

1982

Utah County v. Russell Olsen Brown et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

UTAH COUNTY,)	
)	
)	
Plaintiff and)	
Respondent,)	
)	
vs.)	Case No. 18358
)	
RUSSELL OLSEN BROWN, FAUN V.)	
GAMMON, LUCILLE GAMMON, JOYCE)	
GAMMON SWAPP and NORMA GAMMON)	
BROWN,)	
)	
Defendants and)	
Appellants.)	

BRIEF OF APPELLANTS

NATURE OF THE CASE

This is a condemnation proceeding brought against 16 named defendants. The parties to this appeal constitute five (5) of the 16 defendants. At the trial of the matter, the parties stipulated that the value of the property being condemned for road purposes had a value of \$9,250.00. The matter was submitted to the trial court on the issue of the amount of

interest to which the defendants were entitled on the amount to be awarded in the condemnation proceedings.

DISPOSITION IN THE LOWER COURT

The trial court ruled that the condemning authority was not required to pay interest on all of the funds deposited with the Clerk of the Court for all defendants in the proceeding and allowed interest only on the excess of said deposit.

RELIEF SOUGHT ON APPEAL

Defendants-Appellants ask this Court to rule that because of the noncompliance by the condemning authority with the provisions of §78-34-9, Utah Code Annotated, 1953, as amended, and failure to comply with the Order of Immediate Occupancy, the condemning authority is not entitled to reduce the amount of the award to which interest would be applied and that interest should be allowed on the entire award or, in the alternative, that interest should be awarded on all of the stipulated award except the proportionate share of funds deposited with the trial court to which these Defendants-Appellants would have been entitled.

STATEMENT OF FACTS

On June 1, 1978 Plaintiff-Respondent commenced proceedings in eminent domain against Defendants-Appellants and other defendants to condemn a strip of ground 50 feet wide by

500 feet long between 1000 West and 1100 West on 1st South in Provo City, Utah, for the purpose of establishing a road to county property lying west of the projected road (R. 3-7). On June 8, 1978 Defendants-Appellants were served with Summons and Complaint and a Motion for Order of Immediate Occupancy (R. 16, 18, 20, 22).

A hearing on the Motion for Order of Immediate Occupancy was held on June 16, 1978 (R. 51). Judge David Sam entered an Order of Immediate Occupancy on June 19, 1978 (R. 52-53). No findings and conclusions were made as a result of the hearing on the Motion for an Order of Immediate Occupancy.

The Complaint and Motion for an Order of Immediate Occupancy show that Plaintiff-Respondent was condemning for street purposes a 25 foot strip on each side of a center line 500 feet long (R. 5). The appraisal supplied by the condemning authority showed the value of the entire strip at \$33,500.00 (R. 144:7-26). Defendants-Appellants' portion of the property being condemned by Utah County is shown on the partial plat (R. 89).

Plaintiff-Respondent, the condemning authority, did not deposit 75% of the appraised value of the property as provided by §78-34-9, Utah Code Annotated, 1953, as amended, but instead deposited for the benefit of all of the 16 named condemnees \$6,300.00 pursuant to the Order of Immediate Occupancy entered by Judge David Sam on the 19th day of June, 1978 (R. 52-53).

Judge Sam's Order was conditioned upon the condemning authority depositing the \$6,300.00 from which all defendants, including the parties to this appeal, were to be entitled to withdraw amounts commensurate with their proportionate share of the property being condemned (R. 52 subparagraph a.).

Judge Sam further ordered:

. . .that within 10 days from the date of this Order, the plaintiff shall file with the Court information showing the amounts of land of each defendant being condemned in this action and the percentage of said amount in relation to the total land being condemned herein.

Plaintiff-Respondent did not file the information showing such percentage as required by its own Order of Immediate Occupancy until the final hearing of this matter on January 25, 1982, three and one-half years later (R. 105, Appendix A).

At the date set for the trial of the matter, the parties appeared in court through counsel and stipulated that the value of the property and the right-of-way to the property of these Defendants-Appellants taken by the condemnation proceedings had a value of \$9,250.00 (R. 137:2-4). The matter was submitted to the trial court upon the stipulated value of the property taken. The only issue to be decided by the trial court was the interest on the award to which Defendants-Appellants were entitled under the condemnation proceedings.

At the hearing on January 25, 1982, counsel for the condemning authority submitted to the trial court computations

showing that had Defendants-Appellants applied to the trial court for the funds on deposit, they would have been entitled to 27.8% of the \$6,300.00, or \$1,750.00 (R. 105). A copy of said computations is attached hereto as Appendix A. The parties stipulated that interest on the award should run from June 19, 1978 (R. 138:22-27).

Counsel for the condemning authority also made oral representations to the trial court that the condemning authority's calculation showed that the Defendants-Appellants in this proceeding would be entitled to 27.8% of the \$6,300.00 on deposit with the Clerk of the Court, which is a total of \$1,750.00 (R. 147:14-16). Counsel for Defendants-Appellants submitted a computation of interest through January 25, 1982, the date of the hearing, showing the amount of interest to which Defendants-Appellants are entitled through date of trial (R. 95).

The trial court entered its Memorandum Decision on January 26, 1982 (R. 96) ruling that Defendants-Appellants were not entitled to interest on the sum deposited with the Clerk of the Court on June 20, 1978. Based upon that decision, counsel for the condemning authority submitted, and the trial court signed, Findings of Fact, Conclusions of Law and Judgment dated February 3, 1982 (R. 97-99). The entire decreed portion of the judgment reads:

It is hereby ordered, adjudged and decreed that defendants, based on the authority of State v. Rohan, 28 Utah 2d 375, 503 P.2d 141, are not entitled to interest on the

sum of \$6,300.00 deposited with the Clerk of the Court on June 20, 1978.

On the 9th day of February, 1982 counsel for Defendants-Appellants filed a Motion to Amend Findings of Fact and Conclusions of Law and Judgment (R. 101-102) and a Memorandum in support thereof (R. 103). Attached to the Memorandum in support of the Motion to Amend Findings of Fact and Conclusions of Law, counsel for Defendants-Appellants filed with the trial court proposed Amended Findings of Fact and Conclusions of Law (R. 108-116). The trial court denied Defendants-Appellants' Motion to Amend Findings of Fact and Conclusions of Law and Judgment (R. 121). This appeal is brought to the Court upon the decision of the trial court denying the Motion to Amend Findings of Fact, Conclusions of Law and Judgment and of the Judgment rendered.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANTS-RESPONDENTS INTEREST ON THE \$6,300.00 DEPOSITED WITH THE COURT.

In this matter, the parties have stipulated that the amount to be awarded as the value of the property and the damages for the taking of their right-of-way to the property is \$9,250.00 (R. 137:2-4). Section 78-34-9, Utah Code Annotated, 1953, as amended, mandates regarding an Order of Immediate Occupancy as follows:

If the motion is granted, the court or judge shall enter its order requiring the

plaintiff as a condition precedent to occupancy to file with the clerk of the court a sum equivalent to at least 75% of the condemning authority's appraised valuation of the property sought to be condemned. (Emphasis added)

In this matter, on the representations of Plaintiff-Respondent's counsel that the entire property sought to be condemned had a value of \$33,500.00 (R. 144:7-26), the trial court required only a deposit bond in the amount of \$6,300.00, substantially less than the 75% of the appraised value. Seventy-five percent (75%) of the appraised value would have been \$25,125.00.

Section 78-34-9, Utah Code Annotated, 1953, as amended, provides that the court can fix the terms upon which the defendants must surrender possession of the property to the plaintiff.

Upon the filing of the petition for immediate occupancy the court shall fix the time within which, and the terms upon which, the parties in possession shall be required to surrender possession to the plaintiff. (Emphasis added)

The trial court in this matter entered an Order of Immediate Occupancy on the 19th day of June, 1978 (R. 52-53). This Order was prepared by the condemning authority's counsel and provided in paragraph (b):

(b) That within ten days from the date of this Order, the plaintiff shall file with the court information showing the amounts of land of each defendant being condemned in this action and the percentage of said amount in relation to the total land being condemned here (R. 53).

Until the date of the hearing, January 25, 1982,

Plaintiff-Respondent had never filed any documents showing the percentage of the land being held by Defendants-Appellants in relation to the total land being condemned. The document presented at the hearing on the matter to the trial judge by counsel for the condemning authority shows that the entire land being condemned was a 50 foot wide piece by 500 feet long, or a total of 25,000 square feet, and these Defendants-Appellants held a percentage of that totalling 27.8% of the total land being condemned (R. 105).

Counsel further verified said amounts to the trial court on that date when counsel for the condemning authority said:

Mr. Davis: Our calculations would show they would be entitled to 27.8% of the \$6,300.00 which is a total of \$1,750.00 reduced from the total award (R. 147:14-16).

If the condemning authority had complied with the Order of Immediate Occupancy and had filed those figures within the 10 day period in 1978, these Defendants-Appellants could have applied for and obtained the \$1,750.00 and, pursuant to §78-34-9, Utah Code Annotated, 1953, as amended, would not have been entitled to interest at the time of award on the \$1,750.00 amount that was obtainable or paid into court for them. As provided by §78-34-9, Utah Code Annotated, 1953, as amended:

. . .the said judgment shall include, as a part of the just compensation awarded, interest at the rate of 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; but interest shall not be allowed on so much thereof as shall have been paid into court.
(Emphasis added)

Thus, had the condemning authority complied with the order of the trial court in the Order of Immediate Occupancy, these Defendants-Appellants could have applied for and would have received in 1978 the \$1,750.00. However, because such was not filed with the trial court and was exclusively within the information available to the condemning authority as to the entire parcel they were condemning, these Defendants-Appellants did not even have the benefit of the \$1,750.00.

