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ELECTRONICALLY FILED - 2024 Nov 06 4:20 PM - RICHLAND - COMMON PLEAS - CASE#2023CP4005117

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court for the Fifth Judicial Circuit

Diane Goodstein, Circuit Court Judge

Case No. 2023-CP-40-05117

Bush River C-Store, LLC and Pallav Desai,

Appellants,

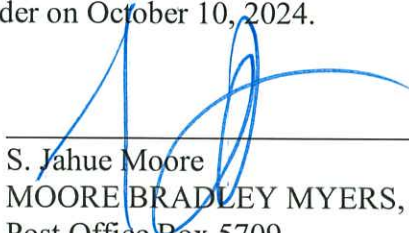
vs.

South Carolina Department of Transportation,

Respondent.

NOTICE OF APPEAL

Bush River C-Store, LLC and Pallav Desai appeal the Order of the Honorable Diane Goodstein, signed on October 10, 2024 and E-filed by the Clerk on that date. Appellants received electronic notice of entry of this Order on October 10, 2024.


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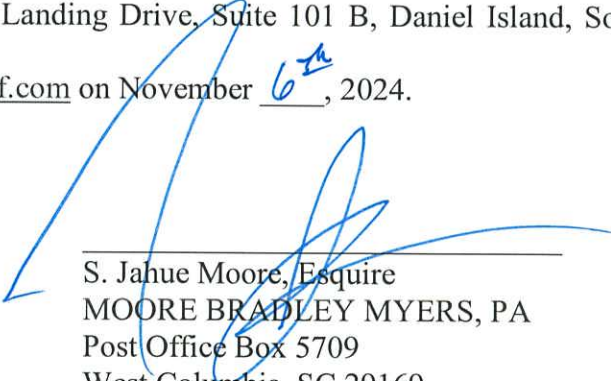
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PROOF OF SERVICE

I certify that I have served the Notice of Appeal by mail, to David G. Pagliarini, Esquire, PAGLIARINI LAW FIRM, LLC, 145 River Landing Drive, Suite 101 B, Daniel Island, South Carolina 29492, and via e-mail, david@lawplf.com on November 6th, 2024.


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ATTORNEYS FOR APPELLANTS

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Bush River C-Store, LLC and Pallav Desai,

Plaintiffs,

vs

South Carolina Department of Transportation,

Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2023-CP-40-05117

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Defendant South Carolina Department of Transportation ("SCDOT") filed a Motion for Summary Judgment, pursuant to Rule 56, SCRCP, on April 30, 2024 and a Motion to Dismiss, pursuant to Rule 12(b)(6), SCRCP, on October 10, 2023 (collectively referred to hereafter as "Motions"). Defendant's Motions are based on the grounds that (i) no genuine issues of material fact exist as to Plaintiffs' challenge action; and (ii) Plaintiffs have failed to state proper causes of action. A hearing on SCDOT's Motions was noticed and held on June 18, 2024 via Zoom. David G. Pagliarini, Esq. and Julia Anne E. McKeachie, Esq. appeared on behalf of Defendant SCDOT. S. Jahue Moore, Esq. appeared on behalf of the Plaintiffs. SCDOT has conceded that the Rule 12(b)(6) motion has been superseded by the Rule 56 motion and, therefore, only the latter is addressed.

BACKGROUND AND FACTUAL CONCLUSIONS

~~The instant case is a statutory challenge action, brought pursuant to South Carolina Code~~
Section 28-2-470, regarding two (2) separate condemnation actions. The challenge statute provides that "[a]n action challenging the condemnor's right to condemn must be commenced in separate proceedings filed in the court of common pleas . . ." The Eminent Domain Procedure Act, S.C.

Code Ann. § 28-2-470 (1976). Challenges to condemnations are cases in equity. *See Ga. Dep't of Transp. v. Jasper Cty.*, 355 S.C. 631, 586 S.E.2d 853 (2003).

This case stems from two (2) separate condemnation cases commenced by SCDOT to acquire right-of-way necessary to complete a road project known as Carolina Crossroads (the "Project") in Richland and Lexington Counties. Specifically, the Project involves the re-design and expansion of interchanges and secondary roads near I-20/I-26/I-126 and is one of the largest in South Carolina history. The Project will be completed in phases over a period of several years.

The underlying condemnation cases were served, but not filed, in September 2023 in accordance with the provisions of the South Carolina Eminent Domain Procedure Act (the "Act"). S.C. Code Ann. § 28-2-220(C). As such, the underlying condemnation actions have not been assigned case numbers. In accordance with the Act, the condemnation cases are stayed pending disposition of this challenge action. S.C. Code Ann. § 28-2-470. Therefore, SCDOT is barred from entering the property and from moving forward with Project construction.

The underlying condemnation actions are referenced as Tract 376 (the tract reference in the Project plans), naming Pallav Desai as Landowner, and as Tract 377, naming Bush River C-Store as Landowner. The term Landowner is defined as "one or more condemnees having a record fee simple interest in the property condemned or any part thereof." S.C. Code Ann. § 28-2-30(12). Tracts 376 and 377 are adjacent and, although there are common ownership interests, they are separately titled.

For Tract 376 (Pallav Desai), SCDOT seeks to acquire a small strip (826 square feet) along ~~the property frontage on Bush River Road. SCDOT appraised the value of the acquisition and is~~ prepared to deposit its estimate of just compensation (\$8,300.00) once the condemnation action is permitted to proceed.

For Tract 377 (Bush River C-Store, LLC), SCDOT seeks to acquire a small strip (1,734 square feet) along the property frontage on Bush River Road. SCDOT appraised the value of the acquisition and is prepared to deposit its estimate of just compensation (\$115,000.00) once the condemnation action is permitted to proceed.

Plaintiffs/Landowners elected to file one statutory challenge action to address the condemnation actions, basing the challenge action on the following:

1. That the SCDOT is barred by the doctrines of res judicata and collateral estoppel from pursuing the acquisitions;
2. That the SCDOT does not have to take these properties and that there are “other ways the properties can be taken;”
3. All damages to the property remainders have not been considered by SCDOT; and
4. The Plaintiffs are filing this action out of “an abundance of caution” and “are obligated to file this action.”

Defendant SCDOT filed its Motions arguing that the SCDOT acquisitions, which are the subjects of the challenge action, are for public use and are necessary to properly and safely design the Project.

Written discovery has been sent and responses have been provided by both parties.

SUMMARY JUDGMENT STANDARD

Motions for summary judgment should be granted where “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRCP. Summary judgment is appropriate when “plain, palpable and undisputed facts exist on which reasonable minds cannot differ.” Thompkins v. Festival Ctr. Grp. I, 306 S.C. 193, 410 S.E. 2d 593 (S.C. Ct. App. 1991); Priest v. Brown, 302 S.C. 405, 396 S.E. 2d 638 (S.C. Ct. App. 1990);

Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). Under Rule 56(c), SCRCP, the party seeking

summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact:

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party.

See George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 545 S.E.2d 500 (2001).

Furthermore, “[a]n adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth *specific facts* showing there is a genuine issue for trial.” Cunningham v. Anderson Cty., 402 S.C. 434, 741 S.E.2d 545, 549 (Ct. App. 2013) (reversed in part on other grounds by Cunningham v. Anderson County, 414 S.C. 298, 778 S.E.2d 884 (2015) (citations omitted) (emphasis added)).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 626 S.E.2d 1, 5 (2006).

LEGAL ANALYSIS AND CONCLUSIONS

The South Carolina Constitution provides: “Except as otherwise provided in this Constitution, private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property.” S.C. CONST. art. I, § 13 (1895). “The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies.” Ga. Dep’t of Transp. v. Jasper Cty., 355 S.C. 631, 586 S.E.2d 853, 856 (2003) (citing Edens v. City of Columbia, 228 S.C. at 573, 91 S.E.2d 280 (1956)).

~~Plaintiffs allege that acquisitions of small portions of the subject properties are not~~ necessary. In South Carolina, a condemning authority must have a public necessity to exercise eminent domain power. Seabrook v. Carolina Power & Light Co., 159 S.C. 1, 156 S.E. 1 (1930); White v. Johnson, 148 S.C. 488, 146 S.E. 411 (1929). The public necessity must be reasonable,

but it is not required to be absolute; the “use must be clearly appropriate and fitting for the purposes for which the land is being condemned.” Timmons v. S.C. Tricentennial Comm’n, 254 S.C. 378, 175 S.E.2d 805, 811 (1970); Groce v. Greenville S. & A. Ry. Co., 94 S.C. 199, 78 S.E. 888 (1913). A reasonable necessity combines the “greatest benefit to the public with the least inconvenience and expense to the condemning” authority. White, 146 S.E. at 412. The question of necessity lies with the condemning authority, but a court can overturn that determination if there is clear abuse of discretion. *See* Sease v. Spartanburg, 242 S.C. 520, 131 S.E.2d 683 (1963).

