[Cite as *State Rd. Assoc. v. Cuyahoga Falls*, 2009-Ohio-2859.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE ROAD ASSOCIATES Appellee v. CITY OF CUYAHOGA FALLS Appellee and MORAN FOODS, INC., dba SAVE-A-LOT LTD. Appellant	C. A. No. 24362 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2007 10 7019

DECISION AND JOURNAL ENTRY

Dated: June 17, 2009

CARR, Judge.

{¶1} Appellant, Moran Foods, Inc., dba Save-A-Lot Ltd. ("Save-A-Lot"), appeals from a judgment of the Summit County Court of Common Pleas that granted summary judgment to Appellee, the city of Cuyahoga Falls, on all of Save-A-Lot's challenges against it in this appropriation action. This Court affirms.

I.

{¶2} On October 9, 2007, the city filed an action against State Road Associates, the owner of the State Road Shopping Center in Cuyahoga Falls, as well as several of the shopping center's tenants, including Save-A-Lot. The city alleged, among other things, that the

appropriation of the shopping center property was necessary to eliminate a blighted area of the city. The same day, State Road Associates filed a separate action against the city, seeking declaratory and/or injunctive relief to stop the appropriation of its property. The trial court later consolidated the two cases and the matter proceeded as an appropriation action under the case number and caption of the case filed by State Road Associates.

{¶3} Save-A-lot filed an answer to the city's complaint and later filed an amended answer and a cross-claim against State Road Associates. Through its amended answer, Save-A-Lot generally denied the city's right to appropriate the property and sought compensation from the city for, among other things, the value of its unexpired leasehold interest, the value of its fixtures, and for the costs incurred in this litigation. Save-A-Lot's cross-claim against State Road Associates alleged claims for beach of contract and breach of the covenant of quiet enjoyment.

{¶4} On May 30, 2008, the city moved for summary judgment against all of the parties with whom it had not yet reached a settlement. It maintained, with supporting evidence, that it had reached a settlement with State Road Associates to purchase the shopping center property, with the exception of six out lots, for $10.2 million. As a result of this settlement, the city maintained that the shopping center tenants who remained in the action had no further right to challenge the necessity of the appropriation and/or seek compensation from the city. The city relied primarily on provisions in the leases between the individual tenants and State Road Associates.

{¶5} The trial court granted summary judgment to the city against the remaining tenants in the action, finding that they had no right to challenge the necessity of the appropriation, nor did they have a right to compensation from the city or to share in the $10.2

million purchase price. As to Save-A-Lot specifically, the trial court found that its lease had terminated and that it no longer had any interest in the property.

{¶6} Although cross-claims between Save-A-Lot and State Road Associates remained pending, the trial court later entered a nunc pro tunc order pursuant to Civ.R. 54(B) that "there is no just reason for delay, and this matter can proceed to immediate appeal." Save-A-Lot appealed, raising four assignments of error.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED IN INTERPRETING THE SAVE-A-LOT LEASE TO FIND THAT THE LEASE AUTOMATICALLY TERMINATED UPON THE ENTERING OF THE SETTLEMENT AGREEMENT."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY RULING THAT STATE ROAD'S SETTLEMENT WITH THE CITY ELIMINATED THE NEED FOR, AND RENDERED MOOT, ANY CONDEMNATION PROCEEDING, INCLUDING A HEARING ON NECESSITY."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN RULING THAT SAVE-A-LOT'S LEASE CONTAINED AN AUTOMATIC TERMINATION CLAUSE AND IT THEREBY HAD NO PROPERTY INTEREST TO PROTECT UPON APPROPRIATION OF THE PROPERTY AND NO ENTITLEMENT TO COMPENSATION."

ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ERRED IN FINDING THAT NONE OF THE ITEMS OF COMPENSATION ALLOCATED IN THE SAVE-A-LOT LEASE ARE AVAILABLE TO SAVE-A-LOT, AS A TENANT, UNDER OHIO EMINENT DOMAIN LAW, AND THAT ANY PROCEED SHARING BY STATE ROAD WAS OBVIATED BY THE TERMINATION CLAUSE IN THE SAVE-A-LOT LEASE AND THUS SAVE-A-LOT WAS NOT ENTITLED TO COMPENSATION."

{¶7} This Court will address Save-A-Lot's four assignments of error together because they all pertain to whether the trial court properly granted summary judgment to the city. Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) [N]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex. rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589.

