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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000018-MR

EDWIN L. CLEMMER AND
MARY A. CLEMMER — APPELLANTS

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 06-CI-90160

ROWAN WATER, INC. — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: The Appellants, Edwin L. and Mary A. Clemmer, appeal from the September 11, 2009, order and judgment, and November 4, 2009, amended order and judgment of the Rowan Circuit Court, denying their claim that

[1] Senior Judge Joseph E. Lambert, sitting as Special Judge by the assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and the Kentucky Revised Statutes (KRS) 21.580.

Appellee, Rowan Water, committed reverse condemnation as to the installation of water lines on their property and as to the manner in which the lines were installed, maintained or abandoned, thereby precluding Clemmers' actions for trespass, nuisance, and fraud. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part, and remand this matter for additional proceedings not inconsistent with this opinion.

The Clemmers are residents of Indiana. They purchased property in Rowan County near an old railroad right-of-way in 1971, 1977, and 1989. The railroad line was abandoned in 1985-86, which gave rise to the Clemmers claim of ownership of the adjacent old railroad property by reversion. In total, the Clemmers own approximately 110 acres of land.

The dispute between the Clemmers and Rowan Water concerns three water lines of 6, 8, and 10 inches in diameter on or near the Clemmer's property. The only line installed after the Clemmers purchased the property was the 8-inch PVC water line. After Rowan Water installed this line, the Clemmers complained about its location. It was subsequently relocated to the Department of Highways easement. No part of the 8-inch line is currently on the Clemmer's property. The 10-inch PVC water line is located on the old railroad right-of-way, and the location of the abandoned 6-inch asbestos-cement water line is uncertain.

The Clemmers initially filed a diversity action in the United States District Court, Eastern District of Kentucky.[2] The basis for the claim against Rowan Water in that action concerned the water lines that allegedly crossed the

[2] Civil Action Number 04-165-HRW.

Clemmers' property. The federal complaint alleged trespass, nuisance, and fraud against Rowan Water. In the federal court litigation, the parties completed discovery, and filed expert reports, witness lists, and pre-trial memoranda. The federal court then specifically requested briefs from the parties with respect to the issue of reverse condemnation, which were filed by the parties.

The federal court issued a fourteen-page memorandum, opinion, and order, in which is examined the basis for the Clemmers' cause of action and concluded that reverse condemnation was their sole remedy. The court then reviewed the damages claimed by the Clemmers, and determined that those damages were not sufficient to meet the minimum jurisdictional limit of the federal court. Accordingly, the federal action was dismissed without prejudice.

Subsequently, the Clemmers filed their complaint in the matter *sub judice* in the Rowan Circuit Court. The facts which served as the basis for the instant claim are identical to the facts alleged in federal court. The Clemmers again alleged trespass, nuisance, misrepresentation, and punitive damages. The Clemmers assert that the transactions and occurrences underlying their claims included not only Rowan Water's placement and abandonment of the above-described water lines, but also included Rowan Water's misrepresentations about the proposed placement of the 8-inch PVC water line on their property and when placement was to occur. The circuit court complaint also included reference to reverse condemnation. The Clemmers sought various forms of relief from the trial court, including compensatory damages, injunctive and declaratory relief, an order

requiring the removal of any asbestos-cement water lines from their property, and punitive damages arising out of the trespass, nuisance, and fraud claims.

After the Clemmers filed their complaint in Rowan Circuit Court, Rowan Water filed its initial motion for partial summary judgment. In so doing, Rowan Water argued that the decision of the federal court holding that the Clemmers' remedy was limited to a claim of reverse condemnation was conclusive on that issue. On January 8, 2007, the trial court entered an order and judgment sustaining the motion made by Rowan Water. The Clemmers then appealed, and this Court issued an opinion holding that *res judicata* did not apply to the federal court decision because there was no adjudication on the merits in the federal action[3].

