IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jayne Horner, Emil P. Horner, Jr., Mary L. Horner	:	
v.	:	No. 2647 C.D. 2010
Loyalsock Township School District, Appellant	:	Submitted: May 13, 2011

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: September 15, 2011

The Loyalsock Township School District (District) appeals the order of the Court of Common Pleas of Lycoming County (trial court) awarding delay damages to Jayne Horner, Emil P. Horner, Jr. and Mary L. Horner (collectively, Landowners) pursuant to the provisions of the Eminent Domain Code (Code).[1] We vacate and remand.

On September 5, 2001, the District adopted a resolution authorizing its solicitor to proceed with the condemnation of Landowners' 9.25-acre parcel of

[1] The District filed its notice of declaration of taking before the codification of the Code in 2006. See 26 Pa.C.S. §§ 101-1106. Therefore, the Code's prior version applies, which is found in the Act of June 22, 1964, Sp. Sess., P.L. 84, as amended, formerly 26 P.S. §§1-101 – 1-903, repealed by the Act of May 4, 2006, P.L. 112.

property located adjacent to the Four Mile Elementary School to expand school facilities. Prior to 2001, the property was farmed by Landowners and was unimproved. As a result, on September 10, 2001, the District filed a Declaration of Taking to condemn Landowners' property.

On October 17, 2001, Landowners filed preliminary objections to the Declaration of Taking. On May 30, 2002, the trial court filed an order and opinion denying a number of Landowners' preliminary objections without a hearing. On June 10, 2002, Landowners filed a motion for reconsideration of the trial court's order denying some the preliminary objections. On June 14, 2002, the trial court issued an order denying Landowners' motion for reconsideration.

Hearings were conducted before the trial court on the remaining preliminary objections on July 22, 2002 and October 1, 2002. Ultimately, on November 8, 2002, the trial court issued an order denying the remainder of Landowners' preliminary objections, and Landowners appealed the trial court's order to this Court.[2]

Meanwhile, on September 23, 2002, the District had filed a petition for a Writ of Possession in which it alleged, inter alia, that Landowners had rejected the District's offer of just compensation, and had refused to deliver possession of the property to the District. On November 20, 2002, the trial court issued an order granting the District's petition for a Writ of Possession, and Landowners appealed the trial court's order to this Court.[3] On December 4, 2002, the District filed a praecipe with the trial court prothonotary to deposit $450,000.00

[2] Landowners' appeal was docketed in this Court at No. 2899 C.D. 2002.

[3] Landowners' appeal was docketed in this Court at No. 3014 C.D. 2002.

as estimated just compensation. Accordingly, on December 5, 2002, the prothonotary issued a Writ of Possession.

On April 21, 2003, the District and Landowners filed a stipulation in the trial court in which Landowners agreed to withdraw two appeals that they had filed in this Court from the trial court order overruling Landowners' remaining preliminary objections, and the trial court's order granting the District's petition for a Writ of Possession. In the stipulation, the parties also agreed that Landowners would receive the funds that the District had deposited with the prothonotary, and that Landowners were entitled to be paid interest on these funds from December 4, 2002.

On March 28, 2006, a Board of View filed a report in which it awarded Landowners damages totaling $573,000.00. On April 27, 2006, Landowners appealed the Board's report to the trial court. By order dated October 16, 2006, the trial court granted the District's motion to strike the appeal, and Landowners appealed the trial court's order to this Court. By memorandum opinion and order dated February 22, 2008, this Court reversed the trial court's order granting the District's motion, and remanded the matter to the trial court for a determination on the merits. See Jayne Horner, Emil P. Horner, Jr., and Mary L. Horner v. Loyalsock Township School District, (Pa. Cmwlth., No. 2153 C.D. 2006, filed February 22, 2008).

On September 8, 2009, the trial court issued an order directing that, based upon a joint stipulation of the parties, the matter would proceed as a non-jury trial. A hearing was conducted before the trial court on March 8 and 9, 2010. On April 5, 2010, the trial court issued an opinion and order awarding Landowners just compensation and damages totaling $600,000.00. The trial court did not include

delay compensation in its order, stating that delay compensation would be calculated and added to the award upon payment.

