IN THE SUPREME COURT OF MISSISSIPPI

CV-~~2005-273-BT~~ 2007-CA-1027

JAMES LLOYD PRESLEY, SR.; MAE PRESLEY VEAZEY

MARTHA PRESLEY HOUSTON — APPELLANTS

vs — CAUSE NO. CV-2005-273-BT

CITY OF SENATOBIA, MISSISSIPPI — APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

APPELLANTS

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I. STATEMENT OF ISSUES

WHETHER THE CIRCUIT COURT ERRED IN GRANTING THE APPELLEE'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON THE GROUND OF LACK OF JURISDICTION.

The Appellants assert reversible error by the circuit court in its ruling that their decision not to appeal the City of Senatobia's denial of a rezoning request beyond the circuit court deprived the same circuit court of jurisdiction in this second case alleging inverse condemnation and seeking just compensation.

II. STATEMENT OF THE CASE

a. NATURE OF THE CASE

Appellants James Lloyd Presley, Sr., Mae Presley Veazey and Martha Presley Houston (hereinafter, collectively, the Presleys) filed suit against the defendant, City of Senatobia, Mississippi, in the Circuit Court of Tate County, alleging a claim of inverse condemnation in violation of Art. 3, §17 (Miss. Const. 1890), [1] and requesting just compensation for a taking of their mineral estate. Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken by the governmental defendant, even

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[1] Art. 3, §17(Miss. Const. 1890) provides as follows:

§17. Taking property for public use; due compensation

Private property shall not be taken or damaged for public use, except on due compensation first being made to the owner or owners thereof, in a manner to be described by law; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be a judicial question, and as such, determined without regard to legislative assertion that the use is public.

though no formal exercise of the power of eminent domain has been attempted by the taking agency. A landowner is entitled to bring such an action as a result of the "self-executing character of the constitutional provision with respect to compensation ... ." *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (citations omitted.) Miss. Const. Article 3, §17, (1890) provides that "private property shall not be taken or damaged without first paying due compensation therefor." This section is self-executing and the courts of the state are always open to provide a remedy for the expropriation of private property by the sovereign or any of its subdivisions. *Williams v. Walley*, 295 So.2d 286, 288 (Miss. 1974); *State Highway Commission v. Mason*, 192 Miss. 576, 592, 4 So.2d 345, 6 So.2d 468 (1941); *Parker v. State Highway Commission*, 173 Miss. 213, 219, 162 So. 162 (1935). The Presleys allege that underlying their agricultural land, previously on the City's outskirts, but now annexed and zoned residential, valuable sand and gravel deposits exist, and that as a result of the annexation and zoning of their property as residential (R-2) by the City and its refusal to rezone for a commercial purpose, they have been deprived of the entire value of their mineral property.

b. PROCEDURAL HISTORY

The Presleys previously unsuccessfully appealed the denial of their rezoning request by the City to the Circuit Court of Tate County in cause number CV-2001-310-LT (Presley I). The circuit court affirmed the City's denial of their request for rezoning to allow recovery of the sand and gravel deposits on their annexed property. R.E. Vol 2, P. 103-104. No further appeal was taken and the court's judgment became final. Consequently, the Presleys claim in this second suit (Presley II) that they are now entitled to just compensation. The defendants filed a Motion to Dismiss or in the Alternative, for Summary Judgment, alleging numerous defenses to the

Complaint. R. Vol. 1, P. 32. The Circuit Court of Tate County granted the motion, holding only that the court lacked jurisdiction over the case because the Presleys had not exhausted their remedies in the first case, Presley I, by foregoing appeal of the circuit court's prior final judgment in Presley I to the Supreme Court. R.E. Vol 2, P 103-104. The Presleys timely filed a notice of appeal, R.E. Vol. 2, P. 167-168. The appellee then filed a Notice of cross-appeal. R.E. Vol. 2, P. 170 - 171.

III.
FACTS

The Presleys are the sole heirs at law of Lloyd T. Presley, deceased. Each owns by inheritance a one-third (1/3) undivided simple fee interest in the annexed property at issue in Senatobia, Tate County, Mississippi. R. Vol. 1, P. 5 - 7. In 1997 the City of Senatobia annexed substantial acreage surrounding the City, including the Presleys' 103 acres, more or less, of agricultural land. R. Vol.1, P. 11 (Exhibit "A" to the Complaint, survey and description); R. Vol. 1, P. 58, ¶3 (affidavit of Mayor Allen Callicott). On March 17, 1998 the City of Senatobia zoned approximately 4,200 acres of the newly annexed land, including the land owned by the Presleys. R. Vol.1, P. 7, ¶10, R Vol.1, P. 58, ¶ 3.

All of the annexed land, including the Presleys' land, was zoned residential (single- R-2-family) despite the primarily agricultural character of the area and despite the fact that the City's industrial park adjoins the property on the east side. R. Vol.1, P. 7 ¶ 11; R. Vol. 1., P. 58 - 59, ¶ 3 (Affidavit of Mayor Allen Callicott).

