

1993

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

Utah Court of Appeals

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DOCKET NO. 930613-CA

IN THE UTAH COURT OF APPEALS

WILLIAM R. OLSEN and
AUDREY OLSEN,

Plaintiffs/Appellees,

vs.

REDEVELOPMENT AGENCY OF
SOUTH SALT LAKE CITY,

Defendant/Appellant.

Case No. 930613-CA

Priority No. 15

BRIEF OF APPELLANT

APPEAL FROM ORDER AND JUDGMENT FOR COSTS
GRANTING SUMMARY JUDGMENT ISSUED BY THE
THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY
HONORABLE RICHARD H. MOFFAT

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Attorneys for Defendant/
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FILED
Utah Court of Appeals

Attorney for Plaintiff/Appellee

NOV 12 1993

Mary T. Noonan
Clerk of the Court

IN THE UTAH COURT OF APPEALS

WILLIAM R. OLSEN and)	
AUDREY OLSEN,)	
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Plaintiffs/Appellees,)	
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)	Case No. 930613-CA
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STATEMENT OF JURISDICTION

This is an appeal from the granting of a Summary Judgment in a District Court pursuant to UTAH CODE ANN. §78a-2a-3. It has been assigned by the Supreme Court to the Court of Appeals.

STATEMENT OF ISSUES

The trial court erred in granting a Summary Judgment determining that an eminent domain proceeding against the Plaintiffs was barred by the Statute of Limitations.

STANDARD OF REVIEW

The standard of review is that no deference is given to the Trial Court's application of law and the Appellate Court shall consider the issue and review the matter for correctness (Sorenson v. Beers, 585 P.2d 458 (Utah 1978)).

DETERMINATIVE PROVISIONS

UTAH CODE ANN. §78-34-6(2):

"The Complaint must contain:

* * *

- (2) the names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants."

Utah R. Civ. P. 19A:

"Persons to be jointed if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

Utah R. Civ. P. 15(a):

"Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise order."

Utah R. Civ. P. 15(c):

"Relation back of amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

NATURE OF THE CASE

This is an action filed by the Plaintiffs to prevent them from being joined in a companion case as parties in an eminent domain proceeding. The Plaintiffs are the record owners of two lots contiguous with four other lots utilized by a business and located within a redevelopment project area. The RDA commenced a condemnation action seeking to acquire title to the property, but inadvertently omitted an owner, William and Audrey Olsen. The condemnation complaint fully described the property being condemned, but did not name all of the parties in interest. The agency filed a Motion to Amend the complaint to add the additional omitted parties. The Olsens commenced this independent action seeking to bar eminent domain proceedings based upon the Statute of Limitations. The Court granted the Olsens' Motion for Partial Summary Judgment and determined that the RDA was barred from filing this condemnation action.

SUMMARY OF THE ARGUMENT

The District Court erred in granting Partial Summary Judgment in not allowing the RDA to amend its condemnation complaint to assert parties not originally named. No prejudice would result to the landowners who were fully aware and apprised of the condemnation proceedings.

STATEMENT OF UNDISPUTED FACTS

1. The Defendant ("RDA") is presently involved in completing a Redevelopment Project known as the Metro Center Project Area, a 20+ acre project involving an FHP Hospital and related facilities located in South Salt Lake City between 2550 South and 2700 South and State and Main Streets (R.-23).

2. The Project was originally composed of 51 separate parcels of property, and some parcels themselves being composed of several small lots (see attached plat taken from the blight analysis of the Project Area--a public document) (R.71).

3. Lots 9, 10, 11 and 12 are contiguous pieces fronting on 2700 South, and Lots 97 and 98 are contiguous to Lots 9 and 10 in front on Malvern Avenue. At the time of condemnation, and for several years preceding, the six "lots" were at all times used as one unit by OLSEN & PETERSON CONSULTING ENGINEERS. The Appellee WILLIAM R. OLSEN was the "OLSEN" in that firm. Fee title to the property is held as follows: Lots 9, 10, 11 and 12--OLSEN & PETERSON CONSULTING ENGINEERS. Lots 97 and 98, WILLIAM and AUDREY OLSEN. Lots 97 and 98, WILLIAM and AUDREY OLSEN, Lessor, OLSEN & PETERSON CONSULTING ENGINEERS, Lessee.

4. Prior to commencing condemnation proceedings to acquire the above-described six lots, the RDA had the property appraised and made an offer to the "owners" thereof:

- (2) The agency herewith offers you, OLSEN & PETERSON CONSULTING ENGINEERS, INC., a Utah corporation, and WILLIAM R. and AUDREY R. OLSEN, hereinafter designated the "Sellers," the sum of ONE HUNDRED FORTY THOUSAND DOLLARS as the purchase price for fee title in the property" (R.205)

5. Said offer was rejected, resulting in the filing of the Condemnation action identified above. Said Condemnation action clearly identified the property sought to be acquired:

EXHIBIT "A"

LEGAL DESCRIPTION OF PROPERTY TO BE ACQUIRED

Lots 11 and 12 Block 1, Southgate Plat A
Lots 9 and 10 Block 1, Southgate Plat A
Lots 97 and 98 Block 1, Southgate Plat A

(See Exhibit 2, Exhibit "A" thereto.)

Said COMPLAINT erroneously named as "owners," however, only OLSEN & PETERSON CONSULTING ENGINEERS, the fee owners of four of the six lots and the lessee of 2 of the lots. It did not originally name WILLIAM and AUDREY OLSEN, the fee owner and lessor of Lots 97 and 98 as parties Defendant.

6. On December 12, 1992, OLSEN & PETERSON CONSULTING ENGINEERS filed an ANSWER to the Condemnation action, and affirmatively alleged that it had only a leasehold interest in Lots 97 and 98 (R.98).

7. Upon learning of the omission of WILLIAM and AUDREY OLSEN as parties defendant to the Condemnation action, Plaintiff's

counsel immediately ordered a new title search of the property to confirm the actual ownership. (The title report used in the original filing was two years old, and also included reference to "Allen J. and Sharon Steadman," as possible claimants of some interest in the property.) A new title report was received in March, 1993 and a Motion was filed in the Condemnation action seeking to add WILLIAM and AUDREY OLSEN as additional parties defendant to the Condemnation action (R.104).

8. WILLIAM and AUDREY OLSEN, in the meantime, filed this separate action seeking, by declaratory judgment, a determination that they cannot be named as Defendants in any condemnation action involving Lots 97 and 98.

9. The RDA filed a MOTION TO CONSOLIDATE this case with the Condemnation Action.

10. The District Court granted a partial summary judgment prohibiting the naming of the OLSENS as additional parties defendnat in the condemnation proceeding.

ARGUMENT

I.

AN ACTION IN EMINENT DOMAIN MUST INCLUDE, AS DEFENDANTS, ALL PERSONS WHO ARE "OWNERS" AND "CLAIMANTS" OF THE PROPERTY BEING ACQUIRED.

UTAH CODE ANN. §78-34-6(2) provides as follows:

The Complaint must contain: . . . (2) the names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled Defendants. (emphasis added)

In this matter, the RDA named the tenant and occupant of Lots 97 & 98, to wit OLSEN & PETERSON CONSULTING ENGINEERS; but has failed to name the "fee owner/lessor" of said two lots, to wit William R. Olsen and Audrey Olsen. Said omission was inadvertent in that the Plaintiff did not transmit to its legal counsel the entire title report on the 6 total lots being condemned prior to the Complaint being filed herein.

II.

PERSONS CLAIMING AN INTEREST IN REAL ESTATE ARE NECESSARY AND INDISPENSABLE PARTIES TO AN ACTION IN EMINENT DOMAIN.

