2013 IL App (4th) 120023-U

NO. 4-12-0023

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 25, 2013
Carla Bender
4th District Appellate
Court, IL

DANNY PEDIGO, WANDA PEDIGO, TONY CAPRANICA, and LINDA CAPRANICA, Plaintiffs-Appellants, and DANNY PEDIGO, Separate Plaintiff-Appellant, v. SAM FLOOD, Director, The Department of Natural Resources, For and on Behalf of the People of the State of Illinois, Defendant-Appellee.	)	Appeal from Circuit Court of Sangamon County No. 07MR561 Honorable John Schmidt, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1)The trial court did not err in dismissing plaintiffs' complaint for *mandamus* to require the empaneling of a jury or, alternatively, the Director of the Illinois Department of Natural Resources to institute eminent domain proceedings to determine just compensation for the taking of certain parcels of plaintiffs' land for public use without just compensation.

(2)Claims against the State of Illinois for damages to real property are to be decided by the Court of Claims and only claims for takings require the empaneling of a jury in the circuit court. Takings require an actual physical invasion of property.

¶ 2 Plaintiffs, Danny Pedigo, Wanda Pedigo, Tony Capranica and Linda Capranica, brought an amended complaint for *mandamus* against defendant, Sam Flood, Director of the Illinois Department of Natural Resources (Department), to compel the empaneling of a jury in an

eminent domain proceeding to determine the amount of damages to which plaintiffs are entitled for the Department's taking of certain parcels of property for public use in the construction of a bike trail on an old railroad right of way. Despite the caption of the complaint as one against Flood, the complaint makes no allegations against him either individually or as director of the Department but only makes allegations against the Department and then asks for relief requesting Flood be ordered to institute eminent domain proceedings.

¶ 3 The Department filed a motion to dismiss, arguing (1) the doctrine of sovereign immunity required complaints for damages against the State be brought in the Court of Claims and (2) although all five counts of the complaint were alleged to be "takings," the facts alleged only amounted to damages to plaintiffs' land. Further, the Department argued specific reasons why each of the five counts should be dismissed.

¶ 4 The trial court granted the motion to dismiss and denied plaintiffs' subsequent motion to reconsider. We affirm the trial court's judgment granting defendant's motion to dismiss.

¶ 5 I. BACKGROUND

¶ 6 The origins of this dispute can be traced to February 6, 2001, when the Department filed a complaint for condemnation proceedings against plaintiffs. The Department sought fee simple title to plaintiffs' property for the acquisition, development, and construction of the Chatham Trail Bikeway, a seven-mile bike trail from Chatham to Springfield. The trail was to be built on an old railroad right of way adjoining plaintiffs' property. The Department also sought a three-year temporary construction easement. Plaintiffs responded by filing a cross-complaint alleging the remainder of their real estate would be damaged by the Department's taking and

requesting damages be assessed. The trial court found the whole of the property to be condemned was only a very small amount of land constituting 0.90 acres, of which the Department was bringing proceeding to acquire title to only 0.147 acres. On appeal to this court, we found the trial court erred and the 0.90 parcel was really a part of a whole property of 58.89 acres. We reversed and remanded for the trial court to assess damages for the damages caused to the remainder of 58.89 acres. *Illinois Department of Natural Resources v. Pedigo*, 348 Ill. App. 3d 1044, 1050, 811 N.E.2d 761, 766-67 (2004).

¶ 7 Upon remand, a jury awarded damages of $25,000 to plaintiffs for the value of the .147 acres of land actually taken and the damage to the remaining 58.89 acres. This amount was affirmed on appeal. *Department of Natural Resources, State of Illinois v. Pedigo*, No. 4-06-0259 (April 18, 2007) (unpublished order under Supreme Court Rule 23).

¶ 8 On October 10, 2007, plaintiffs initiated this suit with the filing of a five-count complaint for *mandamus*. In count I, plaintiffs allege a taking of the remainder of the 0.90 acre portion of their property as a drainage ditch for the bike trail. They also allege the Department allowed the Springfield Park District to connect Lake Springfield's Lick Creek dirt bike trail to the bike trail across the northern end of the 0.90 acre section of plaintiffs' land, denying plaintiffs access to the balance of their lands, thereby taking the balance of those lands. They allege they suffered damages exceeding $125,000. In count II, plaintiffs allege the Department allowed the construction of the bike trail without provision for either of two farm crossing easements over the bike trail in a parcel of their land described in exhibit C, therefore taking plaintiffs' valuable easy access to the road on the other side of the railroad right of way, causing them to suffer damages in excess of $500,000.

