2010-CA-00137 T

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 Mississippi Supreme Court and/or the Court of Appeals may evaluate possible disqualification or recusal.

Willie and Julia Thompson
Plaintiffs/Appellants

City of Canton
Defendant/Appellee

E. Michael Marks
Trial and Appellate Attorney for Appellants

Julie Ann Epps
Appellate Attorney for Appellants

Kenneth Trey O'Cain
Trial and Appellate Attorney for Appellees

Hon. Samac Richardson
Circuit Court Judge

SO CERTIFIED BY ME, this the 12th day of July, 2010.

E. Michael Marks
E. Michael Marks

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STATEMENT OF THE CASE

Willia and Julia Thompson owned a house at 537 Thornhill Street in Canton, Mississippi. At some point, the City decided that the Thompsons' property as well as adjacent properties were to be taken by eminent domain[1]. The Thompsons informed the City that they desired to move the house from the property at their own expense as other property owners were allowed to do. They were first told that they could do so. They were later told by City employees Bill Patrick and Donald Lawrence that their house was situated differently from the others and that they could **not** move their home to a different location. CP. 6, 200, 239, 242. The Thompsons were paid $55,425.00 for their house which was 75% of the appraised value. CP. 200. They were supposed to get $18,475.00 from Increased Cost of Compliance ("ICC") representing the remaining worth of the house as well as appraisal fees, demolition costs, and attorneys fees. CP. 200. They did not get this money, though, because they had already transferred title to the City. CP. 200.

According to the City, had they moved the house to another location, ICC would have reimbursed them up to $30,000 for the costs. CP. 200. The Thompsons did not take advantage of this opportunity because they were told by the City that they could not move the house. CP. 1, 200.

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[1] Apparently, the properties were prone to flooding and the City purchased the properties pursuant to a Hazard Mitigation Program. CP. 160.

On April 18, 2007, the City destroyed the Thompson's home and the Thompsons were presented with a bill of $7,640.00 for the cost of the demolition. CP. 198.

The Thompsons sent the City of Canton a notice in compliance with the Tort Claims Act and then filed suit against the City on April 14, 2008, alleging various claims including breach of contract, misrepresentation, negligence, gross negligence and deprivation of property without due process of law under 42 USC § 1983. In March, 2009, the City of Canton filed a Motion for Summary Judgment arguing that it was immune from suit pursuant to MCA § 11-46-9. The trial court granted the Motion for Summary Judgment on January 14, 2010. CP. 255. The Order did not contain any rationale for its ruling. It is from this Order that the Thompsons have filed the instant appeal.

SUMMARY OF ARGUMENT

The City in this case argued that it was immune from suit pursuant to the sovereign immunity accorded by the Mississippi Tort Claims Act. However, the law is clear that governmental entities are not immune from liability in eminent domain actions. They are not immune for ministerial acts, nor are they immune in contract actions. For all of these reasons, the City of Canton was not immune when it acted in such a way as to deprive the Thompsons of all that they were entitled to under the Hazard Mitigation Program.

Furthermore, the City is liable under 42 U.S.C. §1983 when it treated the Thompsons differently from similarly situated homeowners who were allowed to move their houses to other properties. The Thompsons were arbitrarily denied this opportunity.

For all of these reasons, the trial court's grant of summary judgment to the City was error. The City is not immune and there are material issues of fact that would preclude summary judgment in this case.

LAW AND ARGUMENT

Standard of review:

An appellate court applies a *de novo* standard of review on summary judgment rulings. *Moss v. Batesville Casket Co.*, 935 So.2d 393, 398 (Miss.2006).

According to Rule 56 of the Mississippi Rules of Civil Procedure, a circuit court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A fact is material if it 'tends to resolve any of the issues, properly raised by the parties.'" *Webb v. Jackson,* 583 So.2d 946, 949 (Miss.1991). The moving party bears the burden of showing that no genuine issue of material fact exists. *Tucker v. Hinds County,* 558 So.2d 869, 872 (Miss.1990). Additionally, the circuit court must view the evidence in the light most favorable to the non-moving party. *Russell v. Orr,* 700 So.2d 619, 622 (Miss.1997). Because it is generally better to err on the side of denying the motion, it has been said that the circuit court must consider motions for summary judgment with a skeptical eye. *Ratliff v. Ratliff,* 500 So.2d 981, 981 (Miss.1986).