Utah R. Civ. P., Rule 19(a) provides, in pertinent part, as follows:

"A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of an action shall be joined as a party in an action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the

disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest."

III.

THE PROPOSED ADDITIONAL DEFENDANTS ALREADY HAVE IMPUTED NOTICE OF THE ACTION AND ARE NOT PREJUDICE BY JOINDER.

"Under Utah R. Civ. P. 15(a), leave to amend pleading 'shall be freely given when justice so requires.' Utah R. Civ. P. 15(c) states: '[w]henver the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence, set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.' Relation back is allowed under the rules even if a statute of limitations has run during the intervening time. Meyers v. Interwest Corp., 632 P.2d 879 (Utah 1981). In considering motions to amend pleadings, primary considerations are whether parties have adequate notice to meet new issues and whether any party receives an unfair advantage or disadvantage." Ringwood v. Foreign Auto Works Inc., 786 P.2d 1350, 1359-60 (Utah App. 1990).

In this case the OLSENS were intimately involved with the Defendant OLSEN & PETERSON CONSULTING ENGINEERS. In those type of circumstances the original notice to the Corporation is imputed to the principals.

The four prerequisites to relate back under Rule 15(c) are:

- (1) The amended claim must arise out of the same occurrence as in the original pleading;

(2) The party to be substituted has received notice so as not to be prejudiced in its defense against the claim;

(3) The party to be substituted knew or should have known that, but for a mistake, the suit would have been brought against him/her; and

(4) The second and third requirements must have been fulfilled within the prescribed limitations period.

* * *

Even if the added party did not receive actual notice, relation back may still occur if a "sufficient identity of interest exists between the new and original defendants." Norton, 627 F.2d at 20-21. Once sufficient identity of interest is established, notice to the original defendant is imputed to the new defendant.

Identity of interest is usually present in three types of situations. Hernandez Jimenez v. Calero Toledo, 604 F.2d 99, 102-03 (1st Cir.1979) (cited by Norton, 627 F.2d at 21; Garcia, 717 F.Supp. at 1326). The first situation occurs when the original and added parties are a parent corporation and its wholly owned subsidiary. Id. The second occurs when two related corporations have substantially identical officers, directors, or shareholders and have similar names or share office space. Id. The third situation occurs when the two parties are co-executors of an estate. Id. In these situations, the added party is deemed to have notice vicariously through the original party and, therefore, is not prejudiced in its defense." Hensley v. Soo-Line R. Co., 777 F.Supp. 1421, 1423-24 (N.D. Ill. 1991.)

IV.

NON-JOINDER IS EASILY REMEDIED BY AMENDMENTS
SEEKING JOINDER, WHICH AMENDMENT SHOULD BE
READILY GRANTED.

Utah R. Civ. P. 15(a) provides, in pertinent part as follows:


A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served . . . Otherwise a party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Utah R. Civ. P. 15(a) (emphasis added).

In eminent domain proceedings, the failure to join all of the necessary owners of property is customarily cured by amendment or waiver. See, NICHOLS ON EMINENT DOMAIN, 3rd Ed. §26.1134, P. 26-99; **Piccolo v. Draper, 6 Nd. 152, 69 N.W. 570.

SUMMARY

The Trial Court erred in granting the Plaintiff's Motion for Summary Judgment and this Court should reverse said decision and allow the RDA to amend its Complaint to assert as additional defendants in the condemnation proceedings WILLIAM and AUDREY OLSEN.

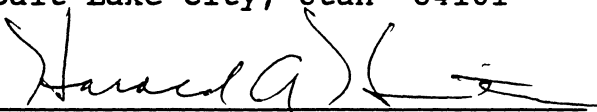
RESPECTFULLY SUBMITTED this 8th day of November, 1993.


Harold A. Hintze
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on November 8, 1993, I caused true and correct copies of the foregoing APPELLANT'S BRIEF to be mailed, postage prepaid, first-class, to the following:

Craig G. Adamson, Esq.
Eric P. Lee, Esq.
DART, ADAMSON & DONOVAN
310 South Main Street, Suite 1330
Salt Lake City, Utah 84101



ADDENDUM

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

William R. Olsen and Audrey Olsen,
Plaintiffs,

vs.

Redevelopment Agency of South Salt Lake,
Defendant.

:
:
:
:
:
:
:

MINUTE ENTRY

CASE NO: 930900965 PR

JUDGE RICHARD H. MOFFAT

The Court having considered the Motion for Summary Judgment and the various pleadings in support and in opposition thereto and now being fully advised in the premises makes this its:

MINUTE ENTRY

The Summary Judgment is granted. The basis for said decision, inter alia, is so plain as to not need explanation. There is a time limitation of seven (7) years which simply has been exceeded by the Agency. Arguments about relating back and the other technical reasons raised by the defendant and discussed in plaintiffs' memorandum and reply memorandum notwithstanding the pure fact of the matter is the RDA simply is acting beyond the statute of limitations and therefore does not have the authority to condemn in this case. The Court's reasoning is further based on each and every point raised in the plaintiffs' memorandum. They adequately raise, discuss and dispose of the various issues presented by the defendant.

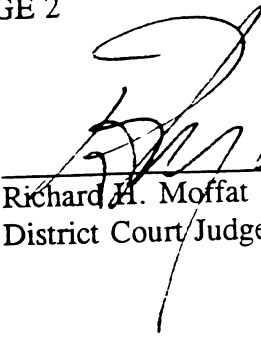
Counsel for the plaintiff will prepare an appropriate order.

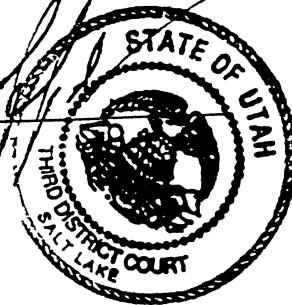
OLSEN V. RDA

PAGE 2

MINUTE ENTRY

Dated this 25 day of May, 1993.


Richard H. Moffat
District Court Judge



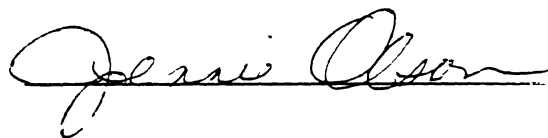
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry,
postage prepaid, to the following on this 26 day of May, 1993.

Craig G. Adamson
Eric P. Lee
DART, ADAMSON & DONOVAN
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Salt Lake City, Utah 84101

Harold A. Hintze
GARDINER & HINTZE
Special Attorney for Defendant
Eagle Gate Tower, #1680N
60 East South Temple
Salt Lake City, Utah 84111

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

A handwritten signature in cursive script, appearing to read "Jessie Olson", written over a horizontal line.

JUDGMENT

CLERK OF DISTRICT COURT
Third Judicial District

JUN 11 1993

[Signature]
Deputy Clerk

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

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

---oooOooo---

WILLIAM R. OLSEN and
AUDREY OLSEN,

Plaintiff,

v.

REDEVELOPMENT AGENCY OF
SOUTH SALT LAKE CITY,

Defendant.

:

:

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:

:

:

ORDER AND JUDGMENT FOR COSTS

2184066
6-16-93-815am.

Civil No. 930900965PR

Judge Richard H. Moffat

---oooOooo---

Plaintiffs' Motion for Summary Judgment came before the Court pursuant to plaintiff's May 7, 1993 Notice to Submit for Decision. On May 20, 1993, defendant filed a written request for oral argument. However, as pointed out by plaintiffs in their May 27, 1993 memorandum in opposition to the request, defendant waived its right to a hearing by not making a written request on or before April 22, 1993, the date defendant filed its principal memorandum.

Defendant requested this Court to withhold its decision on the Motion for Summary Judgment until Judge John A. Rokich decided a Motion to Amend and a Motion to Consolidate in a somewhat related case. Judge Rokich resolved the matter when, on May 7, 1993, he issued a Minute Entry in which he reserved ruling on the motions pending before him until after this Court's ruling on plaintiffs' Motion for Summary Judgment.

The Court considered the Motion for Summary Judgment and the various pleadings submitted in support and in opposition, and is persuaded that summary judgment is proper for each of the reasons raised in plaintiffs' memoranda, including the following:

(a) The statute of limitations on defendant's authority to condemn the subject property expired not later than December 3, 1992.

(b) Defendant took no steps to make plaintiffs parties in any condemnation suit until filing a Motion to Amend in Judge Rokich's case, *Redevelopment Agency of South Salt Lake City v. Olsen & Peterson Consulting Engineers*, Civil No. 920906324, on March 10, 1993, more than three months after the expiration of the statute of limitations.

(c) Defendant's arguments based on the "relation back" doctrine are not well-founded. Under the circumstances present in this matter, the "relation back" doctrine does not allow the addition of new parties after the running of the statute of limitations.

(d) Defendant's arguments based on joinder and the indispensable party rule are similarly flawed. Each argument is premised on the assumption that defendant has authority to take the subject property. Because the premise is false, the arguments lack merit.

(e) There is no basis for imputing notice of *Redevelopment Agency of South Salt Lake City v. Olsen & Peterson Consulting Engineers*, ("Civil No. 920906324") to Mr. and Mrs. Olsen under the "identity of interest" doctrine. Mrs. Olsen was never an officer, director, shareholder, agent or employee of Olsen & Peterson Consulting Engineers, the defendant in Civil No. 920906324. Mr. Olsen was a principal of Olsen & Peterson Consulting Engineers but has had no relationship with the entity which would allow imputing notice under the "identity of interest" doctrine since 1977.

(f) The prejudice to Mr. and Mrs. Olsen resulting from upholding defendant's authority to condemn is at least equal to the prejudice defendant will suffer by granting the Motion for Summary Judgment.

Based on the foregoing, plaintiff's Motion for Summary Judgment is granted and it is hereby

ORDERED as follows:

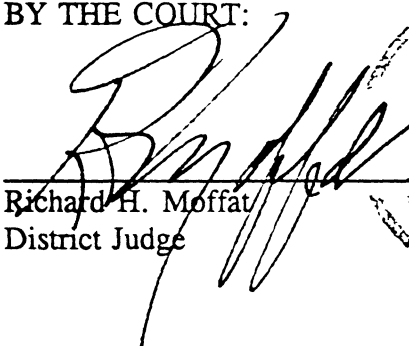
1. Defendant Redevelopment Agency of South Salt Lake City lacks the power to condemn or otherwise acquire the subject property for failure to commence acquisition of the property within the applicable seven year statute of limitations.

2. To the extent the actions of defendant Redevelopment Agency of South Salt Lake City cloud the title to or otherwise encumber the subject property, title to the property is quieted in plaintiffs William R. Olsen and Audrey Olsen.

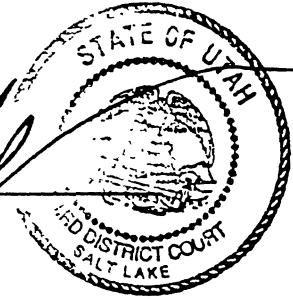
3. Plaintiffs are awarded judgment against defendant for their costs incurred in this action in the amount of \$325.47.

DATED this 11th day of June, 1993

BY THE COURT:



Richard H. Moffat
District Judge



Approved as to form:

Harold A. Hintze

CERTIFICATE OF DELIVERY

I hereby certify that on the 8 day of June, 1993, a true and accurate copy of the foregoing was hand delivered to the following:

Harold A. Hintze
GARDINER & HINTZE
525 East 100 South
Salt Lake City, Utah 84111

William D. Oswald
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Salt Lake City, Utah 84111

