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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001801-MR

JOHN BIANCHI, D.M.D.; SANDY
BIANCHI; BIANCHI REAL ESTATE
LIMITED PARTNERSHIP; AND
LEWIS BIANCHI, AS GENERAL
PARTNER, BIANCHI REAL ESTATE
LIMITED PARTNERSHIP

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RUSSELL D. ALRED, JUDGE
ACTION NO. 01-CI-00061 AND NO. 01-CI-00144

CITY OF HARLAN, A FOURTH
CLASS CITY; AND CITY OF HARLAN
TOURIST AND CONVENTION
COMMISSION, AN AGENCY OF
THE CITY OF HARLAN

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

LAMBERT, JUDGE: This action represents a second appeal in an eminent domain proceeding brought by the City of Harlan and the City of Harlan Tourist and Convention Center (collectively “the City”) related to property the City sought to obtain for a civic center. John Bianchi, D.M.D.; his wife, Sandy Bianchi; Bianchi Real Estate Limited Partnership; and Lewis Bianchi, in his capacity as General Partner of Bianchi Real Estate Limited Partnership (collectively “the Bianchis”) appeal from the September 1, 2009, final order of the Harlan Circuit Court denying their motion to dismiss the action for lack of jurisdiction. In so ruling, the circuit court held that the basis for the Bianchis’ argument had been previously addressed in earlier appeals to this Court and the Supreme Court of Kentucky. We affirm.

For the factual and procedural background of this case, we shall rely, in part, upon the Supreme Court’s recitation of the applicable facts as set forth in its opinion deciding the first appeal:

In February and March 2001, the City of Harlan, Kentucky, on behalf of its Tourist and Convention Commission (the City), brought two petitions in the Harlan Circuit Court to condemn four parcels of downtown Harlan realty for use in conjunction with a proposed convention center and water park. The parcels form a rectangle of approximately 0.38 acres at the southwest corner of South Main Street and West Clover and were sought by the City as parking space for the convention center to be erected opposite them on the east side of South Main Street. Three of the parcels, the subjects of the March petition, were owned by the Bianchi Real Estate Limited Partnership, a family investment business organized by Lewis Bianchi, the Partnership’s general partner, and his children. These

paved parcels provided parking for nearby properties owned by the Partnership. The fourth parcel, the subject of the February petition, was owned by one of the Bianchi children, Dr. John Bianchi, and his wife, Sandy Bianchi. This parcel contained a small, single-story building which was leased to a pet shop. The different ownerships gave rise to the separate petitions, but the record indicates that John and Sandy Bianchi held their tract for the convenience of the Partnership and that all four parcels were managed by the Partnership and for its benefit.

In addition to the four condemned tracts, the Partnership owned at the time more than 130 parcels of realty in Harlan and other eastern Kentucky communities. The Partnership derives the bulk of its income, apparently, from leasing its holdings. In Harlan, the Partnership owns both residential and retail space in a building immediately to the west of the condemned property along the south side of West Clover. That building includes Black Motor Apartments operated by the Partnership and Zion's Rentals, a lessee of the Partnership. Just to the west of that building the Partnership owns property which it leases to a Bianchi family-operated funeral home business, Harlan Funeral Home. Immediately north of West Clover Street along the west side of South Main Street, the Partnership owns three additional lots and buildings, which are leased to retail and residential establishments. At the time of these proceedings, the lessees included New Townsite Restaurant, Styles and Stuff Beauty Salon and Shirt Shack. The Partnership used the condemned tracts as parking for its tenants in these various neighboring properties and for the tenants' customers.

Although initially the four condemned tracts were evaluated separately, the defendants successfully moved to consolidate the two condemnation petitions and to have the four tracts reevaluated as a unit. We shall refer to the defendant landowners collectively, therefore, as the Bianchis. The commissioners found that the combined parcel was worth \$101,500.00, and on April 22, 2003, the trial court entered an interlocutory judgment upholding

the condemnation and awarding the Bianchis that amount. Both parties filed exceptions to the commissioners' valuation. In addition, although initially the Bianchis had not challenged the City's right to condemn the four parcels, on April 11, 2003, they moved to file a belated answer contesting the condemnation as unnecessary to the City's revised plans for its convention center. Then, on May 23, 2003, they moved to file a counterclaim seeking compensation for what they alleged was the "reverse condemnation" of their properties west and north of the condemned area. Although styled "reverse condemnation," the Bianchis' counterclaim did not allege a taking of their remaining property. The Bianchis alleged rather that their compensation should have included the loss of value their other parcels would sustain as a result of the condemnation.

The trial court disallowed the late answer and limited the "lost value" claim to the properties immediately to the west of the condemned tracts, i.e. the building housing Black Motor Apartments and Zion Rentals and the funeral home building with parking lot. The trial court also ordered bifurcated jury trials of the petition and the counterclaim. In accord with the jury's findings in those proceedings, the trial court entered a final judgment of condemnation on March 29, 2005 awarding the Bianchis \$120,000.00 for the taking of the four parcels and \$43,640.00 for the loss in value of the Bianchis' allegedly affected properties to the west of the condemned property.

Both parties appealed. By Opinion rendered November 3, 2006, the Court of Appeals affirmed the \$120,000.00 award for the taking, but because in its view the Bianchis' neighboring property could not be deemed "united" for condemnation purposes with the condemned tracts, it reversed the award for lost value and remanded for dismissal of the Bianchis' counterclaim. We accepted discretionary review to consider the Bianchis' contentions that they should have been allowed to file a late answer challenging the condemnation and that they should have been compensated for the adverse effect of the condemnation on all of their neighboring properties

under the unity rule. We agree with the Court of Appeals that the late answer was properly disallowed, and though our reasoning differs somewhat from that of the Court of Appeals, we also agree that the unity rule does not apply so as to require valuing the condemned parcels in conjunction with the Bianchis' other holdings in downtown Harlan.

Bianchi v. City of Harlan, 274 S.W.3d 368, 369-71 (Ky. 2008).

In addition, our review of the limited record¹ and of the Bianchis' brief filed in this appeal reveals that the Bianchis moved to dismiss the matter below based upon their discovery that the City Council had never authorized the taking of their property. The circuit court denied the motion in an order entered March 29, 2005,² the same day the original judgment was entered following the trial in this matter, stating as follows:

This matter having come before the Court on January 7, 2005 on the Defendants' Motion to dismiss the Plaintiffs' condemnation action; and the Court having considered the memoranda of the Plaintiffs but not having, at that time, read the memorandum of the Defendants, but being fully advised thereon at the hearing and after a review of the record and the Court having fully considered the oral arguments of their attorneys; and the Court having considered same and being sufficiently advised;

THE COURT HEREBY FINDS, CONCLUDES
AND ORDERS AS FOLLOWS:

¹ The record certified for this appeal begins with a copy of the Supreme Court's opinion rendered May 22, 2008; the record certified for the previous appeal was not included in the record transmitted to the Clerk of this Court for the present appeal. However, some documents from the record certified for the first appeal are contained in the present record by virtue of being attached as exhibits to later filings or to the briefs filed in this appeal.

² Then-presiding Judge Ron Johnson signed the order on February 8, 2005, but it appears that the Clerk did not enter the order into the record until March 29, 2005. We have included Judge Johnson's handwritten amendments to the order.

1. These condemnation actions were filed by the City of Harlan and the City of Harlan Tourist and Convention Commission in February and March of 2001. On June 1, 2001, the two cases involving the Bianchi family were consolidated on the motions made by the Defendants.

2. Over two (2) years later, the Defendants filed a Motion for permission to file a late answer to contest the Petitioner's right to condemn. That Motion dealt with the City's planning process, and no allegations were raised concerning matters pertaining to the minutes of the City Council. The Court entered an Interlocutory Judgment on April 22, 2003, concluding that the Plaintiffs had a right to condemn the property described in the Petition. On the same date, the Court denied the Defendants' Motion to file a late answer.

3. The minutes of the City Council cited by the Defendants are from City Council meetings on November 8, 1999 and September 11, 2000. The Defendants concede that these minutes are public record and would have been available to them to utilize in a timely answer raising the issue of the right of the Plaintiffs to condemn the property in question. Pursuant to KRS 416.600, an answer raising the issue of the right of the sovereign to condemn the property must be filed within 20 days after the date of service of the summons and the complaint. Such an answer raising the right to condemn was not timely filed by the Defendants. Issues concerning the right to preserve a claim that the plaintiffs did not have the right to take must be timely filed. The information concerning the Plaintiffs' meetings and their minutes were readily available, and the Defendants had an opportunity to contest the Plaintiffs' authority to condemn but failed to timely do so.

4. In its Interlocutory Order and Judgment of April 22, 2003, the Court authorized the Plaintiffs to take possession of the property with payment awarded by the Commissioner of \$101,500.00 to the Clerk of the Court. An Order of Disbursement was entered May 16, 2003

directing the Clerk to pay Defendants \$101,500.00 which the City had previously paid to the Clerk for the Defendants' property.

5. The Defendants did not appeal the Interlocutory Order and Judgment entered April 22, 2003 contesting the Plaintiffs' right to condemn the property. According to *Hagg v. Kentucky Utilities Company*, 660 S.W.2d 680 (Ky.App. 1983), the trial court is powerless to enlarge the time provided to contest Plaintiffs' right to condemn the property. The Interlocutory Order entered April 22, 2003 was appealable, and the Defendants' failure to appeal the Interlocutory Order and Judgment within 30 days is fatal to their current Motion.