At the time of the hearing on January 25, 1982 and as a result of taking the matter under advisement, the trial court entered a ruling giving credit for the entire \$6,300.00 deposited by the condemning authority for all condemnees as against the award to these Defendants-Appellants only. The credit of the amount on deposit for all condemnees was charged entirely to these Defendants-Appellants. This reduction in the amount to which interest would be applied despite the fact that if Defendants-Appellants had applied for it, the only amount they could have obtained from the Clerk of the Court would have been the \$1,750.00 and despite the fact that the condemning authority did not supply the information on the amount Defendants-Appellants could have applied for until the final hearing date. The trial court erred in not awarding interest on \$9,250.00, the amount determined by stipulation.

These Defendants-Appellants should have been awarded interest on the entire amount awarded because their ability to obtain the \$1,750.00 deposited with the Clerk of the Court was frustrated by the failure of the condemning authority to allocate the proportionate shares until the day of the final hearing.

Because the trial court did not require the condemning authority to deposit with the trial court 75% of their own appraised value, but only required \$6,300.00 on deposit as against a total condemnation valued by the condemning authority at \$33,500.00, the provisions pertaining to the denial of interest on the amount deposited in the trial court should have no application herein. Defendants-Appellants should be awarded interest on the entire \$9,250.00.

The failure of the condemning authority to designate the proportionate share to which these Defendants-Appellants were entitled until the hearing on January 25, 1982, should estop the Plaintiff-Respondent from taking advantage of the suspension of interest by the deposit into court as provided by §78-34-9, Utah Code Annotated, 1953, as amended.

The case relied upon by the trial court and by the condemning authority in support of the reduction of the amount deposited from the full award in calculating interest is State of Utah By and Through its Road Commission v. Walter C. Rohan and Ella E. Rohan, 28 Utah 2d 375, 503 P.2d 141 (1972). In that case, the road commission had deposited with the trial court 75% of the appraised value of the land for the use and

benefit of the land owner and lien holder. The appeal of the condemnees in that case was predicated upon the fact that they had received no notice of the deposit nor a copy of the Order of Immediate Occupancy and, therefore, they should have interest on the amount that was deposited in the trial court. The trial court denied the interest on the basis that notice was not required.

In this case, the Order of Immediate Occupancy required the allocation to be filed with the trial court within 10 days showing the proportionate share of the deposited funds to which each of the condemnees was entitled. The order in the Rohan case did indicate the fact that they were entitled to their proportionate share and the deposit was made accordingly with the Clerk of the Court. In this case, the condemning authority failed to comply with the Order of Immediate Occupancy, failed to allocate the proportionate share to which these Defendants-Appellants would be entitled, and failed to file the 75% of the condemning authority's appraised value of the property. Such differences distinguish the case now before the Court from that in State of Utah By and Through its Road Commission v. Rohan, supra.

The Court is also cited to Utah Department of Transportation v. Hatch, 613 P.2d 764 (1980), wherein this Court ruled that the Order of Immediate Occupancy was invalid because there had been no findings made pursuant to the requirements of §78-34-9, Utah Code Annotated, 1953, as amended,

as to the necessity of the Order of Immediate Occupancy. An examination of the Order of Immediate Occupancy in this case entered by the trial court on June 19, 1978 shows that the trial court failed to make the findings required by the decision in Utah Department of Transportation v. Hatch, supra, and, therefore, the provisions of §78-34-9, Utah Code Annotated, 1953, as amended, have not been properly invoked entitling the condemning authority to a computation of interest, excluding the amount of the monies deposited with the trial court.

In 1978, the deposit into the trial court of the \$6,300.00 was made pursuant to court order, to be utilized by the numerous condemnees named in the proceeding. At the time of the hearing of this matter in January of 1982, the trial court ruled that the Defendants-Appellants would not be entitled to interest on the entire amount deposited with the trial court. This ruling was made despite the fact that only \$1,750.00 of that was deposited for the benefit of these Defendants-Appellants, and despite the fact that even that 27.8% equalling \$1,750.00 was not disclosed to Defendants-Appellants or filed with the trial court as required by the Order of Immediate Occupancy until the date of the trial, January 25, 1982, and thus was not available for these Defendants-Appellants to apply for until said date.

POINT II

THE JUDGMENT, AS DRAWN, IS IN ERROR

The trial court entered judgment denying the interest on the \$6,300.00 deposited with the trial court, but did not enter a judgment for the condemnation amount, \$9,250.00, which as any other judgment would bear interest at 12% per annum after the entry of the judgment (R. 99). To the date of the preparation of this Brief on Appeal, no judgment has been entered and no payment paid to the Defendants-Appellants as required by the statutes on eminent domain (§§ 78-34-13, 78-34-14, Utah Code Annotated, 1953, as amended).