"Doubts must be resolved in favor of the nonmoving party." *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686.

{¶8} The city raised several arguments to support its motion for summary judgment, including that Save-A-Lot's lease had terminated pursuant to a specific provision of the lease and that, as a result, it no longer had any interest in the shopping center property. The city presented evidence that it had reached a settlement with State Road Associates to purchase the shopping center property for $10.2 million. The city further pointed to Save-A-Lot's lease, which included a provision for termination in the event of a taking of the property by eminent domain. The trial court accepted the city's construction of the termination provision and found that Save-A-Lot's lease had terminated. Therefore, the court held that Save-A-Lot no longer had any interest in the shopping center property and had no right to challenge the appropriation or to receive any compensation from the city in this action.

{¶9} Save-A-Lot maintains that the trial court erred in determining that its lease had terminated. It further argues that, because all of the trial court's reasoning flowed from that erroneous conclusion, the summary judgment decision must be reversed. Even if the trial court erroneously concluded that Save-A-Lot's lease had terminated, the city raised numerous alternate grounds for summary judgment in its motion. This Court must affirm the trial court's decision if

any of the grounds raised by the movant support summary judgment, even if the trial court failed to consider those grounds. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 42.

{¶10} As set forth in R.C. 163.02, this action for the appropriation of real property was governed by the terms of R.C. 163.01 to 163.22. The parties do not dispute that, because the city filed this action on October 9, 2007, one day before extensive amendments to R.C. Chapter 163 became effective, this action is governed by the pre-amendment versions of the relevant statutes.

{¶11} The parties also agree that an action in eminent domain involves two key issues: (1) the government's need to appropriate the property and (2) the right to compensation, if any, of those who hold interests in the property. This Court will address the two issues separately.

Necessity of the Appropriation

{¶12} Through its motion for summary judgment, the city maintained that Save-A-Lot had not properly asserted a challenge to the necessity of the city's appropriation of the shopping center property. The parties do not dispute that, at the time Save-A-Lot filed its answer to the city's appropriation complaint, it had a leasehold interest in part of the shopping center property and therefore qualified as an "owner" of the property under R.C. Chapter 163. Former R.C. 163.01(C) defined "[o]wner" to include any individual, partnership, association, or corporation having any interest in the real property sought to be appropriated. Therefore, the parties agree that under R.C. Chapter 163, Save-A-Lot initially had a right to challenge the appropriation.

{¶13} The city asserted through its summary judgment motion, however, that Save-A-Lot had lost it right to challenge to the necessity of the appropriation by failing to comply with the specific pleading requirements of R.C. 163.08. R.C. 163.08, which was not affected by the recent amendments to R.C. Chapter 163, provides, in relevant part:

> "Any owner may file an answer to such petition. *** The agency's right to make the appropriation *** shall be resolved by the court in favor of the agency unless

> such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein[.]"

{¶14} In its original answer, Save-A-Lot failed to raise any challenge to the necessity of the appropriation. Through its amended answer, Save-A-Lot made only the following allegation to challenge the necessity of the appropriation:

> "[P]ursuant to Ohio Rev. Code § 163.08, Save-A-Lot denies that the City has the right and/or necessity to appropriate the property at issue."

{¶15} The city maintained, and this Court agrees, that the brief statement in Save-A-Lot's amended answer was not sufficient under R.C. 163.08 to challenge the necessity of the appropriation. Conclusory allegations do not comply with the pleading requirements of R.C. 163.08, as the statute explicitly requires that the owner plead "facts relied upon in support of such denial[.]" See, also *Sugarcreek Twp. Bd. of Trustees v. Farra* (Apr. 17, 1998), 2d Dist. No. 97-CA-90; *Columbus v. Triplett* (1993), 91 Ohio App.3d 239, 244.

{¶16} Save-A-Lot failed to set forth any facts to support its general allegation that the city's appropriation of the shopping center was not necessary. Pursuant to the explicit terms of R.C. 163.08, the trial court was required to resolve this issue in favor of the city. Therefore, summary judgment to the city on the issue of the necessity of the appropriation was proper.

Right to Compensation

{¶17} In its motion for summary judgment, the city raised several arguments as to why Save-A-Lot was not entitled to seek compensation from the city. The city asserted, with supporting evidence, that it had settled the appropriation action with State Road Associates and that it had agreed to pay $10.2 million as the total value of the property. The city argued, among other things, that if Save-A-Lot had any right to a portion of the $10.2 million compensation award, that right was against State Road Associates, not the city.

