

SUPREME COURT OF ARKANSAS

No. 11-930

ZARA THOMAS, TRUSTEE OF THE
ZARA L. THOMAS REVOCABLE
TRUST, AND OF THE MARY C.
THOMAS REVOCABLE TRUST
APPELLANT

V.

CITY OF FAYETTEVILLE, ARKANSAS
APPELLEE

Opinion Delivered March 15, 2012

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT,
[NO. CV-11-2220-7]
HON. JOANNA TAYLOR, JUDGE,

DISMISSED WITHOUT PREJUDICE.**KAREN R. BAKER, Associate Justice**

Appellant Zara Thomas, Trustee of the Zara L. Thomas Revocable Trust u/d/t November 20, 1998, and of the Mary C. Thomas Revocable Trust u/d/t November 20, 1998 (“Thomas”) appeals from a Washington County Circuit Court order finding that appellee City of Fayetteville (“City”) had the authority to exercise its power of eminent domain to procure a portion of Thomas’s property for the purpose of constructing a bike trail. The City moved to dismiss this appeal for lack of jurisdiction, asserting that the circuit court’s order from which Thomas brings this appeal is not a final, appealable order necessary to vest this court with jurisdiction under our holding in *Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982). Thomas counters that this case is an exception to the rule, relying on this court’s language in *Omni Farms, Inc. v. Arkansas Power & Light Co.*, 271 Ark. 61, 63, 607 S.W.2d 363, 364 (1980), as “one of the comparatively rare instances . . . in which an order must be regarded as appealable because otherwise the order would divest a substantial right in such a way as to put it beyond the power of the court to place the party in its former

condition.” As a threshold matter, we must determine whether we have jurisdiction to hear this appeal. We conclude that we do not and dismiss the appeal without prejudice.

The facts are not disputed. On July 27, 2011, the City filed a complaint in eminent domain against Thomas in the Washington County Circuit Court. Concurrent therewith, the City also filed a motion for an order of immediate possession pursuant to Arkansas Code Annotated section 18-15-303, seeking the circuit court’s approval of the City’s deposit of \$17,300 into the court’s registry as just compensation for the taking and authorizing the City’s immediate entry onto the property to commence construction of the asphalt bike trail. Thomas was served with the complaint, motion, and summons on August 1, 2011. In its complaint, the City sought to condemn permanent easements on a portion of Thomas’s real property for the construction, maintenance, repair, and/or replacement of a multi-use recreational and transportation trail, pursuant to the authority granted under Arkansas Code Annotated sections 14-269-103, 18-15-201, and 18-15-301. Thomas objected to the motion for an order of immediate possession and requested a hearing on the matter. He argued that the statutory authority for the condemnation violates the federal and state constitutions or alternatively, that the City lacked the authority to exercise its eminent-domain authority for the use of a recreational and transportation trail.

On August 8, 2011, the circuit court held a hearing on the City’s motion for an order of immediate possession. At the hearing, Matt Mihalevich, the City’s trails coordinator, testified that the goal of the trails project is to establish a viable, alternative transportation network, but that there is a natural recreational component as well. He stated that a portion

of Thomas's land is necessary to construct the trail in order to connect two parts of the trail. Mihalevich testified that construction had halted at the western line to Thomas's property and that there were no other options to connect the portions of the trail. He stated that the City would install a fence on Thomas's property and then remove the topsoil, lay the base material, and pave the trail.

On August 19, 2011, the circuit court entered an order granting the City's motion for order of immediate possession. In its order, the circuit court specifically found that Thomas's property was necessary to complete the construction of the University of Arkansas Farm Trail, that the determination of the issues in controversy would likely retard the progress of construction, and that, after verifying the City had deposited \$17,300 in the circuit court's registry, it was lawful for the City to enter upon the property at issue and proceed with construction prior to the assessment of damages and compensation.

The City entered upon Thomas's property and commenced construction. Thomas filed a notice of interlocutory appeal and an emergency motion to stay execution of the order of immediate possession on August 26, 2011. The circuit court held a hearing on September 7, 2011. On September 8, 2011, the circuit court entered an order granting Thomas's motion for stay of execution upon Thomas's filing of a supersedeas signature bond in the amount of \$500. The circuit court has not considered the main issue of the amount of just compensation to be awarded.

For reversal, Thomas argues that (1) the City lacks statutory authority to condemn his property for use as a bike trail; (2) the taking is unnecessary; and (3) the quick-take statute,

Arkansas Code Annotated section 18-15-303(b), is unconstitutional on grounds of due process and a violation of the separation-of-powers doctrine. The issues on appeal concern whether the City has the power to condemn Thomas's property for the purpose of constructing the bike trail and whether the circuit court's order deprived Thomas of his constitutional rights.

Rule 2 of the Arkansas Rules of Appellate Procedure—Civil requires that a judgment or decree be final in order to take an appeal with certain enumerated exceptions. Without a certificate from the circuit court directing that the order or decree is final, “any judgment, order, or other form of decision, however designated, which adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.” Ark. R. Civ. P. 54(b)(2) (2011).

Before a judgment is final and appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter that is in controversy. *Hyatt*, 275 Ark. at 211, 628 S.W.2d at 327. *Hyatt* likewise involved a city seeking to exercise its eminent-domain authority to procure an easement against a private landowner's property. The issue on appeal was whether the city had the right to take the property for the purpose stated. *Id.* We held that the trial court's order was not a final, appealable order because two issues remained before final judgment: “1) the right of the city to exercise eminent domain, and 2) the right of the landowners to just compensation.” *Id.* Because the trial court's order dealt only with the former, leaving open the issue of just compensation, we dismissed the appeal to avoid piecemeal litigation. *Id.*

As in *Hyatt*, the issue of just compensation remains in the instant appeal; therefore, the circuit court's order is not a final, appealable order. Thomas urges us to apply an exception under *Omni Farms* on the basis that failure to hear the appeal at this interlocutory stage would divest him of a substantial right in such a manner as to put it beyond the power of the court to place him in his former condition. We disagree.

In *Omni Farms*, AP&L, the condemning utility, sought to acquire a 180-foot right of way across the appellant's cattle ranch for the purpose of erecting high-voltage transmission lines. *Omni Farms*, 271 Ark. at 62, 607 S.W.2d at 364. The proposed transmission lines would have been strung on tall metal towers that were embedded in concrete across the appellant's ranch. *Id.* AP&L conceded at oral argument that if it proceeded with the construction, it would be impossible to restore the appellant's property to its previous condition. *Id.* The court found this persuasive.

Here, Mihalevich testified at the hearing that the City planned to install a fence on Thomas's property and then remove the topsoil, lay the base material, and pave the trail. The portion of Thomas's property that the City seeks to condemn is a 20-foot-wide easement along the western border of Thomas's property. Unlike the facts in *Omni Farms*, the easement does not stretch across Thomas's property. Further, the City has not conceded that commencing construction would render it impossible to restore Thomas's property to its previous condition, and Thomas has not presented any evidence that would prove such an effect.

The order of the circuit court decided the issue of whether the City could rightfully

exercise eminent domain to condemn a portion of Thomas's property for use in constructing a bike trail, but the circuit court has not yet addressed the issue of the landowner's right to just compensation and the amount of damages. There is neither a final order nor a Rule 54(b) certification. An appeal at this point constitutes piecemeal litigation. *See Hyatt, supra*. We hold that the order did not conclude the parties' rights to the subject matter in controversy and is therefore not a final and appealable order.

Dismissed without prejudice.