In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00196-CV

CANADIAN RIVER MUNICIPAL WATER AUTHORITY, APPELLANT

V.

HAYHOOK, LTD, APPELLEE

On Appeal from the 31st District Court
Roberts County, Texas
Trial Court No. 2094, Honorable Steven R. Emmert, Presiding

March 30, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

"The Defendant's construction of a 54" pipeline, 2.66625 miles in length, across the Plaintiff's 30,720 acre [Hayhook] Ranch . . . for the sole purpose of transporting ground water, produced from land other than the Plaintiff's Ranch, across the Plaintiff's Ranch, was an intentional physical *taking* of part of the Plaintiff's property by the Defendant for a public use, without payment of adequate compensation, and a violation of" art. 1, § 17 of the Texas Constitution. That declaration found in the trial court's final judgment underlies this appeal. The Canadian River Municipal Water Authority (Canadian) was the

“defendant” alluded to, while Hayhook, Ltd. was the “plaintiff.” As a consequence of the declaration, the trial court awarded Hayhook damages of $506,496.00 plus interest. Canadian appealed, contending that it acted under “color of right” and, therefore, lacked the requisite intent to engage in a taking. So, allegedly, 1) insufficient evidence supported an essential element of Hayhook’s claim; 2) governmental immunity insulated it from the takings claim; and, 3) limitations expired on any other cause of action Hayhook had which may have allowed it to collect damages. We affirm.

Background

Uncontested findings of fact issued by the trial court reveal that 1) prior owners of the Hayhook Ranch (the Campbells) conveyed all the water rights under the Ranch to Southwestern Public Service in 1976; 2) Canadian became the successor to those rights in 1996; 3) Hayhook, Ltd. came to own the surface estate of the Ranch in 2004; 4) per the conveyance, Canadian acquired all of the underground water and rights to it beneath the Ranch, including easements for underground pipelines reasonably necessary and desirable to permit full and complete use of the water rights; 5) in 1999, Canadian began developing a water well field under the Ranch, which resulted in litigation with the then surface estate owners; 6) the litigation was ended via execution, in March of 2000, of an “Agreement Concerning Installation and Operation of a Water Well Field” (the 2000 Agreement); 7) due to a drought, Canadian decided to construct the aforementioned 54" pipeline in 2008 to carry water produced from locations other than the Ranch to a pumping station on the Ranch; 8) Canadian also tendered an agreement to Hayhook, Ltd. allowing the former to install the pipeline in return for payment of $85,320; 9) Hayhook declined to execute the 2008 agreement; 10) Canadian nevertheless commenced installation by

clearing a 120’ right-of-way across the eastern portion of the Ranch, excavating a ditch 10 to 12 feet deep and wide, and over 2.6 miles long; 11) the project, completed in March of 2010, “disturbed” approximately 38.78 acres of Hayhook, Ltd. land; and 12) since completion, Canadian only used the pipeline to transport water pumped from locales other than from beneath the Ranch to the pump station on the Ranch. No wells or pipelines drawing water from under the Ranch were connected to its 54" pipeline. The trial court also found that transporting “off-site” water across the Ranch “was not reasonably necessary and desirable to permit the full and complete utilization of the water rights in and under the Ranch”; “nor was it reasonably necessary to produce and remove groundwater from the Ranch.” Again, no one contested these findings on appeal.

Hayhook, Ltd. sued, alleging various causes of action. One of them sounded in inverse condemnation, and that was the one upon which the trial court granted recovery. Construction of the 54" pipeline was an intentional act causing the partial taking of the aforementioned 38.78 acres for public use and for which Hayhook, Ltd. was not compensated, according to the court.

Sufficiency of the Evidence

Canadian questioned the sufficiency of the evidence underlying the trial court’s decision “[b]ecause [Canadian] was operating under color of right pursuant to” two agreements. The agreements were those representing the initial conveyance of water rights in 1976 and the 2000 Agreement. Operating under the color of right created by them meant it “lacked the requisite intent to engage in a taking.” We overrule the issue.

The elements of an inverse condemnation consist of an intentional government act resulting in the uncompensated taking of private property. *City of Houston v. Carlson*,

451 S.W.3d 828, 831 (Tex. 2014); *Sw. Bell Tel., L.P. v. Harris Cty. Toll Rd. Auth.*, 282 S.W.3d 59, 61 (Tex. 2009). A taking is the acquisition, damage, or destruction of property through physical or regulatory means. *City of Houston*, 451 S.W.3d at 831. As for the *mens rea* element, the damage, destruction, or acquisition must be more than accidental. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313–14 (Tex. 2004). Rather, the governmental entity acts with the requisite intent when it 1) knows that a specific act will cause an identifiable result or harm or 2) knows the result or harm is substantially certain to arise from the governmental action. *See id.* at 314 (involving damage caused to property by a governmental act and stating that when a governmental entity physically damages private property to confer a public benefit, it may be liable for a taking "if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action–that is, that the damage is 'necessarily an incident to, or necessarily a consequential result of' the government's action").

Yet, the requisite intent is missing when the governmental body withholds property or money in a contract dispute. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598–99 (Tex. 2001). There, it acts "within a color of right under the contract and not under its eminent domain powers." *Id.* This is so because the State can wear two hats, one as a party to a contract and the other as a sovereign. *Id.* In the former scenario, its conduct likens to a private citizen exercising powers under a contract as opposed to a sovereign exercising sovereign powers. *Id.* So, if purportedly acting under a contract, the entity lacks the intent to act pursuant to its powers of eminent domain. *Id.*; *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007) (stating that"[w]hen the government

acts pursuant to colorable contract rights, it lacks the necessary intent to take under its eminent-domain powers and thus retains its immunity from suit"). Yet, the parameters of acting under a contractual "color of right" are rather amorphous, as noted by various courts of appeal. *City of Dallas v. CKS Asset Mgmt.,* 345 S.W.3d 199, 202 (Tex. App.—Dallas 2011, pet. denied); *MBP Corp. v. Bd. of Trs. of the Galveston Wharves*, 297 S.W.3d 483, 489–90 (Tex. App.—Houston [14th Dist.] 2009, no pet.). For instance, the mere existence of a contract "'does not build an impenetrable wall nullifying the possibility of other waivers of and exceptions to that immunity.'" *City of Dallas*, 345 S.W.3d at 202 (quoting *Tex. Parks & Wildlife Dep't v. Callaway*, 971 S.W.2d 145, 150 (Tex. App.—Austin 1998, no pet.). As said in *Callaway,* "[t]he existence of a contract is not talismanic." *Callaway*, 971 S.W.2d at 150. Moreover, the governmental entity's subjective belief about the existence of a contract vesting it with an interest or right is not necessarily determinative, either. *MBP Corp.*, 297 S.W.3d at 489–90; *accord Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451, 458 (Tex. App.—Austin 2008, pet. denied) (stating that "[w]e are not persuaded that the State's subjective belief regarding its title to property, by itself, changes or dictates the capacity in which the State acts"). Indeed, the State cannot evade its constitutional obligation to reasonably compensate those whose property it takes "merely by asserting that it 'believes' it is acting" under color of right or title irrespective of whether the belief is accurate. *Koch,* 273 S.W.3d at 459. If this were not so, then it would be able to unilaterally determine the outcome of all takings disputes by merely professing "a subjective belief–whether right or wrong–that it thought it" could do what it did due to some ownership or contractual interest. *Id.* This may be why several courts require a good-faith inquiry into the government's belief that its actions were justified by the

contract. *See MBP Corp.*, 297 S.W.3d at 490 (discussing imposition of a good-faith element); *see also TRST Corpus, Inc. v. Fin. Ctr., Inc.*, 9 S.W.3d 316, 323 n.4 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (imposing element of good faith); *N.C. Sturgeon, L.P. v. Sul Ross State Univ.*, No. 03-01-00716-CV, 2003 Tex. App. LEXIS 331, at *5–6 (Tex. App.—Austin Jan. 16, 2003, pet. denied) (mem. op.) (noting a good-faith requirement); *Green Int'l v. State,* 877 S.W.2d 428, 434 (Tex. App.—Austin 1994, writ dism'd by agr.)(imposing an element of good faith).

