

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

JOHN KOTCHMAR, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF TRANSPORTATION

Defendant

Case No. 2008-05524

Judge J. Craig Wright

DECISION

{¶ 1} Plaintiffs assert a claim for a compensable taking pursuant to Article I, Section 19 of the Ohio Constitution as a result of two separate construction projects carried out by defendant in 2003 and in 2006.

{¶ 2} On April 2, 2009, the parties filed a joint stipulation of facts and defendant filed a motion for summary judgment pursuant to Civ.R. 56. On April 3, 2009, plaintiffs filed their motion for summary judgment. On April 8, 2009, the parties filed their respective responses to the motions. The cause is now before the court for a non-oral hearing.

{¶ 3} Civ.R. 56(C) states, in part, as follows:

{¶ 4} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as

stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 5} Plaintiffs are the owners and operators of a convenience store business known as "Dairy 224" located in Lowellville, Ohio. Dairy 224 is located on U.S. 224, approximately 550 feet west of the Ohio/Pennsylvania border. Pursuant to R.C. 5517.03, defendant has the authority to determine whether a highway construction, improvement, or maintenance project would require closing the highway to traffic, and if closed, to develop and approve a detour route.

{¶ 6} On March 12, 2003, defendant entered into a contract with a private company to replace the bridge over Yellow Creek in the village of Poland, Mahoning County, Ohio on U.S. 224. The bridge was located approximately 4.5 miles west of Dairy 224. The bridge replacement project was necessary and proper with regard to defendant's duty to construct, improve, and maintain its highways. Defendant determined that it was impracticable to construct a temporary highway, bridge, or culvert in the vicinity of the project. Instead, defendant decided to close a portion of U.S. 224 from S.R. 616 to Riverside Drive for approximately six months, commencing May 1, 2003.

{¶ 7} Due to the road closure, defendant developed and approved a detour route. The detour route was 15.9 miles long and it directed traffic to bypass U.S. 224 in the vicinity of Dairy 224. During the period of the road closure and detour, motor vehicles traveling on U.S. 224 could also use a local alternate route to bypass the bridge replacement project and continue traveling eastbound and westbound on U.S. 224. However, defendant expected that tractor-trailers and 20-ton waste hauling trucks would use the detour rather than the local alternate route, inasmuch as the local alternate route was narrow and not conducive to commercial vehicles.

{¶ 8} The other construction project at issue occurred in 2006. It was designed both to eliminate a steep grade on U.S. 224, slightly east of the U.S. 224 and Struthers Road intersection and to increase visibility at the intersection. The grade was located approximately 2.25 miles west of Dairy 224. As was the case with the bridge replacement project, the steep grade elimination project was necessary and proper, and defendant had determined that it was impracticable to construct a temporary highway in the vicinity of the project. Due to the road closure, defendant implemented the same detour it had used for the bridge replacement project; however, the local alternate route from the prior project was not an option inasmuch as it was located several miles away from the bridge replacement project.

{¶ 9} Plaintiffs submitted the affidavit of plaintiff, John Kotchmar, in support of their motion. According to Kotchmar, U.S. 224 is a well-known truck route. Prior to the construction projects at issue, a significant number of tractor-trailers and 20-ton waste hauling trucks used U.S. 224 to access Dairy 224 on a daily basis and their drivers and occupants patronized Dairy 224. In the late 1980s, plaintiffs made improvements to Dairy 224 and its premises to accommodate the truck traffic and to encourage truck drivers to patronize Dairy 224. The improvements included a 38,500 square foot heavy duty truck lot suitable to accommodate trucks. Prior to the construction projects, and except during the periods of detours, a majority of the patrons at Dairy 224 were drivers and other occupants of tractor-trailers and 20-ton waste hauling trucks traveling both east and west on U.S. 224. According to Kotchmar, trucks traveling east or west on U.S. 224 that followed either the 2003 or the 2006 detour would be required to “back-track” in order to access Dairy 224. Kotchmar averred that the detour for the bridge project was in effect for six months and that the detour for the grade elimination project was in effect for more than five weeks. Kotchmar averred that as a result of the detours, plaintiffs suffered damages to their property interests and lost business resulting in substantial monetary damages.

{¶ 10} In support of their motion, plaintiffs filed the deposition of Mark Walker, who was employed by defendant as a transportation technical specialist in District 4, which includes Mahoning County. According to Walker, defendant was required to designate one alternate route during each construction project. For the bridge

replacement project, Riverside Drive in Poland Village was designated as a local alternate route. The local alternate route was two-tenths of a mile long. A different alternate route was designated for the grade elimination project. Walker testified that it was defendant's understanding that during the projects, cars were likely to use the local alternate route but that trucks would use the 15.9 mile detour.

{¶ 11} Defendant argues in its motion that plaintiffs did not suffer a compensable taking as a result of the detours.

{¶ 12} A land owner has a right of access to public streets on which the land abuts. *State ex rel. McKay v. Kauer* (1951), 156 Ohio St. 347, 351. Accordingly, a property owner whose property abuts a street or highway has a private right or easement for the purpose of ingress and egress, which right cannot be taken away or destroyed or substantially impaired without compensation. *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, paragraph one of the syllabus. However, an abutting property owner's right of access is subordinate to the public's right to use or improve a public street. *State ex rel. Schiederer v. Preston* (1960), 170 Ohio St. 542. The test of whether a property owner's right of access is so impaired as to require compensation is whether there is a substantial, material or unreasonable interference with an owner's or the public's access to his property. *Salvation Army v. Ohio Dept. of Transportation*, Franklin App. No. 04AP-1162, 2005-Ohio-2640, ¶ 16. "Substantial interference' occurs when an owner is 'prevented from enjoying the continued use to which the property had been previously devoted.'" *Id.* quoting *Wray v. Fitch* (1994), 95 Ohio App.3d 249, 252-253. (Additional citations omitted.) "To successfully demonstrate that there has been a compensable taking, the property owner must show that the interference has rendered the restriction of access more than just inconvenient. In general, as long as the property owner has not been denied ingress and egress, there is no compensable taking." *State ex rel. Thieken v. Proctor*, Franklin App. No. 06AP-171, 2006-Ohio-4596, ¶ 12. (Citations omitted.)

{¶ 13} Plaintiffs assert that defendant unreasonably interfered with truck drivers' access to Dairy 224 when it implemented the detours, and that they lost business as a result. However, "[t]he owner of land abutting on a highway has no property right in the continuation or maintenance of the flow of traffic past his property, and the diversion of

traffic as the result of an improvement in the highway or the construction of an alternate highway is not an impairment of a property right of such owner for which damages may be awarded.” *Merritt*, supra, paragraph 3 of the syllabus. Although the detours made access to plaintiffs’ property inconvenient for truck traffic, ingress and egress to plaintiffs’ property was not denied. Moreover, the detours did not prevent plaintiffs from operating Dairy 224 as a convenience store. Upon review of the evidence pursuant to Civ.R. 56, the court concludes that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law. Accordingly, defendant’s motion for summary judgment shall be granted, and plaintiffs’ motion for summary judgment shall be denied.

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JUDGMENT ENTRY

A non-oral hearing was conducted in this case upon the parties’ cross-motions for summary judgment. For the reasons set forth in the decision filed concurrently

herewith, defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of defendant. Plaintiffs' motion for summary judgment is DENIED. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. CRAIG WRIGHT
Judge

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HTS/cmd
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