¶ 9 In count III, plaintiffs allege the Department allowed the construction of the bike trail without allowing for their valuable right of way in the land described in exhibit C where the original landowners kept a right of way to cross the railroad with wagons at convenient places for the purpose of hauling coal from any coal mine located on their land or adjoining land. They allege this caused them damages in excess of $600,000. In count IV, plaintiffs allege the Department has taken (1) their right to natural drainage to their land, (2) their right to have no damage to their land, and (3) the benefit and advantage of having a railway on their exhibit C strip of land. Plaintiffs allege part of the consideration paid for the land when the railroad originally purchased it was the construction and operation of a railroad. Since a railroad is no longer operating there, extra consideration is due the successor in title to exhibit C (the plaintiffs) as part of the original consideration has failed. Plaintiffs contend they have suffered damages in excess of $600,000.

¶ 10 Finally, in count V, plaintiffs allege their predecessor in title had the privilege of using part of a strip of land in exhibit D for roadway purposes at the entrance to their property so long as it did not interfere with the practical operation of the railway. Because the railway had been abandoned, they argue they had the privilege of using any part of said strip for roadway purposes and the Department has taken this valuable privilege by allowing the construction of a bike trail forbidding motorized traffic. They allege this taking caused them to suffer damages in excess of $25,000. All together, plaintiffs allege takings by the Department causing them damages in excess of $1,850,000.

¶ 11 On November 19, 2007, the Department filed a motion to dismiss plaintiffs' complaint and a memorandum in support of its motion. As a preliminary matter, the Department

requested Flood be dismissed as a party-defendant because no relief was requested against him. The remainder of the motion raised specific reasons why each of the five counts of the complaint should be dismissed. On January 11, 2008, plaintiffs moved for leave to file an amended complaint amending the prayer for relief in each count to request Flood, director of the Department, be ordered and directed to institute eminent domain proceedings. The trial court allowed this motion and plaintiffs filed the amended complaint on March 6, 2008.

¶ 12 On March 25, 2008, the Department filed a motion to dismiss the amended complaint for *mandamus* relief. The motion and memorandum in support of the motion adopted the allegations of the previously filed motion to dismiss and added additional law in regard to the doctrine of sovereign immunity.

¶ 13 On April 25, 2011, plaintiffs filed a memorandum in opposition to the motion to dismiss. A hearing on the motion took place that day also. On April 27, 2011, the trial court granted the motion to dismiss the complaint in *mandamus*.

¶ 14 On May 27, 2011, plaintiffs filed a motion to reconsider. Plaintiffs' motion requested reinstatement of each count of their amended complaint or, alternatively, leave to file a second amended complaint, the original of which was submitted with the motion to reconsider.

¶ 15 On December 20, 2011, plaintiffs' motion to reconsider was denied as well as plaintiffs' alternative request for leave to file a second amended complaint. This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiffs argue it is the Department's duty to justly compensate them for the taking of their real property for a public purpose in eminent domain proceedings. See Ill. Const. 1970, art. I, § 15 ("Private property shall not be taken or damaged for public use without

just compensation as provided by law. Such compensation shall be determined by a jury as provided by law."). Plaintiffs argue the Department did not perform this duty and the trial court should not have granted the Department's motion to dismiss.

¶ 18 Plaintiffs argue the bike trail was constructed on former railroad corridor land and anything that was part of the former railroad corridor is part of the bike trail. They do not argue the bike trail actually physically exists on their land but that either the trail has caused a loss of access to their land or the "remainder" of their land, located adjacent to the railroad corridor land, has been "taken."

¶ 19 The Department raised several grounds for dismissing plaintiffs' complaint in its motion to dismiss based upon both sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2006)). The standard of review for dismissals under either section is *de novo*. *Morris v. Williams*, 359 Ill. App. 3d 383, 386, 834 N.E.2d 622, 626 (2005).

¶ 20 The ground for dismissal alleged by the Department common to all five counts is as follows: what occurred to plaintiffs' land, if anything, was that plaintiffs suffered damages and not a "taking." If a judgment could operate to control the actions of the State or subject it to liability, the action is effectively against the State and is barred by the concept of sovereign immunity. *Village of Riverwoods v. BG Limited Partnership*, 276 Ill. App. 3d 720, 725, 658 N.E.2d 1261, 1265 (1995).

