

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

State of Ohio, ex rel. Stanley J. Wasserman Court of Appeals No. S-10-031

and

State of Ohio, ex rel. Kathryn A. Wasserman

Relators

v.

City of Fremont

and

Terry Overmyer

DECISION AND JUDGMENT

Respondents

Decided: March 14, 2011

* * * * *

Corey J. Speweik and J. Douglas Ruck, for relators.

Robert G. Hart, Director of Law, for respondents.
OSOWIK, P.J.

{¶ 1} On June 25, 2010, relators, Stanley and Kathryn Wasserman, filed a petition for a writ of mandamus against respondents, the city of Fremont, Ohio, and

Fremont's Mayor, Terry Overmyer.¹ In the petition, relators asked this court to order respondents to commence an eminent domain action to compensate relators for the partial taking of an easement that provided drainage of excess water from relators' property, across property owned by the city of Fremont, and into nearby Minnow Creek. In support, relators alleged in the petition that drainage tiles running from their property across respondents' property were damaged when respondents began creating a reservoir on the city-owned land.

{¶ 2} On July 20, 2010, this court issued an alternative writ, in which we ordered respondents to either commence eminent domain proceedings or show cause as to why they have not done so. On August 6, 2010, respondents filed a motion to dismiss, a motion to strike and for attorney fees, and a motion to add additional "indispensable" parties.² On January 18, 2011, this court issued a decision in which we found that: (1) respondents' motion to dismiss was not well-taken because relators have no adequate remedy at law other than a mandamus action, and respondents' actions, if found to be an unlawful taking of relators' easement, are the proper subject of a mandamus action; (2) respondents did not put forth sufficient evidence of misconduct by relators and their attorneys to support a motion to strike or an award of attorney fees; and (3) respondents'

¹The facts in this mandamus action are more fully set forth in our decision issued on January 18, 2011, which is attached hereto as Appendix A.

²Respondents sought to add adjacent landowners, Sharon and Thomas Kipps, as parties in this mandamus action. In support, respondents argued that the Kipps are "indispensable parties" pursuant to Civ.R. 19(A), because a possibility exists that the Kipps may bring a similar action for damages against respondents.

motion to add a party was not well-taken because respondents did not show that the Kipps' absence would prevent either party in this action from obtaining complete relief, and the mere possibility that respondents may be exposed to multiple litigation is insufficient to render the Kipps, or any other party, "indispensable" pursuant to Civ. R. 19(A).

{¶ 3} Based on the foregoing findings, respondents' motions to strike, dismiss and to add a party were denied on January 18, 2011. Pursuant to 6th Dist.Loc.App.R. 6, both parties were ordered to submit their cases to this court in written form within 20 days of our decision. On February 7, 2011, relators and respondents complied by timely submitting merit briefs to this court.

{¶ 4} In their merit brief, relators reassert their earlier arguments in favor of a remedy by way of a mandamus action. Specifically, relators state that respondents' encroachment on their drainage easement constitutes a taking of their property without just compensation; the amount of reduced earning capacity of their farmland due to such encroachment is an issue to be determined by a jury; and respondents' argument that the drainage issue has been resolved is not relevant to the issue of whether or not a compensable taking ever occurred.

{¶ 5} In addition to the foregoing, relators now ask this court to grant them an injunction that prohibits respondents from "further encroaching upon Relators' property rights during the pendency of the eminent domain proceedings." Relators cite *State ex*

rel. Bilmour Realty, Inc. v .Mayfield Hts., 119 Ohio St.3d 11, 2008-Ohio-3181, ¶ 10-12, 14, as authority for their position that a property owner may seek both mandamus and an injunction in cases where an injunction alone does not afford complete relief from a taking of private property.

{¶ 6} In their merit brief, respondents attempt to reassert the issue of whether or not a writ of mandamus is the proper remedy in this case. In support, respondents once again argue that no taking has occurred. Alternatively, respondents argue that, if relators have suffered damage because of respondents' actions, relators have an alternative remedy at law through a lawsuit for damages due to breach of contract.

{¶ 7} As to the parties' arguments for and against the issuance of a writ of mandamus, in our decision issued on January 18, 2011, we held that "an action for mandamus 'is the appropriate means for a property owner to compel public authorities to institute proceedings to appropriate property where the property owner is alleging that an involuntary taking of private property has occurred.'" *State ex rel. Wasserman v. City of Fremont* (Jan. 18, 2011), 6th Dist. No. S-10-031, quoting *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 12. We further found that, in this case, "relators' petition alleges a taking that, if proved, is compensable through an eminent domain action." *Id.* Finally, we held that the written agreement through which relators' easement was originally formed, "although contractual in nature, created an easement over respondent's property." Accordingly, the contractual nature of

the agreement does not in any way prevent relators from pursuing a remedy by way of a mandamus action. Id.

{¶ 8} As to relators' request for a preliminary injunction pending the outcome of eminent domain proceedings, we disagree with relators' assertion that *State ex rel. Bilmour Realty, Inc.*, is applicable to this case. In *Bilmour Realty*, an action for a declaratory judgment and an injunction were sought by the relator in the trial court. The ultimate decision of the Ohio Supreme Court in that case was that a mandamus action brought in the court of appeals was not precluded by prior filings in the trial court, since those actions were inadequate to afford complete relief. Id. In contrast, in this case, relators are attempting to simultaneously bring an injunction and a mandamus action in this court. Ohio courts have held that "neither the [Ohio] Supreme Court nor the Court of Appeals has original jurisdiction in injunction * * *." *State ex rel. Pressley v. Indus. Comm. of Ohio* (1967), 11 Ohio St.2d 141, paragraph four of the syllabus. Accordingly, a petition that purports to be in mandamus must be dismissed by the court of appeals for want of jurisdiction, if its real objective is to obtain an injunction. Id. Relators' request for a preliminary injunction in this court pending the outcome of eminent domain proceedings is, therefore, not well-taken and is denied.

{¶ 9} Upon consideration of the entire record in this case, we find that no evidence has been presented to change our prior finding that relators are entitled to a writ of mandamus to determine whether or not a taking actually occurred in this case and how

much compensation, if any, is due from respondents. Pursuant to R.C. 2731.07, we hereby issue a writ of mandamus and order respondents to commence eminent domain proceedings to determine if a taking has occurred and what, if any, compensation is due to relators.

{¶ 10} Writ granted. Costs assessed to respondents.

{¶ 11} **To the clerk: Manner of Service.**

{¶ 12} The sheriff of Sandusky County shall immediately serve, **upon the respondents** by personal service, a copy of this writ in a manner pursuant to R.C. 2731.08. The clerk is directed to immediately serve upon all other parties a copy of this writ in a manner prescribed by Civ.R. 5(B).

{¶ 13} It is so ordered.

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v. City of Fremont and Terry Overmyer

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.