

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
MARION COUNTY**

RICK J. CONNER

CASE NUMBER 9-04-48

RELATOR-APPELLANT

v.

O P I N I O N

VILLAGE OF CALEDONIA

RESPONDENT-APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: March 28, 2005

ATTORNEYS:

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For Appellee.

Shaw, J.

{¶ 1} The relator-appellant, Rick J. Conner, appeals the judgment of the Common Pleas Court of Marion County denying his writ for mandamus.

{¶ 2} In June 1995, Johnson & Hughes Excavating Inc. started a project pursuant to a contract between them and the respondent-appellee, Village of Caledonia (hereinafter “the Village”), for the construction and installation of a new four-inch sanitary sewer line and roadway on an easement adjacent to Conner’s property line.

{¶ 3} Initially, Joy Conner, Rick Conner’s wife, expressed concerns that the excavation was being performed on their property. As a result, the project was stopped in order to confirm the location of the easement and the sewer line. Wilber Smith Associates surveyed the excavation site and determined that the project was not encroaching onto Conner’s property.

{¶ 4} When the project was finished, Conner again expressed reservations that the project was completed on his land outside the easement. The Village then contracted with Ahlers and Moe to complete another survey of the Conner’s property. Again, the survey confirmed that the excavation was not performed on Conner’s property.

{¶ 5} On August 23, 2002, Conner filed a complaint alleging, inter alia, negligence, trespass, and unlawful appropriation.¹ The Village timely answered and denied Conner's allegations. Subsequently, the Village filed a motion for summary judgment, and the court dismissed the negligence and trespass claims. Upon consideration of the unlawful appropriation claim, the trial court noted that this remaining claim was a mandamus claim; therefore, the court sua sponte granted Conner leave to amend his complaint to conform to the requirements of an application for a writ of mandamus.

{¶ 6} On November 3, 2003, Conner filed an application for mandamus alleging:

In [sic] or about the months of June and July 1995, in preparation for the installation of the Village's sewer system the Respondent, Village of Caledonia unlawfully entered onto Relator's premises, unlawfully took Relator's property, and caused irreparable damages to Relator's property.

Pursuant to Ohio Revised Code Section 719.04 and 719.05 and Chapter 163 of the Ohio Revised Code, Respondent, Village of Caledonia, has a clear and legal duty to commence appropriation proceedings leading to the determination of just compensation for Relator for the Village's taking of Relator's property rights.

Application for Mandamus at ¶¶ 5, 6. On November 13, 2003, the Village responded to Conner's mandamus application, and, by clerical error that is

¹ The record reflects that Conner originally filed a complaint in May 1999, but he voluntarily dismissed that suit.

admitted by the Village in its appellate brief, admitted to all the allegations.² On November 24, 2003, the trial court issued an alternative writ of mandamus stating:

IT IS THEREFORE ORDERED that the Village of Caledonia, Ohio, shall initiate an action for the appropriation of the relator's real property. In the alternative, the respondent may show cause why it should not be required to initiate an appropriation action by written brief filed on or before December 22, 2003. If the respondent files a brief within the allotted time, the relator may respond on or before January 12, 2004. The court will then rule without oral hearing, unless a party affirmative [sic] demonstrates why an oral hearing is necessary.

Alternative Writ of Mandamus (capital letters in original).

{¶ 7} On December 10, 2003, the Village filed for an extension to file its Show Cause brief, which the trial court extended to January 9, 2004. At a status conference on January 8, 2004, both parties agreed to extend the deadline for the Show Cause brief until February 9, 2004. Moreover, both parties agreed that the Village was to file its jurisdictional brief on January 15, 2004, and Conner was to file his reply to that brief on January 29, 2004. On January 20, 2004, the Village filed a motion to dismiss Conner's application for mandamus; Conner responded on February 4, 2004; and the Village filed a reply on February 17, 2004. Moreover, the Village requested two more extensions to file its Show Cause brief, which gave the Village until April 20, 2004 to file.

² Even though the Village admitted to the allegations stated in Conner's application for mandamus, the Village also pleaded eight affirmative defenses.

{¶ 8} On April 26, 2004, the Village filed its Show Cause brief, which the trial court accepted as filed on April 29, 2004. Finally, on August 18, 2004, the trial court denied Conner's application for mandamus. The judgment entry states:

The court has reviewed the Application for Writ of Mandamus filed by Plaintiff-Relator Rick J. Conner, on November 3, 2003; Repondent, Village of Caledonia, Answer to same filed on November 13, 2003; Respondent's Motion to Dismiss filed January 20, 2004; Relator's Memorandum Contra filed February 4, 2004; Respondent's Reply to same filed February 17, 2004; and Respondent's Show Cause Brief filed April 26, 2004, and accordingly finds as follows:

- 1. Relator's Application for Writ of Mandamus is not barred by expiration of the Statute of Limitations;**
 - 2. Relator has failed to demonstrate a clear legal right to an appropriation proceeding based upon their failure to demonstrate a taking of his property by Respondent, which would result in the appropriate compensation for same;**
- Accordingly, the application for Write of Mandamus filed by Plaintiff-Relator, Rick J. Conner, is hereby denied.*****

Judgment Denying Application for Mandamus. Conner appeals this judgment alleging two assignments of error.

THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT HAD FAILED TO DEMONSTRATE A TAKING OF HIS PROPERTY BY THE APPELLEE VILLAGE ENTITLING HIM TO AN APPROPRIATION PROCEEDING.

{¶ 9} As a threshold matter, we must first determine the effect of the Village's clerical error in admitting all the allegations in Conner's complaint. We note that a party may be precluded from raising an issue or an argument for the first time on appeal unless an exception to the waiver doctrine applies. See

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generally, *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43, 322 N.E.2d 629.

{¶ 10} In the case before us, we note that Conner failed to act upon the Village's admissions in its answer while the case was pending in the trial court. Even if the Village made a clerical error in admitting the allegations in the complaint, no action was taken by Conner to move for judgment on the pleadings. As a result, the Village was never given an opportunity to explain the error or amend its answer to the application for mandamus because the matter was never brought to the trial court's attention.

{¶ 11} A review of the record indicates that the Village's admission was a mistake. While the Village did admit to the allegations filed in its answer to the application for mandamus, the Village denied all allegations in its answer to Conner's original complaint filed on August 23, 2002. Moreover, the Village also filed a motion for summary judgment in response to that same complaint. Once the complaint was dismissed and Conner filed an application for mandamus on November 3, 2003, the Village asserted affirmative defenses in its answer and filed a motion to dismiss the mandamus action. Finally, the Village filed a Show Cause brief in response to the trial court's issuance of an alternative writ of mandamus.

{¶ 12} Viewing the Village's admission error in conjunction with the numerous denials asserted by the Village, we conclude that this mistake did not prejudice Conner. See, e.g. *Gagel v. Kingston-Greene Partners* (April 25, 1994), 12th Dist. No. CA93-08-151, unreported. Conner had the opportunity to be heard and litigate his claims in the trial court. Accordingly, this argument is without merit.

{¶ 13} Turning now to the mandamus action, Conner contends that the Village unlawfully entered onto his property; unlawfully appropriated his property; caused irreparable damage to his property; and failed to provide him with an appropriation hearing. Contrarily, the Village argues that Conner's mandamus action is without merit because the excavation took place on an easement. For support, the Village submitted an affidavit of Don Morrison, an employee of Wilbur Smith Associates, who stated that two separate land surveys confirmed that the excavation project did not encroach on Conner's land. Furthermore, in its judgment entry denying Conner's application for mandamus, the trial court relied on these factual findings in determining that Conner "failed to demonstrate a clear legal right to an appropriation proceeding based upon [his] failure to demonstrate a taking by [the Village]." Judgment Denying Mandamus.

{¶ 14} In order to be entitled to relief in a mandamus action, the relator must prove (1) a clear legal right to the requested acts; (2) a corresponding legal

duty on the part of the respondent to perform these acts; and (3) the absence of an adequate or plain remedy at law. *State ex rel. Sekermestrovich v. Akron* (2001), 90 Ohio St.3d 536, 537, 740 N.E.2d 252. The Supreme Court of Ohio has held mandamus is “the appropriate vehicle for compelling appropriation proceedings by public authorities where an involuntary taking of private property is alleged.” *State ex rel. BSW Development Group v. City of Dayton* (1998), 83 Ohio St.3d 338, 341, 699 N.E.2d 1271. In a mandamus action based on an alleged taking, the court, as trier of law and fact, must determine whether the relator’s private property had been taken by the public authority. *Id.* at 342. When making a factual determination, “the proof produced must be plain, clear, and convincing before a court is justified in using the strong arm of the law by way of granting the writ.” *State ex rel. Pressley v. Industrial Commission* (1967), 11 Ohio St.2d 141, 161, 228 N.E.2d 631.