The matter was then remanded back to the Rowan Circuit Court, and a status conference was scheduled. During the course of that conference, counsel for Rowan Water advised the court of its intention to file a motion to request dismissal of the Clemmers' claim on essentially the same legal premise as relied upon by the federal court, namely, that the Clemmers' claim against Rowan Water was limited to reverse condemnation. Counsel agreed that this issue should be resolved before any other action was initiated in the case. This matter was argued by the parties to the court, and was followed by another motion for partial summary judgment by Rowan Water. The trial court sustained that motion in an order and judgment entered on September 11, 2009, again finding that the Clemmers' action was limited to a claim of reverse condemnation.

[3] *See Edwin and Mary Clemmer v. Rowan Water, Inc.*, 277 S.W.3d 633 (Ky.App. 2009).

The Clemmers then filed a CR 59.05 motion to alter or amend September 11, 2009, judgment, and the trial court entered an amended order and judgment was entered on November 4, 2009. Therein, the court stated that the Clemmers "have not argued any legal theory that is independent of the real property. All these potential damages are one and the same, which is what was the bottom line in *Whitbeck v. Big Rivers Electrical Coop. Corp.*, 412 S.W.2d 265 (Ky. 1967)." The trial court again dismissed the Clemmers' claims for trespass, nuisance and fraud/misrepresentation, leaving reverse condemnation as the only remaining claim. The Clemmers then appealed to this Court.

At the outset, we note that this appeal presents a question of law regarding the trial court's determination at the pleadings stage that Rowan Water was entitled to partial summary judgment. The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996); CR 56.03. "The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky.App. 2001) (citing *Steelvest* 807 S.W.2d at 480-82). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing

summary judgment to present 'at least some affirmative evidence showing that there is a genuine issue of material fact for trial.' ". *Id.* at 436 (citing *Steelvest,* 807 S.W.2d at 482). The trial court "must examine the evidence, not to decide any issue of fact, but to discover if a real issue exists." *Steelvest,* 807 S.W.2d at 480. The word "impossible," as set forth in the standard for summary judgment, is meant to be "used in a practical sense, not in an absolute sense." *Lewis,* 56 S.W.3d at 436 (citing *Perkins v. Hausladen,* 828 S.W.2d 652, 654 (Ky. 1992)). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Id.* at 436.

As their first basis for appeal, the Clemmers argue that the trial court's ruling on the condemnation issue improperly presumed that Rowan Water complied with the statutory prerequisites for condemnation under the circumstances of this case. The Clemmers assert that the trial court's order is completely devoid of any analysis regarding: (1) whether Rowan Water had the power to condemn the Clemmer's property, and (2) whether Rowan Water properly exercised that right under the circumstances. The Clemmers assert that before they can be limited to a reverse condemnation recovery against Rowan Water, that the trier of fact must first decide certain threshold questions about the condemnation power and its exercise, including whether Rowan Water had the authority to condemn the land, and if so, whether that authority was properly exercised.

Concerning the issue of whether Rowan actually had the power to condemn their property, the Clemmers assert that although KRS 416.340 grants the power of eminent domain to any water association supplying water to more than 100 customers, the statute does not specifically refer to or address the issue of condemnation. While the Clemmers have at times acknowledged and at times disputed that Rowan Water has the power of eminent domain, they note that by Rowan's own admission it has never instituted eminent domain proceedings or paid compensation for the right to lay waterlines on property[4].

The Clemmers argue that these admissions cast doubt as to whether Rowan met the requirements to exercise condemnation power, including the need for good faith pre-condemnation negotiations and a public purpose for the taking.[5][6] They assert that these are issues which should be addressed during the course of further proceedings and that accordingly, this Court should reverse the trial court's September 11, 2009, judgment and November 4, 2009, amended judgment for a determination as to whether condemnation was available and properly exercised under the circumstances.

[4] 2007 R.8, 10-11.

[5] As set forth in KRS 416.550, the Eminent Domain Act of Kentucky provides for condemnation only after any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges, or easements needed for any of the uses or purposes for which the condemnor is authorized by law. Further, as set forth in *City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992), the legislature cannot authorize the taking of property by eminent domain in excess of the particular public need involved.

