STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY S. BARKER,

Plaintiff-Appellee/Cross-Appellant,

V

CITY OF FLINT,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 19, 2001

No. 209124
Genesee Circuit Court
LC No. 90-109977-CC

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted the trial court's order denying defendant's motion for summary disposition of plaintiff's inverse condemnation action. Plaintiff cross-appeals the trial court's denial of his motion to strike defendant's motion as untimely and for sanctions. We reverse the trial court's denial of summary disposition and remand for entry of judgment in favor of defendant. We affirm the trial court's denial of plaintiff's motion to strike and for sanctions.

Plaintiff owns a three-unit rental house at 1710 Nebraska Street in Flint. Plaintiff's property is located on the south side of Nebraska Street, and parking is permitted on the north side of the street only. Plaintiff's property does not have a driveway or a garage. When plaintiff bought the property in 1978, a paved public parkway was located in front of the house between the street and the sidewalk. Plaintiff and his tenants parked in that area.

In May 1984, defendant began a repaving project on Nebraska Street. Because the street had been capped many times, the previous curb in front of 1710 Nebraska was almost at street level. Defendant's repaving project included the removal of several inches of street surface. A regular eight-inch curb was installed and the parkway in front of plaintiff's property was filled with dirt and seeded. As a result of the repaving and curbing in of the parkway, plaintiff and his tenants have been forced to park elsewhere.

Plaintiff filed his complaint in this matter in 1990, alleging that defendant's actions constituted a taking and inverse condemnation without compensation or due process. Plaintiff claims that the ease of access to his property and to the parkway, as well as the value of his property, have been diminished. He sought monetary compensation as well as restoration of the paved parkway.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), which the trial court denied. The trial court relied heavily upon this Court's opinion in *Spiek v Dept of Trans*, 212 Mich App 565; 538 NW2d 74 (1995), rev'd 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court reasoned that plaintiff should have an opportunity to prove that he had suffered some unique damage to his property.[1] This case proceeded to a jury trial in November 1996. The trial court declared a mistrial when the jury was unable to reach a verdict.

In August 1997, defendant filed a second motion for summary disposition after learning that our Supreme Court had issued an order reversing this Court's decision in *Spiek*, stating that the defendant was entitled to summary disposition because the plaintiff had not shown a particular injury. Defendant also argued that pursuant to city ordinance, parking on the parkway was not permitted. Plaintiff moved to strike defendant's second motion for summary disposition. Plaintiff argued that defendant's motion was really a motion for reconsideration and was not timely filed. Plaintiff also requested sanctions. The trial court denied plaintiff's motion to strike. The court also denied defendant's motion for summary disposition. The court concluded that the reversal of *Spiek* was factually based and did not change the law such that summary disposition was warranted in the instant case. The trial court determined that genuine issues of material fact existed regarding whether defendant denied plaintiff access to his property and whether parking on the parkway was illegal.

Defendant filed with this Court an application for leave to appeal the trial court's denial of summary disposition. This Court granted leave to appeal. Plaintiff filed a cross-appeal challenging the trial court's denial of his motion to strike defendant's second motion for summary disposition and for sanctions.

Defendant argues that the trial court erroneously denied his motion for summary disposition. Defendant claims that the trial court erred in finding a genuine issue of material fact regarding whether defendant had destroyed or seriously interfered with plaintiff's right of access to his property such that a taking occurred for which he is entitled to compensation. Defendant also argues that it was entitled to summary disposition because plaintiff failed to show the existence of a genuine issue of material fact that plaintiff's alleged injury was different in kind from the injury shared by the general public.

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[1] In its ruling from the bench, the trial court quoted the following passage from this Court's opinion in *Spiek*:

> The trial court erred in dismissing plaintiffs' claim without affording them an opportunity to establish that their use and enjoyment of their property has been detrimentally affected to a degree greater than that of the citizenry at large in conjunction with the normal use of a highway. If they can so establish, then they are entitled to compensation for the reasons and principles set forth in [*Richards v Washington Terminal Co*, 233 US 546, 554-558; 34 S Ct 654, 657-659; 58 L Ed 1088 (1914)]. [*Spiek*, *supra* at 568.]

This Court reviews decisions on motions for summary disposition de novo. *Outdoor Systems Advertising, Inc v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). The trial court properly grants summary disposition pursuant to MCR 2.116(C)(10) when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Spiek v Michigan Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

"Inverse condemnation is a taking of private property for a public use without the commencement of condemnation proceedings." *Hart v City of Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982). Both our state and federal constitutions provide that private property may not be taken for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v City of East Lansing*, 463 Mich 17, 23; 614 NW2d 634 (2000); *Charles Murphy MD, PC v City of Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). "A 'taking' for purposes of inverse condemnation means that government action has permanently deprived the property owner of any possession or use of the property." *Id.* When such a taking has occurred, the property owner is entitled to just compensation for the value of the property taken. Const 1963, art 10, § 2.

As a preliminary matter, it is necessary to determine whether plaintiff possesses the property interest that he claims has been taken by defendant. See *Adams Outdoor Advertising*, *supra* at 24. In his complaint, plaintiff alleged that defendant "took" the "parking area by destroying the pavement, constructing a curb parallel to the southerly edge of Nebraska, elevating the land which had formerly been the parkway so as to deprive plaintiff and his tenants of access to the parkway parking area and their previous means of access to the above-described real estate."

With respect to plaintiff's claim that he was deprived access to the parkway, his claim fails. Plaintiff has not been deprived of access to the parkway area, rather, he has been deprived only of the ability to park in the parkway area. There is no question of fact that the parkway belonged to defendant. Plaintiff possessed no greater right to park on the parkway than the general public. Certainly the paved parkway was a convenient place to park, and plaintiff presumably purchased the property with the expectation that he and his tenants would use that area to park. However, expectations are not rights. *Charles Murphy, supra* at 57. Plaintiff simply did not have a property right in the public parkway.

