

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001019-MR
AND
NO. 2005-CA-001020-MR

JOHN BIANCHI, D.M.D.
and wife, SANDY BIANCHI;
BIANCHI REAL ESTATE
LIMITED PARTNERSHIP; and
LEWIS BIANCHI in his capacity
as General Partner, BIANCHI
REAL ESTATE LIMITED PARTNERSHIP APPELLANTS/CROSS-APPELLEES

APPEAL AND CROSS-APPEAL FROM HARLAN CIRCUIT COURT
v. HONORABLE RON JOHNSON, JUDGE
 CIVIL ACTION NOS. 01-CI-00061 & 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/CROSS-APPELLANTS

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; PAISLEY, SENIOR
JUDGE.¹

PAISLEY, SENIOR JUDGE: This appeal revolves around two
condemnation actions filed by the City of Harlan and the City of
Harlan Tourist and Convention Commission (hereinafter these

¹ Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

parties will be referred to collectively as "City of Harlan" or "city") against John Bianchi; Sandy Bianchi, his wife; Bianchi Real Estate Limited Partnership and Lewis Bianchi, John Bianchi's son, as a general partner in the Bianchi Real Estate Limited Partnership (hereinafter these parties will be referred to collectively as the "Bianchis"). In these condemnation actions, the city sought to take certain properties owned by the Bianchis.

This controversy started in early 2001 when the City of Harlan decided to build a civic center and water park (the civic center project). So, seeking land on which to build the civic center project, the City of Harlan, in February 2001, filed a condemnation action in Harlan Circuit Court against the Bianchis seeking to take some of their property. This property was located at 204-206 South Main Street in Harlan, Kentucky. The Bianchis leased out this property, and, at the time of the condemnation action, it was used as a pet shop (the pet shop property).

Then in March 2001, the City of Harlan filed another condemnation suit against the Bianchis. In the second action, the city sought to take more of the Bianchis' property. The property that was the subject of the second action was located at 200-202 South Main Street and at 208 South Main Street on the corner of West Clover Street and South Main Street. The

Bianchis used this property as a parking lot (the parking lot property).

According to the Bianchis, the parking lot property provided parking to the pet shop and to various other businesses in downtown Harlan such as: the New Townsite Restaurant located at 124 South Main Street, the Styles and Stuff Beauty Salon and apartments located at 126-128 South Main Street and the Shirt Shack print shop located at 130 South Main Street. These businesses were all located across the street from the parking lot property on the north side of Clover Street; thus, they were not adjacent to any of the condemned property. Moreover, each of these businesses leased its premises from the Bianchis.

In addition, the Bianchis insisted that the parking lot property also provided parking to the Harlan Funeral Home, a funeral home owned and operated by the Bianchis. The funeral home was located at 208-209 South Cumberland Avenue and had its own parking lot on the far west side of the funeral home that fronted upon South Cumberland Avenue. The back of the funeral home was immediately west and adjacent to the parking lot property. Moreover, the Bianchis claimed that the parking lot property provided parking to both Zion's Rentals located at 109 West Clover Street and the Black Motor Apartments located at 201 South Cumberland Avenue. These properties were located immediately west and adjacent to the condemnation properties as

well. Zion's Rentals leased its premise from the Bianchis, and the record revealed that the Bianchis owned the Black Motor Apartments.

Although the condemnation petitions were properly served upon the Bianchis, they did not file an answer contesting the city's right to condemn their property. However, in May 2001, the Bianchis did file a motion to consolidate the two actions. Also, in this motion, they asked the trial court to apply the "unity rule". The unity rule permits two or more tracts of land to be considered as one tract for the purpose of valuation in a condemnation action if the tracts are contiguous or in close proximity and they have a single owner and are used for a single purpose. Commonwealth of Kentucky, Department of Transportation, Bureau of Highways v. Crafton-Duncan, Inc., 668 S.W.2d 62, 64 (Ky. App. 1984). In the Bianchis' motion, they argued that the trial court should apply the unity rule to the parking lot property and the pet shop property since these tracts had a single owner and were used for a single purpose. In addition, the Bianchis argued that the unity rule should also be applied to the business properties on the north side of Clover Street and to the funeral home property, the Zion's Rentals property and the Black Motor Apartments property. According to the Bianchis, all of these properties were used along with the condemnation properties for a single purpose.

