[Cite as *State ex rel. Stamper v. Richmond Hts.*, 2010-Ohio-3884.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94721

STATE OF OHIO, EX REL. GORDON A. STAMPER, ET AL.

RELATORS

vs.

CITY OF RICHMOND HEIGHTS, ET AL.

RESPONDENTS

JUDGMENT:
WRIT DENIED

Writ of Mandamus
Motion Nos. 435093, 435097, and 435215
Order No. 436297

RELEASE DATE: August 16, 2010

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SEAN C. GALLAGHER, A.J.:

{¶ 1} Gordon Stamper and Marion Stamper ("Stampers"), the relators, have filed a complaint for a writ of mandamus in order to compel the respondents city of Richmond Heights, the Richmond Heights City Council, and individual council members David H. Roche, Donald O'Toole, Miesha Wilson Headen, Marcia Starkey Morgan, Kathryn Gambatese, Eloise Henry and Mark Alexander, hereinafter ("City"), to commence land appropriation proceedings within the Cuyahoga County Court of Common Pleas, Probate Division. The Stampers allege that conduct on the part of the City has resulted in the creation of a "de facto" storm water retention basin upon their real property, which constitutes a wrongful taking that has caused flooding and damage to their real property and home. The Stampers seek

appropriation proceedings in order to determine compensation for the city's wrongful taking. While we are acutely aware of the Stampers' flooding problems and resulting damage, we must apply the law as it exists. Thus, we grant the City's motion for summary judment and deny the Stampers' motion for summary judgment.

I. **The Facts**

{¶ 2} The facts, which are gleaned from the Stampers' motion for summary judgment with supporting affidavits and exhibits, the City's motion for summary judgment with supporting affidavits and exhibits, the deposition of Gordon Stamper, the deposition of Lee Courtney, and the interrogatories as answered by the Stampers and the City, provide that:

{¶ 3} 1) in 1998, Home Builders & Developers, L.L.C. owned the real property located at 179 Richmond Road, Richmond Heights, Ohio;

{¶ 4} 2) Home Builders & Developers, L.L.C. engaged the services of James R. Constabile, a design professional and surveyor, in order to prepare and design a drainage plan for the real property and home ("Property") that was to constructed at 179 Richmond Road;

{¶ 5} 3) on June 29, 1998, the City, through Lee Courtney, the City's Engineer, approved the "Topological Survey and Improvement Plan" ("Plan"), that was developed and prepared by James R. Constabile, the design

professional and surveyor engaged by Home Builders & Developers, L.L.C., for the Property;

{¶ 6} 4) the Plan established a storm water drainage pattern for the Property so that storm water flowed in an easterly direction toward a catch basin and yard drain located in the rear of the Property, that drained into an underground eight inch storm water sewer pipe that traveled in a northerly direction in the rear of the Property, and then in a westerly direction in the side yard, and emptied into a manhole located in the front of the property, but within the public right-of-way of Richmond Road;

{¶ 7} 5) the Stampers purchased the property from Home Builders & Developers, L.L.C. on April 29, 1999, but did not move into the Property until December 1999;

{¶ 8} 6) a ten foot wide private storm water sewer pipe easement existed on the property as purchased by the Stampers. The easement provided for the connection of a catch basin, located on the property to the south of the Property, to the storm water sewer pipe that traveled across the rear and side yards of the Property and to permit the owner of the southern property to enter onto the property "to maintain, repair, replace, enlarge, add to, relocate, cleanout and/or repair" the private storm water sewer system;

{¶ 9} 7) the Stampers took possession to the Property, through a Warranty Deed with Reservation of Easement, with knowledge of the private storm water sewer easement;

{¶ 10} 8) the Stampers' Property, during heavy rains, has flooded on multiple occasions, resulting in damage to the Property. The Property flooded on May 10, 2003, May 22, 2004, August 20, 2005, July 7, 2006, February 6, 2008, and April of 2010;

{¶ 11} 9) as early as June 8, 2004, Gordon Stamper attended meetings of the Richmond Heights City Council and other City officials, and lodged complaints with regard to the flooding of the Property;

