

STATE OF MICHIGAN
COURT OF APPEALS

MUSKEGON CONSERVATION CLUB,

Plaintiff-Appellee,

v

CITY OF NORTH MUSKEGON,

Defendant-Appellant.

UNPUBLISHED
November 1, 2007

No. 270643
Muskegon Circuit Court
LC No. 03-042755-ND

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

In this inverse condemnation action, defendant appeals as of right a judgment in favor of plaintiff entered by the trial court following a jury trial. Because we conclude that plaintiff's proofs failed to establish a de facto taking, we vacate the judgment entered by the trial court and remand this matter for entry of an order dismissing the action.

I. Basic Facts and Procedural History

The evidence produced at trial showed that in 1951 plaintiff granted defendant an easement across its property to install a storm sewer drain. This drain was extended at the request of plaintiff in 1965 because plaintiff was constructing a marina basin that altered the shoreline in the area of the easement. Because of a drop in elevation and the necessity of negotiating the extended drain line over existing utility pipes and under a railroad track, defendant installed a concrete sump at the terminus of the existing line to collect water during heavy rains. The sump was designed with a grated opening at its top to allow for the discharge of storm water into the surrounding area if it filled beyond its capacity. Plaintiff gave its approval to install the sump "in accordance with the plans and specifications prepared by" defendant's engineer by way of a written agreement executed by the parties in July 1965.¹

¹ This agreement stated in relevant part:

Whereas the [Muskegon Conservation Club] now desires that the [City of North Muskegon] extend said storm sewer drain across said lands from its present point of termination as shown by a map prepared Alfred E. Hansen City Engineer, to

(continued...)

Ten years later in 1975, plaintiff installed a wooden seawall in which a hole accommodating the storm sewer discharge pipe was cut. Over time the wooden sea wall deteriorated and was replaced in a piecemeal fashion throughout the mid-1980s and early 1990s, with a sheet metal seawall that was placed adjacent to the original wooden seawall. A hole was again cut in the sheet metal wall for the storm water drainage pipe.

According to plaintiff the sump performed without incident until sometime in 2001, when it began to periodically overflow excessive amounts of water. As designed, the excess storm water drained across plaintiff's property. At trial, plaintiff maintained that this excess storm water drainage eroded its property along the shoreline and undermined its sheet metal seawall. Plaintiff claimed damages for the attempted repairs to the sheet metal seawall and to permanently replace it with one that would withstand the water overflowing from the sump, which it asserted constituted a de facto taking of its property by defendant. The jury apparently agreed and rendered a verdict in plaintiff's favor. This appeal ensued.

II. Analysis

On appeal, we find dispositive defendant's claim that its motion for a directed verdict was improperly denied by the trial court. This Court reviews de novo a trial court's decision on a motion for a directed verdict, considering the evidence in the light most favorable to the nonmoving party. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221; 716 NW2d 220 (2006). A directed verdict is appropriate when no material factual questions exist on which reasonable minds could differ. *Merkur Steel Supply v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004).

"An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use 'without the commencement of condemnation proceedings.'" *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989), quoting *Hart v Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982). There is no exact formula for establishing a de facto taking. *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006). It is nonetheless universally accepted that a plaintiff alleging inverse condemnation must establish, among other things, "that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004) (internal quotation marks omitted).

In this case, plaintiff asserted and the trial court agreed that the relevant governmental action establishing this requirement for a de facto taking was the sump's discharge of water across plaintiff's property. The discharge of water from the sump is not, however, an "affirmative" action by defendant. Rather, it is merely the passive result of the design and installation of the storm sewer extension requested by plaintiff. Thus, we agree with defendant that the governmental action relevant here is defendant's extension of the storm sewer line in

(...continued)

the channel dredged [sic] by [Muskegon Conservation Club] across said lands as shown on said map, in accordance with the plans and specifications prepared by said engineer.

1965. With regard to this affirmative act, however, the undisputed evidence shows that the extension was constructed at the request of plaintiff and with its tacit, if not express, approval of the design proposed by defendant's engineer. Further, there is no evidence or claim that the sump installed as part of that project was defectively constructed or negligently maintained, or that the system did not operate in accordance with its approved design. In light of these facts, and considering plaintiff's acknowledgement that the sump was in place for nearly forty years without incident, it cannot be reasonably concluded that defendant's placement of that structure on defendant's property was an "abuse" of its legitimate powers. A directed verdict of plaintiff's claim for inverse condemnation was, therefore, required. *Merkur Steel Supply, supra*.

Consequently, we vacate the judgment entered by the trial court and remand this matter for entry of an order dismissing this action.² We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ David H. Sawyer

/s/ Christopher M. Murray

² Given our resolution of this matter, it is unnecessary for us to address the remaining issues raised on appeal.