

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel L. Rizzo and Samuel P. Rizzo :
 :
 v. : No. 797 C.D. 2014
 : Argued: December 8, 2014
 Borough of West Wyoming, :
 Appellant :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: January 23, 2015

This appeal arises from a de facto condemnation action filed by Samuel L. Rizzo and Samuel P. Rizzo against the Borough of West Wyoming. The Rizzos own a 23-acre parcel of land on which the Moonlite Drive-In operated until approximately 1991. In December 1990, the Borough negotiated and executed a right-of-way agreement for two 30-foot easements in order to construct sanitary sewer lines. On November 17, 2009, the Rizzos filed a petition for appointment of a board of viewers in the Court of Common Pleas of Luzerne County. In the petition, the Rizzos alleged that in 1993 the Borough relocated Dimmocks Creek into an excavated channel in order to install the sewer lines. They asserted that the right-of-way agreement obligated the Borough to maintain the easement to prevent damage to their property. The Rizzos alleged that over time and culminating in the summer of 2006, the Borough's failure to properly

maintain the easement and sewer line and the improper diversion of Dimmocks Creek resulted in wetland areas and an intermittent stream encompassing over one-third of their property. In 2005 and 2006, property developers terminated sales agreements to purchase the property due to the presence of water on the property. The Rizzos asserted that the Borough's actions substantially interfered with the practical use and enjoyment of the property and constituted a de facto condemnation.

On February 19, 2010, the Borough filed preliminary objections to the petition for appointment of a board of viewers. The Borough's preliminary objections specifically argued that a taking had not occurred, the subject property had been burdened by water issues prior to the Borough obtaining a right-of-way to place sewer lines, and that other persons and/or conditions were responsible for any alleged presence of water on the Rizzos' property.

The trial court scheduled a hearing on the preliminary objections for April 26, 2010. On April 20, 2010, the Borough sent a letter to the trial court withdrawing its request for argument and asking that the matter be decided on the briefs. On April 21, 2010, the trial court overruled the preliminary objections. The order stated as follows:

AND NOW, this 21st day of April, 2010, it appearing that [the Rizzos] have met the criteria requisite for allegations of a de facto condemnation,

NOW THEREFORE, it is HEREBY ORDERED that upon presentation for a petition of appointment of a board of viewers in the within matter, a board of viewers shall be appointed to consider issues raised in the within matter.

Reproduced Record (R.R.) at 78a. The trial court issued this order without first conducting an evidentiary hearing to determine whether a de facto taking had occurred. The Borough failed to appeal this order.

On April 27, 2010, the Rizzos obtained an order from the trial court appointing a board of viewers.¹ The April 27, 2010 order appointing a board of viewers specifically identified the entire parcel as the subject of a de facto taking. R.R. 84a. In response, the Borough filed preliminary objections to the notice of appointment of a board of viewers. The Borough asserted that the trial court had failed to hold an evidentiary hearing to resolve issues of fact raised in the preliminary objections to the petition to appoint a board of viewers as required by Section 504(d)(5) of the Eminent Domain Code, 26 Pa. C.S. § 504(d)(5). The Rizzos filed preliminary objections, in the form of a motion to strike, to the Borough's preliminary objections, asserting that the Borough waived any entitlement to an evidentiary hearing when it informed the trial court that the matter could be decided on the briefs. On July 10, 2010, common pleas sustained the Rizzos' preliminary objections, determining that the Borough's preliminary objections were untimely. The Borough filed a motion for reconsideration of the

¹ The Honorable Thomas F. Burke, Jr.'s order stated:

[U]pon consideration of the Petition for the Appointment of a Board of Viewers pursuant to Section 502 of the Eminent Domain Code, and the Order of the Honorable Judge Lewis Wetzel dated April 21, 2010, a Board of Viewers is hereby appointed to determine and to report to this Court the damages, including costs and attorneys fees, to which Petitioners are entitled by reason of the de facto condemnation of the Property located at 1190 Shoemaker Avenue, West Wyoming, Pennsylvania, with PIN Numbers of E10S2 B001 Lots 4, 5, 6 and 20; and referenced under Luzerne County Deed Book 2538 at Page 682, and consisting of approximately 23 acres, more or less

R.R. 84a.

July 10 order, reiterating its argument that the trial court was required to hold an evidentiary hearing on the factual issues raised by preliminary objection. The Borough's motion for reconsideration was denied. The Borough did not appeal either order.

The board of viewers issued a notice that the property would be viewed on May 27, 2010. The board of viewers conducted three hearings in 2011 at which it received exhibits and heard testimony. The board of viewers submitted a report on February 21, 2012, in which it found the following:

Value of Condemnees land as unaffected
by the De Facto Condemnation

\$201,000.00

Value of Condemnees land as affected
by the De Facto Condemnation

\$201,000.00

Damages

\$-0-

R.R. 259a-60a. The Rizzos appealed the viewers' report to the trial court alleging various errors. The Borough filed a motion to quash the appeal, which was denied by the trial court.

The trial court scheduled a trial for June 16, 2014. On February 12, 2014, the Rizzos filed a motion to compel the Borough to file the April 21, 2010 order, asserting that Section 502(c)(4) of the Eminent Domain Code, 26 Pa. C.S. § 502(c)(4), required that the Borough file the order with the office of the recorder of deeds. They also filed a motion to compel filing of a declaration of estimated just compensation and payment to plaintiffs. Additionally, the Rizzos asserted that the Borough was required to pay them \$201,000, the value of the condemned property,

plus \$83,000 in attorney's fees and \$40,000 in real estate taxes. A subsequent trial judge (Judge Hughes) held a hearing on the motions on February 28, 2014, at which he acknowledged that the first trial judge's order was problematic, but opined that there was no way that the order could be undone at the current stage of litigation. R.R. 329a-331a, 342a, 345a-46a. On March 21, 2014, Judge Hughes granted the Rizzos' motion, holding as follows:

1. Judge Wetzel's Order dated April 21, 2010, found that a taking of the entirety of the concerned property occurred.
2. When a de facto taking of the entirety of a given property occurs, title to the taken property transfers to the Condemnor.
3. When a taking occurs, 26 Pa. C.S.A. [sic] § 502(c)(4) requires that the Condemnor of the property file with the Office of the Recorder of Deeds of the County in which the property is located a copy of the Order making such a finding.
4. Because a de facto taking of the entirety of the concerned property has occurred, the Borough of West Wyoming must file Judge Wetzel's April 21, 2010, Order with the Recorder of Deeds of Luzerne County, and title to the property transfers from the Condemnee, Plaintiffs, to the Condemnor, the Borough of West Wyoming.

R.R. 359a.

The Borough filed a motion to amend Judge Hughes' order to certify for purposes of taking an interlocutory appeal, which the trial court granted pursuant to Section 702(b) of the Judicial Code, *as amended*, 42 Pa. C.S. § 702(b),

because the order involved a controlling question of law where there is substantial ground for difference of opinion. This appeal followed.²

Sections 502(c) and 502(d) of the Eminent Domain Code set forth the procedures governing a de facto condemnation.³ An owner who believes that his property has been taken without the filing of a declaration of taking may file a petition for the appointment of viewers. There is no automatic right to have an appointment of a board of viewers, and preliminary objections to the petition may be filed. The trial court is required to determine all preliminary objections promptly and make any orders or decrees required by justice. 26 Pa. C.S. § 504(d)(4). Where preliminary objections raise an issue of fact as to whether a de facto taking has occurred, the trial court must take evidence, even if the parties have not requested an evidentiary hearing. *Hill v. City of Bethlehem*, 909 A.2d 439, 443 (Pa. Cmwlth. 2006).⁴ The trial court must determine whether a

² Judge Brobson ordered that the question to be considered by this court is: “[w]hether a condemnor is required to file an order in the recorder of deeds office pursuant to 26 Pa. C.S. § 502(c)(4) under the facts presented in this case.”

³ Section 502(c) provides:

(c) Condemnation where no declaration of taking has been filed.—

(1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

(2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

⁴ Section 504(d)(5) of the Eminent Domain Code provides:

If an issue of fact is raised, the court shall conduct an evidentiary hearing or order that evidence be taken by

(Footnote continued on next page...)

condemnation has occurred, the date of the condemnation and the extent and nature of any property interest condemned. 26 Pa. C.S. § 502(c)(2). The trial court is required to enter an order specifying any property interest which has been condemned and the date of the condemnation. 26 Pa. C.S. § 502(c)(3). The condemnor must then file a copy of the order in the office of the recorder of deeds and the order is indexed in the deed indices showing the condemnee as the grantor and condemnor as the grantee. 26 Pa. C.S. § 502(c)(4).

Preliminary objections are the exclusive method of raising objections to a petition for appointment of viewers alleging a de facto taking. *Genter v. Blair Cnty. Convention & Sports Facilities Authority*, 805 A.2d 51, 55 (Pa. Cmwlth. 2002). Pursuant to Appellate Rule 311(e), Pa.R.A.P. 311(e), a party may take an appeal as of right from an order overruling preliminary objections to a petition for appointment of a board of viewers. Appellate Rule 311(g)(1)(iii), Pa.R.A.P. 311(g)(1)(iii), further provides:

(g) Waiver of objections.

(1) Where an interlocutory order is immediately appealable under this rule, failure to appeal:

* * *

(iii) Under Subdivision [311(e)] of this rule shall constitute a waiver of all objections to such orders and any objection may not be raised on any subsequent appeal in the matter from a determination on the merits.

(continued...)

deposition or otherwise, but in no event shall evidence be taken by the viewers on this issue.

The Borough argues that the trial court abused its discretion and erred as a matter of law by ordering it to file the April 21, 2010, order in the recorder of deeds office because the order did not specify the date of the condemnation, the extent of the condemnation and the property interest condemned. The Borough further asserts that the first trial judge erred by failing to conduct an evidentiary hearing to determine whether a de facto taking occurred and that, therefore, it was improper for Judge Hughes to order the Borough to file his order. *Commonwealth, Department of Transportation v. Mano*, 613 A.2d 119 (Pa. Cmwlth. 1992) (holding that a trial court may not overrule preliminary objections in a de facto taking case without first conducting an evidentiary hearing to ascertain whether a de facto taking occurred). The Borough asserts that Judge Hughes did not have a basis to state that the first judge had found that a taking of the entirety of the property had occurred and that Judge Hughes in fact acknowledged at oral argument that the April 21 order was “defective” and insufficiently specific. R.R. at 342a, 345a-46a.

This Court has not directly addressed the interplay between Section 502 of the Eminent Domain Code and Appellate Rule of Procedure 311. Although not directly on point, the holdings in *Gardner v. Consolidated Rail Corporation*, 100 A.3d 280 (Pa. Super. 2104) and *In re: Condemnation by City of Philadelphia of Leasehold of Airportels, Inc.*, 398 A.2d 224, 225 (Pa. Cmwlth. 1979), are instructive.

In *Gardner*, the railroad defendants filed a motion to transfer venue based upon *forum non conveniens*, which the trial court granted. The plaintiffs filed a motion for reconsideration, but did not file a direct appeal. The trial court improperly granted the motion for reconsideration more than 30 days after entering its order transferring venue. The railroad defendants appealed the grant of

reconsideration. The Superior Court noted that under Appellate Rule 311(c), a motion granting a transfer of venue based upon *forum non conveniens* is immediately appealable and, under Appellate Rule 311(g)(1)(ii), the failure to immediately appeal such an order constitutes a waiver of all objections to jurisdiction or venue. 100 A.3d at 282. The Superior Court further noted that the plaintiffs were required by Appellate Rule of Procedure 903(a), Pa.R.A.P. 903(a), to appeal the transfer order within 30 days and failed to do so, and such failure to appeal a final order resulted in the order becoming *res judicata* on the issue. *Id.* at 282-83.

In a series of opinions relating to a *de facto* condemnation by the City of Philadelphia, this Court discussed the City's repeated attempts to circumvent its failure to immediately appeal an order overruling its preliminary objections to a petition to appoint a board of viewers. Airportels had filed a petition for appointment of viewers alleging that the City's actions had resulted in a *de facto* taking of its property interest. The trial court overruled the City's preliminary objections. The City filed a petition for permission to file an answer, which the trial court denied. The City appealed to this court. *City of Phila. v. Airportels, Inc.*, 322 A.2d 727 (Pa. Cmwlth. 1974). This court quashed the City's appeal of the order denying permission to file an answer, holding that if the City believed that the trial court had erred in determining that a *de facto* taking had occurred, its only recourse was to appeal the order overruling preliminary objections because the Eminent Domain Code did not permit the filing of an answer. 322 A.2d at 730. Following remand, the City filed a petition for leave to amend preliminary objections alleging factual matters, which the trial court denied. The City again appealed to this court. *In re Condemnation by the City of Phila. of the Leasehold*

Interest of Airportels, Inc., 344 A.2d 737 (Pa. Cmwlth. 1975). This Court quashed the appeal, stating that the City was trying once again to collaterally attack the appointment of board of viewers, and characterized the case as a “dilatatory procedural morass, resulting from no fault of Airportels.” *Id* at 738. In a third opinion, this court stated that the City’s repeated appeals were an effort to circumvent the results of its failure to appeal the order overruling preliminary objections within 30 days. The court stated that this failure resulted in the City’s loss of the “opportunity to contest whether there had been a de facto taking.” *In re Condemnation by City of Phila. of Leasehold of Airportels, Inc.*, 398 A.2d at 225.

The April 21 order patently does not comply with the mandates of Section 502(c) of the Eminent Domain Code. The Borough was clearly aware of the problems with the order as reflected in its second set of preliminary objections and the motion for reconsideration. However, the Borough failed to appeal the order overruling the first set of preliminary objections or the order overruling the second set of preliminary objections. The Borough had numerous opportunities to seek review of the errors of law and procedural errors committed by the trial court at the very outset of the litigation, yet did not do so. Appellate Rule of Procedure 311(g)(1)(iii) specifically states that a failure to immediately appeal an order overruling preliminary objections in a de facto condemnation case results in a waiver of all issues on the merits. Thus, once the 30-day time period to file an appeal from the trial court’s decision on preliminary objections had expired, the April 21 order concluding that a de facto taking had occurred became *res judicata* and the Borough is prohibited from further litigating that issue.⁵

⁵ During the hearings conducted by the board of viewers, the board received testimony regarding the value of the property at the time of June 6, 2006. Based on the April 21 order and **(Footnote continued on next page...)**

Accordingly, we conclude that the trial court did not err and the Borough is required to file the April 21, 2010 order with the office of the recorder of deeds pursuant to Section 502(c)(4) of the Eminent Domain Code.

BONNIE BRIGANCE LEADBETTER,
Judge

(continued...)

the April 27 order and the testimony from the hearings, this case has been conducted as if a de facto taking of the entirety of the Rizzos' property occurred on June 6, 2006.

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 :
 v. : No. 797 C.D. 2014
 :
 Borough of West Wyoming, :
 Appellant :

ORDER

AND NOW, this 23rd day of January, 2015, the order of the Court of Common Pleas of Luzerne County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge