

83-LW-1449 (10th)

John J. Ranft, Plaintiff-Appellant

v.

Columbia Gas of Ohio, Inc., Defendant-Appellee.

No. 82AP-620 (REGULAR CALENDAR).
10th District Court of Appeals of Ohio, Franklin County.
Decided on March 29, 1983.

APPEAL from the Franklin County Court of Common Pleas.

MESSRS. LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, NEWMAN & GEE and MR. RANKIN M. GIBSON, for appellant.

MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, MR. RUDOLPH JANATA, MR. CRAIG D. BARCLAY, MR. WILLIAM M. TODD, MR. JAMES L. FULLIN and MR. JAMES BERENDSEN, for appellee.

OPINION

WHITESIDE, P.J.

Plaintiff appeals from a judgment of the Franklin County Court of Common Pleas and raises seven assignments of error, as follows:

"I. The trial court erred in finding that appellant is not entitled to a declaration that appellee's right-of-way easements for a gas line through appellant's property should be terminated.

"II. The trial court erred in finding that appellant is not entitled to a decree quieting appellant's title in his premises as against any adverse right, title, claim or interest of appellee.

"III. The trial court erred in finding that appellant is not entitled to an injunction requiring appellee to remove its gas lines from appellant's property.

"IV. The trial court erred in finding that appellee is not liable to appellant for just compensation for the land taken or for the damages to the residue because appellant and his predecessors in interest received adequate compensation for said easements and because such damages, if any, would be de minimis non curat lex.

"V. The trial court erred in finding that appellant is not entitled to an accounting for the profits which appellee has accrued by reason of its usage of appellant's property, nor is appellant entitled to a share of such profits.

"VI. The trial court erred in failing to find that where a natural gas company breaches the right-of-way easement by refusing to sell gas to the property owner, such owner is entitled to damages for all consequential damages flowing from such breach.

"VII. The trial court erred in finding that appellant is not entitled to an award of attorneys' fees or any other or further relief, whether such relief be at law or in equity."

This cause is before the court for the second time. Upon the first appeal (Ranft v. Columbia Gas [May 25, 1978], No. 78AP-43, unreported [1978 Decisions 1421], this court reversed a judgment of the trial court granting summary judgment to defendant. We found that the trial court erred in granting summary judgment because plaintiff's complaint states a claim for relief, and there are genuine issues of material facts. For whatever reason, several years passed before

the matter came before the trial court upon a bifurcated trial upon the issue of "liability only" upon an agreed statement of facts. The trial court rendered a second decision and judgment, finding for defendant and entered final judgment for defendant. In the decision, the trial court found it necessary to repeat certain findings of fact which the trial court had made in its original decision granting summary judgment and as to which this court found there to be disputed issues of fact. The agreed statement of facts made by the parties does not supply the factual foundation for many of the findings of fact which the trial court adopted from its previously reversed judgment.

Plaintiff is the owner of real estate which he acquired by four separate deeds, one in 1973 and three in 1976. Plaintiff's four predecessors in title granted various right-of-way easements to defendant for the purpose of installing a gas transmission line. In addition to nominal monetary consideration, the easements provided that the grantors of the easements and their assigns "have the right to purchase gas for use on said premises." These easements were executed in 1964.

In 1972, the Public Utilities Commission of Ohio adopted an emergency order making certain restrictions upon the supply of natural gas to new customers and providing in part that:

"The Columbia Gas of Ohio, Inc. * * * may commence the following program:

"1. Refuse new service to any applicants, other than residential type.

"2. Refuse additional volumes of gas to existing customers * * * other than residential type, provided, however, that notwithstanding the foregoing, gas service shall be supplied to

"a. any applicant who has received a written commitment for service from either company prior to the date of this order (February 11, 1972) * * *."