{¶ 12} 10) at the Richmond Heights City Council meeting of June 8, 2004, Gordon Stamper indicated that his basement had flooded on two prior occasions;

{¶ 13} 11) at subsequent Richmond Heights City Council meetings, that took place between July 2004 and October 2004, Gordon Stamper demanded that the City provide assistance in resolving the flooding of the Property. Gordon Stamper indicated that the City's approval of the private storm water sewer system, vis-a-vis the Plan, created a duty on the part of the City to alleviate the flooding problem;

{¶ 14} 12) Gordon Stamper threatened to initiate legal proceedings against the City during the time period of June 2004 through October 2004;

{¶ 15} 13) at a City Council meeting, held on June 14, 2005, the Stampers were informed that the City was not liable for any flooding on the Property;

{¶ 16} 14) on February 23, 2010, the Stampers filed a complaint for a writ of mandamus;

{¶ 17} 15) on March 25, 2010, this court conducted a guidelines hearing, which established a discovery and briefing schedule for the parties;

{¶ 18} 16) on June 23, 2010, the Stampers filed a motion for summary judgment;

{¶ 19} 17) on June 23, 2010, the City filed a motion for summary judgment;

{¶ 20} 18) on June 28, 2010, the Stampers filed an amended motion for summary judgment;

{¶ 21} 19) on July 7, 2010, the City filed a memorandum in opposition to the Stampers' amended motion for summary judgment.

II. The Stampers' Complaint for a Writ of Mandamus

{¶ 22} In the case sub judice, the Stampers argue that the approval of the Plan, including the placement of catch basins on the Property and the

property to the south, and the usage of undersized storm water sewer pipes to carry storm water runoff, created a duty on the part of the City to replace or maintain the private storm water sewer system. Specifically, the Stampers argue that as a direct and proximate result of the undersized storm water sewer pipes and the malfunctioning catch basin located on the parcel of land to the south of the Property, the Property has become a de facto storm water retention basin for the Richmond Heights Watershed and, as such, has become part of the City's storm water sewer system. The Stampers argue that the de facto storm retention water basin has caused numerous floods and damage to the Property, which has resulted in a taking of the Property and requires the immediate commencement of proceedings in the Cuyahoga County Court of Common Pleas, Probate Division, to appropriate the Property and to determine the amount of compensation due as a result of the taking.

III. Mandamus as a Remedy to Compel Appropriation Proceedings

{¶ 23} "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation." *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63, 2002-Ohio-1627, 765 N.E.2d 345, judgment modified in part on other grounds, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493; Fifth and Fourteenth Amendments to

the United States Constitution; Section 19, Article I, Ohio Constitution. The Supreme Court of Ohio has firmly established that mandamus is "the appropriate vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged." *State ex rel. BSW Dev. Group v. City of Dayton*, 83 Ohio St.3d 338, 341, 1998-Ohio-287, 699 N.E.2d 1271. See, also, *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968; *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832. Thus, in order for this court to issue a writ of mandamus, the Stampers must demonstrate that: (1) the Stampers possess a clear legal right to appropriation proceedings; (2) the City possesses a clear legal duty to initiate appropriation proceedings; and (3) there exists no other adequate or plain remedy in the ordinary course of the law. *State ex rel. Sekermestrovich v. Akron*, 90 Ohio St.3d 536, 2001-Ohio-223, 740 N.E.2d 252; *State ex rel. BSW Dev. Group v. Dayton* (1998), supra; *State ex rel. Dehler v. Sutula* (1995), 74 Ohio St.3d 33, 656 N.E.2d 332. This court, as the trier of law and fact, must determine whether the Stampers' private property has been taken by the City and will employ "the strong arm of the law by way of granting the writ" *only* when the proof produced is *plain, clear, and convincing.* *State ex rel. Pressley v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 631.

IV. Legal Analysis

A. Statute of Limitations

{¶ 24} The City, through its answer and motion for summary judgment, raises the statute of limitations as an affirmative defense to the Stampers' complaint for a writ of mandamus. The City argues that the statute of limitations bars the complaint for a writ of mandamus.