Thus, they should all be considered as one parcel of land for the purposes of condemnation. In June 2001, the trial court consolidated the two condemnation actions. And, in January 2002, the trial court held that the unity rule would be applied to the parking lot property and the pet shop property, but the court declined to apply the unity rule to the Bianchis' other properties.

On April 11, 2003, over two years after the condemnation actions had been initiated, the Bianchis moved the trial court for permission to file a late answer in order to contest the city's right to condemn. In their motion, the Bianchis alleged that the city had significantly scaled back the civic center project and could have obtained land elsewhere. On April 22, 2003, the trial court denied the Bianchis' motion and entered an interlocutory order and judgment authorizing the city to take possession of the parking lot property and the pet shop property and authorizing payment for the taking. Afterwards, both the city and the Bianchis filed exceptions from the valuation part of the judgment prompting the need for a trial.

In May 2003, the Bianchis sought permission to file a counterclaim against the city. In June 2003, the trial court granted permission, and the Bianchis subsequently filed a counterclaim for inverse condemnation. According to the Supreme Court of Kentucky, "inverse condemnation" refers to a lawsuit

filed against a governmental entity to recover the fair market value of property that the government has taken by its activities instead of taking the property through an eminent domain proceeding. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co., 678 S.W.2d 378, 381 (Ky. 1984). In their counterclaim, the Bianchis alleged that when the city took the pet shop property and the parking lot property, it also took and utilized all of the adjoining tracts of land, specifically: 124 South Main (the New Townsite Restaurant); 126-128 South Main Street (the Styles and Stuff Beauty Salon and apartments); 130 South Main Street (the Shirt Shack print shop); 208-209 South Cumberland Avenue (the Harlan Funeral Home and its adjacent parking lot); 109 West Clover Street (Zion's Rentals) and 201 South Cumberland Avenue (the Black Motor Apartments). According to the Bianchis, they owned the previously mentioned properties and these properties "were being utilized and in conjunction in unity and concert of purpose with the property taken by the [city]." The Bianchis requested the trial court to award them the difference in fair market value of the previously mentioned properties immediately before the city took the condemnation properties and immediately after the city took the condemnation properties.

Prior to trial, the trial court ordered the condemnation action and the Bianchis' inverse condemnation

counterclaim to be tried separately although both were to be heard by the same jury. Pursuant to that ruling, the condemnation action proceeded to trial on February 15, 2005. On February 18th, the jury entered its verdict and found that the difference in value of the parking lot and pet shop properties immediately before and immediately after the taking was \$120,000.00.

About a month later, the inverse condemnation counterclaim proceeded to trial on March 15, 2005. At the beginning of the second trial, the trial court dismissed the following properties from the Bianchis' counterclaim: 124 South Main (the New Townsite Restaurant); 126-128 South Main Street (the Styles and Stuff Beauty Salon and apartments); 130 South Main Street (the Shirt Shack print shop). The trial court dismissed these properties because they were not contiguous with the parking lot and pet shop properties. As a result, the jury only heard evidence regarding the funeral home and its parking lot, Zion's Rentals and the Black Motor Apartments. Furthermore, the trial court did not apply the unity rule to the remaining inverse condemnation properties. On March 17th, the jury entered its second verdict and found that the difference in value of the inverse condemnation properties immediately before and immediately after the city took the parking lot and pet shop properties was \$43,640.00.

On March 29, 2005, the trial court entered a judgment in the present case and awarded the Bianchis \$120,000.00 for the parking lot and pet shop properties and awarded the Bianchis \$43,640.00 for the remaining inverse condemnation properties. The Bianchis immediately filed an appeal from the judgment, and the City of Harlan filed a cross-appeal.

