

1993

William R. Olsen and Audrey Olsen v.
Redevelopment Agency of South Salt Lake City :
Brief of Appellee

Utah Court of Appeals

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Harold A. Hintze; Gardiner & Hintze; William D. Oswald; Oswald & Feil; Attorneys for Defendant/Appellant.

Craig G. Adamson; Eric P. Lee; Dart, Adamson & Donovan; Attorney for Plaintiffs/Appellees.

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Mary Noonan
Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WILLIAM R. OLSEN and	:	
AUDREY OLSEN,	:	
	:	
Plaintiffs/Appellees,	:	Case No. 930613-CA
	:	
v.	:	Argument Priority No. 15
	:	
REDEVELOPMENT AGENCY OF	:	
SOUTH SALT LAKE CITY,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEES

An Appeal from the
Order and Judgment for Costs of the
Third Judicial District Court
for Salt Lake County, State of Utah
The Honorable Richard H. Moffat Presiding

CRAIG G. ADAMSON
ERIC P. LEE
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101
Telephone: (801) 521-6383

Attorneys for Plaintiffs/Appellees

Harold A. Hintze
GARDINER & HINTZE
60 East South Temple, Suite 1680N
Salt Lake City, Utah 84111
Telephone: (801) 355-7900

William D. Oswald
OSWALD & FEIL
201 South Main Street, Suite 1200
Salt Lake City, Utah 84111
Telephone: (801) 355-9845

Attorneys for Defendant/Appellant

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IN THE UTAH COURT OF APPEALS

---oooOooo---

WILLIAM R. OLSEN and	:	
AUDREY OLSEN,	:	
	:	
Plaintiffs/Appellees,	:	Case No. 930613-CA
	:	
v.	:	Argument Priority No. 15
	:	
REDEVELOPMENT AGENCY OF	:	
SOUTH SALT LAKE CITY,	:	
	:	
Defendant/Appellant.	:	

---oooOooo---

JURISDICTION

Jurisdiction to hear this appeal from a final judgment of the Third Judicial District Court is conferred on this court by Utah Code Ann. §78-2a-3(2)(k) (1992).

ISSUE PRESENTED FOR REVIEW

The only issue presented for review is whether appellant Redevelopment Agency of South Salt Lake City (the "RDA") lacks the authority to acquire appellees William R. Olsen and Audrey Olsen's (the "Olsens") property as a result of the expiration of the applicable statute of limitations. This Court reviews the order granting the Olsens' Motion for Summary Judgment by determining whether the Olsens are entitled to judgment as a matter of law, without deference to the trial court's legal conclusions. *Arrow Indus. v. Zions First National Bank*, 767 P.2d 935, 936-37 (Utah 1988).

DETERMINATIVE LAW

The only determinative is the 1983 version of Utah Code Ann.

§11-19-9.5(5)(a):

(5) A redevelopment plan adopted after April 1, 1983, shall contain:

(a) A time limit not to exceed seven years from the date of the approval of the plan after which the agency may not commence acquisition of property through eminent domain;

STATEMENT OF THE CASE

The Nature of the Case

This is an action for declaratory relief. The Olsens sought judgment quieting title to their property through the court's declaration that the RDA lacks the authority to condemn or otherwise acquire the property.

The Olsens filed their Complaint on February 22, 1993. The Complaint states six causes of action, including a statute of limitations claim based on Utah Code Ann. §11-19-9.5(5)(a) (1983).

On April 7, 1993 the Olsens filed their Motion for Summary Judgment, asserting only the statute of limitations claim. The Olsens argued that the RDA lacks the power to condemn or otherwise acquire the subject property for failure to commence acquisition within the applicable seven year period.

The parties filed opposing and reply memoranda, and the matter was submitted for decision without oral argument. On May 25, 1993, Judge Richard H. Moffat issued his Minute Entry granting the

Olsens' Motion for Summary Judgment. The Order and Judgment for Costs appealed from was entered by Judge Moffat on June 29, 1993.

Statement of Facts

1. The Olsens have owned Lots 97 and 98, Block 1, Southgate Plat "A," located on Malvern Avenue in South Salt Lake City, Utah (the "property") since prior to 1977. (R. 29.)¹

2. On November 20, 1985, the RDA adopted a redevelopment plan which authorizes the acquisition of approximately twenty acres in South Salt Lake City through eminent domain. The property is part of the twenty acres. As required by Utah Code Ann. §11-19-9.5(5)(a) (1983), the redevelopment plan contains several "limitations on the power" of the RDA including:

A time limit of 7 years from the date of the approval of the plan after which the Agency shall not commence acquisition of property through eminent domain.

Metro-Center Neighborhood Development Plan at 12. (R. 29.)

3. The RDA's statutory power of eminent domain expired not later than December 3, 1992, seven years after the effective date of the redevelopment plan.² (R. 29.)

¹ The references to the record are, for the most part, references to the statement of "undisputed Material Facts" found in the Olsens' Memorandum in Support of Motion for Summary Judgment. (R. 28 - 63.) The RDA disputed none of the statements in the Olsens' "Undisputed Material Facts." (R. 64 - 67, 134.)

² Although the redevelopment plan was adopted on November 20, 1985, the RDA claims its effective date is December 3, 1985.

4. On or about November 10, 1992, the RDA filed a condemnation lawsuit in the Third District Court captioned *Redevelopment Agency of South Salt Lake City v. Olsen & Peterson Consulting Engineers*, Civil No. 920906324 (the "condemnation case"). The case was assigned to Judge John A. Rokich. (R. 30.)

5. The condemnation case purportedly concerned lots 9, 10, 11, 12, 97 and 98, Block 1, Southgate Plat "A." (R. 30.)

6. Olsen & Peterson Consulting Engineers is the only named defendant in the condemnation case although Olsen & Peterson Consulting Engineers only owns four of the six lots sought to be condemned in that case. The two lots not owned by Olsen & Peterson Consulting Engineers, Lots 97 and 98, are owned by the Olsens and is the property which is the subject of this action. (R. 30.)

7. The RDA never sued the Olsens. The RDA took no steps to make the Olsens parties in the condemnation case until filing a motion to amend on March 10, 1993, more than three months after the expiration of the statute of limitations. The RDA claims that it failed to sue the Olsens within the limitations period as a result of an "inadvertent" omission. (R. 30.)

8. The RDA knew that the Olsens owned the property at least two years before the RDA filed its complaint in the condemnation case. On October 24, 1990, the RDA passed a resolution authorizing the acquisition of the property by condemnation. The resolution, a copy of which is attached to the RDA's Complaint in the

condemnation case, lists the Olsens as "owners of record."
(R. 30.)

9. Prior to 1977, Mr. Olsen was a principal of Olsen & Peterson Consulting Engineers. In 1977 he sold his interest in the corporation and retired. (R. 31.)

10. Since 1977, the Olsens have had no relationship with Olsen & Peterson Consulting Engineers other than as landlords of the property, which is leased to Olsen & Peterson Consulting Engineers. The Olsens own no stock in the company, have no role in its management, receive no income from the company and have not been employed by the company since 1977. (R. 31.)

PROCEDURAL HISTORY

The argument section of the RDA's opening brief makes confusing references to proceedings in the condemnation case, *Redevelopment Agency of South Salt Lake City v. Olsen & Peterson Consulting Engineers*, Civil No. 920906324.³ A brief review of the proceedings in the condemnation case will aid the Court's understanding of this matter.

The RDA filed its Complaint in the condemnation case on November 10, 1992. The defendant in the case, Olsen & Peterson Consulting Engineers, answered the Complaint on December 18, 1992,

³ For example, the RDA's conclusion asks this Court to "allow the RDA to amend its Complaint to assert as additional defendants in the condemnation proceedings WILLIAM AND AUDREY OLSEN." Brief of Appellant at 10.

affirmatively alleging "that it has no ownership interest in lots 97 and 98, but only a leasehold interest." (R. 99.) Discovery proceeded until, on March 10, 1993, the RDA filed its motion requesting leave to amend and bring in the Olsens as defendants. (R. 104 - 106.)

In the interim, the Olsens had filed their Complaint in the present matter. (R. 2 - 7.) On March 18, 1993, the RDA filed their Motion to Consolidate in the condemnation case, seeking consolidation with this case. (R. 118 - 123.)

The Olsens filed their Motion for Summary Judgment in this case on April 7, 1993. The RDA's opposing memorandum, filed on April 22, 1993, requests the trial court to withhold its decision on the Motion for Summary Judgment until Judge Rokich's decision on the then pending Motion to Amend and Motion to Consolidate. On May 7, 1993, Judge Rokich issued a Minute Entry in which he reserved ruling on the motions pending Judge Moffat's ruling on the Olsens' Motion for Summary Judgment. (R. 241.)

On May 25, 1993, Judge Moffat issued his minute entry granting the Olsens' Motion for Summary Judgment. On June 17, 1993, the parties entered into a stipulation in the condemnation case agreeing that the Motion to Amend and Motion to Consolidate were rendered moot by Judge Moffat's ruling on the Motion for Summary

Judgment.⁴ The parties jointly moved Judge Rokich for an order denying the Motion to Amend and Motion to Consolidate, and Judge Rokich granted the motion on July 13, 1993.⁵

SUMMARY OF ARGUMENTS

Utah Code Ann. §11-19-9.5(5)(a) (1983), provides that a redevelopment plan adopted after April 1, 1993, "shall contain a time limit not to exceed seven years from the date of the approval of the plan after which the agency may not commence acquisition of property through eminent domain."⁶ The redevelopment plan which authorized the RDA to acquire the property that is the subject of this lawsuit was approved no later than December 3, 1985. Consequently, the RDA's statutory power of eminent domain expired on December 3, 1992, long before the RDA took any action to acquire the property from the Olsens.

The RDA claims that it did not sue the Olsens because, through "inadvertence," it mistakenly believed that Olsen & Peterson Consulting Engineers owned all six lots. (R. 112) The RDA's "inadvertent" mistake does not excuse its failure to sue the Olsens, and does not override the policy of finality behind the

⁴ Certified copies of the Stipulation and the resulting Order in Judge Rokich's case are included in the addendum to this brief.

⁵ *Id.*

⁶ Utah Code Ann. §17A-2-1210.5 (1993) is the current version of the statute of limitations. Section 17A-2-1210.5 imports a five year limitation on projects for which preliminary plans are adopted after April 1, 1993.

statute of limitations. The trial court was correct in so ruling as a matter of law.

ARGUMENT

POINT I: THE EMINENT DOMAIN STATUTE DOES NOT MANDATE JOINDER OF OWNERS WHO ARE BEYOND THE REACH OF THE STATUTE.

The only issue presented by the Olsens' motion was whether the statute of limitations barred any attempt to acquire the property by power of eminent domain. The RDA conceded the applicability of the statute, but argued that certain exceptions to the statute should apply to allow joinder of the Olsens as defendants in the condemnation case.

The RDA makes the same arguments on appeal. For example, the RDA argues that since eminent domain proceedings "must include, as defendants, all persons who are 'owners' . . . of the property being acquired," and the condemnation case is an eminent domain proceeding, Mr. and Mrs. Olsen as "owners" must be joined. Brief of Appellant at 7. The reasoning is circular. Obviously, if the RDA is to acquire property through eminent domain, it must sue the owners of the property. But the issue is not who must be joined, but whether the RDA has the authority to acquire the property after the expiration of the statute of limitations. Having failed to sue the owners within the seven year period in which it is empowered to bring a condemnation suit, the RDA's authority to acquire the property through eminent domain is extinguished.

The RDA's argument based on the indispensable party doctrine found in U.R.Civ.P. 19(a) is also circular. Again, the argument is premised on the assumption that the RDA is entitled to take the Olsens' property. Obviously, if the RDA still has eminent domain authority over the property, Mr. and Mrs. Olsen, as owners, are indispensable parties. But the assumption is false. The RDA's authority to acquire the property expired prior to the time it sought leave to add Mr. and Mrs. Olsen as parties in the condemnation case.

POINT II: THE RELATION BACK DOCTRINE DOES NOT ALLOW THE ADDITION OF NEW PARTIES AFTER THE RUNNING OF THE STATUTE OF LIMITATIONS.

The RDA next argues that its claim against the Olsens should relate back to the filing of the complaint in the condemnation case pursuant to U.R.Civ.P. 15(c). Rule 15(c) does not apply under these circumstances:

Generally Rule 15(c), U.R.C.P., will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings - - whether plaintiff or defendant. This [is] for the reason that such would amount to the assertion of a new cause of action, and if such were allowed to relate back to the filing of the complaint, the purpose of a statute of limitation would be defeated.

Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976).

A narrow exception to this rule exists where the old and new parties have an "identity of interest." *Id.* In *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214 (Utah 1984), the Utah Supreme Court defined the phrase as follows:

"Identity of interest" as used in this context means that the parties are so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other.

