1980

City of South Ogden, A Utah Municipal Corporation v. Noel Okamoto and Susie S. Okamoto, His Wife : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

CITY OF SOUTH OGDEN, A UTAH MUNICIPAL CORPORATION, Plaintiff-Appellant, vs. NOEL OKAMOTO and SUSIE S. OKAMOTO, His Wife, Defendants-Respondents.	)	Case No. 16904

BRIEF OF APPELLANT

Appeal from the Judgment of the Second Judicial

District Court of Weber County, State of Utah

Honorable John F. Wahlquist, Judge

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NATURE OF THE CASE

This is an appeal from the final order and judgment of the Second District Court, Weber County, Honorable John F. Wahlquist presiding, arising out of a condemnation action. The judgment had been stipulated with the matter of interest on the award reserved for determination on appeal. The City at first sought summary disposition under Rule 73 but this was denied.

NATURE OF RELIEF SOUGHT

Appellant City seeks a reversal of the interest portion of the award as contained in the judgment.

STATEMENT OF FACTS

Plaintiff City commenced this eminent domain proceeding seeking to condemn the unimproved real property belonging to defendant

for the purpose of construction of a new municipal building. Several adjoining tracts, all unimproved, were filed against at the same time. Appeals in those cases (Case No. 16902 and Case No. 16903) are here at the same time. They were consolidated for trial below.

Plaintiff in its complaint prayed for an order of occupancy but never did formally move the Court for an order, nor did it ever enter or take actual possession nor commence any construction.

Defendant or defendants in answering admitted all the material allegations of the complaint but denied that just compensation had been offered (though there was no allegation in the complaint that any offer had ever been made). The prayer in the answer requested an award of just compensation together with interest from the date of acceptance of service of summons.

The matter of just compensation for the taking was subsequently agreed upon and a stipulation entered into. This reserved for appeal the matter of determination of the date from which the interest should commence to run. Judgment was entered for the amount agreed upon together with interest from the date of acceptance of service. The principal amount has been paid. A final order of condemnation awaits the determination of the interest question pursuant to the stipulation. A fourth contiguous piece of property which had a house on it was also involved. This was the subject of a separate settlement however, and it is not involved in this appeal.

ARGUMENT

POINT ONE

INTEREST ON A CONDEMNATION AWARD RUNS FROM THE DATE OF ACTUAL POSSESSION OR ORDER OF OCCUPANCY, WHICHEVER IS EARLIER.

The judgment was drawn pursuant to the lower Court's pretrial order which found that the allegations of the City's complaint having been admitted and the City praying for occupancy even though no hearing was held nor any order entered, nor any possession actually taken, the value of the property was substantially destroyed since possession could have been taken anytime. Interest was therefore allowed from the date of acceptance of service of summons. In effect the position of the defendants and that of the lower Court is that by admitting the allegations in the complaint the defendants have, in effect, abandoned the property to the City.

The statute, 78-34-9 UCA 1953 as amended, is quite lengthly but provides in essence that the plaintiff may move the Court for an order of occupancy after commencement of the action the same to be granted or refused according to the equity of the case. If granted, the condemnor must post an amount equal to 75% of its appraised value of the premises. The right to just compensation shall then vest and be thereafter determined. The particular language as to interest is as follows:

> " . . .The rights of just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained

> and awarded as provided in section 78-34-10 and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate or 8% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the plaintiff or order of occupancy, whichever is earlier, to the date of judgment; . . . ."

The granting of an order is discretionary with the Court and is granted consistent with the equities in the case, or is accordingly refused. Utah Copper v. Montana Bingham Consol. Min. Co. 69 U. 423, 255 P. 672; State v. Denver & Rio Grande 8 U2d 236, 332 P.2d 926. Under the theory of respondent, it would not make any difference if the Court, upon application, were to refuse to grant the order if the other facts were present as in the instant case, i.e., the defendant's admission of the plaintiff's allegations coupled with the prayer for an order. In other words, if the City prays for an order and the defendant admits all allegations then the City has constructively possessed and is liable for interest from the date of service of summons whether the Court is formally moved for an order or not. No judicial pronouncement of this assertion has been found.

This Court has uniformly held, pursuant to the statute, that interest runs from the date of actual possession or order of occupancy whichever is earlier. Oregon Short Line R. Co. v. Jones, 29 U. 147, 80 P. 732; State v. Peek, 1 U2d 263, 265 P.2d 630; State v. Bettilyons Inc., 17 U2d 135, 405 P.2d 420. These cases are illustrative of the

though there are many others which follow the rule. See also the excellent discussion in Independent School Dist. v. C. B. Lauch Const. Co. 305 P.2d 1077 (Idaho) which cites the Utah cases and comments on various annotations discussing the rule. The Idaho statute is similar to that of Utah and the Idaho Court accordingly acknowledged no interest to be allowable prior to entry. This Court said in Peek at P. 269:

> "Appellants have cited no case and we have found none which holds that where under the state law the taking occurs when the possession of the property is actually surrendered, and not when the suit was commenced, that the failure to allow interest from the time of the commencement of the action constitutes a violation of these constitutional provisions, but a number of courts, including the Supreme Court of the United States, have held to the contrary '(citing authority)'. So we will adhere to our previous rule that interest is recoverable only from the time of taking possession of the property."

And again at Pages 267 and 268:

> "Appellants are not entitled to interest on the judgment prior to the time when actual possession was taken. This Court has uniformly so held (citing cases)."

The same quote came from Bettilyon at pages 137 and 138:

> "Interest accrues only from the time of actual taking of possession by occupation or entry or upon final judgment and order of condemnation (citing cases)."

Would anyone advising a condemning authority under our state of facts feel comfortable in telling it to go upon the ground without an agreement allowing entry or a formal order of the Court so authorizing. At this time the owner still retains the fee interest until it is

divested by judicial proceeding. Any physical entry outside the pr tection of either would be tortious.

We call attention again to Jones v. Oregon Short Line, supra. There the appellants argued that there was in effect a takir at the time of service of summons so compensation became due then and interest should be allowed from then until verdict. This Court held that in determining the interest claim it must be determined when there was a taking since the condemnor is not required to make compensation until the taking either actual or constructive. The material point therefore is when did the taking occur. Trial and verdict determining liability were held to constitute the taking not the service of summons. It was observed that Sec. 3599 R.S. Utah 19 (now 78-34-11) fixes the time with reference to which compensation i to be computed rather than fixing the time of taking. There was in Jones no physical entry nor occupation nor was any requested. Inter was held allowable therefore as of the time of taking.

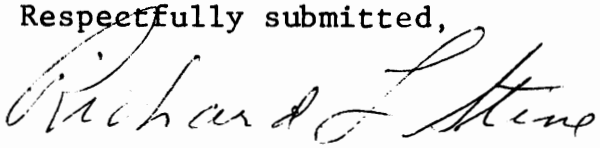
In the case at bar we submit there was no taking until the judgment. We, therefore, allow interest from the date of taking actual possession or entry of the order of occupancy under 78-34-9 or pursuant to the provisions of 78-34-13 after the lapse of 30 days after judgment. If respondent's position is correct then the proper must necessarily be deemed to have been taken at the time of accepta of service of summons. This does not accord with the decisions of this Court.

We have found no case which, under the facts of the one at bar, would say that a plaintiff has actually possessed the property involved. Actual according to its common meaning means existing in fact or reality and not false or apparent.

CONCLUSION

The lower Court erred in allowing the computation of interest from the date of acceptance of service of summons, actual possession not being taken nor any order of occupancy asked for nor granted.

Respectfully submitted,



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