6. The Court has no legal duty to set aside the proceedings taken thus far which have been considerable. The equities and the law do not allow the Court to revisit matters which should have been raised previously.

7. Based on the foregoing Findings of Fact and Conclusions of Law, the Defendants' Motion to Dismiss these condemnation actions is denied.

8. The Court finds the Plaintiffs' alleged failure in regard to its minutes, if any there was, to not be jurisdictional in nature.

9. There being no just cause of delay, this is a final and appealable order. However, the Defendants' request for a stay on the proceedings to allow them to appeal this decision prior to the Jury Trial set for February 15, 2005 is denied.

As stated in the Supreme Court's opinion, a different panel of this Court in an earlier opinion upheld the circuit court's decision to deny the Bianchis' motion to file a late answer, agreeing with the City that the circuit court did not abuse its discretion in its ruling. In that opinion, the earlier panel noted that the motion came more than two years after the petitions had been filed and was based upon

information from an unnamed source that the size of the civic center project had been scaled back. The Court then discussed the issue concerning the City's right to condemn. Specifically, the Court stated:

According to the Bianchis, the trial court erred as a matter of law when it failed to dismiss the original condemnation actions. The Bianchis aver that the Harlan city council voted to condemn property for use on the civic center project but the council never specifically mentioned the Bianchis' properties. Based on this allegation, the Bianchis reason that the city had no right to condemn their properties.

Since the Bianchis did not file a timely answer challenging the city's right to condemn their property and since they did not file an appeal from the interlocutory judgment granting the city the right to enter the property, we find that the Bianchis did not properly preserve this allegation of error for appellate review. Thus, we decline to address the merits of this argument.

Bianchi v. City of Harlan, 2006 WL 3108247 *5 (Ky. App. 2006) (2005-CA-001019-MR, 2005-CA-001020-MR). While it did not specifically address this ruling on discretionary review, the Supreme Court affirmed the decision of the Court of Appeals and stated that "where parking space remained a reasonable necessity for the convention center project, the scaling back of the City's plans did not entitle the Bianchis to challenge the condemnation two years after the petitions were filed." *Bianchi*, 274 S.W.3d at 374.

Upon remand, the City moved the circuit court to enter an order consistent with the Supreme Court's opinion and to order the Bianchis to execute and deliver the deed to the condemned property awarded to the City. The matter came before

the court on April 9, 2009, when the parties briefly discussed issues with the deed as well as a recently filed motion to dismiss by the Bianchis on jurisdictional grounds. On April 22, 2009, the circuit court entered an order passing the Bianchis' motion to dismiss to a motion hour the following month.³ At the May 28, 2009, motion hour, the parties extensively argued the jurisdictional issue, and the court specifically noted that the Court of Appeals declined to review the merits of the City's right to condemn as the issue was unpreserved. Accordingly, the court declared that the issue had already been ruled on by the appellate courts and could not be revisited.

The City responded to the Bianchis' motion, arguing that the appellate courts had already ruled that the Bianchis' failure to timely appeal from the interlocutory judgment barred them from making this claim. In reply, the Bianchis countered that the appellate courts did not address jurisdiction because that issue was not argued. Rather, they were presently raising a new argument that the circuit court lacked subject matter and particular case jurisdiction to decide the case because there was no decision of a legislative body (here, the City Council) to enforce. The circuit court denied the Bianchis' motion in an order entered September 1, 2009, stating that "the arguments raised as the basis for said motion by the Defendants were addressed in the appeal of this case to the Court of Appeals and the Kentucky Supreme Court and this Court must follow the orders and decisions issued by those Courts." This current appeal now follows.

³ The record on appeal does not contain the Bianchis' motion to dismiss filed subsequent to the remand.

In their appellate brief, the Bianchis make a series of arguments all related to whether the circuit court erred in denying their motion to dismiss due to lack of jurisdiction. Our standard of review in this matter is set forth below:

In making this decision [ruling on a motion to dismiss], the trial court is not required to make any factual findings. *James v. Wilson*, 95 S.W.3d 875, 884 (Ky. App. 2002). Therefore, “the question is purely a matter of law.” *Id.* Accordingly, the trial court’s decision will be reviewed *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000).

Benningfield v. Pettit Env’tl., Inc., 183 S.W.3d 567, 570 (Ky. App. 2005). *See also Hisle v. Lexington-Fayette Urban County Gov’t*, 258 S.W.3d 422, 428 (Ky. App. 2008) (“Whether a court was acting outside its jurisdiction is generally a question of law[,]” requiring *de novo* review.).