Section 78-34-15, Utah Code Annotated, 1953, as amended, provides in part:

. . .the court must make a final judgment of condemnation, which must describe the property condemned and the purpose of such condemnation. A copy of the judgment must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purpose therein specified. (Emphasis added)

The judgment entered herein dealt solely with the issue of whether interest should be awarded on the \$6,300.00 deposited with the Clerk of the Court, but did not comply with the statute on entering a judgment of condemnation and made no award in conformity to the stipulation of the parties that the property condemned was valued at \$9,250.00 (R. 137:2-4).

On February 9, 1982, Defendants-Appellants' counsel filed a Motion to Amend Findings of Fact and Conclusions of

Law and Judgment (R. 101-102) and submitted proposed Amended Findings of Fact and Conclusions of Law which would include the description of the property taken from these Defendants-Appellants and would fix the amount of the award as required by §78-34-15, Utah Code Annotated, 1953, as amended. The trial court denied the Motion on March 4, 1982 (R. 121).

The failure of the condemning authority to enter a judgment in accordance with §78-34-15, Utah Code Annotated, 1953, as amended, resulted in the failure to establish of record the judgment amount to which judgment interest would apply in accordance with §15-1-4, Utah Code Annotated, 1953, as amended. This Court should now rule that the trial court must enter a final judgment of condemnation describing the property condemned, the purpose of the condemnation, and awarding Plaintiff-Respondent the stipulated \$9,250.00 value of the property taken together with interest thereon at eight percent (8%) per annum pursuant to §78-34-9, Utah Code Annotated, 1953, as amended, from June 20, 1978, until the judgment should have been entered on January 25, 1982, and that the judgment thereafter should bear interest at the rate of 12% per annum until paid.

CONCLUSION

This Court should reverse the trial court with instructions to enter a proper Order of Condemnation upon the said \$9,250.00 to bear interest at the rate of eight percent

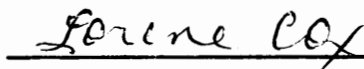
(8%) per annum from June 20, 1978 to January 25, 1982. Said judgment to bear interest from January 25, 1982 at the rate of 12% per annum until paid and awarding to the Defendants-Appellants' their costs in this proceeding.

Dated and signed this 7th day of July, 1982.


M. Dayle Jeffs

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Appellants was mailed to Lynn W. Davis, Deputy County Attorney, Attorney for Plaintiff-Respondent, Utah County Building, Provo, Utah 84601, by placing the same in the U. S. Mails, postage prepaid, this 7th day of July, 1982.


Lorene Cox

CALCULATIONS OF INTEREST

Pursuant to 78-34-9 U.C.A., \$6,300 was deposited with the Clerk of the Court on June 20, 1978.

A. No interest pursuant to 78-34-9, U.C.A., allowed on available \$6,300 deposited with Court --

\$8,750 award - \$6,300 = \$2,450
\$2,450 x .08 x 3.61 = \$708.00

B. Property subject to eminent domain

50 ft. x 500 ft. = 25,000 square feet

Lucille Gammon --

.0259 acres x 43,560 sq. ft/acre 1,128.20 sq. ft.

Russell Olsen Brown --

.0287 acres x 43,560 sq. ft/acre 1,250.17 sq. ft.

Don L. Gammon --

.1052 acres x 43,560 sq. ft/acre 4,582.51 sq. ft

Total sq. footage 6,960.88

6,960.88 = 27.8% of total
25,000.00 sq. ft.

- 27.8% x \$6,300.00 = \$1,750.00

\$8,750 - \$1,750 = \$7,000 x .08% = \$560.00
(June 19, 1978 - June 19, 1979)

\$560.00
(June 19, 1979 - June 19, 1980)

APPENDIX "A"

RUSSELL OLSEN
BROWN

S 89° 39' 59" E

S 89° 39' 59" E

55.44'
(0.0287 acre)

S 00° 20' 01" W 22.54'

55.44'

61.46'

S 00° 20' 01" W 8.85'

N 89° 42' 47" W 116.90'

N 89° 39' 59" W

73.61'

60.42'

(0.0259 acre)

S 00° 28' 31" W 18.65'

(0.1052 acre)

60.38'

190.51'
N 89° 39' 59" W

S 00° 20' 01" W 18.65'

N 89° 39' 59" W

DRIVEWAY

DRIVEWAY

DRIVEWAY

HOUSE

HOUSE

FAUN V. GAMMON

FAUN V. GAMMON

LUCILLE GAMMON
JOYCE GAMMON SWAPP
NORMA GAMMON BROWN

NORTH 268.70'

APPENDIX 'B'

W