¶ 21 The 1870 Illinois Constitution provided the State with sovereign immunity. Ill. Const. 1870, art. IV, § 26 ("The State of Illinois shall never be made defendant in any court of law or equity."). The 1970 Illinois Constitution abolished sovereign immunity. Ill. Const. 1970, art. XIII, § 4 ("Except as the General Assembly may provide by law, sovereign immunity in this

State is abolished."). Thereafter, the General Assembly restored sovereign immunity to the State. *Patzner v. Baise*, 133 Ill. 2d 540, 545, 548, 552 N.E.2d 714, 716, 718 (1990); 745 ILCS 5/1 (West 2006)("Except as provided in *** the Court of Claims Act, *** the State of Illinois shall not be made a defendant or party in any court."). The Court of Claims Act gives the Court of Claims exclusive jurisdiction to hear and determine "(a) [a]ll claims against the State founded upon any law of the State of Illinois *** [and] (d) [a]ll claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit * * *." 705 ILCS 505/8 (West 2006). The Court of Claims provides the exclusive remedy for a property owner whose property is damaged but not taken by the State. *Patzner*, 133 Ill. 2d at 545, 552 N.E.2d at 716-17. No provision for a jury determination is provided under the Court of Claims Act. See 705 ILCS 505/1 (West 2006).

¶ 22 Under eminent domain, a distinction is drawn between property physically taken and property damaged. *Patzner*, 133 Ill. 2d at 546, 552 N.E.2d at 717. The test for determining whether real estate has been taken for public use is whether there has been "an actual physical invasion of the tangible property." *Horn v. City of Chicago*, 403 Ill. 549, 554, 87 N.E.2d 642, 646 (1949). Anything less than actual physical invasion of the land is a "damaging," not a "taking." *Id.* When there has been a physical taking of property, the "taking" is compensable through eminent domain proceedings. *Patzner*, 133 Ill. 2d at 546, 552 N.E.2d at 717. Where there has been no physical taking of property, a "damaging" has occurred but the property owner cannot, by *mandamus*, compel eminent domain proceedings. *Patzner*, 133 Ill. 2d at 546, 552 N.W.2d at 717. Where another adequate remedy is available, *mandamus* will not lie. *Id.*, 133 Ill. 2d at 545, 552 N.E.2d at 717. A property owner has adequate remedy for "damaging" without a

"taking" through an action at law for recovery of his damages. See *Horn*, 403 Ill. at 559, 87 N.E.2d at 648.

¶ 23 The *Patzner* court dealt with a plaintiff's contention a referral of his case to the Court of Claims, where no provision is made for juries, would deprive him of his right to a jury trial. The court declared plaintiff did not have a right to a jury. *Patzner*, 133 Ill. 2d at 547, 552 N.E.2d at 718. The court reasoned although Article I, section 15 of the Illinois Constitution provided private property shall not be taken or damaged for public use without just compensation as provided by law and such compensation shall be determined by a jury as provided by law, the General Assembly restored sovereign immunity and provided, under the Court of Claims Act, the Court of Claims has exclusive jurisdiction of claims against the State, and it was up to the legislature to remedy any inequities its enactments created. See *Id*., 133 Ill. 2d at 548, 552 N.E.2d at 718. Thus, as provided by law, the plaintiff had no right to a jury.

¶ 24 Here, plaintiffs's allegations of damages they suffered, which did not claim actual physical takings of property, did not establish a right to eminent domain proceedings in the circuit court and were required to be brought in the Court of Claims. The trial court did not err in dismissing their complaint for *mandamus* to require eminent domain proceedings.

¶ 25 Illinois is a fact-pleading jurisdiction, and a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. *Marshall v. Burger King Corporation*, 222 Ill. 2d 422, 429-30, 856 N.E.2d 1048, 1053 (2006). Several, if not all, of plaintiffs' counts in their complaint did not set forth enough facts for any relief to be considered or granted.

¶ 26 Finally, some of plaintiffs' land as described in their exhibits to their complaint appears to have been included in larger parcels of land for which they received compensation in

prior damage awards in other litigation mentioned earlier. They may not be entitled to additional compensation.

¶ 27 III. CONCLUSION

¶ 28 We affirm the trial court's judgment.

¶ 29 Affirmed.