DOUGLAS COUNTY DISTRICT COURT

Seventh Judicial District

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Division IV
Michael J. Malone
Judge, Fourth Division

Debbie Oakleaf
Court Reporter

Susan Wolfe
Administrative Assistant

Donald Lee Phipps,
Plaintiff,

v.

2006 CV 338

Rural Water District No. 4,
Douglas County, Kansas,
A Quasi Municipal Corporation,
Defendant.

Memorandum of Decision

Defendant moves for reconsideration of, or for alteration or amendment to, the decision denying defendant's summary judgment motion. In addition, defendant files a supplemental motion for summary judgment.

History

Plaintiff's amended petition sought 1) a declaratory judgment that defendant's condemnation action is void for failure to comply with K.S.A. 82a-619b; 2) a determination that there had been an inverse condemnation and for just compensation; 3) a determination that defendant took plaintiff's land in violation of the Fifth Amendment and for just compensation; 4) a determination that defendant trespassed and for just compensation; and 5) a temporary and permanent injunction a) enjoining defendant's eminent domain proceeding from going forward, and b) enjoining defendant from using its water line and related apparatus until it is relocated into the existing easement. Plaintiff later withdrew his trespass claim.

Defendant moved for summary dismissal arguing 1) the defendant substantially complied with K.S.A. 82a-619b; 2) plaintiff's claim of inverse condemnation was improper; 3) plaintiff's claim for an unconstitutional taking was premature; and 4) the plaintiff's request for an injunction was barred by failure to timely secure an injunction to enjoin defendant's condemnation action.

In denying defendant's motion for summary judgment, this court focused on plaintiff's interpretation of K.S.A. 82a-619b and found that the statute was mandatory, not discretionary. Accordingly, the court denied defendant's motion so the court could hear evidence on how and where the new waterline was installed. In denying the dispositive motion the court acknowledged there was still a question of fact as to whether or not plaintiff authorized the installation of the waterline without the necessity of an easement. Due to its ruling, the court did not address defendant's other arguments.

Defendant moves for reconsideration of the denial of its motion for summary judgment or for amendment of the decision to set forth all material facts that are and are not in controversy, and to allow an interlocutory appeal pursuant to K.S.A. 60-2102(c).

Motion for Reconsideration

Although not cited, the court presumes defendant is proceeding under K.S.A. 60-259(f). The standard governing a trial court's consideration of a 60-259(f) motion to alter or amend judgment appears unarticulated by Kansas courts, but Fed. R. Civ. Pro. 59(e), its federal counterpart, is instructive. *Sharp v. Sharp*, 196 Kan. 38, 42 (1966). Courts recognize three grounds that justify consideration of a motion to alter or amend judgment under Fed. R. Civ. Pro. 59(e): 1) an intervening change in controlling law, 2) the availability of new evidence, and 3) the need to correct clear error or prevent manifest injustice. *Davis v. Bruce*, 215 F.R.D. 612, 615 (D. Kan. 2003). Plaintiff argues that this court erred in its interpretation of K.S.A. 82a-619b; therefore its argument is based upon the third ground. The decision to grant or deny a motion for reconsideration rests within the sound discretion of the court, and "[a]ppropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position or the facts or the law . . . ." *Sithon Maritime Co. v. Holiday Mansion*, 177 F.R.D. 504, 505 (D. Kan 1998).

Defendant's Motion to Reconsider Argument.

In the decision denying defendant's motion for summary judgment, this court concluded, "Therefore, if defendant violated K.S.A. 82a-619b, the eminent domain proceedings are void or voidable, and plaintiff's cause of action remains intact." It is this legal conclusion that defendant moves the court to reconsider.

At the time of this taking, all eminent domain actions were governed by the Eminent Domain Procedure Act (EDPA). K.S.A. 26-501 to 518, as amended K.S.A. 2005 Supp. Furthermore, rural water districts have the power "to exercise eminent domain within the boundaries of such district." K.S.A. 2006 Supp. 82a-619(a).

Defendant argues the court failed to consider K.S.A. 82a-619(a) in concluding that K.S.A. 82a-619b governed the condemnation proceeding. It is true that the court focused on the language of K.S.A. 82a-619b and failed to read it in the light of the EDPA and K.S.A. 82a-619. The language of K.S.A. 82a-619b is strong, clear and all-encompassing. It states that prior to the installation of any waterline upon any easement granted to any rural water district, the board of directors shall advise the landowner as to the exact location of the proposed installation. The use of absolutes in

the statute coupled with some legislative history comments caused this court to view 82a-619b as an empowering statute.

In his response to defendant's motion for summary judgment, plaintiff persuasively argued that compliance with 619b is mandatory, not discretionary. Furthermore, plaintiff argued that 619b is "a part of the [defendant's] enabling legislation."

K.S.A. 82a-619b is titled "Same; alteration of location of pipelines on easements; costs" and reads "(a) Prior to the installation of any water pipeline or appurtenant facility upon any easement or right-of-way granted to any rural water district, the board of directors or its designee shall advise the grantor or his or her local agent of such easement or right-of-way as to the exact location of the proposed installation. If a revision of such location is requested by the grantor, the board or its designee shall offer to negotiate with the grantor for the relocation of the proposed installation to the grantor's satisfaction. Any additional cost incurred by the district as a result of altering the location of the installation shall be borne by the party requesting the alteration. (b) The terms used in this section shall have the meanings respectively ascribed thereto by K.S.A. 82a-612."

It is clear from its own language that K.S.A. 82a-619b is not and cannot be a requirement to the filing of an eminent domain action; therefore, it should not be construed as an empowering or enabling statute as it relates to such proceedings. This court erred in its conclusion that "if defendant violated K.S.A. 82a-619b, the eminent domain proceedings are void or voidable". Even if 619b was not followed, defendant's authority to bring an eminent domain action was not prevented.

Although the above ruling disposes of plaintiff's claim that defendant's eminent domain action is void for failure to comply with K.S.A. 82a-619b, the significance and application of the statute needs to be considered. Defendant argues that 1) notwithstanding its strong language, 816b is only a guideline statute, thus substantial compliance was all that was required and defendant met those requirements; and 2) even though substantial requirement was met, it was not necessary under the existing facts.

"Whether language in a statute is mandatory or directory is to be determined on a case-by-case basis and the criterion as to whether a requirement is mandatory or directory is whether compliance with such requirement is essential to preserve the rights of the parties. *Griffin v. Rogers*, 232 Kan. 168, 174, (1982). In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system, and dispatch of the public business, the provision is directory. Factors which would indicate that the provisions of a statute or ordinance are mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence of noncompliance. *Paul v. City of Manhattan*, 212 Kan. 381, Syl. PP1, 2 (1973)."

K.S.A. 82a-619b does not contain a penalty provision or consequence for not complying. In addition, under Kansas law, the term "shall" is sometimes translated as

"may" depending on the context of the statute. *Rural Water District No. 4, Douglas County, Kansas v. City of Eudora*, 604 F. Supp. 2d 1298, 2009 U.S. Dist. LEXIS 17843 (March 9, 2009). Taking away the jurisdictional element and reading it in context with the eminent domain statutes cited above, it is apparent that the purpose of 816b is to set forth a protocol for rural water districts to consider the concerns of the landowners regarding the location of the pipelines. K.S.A. 82a-619b is directory, not mandatory.

Defendant complains about the lack of findings in the original ruling, but the court's flawed conclusion which resulted in the denial of defendant's summary judgment motion dictated the sparse findings of fact. The granting of a summary judgment motion disposes of the need for a trial and a trier of fact; the denial of a summary judgment motion does not. A district court complies with Supreme Court Rule 141 and 165, and K.S.A. 60-252 and 60-256 if the decision granting summary judgment reflects the court has "individually consider[ed]" a party's findings and conclusions, even if the memorandum is terse. *Stone v. Kiowa*, 263 Kan. 502, 506 (1997). It follows that a decision denying summary judgment does not need to set forth extensive facts that will need to be presented for background and perspective to the trier of fact. Also, plaintiff's other causes of action were not addressed with findings of fact due to the court's erroneous ruling that the eminent domain proceedings were void or voidable if plaintiff could prove defendant violated K.S.A. 82a-619b. Since that legal ruling has changed, additional findings of fact are necessary to address all arguments raised in defendant's motion for summary judgment.

A summarized background of the case follows:

Plaintiff owns a tract of land in Douglas County, Kansas. In 1974, a waterline was constructed along the southern edge of what is now plaintiff's property. Defendant obtained a written easement for the line from the previous landowner. In 2005, defendant wanted to improve the line by replacing the existing water line with a larger line that would include four additional valves. Discussions were held between the parties about saving certain trees and the natural beauty of the property while upgrading the waterline. A new waterline was installed across plaintiff's property during the summer of 2005. After the installation, plaintiff complained to defendant, inter alia, that the line was laid outside the 1974 easement and that the 4-valve system was not placed in the location agreed to by the parties.

Attempts to resolve plaintiff's concerns were unsuccessful, so defendant filed an eminent domain action seeking a thirty foot wide easement across plaintiff's property, which generally included an area 15 feet wide on each side of where the waterline was laid during the summer of 2005. See Case No. 2006 CV 128. The eminent domain petition was granted.

The following are additional findings of fact subject to the rules of K.S.A. 60-256.

David Mackler is an employee of defendant and Scott Schultz is the administrator for defendant. Mr. Schultz is Mr. Mackler's supervisor.

On or about March 18, 2005, defendant gave written notice to plaintiff of its intent to lay a new and improved waterline in the existing easement parallel to the existing line. If

defendant went outside the existing easement, it would request that plaintiff sign a new easement.

Thereafter, defendant marked the old waterline with flags. On May 23, 2005, plaintiff wrote Mr. Schultz, "Now that they have put flags up to mark the old water line, is there any chance that [Mr. Mackler] could come out to my place on Thursday or Friday morning to walk the property again?"

On June 7, 2005, plaintiff emailed Mr. Schultz wanting the defendant to provide him with a surveyed drawing of the old water line and the existing easement. Plaintiff wrote, "It is my understanding that you are requesting a variance on the easement to accommodate the new water line and that this variance would be granted in order to preserve the natural aesthetics of my property. Secondly, I would like to know if, once the new water line is in place, whether we could redraw your easement to conform to the new water line; this would make the new water line the center of the 20 foot easement." Plaintiff conveyed to defendant his understanding that a surveyed drawing of the new water line could not be made prior to the line being laid since he wanted to preserve the natural aesthetics of his property and that the new water line would necessarily go out of the existing easement.

On July 8, 2005, plaintiff sent Mr. Schultz the following email: "I'll be out of the country July 16-30. If you need the temporary easement signed, we will need to move quickly. I will be in town all next week. Should [Mr. Mackler] have any questions when he is on my property about avoiding trees, he should contact Richard Morantz at [phone number]. He lives next door to me and has agreed to act on my behalf should any questions arise. [Mr. Mackler] has walked the property with me twice and I feel he has a good understanding of my concerns, so I have no problem with the process going on while I am away."

On July 9, 2005, Mr. Schultz replied to plaintiff's email. The entire correspondence is set forth in Phipps' Deposition Exhibit #12. Plaintiff responded, "I'm fine with the easement being defined as 10 foot either side of the newly installed as laid pipe. No need to survey."

The new water line was laid across the plaintiff's property from July 18 to July 25, 2005.

On July 18, 2005, Mr. Schultz emailed plaintiff, who was out of the country, that the waterline construction started at the corner of the property that day and that Mr. Schultz had contacted Mr. Morantz, who said he would check in on the defendant.

Plaintiff received the email while he was in Costa Rica and he could have responded to Mr. Schultz, but he did not nor did he check in with Mr. Morantz as the work progressed across plaintiff's property.

On September 16, 2005, plaintiff emailed Mr. Schultz stating the following:

1) Defendant did a good job of clearing the path;
2) Defendant took out two large trees but left three dead ones standing;

3) Defendant went outside its easement at the southwest corner of the property, and "an easement to the south, however small, was not agree to", and therefore cash compensation might be appropriate;
4) That the valves were farther east of where he thought they would be placed;
5) The dead vegetation is on one side of the cleared pathway for the pipeline rather than on both sides; and
6) He wanted a fence put around the valves.

The parties were never able to settle their differences, and defendant filed an action for eminent domain on March 10, 2006, in Case No. 2006 CV 128. The legal description of the plaintiff's property was defective. Eventually and prior to an award being entered, defendant corrected its error.

Plaintiff filed this action for an injunction and for damages on July 7, 2006, but the unverified petition was never set for hearing.

Facts surrounding the eminent domain proceeding, Rural Water District No. 4, Douglas County, Kansas v. Donald Lee Phipps, Case No. 2006 CV 128:

> In an order entered on October 11, 2006, and amended on October 25, 2006, the court granted the District a thirty foot easement for the waterline installed on Mr. Phipps's property from July 18 to July 25, 2005. The order stated the taking was authorized by K.S.A. 82a-619(a)(1). The order further stated that Mr. Phipps "shall also be entitled to make such claim for damages as are in accordance with the laws of eminent domain, for damages he has suffered by reason of the installation of the waterline that was installed by the District in the summer of 2005, regardless of whether the damage occurred within the thirty foot strip . . . or outside the said strip." The order also appointed three appraisers to evaluate the value of the taking.
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> The three appraisers were instructed pursuant to PIK—Civil 4th, Chapter 131, et seq. and K.S.A. 26-501-516. See Judge's Instructions to Appraisers filed October 25, 2006.
>
> The court-appointed appraisers conducted a hearing on the value of the taking on November 14, 2006, and awarded Mr. Phipps the sum of $12,000.00, which was paid into the Clerk of the District Court on December 15, 2006.
>
> The condemnation award was appealed by Mr. Phipps, but the condemnation was not.

On January 9, 2007, plaintiff filed a motion to amend his petition in this action to include a declaratory judgment that defendant failed to follow the provisions of K.S.A. 82a-619b. On January 18, 2007, a pretrial conference was held and the court granted plaintiff's motion for leave to file an amended petition.

Plaintiff's Causes of Action

Declaratory Relief for Defendant's Failure to Comply with K.S.A. 82a-619b.

As indicated above, K.S.A. 82a-619b is not a mandatory statute and failure to comply with its provisions does not render the eminent domain proceedings void or voidable, thus defendant's motion for summary judgment on this claim should be granted. In addition, because of its directory nature, the court concludes that substantial compliance with the statute is all that is required. Plaintiff disputes defendant's context of many of the emails he and defendant sent to each other. However, having read and considered these emails and plaintiff's comments; e.g., "[Mr. Mackler] has walked the property with me twice and I feel he has a good understanding of my concerns, so I have no problem with the process going on while I am away," it is apparent that the intent of the statute was being followed by defendant in its effort to advise plaintiff of the exact location of the installation of the waterline. Defendant's motion for summary judgment on this cause of action is granted.

Inverse Condemnation

An inverse condemnation action cannot proceed when the condemner files an eminent domain action, even if the action is not filed until after the taking. *Lone Star Industries, Inc. v. Sec. of Kansas Dept. of Transp.*, 234 Kan. 121, 122 (1983); *Hiji v. City of Garnett,* 248 Kan. 1, 9 (1991). The defendant filed an eminent domain action against plaintiff on March 10, 2006, and defendant was granted a thirty foot easement for the waterline installed on Mr. Phipps's property during the summer of 2005. See Rural Water District, No. 4, Douglas County, Kansas, a Quasi Municipal Corp. v. Donald Lee Phipps, Case No. 2006 CV 128. Defendant's motion for summary judgment on this cause of action is granted.

Fifth Amendment Taking

Defendant correctly sets forth the controlling authority that the taking claim is not ripe until state remedies have been exhausted. Defendant's motion for summary judgment on this cause of action is granted.

Trespass

Defendant has withdrawn this cause of action.

Injunctive Relief

Plaintiff requested the court to enjoin defendant's eminent domain proceeding from going forward to allow adjudications of the issues raised. Plaintiff also requested the court to enjoin defendant from using the new waterline and related apparatus until all were relocated into the existing easement.

"The movant has the burden of proof in an injunction action. In order to receive temporary injunctive relief, the movant must show a substantial likelihood of prevailing

on the merits; there is a reasonable probability of irreparable future injury to the movant; an action at law will not provide an adequate remedy; the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and the injunction, if issued, will not be adverse to the public interest. *Steffes v. City of Lawrence,* 284 Kan. 380, 394-95 (2007). Injunctive relief will not be granted if there is an adequate remedy at law. *Schuck v. Rural Telephone Service Co.*, 286 Kan. 19, 24 (2008).

As mentioned in the above additional findings of fact, defendant prevailed in the eminent domain action and received a thirty foot easement for the new waterline as laid. After holding the statutorily required hearing, the court-appointed appraisers valued the taking at $12,000.00. This money has been paid to the Clerk of the District Court. Plaintiff has appealed the amount of the award of the appraisers, but he did not appeal the court's finding that the taking of the thirty foot strip for the easement was necessary for the lawful purposes of defendant. Plaintiff's request to enjoin the eminent domain proceedings from going forward "to allow an adjudication of the issues raised in this proceeding" is moot. The eminent domain proceeding, in which plaintiff actively participated, is concluded except for a determination of just compensation, and all issues raised in this action have been summarily denied.

Likewise, plaintiff's request to enjoin defendant from using the waterline cannot be considered in light of this court's granting defendant an easement in Case No. 2006 CV 128 along with granting defendant summary judgment on all of plaintiff's causes of action in this case. In other words, there is nothing left to enjoin.

Plaintiff's request for a temporary and permanent injunction is dismissed.

Defendant's Supplemental Motion for Summary Judgment

After defendant filed its motion for reconsideration, it filed a supplemental motion for summary judgment. Defendant moves for summary judgment arguing plaintiff's claims are barred by: 1) a release entered by plaintiff as a result of receipts of payments in a settlement from Cronister & Company, Inc.; and 2) failure to comply with the notice of claim requirements of K.S.A. 12-105b. Once served, plaintiff filed a memorandum in opposition to defendant's supplemental motion for summary judgment.

Given the court's reconsidering and granting of defendant's original motion for summary judgment, the supplemental motion is moot. However, given the age of this lawsuit, the court wants to briefly address this motion.

The following are uncontroverted facts or facts viewed in the light most favorable to plaintiff:

1) Plaintiff filed a petition for damages against Cronister & Company, Inc. (Cronister) and another. See Case No. 2007 CV 288. Plaintiff's alleged that Cronister is a corporation and is in the business of providing construction services and materials. Further, plaintiff claimed Cronister "undertook to perform construction services and to provide the materials necessary to install new water lines over and across Plaintiff's Property, which included the installation of

appurtenant apparatus, including four (4) water valves." Plaintiff alleged that Cronister was negligent in performing its work, including failing to obtain information about the placement of the water line easement. The entirety of plaintiff's claims is set forth in plaintiff's petition for damages, Case No. 2007 CV 288.

2) Plaintiff settled the claim against Cronister for $35,000.00.
3) In the present case, plaintiff seeks $32,325.00 from defendant for tree and vegetation loss in installing the new waterline. In addition, plaintiff seeks an additional $332,596.00 from defendant to disassemble and reassemble an historic barn due to the location placement of the new water line, and $40,000.00 to move the water line back to the original easement.
4) Plaintiff has not served defendant a written notice as set forth in K.S.A. 12-105b.

Ruling

Settlement Release of K.S.A. 75-6106.

K.S.A. 75-6103 states, in part, "Subject to the limitations of [the Kansas Tort Claims Act] each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state."

K.S.A. 75-6106(c) states, "The acceptance by a claimant of any such compromise or settlement hereunder shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the governmental entity involved and against the employee whose act or omission gave rise to the claim, by reason of the same subject matter."

Under the Kansas Tort Claims Act, K.S.A 75-6101 *et seq.*, an independent contractor is not a state employee. See K.S.A. 75-6102(d) and *Mitzner v. State Dept. of SRS*, 257 Kan. 258 (1995).

Viewing the facts most favorable to plaintiff, the court finds that Cronister was not an employee of defendant, but rather an independent contractor; therefore K.S.A. 75-6106(c) does not apply. Any settlement with Cronister was not a release pursuant to said statute, and defendant's motion for summary judgment is denied. This court makes no ruling concerning the applicability of the single action rule as set forth in *Albertson v. Volkswagenwerk Aktiengesellschaft,* 230 Kan. 368, (1981).

Notice Requirement of K.S.A. 12-105b.

K.S.A. 12-105b(d) states, in part, "Any person having a claim against a municipality which could give rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action. The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event

complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and the extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested. In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim."

Any person or entity with a claim against a municipality under the Kansas Tort Claims Act must file a written notice of the claim with the municipality, and the filing of a proper notice is a prerequisite to the filing of an action in district court. If the statutory notice requirement is not met, the court cannot obtain jurisdiction over the municipality. *Kau Kau Take Home No. 1 v. City of Wichita,* 281 Kan. 1185, Syl. ¶ 2 (2006). However, "In the filing of a notice of claim, substantial compliance with the provisions and requirements of this subsection shall constitute valid filing of a claim." K.S.A. 12-105b(d). "'Substantial compliance' refers to compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." *Orr v. Heiman,* 270 Kan. 109, 113 (2000). The statutory objectives are to advise the municipality of the time and place of the injury and to give the municipality an opportunity to ascertain the character and extent of the injury sustained. *Bell v. Kansas City, Kansas, Housing Authority,* 268 Kan. 208, 210 (1999).

In order to substantially comply with K.S.A. 12-105b, a plaintiff must attempt to supply information for each of the five categories in the statute if relevant to the facts of the case; omission of one or more of the categories makes the notice fatally insufficient. See *Dodge City Implement Inc. v. Bd. of Barber County Comm'rs,* 288 Kan. 619 (2009).

Plaintiff argues his claims are not based in tort, thus the notice provisions of K.S.A. 12-105b do not apply. He withdrew his tort claim and the court has ruled his inverse condemnation claim cannot be pursued as a matter of law. Assuming only for the sake of considering this supplemental motion that plaintiff's request for declaratory judgment survived, then his request for injunctive relief would also remain intact.

Also plaintiff argues, if the notice provisions of K.S.A. 12-105b apply, additional discovery is needed to determine if he substantially complied with the notice. A mechanical counting of categories approach to determining substantial compliance with K.S.A. 12-105b(d) has been rejected. 288 Kan. at 642. Therefore, the uncontroverted facts do not support defendant's motion that plaintiff failed to give notice as set forth in K.S.A. 12-105b(d). Accordingly, defendant's motion for summary judgment is denied.

This memorandum constitutes a journal entry of judgment. It is so ordered on this February 10, 2010.

Michael J. Malone
District Judge

copy to Richard W. Byrum
John W. Nitcher
J. Steven Pigg