In early 2000 the Presleys contacted Memphis Stone and Gravel (MS&G) and requested boring of their property to test for deposits of gravel. On May 4, 2000 a geologist for Memphis

Stone and Gravel reported the testing results to the company's chief engineer, estimating gravel deposits yielding over three million one hundred fifty thousand tons. R. Vol. 1, P. 12. MS&G conservatively estimated the value of the gravel deposits to the Presleys to be between $945,000.00 and $1,102,500.00. Id.

On August 30, 2001, the Presleys entered into a lease agreement with MS&G for mining of the underlying gravel over a period of fifteen years, contingent upon both parties being able to obtain a change in the Presleys' property zoning classification from R-2 to M-1, as well as conditioned upon other required permits. R. Vol. 1, P. 14. On that same day the Presley family through their attorney presented a formal request for rezoning to the Senatobia Planning Commission, which did not act, but referred the request to the Mayor and Board of Alderman for their consideration. R. Vol. 1, P 67, R. Vol. 1, P 72. The Mayor and Board denied the rezoning request on November 6, 2001. R. Vol. 1, P 65, 69-71, R.E. As noted, supra, that decision was appealed to the Circuit Court of Tate County and the court affirmed the City's decision. The Presleys took no further appeal.

On September 20, 2005, the Presleys then filed this inverse condemnation suit in the Tate County Circuit Court, requesting just compensation for the taking of their mineral estate. The City filed its Motion to Dismiss or in the Alternative for Summary Judgment, R. Vol. 1, P. 32, and the Circuit Court granted the motion on the ground that it did not have jurisdiction because the Presleys had not taken further appeal of the Circuit Court's decision in the prior case. R. Vol. 2, P. 101 - 104.

IV.
SUMMARY OF THE ARGUMENT

The Circuit Court of Tate County granted summary judgment for the defendant City, holding that the appellants failed to exhaust their remedies and that, therefore, the Court did not have jurisdiction of the case. Appellants submit that they exhausted their administrative remedies and had no obligation to exhaust judicial remedies in the prior rezoning case. Nonetheless, they did appeal the administrative decision of the City to the Circuit Court of Tate County in Presley I, the rezoning case. The Circuit Court affirmed denial of appellants' rezoning requests in Presley I. The appellants chose not to take further appeal. Appellants submit that first, they had no obligation to take a further appeal prior to bringing this inverse condemnation case and that the final decision in Presley I was the decision of the Circuit Court dismissing the appeal. As a result, the appellants were entitled to bring this inverse condemnation case and did so in a timely manner.

V.
ARGUMENT

THE CIRCUIT COURT HAD JURISDICTION OVER THIS MATTER:

Appellee City asserted in the circuit court in this case that the Presleys' decision to forego further appeal of the Tate County Circuit Court's affirmance of the City of Senatobia's refusal to rezone their property deprived that court of jurisdiction to entertain this later case. The court agreed. However, the Presleys do not seek to appeal or to relitigate the denial of their request for rezoning. The Presleys do not dispute the decision of the City and its affirmance by the circuit court in Presley I. This does not, however, prevent the plaintiffs from seeking just compensation in a second suit for "inverse condemnation" as a result of the taking, which

became final with the court's unappealed judgment in Presley I. *Bowman v. Empson*, 138 So. 841, 843 (Miss. 1931).

In the recent case of *Dunston v. Miss. Dept. Of Marine Resources*, 892 So.2d 837 (Miss. App. 2005), the Court of Appeals explained that since the Dunstons never filed for, and consequently were never denied a permit to develop their property, they had not exhausted all the administrative remedies available to them, and, therefore, their inverse condemnation claim was not ripe for judicial review. In other words, the plaintiffs first had to be denied the right to develop their property before they could seek just compensation for their loss. ***The Court of Appeals went further to state that after exhaustion, the Dunstons' claim of a taking must then be brought as a separate inverse condemnation action.*** *Dunston*, 892 So.2d at 843, P. 16. Nothing in *Dunston* suggests, however, that a litigant must exhaust not only administrative remedies, but also judicial remedies. In the previous litigation (Presley I) the Presleys sought only to rezone their property. Upon refusal of the City to grant the rezoning request, the Presleys appealed to the Circuit Court of Tate County, which affirmed the City's decision, thereby prohibiting recovery of the Presleys' mineral resources. The Presleys could have filed this second suit after the rezoning denial by the City, but instead chose to appeal to the court. Thus the "final decision" on the rezoning issue was deferred until the circuit court affirmed the City's decision. The taking was finally established by the prior circuit court judgment, and the proper approach now, according to *Dunston,* is this inverse condemnation suit. The City's assertion and the trial court's holding that further appeal of the circuit court decision in Presley I was a necessary precondition to filing of this suit is erroneous and without precedent. The just compensation issue could not be raised until a final decision amounting to a taking occurred -

that is, when the final judgment on the rezoning request was entered in the Circuit Court. The issue here could not have been raised in the earlier case, either initially, or on appeal. The issue of just compensation for an inverse condemnation taking has not previously been litigated in this dispute and was not ripe for adjudication until the prior process was completed. Indeed, according to *Dunston, supra,* an inverse condemnation suit *must* be brought *subsequent* to the de facto taking of the property by the governmental entity. Id. The taking in this case did not occur until, at the earliest, entry of the judgment of the circuit court on the Presley's rezoning appeal.

Quoting *Dunston*, the Fifth Circuit Court of Appeals in *Urban Developers, LLC v. City of Jackson,* 468 F.3d 281, 294 (5th Cir. 2006) recently explained,

> The Mississippi Takings Clause, like its federal counterpart, has also been interpreted to require finality. See, *Dunston v. Mississippi Dept. Of Marine Res.,* 892 So.2nd 837, 843 (Miss. App. 2005) (citing, *Everitt v. Lovitt*, 192 So.2d 422, 428 (Miss. 1966) ("The Dunstons never filed for and subsequently were never denied, a permit to develop their property. Since the Dunstons have not exhausted all administrative remedies available to them this Court does not have jurisdiction to hear this claim, as it is unripe for judicial review."). *C. f., San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 125 S.Ct. 2491, 2506, 162 L.Ed.2d 315 (2005) ("It was settled well before *Williamson County* that a claim that the application of government regulations effects the taking of a property interest is not ripe until a government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. (Internal quotation omitted)." [2]

The recognition that an inverse condemnation suit must follow a decision resulting in a taking is recognized in both the recent decision in *Urban Developers* and the recent decision in

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[2] Appellants submit that an unappealed municipal decision is a final decision, but an appealed municipal decision is not final until it is affirmed on appeal and no further appeal is taken.

Lange v. City of Batesville, (unpublished 160 Fed. Appx. 348, 354, (5th Cir. 2005), affirming in part and vacating and dismissing without prejudice in part the decision of the United States District Court for the Northern District of Mississippi in Cause No. 2:01-CV-076-P-A.

The circuit court's conclusion that it lacks jurisdiction is erroneous. On the contrary Plaintiffs' filing of this inverse condemnation suit was the proper procedure for Plaintiffs to seek a monetary remedy for the taking of their property without just compensation. See, e.g., *Gilich v. Mississippi State Highway Comm'n*, 574 So.2d 8, 10 -11 (Miss. 1990) and *City of Gulfport v. Anderson*, 554 So.2d 873, 875 (Miss. 1989). See, also, *Herrington v. City of Pearl*, 908 F. Supp.418, 422-423 (S.D. Miss. 1995). (Emphasis added.)

The purpose of the present lawsuit is to seek compensation, not to dispute affirmance by the court of the earlier zoning decision, i.e., not to dispute that the Presley's mineral estate has been taken.

In *Dunston*, the plaintiffs alleged that the following acts constituted a taking of their property without just compensation:

> (1) inclusion of their property in a marshland reserve, (2) stonewalling any possible development to the plaintiffs' property, (3) depositing dredge spoils, (4) placing a jetty on the property, and (5) statements made by DMR employees.

Dunston, 892 So.2d at 843 - 844, P.15.

Finding that the plaintiffs had not exhausted their administrative remedies, the court held that the claim of inverse condemnation was not yet ripe for judicial review. Explaining what administrative remedies the Dunstons should have pursued, the court noted that they had never submitted nor been denied a permit by the relevant state agencies. Id., at 842 P.13. However, there was no suggestion that the Dunstons also had to exhaust any judicial remedies. Unlike the

Dunstons, the Presleys ***were denied the right to recover their mineral resources.*** Upon their request being denied by the City, they appealed the City's decision to the Circuit Court of Tate County. It cannot be said that final decision constituting a taking had occurred until the circuit court rendered final judgment in favor of the city. An inverse condemnation suit did not become ripe for adjudication in state court until the judgment in the rezoning case was final. Once the circuit court judgment became final, the issue of compensation arose. The Presleys filed their suit within the three-year statute of limitations after the circuit court's earlier ruling which became a final judgment only on the zoning issue. Undersigned counsel has not found any Mississippi authority requiring the Presleys to exhaust all judicial remedies in the prior suit in order to have exhausted their administrative remedies. Indeed, the circuit simply blurred the distinction between administrative and judicial remedies. All that was required was a final determination of the zoning issue. The Presleys exhausted their administrative remedies. The trial court had and this court has jurisdiction.

V.

CONCLUSION

On the basis of the exhibits referenced in the record, as well as the legal authorities cited by appellants, the judgment of the Tate County Circuit Court should be reversed and this case remanded for trial on the issue of just compensation.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Ronald W. Lewis, one of the attorneys in the above styled and numbered cause do hereby certify that I have caused to delivered or to be mailed, First Class Mail, Postage Prepaid a true and correct copies of the foregoing **BRIEF OF APPELLANTS** to the following:

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This the 9th day of November, 2007.

Ronald W. Lewis