{¶ 15} After reviewing the applicable law, we conclude that Conner failed to prove that he had a clear legal right to an appropriation hearing. A review of the record indicates that the trial court’s factual determination is supported by competent and credible evidence. Specifically, the land surveys submitted into evidence by the Village were not challenged or denied as being false by Conner. Thus, because the land surveys indicated the excavation projects did not infringe

on Conner's land, Conner had no legal right to a taking proceeding. Accordingly, the first assignment of error is overruled.

Second Assignment of Error

THE TRIAL COURT'S FINDING THAT THE APPELLANT WAS NOT ENTITLED TO AN APPROPRIATION PROCEEDING FOR THE UNLAWFUL TAKING OF HIS PROPERTY, WITHOUT A HEARING OR WITHOUT NOTICE THAT THE TRIAL COURT WOULD RULE ON THE SAME WITHOUT AN ORAL HEARING ON A SPECIFIC DATE, EFFECTIVELY DENIED APPELLANT DUE PROCESS OF LAW.

{¶ 16} In this assignment of error, Conner alleges that the trial court denied him due process of law by “summarily ruling on the merits of [the mandamus action] without providing him notice as to the date the merits of the case would be considered by the Court, either at an oral evidentiary hearing or at a non-oral hearing.” Appellant's Brief at p. 10. Furthermore, Conner states:

Although the trial court consistently established deadlines for responsive memoranda, whether in response to a motion for summary judgment or a jurisdictional motion, it failed to establish any responsive date, after its initial order, for [Conner] to respond to a Show Cause Brief.

Id. at 10-11. In response, the Village argues that although it “was granted multiple extensions to file its show cause brief...there was still sufficient notice afforded to [Conner] alerting him of his rights. Specifically, the [Alternative Writ of Mandamus] alerted [Conner] a response was due shortly thereafter, and a ruling on

the show cause brief would be made without an oral hearing.” Appellee’s Brief at p. 9.

{¶ 17} In the instant case, the alternative writ of mandamus stated:

This matter is before the court for further consideration of the status of the case. The Relator has now filed an appropriate application for a writ of mandamus. The finding the [sic] application sufficient, will require the Village of Caledonia, Ohio, to initiate an action for the appropriation of the relator’s real property. In the alternative, the respondent may show cause why it should not be required to initiate an appropriation action by written brief.

IT IS THEREFORE ORDERED that the Village of Caledonia, Ohio, shall initiate an action for the appropriation of the relator’s real property. In the alternative, the respondent may show cause why it should not be required to initiate an appropriation action by written brief filed on or before December 22, 2003. If the respondent files a brief within the allotted time, the relator *may* respond on or before January 12, 2004. The court will then rule without oral hearing, unless a party affirmatively demonstrates why an oral hearing is necessary.

Alternative Writ of Mandamus (capital letters in original and italics added). The Village filed three motions for an extension to file their Show Cause brief, and all were granted. Nevertheless, each journal entry granting an extension was silent as to the date when Conner may respond to the Village’s brief. The Village filed its Show Cause brief with certificate of service on April 26, 2004. The trial court then denied Conner’s application for mandamus on August 18, 2004.

{¶ 18} A review of the record indicates that Conner was never denied the opportunity to file a response to the Village’s Show Cause brief. While each

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continuance did not state a specific deadline to which Conner may file a response, the alternative writ of mandamus did indicate that Conner may file a response brief if he chose to. The record is devoid as to any attempt of Conner to file a response brief after the Village filed their brief on April 26, 2004. Accordingly, because the trial court did not rule on Conner's application for mandamus until August 18, 2004, Conner had almost three months to respond to the Village's brief. Thus, Conner's argument that he did not have an opportunity to be heard is without merit. The second assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment Affirmed.

CUPP, P.J., and BRYANT, J., concur.

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