1. The City does not have immunity in this eminent domain case.

The doctrine of sovereignty immunity does not apply in eminent domain proceedings. CJS STATES § 547. This was made clear in the case of *McLemore v. Mississippi Transp. Com'n*, 992 So.2d 1107 (Miss. 2008). In that case, the McLemores filed suit against the Mississippi Transportation Commission (MTC) and Talbot Brothers Contracting Co., Inc., alleging a taking without just compensation in violation of the Mississippi and United States Constitutions due to flooding and siltation on real property from negligence in the construction of a highway. The trial court dismissed the McLemore's claims against the MTC finding that the statute of limitations had run under the Tort Claims Act. The Mississippi Supreme Court reversed finding that eminent domain cases were not subject to the Tort Claims Act but instead were governed under Art. 3, Sect. 13 of the Mississippi Constitution which states that

> Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed 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.

Miss. Const. Ann. Art. 3, Sect. 17. *McLemore*, 992 So.2d at 1110.

In *Green Realty Management Corp. v. Mississippi Transp. Com'n*, 4 So.3d 347 (Miss. 2009), a vendor filed suit against the Mississippi Transportation Commission (MTC), which had purchased two tracts of undeveloped land from the vendor in connection with a road-widening project. The vendor claimed that MTC's alleged future

diversion of surface water onto the vendor's remaining property constituted a taking without just compensation. The MTC filed a motion for summary judgment contending that releases in the warranty deed absolved the MTC of liability. The trial court granted summary judgment for the MTC. On appeal, the Mississippi Supreme Court reversed finding that there were material issues of fact regarding the MTC's procurement of the releases. If the releases were obtained by misrepresentations or illegal concealment of facts on the part of the MTC, the releases were not enforceable. *Green Realty Management Corp.*, 4 So.3d at 350.

Just as in *Green Realty Management Corp.*, the Thompsons contend that the City made material misrepresentations when purchasing their property that caused them damages. Just like the vendors in *Green Realty Management Corp.*, the Thompsons are entitled to their day in court.

Mississippi law that eminent domain disputes are not subject to a defense of sovereign immunity is in accord with the law of other states. For example, in *Shaffer v. West Virginia Department of Transportation*, 542 S.E.2d 836 (W.Va. 2000), Shaffer applied for a writ of mandamus to require the State Division of Highways (DOH) to institute eminent domain proceedings after construction of a storm water drainage system resulted in damage to her property. *Shaffer*, 542 S.E.2d at 838. DOH asserted sovereign immunity in its defense. *Shaffer*, 542 S.E.2d at 840. As did the Mississippi Supreme Court in *McLemore*, and for the same reason, the court in *Shaffer* held that the state and its subsidiaries were not immune from suit when it came to eminent domain proceedings. *Shaffer*, 542 S.E.2d at 840. West Virginia, like Mississippi, has a

constitutional provision prohibiting the taking of private property for public use without just compensation. *Id.;* W.Va.Const. Art II, Sect. 9. For this reason, the state is not entitled to immunity in eminent domain proceedings. *Id. See also State v. Montgomery County*, 262 S.W.3d 439, 443 (Tex.App. 2008) (holding that by permitting a county to condemn public land, the legislature waived the sovereign or governmental immunity of the entities condemning the land).

Indeed, an examination of Mississippi caselaw demonstrates that property owners challenge eminent domain decisions all the time and not once has the Mississippi Supreme Court held that such challenges are barred by sovereign immunity. *See, e.g. Hutzel v. City of Jackson,* 33 So.3d 1116 (Miss.2010); *Harrison v. Mississippi Transp. Com'n*, 2010 WL 610655 (Miss.App. 2010); *Smith v. Jackson State University*, 995 So.2d 88 (Miss. 2008).

The fact that the City did not have to institute eminent domain proceedings but was able to reach an agreement with the Thompsons does not change the result. "An agreement to sell property to a governmental authority for public purpose has the same effect as a formal condemnation proceeding." *City of Carrollton v. Singer*, 232 S.W.3d 790, 798 (Tex.App. 2007) (holding that contract was a settlement of an eminent domain proceeding such that city did not have governmental immunity). *See also Fuddy Duddy's v. State Dep't Transp.,* 113 Nev. 1452, 950 P.2d 773 (1997) (holding that land sold under threat of condemnation has the same legal effect as if the land was actually taken under

eminent domain proceedings); *Bristol v. Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 931 A.2d 837 (2007) (same).

Furthermore, once the City decided to exercise eminent domain over the Thompson's property, the steps taken in furtherance of the taking would be ministerial and not discretionary and, thus, not insulated by immunity. *Stranahan House, Inc. v. City of Fort Lauderdale*, 927 So.2d 1068 (Fla.App. 2006) (city's duty to submit non-profit organizations' application to have property designated as historic landmark to board pursuant to eminent domain proceeding was ministerial). The Mississippi Tort Claims Act does not immunize ministerial acts from liability unless they are carried out with ordinary care. *Stewart ex rel. Womack v. City of Jackson*, 804 So.2d 1041, 1048 (Miss. 2002).