Our Supreme Court's opinion in *Spiek* clarified the requisite showing in cases alleging inverse condemnation. "The right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects to property abutting a public highway, exists only where the land owner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by

all persons similarly situated." *Spiek*, *supra* at 348.[2] Even if lawful parking could be inferred from this record, there is no evidence that plaintiff was granted a parking right that differed from other members of the public using the highway. Accordingly, the inability to park on the public parkway in front of plaintiff's property is shared by the other residents on Nebraska Street as well as the general public. Although this inconvenience undoubtedly affects plaintiff and his tenants to a greater degree than it affects others, the degree of harm is not the relevant inquiry. *Spiek*, *supra* at 348. Plaintiff's injury, if any, is not compensable under a theory of inverse condemnation because the harm suffered, i.e., the elimination or impairment of lawful parking as a result of defendant's filling in the parkway, does not differ in kind from other members of the public using the highway. Plaintiff's injury differs only in degree. *Spiek*, *supra* at 348. Accordingly, summary disposition should have been granted to defendant.

With regard to plaintiff's claim that defendant deprived him and his tenants of their "previous means of access" to the property, plaintiff's reliance upon *Thom v State Highway Comm'r*, 376 Mich 608; 138 NW2d 322 (1965) is misplaced because that case is easily distinguishable on its facts. In *Thom*, the defendant's change in the grade of the highway made it virtually impossible for the plaintiff to access the highway from his property because of a difference in height of several feet between his driveway and the highway. *Thom*, *supra* at 625-626 (Souris, J.). In the case at bar, plaintiff's property did not have a driveway or a garage. There is no evidence that defendant's change in the character of the parkway affected plaintiff's access to the highway from his property apart from the ability to park on the parkway. Unlike *Thom*, plaintiff offers no evidence in this case that defendant changed the grade of the street "in such a way as either to destroy or to interfere seriously with [plaintiff's] right of access to that highway." *Thom*, *supra* at 628. Rather, the change to the street resulted in an inability to park on the parkway. However, even if defendant's actions made access to his property inconvenient, mere inconvenience of access does not afford a basis for finding that a taking has occurred. *Biff's Grills, Inc v Michigan State Highway Commission*, 75 Mich App 154, 163; 254 NW2d 824 (1977).

In its last issue on appeal, defendant argues that the trial court erred in determining that plaintiff stated a cause of action for inverse condemnation and in denying defendant's motion for summary disposition under MCR 2.116(C)(8). Because we conclude that summary disposition was warranted pursuant to MCR 2.116(C)(10), we need not consider defendant's argument that its motion for summary disposition under MCR 2.116(C)(8) was erroneously denied.

On cross-appeal, plaintiff argues that the trial court erred in denying his motion to strike defendant's second motion for summary disposition. Plaintiff contends that defendant's second motion for summary disposition was actually a motion for reconsideration which was not timely filed and which merely asked the trial court to revisit previously addressed issues. The

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[2] After the trial court denied defendant's first motion for summary disposition, the Supreme Court vacated its order in *Spiek* and granted leave to appeal. *Spiek v Dep't of Trans*, 454 Mich 905 (1997). The Court issued its opinion on January 21, 1998, shortly after the trial court denied defendant's second motion for summary disposition. *Spiek v Dep't of Trans*, 456 Mich 331, 337; 572 NW2d 201 (1998).

interpretation and application of court rules are questions of law which we review de novo. *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000).

Plaintiff cites MCR 2.119(F)(1), which provides that "[u]nless another rule provides a different procedure for reconsideration of a decision . . . a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 14 days after entry of an order disposing of the motion." Plaintiff also relies on *Ramsey v Pontiac*, 164 Mich App 527, 538; 417 NW2d 489 (1987) for his argument that a delayed motion for reconsideration is not permitted.

We conclude that the trial court did not err in denying plaintiff's motion to strike defendant's second motion for summary disposition. MCR 2.116(E)(3) permits a party to file more than one motion under MCR 2.116, subject to the provisions of MCR 2.115(F) which authorizes sanctions if filed in bad faith. This Court has applied MCR 2.116(E)(3) to hold that a trial court's denial of one motion for summary disposition does not bar a second motion for summary disposition. See *Limbach v Oakland Bd of Co Rd Comm'rs*, 226 Mich App 389, 394-3395; 573 NW2d 336 (1997). Further, even if defendant's motion is properly viewed as a motion for reconsideration, MCR 2.108(E) provides that a trial court may extend the time for filing a motion where another rule does not otherwise limit a court's authority to do so. See *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 549-550; 493 NW2d 492 (1992).

Whether defendant's second motion is properly considered a motion for reconsideration, it is clear that the grounds upon which defendant sought summary disposition differed from those advanced in the first motion seeking summary disposition. In addition to arguing the Supreme Court's reversal of *Spiek* in its second motion, defendant advanced its theory that parkway parking was illegal as a basis for summary disposition under MCR 2.116(C)(10). The question of illegal parking was not addressed at the time of the first motion. This Court has found a motion properly presented as one for summary disposition, notwithstanding a trial court's unusual treatment of it as a "delayed" motion for rehearing, where the second motion was based, at least in part, on different grounds. *Murad v Professional & Administrative Union Local 1979*, 239 Mich App 538, 541 n 1; 609 NW2d 588 (2000). Accordingly, we find no error in the trial court's entertainment of defendant's second motion for summary disposition.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot