IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Condemnation by the Beaver Falls Municipal Authority for Penndale Water Line Extension, Big Beaver Borough, Beaver County	:	
	:	No. 736 C.D. 2010
Constantine John Vassilaros and Sherry Vassilaros	:	Argued: December 6, 2010
v.	:	
Beaver Falls Municipal Authority, Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: March 21, 2011

The Beaver Falls Municipal Authority (Authority) appeals from the March 30, 2010, order of the Court of Common Pleas of Beaver County (trial court) denying and declaring moot a motion by the Authority to convene a Board of View to determine damages due Constantine John Vassilaros and Sherry Vassilaros (Landowners). The Authority contends that the trial court's order violates the law of the case doctrine.

The Authority is a municipal authority duly organized and existing under the laws of the Commonwealth with its principal office located in the City of Beaver Falls, Beaver County. (R.R. at 10a.) Landowners reside in Wampum Borough, Beaver County, where they are fee simple owners of sixty-four acres in Big Beaver

Borough (subject property). Id. The western boundary of the subject property adjoins property owned by Speed4U, L.P. In 2005, the Authority decided to construct a water tank and ancillary facilities on a portion of the property owned by Speed4U. (R.R. at 157a.) The project required construction of an access road and water lines across the subject property. (R.R. at 43a, 158a.)

In mid-2005, an employee of the engineering firm representing the Authority contacted Landowners to discuss the possibility of using a portion of the subject property for the access road. (R.R. at 158a, 163a.) A few weeks later, this representative provided Landowners with an aerial photograph to show the proposed location of the water tank, the water lines and the access road. (R.R. at 163a.) In June 2005, a subdivision plan for the property owned by Speed4U was prepared, which included an easement, thirty feet in width, running from the water tank and across the subject property and connecting to Penndale Road, which abuts both properties. (R.R. at 164a.) On July 7, 2006, Landowners executed and delivered a water line easement agreement to the Authority. (R.R. at 62a-65a, 164a.) The easement agreement was recorded on July 11, 2006. (R.R. at 67a, 164a.) The subdivision plan was recorded three days later, on July 14, 2006. (R.R. at 164a.)

Pursuant to the easement agreement, Landowners conveyed an easement for a water line and access road across the subject property as detailed in a scaled drawing and survey, neither of which was attached to the easement agreement. (R.R. at 62a.) In consideration for the grant of the easement, the Authority agreed to: (1) provide water service to Landowners and a tap to connect to the water line at no fee; (2) delimit the area where the access road and water line easement would be placed; (3) permit Landowners to remove all salable timber from the area of the water line easement and access road; and, (4) stockpile any excess excavation from construction

of the access road on the subject property at Landowners' direction. (R.R. at 62a-63a.) The easement agreement further provided that Landowners could seek additional compensation from the Authority within one year of the date of the agreement. (R.R. at 63a.)

On August 1, 2006, the Authority began construction of the access road. (R.R. at 167a.) However, despite the terms of the easement agreement, the Authority stockpiled excess soil from the construction at a location on the subject property to which Landowners did not agree. Id. The soil ultimately reached a mass of 10,900 cubic yards, ranging from twenty-five to thirty feet in height and exceeding thirty feet in width. Id. In addition, a dispute arose between the parties as to whether the location of the access road and water line complied with the terms of the water line easement agreement. Id.

On April 10, 2007, the Authority filed a declaration of taking seeking to condemn five acres of the subject property in fee simple, in order to avoid the cost of moving the stockpile of soil from its present location to a location directed by Landowners. Id. Landowners filed preliminary objections to the declaration claiming, inter alia, that the Authority's conduct constituted a *de facto* taking, was excessive, and violated their constitutional rights. (R.R. at 124a-25a.)

While the preliminary objections were pending, Landowners, citing the provision in the easement agreement permitting them to make a claim for additional compensation, filed a separate petition with the trial court for the appointment of a Board of View to determine just compensation for the Authority's taking of their

property.[1] (R.R. at 38a-41a.) By order dated May 14, 2007, the trial court appointed a Board of View. (R.R. at 68a.)

Approximately nine months later, by opinion and order dated February 27, 2008, the trial court, by the Honorable Robert Kunselman, sustained Landowners' preliminary objections and declared the Authority's declaration of taking to be invalid, finding that the amount of land sought to be condemned by the Authority far exceeded the amount of land reasonably required for the project's purpose and that the estate in land sought by the Authority far exceeded the estate reasonably required for the project's purpose.[2] (R.R. at 168a.) The trial court also found that the Authority's action in permitting a huge stockpile of soil to remain on the subject property interfered with Landowners' beneficial use of the land and directed that title to the property affected by the easement be reverted to Landowners. (R.R. at 172a-73a.) The trial court further directed that the matter be referred to the Board of View previously appointed to consider Landowners' petition for a determination of damages. (R.R. at 174a.) The Authority appealed to this Court, and we affirmed. In re: Condemnation by the Beaver Falls Municipal Authority for Penndale Water Line Extension, 960 A.2d 933 (Pa. Cmwlth. 2008). In accordance with the trial court's orders, the Board of View viewed the subject property on May 21, 2009. (R.R. at 223a.)

In the meantime, Landowners commenced a separate civil action against the Authority seeking specific performance of the easement agreement under a breach

[1] It appears that Landowners filed this petition in order to protect their right to additional compensation under the easement agreement, which required that such a claim be filed within one year.

[2] A subsequent motion of the Authority for reconsideration was denied by order of the trial court dated April 16, 2008.

of contract claim and monetary damages under a trespass claim. By opinion and order dated October 9, 2009, the trial court denied a motion for summary judgment filed by the Authority in which the Authority argued that the exclusive method of calculating the damages sought by Landowners was provided for in the collateral eminent domain proceedings. The trial court noted that the Authority obtained the easement in question via a private agreement and not by virtue of its eminent domain powers. This order, issued by the Honorable Deborah Kunselman, is not part of the present appeal to this Court.

After an extended period of inactivity, the Authority filed a motion in March of 2010 to convene the Board of View to determine what damages, if any, were due to Landowners. (R.R. at 225a-30a.) By order dated March 30, 2010, the trial court denied the Authority's motion and declared the same to be moot.[3] The trial court noted that the Authority's eminent domain action had been dismissed and concluded that there was no taking because the parties had negotiated an easement agreement. The trial court also noted its belief that the prior order directing a determination of damages by a Board of View was in error, as the issue of damages will be determined in Landowners' collateral civil action.

On appeal to this Court,[4] the Authority argues that the trial court abused its discretion in *sua sponte* dismissing the Authority's motion and in disregarding a prior trial court order directing a Board of View to determine damages. Based on the

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[3] This order was also entered by the Honorable Deborah Kunselman.

[4] Our scope of review is limited to determining whether the trial court abused its discretion or committed an error of law. In re Condemnation by the Department of Transportation, 871 A.2d 896 (Pa. Cmwlth. 2005).

well-established law of the case doctrine and rule of coordinate jurisdiction, we must agree.

The law of the case doctrine embodies the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Ario v. Reliance Insurance Company, 602 Pa. 490, 980 A.2d 588 (2009).[5] More specifically, this doctrine involves several related but distinct rules: (1) upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter; (2) upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court; and (3) upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor trial court. Id.; Commonwealth v. Starr, 541 Pa. 564, 664 A.2d 1326 (1995).

In Starr, Gary Lee Starr was on trial for first-degree murder and facing a sentence of death. Starr filed a motion seeking to represent himself at trial and, following a battery of psychiatric testing, the motion was granted by a judge of the Court of Common Pleas of Allegheny County. The case was later transferred to another judge on the same court, who revoked the previous order granting Starr the right to represent himself and directed the Office of Public Defender to assume control of Starr's defense. Following a conviction and sentence to death, Starr was

[5] In Ario, our Supreme Court considered whether this Court was permitted to depart from prior referee decisions involving the liquidation of Reliance Insurance Company that it had affirmed. The Court in Ario cited the law of the case doctrine and the rule of coordinate jurisdiction in the context of a discussion of uniformity of decisions under general principles of law. Ultimately, the Court held that further analysis of this doctrine and rule were unnecessary because the broader principles of uniformity and equity applied and directed the result therein.

granted an automatic direct appeal to our Supreme Court. On appeal, Starr challenged the common pleas court's second order revoking his right to self-representation. Citing the law of the case doctrine and the rule of coordinate jurisdiction, our Supreme Court held that the second judge erred in revoking the prior judge's order regarding self-representation.

The rule of coordinate jurisdiction provides that judges of equal jurisdiction sitting in the same case should not overrule each others' decisions. Ario; Starr; Commonwealth v. Brown, 485 Pa. 368, 402 A.2d 1007 (1979). In Brown, the judge in the family division had entered an order certifying Herbert Brown, who was sixteen years of age at the time, as an adult to face charges of aggravated assault, robbery, and various weapons offenses. Brown thereafter filed an application to quash the transfer to the criminal division, but his application was denied. Brown filed a motion for reconsideration, but the common pleas court's criminal division held it lacked authority to review a decision of a judge from the family division. However, the criminal division certified the case for purposes of an interlocutory appeal with respect to this issue. Our Supreme Court affirmed, holding that, absent some new evidence, it would be improper for a trial judge to overrule an interlocutory order by another judge of the same court in the same case.

Moreover, the act of one judge overruling another judge on the same record facts has been held to constitute an abuse of discretion. Hainsey v. Pennsylvania Liquor Control Board, 529 Pa. 286, 602 A.2d 1300 (1992). Hainsey involved successive orders of the Pennsylvania Liquor Control Board (PLCB), the first denying a request for a continuance by the licensees in that case pending resolution of an underlying criminal matter and the second granting the PLCB's request for a continuance on the same basis. Relying on Brown, our Supreme Court

held that the PLCB's subsequent action constituted an inappropriate exercise of discretion.

Departure from either the law of the case doctrine or the coordinate jurisdiction rule is allowed only in exceptional circumstances, such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where the prior holding was clearly erroneous and would create a manifest injustice if followed. Ario.

In the case *sub judice*, we conclude that the trial court (Honorable Robert Kunselman) correctly recognized that both actions before it, the Authority's declaration of taking and Landowners' petition for a Board of View, sounded in eminent domain.

This matter originally came before the trial court (Honorable Robert Kunselman) by virtue of the Authority's declaration of taking, followed by Landowners' preliminary objections and their petition seeking appointment of a Board of View, matters which clearly sound in eminent domain. Generally, the Eminent Domain Code (Code), 26 Pa. C.S. §§101-1106, provides a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages. 26 Pa. C.S. §102(a); Fulmer v. White Oak Borough, 606 A.2d 589 (Pa. Cmwlth. 1992). Where a landowner's property has been taken by an exercise of eminent domain, whether it be a *de facto* taking or by filing of a declaration, a landowner's only recourse is to proceed under the Code, and he may not seek relief by filing an action in trespass. Fulmer; Wagner v. Borough of Rainsburg, 714 A.2d 1164 (Pa. Cmwlth. 1998).

In Fulmer, the landowners owned parcels of property in White Oak Borough (Borough) located along Center Street and extending back to Stepanik Road.

The landowners alleged that, in the course of grading and excavating Stepanik Road, the Borough exceeded its right-of-way and entered their properties by five or six feet. The landowners also alleged that the Borough negligently cut into a steep hillside on their properties creating an embankment and resulting in the destruction of shrubs and trees and increasing the potential for mud slides and erosion. The landowners instituted suit asserting a cause of action sounding in trespass and negligence. The Borough filed an answer with new matter alleging, inter alia, that the landowners' exclusive remedy was under the Code. The trial court agreed and granted a motion for summary judgment filed by the Borough. We affirmed the trial court's order, explaining that a condemnor is liable for damages to property resulting from a change of grade in a road and that any damage to the landowners' property beyond the land actually appropriated by the grading of Stepanik Road was expressly covered by the Code.

In Wagner, the landowners owned a parcel of real property in the Borough of Rainsburg (Borough). A driveway ran along the southern border of this property. The landowners filed a complaint in trespass against the Borough alleging that the Borough directed a private contractor to place shale on their driveway. The Borough filed preliminary objections asserting that the landowners' exclusive remedy was provided under the Code. The trial court granted the Borough's preliminary objections, and we affirmed, concluding that the landowners' allegations, if proved, amounted to a *de facto* taking of the landowners' property, for which the Code provides an exclusive remedy.

On the contrary, "[a]cts not done in the exercise of eminent domain and not the immediate, necessary or unavoidable consequences of such exercise cannot be the basis of a proceeding in eminent domain." Fulmer, 606 A.2d at 590. Rather,

where a landowner suffers specific damage to his property as a result of the negligent actions or tortious acts of the condemning body, the proper action lies in trespass. Id. Further, this Court in Fulmer rejected the argument that a landowner may proceed under either the Code or in trespass. In determining whether a particular action is an exercise of eminent domain or a trespass, we must focus upon the nature of the acts complained of. Poole v. Township of District, 843 A.2d 422 (Pa. Cmwlth. 2004); Fulmer.

In Poole, the landowners owned fifteen acres of land in the Township of District (Township). The property was divided in part by a twelve-foot-wide strip of land owned by the Township which partially ran onto this property. The landowners filed a complaint in trespass and negligence against the Township alleging that Township employees and/or its agents or contractors damaged their property by grading the strip of land and depositing stone on it. The Township filed a motion for summary judgment alleging, inter alia, that the landowners failed to state a claim in trespass. Relying on Fulmer, the trial court granted the Township's motion, holding that the landowners' exclusive remedy was under the Code. However, this Court reversed the order of the trial court and remanded for further proceedings, noting that this case was distinguishable from Fulmer because the alleged facts supported a claim that the Township was negligent, and did not allege a degree of damage that could be construed as a *de facto* taking. We also noted that the facts did not indicate that the Township intended to take landowners' land.

Here, however, there is no dispute that the Authority intended to take a portion of the subject property for construction of an access road and installation of a water line. The fact that the parties executed an easement agreement does not alter

the underlying nature of the Authority's action.[6] In addition, the Authority's stockpiling of excess soil on a portion of the subject property, which was not approved by Landowners, arguably amounts to a *de facto* taking by the Authority of that portion of the subject property.

Properly recognizing that this matter sounded in eminent domain, the Honorable Robert Kunselman issued an order dated May 14, 2007, appointing a Board of View to determine the just compensation due Landowners. Moreover, in his February 27, 2008, opinion and order, later affirmed by this Court, the Honorable Robert Kunselman further recognized that the Authority's actions effectuated a condemnation of Landowners' property and directed that the matter be referred to the Board of View previously appointed to consider damages. However, on March 30, 2010, the Honorable Deborah Kunselman issued an order which effectively overruled the 2007 order. As there was no change in the controlling law or in the facts or evidence giving rise to the dispute between the 2007 and 2010 orders, and the 2007 order was clearly not erroneous, we agree with the Authority that the 2010 order did not comply with the law of the case doctrine and/or the rule of coordinate jurisdiction.

Accordingly, the March 30, 2010, order of the trial court must be reversed, and the matter remanded to the trial court with instructions to grant the Authority's motion to convene a Board of View to determine the just compensation due Landowners under the Code. On remand, the trial court shall further consider the

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[6] The Authority could have opted to file a declaration of taking solely with respect to that portion of the property necessary for an access road and installation of the water line. However, in its brief to this Court, the Authority explained that it chose to execute the easement agreement in order to gain immediate access to the subject property to ensure that it met its schedule for completion of the project.

amount of attorney fees, costs, and expenses due Landowners under section 306(g) of the Code, 26 Pa. C.S. §306(g),[7] by virtue of the trial court's February 27, 2008, order, sustaining Landowners' preliminary objections to the Authority's declaration of taking. See In re: Condemnation by the Beaver Falls Municipal Authority for Penndale Water Line Extension, 960 A.2d 933 (Pa. Cmwlth. 2008).

PATRICIA A. McCULLOUGH, Judge

[7] Section 306(g) of the Eminent Domain Code provides as follows:

> (1) If preliminary objections which have the effect of terminating the condemnation are sustained, the condemnor shall reimburse the condemnee for reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceedings.
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> (2) The court shall assess costs and expenses under this subsection.

26 Pa. C.S. §306(g)(1), (2).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Constantine John Vassilaros and Sherry Vassilaros	:	
v.	:	
Beaver Falls Municipal Authority, Appellant	:	

ORDER

AND NOW, this 21st day of March, 2011, the order of the Court of Common Pleas of Beaver County (trial court) dated March 30, 2010, is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge