STATE OF MICHIGAN

COURT OF APPEALS

ORCO INVESTMENTS, INC., Plaintiff-Appellant,	UNPUBLISHED June 26, 2012
v	No. 303744 Wayne Circuit Court
CITY OF ROMULUS, ROMULUS PLANNING COMMISSION, and ROMULUS CITY COUNCIL, Defendants-Appellees.	LC No. 09-018235-CK

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. *(concurring in part and dissenting in part)*

I concur with the majority's conclusions and reasoning that plaintiff's due process and equal protection claims that are based on actions taken by the city before July 24, 2006, are barred by the statute of limitations; that the trial court properly granted summary disposition in favor of defendants on plaintiff's equal protection and substantive due process claims; and that the trial court did not abuse its discretion by denying plaintiff's motion to reinstate its prior case. However, I believe there are sufficient questions of fact as to plaintiff's regulatory taking claim that I respectfully dissent from the majority's affirmance of the trial court's dismissal of that claim. I would therefore reverse and remand as to that claim.

I agree with the majority's recitation of the applicable law and will not repeat it. Furthermore, I agree with the majority's conclusion that the "character of the government action" favors plaintiff. I appreciate that the community did not wish to have a housing development take place within its confines, and I am not unsympathetic to that; and furthermore, plaintiff here may arguably have more resources than a similarly situated individual. Nonetheless, defendants' conduct was clearly the kind of ersatz legislation specifically targeted at frustrating or harming a specific individual entity that cannot ever be countenanced.

It is a closer question whether the economic effect of the government regulation on the property weighs in either party's favor. However, if the question is a close one, on summary disposition the question should be presented to the jury. This inquiry is closely tied to the effect on plaintiff's interest-backed expectations.

The reason the question is close is that much of the harm plaintiff alleges appears to be the result of the housing market in particular, and the economy in general, both collapsing. I see

no evidence that defendants are responsible for either. Furthermore, to the extent those collapses could have been predicted, plaintiff is a sophisticated party with experience in the field and therefore equally, if not better, suited to make that prognostication. While I recognize that American jurisprudence generally adopts the "eggshell plaintiff" philosophy, developers inherently assume the risk of market fluctuations when they commence long-term projects. I would hold that, no matter how egregious defendants' conduct might have been, it is unfair to hold them responsible for damages that they could not have controlled and could not have predicted.

Nevertheless, it appears that plaintiff incurred expenses and delays it should not have incurred because of defendants' calculated attempts to hinder plaintiff's project. For example, defendants allegedly did not advise plaintiff that it had relinquished jurisdiction over soil erosion and storm water drainage plans, resulting in plaintiff wasting six months and other resources submitting futile plans to defendants and subsequently adapting those plans to the new entity. While plaintiff could theoretically have renegotiated the purchase price of the property to reflect the Overlay District, I am not aware of any evidence that it was successful in doing so; and while plaintiff did not need to purchase the property at all, the expenses and time it had already invested into the project would thereby have become entirely wasted. Furthermore, plaintiff could not have anticipated the ongoing delays and frustrations allegedly inflicted by defendants even after the purchase. Even more significantly, I believe that the Overlay District was so unreasonable that plaintiff's knowledge of it does not defeat the possibility of a regulatory taking. See *Palazzolo v Rhode Island*, 533 US 606, 626-627; 121 S Ct 2448; 150 L Ed 2d 592 (2001).

I believe that, when the evidence is viewed in the light most favorable to plaintiff, there are questions of fact regarding plaintiff's regulatory taking claim. Consequently, I would reverse the trial court's grant of summary disposition as to that claim and remand for further proceedings. In all other respects, I agree with the majority.

/s/ Amy Ronayne Krause