Id. at 217. The Court in *Perry* cites *Spiker v. Hoogeboom*, 628 P.2d 177, 179 (Colo.App. 1981) for the proposition that an "identity of interest" exists between past and present forms of the same enterprise. *Spiker* involved an action by a homeowner against a construction company to recover for structural defects. After discovering during a deposition that the construction company was not incorporated until after the homeowner purchased the property, and that prior to incorporation the company was operated as a partnership, the homeowner filed a motion to substitute the individual partners for the corporate defendant. After granting the homeowner's motion, the trial court granted summary judgment for the individual partners based upon a failure to substitute the individual partners within the applicable statute of limitations.⁷

The Court of Appeals reversed, noting that a sufficient "identity of interest" existed between the corporation and the partnership:

Here, there is sufficient identity of interest between the corporation and the partnership to demonstrate that the partnership would not be prejudiced in being substituted for the corporation as defendant. The Hoogebooms were the sole partners in the Hoogeboom Construction Co. and are shareholders in the same business enterprise which was incorporated under the same name. . . . Moreover, service was made on a partner,

⁷ *Spiker v. Hoogeboom*, 628 P.2d 177, 178 (Colo.App. 1981).

albeit in his position as president of the corporation. Notice to a partner serves as notice to the partnership. . . . In addition, defendants misled plaintiff into thinking that the corporation was the proper party by admitting in the answer that the corporation sold the house to plaintiff.

Id. at 179.

No similar identity of interest exists in this case. Although Mr. Olsen was a principal of Olsen & Peterson Consulting Engineers some sixteen years ago, he did not retain an interest in the corporation when he retired in 1977. Furthermore, service was never made on Mr. Olsen, unlike the partner and former corporate president of the defendant in *Spiker*. Finally, the RDA was not misled into thinking that Olsen & Peterson Consulting Engineers was the only proper party in the condemnation case. Unlike the defendants in *Spiker*, Olsen & Peterson Consulting Engineers asserted in its answer that it was not the owner of Lots 97 and 98. (R. 99)

Olsen & Peterson Consulting Engineers' admission that it did not own the lots was, of course, a fact already known to the RDA. This prior knowledge brings the case squarely within the holding of the Ninth Circuit Court of Appeals in *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853 (1986), a case cited with approval and discussed at length by this Court in *Vina v. Jefferson Ins. Co. of New York*, 761 P.2d 581, 587 (1988). In *Kilkenny*, a motion to amend was denied because the plaintiff knew the identity of the new defendants prior to the expiration of the statute of limitations. Therefore, it

could not be said that the proposed new parties knew or should have known that, but for a mistake, they would have been named as defendants. The court concluded that:

Rule 15(c) was intended to protect the plaintiff who mistakenly names a party and then discovers, after the relevant statute of limitations has run, the identity of the proper party. Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party. . . . (Emphasis added.)

Kilkenny, 800 F.2d at 857-8. The RDA knew the Olsens owned the property prior to the running of the limitations period but simply ignored the knowledge. The identity of interest doctrine was never intended to apply in these circumstances.

In summary, the purpose of the statute of limitations is outweighed by the purpose of the relation back doctrine in the proper case. Thus, an amendment will relate back despite the expiration of the limitations period when an "identity of interest" exists. In the condemnation case, however, the purpose of Rule 15(c) is not advanced. There is no "identity of interest." Accordingly, there is no reason to thwart the purpose of the statute of limitations. The RDA knew of the Olsens as potential parties yet failed "to respond in a reasonable fashion. . . ." *Id.* The trial court was correct in its ruling on this issue.

POINT III: FAILURE TO JOIN SHOULD NOT BE CURED BY AMENDMENT WHEN THE STATUTE OF LIMITATIONS HAS RUN.

The RDA cites U.R.Civ.P. 15(a) for the proposition that leave to amend should be "readily granted." Under normal circumstances,

this is true. Under normal circumstances, the RDA's citation to *Nichols on Eminent Domain* for the proposition that failure to join is customarily cured by amendment may be persuasive.

Under the unique circumstances here, however, different rules apply. First, the specific provisions of Rule 15(c) and its interpreting case law govern over the more general provisions of Rule 15(a). *Perry v. Pioneer Wholesale Supply Co.*, 681 P.2d 214, 216 (Utah 1984). When the issue is whether an amendment will relate back, the general proposition that leave to amend should be "readily granted" is considered, if at all, only after application of the relation back rules. Second, the reference to *Nichols on Eminent Domain* is nothing more than a restatement of Rule 15(a) in the eminent domain context. What matters in this case is that *Nichols* does not propose that failure to join all owners may be cured by amendment when the statute of limitations has run.

CONCLUSION

The trial court was correct in concluding as a matter of law that the power of eminent domain granted to the RDA by statute expired no later than December 3, 1992, months before any action by

the RDA to bring a condemnation proceeding against the Olsens. The trial court's Order and Judgment for Costs should be affirmed.

DATED this 13 day of December, 1993

DART, ADAMSON & DONOVAN



CRAIG G. ADAMSON
ERIC P. LEE

CERTIFICATE OF MAILING

I hereby certify that on the 13 day of December, 1993, a true and accurate copy of the foregoing was mailed, postage prepaid, to the following:

Harold A. Hintze
GARDINER & HINTZE
60 East South Temple, Suite 1680N
Salt Lake City, Utah 84111

William D. Oswald
OSWALD & FEIL
201 South Main Street, 12th Floor
Salt Lake City, Utah 84111



ADDENDUM

Craig G. Adamson (0024)
Eric P. Lee (4870)
DART, ADAMSON & DONOVAN
Attorneys for Defendant
310 South Main Street, Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

FILED
To
District

JUL 15 1993

By
C. W. Peters
Clerk of Court

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

REDEVELOPMENT AGENCY OF	:	
SOUTH SALT LAKE CITY,	:	STIPULATION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
OLSEN & PETERSON CONSULTING	:	Civil No. 920906324
ENGINEERS,	:	
	:	Judge John A. Rokich
Defendant.	:	

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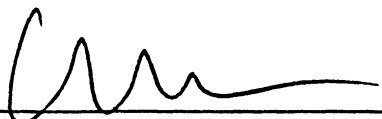
The parties hereby stipulate as follows:

1. On May 25, 1993, the Honorable Richard H. Moffat granted plaintiffs' Motion for Summary Judgment in *William R. Olsen and Audrey Olsen v. Redevelopment Agency of South Salt Lake City*, Case No. 930900965 PR.
2. As a result, the Motion for Leave to File Amended Complaint and Motion to Consolidate filed in this matter by plaintiff are rendered moot.

3. The parties jointly move the Court for an order denying the Motion for Leave to File Amended Complaint and Motion to Consolidate.

DATED this 17 day of June, 1993

DART, ADAMSON & DONOVAN



CRAIG G. ADAMSON

ERIC P. LEE

Attorneys for defendant

DATED this ____ day of June, 1993

GARDINER & HINTZE

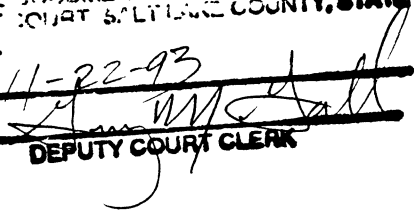


HAROLD A. HINTZE

Attorneys for plaintiff

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OF UTAH.

DATE: 11-22-93



DEPUTY COURT CLERK

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Third Judicial District

JUL 15 1993

Craig G. Adamson (0024)
Eric P. Lee (4870)
DART, ADAMSON & DONOVAN
Attorneys for Defendant
310 South Main Street, Suite 1330
Salt Lake City, UT 84101
Telephone: (801) 521-6383

SALT LAKE COUNTY
By [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

---oooOooo---

REDEVELOPMENT AGENCY OF
SOUTH SALT LAKE CITY,

Plaintiff,

v.

OLSEN & PETERSON CONSULTING
ENGINEERS,

Defendant.

:
:
:
:
:
:
:

ORDER

Civil No. 920906324

Judge John A. Rokich

---oooOooo---

Pursuant to the Stipulation of the parties and good cause appearing, it is hereby
ORDERED that plaintiff's Motion for Leave to File Amended Complaint and plaintiff's
Motion to Consolidate are denied.

DATED this 13 day of July, 1993.

BY THE COURT:

CERTIFY THAT THIS IS A TRUE COPY OF AN
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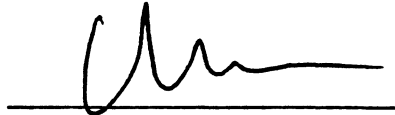
[Signature]
John A. Rokich, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17 day of June, 1993, a true and accurate copy of the foregoing was mailed, postage prepaid, to the following:

Harold A. Hintze
GARDINER & HINTZE
60 East South Temple, Suite 1680N
Salt Lake City, Utah 84111

William D. Oswald
OSWALD & FEIL
201 South Main Street, 12th Floor
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to be 'W. D. Oswald', is written above a horizontal line.