[6] The Clemmers assert that Rowan never attempted to acquire any property rights or easement with respect to the 10 and 6-inch lines, and that it made misrepresentations with regard to the 8-inch line, thus creating a genuine dispute as to whether negotiations conducted with regard to that line were in bad faith. The Clemmers argue that this issue alone, whether the negotiations were conducted in bad faith, is a genuine issue of material fact which would render moot the question of whether reverse condemnation is dispositive of their claims.

In response to the first argument asserted by the Clemmers, Rowan Water argues that this issue should not be considered on appeal. Rowan Water asserts that the Clemmers failed to present this argument to the trial court and that they specifically conceded, both to the trial court and the federal court, that Rowan Water was vested with the powers of eminent domain pursuant to the provisions of KRS 416.340.[7] Moreover, Rowan Water notes that the Clemmers agreed that the issue as to whether their claim was limited to reverse condemnation should initially be determined by the trial court, stating in their ELP Status Report that there was a, "legal question regarding whether reverse condemnation is the exclusive remedy available to them." In making these arguments, Rowan Water acknowledges that it never pursued a condemnation action nor exercised its power of eminent domain.

The Clemmers disagree. Although they acknowledge that the trial court's consideration of the reverse condemnation issue was proper, they nevertheless assert that the trial court erred by ruling on this issue without first conducting the proper analysis regarding the statutory prerequisites for condemnation. Specifically, they direct this Court's attention to their Response to Rowan Water's Motion for Partial Summary Judgment, in which they argued:

> All requirements that must be satisfied in a standard condemnation action must also be satisfied in a reverse condemnation action. Here, Rowan Water has failed to provide any evidence to this Court that it (1)has eminent domain power and (2)satisfied the statutory prerequisites for condemnation.

[7] *See* Appellant's May 24, 2006, Complaint as filed in Rowan Circuit Court, p. 2, paragraph 9, and February 23, 2006, Memorandum, Opinion, and Order, United States District Court, Eastern District of Kentucky, p. 7.

> Moreover, a review of the pleadings in this case reveals several contested facts between the parties, including those facts involving allegations of Rowan Water's fraud and bad faith. It is clear that these factual disputes must be resolved before the Court can rule on whether Rowan Water has a right to condemn the Clemmers' property. Only after this analysis is completed can the Court even reach the reverse condemnation issue raised in Rowan Water's motion.

(T.R., p. 27).

In addressing the arguments of the parties on the first issue raised by the Clemmers, we are in agreement with Rowan Water and the trial court that Rowan Water, as an entity which provides water to more than 100 customers, was formed under the provisions of KRS Chapter 273, and has the power of eminent domain as set forth in KRS 416.340. Since Rowan Water has the authority to exercise powers of eminent domain, it has the authority to institute condemnation proceedings.

Having made this determination, this Court is of the opinion that the remainder of the Clemmers' argument on this issue is immaterial because Rowan Water had the power to condemn the land although it ultimately did not seek to do so. Thus, the question of whether the "power of condemnation" was correctly exercised is irrelevant, insofar as it was not exercised at all. In the matter *sub judice,* Rowan Water advised the Clemmers that it intended to place an 8-inch water line on their land, was given permission to do so, and did so, albeit in a location which was allegedly not the location for which permission was granted.

Rowan never exercised its power of eminent domain, nor instituted condemnation proceedings in this instance.

Further, we disagree with the Clemmers' interpretation of the determination in *Witbeck v. Big Rivers Rural Electrical Coop. Corp.*, 412 S.W.2d 265 (Ky. 1965)(*overruled on other grounds by Com. Dept. of Highways v. Stephens Estate*, 502 S.W.2d 71 (Ky. 1973)) in support of their position. Specifically, they cite the language that "standard and reverse condemnation are two sides of the same coin" and interpret that to mean that an entity must first appropriately exercise its condemnation powers in order to be charged with reverse condemnation. We disagree. This Court believes this holding to stand for the principle that one cannot institute reverse condemnation proceedings against an entity where the entity does not have the power of condemnation in the first place. Such is not the case *sub judice*. Rowan Water does have the power of condemnation; it simply did not exercise it in this instance.

Indeed, as held in *Commonwealth, Natural Res. & Env'l Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378, 381 (1984), inverse[8] condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are instituted. Such is the situation in the matter *sub judice*. Accordingly, the true matter at issue is whether the actions of Rowan Water as alleged by the Clemmers constitute only

[8] Our review of various decisions reveal that the terms inverse and reverse condemnation are used interchangeably. Herein, we refer primarily to reverse condemnation, unless specifically citing a holding utilizing other terminology.

an action for reverse condemnation and whether such an action is the exclusive basis for recovery. We now address those issues.

The Clemmers argue that the trial court erred in determining that reverse condemnation is their exclusive remedy, and that it should not preclude their other claims for nuisance, fraud, or punitive damages in connection therewith. In making this argument, the Clemmers recognize that the reverse condemnation claims and trespass claims are mutually exclusive, and note that the trespass claim was asserted only as an alternative to reverse condemnation.[9]

Nevertheless, the Clemmers take issue with the trial court's determination that "reverse condemnation is the plaintiffs [sic] sole remedy for any encroachment by Rowan Water, and the Plaintiff's [sic] cause of action is limited to an action in reverse condemnation.[10] The trial court, in reliance upon *Witbeck v. Big Rivers Rural Electrical Coop. Corp.*, 412 S.W.2d 265 (Ky. 1965), noted the court's holding that, "where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy is based on Kentucky Constitution, Section 242, which provides that 'just compensation for property taken' shall be made." The trial court below interpreted the phrase "sole remedy for any encroachment" to preclude not only the trespass claim filed by the Clemmers, but the fraud and nuisance claims as well, stating, "[the Clemmers] have not argued any legal theory that is independent of the real

[9] Having determined that reverse condemnation is the more appropriate cause of action in this instance, we believe the trial court was correct in determining that it precludes the trespass claim. Accordingly, we shall not address the issue of dismissal of the trespass claim further herein.

[10] See September 11, 2009, Rowan Circuit Court Judgment, R. 32, Apx. p. 4.

property. All of these potential damages are one and the same. *Witbeck*."[11] The Clemmers argue that the trial court's finding of "sole remedy" was in error, and argue that the trial court's reading of *Witbeck* was overly broad.

In support of that argument, the Clemmers note that the trial court cited three cases in support of its holding, none of which involved claims for nuisance or fraud.[12] The Clemmers acknowledge that the sole cause of action in those cases was for trespass with an accompanying request for punitive damages, and do not address the effect of a reverse condemnation action on claims for nuisance or fraud. The Clemmers argue that their claims of fraud and nuisance are distinct from their claims of trespass and reverse condemnation, and are meant to remedy a different type of injury. In support of that assertion, they state that their claims for misrepresentation and nuisance have no connection to improper encroachment through trespass or condemnation. Likewise, they argue that the remedies and damages sought in connection with the nuisance and fraud claims (e.g. injunctive and declaratory relief, removal of any asbestos-cement water lines from the property, and punitive damages), are not available in a reverse condemnation action.

In response to the argument made by the Clemmers, Rowan Water asserts that the decision of the circuit court sustaining its motion for partial summary judgment is supported by clear legal authority, and that if the Clemmers

[11] November 4, 2009, Amended Judgment of the Rowan Circuit Court, R. 40, Apx. p. 7).

[12] *See Kentucky & West Virginia Power Co. v. Vanhoose*, 174 S.W.2d 538 (Ky. App. 1943), *Eversole v. Morgan Coal Co.*, 297 S.W.2d 51 (Ky. 1957), and *Witbeck*, *supra*.

have a claim against Rowan Water, it is only for reverse condemnation. Rowan Water directs this Court to the decision of our Kentucky Supreme Court in *Witbeck*, in support of its argument that reverse condemnation is the sole remedy available to the Clemmers. In *Witbeck*, the Plaintiffs brought a claim for trespass and punitive damages resulting from an electric company's entry onto their property without an easement and without prior payment of compensation. The *Witbeck* Court decided that the case was a reverse condemnation case rather than a trespass case. In so finding, it concluded that punitive damages could not be recovered, stating:

> The rule is that where an entity possessing the power of eminent domain prematurely enters upon the premises of the condemnee, the exclusive remedy of the landowners is based on Kentucky Constitution, Section 242, which provides that 'just compensation for property taken' shall be made. This remedy is frequently referred to as 'reverse condemnation.' (citations omitted). The measure of damages is the same as in condemnation cases. Separate recovery of punitive damages is prohibited. (citations omitted). *Id.* at 269.