The Bianchis contend that the circuit court lacked subject matter jurisdiction because it was improperly exercising judicial authority over a condemnation action that did not arise from the exercise of the city council’s legislative authority. They assert that subject matter jurisdiction may be raised at any time during a proceeding and may not be waived. As a result, they argue that the circuit court’s orders were void *ab initio*. The City, on the other hand, contends that the circuit court did have subject matter jurisdiction, and if it lacked jurisdiction at all, it lacked only particular case jurisdiction. Accordingly, any orders entered would be voidable, not void, and the issue of jurisdiction would be subject to waiver. The City further argues that the Bianchis are precluded by the doctrines of *res judicata* and collateral estoppel because the issue has already been decided against them in

the prior appellate actions. We agree with the City and therefore affirm the circuit court's order denying the motion to dismiss.

In *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422 (Ky. App. 2008), this Court presented a detailed analysis of the legal concept of jurisdiction, which it described as “a fundamental concept that goes to the very heart of a court to act or decide a case.” *Id.* at 428. The Court went on to describe the three types of jurisdiction recognized by the courts. Those three categories are personal jurisdiction, which addresses the court's authority over a specific person or persons; subject matter jurisdiction; and particular case jurisdiction. Specifically addressing the interplay of subject matter and particular case jurisdiction, the Court explained:

Subject matter jurisdiction concerns the very nature of the court's creation under constitutional provisions. Particular case jurisdiction is a subset of subject matter jurisdiction in that a court that lacks subject-matter jurisdiction over an action will also always lack particular-case jurisdiction, but a court can have proper subject-matter jurisdiction over an action, but nonetheless lack particular case jurisdiction.

* * * *

Particular case jurisdiction generally involves more specific so-called “jurisdictional facts.” A “jurisdictional fact” has been defined as “[a] fact that must exist for a court to properly exercise its jurisdiction over a case, party, or thing.” BLACK'S LAW DICTIONARY 857 (7th ed. 1999). This definition is somewhat circular and not particularly helpful. Some courts have linked jurisdictional facts to factual prerequisites established by statute or rule that are treated as affirmative defenses such as limitations periods or failure to state a claim,

although clearly not all affirmative defenses should be treated as involving jurisdictional authority. . . .

Hisle, 258 S.W.3d at 429-30 (internal citations, quotation marks, brackets, and footnotes omitted).

The *Hisle* Court then addressed the effect a lack of either subject matter or particular case jurisdiction would have on a court's judgment:

It is well-established that a judgment entered by a court without subject matter jurisdiction is void. In addition, since subject matter jurisdiction concerns the very nature and origins of a court's power to do anything at all, it cannot be born of waiver, consent or estoppel, and may be raised at any time.

On the other hand, lack of particular case jurisdiction merely renders a judgment *voidable*, rather than *void ab initio*. In *Dix v. Dix*, 310 Ky. 818, 822, 222 S.W.2d 839, 841 (1949) (holding judgment granting a wife fee title to a house in a divorce action contrary to the statutory requirements was not void for lack of subject matter jurisdiction), the court commented that “where the court has jurisdiction of the parties and subject matter, the judgment, if erroneous, is voidable, not void.” Any error rendering a judgment voidable cannot be challenged in a collateral action and is subject to consent, waiver, or estoppel.

Hisle, 258 S.W.3d at 430-31 (emphasis in original, internal citations, quotation marks, brackets, and footnotes omitted).

Turning to the present matter, we hold that the circuit court had general subject matter jurisdiction regarding condemnation and eminent domain proceedings; and even if it lacked particular case jurisdiction for the reasons the Bianchis suggested, including lack of action by the city council, we need not reach

the issue because the Bianchis waived any right they might have had to contest it by failing to answer the original condemnation petitions or to appeal from the interlocutory judgment. As this Court stated in *Hisle*, lack of particular case jurisdiction merely renders a judgment voidable, and any error related to a voidable judgment is subject to waiver. *See also Schooley v. Commonwealth*, 556 S.W.2d 912 (Ky. App. 1977).

Furthermore, the Bianchis have previously raised the issue of whether the City had the right to condemn the property based upon a lack of legislative action by the city council. They base their current argument that the circuit court lacked jurisdiction on the same contention. This Court and, by implication, the Supreme Court previously ruled that the Bianchis failed to preserve this allegation by either challenging the City's right to condemn or appealing the interlocutory judgment. In declining to review the allegation, the appellate courts in essence upheld the City's right to condemn. Accordingly, any challenge to the circuit court's jurisdiction must also fail, as the issue has already been addressed by the circuit court and raised in previous appeals. These prior rulings represent the law of the case and are not subject to further litigation upon remand. *See Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 244 S.W.3d 747, 751 (Ky. App. 2007) (holding that the law of the case doctrine precluded the Housing Authority from contesting the recovery of post-judgment interest on remand when the issue was not raised in a previous appeal).

For the foregoing reasons, we hold that the circuit court did not err in denying the motion to dismiss. Accordingly, the order of the Harlan Circuit Court is affirmed.

NICKELL, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

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