{¶ 25} Pursuant to R.C. 2305.09(E), an action for relief, based upon the a physical or regulatory taking of real property, must be brought within four years after the cause has accrued. *Painesville Mini Storage, Inc. v. City of Painesville*, 124 Ohio St.3d 504, 2010-Ohio-920, 924 N.E.2d 357. See, also, *State ex rel. Nickoli v. Erie MetroParks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588; *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, 780 N.E.2d 998. A cause of action for injury to real property and relief on the grounds of a physical or regulatory taking accrues, and the four-year statute of limitations commences to run, when the injury or taking is first discovered, or through the exercise of reasonable diligence, should have been discovered. *Harris v. Liston*, 86 Ohio St.3d 203, 1999-Ohio-159, 714 N.E.2d 377; *NCR Corp. v. U.S. Mineral Prod. Co.*, 72 Ohio St.3d 269, 1995-Ohio-191, 649 N.E.2d 175; *Kay v. City of Cleveland*, Cuyahoga App. No. 81099, 2003-Ohio-171.

{¶ 26} The facts, as presented by the parties through the deposition of Gordon Stamper, the deposition of Lee Courtney, the sworn affidavit of Gordon Stamper, the sworn affidavit of Lee Courtney, the Stampers' answers to Interrogatories and Requests for Production of Documents, and Exhibit "E" as made part of the deposition of Gordon Stamper, clearly demonstrate the Stampers were aware of a flooding problem no later than May of 2004 and that the Stampers attempted to assign responsibility for the flooding, to the City, no later than October of 2004. The facts demonstrate that: (1) the Property flooded on May 10, 2003; (2) the Property flooded on May 22, 2004; (3) beginning in June 2004 and continuing through October 2004, Gordon Stamper attended City Council meetings and other meetings with City officials with regard to the Property flooding problems; (4) during the time period of June 2004 through October, 2004, the Stampers threatened to file legal action against the City, based upon the flooding of the Property; (5) during a City Council meeting held on June 14, 2004, the Stampers were informed by legal counsel, that the City possessed no responsibility for the flooding of the Property; (6) during a City Council meeting held on September 6, 2008, the Stampers were again informed that the City was not responsible for the flooding of the property, since the storm water sewer system located on the Property was a private storm water sewer system; and (7) on October

17, 2004, Gordon Stamper, through a document captioned "House Chronology," that was reviewed during the deposition of Gordon Stamper and introduced as Exhibit "E," memorialized that the "City of Richmond Heights approved a bogus storm connection that is not according to their own approved plans. Our ground floor has flooded twice. Our sanitary drains are not right, even though they said they were up to code. The city should pay to have everything fixed. End of story."

{¶ 27} As previously stated, R.C. 2305.09(E) requires that an action for relief on the grounds of a physical or regulatory taking of real property shall be brought within four years after the cause of action has accrued. Herein, the Stampers did not file their takings claim until February 23, 2010, more than four years after October 2004, when the Stampers alleged that the City was liable for the flooding of the Property based upon the City's approval of the Plan that provided for the Property's storm water drainage pattern and storm water sewer system. We also find that the continuous-violation doctrine did not toll the statute of limitations, because the City did not perform or take any additional actions after the approval of the Plan on June 29, 1998. The present effects of a single past action do not trigger a continuing-violations exception to the statute of limitations. *Nickoli*, supra, at ¶ 33; *Ohio Midland Inc. v. Ohio Dept. of Transp.* (C.A.6, 2008), 286

Fed.Appx. 416. Therefore, because the continuing-violations doctrine does not toll the application of the statute of limitations, we find that the Stampers' claim for mandamus is barred since it was not brought within four years of accrual as mandated by R.C. 2305.09(E).

B. Complaint for Mandamus/Appropriation Proceedings

{¶ 28} Notwithstanding the fact that the Stampers did not timely file their complaint for a writ of mandamus, we also find that they have failed to establish entitlement to a writ of mandamus in order to commence appropriation proceedings within the Cuyahoga County Court of Common Pleas, Probate Division.

