recovery for the taking of its real property interests because the statute of

limitations should not be applied to bar its entire appropriation claim. Essentially, relator asserts that this court's prior legal analysis on its "continuing violation" theory should be reversed because we misinterpreted the cited case law.

{¶16} In disposing of the argument that the city's acts had subjected relator to a continuing violation of its constitutional right to just compensation, our prior judgment in the instant case contained the following discussion:

{¶17} "In support of its argument, relator relies solely upon two federal decisions, issued by the Sixth Circuit Court of Appeals, in which Ohio statutes of limitations were interpreted and applied: *McNamara v. City of Rittman* (6th Cir., 2007), 473 F.3d 633: *Kuhnle Bros., Inc. v. Cty. of Geauga* (6th Cir., 1997), 103 F.3d 518. A review of these opinions shows that both cases involved §1983 civil rights claims in which the property owners alleged that the governmental entity had taken their property without compensation and had violated their due process rights. In considering whether the 'takings' claims were barred under the governing statute of limitations, each opinion contained a general discussion of the 'continuing violation' doctrine.

{¶18} "In *McNamara*, the Sixth Circuit relied upon its prior analysis in *Kuhnle*:

{¶19} "' "Ordinarily, the limitations period starts to run when the plaintiff knows or has reason to know of the injury which is the basis of his action." *Kuhnle* ***, 103 F.3d 516, 520 ***. The limitations period will not bar all actions for all time, however, as in certain cases where there is a "continuing violation . . . which inflict[s] continuing and accumulating harm . . . " *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, *** (1968)(discussing the government's continuing violation of a company's rights under the Sherman Act). In other words, "[a] law that works an ongoing violation of

constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment." *Kuhnle*, 103 F.3d at 522.' *McNamara*, 473 F.3d at 639.

{¶20} "In *McNamara*, the court did not apply the doctrine to the facts of that case because the issue had never been raised before the district court. However, the *Kuhnle* court applied the rule to each of the pending claims to decide if the matter could still proceed even though the action had not been filed timely. In *Kuhnle*, the county had enacted a resolution to ban the use of certain trucks on a specific road. As to the property owner's substantive due process claim for deprivation of liberty, the court concluded that the 'continuing violation' doctrine was applicable because the owner would incur new harm every day the resolution was in effect. Regarding the 'takings' claim, the *Kuhnle* court reached the opposite conclusion:

{¶21} "'If Resolution 91-87 did, in fact, "take" any property interest belonging to Kuhnle, that taking occurred when the resolution was enacted. "In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has affected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." *Levald v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir., 1993); ***.' *Kuhnle*, 103 F.3d at 521.

{¶22} "In asserting that a continuing violation has occurred under the facts of this case, relator contends that *Kuhnle* and *McNamara* clearly support its position. In light of the clear holding in *Kuhnle*, though, this court cannot concur. To the extent that the granting of a building permit constitutes a single act, the city's conduct in this instance is no different than the enactment of a law or resolution. Furthermore, the nature of the

harm to relator's interest would be similar to that in *Kuhnle*; i.e., relator seeks compensation for the decrease in the value of its property, including the 'easement' interest, which was caused by the blockage of the 'street' parcel. Since this diminution in value would have taken place as soon as the permit was issued and the roadway became inaccessible, this was not a situation in which relator would be subject to additional harm every day.

{¶23} "As part of its factual allegations before this court, relator has also asserted that a taking of its property interest occurred when the city tried to basically nullify the roadway easement in the second quit claim deed to J.B.H. Properties in June 2000. As previously noted, the language of the second deed clearly set forth the city's intention to relinquish the public's right to use the existing roadway. As to this point, this court holds that the nature of the harm caused by this separate act would have been identical to the harm resulting from the determination to grant the building permit. That is, not only would the diminution in the value of relator's interest have accrued instantly, but there would have been no accumulating or continuing damages. Thus, as a matter of law, the factual allegations in relator's petition do not support a finding that it has been subject to a possible continuing violation of its constitutional rights." *Painesville Mini Storage Inc. v. City of Painesville*, 11th Dist. No. 2008-L-092, Judgment Entry of November 19, 2008, at pp. 5-7.

{¶24} As the foregoing quote readily indicates, this court's prior analysis on the "continuing violation" issue was based upon specific language from the Sixth Circuit's decision in *Kuhnle*, a case which relator had referenced in its response to the city's first dispositive motion. In now contending that the *Kuhnle* opinion does not actually support

our analysis, relator asserts that our reliance upon the language cited in our judgment entry was misplaced, and that the *Kuhnle* holding on the "continuing violation" point was instead predicated upon its application of a three-prong test which had been originally espoused in *Baker v. F & F Inv. Co.* (7th Cir., 1973), 489 F.2d 829. Relator also asserts that if this court had applied the *Baker* test to the undisputed facts of this proceeding, we would have reached a different result.

{¶25} In regard to this argument, this court would emphasize that the plaintiff in *Kuhnle* had raised three distinct claims for relief: (1) a "takings" claim; (2) a substantive due process claim for deprivation of property; and (3) a substantive due process claim for deprivation of liberty. After reviewing the *Kuhnle* opinion again, we would note that, in determining whether a continuing violation had occurred for purposes of the plaintiff's third claim, the Sixth Circuit explicitly followed the *Baker* test. *Kuhnle*, 103 F.3d at 522. However, in deciding if a continuing violation had occurred for purposes of the separate "takings" claim, the *Kuhnle* court made no reference to *Baker*. Rather, as was indicated in our prior judgment entry, the *Kuhnle* analysis as to the "takings" claim was predicated solely upon *Levald v. City of Palm Desert* (9th Cir., 1993), 998 F.2d 680. *Kuhnle*, 103 F.3d at 520-521. *Levald* stood for the proposition that when the enactment of legislation has the effect of decreasing the value of a property interest, there is a single harm that accrues on the date of the law's passage.

{¶26} In essentially maintaining that the "substantive due process" aspect of the *Kuhnle* "continuing violation" discussion should be given more weight that the "takings" aspect, relator submits that the "proper focus" of our analysis should be upon whether a general violation of its constitutional right to due process occurred under the undisputed

facts of the instant action. That is, relator contends that its claim for relief is not barred under the governing statute of limitations because the subject matter of this case does not merely cover the issue of whether the city engaged in a taking of its interests in real property. However, given the limited purpose of the sole claim in relator's petition, this court holds that no "due process" question can be litigated in the context of this action.

{¶27} First, our review of the mandamus petition readily shows that relator never asserted that the city's actions in relation to the "street" tract had resulted in a violation of any substantive due process rights. Rather, the petition only alleged that a taking of certain property interests had occurred, and that the city had not taken any legal steps to compensate relator for the ensuing damages. Accordingly, relator's prayer for relief only sought the issuance of a writ to compel the city to file an appropriation proceeding. The petition did not contain any request for separate relief predicated upon an alleged "substantive due process" violation.

{¶28} Furthermore, even if relator's petition had set forth a distinct "substantive due process" claim, this court would not have had the basic authority to proceed on the merits of such a claim. Pursuant to Section 3(B)(1), Article IV of the Ohio Constitution, the original jurisdiction of an appellate court is limited to five causes of action: habeas corpus; mandamus; prohibition; procedendo; and quo warranto. In regard to a factual assertion of a compensable taking of real property, it is well settled under Ohio law that mandamus constitutes "*** the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo v. City of Mayfield Heights* (2002), 95 Ohio St.3d 59, 63. However, the use of a mandamus case for this exact purpose is only necessary because our state

does not recognize a separate action for direct inverse condemnation before a common pleas court. *Trafalgar Corp. v. Bd. of Miami Cty. Commrs.* (Sept. 7, 2001), 2nd Dist. No. 2001 CA 6, 2001 Ohio App. LEXIS 3946. Therefore, since relator chose to institute the instant matter as an original action before the court, the scope of our jurisdiction is now expressly limited to determining whether a writ of mandamus could lie as a result of a compensable taking of relator's property interests.