Our Supreme Court did little to clear the blurred boundaries in *Holland* when observing that the "absence of an express contract between Holland and the State, or uncertainties about the existence of an implied contract between them, are immaterial to determining the capacity in which the State is acting." *Holland*, 221 S.W.3d at 643. Despite the observation, its ruling nonetheless turned on the existence of a contractual arrangement through which it obtained the property in question. The contract just happened to be with companies managed by the complainant, Holland. *Id.* at 641. As the court said: "the State presented uncontroverted evidence that Holland voluntarily provided, and the State accepted, his filtration process along with his design assistance pursuant to contractual agreements with SRP and PPP [Holland's companies]. Whether or not a contract may be implied between the State and Holland individually, the State accepted Holland's product and his services under color of its contracts with SRP and PPP, and not pursuant to its powers of eminent domain." *Id.* at 644. So, even in *Holland*, the presence of a contract and the State obtaining the property in question through it was elemental to retaining its immunity.

To reiterate, the factual circumstance triggering the suit at bar was Canadian's use of the Ranch to transport water produced from fields other than those underlying that of the Ranch. And, though both the original conveyance and 2000 Agreement dealt with the construction of water pipelines, neither permitted Canadian to burden the Ranch for that purpose.

Written instruments must be interpreted in light of the parties' intent as expressed in the entire document. *Hysaw v. Dawkins*, 483 S.W.3d 1, 13 (Tex. 2016). That is, a holistic approach is utilized whereby intent is discerned from all words and phrases in the writing, and those words and phrases must be construed together, in context, not in isolation. *Id.* Applying that holistic approach to the original conveyance here, we encounter in paragraph 4 allusion to the then grantee (Southwestern Public Service) building an infrastructure on the Ranch. Yet, the right to build such infrastructure was preceded by the phrase "in the development and utilization of the water rights" and followed by the phrase "reasonably necessary and desirable to permit the full and complete utilization of the water rights." The "water rights" alluded to were those acquired from the grantors (i.e., the Campbells) under the conveyance. So, in reading the language of paragraph 4 in context, we see that the grantee intended to obtain while the grantor intended to afford permission to install pipes, well sites, electrical lines and the like for purposes of producing the water underlying the Ranch, not water found elsewhere.

The same is true of the 2000 Agreement. Among other things, it allowed Canadian to install "Transmission Pipelines . . . shown on the Plans."[1] Canadian was also given

[1] "The Plans" were those attached to the agreement as Exhibit 3, depicting Phase I of the water well field. They did "not include future development of the water well field, including without limitation the placement and number of wells, pipelines, roads, power lines, etc."

authority to "construct, install and operate additional transmission pipelines after the completion of Phase 1." That authority was not without limitation, though. The limitation appeared in paragraph 20 of the document. It read:

> Off-Site Rights. The issues involved in the Damage Suit include whether [Canadian] has under the Water Rights Conveyance, the right to: (i) transport water, which has been produced on property other than Water Rights Lands, across the Water Rights Lands: and (ii) connect roads, pipelines and power lines on the Water Rights Lands with roads, pipelines and power lines located on property other than the Water Rights Lands. [The Campbells and Canadian] hereby agree that they ***have not resolved these issues***, but that the only rights relating to these issues that [Canadian] is acquiring under this Agreement, are as follows: (i) the right to transport water, which has been produced on property other than Water Rights Lands, across the Water Rights Lands through the Main Pipeline, Transmission Pipelines, and Feeder Pipelines, which are ***depicted on the Plans***; (ii) the right to connect those roads, pipelines and power lines, ***depicted on the Plans***, to roads, pipelines and power lines located on property other than the Water Rights Lands.[2]

(Emphasis added). Again, "The Plans" did not include the transmission or pipeline at issue here. Moreover, Canadian, through its representative, admitted that at trial. Indeed, that Canadian knew it lacked such a right is further exemplified by its effort to secure an amendment to the 2000 agreement. Via the proposed amendment, it sought to receive the ability "to transport water, which has been produced on property other than the Water Rights Lands [i.e., the Ranch], across the Water Rights Lands though the Phase 3 Main Pipeline." Had Canadian the right it claimed it had, it would have had no need for such an amendment.

Upon hearing the evidence proffered by the litigants, the trial court found that building the 54" pipeline on the Ranch was "an intentional act[] and . . . proximate cause of [Canadian's] physical taking and appropriation of" a portion of the Ranch for public use.

[2] The Campbells owned the ranch before Hayhook, Ltd. acquired it.