THE BIANCHIS' APPEAL

The Unity Rule

In their appellate brief, the Bianchis vigorously insist that the trial court erred as a matter of law when it did not apply the unity rule to the inverse condemnation properties² vis à vis the original condemnation properties.³ According to the Bianchis, the parking lot property provided parking to all of the inverse condemnation properties; thus, the Bianchis contend that the condemnation properties and the inverse condemnation properties were used for a single purpose. Thus, they argue that the trial court should have applied the unity rule so the jury could consider both the condemnation properties and the inverse condemnation properties as one parcel in

² The New Townsite Restaurant, the Styles and Stuff Beauty Salon and apartments and the Shirt Shack print shop (all on the north side of Clover Street) and the Harlan Funeral Home and its adjacent parking lot, Zion's Rentals and the Black Motor Apartments (all on the south side of Clover Street adjacent to the condemnation properties.

³ The parking lot property and the pet shop property.

determining the value of the Bianchis' property immediately before and immediately after the taking.

As previously stated, the unity rule "permits two or more parcels of land to be deemed one tract for the purpose of a condemnation when they are contiguous or in near proximity and are united in use and ownership." Commonwealth of Kentucky, Department of Transportation, Bureau of Highways v. Crafton-Duncan, Inc., supra. In the present case, there is no serious dispute that all the properties in question were owned by the Bianchis, either by John Bianchi or by the Bianchi Real Estate Limited Partnership. However, despite the Bianchis strenuous insistence to the contrary, the Bianchis' various properties were not used for a single purpose. For example, the various properties in the inverse condemnation action were used as a funeral home, as parking lot for said funeral home, as a retail rental business, as a hair salon, as a restaurant, as a print shop and as apartments. As for the condemnation properties, one property was used as a pet shop, and the other property was used to provide parking for the pet shop and for the inverse condemnation properties. At the trial court level and now on appeal, the Bianchis attempt to use the parking lot property as the glue to bind all of their properties together into a single parcel by claiming that they were all used for a single purpose; however, as the record clearly demonstrates, each property was

used for a different purpose. Since the Bianchis' various properties lacked a single purpose, the trial court did not err when it refused to apply the unity rule to the inverse condemnation properties.

In the alternative, the Bianchis insist that the trial court violated Kentucky Rules of Civil Procedure (CR) 42.02 by conducting separate trials. According to CR 42.01, a trial court may consolidate actions which involve a common question of law or fact. However, according to CR 42.02, a trial court may order separate trials for any claim, cross-claim, counterclaim or third-party claim if the trial court determines that separation will be in furtherance of judicial convenience or avoid prejudice. Moreover, it has long been held that such a decision is within the sound discretion of the trial court and will not be reversed on appeal absent abuse of that discretion. Malcolm v. Poland, 126 S.W.2d 1098, 1101 (Ky. 1930). In the present case, the Bianchis have simply failed to show that the trial court abused its considerable discretion when it ordered the inverse condemnation counterclaim to be tried separately from the original condemnation actions.

The Bianchis' Late Answer

According to the Bianchis, the trial court erred as a matter of law when it denied their motion to file a late answer. The Bianchis admit that they did not file an answer since they

did not initially desire to contest the city's right to take the properties. However, on appeal, they repeat their claim that they learned from an unnamed source that the city had scaled back the size of civic center project. Based on this and relying on CR 6.02, the Bianchis insist that they demonstrated the requisite excusable neglect to justify the need to file a late answer.

In the Commonwealth, condemnation actions are controlled by the Eminent Domain Act of Kentucky, KRS Chapter 416.540-990. KRS 416.600 specifically deals with the filing of answers. According to that statute, the property owner has twenty days from the date the petition was served to file an answer. The answer must be limited solely to the question of the petitioner's right to condemn. KRS 416.600. The statute contains no provision for the filing of a late answer. However, according to the pertinent part of CR 6.02,

[w]hen by statute . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]

As a can be seen, the enlargement of time is within the discretion of the trial court; thus, we will not reverse absent an abuse of that discretion. See Sims Motor Transport. Lines v.

Foster, 293 S.W.2d 226 (Ky. 1956). In the present case, the Bianchis alleged, more than two years after the petitions had been filed, that they had learned from an unnamed source that the city had scaled back the size of the civic center project. They insist that this constituted excusable neglect which would justify filing a late answer to contest the city's right to condemn. However, this allegation does not rise to the level of excusable neglect since, even if true, it does not strip the city of its right to condemn the Bianchis' properties for public use, especially since the city made use of all of the property it took from the Bianchis. We find that the Bianchis failed to show that the trial court abused its discretion; thus, we affirm the trial court's denial of their request to file a late answer.