On July 26, 2010 and September 8, 2010, hearings were conducted before the trial court on the delay compensation to be awarded to Landowners. See N.T. 7/26/10[4] at 2-22; N.T. 9/8/10[5] at 2-33. On September 8, 2010, the trial court issued an order which stated the following:

> [A]fter a hearing on [Landowners]' request for delay compensation pursuant to Section 1-611 of the [Code], the Court finds that delay compensation, which is to begin at the date of relinquishment of possession or the date of condemnation, should be calculated as of April 1, 2001. [Landowners] testified that although they planned to plant corn on the subject property in the spring of 2001, they were told not to plant the field that year as they would not be able to harvest the crop due to the [District]'s plan to condemn the land. The Court finds this testimony credible and that [Landowners] were effectively deprived of their right to their land as of that date. [The District] is therefore directed to pay the $599,500.00 just compensation provided for in the Order of April 5, 2010, plus the $500.00 Section 1-610 damages and the delay compensation provided for herein, within thirty (30) days of this date.

Trial Court Order 9/8/10.

On September 23, 2010, the District filed a motion for reconsideration of the trial court's order awarding delay compensation. On October 5, 2010, the

[4] "N.T. 7/26/10" refers to the transcript of the hearing conducted before the trial court on July 26, 2010.

[5] "N.T. 9/8/10" refers to the transcript of the hearing conducted before the trial court on September 8, 2010.

trial court issued an order granting the District's motion for reconsideration. On November 17, 2010, the trial court issued an order which stated the following:

> [A]fter argument on [the District]'s Motion for Reconsideration of this Court's Order of September 8, 2010, the Court hereby affirms its previous Order. [The District]'s argument that delay compensation cannot be paid prior to the declaration of taking is without merit. Although the Court in Hughes v. [Department of Transportation, 514 Pa. 300, 523 A.2d 747 (1987)], did state that the condemnees therein were entitled to delay compensation *from the date of the declaration of taking*, the circumstances there were such that the conduct which deprived the condemnees of the use of their land did not occur until after the declaration of taking. In Gross v. City of Pittsburgh, 741 A.2d 234 (Pa. [Cmwlth.] 1999), [petition for allowance of appeal denied, 563 Pa. 623, 758 A.2d 664 (2000),] there was never a declaration of taking filed but delay compensation was nevertheless awarded from the date the landowner was deprived of the full and normal use of the property. The Court believes the fact of the filing of the declaration of taking to thus be inconsequential in determining when possession is relinquished, and since in the instant case [Landowners] were deprived of the full and normal use of their land as of April 1, 2001, delay compensation from that date is appropriate.

Trial Court Order 11/17/10 (emphasis in original).

Based on the foregoing, Landowners filed a praecipe to enter final judgment for the delay compensation, and the prothonotary entered judgment in favor of Landowners and against the District in the amount of $130,549.56. The District then filed the instant appeal.[6]

[6] In eminent domain cases, our review is limited to determining whether the trial court committed an abuse of discretion or error of law, and where the trial court made findings of fact, to determine whether the findings are supported by substantial evidence. Appeal of Department of Transportation, 605 A.2d 1286 (Pa. Cmwlth. 1992). Substantial evidence is such relevant

(Continued....)

In this appeal, the District claims that the trial court erred in awarding delay compensation as of April 1, 2001 because delay compensation properly accrues from the time of relinquishment of possession of the condemned property, and Landowners were not deprived of the full and normal use of their property as of that date. We agree.

"As a general principle, when land is taken under the power of eminent domain, the owner thereof acquires the right to its value immediately upon appropriation." Pennsylvania Game Commission v. 21.1 Acres of Land in Washington Township, Butler County, 433 A.2d 915, 916 (Pa. Cmwlth. 1981). When the value of the land taken is definitively ascertained, the valuation dates back to the time of taking, and the owner is entitled to compensation for delay in payment unless he remains in possession of the land after condemnation. Id. Delay damages constitute separate compensation for an owner's loss of use of property during the period after he relinquishes possession and before he receives just compensation. Ridley Township v. Forde, 459 A.2d 449 (Pa. Cmwlth. 1983). The condemnor has the burden to overcome the presumption that the condemnee is entitled to delay damages. Pennsylvania Game Commission.

