THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

LAURA D'GINTO, et al.,	:	August Term, 2001
Plaintiffs	:	
	:	No. 2475
v.	:	
	:	Commerce Case Program
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY,	:	
Defendant	:	

OPINION

Petitioners Laura L. D'Ginto, Amram Associates ("Associates") and Amram Management Corporation ("Corporation")[1] commenced this action by filing a Petition for the Appointment of a Board of Viewers Pursuant to § 502(e) of the Eminent Domain Code ("Petition"). For the reasons set forth in this Opinion, the Court properly sustained the preliminary objections ("Objections") of Defendant Southeastern Pennsylvania Transportation ("SEPTA") and dismissed the Petition on October 24, 2001.

BACKGROUND

The facts of this matter, as alleged in the Petition, are as follows:[2]

[1] Associates is a limited partnership, with Ms. D'Ginto as a limited partner and Corporation as the general partner. Associates is the successor to Amram, Ltd. ("Limited"), a corporation owned by Ms. D'Ginto's late husband.

[2] In reviewing the Objections, the Court was required to treat these allegations as fact. See Beltrami Enters., Inc. v. Commonwealth, Dept. of Envtl. Resources, 159 Pa. Commw. 72, 77, 632 A.2d 989, 991 (1993) ("[A] court confronted with a petition for an appointment of viewers alleging a de facto taking which is objected to, must first decide as a matter of law, whether the averments of the petition, taken as true, are sufficient to state a cause of action.").

Beginning in 1983, SEPTA leased to Associates[3] the upper three-quarters of SEPTA's communication tower located at Port Royal and Hagys Mill Roads ("Tower"). Pursuant to the lease for the Tower ("Lease"), Limited was permitted to install, maintain and operate radio communications equipment on the Tower without a limit on the number of antennas[4] and was guaranteed free access to the Tower and Tower site. The Lease also gave Associates the right to renew in five-year increments up to a total of 30 years.

In May 1994, SEPTA officials met with Associates' representatives to discuss SEPTA's concern over the proliferating number of antennas on the Tower. Two years later, a dispute broke out between the Parties over the number of antennas on the Tower and whether Associates' rental payment accurately reflected the number of antennas. On July 26, 1996, SEPTA unilaterally terminated the Lease and advised Associates that it would be denied access to the Tower at the end of a 30-day notice period. This termination resulted in SEPTA's seizure of Associates' property on the Tower without any judicial process or compensation, as well as other unspecified damages to Associates' business and reputation.

When SEPTA instituted an action in federal court based on the Petitioners' alleged failure to pay amounts due under the Lease, the Petitioners responded with a counterclaim for contract-related damages. The Petitioners subsequently sought to amend their federal counterclaim to assert a claim for

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[3] The Lease originally was between Limited and SEPTA, but Limited's rights were eventually assigned to Associates. For the sake of simplicity, the rights of the lessee under the Lease will be spoken of as Associates' rights.

[4] The Lease permitted Associates to install an initial seven antennas for a payment of $6,250.00 and gave Associates the right to install additional antennas at a cost of $100.00 per month per antenna.

inverse condemnation and hedged their bets by initiating the instant action on August 23, 2001, alleging that SEPTA's actions constituted a de facto taking. On October 24, 2001, the Court sustained the Objections and dismissed the Petition, whereupon the Petitioners appealed.

DISCUSSION

In response to the Court's request, Petitioner has filed a concise statement of matters complained of on appeal ("Concise Statement") asserting that the Court's ruling on the Objections was in error for two reasons: (1) the Petition stated facts that are legally sufficient to support the appointment of a board of viewers; and (2) there is no pending prior action to bar the instant case from proceeding. Because the Petition is legally insufficient, it was properly dismissed, and there was no need to consider the question of whether a pending prior action exists.

In reviewing a trial court's evaluation of preliminary objections to a petition for the appointment of a board of viewers, the Commonwealth Court is limited to an examination of "whether an error of law was committed or whether necessary findings of fact are supported by substantial evidence." Shaner v. Perry Twp., 775 A.2d 887, 890 n.2 (Pa. Commw. Ct. 2001) (citing Department of Transp. v. Mano, 149 Pa. Commw. 337, 613 A.2d 119 (1992)). A review of the sufficiency of the petitioner's action, in turn, focuses on "the nature of the complained of acts." Enon Valley Tel. Co. v. Market, 90 Pa. Commw. 53, 56, 493 A.2d 800, 802 (1985) (citing Condemnation of the Land & Prop. of Jacobs, 55 Pa. Commw. 142, 423 A.2d 442 (1980)).

An individual alleging a de facto taking "bears a heavy burden of proving that exceptional circumstances exist which substantially deprive one of the use of their property, and that the deprivation is the direct and necessary consequence of the actions of the entity having the power of eminent

domain." Waldron St. Book Co. v. City of Pittsburgh, 771 A.2d 111, 112 (Pa. Commw. Ct. 2001) (citing Petition of 1301 Filbert Limited Partnership for the Appointment of Viewers, 64 Pa. Commw. 605, 441 A.2d 1345 (1982)). See also Miller & Sons Paving, Inc. v. Plumstead Twp., Bucks County, 552 Pa. 652, 656, 717 A.2d 483, 485 (1998) (noting that a petitioner alleging a de facto taking has the "heavy" burden of establishing that "the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property." It is also necessary that the "taking . . . result from a governmental body's 'actual exercise of the power of eminent domain.'" Domiano v. Commonwealth, Dept. of Envtl. Resources, 713 A.2d 713, 716 n.3 (Pa. Commw. Ct. 1998) (quoting Darlington v. County of Chester, 147 Pa. Commw. 177, 607 A.2d 315, 320 (1992)). See also Enon Valley Tel. Co., 90 Pa. Commw. at 56, 493 A.2d at 802 (noting that "[i]t is well established that acts not done in the exercise of the right of eminent domain and which are not the immediate, necessary or unavoidable consequence of exercising that right cannot be the bases of an action in eminent domain"); Moore v. Commonwealth, Dept. of Envtl. Resources, 660 A.2d 677, 681 (Pa. Commw. Ct. 1995) ("[N]ot all compensable injuries suffered by property owners as the result of government action are takings. . . . [W]here de facto takings have been found, either physical intrusion or the imminence or inevitability of condemnation, as that term is statutorily defined, has been an essential element.").

In this instance, there is nothing to indicate that SEPTA's actions are in any way related to its eminent domain powers. Indeed, the Petition alleges nothing more than a breach of contract action, which cannot be transformed into an inverse condemnation claim merely because the allegedly breaching party is a government entity. As such, an examination of the nature of SEPTA's actions reveals that this is not a legitimate inverse condemnation claim.

In the Concise Statement, the Plaintiffs assert a number of other defects in the Court's reasoning that require a reversal of its ruling on the Objections. Even if all of the Plaintiffs' assertions are correct, they cannot overcome the legal deficiency of failing to set forth facts necessary to appoint a board of viewers. Accordingly, the Petition does not set forth a legally sufficient claim for inverse condemnation, and the Court properly sustained the Objections and dismissed the Petition.

CONCLUSION

For the reasons set forth supra, the Commonwealth Court should affirm the Court's decision in this matter.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: January 23, 2002