In 1975, defendant gas company filed an application for a "clarification" of the gas restrictions and specifically sought to restrict service to those whom it had committed to provide gas pursuant to right-of-way easements, such as the premises herein involved. In February 1976, the Public Utilities Commission of Ohio adopted an order, including the following in the opinion portion of its opinion and order: "The commission now holds that pipeline right of way agreements are not written commitments for service within the terms of the June 23, 1972, order." In the findings of fact portion, it is stated in part: "Columbia should be authorized to limit new service pursuant to right-of-way agreements." In the order itself, it is stated in part, as follows:

"* * * That Columbia Gas of Ohio, Inc., be, and hereby is, authorized to defer, for a period of eighteen months commencing March 1, 1977, or until the Commission determines that the gas supply emergency has ended, should that occur before the end of the 18-month period, all applications for new service pursuant to pipeline right-of-way agreements containing tap provisions, unless the persons making application are ready to receive full service on or before March 1, 1977. It is, further,

"ORDERED, That any new gas service provided pursuant to pipeline right of way agreements with tap provisions be limited to service classified as residential. It is, further,

"ORDERED, That Columbia limit any new gas service provided pursuant to such right of way agreements to one tap, if the instrument granting the right to the tap does not provide for a specific number of taps. * * *"

In October 1976, plaintiff applied for gas service in accordance with the terms of the right-of-way agreements, which application was denied on November 5, 1976, because the proposed use of the premises was commercial. Further inquiry was made by plaintiff, and further rejection was made by a letter dated January 13, 1977, refusing to provide gas service except for a single residential tap, provided the service was commenced prior to March 1, 1977.

Although the 1976 order expired by its terms in September 1978, and the 1971 and 1972 orders were labeled interim emergency orders, not until February 1979 did defendant make application for cancellation of the restrictions upon the supplying of gas, which application was granted by order of June 6, 1979. In the interim, this action had been commenced in May 1977. Accordingly, in June 1979, defendant notified plaintiff of the P.U.C.O. order. In October and

November 1979, plaintiff made application for gas service, but to the date of the stipulation, June 1980, no gas service had been provided to plaintiff, although defendant did, by letter in May 1980, send a letter to plaintiff indicating that service would be supplied as soon as plaintiff installed necessary gas piping on the premises.

Unfortunately, the record is somewhat sketchy in many regards. There is no direct statement that plaintiff constructed commercial buildings on the premises except for the indication in the last paragraph of the agreed statement of facts that no gas has been furnished "for the warehouses and other commercial buildings on the land in question." Presumably, these are the same warehouse and commercial buildings referred to in paragraph six of the complaint, which plaintiff indicated he intended to construct at that time.

The trial court apparently predicated both its original decision on summary judgment and the present decision upon an assumption that plaintiff should be precluded from any relief because he "purchased a substantial portion of the land * * * with full knowledge or at least imputed knowledge of the limitations on the right to tap in." However, the record clearly indicates to the contrary with respect to the vast majority of the land. Arguably, this might be true of the three parcels containing approximately six acres acquired in 1976 subsequent to the 1976 P.U.C.O. order. However, the fourth parcel containing 16.5 acres was acquired in 1973, long before the 1976 order. Were it not for the disclaimer in the 1976 P.U.C.O. order, this court would find as a matter of law that the right-of-way agreements involved constituted commitments to furnish gas within the contemplation of the 1971 and 1972 P.U.C.O. orders. Accordingly, knowledge of the limitation of those orders cannot be imputed where it required "clarification" by the 1976 order.

Plaintiff's 1976 application for service was made with respect to the 16.5-acre tract. There is no indication in the record, at least, that plaintiff ever made application for gas service with respect to the remaining three tracts comprising approximately 6 acres. However, the trial court centered its finding upon these 6 acres. The record is unclear as to which parcels were involved in the 1979 applications for service.

In its opinion, the trial court, sometimes out of context, quoted certain portions of our prior decisions in this case. Since these decisions attempted to set forth the applicable law, we shall quote therefrom, hopefully sufficiently in context to preserve the meaning, commencing with the following from the May 25, 1978 decision at page 1425-1426:

"Assuming that refusal of service is for a temporary period only, 18 months commencing March 1, 1977, pursuant to the commission order, it is extremely doubtful that plaintiff would be entitled to the remedy it seeks of cancellation of the easement. However, assuming that plaintiff has a real need for immediate gas service, defendant, by exercising the right authorized by the commission order to refuse to provide such service contrary to the right-of-way agreement is depriving plaintiff of a valuable contractual right.