In this case, the statutory right of delay damages was authorized by the former Section 611 of the Code which provided, in pertinent part:

> *The condemnee shall not be entitled to compensation for delay in payment during the period he remains in possession after the condemnation*, nor during

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evidence that a reasonable mind might consider adequate to support a conclusion, and requires more than a scintilla of evidence or suspicion of the existence of a fact to be established. Department of Transportation v. Agricultural Lands Condemnation Approval Board, 5 A.3d 821 (Pa. Cmwlth. 2010).

> such period shall a condemnor be entitled to rent or other charges for use and occupancy of the condemned property by the condemnee. Compensation for delay in payment shall, however, be paid at the rate of six percent per annum from the date of relinquishment of possession of the condemned property by the condemnee, or if the condemnation is such that possession is not required to effectuate it, then delay compensation shall be paid from the date of condemnation: Provided, however, That no compensation for delay shall be payable with respect to funds paid on account, or by deposit in court, after the date of such payment or deposit. Compensation for delay shall not be included by the [board of] viewers or the court or jury on appeal as part of the award or verdict, but shall at the time of payment of the award or judgment be calculated as above and added thereto. There shall be no further or additional payment of interest on the award or verdict.

Former 26 P.S. §1-611 (emphasis added).

Whether a condemnee remains in possession of condemned property is a question of fact to be resolved by the fact-finder. Pennsylvania Game Commission. Thus, in the case sub judice,

> [t]he threshold issue before us is what constitutes the date of taking for purposes of computing delay damages. This date has been variously held to occur upon the adoption of a condemnation resolution or ordinance by the body authorized to appropriate private property for public use, upon filing the plans as authorized by law, upon filing the bond to secure payment of the compensation, or not until actual entry upon the land. *Lakewood Mem'l Gardens* [*Appeal*], 381 Pa. 46, 112 A.2d 135 (1955); *Rosenblatt v. Pa. Tpk. Comm'n*, 398 Pa. 111, 157 A.2d 182 (1959).

In re De Facto Condemnation and Taking of Lands of WBF Associates, L.P., 588 Pa. 242, 255, 903 A.2d 1192, 1199 (2006).

In Hughes, the Supreme Court interpreted the phrase "remains in possession" as used in former Section 611. In that case, the Department of

Transportation (DOT) notified three property owners in 1978 it intended to take portions of their farms. As a result, each property owner modified the use of the property. In late 1979, DOT filed declarations of taking for all three parcels and made offers of just compensation. The property owners rejected DOT's offers, and a board of viewers subsequently found in favor of the property owners. DOT appealed to the trial court, and a jury also found in favor of the property owners. DOT ultimately paid the jury's award but did not include delay damages in its payments. After a non-jury trial on the issue of delay damages, the trial court ultimately held that the former Section 611 was unconstitutional on the basis that it failed to provide just compensation in cases where a taking diminishes the use of the land.

On appeal, the Supreme Court reversed the trial court, explaining that the former Section 611 did, in fact, provide for just compensation in such circumstances:

> In that twilight of eminent domain, between present possession in the owner and the future right of possession by the Commonwealth, all the possible ordinary concomitants of possession repose in the actual potential of the land. If the land cannot be put to its ordinary use because of the condemnation, such a result, without adequate compensation, would be an unjust taking and a waste of the uses of land. It follows that when the condemnation deprives the landowner of the normal uses of the land, pending physical possession by the Commonwealth, compensation must also be intended.
>
> Therefore, we hold that where a declaration of taking deprives a landowner of the full and normal use of his property, *as established by the use to which his property was devoted prior to the declaration*, then that landowner shall no longer be considered "in possession" within the meaning of section 611, and the condemnee

> may claim delay damages from the date of the declaration of taking. Thus, we conclude that section 611, when so construed, does pass constitutional muster in determining when delay damages go into effect.

Hughes, 514 Pa. at 309, 523 A.2d at 751-752 (emphasis in original).

Noting that DOT's refusal to inform the property owners of the actual date of condemnation had forced the property owners to cease all crop growing operations, the Supreme Court determined DOT had infringed on the property owner's full and normal use of the condemned lands. The Court found that delay damages were therefore appropriate under the former Section 611 of the Code. See Id. at 309-310, 523 A.2d at 752 ("[T]his refusal forced the condemnees to cease all farming operations on the condemned portions of their farms for fear that they would lose the invested planting once [DOT] assumed possession. To this date, [DOT] has not taken possession of any of the condemned properties. Thus the record establishes that [DOT]'s declaration of taking, in conjunction with its subsequent actions, infringed on the landowners' full and normal use of their property, and that delay damages were properly awarded.").[7]

[7] See also BOC Group, Inc. v. Department of Transportation, 549 Pa. 439, 446-447, 701 A.2d 535, 539 (1997) ("[Delay damages] only begin to accrue when the condemnee relinquishes possession of the condemned property. In [*Hughes*], this Court construed the meaning of 'possession' in this context. The Court explained that when property is condemned, the Commonwealth has equitable possession with the option to take physical possession. Until it exercises its option, the landowner remains in physical possession. The Court held in *Hughes* that where a declaration of taking deprives a landowner of the full and normal use of his property, as established by the use to which his property was devoted before the declaration, the landowner is no longer in possession under section 611. In such a case, the condemnee may claim delay damages from the date of the declaration of taking. *See also Pittsburgh North, Inc. v. Dep't of Transportation*, 514 Pa. 316, 523 A.2d 755 (1987) (where [DOT]'s condemnation did not interfere with the condemnee's normal use of the property, condemnee was not entitled to delay damages.").

In awarding delay damages in the case sub judice, the trial court relied upon the credible testimony presented by Landowners. See Trial Court Order 9/8/10.[8] However, our review of this testimony[9] demonstrates that the date that Landowners were no longer in possession was not April 1, 2001, as found by the trial court. Rather the substantial evidence of this case shows that Landowners were no longer in possession of the property as of September 5, 2001, the date on which the District adopted the resolution authorizing its solicitor to proceed with the condemnation of Landowners' property.[10] See, e.g., Lakewood Mem'l Gardens

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[8] The trial court, as the fact-finder, must resolve evidentiary conflicts and its findings in this regard will not be disturbed if supported by substantial evidence. In re Condemnation by Department of Transportation, 827 A.2d 544 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 577 Pa. 737, 848 A.2d 930 (2004).

[9] This testimony must be viewed in a light most favorable to Landowners. Billings v. Upper Merion Township Authority, 405 A.2d 967 (Pa. Cmwlth. 1979).

[10] More specifically, Mr. Horner testified, in pertinent part, as follows:

> Q Did there – during one of these – well, first of all, in that area of time, in the spring of 2001, what was your intention with regard to this property?
>
> A I was going to put it in corn.
>
> Q For the prior years, 2000 and back to the mid-1980s, had you always planted that field?
>
> A Yes.
>
> * * *
>
> Q Did you plant the field as you intended in the spring of 2001?
>
> A No.
>
> Q And why not?
>
> A Because the school told me—
>
> THE COURT: Overruled.
>
> THE WITNESS: They were going to be condemning it

(Continued....)

and not to bother putting anything in because I wouldn't be able to get it….

Q Not be able to get it harvested?

A Right.

Q In September 5th of 2001 did the [District] pass a resolution taking your property?

A Yes, sir.

Q And did you receive official notice of that?

A Yes, sir.

* * *

Q After you received that resolution and you went to the property that was posted did you communicate with the [District's] solicitor with regard to the trees that are located on that property?

A Yes, I did.

Q Why what was your reason for communicating with them?

A Because I wanted to go and cut the trees.

Q And the communication you had with the solicitor what were you advised?

A He said it wasn't my property—

* * *

Q What was the—

A It wasn't—

Q — response?

A It wasn't our property no [sic] more. No, it wasn't our property no [sic] more.

Q Did you at any time thereafter go on this property?

A I never used it and farmed it, never took trees, never did anything on it, no.

Q Why not?

A Because we felt for sure once we'd gotten that resolution with the condemnation we took it as a true document and it was their property from then on.

(Continued....)

Q Did you receive notice for taxes on that property for the tax year 2002?

A Yes, sir.

Q Did you pay them?

A Gave 'em [sic] to the attorney that was handling our case then and he took and gave 'em [sic] to the school, and whatever they did they took care of.

Q The school district took care of the taxes for 2002?

A Right.

* * *

Q What was your intent to do with the property in the spring of 2001?

A I would have planted it again.

* * *

Q Mr. Horner, when is the last time prior to 2001 that you actually planted crops on the subject property?

A 2000.

Q What month would that have been?

A April probably.

Q I'm sorry, April?

A Probably April.

N.T. 7/26/10 at 8, 10-11, 12, 13-14, 15.

Jerome Bower also testified for Landowners regarding the date that they were no longer in possession of the property stating, in pertinent part:

Q In the spring of 2001 what, if anything, did you and Mr. Horner intend to do?

A We intended to plow it and lyme it and put corn in it.

Q And why wasn't that done?

A Because of the posters on the property that the school was apparently taking possession of it.

* * *

(Continued....)

Appeal, 381 Pa. at 52-53, 112 A.2d at 138-139 ("Reasoning from decisions in eminent domain cases arising under other statutes, we think it is both logical and just to conclude that the Commission's formal adoption of the condemnation resolution which set forth the location of the proposed turnpike extension by description and plans, approved by the Governor and the Department of Highways, constituted an appropriation of the indicated properties…. Again, in Jury v. Wiest, 326 Pa. 554, 193 A. 5 [(1937)], the date of a school board's resolution condemning

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> Q And in 2000 did you help Mr. Horner plant the rye? Were you over there or were you just relying on what he told you?
>
> A No, all I did was I loaned him the broadcaster.
>
> Q Okay, so you weren't over there, you really don't know firsthand what he did?
>
> A No, and I didn't go back to the field until later in the fall when we were going to go in and cut firewood.
>
> * * *
>
> Q You mentioned firewood, what – what did you do with regard to firewood with Mr. Horner?
>
> A We'd go in and help cut some of the stuff I used my chainsaw. He would take some firewood to his place, I would take some to my place.
>
> Q How often was that done?
>
> A Whenever he would get off. Occasionally we would – maybe a couple of times, we're not sure exactly just how many times.
>
> Q Did you intend to do it, or did you go over to do it in September, or around September of 2001?
>
> A I know he wanted me to go over and help him cut some, and then we got over there and found posters that we weren't allowed on the property so we didn't do any.

N.T. 9/8/10 at 20, 24, 25.

certain property was the date of the appropriation. It was there recognized that it was not necessary for the school directors to take physical possession of the land in order to effectuate the condemnation.").

Because Landowners were no longer in possession of the property as of September 5, 2001, they were entitled to delay damages under the provisions of the former Section 611 of the Code as of that date. See, e.g., In re De Facto Condemnation and Taking of Lands of WBF Associates, L.P., 588 Pa. at 257-258, 903 A.2d at 1201 ("[I]n *Hughes*, we specifically stated that, once a property owner has been deprived of the 'full and normal use' of the property, the property owner is entitled to delay damages from the date of taking….").[11] As a result, this matter must be remanded to the trial court for the award of delay damages under the former Section 611 of the Code as of September 5, 2001. Hughes.

Accordingly, the order of the trial court is vacated, and this case is remanded to the trial court to award delay damages as of September 5, 2001.

JAMES R. KELLEY, Senior Judge

[11] See also BOC Group, Inc., 549 Pa. at 447, 701 A.2d at 539 ("[T]he Court held in *Hughes* that where a declaration of taking deprives a landowner of the full and normal use of his property, as established by the use to which his property was devoted before the declaration, the landowner is no longer in possession under section 611. In such a case the condemnee may claim delay damages from the date of the declaration of taking….").

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 2647 C.D. 2010
Loyalsock Township School District, Appellant	:	

O R D E R

AND NOW, this 15th day of September, 2011, the order of the Court of Common Pleas of Lycoming County, dated November 17, 2010 at No. 06-00893 is VACATED, and the above-captioned case is REMANDED to the Court of Common Pleas of Lycoming County for proceedings consistent with the foregoing opinion.

Jurisdiction is RELINQUISHED.

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JAMES R. KELLEY, Senior Judge