In *Fortenberry v. City of Jackson*, 2010 WL 522647 *3 (Miss.App. 2010), homeowners sued the sued the city after their homes were flooded by sewage due to blocked city sewer lines and city's violation of regulatory standards. The trial court granted summary judgment finding that the homeowners' claims were barred by the Tort Claims Act. The Mississippi Court of Appeals reversed finding that the city's maintenance of its sewerage system in compliance with municipal subdivision ordinance and sewage-permitting standards, in addition to state and federal environmental laws, was a ministerial duty rather than a discretionary function, such that City was not immune from action for damages under the Tort Claims Act. *Fortenberry*, 2010 WL 522647 *6.

In this case, the City's eminent domain purchase of the Thompsons' property was done pursuant to regulations provided by the Mississippi Emergency Management

Agency and the Hazard Mitigation Program. Had the City abided by these rules and not made misrepresentations to the Thompsons, the Thompsons would have been able to avail themselves of all the recompense they were entitled to under the Hazard Mitigation Program and they would have been able to move their house to another site with money provided by the ICC. But because the City did not use ordinary care in purchasing the Thompsons' property, the City is not entitled to immunity under the Tort Claims Act.

And, finally, the City is not entitled to immunity because the Tort Claims Act does not apply to "pure contract actions". *Lamb v. Booneville School Dist.*, 2009 WL 843116, *1 (N.D.Miss.). When a governmental entity enters into a contract, it waives sovereign immunity from suit. *City of Grenada v. Whitten Aviation,* 755 So.2d 1208, 1213 (Miss.Ct.App.1999).

In this case, the City of Canton was taking the Thompson's property using funds obtained from a Hazard Mitigation Grant Program via the Mississippi Emergency Management Agency. Once the City exercised its discretion to decide to purchase the Thompson's property using these grant funds, the carrying out of the agreement and disbursement of such funds was ministerial. The Thompsons alleged that the City did not use ordinary care in carrying out the agreement to purchase the Thompsons property in various ways including misrepresentations as to whether the Thompsons could or could not move their house to another property and by having the Thompsons sign over their property to the City and thereby waive their ability to get additional funds from the ICC. The Thompsons suffered damages in that their house was appraised at $73,900.00 (CP. 119) but they received only $55,425.00 and a bill for $7,640.00.

Had the City exercised ordinary care, the Thompsons would have received all that there were entitled to under the Hazard Mitigation Grant Program including the ICC funds.

The City has admitted that there are factual disputes in this case, for instance the Thompson's allegation that the City told them they could move their home and then reversed its position to declare that the Thompsons could not move their home. CP. 120. The City's position is that these disputes are immaterial inasmuch as the Thompsons' claims are barred by the Tort Claims Act. However, the law is clear that the City is not entitled to sovereign immunity in this eminent domain dispute. The existence, then, of material issues of fact means that the trial court erred in granting summary judgment to the City.

2. The City is also liable under 42 U.S.C. § 1983.

Before a person can be deprived of his property by the State, it must accord that person due process. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). The denial of predeprivation and/or postdeprivation hearings or remedies for property rights can violate Fourteenth Amendment due process and equal protection. *See Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1906, 68 L.Ed.2d 420 (1981) and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

Furthermore, the Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal

protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. *City of Cleburne, Tex. V. Cleburne Living Center*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). In this case, the Thompsons allege that they were treated differently from similarly situated persons in that pother homeowners whose properties were purchased pursuant to the Hazard Mitigation Program were allowed to move their homes while the Thompsons were denied this opportunity. In *New England Estates, LLC v. Town of Branford*, 988 A.2d 229 (Conn. 2010), the court held that landowners could bring a Sect. 1983 action against the town based on, among other things, the town's actions in denying them permits despite prior approval of a similar development. *New England Estates, LLC.*, 988 A.2d at 248.

Conclusion

The law is clear that the City is not immune from suit in this eminent domain lawsuit. Since the City is not immune and there exist material questions of fact, the trial court's grant of summary judgment for the City was error and must be reversed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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And mailed the original and three copies for filing (along with a copy on CD-ROM in PDF format) to the Clerk of the Mississippi Appellate Courts at P.O. Box 249, Jackson, MS 39205.

This, the 12th day of July, 2010.

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