{¶29} In turn, this further means that, in deciding if relator has been subject to a continuing violation of its rights for purposes of our "statute of limitations" analysis, we certainly would not apply the standard which the *Kuhnle* court solely employed in regard to a substantive due process claim for deprivation of liberty. Instead, the standard for a "takings" claim would govern. To this extent, relator has simply failed to establish that our prior interpretation of the *Kuhnle* opinion was flawed.

{¶30} In regard to the proper application of *Kuhnle* to the undisputed facts of the instant matter, relator maintains that, once the building permit was issued and the construction across the roadway area proceeded, "the destruction of the easement rights continued day after day." Apparently, it is relator's position that the damage to its property interests has continued to accumulate each day that the "street" tract has been blocked.

{¶31} As to this point, this court would emphasize that relator's position would be persuasive only if its petition contained allegations of an ongoing course of conduct by the city. Our review of relator's claim for relief readily indicates that this type of factual assertions was never made. Specifically, this case does not involve a situation in which the city issued a series of permits over a sustained period of time. Similarly, this is not

an instance in which new construction on the "street" tract occurred periodically through the years as a result of separate acts by the city. Instead, relator's own allegations can only be construed to establish that the damage to its property interests was predicated entirely upon one act; i.e., the city's decision to issue the building permit in September 2000. In this regard, we would note that the conveyance of the city's interest in the tract did not cause any harm to relator's interest until the building permit was awarded.

{¶32} Along the same lines, relator's assertions do not support the conclusion that it has suffered new damages to its interests on each day following the issuance of the permit and the completion of the improvements on the "street" tract. As was stated in our original discussion, the extent of the damages stemming from the alleged taking, i.e., the decrease in the value of its real property interests, was complete as soon as the roadway on the tract was no longer accessible. Although this damage or harm might still exist because relator has never received compensated from the city, it has never increased or accumulated during the intervening period between September 2000 and December 2007.

{¶33} Under relator's theory of the "continuing violation" doctrine, every taking of private property by a governmental entity could be said to be "ongoing" for purposes of the statute of limitations until the entity's act is vacated or compensation is paid. Given that this theory is not supported by the pertinent case law and would illogically limit the situations in which a "takings" claim would be totally barred, this court rejects the theory and its application to the facts of this action. Therefore, we affirm our prior holding that relator's factual allegations are legally insufficient to establish that it has been subject to a continuing violation as a result of the city's acts regarding the "street" tract.

{¶34} As was noted previously, relator has now admitted the fact that the permit for the improvements across the roadway area was awarded by the city on September 15, 2000. Hence, regardless of whether the four-year or six-year statute of limitations was applicable to relator's "takings" claim, the latest date upon which relator could have brought that claim in a timely manner would have been September 15, 2006. Since it is also undisputed that relator did not commence its federal "takings" case until December 2007, it follows that relator is barred from pursuing any claim for compensation based upon the city's taking of its property interests. In turn, this further means that the instant mandamus claim must fail because relator will never be able to establish a set of facts under which it would be entitled to a writ compelling the city to initiate an appropriation proceeding concerning the "street" tract.

{¶35} In order to prevail on a motion for judgment on the pleadings under Civ.R. 12(C), the moving party must satisfy the same standard that is used in a Civ.R. 12(B)(6) analysis; i.e., the moving party must show that, even when the factual assertions in the pleadings are accepted as true and all reasonable inferences are drawn in favor of the plaintiff/relator, it would still be impossible for the plaintiff/relator to prove the necessary facts entitling it to recovery. *State ex rel. Simeone v. City of Niles*, 11th Dist. No 2008-T-0059, 2008-Ohio-5856, at ¶18. Pursuant to the foregoing discussion, this court holds that the city has met this standard regarding the elements of relator's mandamus claim. That is, relator's allegations are legally insufficient to show that the city would ever have a legal duty to file an appropriation action.

{¶36} The motion of respondent, the City of Painesville, Ohio, for judgment on

the pleadings is granted. It is the order of this court that relator's mandamus petition is hereby dismissed in its entirety.

MARY JANE TRAPP, P.J., DIANE V. GRENDELL, J., CYNTHIA WESTCOTT RICE, J., concur.