"Section 5, Article XIII, Ohio Constitution, guarantees that, when a corporation appropriates a right-of-way, it must make full compensation therefor. The compensation for the easements in question consisted primarily of the granted right to receive gas service, if needed. It was not restricted to a single tap, nor restricted to residential use. Defendant has now so restricted such right pursuant to the Commission order, which it sought. If defendant wishes to continue to enjoy the benefits of the right-of-way easements, it cannot avoid the burdens thereof, even if justified by public need, unless it makes compensation for the right appropriated in order to meet such public need, in this case curtailment of gas service because of a shortage of gas. Accordingly, although defendant is not required to provide gas service to plaintiff (which plaintiff recognizes and does not seek in this action), defendant may be required to compensate plaintiff for depriving him of that valuable contractual right. Whether or not plaintiff is entitled to compensation, and if so the amount thereof, cannot be ascertained from that which has been submitted in support of the motion for summary judgment. However, the complaint does state a claim for such relief, even though it is doubtful as to whether plaintiff could be entitled to relief by way of cancellation of the easements or for an accounting. * * *"

Defendant filed a motion for reconsideration, and we attempted on June 29, 1978, to clarify certain portions of the opinion, stating in part at page 1907-1908:

"* * * Plaintiff does not seek to obtain the benefit of the consideration called for in the agreements involved but, rather, accepts the fact that performance by defendant has been rendered 'impossible' by the order of the Public Utilities Commission. Plaintiff does seek rescission of the agreements upon the

grounds of failure of consideration caused by such 'impossibility of performance.' Additionally, plaintiff seeks compensation for the rights of way involved in the event defendant desires to continue them after such rescission. * * *

"Defendant further contends that it has an absolute defense of impossibility of performance. While impossibility of performance constitutes a defense in an action to enforce a contract, it does not constitute a defense to an action to rescind a contract but, rather, may constitute grounds for rescission. * * *

"Where performance of a contract for one party thereto has been rendered impossible, the other party thereto ordinarily has a right to rescind. * * *"

Defendant then filed a motion contending that our judgment was in conflict with that of other courts of appeals and sought certification to the Supreme Court. In rejecting these claims of defendant, we noted in a decision of July 18, 1978: "Plaintiff herein does not seek to enforce contract rights but, rather, seeks to be relieved of his burdens under the contract since defendant cannot perform its obligation because of the PUCO order."

Turning specifically to the assignments of error, the first three relate to plaintiff's requested relief of rescission of the right-of-way easements. As to the three easements involving the parcels acquired by plaintiff in 1976, there is no direct evidence that plaintiff has been denied the exercise of the rights granted by the easements. The 1976 request for service specifically referred to the 16.5-acre parcel acquired by plaintiff in 1973 and made no mention of the other three parcels.

There is no question but that plaintiff was deprived of the right to use the gas from the pipeline on the 16.5-acre premises from October 1976 until June 20, 1979. Whether there should be deemed a temporary taking of this property right during this entire period may present a question of fact.

However, the issue of equitable relief by way of cancellation of the contract and return of the property poses a special question. Equitable principles must be applied. The stipulations indicate that the pipeline was constructed and that defendant has used it to convey gas since January 1965. While the evidence does not indicate the property or areas served by this gas pipeline, presumably there would be a disruption of service to others if the easement were cancelled and the gas pipeline ordered removed. True, defendant could commence appropriation proceedings, and a conditional order could be issued requiring cancellation of the easement and removal of the pipeline unless defendant commenced appropriation proceedings within a reasonable time. See Varwig v. Cleveland, Cincinnati, Chicago & St. Louis Rd. Co. (1896), 54 Ohio St. 455. Nevertheless, we find no abuse of discretion under the circumstances herein involved in denying equitable relief to plaintiff, other than possibly a mandatory injunction requiring defendant to commence an action to appropriate the easement rights which were used.

There are two reasons why we find this unnecessary in this case. First, plaintiff has sought requirement of appropriation of the easement rights as an alternative remedy, and the parties apparently intended to proceed to that issue if the liability issue be determined in favor of plaintiff. Secondly, we are dealing with a temporary taking, not a permanent taking. The taking in effect is of the consideration given for the easement, namely, the right to tap the gas line and use gas therefrom, not free of charge but upon payment of the usual rates. Thus, we are dealing with a property right, which presumably enhances the value of the real property involved. This right was taken only for a temporary period of time and presumably, since June 1979, defendant has been willing and able to fulfill its obligation. In addition, under general equity principles, plaintiff has not demonstrated that the remedy of compensation received through an appropriation proceedings will not be adequate.

Accordingly, we find no abuse of discretion in denying the injunctive relief and no error in any other respects claimed by the first three assignments of error, so that we must find them not to be well taken.

The fifth assignment of error involves the accounting issue as to which we expressed doubt in our 1978 decision. Plaintiff has presented no evidence and no authority which supports his contention that he is entitled to a portion of the profits received by defendant by the use of plaintiff's property for the gas pipeline to supply gas to others. Where there has been a taking of property, the usual measure of damages is the fair market value of the property taken plus any damages to the residue. Accounting for profits is not an ordinary measure of damages. Accordingly, the fifth assignment of error is not well taken.

By the sixth assignment of error, plaintiff contends that the trial court erred in finding the plaintiff not to be entitled

to consequential damages. As we indicated in our 1978 decisions, we did not view this as a breach-of-contract action for damages. Nor is there anything in the complaint so suggesting, and, as the trial court noted, there is no demand for a money judgment for damages for breach of contract. Even assuming that plaintiff be entitled to such damages, he has not sought them in this action, and we find no error on the part of the trial court in finding the issue of consequential damages not to be properly before that court in this case. The sixth assignment of error is not well taken.

The seventh assignment of error relates primarily to an effort to obtain attorney fees for the maintenance of this action. Attorney fees are not ordinarily recoverable in a civil action. Plaintiff has set forth no special circumstance or contractual provision entitling him to attorney fees in this case, nor has he set forth any controlling authority indicating his entitlement to attorney fees. Accordingly, the seventh assignment of error is not well taken, inasmuch as the other issues alluded thereto in argument in support of this assignment will be considered in connection with the fourth assignment of error.

The trial court found that plaintiff is not entitled to just compensation for the taking of the property right involved. Apparently, the trial court predicated its reasoning upon the application of the doctrine of de minimus non curat lex. Not only is this principle of doubtful applicability from a legal standpoint under the circumstances of this case, but it clearly is not applicable factually. There was not even a scintilla of evidence presented supporting the trial court's application of the doctrine of de minimus non curat lex. In other words, no evidence of the amount of compensation due plaintiff for the taking of his property was presented to the trial court for the simple reason that the case had been bifurcated, leaving that evidence to be presented at a subsequent time if the trial court found the liability issue in favor of plaintiff. On the other hand, there was no evidence whatsoever that the amount of that compensation would be so small and trivial that a court should not take cognizance thereof.

As we noted in our 1978 decisions, plaintiff has elected not to bring an action for breach of contract or a direct action for damages but, instead, has elected to bring this action to compel the determination of the compensation due plaintiff for defendant's pro tanto appropriation of plaintiff's property rights in order to meet a public need. While the appropriation was temporary, it was no less real, assuming that plaintiff operated in good faith in requesting gas service in 1976. There is no indication in the record that plaintiff did not act in good faith at that time or subsequently. The trial court correctly noted that Civ. R. 54(C) limits judgments for money only to a sum claimed in the demand, unless amended seven days prior to trial. Here, no money demand was made. However, Civ. R. 54(C) also provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled." The proper remedy in this case is the ordering of the impaneling of a jury to determine the just compensation due plaintiff for the pro tanto appropriation of plaintiff's property rights with respect to the 16.5-acre tract, there being no clear showing that plaintiff was deprived of any immediate use of the property right with respect to the other tracts. While the trial court is certainly free to disagree with the holding of this court in the 1978 appeal, it was required to follow the mandate issued upon that appeal and to follow the law as established thereby.

We repeat, however, that the compensation involved is not damages for breach of contract or accounting for profits. If plaintiff has such remedies, he did not elect to pursue them in this action.

The proceedings for determination of just compensation necessarily includes both compensation for the taking and damages to the residue. As to the latter, the appropriate measure of damages, since the taking is only temporary, is the value of the loss of use of the property right for the period involved, which in this case could be determined by the difference in the fair rental value of the premises with the right to use gas from the pipeline and the fair rental value of the property, with no right to use gas from the pipeline and no gas service available. Accordingly, the fourth assignment of error is well taken, and this cause must be remanded to the trial court for further proceedings.

For the foregoing reasons, the fourth assignment of error is sustained, and the other six assignments of error are overruled; the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this decision.

Judgment reversed and cause remanded.

REILLY and NORRIS, JJ., concur.