{¶ 29} As stated previously, in order for this court to issue a writ of mandamus, the Stampers must affirmatively demonstrate that: (1) the Stampers possess a clear legal right that mandates the commencement of appropriation proceedings; (2) the City possesses a clear legal duty that mandates the commencement of appropriation proceedings; and (3) the Stampers do not possess nor possessed an adequate legal remedy in the ordinary course of the law. *State ex rel. Pressley v. Indus. Comm.*, supra. After reviewing the motions for summary judgment, the evidentiary material attached to the motions for summary judgment, and the applicable law, we

conclude that the Stampers have failed to prove each prong of the aforesaid three-part test.

{¶ 30} Any action on the part of the City, that results in seizure of or encroachment upon the Stampers' Property, constitutes an obvious taking. Direct physical invasion is not always necessary, since interference with the basic rights of property ownership may constitute a governmental taking. *State ex rel. Taylor v. Whitehead* (1982), 70 Ohio St.2d 37, 434 N.E.2d 732; *Smith v. Erie R.R. Co.* (1938), 134 Ohio St. 135, 16 N.E.2d 732. Herein, the Stampers claim that the City has effectively taken their Property because: (1) the City approved the Plan that established the general drainage pattern for the Property; (2) the City approved the Plan that established a private storm water sewer system, including the location of multiple catch basins, drainage pipes, and the diameter of the drainage pipes for the property; and (3) the City has failed to maintain the storm water sewer system by clearing debris from the catch basins and increasing the diameter of the drainage pipes after being informed of the flooding problem. In essence, the Stampers argue that the City's approval of the Plan resulted in the creation of a de facto storm water retention basin, on the Property, and as such, the Property has become part of the City's public storm water sewer system.

{¶ 31} The Stampers, however, have failed to establish that the City's approval of the privately contracted Plan creates any right to have the private storm water sewer system maintained and repaired by the City or that the City possesses any duty to repair and maintain the private storm water sewer system. The City possesses no duty to maintain or repair a private storm water sewer system on private property that it did not construct, did not appropriate or accept, and was not part of a regularly running public watercourse. The Stampers have failed to establish that the City's approval of the Plan resulted in the creation of a de facto storm water retention basin that has become part of the City's public storm water sewer system. *Caldwell v. Goldberg* (1975), 43 Ohio St.2d 48, 330 N.E.2d 694; *Mosley v. City of Lorain* (1976), 48 Ohio St.2d 334, 358 N.E.2d 596; *Vermillion v. Dickason* (1976), 53 Ohio App.2d 138, 372 N.E.2d 608. The Stampers have failed to produce *plain, clear, and convincing proof* that *any* action on the part of the City has resulted in the taking of their Property.

{¶ 32} Finally, the Stampers have failed to establish that they do not possess nor possessed an adequate remedy in the ordinary course of the law. *State ex rel. Hughley v. McMonagle*, 121 Ohio St.3d 536, 2009-Ohio-1703, 905 N.E.2d 1220; *State ex rel. Jaffal v. Calabrese*, 105 Ohio St.3d 440, 2005-Ohio-2591, 828 N.E.2d 107. Possible adequate legal remedies, inter

alia, that the Stampers possess or possessed, include initiating legal action for: (1) a claim for trespass against bordering landowners; (2) a claim for the act of negligently designing the Plan; (3) a claim of fraud against the former owner of the Property; and (4) a petition for the construction of an improvement for the disposal and removal of surplus water or controlled drainage of any land pursuant to R.C. Chapter 6131.

{¶ 33} Because the Stampers' complaint for a writ of mandamus is barred by the four year statute of limitations, as contained within R.C. 2305.09(E), and the failure to meet their burden of proving entitlement to the extraordinary writ of mandamus, we deny the writ. The City's motion for summary judgment is granted. The Stampers' motion for summary judgment is denied. Costs to the Stampers. It is further ordered that the Clerk of the Eighth District Court of Appeals serve notice of this judgment upon all parties as required by Civ.R. 58(B).

Writ denied.

SEAN C. GALLAGHER, ADMINISTRATIVE JUDGE

MELODY J. STEWART, J., CONCURS IN JUDGMENT ONLY, and
JAMES J. SWEENEY, J., CONCURS