The evidence supports that determination.[3] From the above, we conclude that there was no contract of the ilk suggested by Canadian. Neither Hayhook. Ltd., its predecessors in title, nor anyone else signed an agreement conveying to Canadian an easement or other authority permitting the governmental entity to build a pipeline across the Ranch dedicated only to transporting water produced off-site. So, there was no contract of which it could act under the color for purposes of that theory. Nor was there such a contract through which one voluntarily gave, and it could accept the right to build the pipeline, for purposes of *Holland.*

In concluding as we do, we do not ignore the authority suggesting that a governmental entity may still have acted under color of contractual right even if it misinterpreted the contract. But, there is a distinction between mistakenly interpreting the scope of an expressed contractual right and invoking a non-existent contractual right. Arguably, the former comes within the realm of good faith, as that concept was mentioned in *MBP Corp.*, *TRST Corpus*, *N.C. Sturgeon*, and *Green Int'l.* In such circumstances, some contract provided the governmental entity basis to believe, though mistakenly, it had the authority it thought it had. However, when the contract itself disclaims the right's existence or nowhere provides for it, then one can hardly be acting under color of it. Indeed, it would be utterly specious to suggest that a governmental entity acted under color of right when it took two vehicles from a car dealership under the auspices of a

[3] Assuming *arguendo* that Canadian correctly suggests that the trial court's finding about "an intentional act" failed to encompass the intent required to support a takings claim, we note that the requisite finding would be implied. As said in *Seger v. Yorkshire Ins. Co.*, 503 S.W.3d 388 (Tex. 2016), "[w]hen a court makes fact findings but inadvertently omits an essential element of a ground of recovery or defense, the presumption of validity will supply by implication any omitted unrequested element that is supported by evidence." *Id.* at 401.

contract allowing it only one; there would be a contract that it could bandy about but not one permitting anyone, public or private, from doing it. That is the situation here.

The situation before us likens more to that in *Sw. Bell Tel., L.P. v. Harris County*, 267 S.W.3d 490 (Tex. App.—Houston [14th Dist.] 2008, no pet.). There, the county bought a parcel of land. The latter was burdened by an easement which the utility acquired earlier. Per the agreement granting the easement, the landowner reserved the right to "use the surface, lay drainage structures across and through the easement, and replace and remove electric lines across and through the easement, so long as such improvements did not unreasonably interfere with [the utility's] use of the easement." *Id.* at 493. Eventually, the county, as landowner, decided to install an underground culvert across the easement and required the utility to move communication lines, a manhole vault, conduits, and cables previously installed. The utility deemed this a taking of its easement for public purposes and sued. In response, the county argued that it was not so taking property since it had a contractual right to do what it proposed. That right allegedly arose from the language in the easement reserving unto the landowner the authority to engage in certain improvements if they "did not unreasonably interfere with [the utility's] use of the easement." *Id.* at 496. The reviewing court disagreed. It observed that the utility "did not contract with Harris County to voluntarily give up a portion of its easement or move its equipment, nor did [the utility] contract to render services to Harris County." *Id.* It further said that "a private landowner would not be able to force [the utility] to relocate its equipment, give up a portion of its easement to public right-of-way, and incur up to $200,000 in damages based on the 'unreasonably impair' language in the easement." *Id.* "Only a government entity with condemning powers could force a private

utility company to relocate equipment and relinquish part of its easement to public right-of-way," according to the court. *Id.* at 496–97. Furthermore, "under Texas case law, these actions constitute a taking." *Id.* at 497.

If nothing else, *Southwestern Bell* stands for the proposition that a governmental entity merely having some type of contract and averring that it acted under it does not morph its conduct to something other than a governmental taking. One must see what the contract authorizes and compare it to what was done. To the extent that the former fails to authorize a private party to engage in the conduct at issue, then a governmental entity cannot raise the same contract as a shield against a takings claim; it cannot use the contract as basis for asserting it acted under color of right. This is especially so when the contracts being bandied about say nothing of the right and even disclaim it. That is our situation. Though there are agreements which Canadian may bandy about, none permit a private entity to build a 54" water pipeline across the Ranch solely for purposes of transporting water obtained from neighboring fields. Moreover, evidence of record illustrates that Canadian knew what it intended to do fell outside the agreements. Only a governmental entity with condemning powers could force a private entity to succumb to that, under the circumstances here.

Consequently, we overrule the first issue, and our doing so dispenses with the need to address the remaining contentions of Canadian. They too were dependent upon the proposition that it acted under color of right. We also affirm the judgment of the trial court.

Brian Quinn
Chief Justice