Inverse Condemnation Properties on the North Side of Clover Street

The Bianchis argue that the trial court erred as a matter of law when it dismissed the following properties from their counterclaim: the New Townsite Restaurant property, the Styles and Stuff Beauty Salon/apartments property and the Shirt Shack print shop property. The trial court dismissed these properties since they were located on the north side of Clover Street, and they were not contiguous with the condemnation properties. Relying on Jones v. Commonwealth of Kentucky, Department of Highways, 413 S.W.2d 65 (Ky. 1967), the Bianchis

argue that even if different tracts of land are physically separated from one another they can still be considered as a whole if they are used for a single purpose. The Bianchis argue that the properties on the north side of Clover Street were used with the parking lot property for a single purpose.

We find that this allegation of error is merely a rehashing of the Bianchis' earlier unity rule argument; thus, we find it unnecessary to address its merits since we previously addressed the unity rule and, more importantly, since we reverse that part of the trial court's judgment as it relates to the Bianchis' counterclaim.

The City's Right to Condemn

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.

THE CITY OF HARLAN'S CROSS-APPEAL

The Bianchis' Counterclaim.

On cross-appeal, the City of Harlan argues that the trial court erred as a matter of law when it denied the city's motion to dismiss the Bianchis' counterclaim in its entirety. The city argues that to have a taking for inverse condemnation purposes there must be physical intrusion upon the property. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co., supra. The Stearns court defined a "taking" as "entering onto private property and devoting it to public use so as to deprive the owner of all beneficial enjoyment." Id. at 381. The city insists that it did not intrude, physically or otherwise, upon any of the inverse condemnation properties. Thus, there was no taking of these properties; thus, the trial court erred when it failed to dismiss the Bianchis' counterclaim.

In the present case, for the Bianchis to sustain an action for inverse condemnation, they had to show that they suffered an actual taking. Spanish Cove Sanitation, Inc., v Louisville-Jefferson County Metropolitan Sewer District, 72 S.W.3d 918, 921 (Ky. 2002). However, a property owner does not suffer a taking, for inverse condemnation purposes, unless he

shows that his rights as a landowner have been completely frustrated and he has been completely deprived of the use of his property. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co., supra. at 382. Or, in other words, a property owner suffers a taking when he loses all the economically beneficial uses of his property. Bobbie Preece Facility v. Commonwealth of Kentucky, Department of Charitable Gaming, 71 S.W.3d 99, 103 (Ky. App. 2001). In the present case, the Bianchis did not suffer an actual taking since the city did not physically intrude upon any of the inverse condemnation properties and since they lost none of the economically beneficial uses of said properties. In fact, the record demonstrates that, after the city took the condemnation properties, the Bianchis continued to use the inverse condemnation properties for the same purposes as they did prior to the taking. Since there was no physical intrusion and no lose of use by the Bianchis, the trial court erred as a matter of law when it denied the city's motion to dismiss the Bianchis' counterclaim for inverse condemnation. Thus, we reverse that part of the judgment as it relates to the Bianchis' counterclaim and remand for dismissal.

Jury Instructions and Witness Testimony

According to the city, the jury instructions regarding the Bianchis' counterclaim were defective. In addition, the

city complains that John Bianchi, Lewis Bianchi and their expert witness all testified to incompetent and irrelevant matters. However, since we reverse that part of the judgment as it relates to the Bianchis' counterclaim and remand for dismissal of the counterclaim, we need not address the city's last two allegations of error.

CONCLUSION

We affirm that part of the trial court's judgment as it relates to the original condemnation action. However, we reverse that part of the judgment as it relates to the Bianchis' counterclaim and remand for dismissal of the counterclaim.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANTS/CROSS-APPELLEES:

Rodney E. Buttermore, Jr.
BUTTERMORE & BOGGS
Harlan, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEES/CROSS-APPELLANTS:

Susan C. Lawson
LAWSON & LAWSON, P.S.C.
Harlan, Kentucky