{¶18} In opposition to summary judgment, Save-A-Lot did not challenge the amount of the city's $10.2 million settlement or otherwise claim that it did not constitute just compensation for the shopping center property. Instead, Save-A-Lot maintained that it was entitled to a share of the settlement award that the city had agreed to pay State Road Associates for the total value of the property.

{¶19} Although Save-A-Lot maintained that its lease with State Road Associates entitled it to share in the compensation award, that issue had no bearing on Save-A-Lot's rights against the city. Whether Save-A-Lot had a contractual right with State Road Associates to share in the compensation that State Road Associates received for the property was an issue between Save-A-Lot and State Road Associates, the parties to the lease. State Road Associates did not move for summary judgment and Save-A-Lot's rights against it were not before the court. Likewise, the only issue on appeal is whether Save-A-Lot still had a claim for compensation against city.

{¶20} Ohio law is clear that Save-A-Lot's dispute over its entitlement to share in the compensation award was with State Road Associates, and it had no further claim against the city to seek compensation. The Ohio Supreme Court has emphasized that "if there is more than one interest or estate in land sought to be appropriated, a bifurcated proceeding is required." *Pokorny v. Local No. 310* (1974), 38 Ohio St.2d 177, 179. During the first proceeding, the compensation to be paid to the group of owners is determined; then, in a subsequent proceeding, the award is apportioned among the various owners according to their interests. See id; *Alliance Towers, Ltd. v. Stark Cty Bd. of Revision* (1988), 37 Ohio St.3d 16, 23; see, also R.C. 163.18. "This procedure is also made clear in R.C. Chapter 163." *Pokorny*, 38 Ohio St.2d at 179; see, also R.C. 163.10, 163.14, and 163.18.

> "In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole, with a later apportionment of the amount awarded among the several owners according to their respective interests, rather than to take each interest or estate as a unit and fix the value thereof separately. The separate interests or estates as between the condemner and the owners are regarded as one estate." *Sowers v. Schaeffer* (1951), 155 Ohio St. 454, paragraph one of the syllabus.

{¶21} Disputes over the apportionment of the compensation among those with ownership interests in the appropriated property are between those claiming to be entitled to share in the compensation award. See, e.g., *Pokorny v. Pecsok* (1977), 50 Ohio St.2d 260 (owner of property and one with a leasehold interest litigate apportionment of the compensation based on the terms of their lease agreement); *Lorain v. Ross* (Apr. 2, 1975), 9th Dist. No. 2265 (owner of property and one with an option to purchase dispute apportionment of the compensation after the owner settled the appropriation action with the city). Save-A-Lot's dispute over whether it is entitled to share in the compensation award is with State Road Associates, who was not a party to the summary judgment motion.

{¶22} Save-A-Lot failed to raise a genuine issue of material fact that it was entitled to any compensation from the city. The city had agreed to pay compensation for the whole property and Save-A-Lot did not contend that it was entitled to anything more, just that it was entitled to share in the compensation award that the city paid. Because the city had settled with State Road Associates for the total compensation that it would pay for the property, Save-A-Lot had no separate claim against it for compensation in the appropriation action. See *Sowers*, supra.

{¶23} The city met its burden of demonstrating that there were no genuine issues of material fact and, as a matter of law, Save-A-Lot was not entitled to challenge the necessity of the appropriation or seek compensation from the city. Therefore, the trial court properly granted summary judgment to the city. The assignments of error are overruled.

III.

{¶24} The assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

BELFANCE, J.
CONCURS

MOORE, P. J.
CONCURS, SAYING:

{¶25} I concur in the opinion of the majority, but write separately to point out, perhaps the obvious. Save-A-Lot entered into a lease agreement with State Road Associates which

entitled Save-A-Lot to compensation for its trade fixtures, leasehold improvements, business interruption and/or relocation expenses. When State Road Associates later entered into its settlement with the city, it specifically and explicitly excluded from the settlement those very items, eliminating any opportunity for Save-A-Lot to recover from the settlement. We are bound by the terms of each contract to uphold the agreements reached by the parties. Save-A-Lot, however, is not without a remedy, as its cross-claim against State Road Associates remains pending in the trial court.

APPEARANCES:

ROBIN M. WILSON, GARY L. WALTERS, OLIVER J. DUNFORD, and ANNAL VYAS, Attorneys at Law, for Appellant.

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