Rowan Water also directs our attention to the decision of this Court in *Big Rivers Elec. Corp. v. Barnes*, 147 S.W.3d 753 (Ky. App. 2004), which followed the holding in *Witbeck*. Therein, the trial court had permitted an award to the landowner for trespass after the electric company had placed a tower and wires outside its original easement area. This Court, in reversing the trial court, held that it was error for the property owner to recover for trespass and that the exclusive remedy of the owner was for reverse condemnation.[13] Rowan Water also directs

[13] *See also Kentucky & West Virginia Power Co. v. Vanhoose*, 174 S.W.2d 538, 539 (Ky. App. 1943), in which two landowners sued an electric company for trespass and punitive damages because the electric company built a power line across their property without compensation, and in which the Court held that, "…the only question after entry without first making payment being

our attention to a number of other cases[14] in which the courts of this Commonwealth have held that claims for reverse condemnation and trespass are mutually exclusive.

In reviewing the arguments of the parties and the applicable law, this Court notes that each of the cases cited by Rowan Water refer only to the mutual exclusivity of reverse condemnation and trespass claims, and do not address the effect of reverse condemnation on claims for nuisance or fraud. Stated simply, the claims filed by the Clemmers with respect to the 6 and 8-inch lines (for nuisance and misrepresentation/fraud, respectively), are distinct from the issue of whether Rowan Water's action amounted to a trespass onto the Clemmers' land. Clearly, *Witbeck* establishes that any claim for trespass is precluded by a claim for reverse condemnation. However, we decline to expand that holding to encompass preclusion of other causes of action which are distinct from the issue of whether a trespass occurred, and which encompass entirely different types of damages. Certainly, claims involving fraud, misrepresentation, and nuisance are distinct

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the value of the land taken, and the damages caused to the residue by reason of the taking."

[14] Including, among others, *Big Rivers Electrical Corp. v. Barnes*, 147 S.W.3d 753 (Ky. App. 2004)(In which the trial court awarded damages to the landowner for trespass after the electric company had placed a tower and wires outside its original easement area, and this Court reversed, holding that it was error for the property owner to recover for trespass, the exclusive remedy being for reverse condemnation); *Kentucky & West Virginia Power Co. v. Vanhoose*, 174 S.W.2d 538, 539 (Ky. App. 1943)(See FN 11 herein, *supra*); *Eversole v. Morgan Coal Co.*, 297 S.W.2d 51 (Ky. 1957)(Holding that when a coal company deviated from a right-of-way which had been condemned over a surface owner's property, the case had to be treated as a condemnation case, and the proper measure of damages was the difference between the before and after market value of the property); *City of Hazard v. Eversole*, 35 S.W.2d 313 (Ky. App. 1931)(In which a landowner sued the city of Hazard alleging a trespass claim for construction of a storm sewer and street on land he claimed to own, and Court held that the trespass claim could not be maintained).

from claims of trespass and reverse condemnation, and which are meant to remedy a different type of injury.

Having so held, this Court notes that this opinion is not intended as a commentary on the merits or viability of any nuisance or fraud claims brought or that may be brought by the Clemmers, and is limited only to a determination as to the lack of exclusivity between such claims and a claim of reverse condemnation. Certainly, it is for the court below to make determinations upon the merits of such claims. This opinion holds only that it was error to dismiss the fraud and nuisance claims on the grounds that such claims are precluded by a claim of reverse condemnation. We do not believe that *Witbeck* can be read so broadly.

Wherefore, for the foregoing reasons, we hereby affirm the trial court's dismissal of the Clemmers' trespass claim, reverse that dismissal with respect to the claims of fraud and nuisance, and remand this matter for all additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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