SCDOT argues that Plaintiffs have produced no evidence that SCDOT has abused its discretion or that alterations to Bush River Road are not necessary to the larger project. SCDOT further contends that Plaintiffs/Landowners, after approximately nine (9) months, have failed to produce any facts, opinions, or witnesses that would lead to any discoverable evidence to support the contention that there are “other ways the properties can be taken.”

SCDOT Assistant Director of Rights of Way, Mega Projects, William C. Johnston, prepared an affidavit, filed with the court, which provides details as to the reasoning and necessity of the acquisitions, as well as to public use.

SCDOT argues that Plaintiffs’ claim that SCDOT has not properly addressed damages to the remainder may not be addressed in the instant challenge action pursuant to the Act, and that the issue of just compensation is the sole issue for determination in the underlying condemnation cases. S.C. Code Ann. § 28-2-340.

Finally, during the June 18, 2024 hearing in front of the Honorable Judge Goodstein, ~~Plaintiffs argued that SCDOT failed to respond to its discovery requests and that it had no~~ knowledge of who William C. Johnston was in relation to the underlying condemnation actions. SCDOT countered that these claims are false, as SCDOT responded to Plaintiffs’ discovery requests on March 14, 2024 and in those responses Mr. Johnston was named as a witness.

The court first addresses the Plaintiffs' claim that the SCDOT is barred by the doctrines of res judicata and collateral estoppel from pursuing the acquisitions. Plaintiffs have provided no evidence or made any tenable argument showing that the underlying condemnation actions have been litigated or are barred in any manner.

Plaintiffs further argue that the SCDOT does not have to take these properties and that there are "other ways the properties can be taken." This argument appears to be based on the public necessity doctrine previously cited in this Order. The question of necessity lies with the condemning authority, but a court can overturn that determination if there is clear abuse of discretion. *See Sease v. Spartanburg*, 242 S.C. 520, 131 S.E.2d 683 (1963).

There is no doubt that the Carolina Crossroads project is a public highway project both financed by and designed and constructed for the benefit of the public. SCDOT representative William C. Johnston provided an affidavit supporting these conclusions and Plaintiffs have not seriously challenged the public use aspect. Rather, Plaintiffs argue, without factual basis, that the proposed acquisitions from Tracts 376 and 377 are unnecessary as the project could have been designed in a manner that would allow the acquisitions to be avoided.

SCDOT is charged with maintaining South Carolina highways. S.C. Code Ann. § 57-5-10. SCDOT engineers and consultants designed and approved project plans for this section of the Project. The subject properties are situated along Bush River Road, an existing public right-of-way, and have direct access to and from the road.

In approximately nine (9) months of litigation, Plaintiffs have named no witnesses who ~~hold qualifications to address any deficiency or problem with the SCDOT plans.~~ Plaintiffs have failed to provide affidavits from any witnesses that would create a question of fact. Moreover, even if Plaintiffs provided an alternative to the SCDOT plans, that alone is insufficient: The question of necessity lies with the condemning authority. *See Sease v. Spartanburg*, 242 S.C. 520, 131 S.E.2d

683 (1963). It is insufficient for a Landowner to simply provide an alternate or competing plan for a court sitting in equity to determine which plan is “better.” It is presumed that the condemning authority is correct that the acquisitions, in size and scope, are necessary to design and construct a safe and effective public project:

When a landowner brings an action to enjoin a condemnation proceeding the burden is upon him to allege and establish fraud, bad faith, or clear abuse of discretion on the part of the condemnor. It follows that if the landowner fails to allege facts in the complaint constituting fraud, bad faith or clear abuse of discretion on the part of the condemnor, such complaint does not state a cause of action.

Id. at 525-26 (citing Atkinson v. Carolina Light Co., 239 S.C. 150, 121 S.E.2d 743 (1961)). Plaintiffs have failed to put forth any facts that would indicate that SCDOT has abused its discretion.

Plaintiffs also argue that damages to the property remainders have not been considered by SCDOT. Damages are an element of just compensation. The Act provides that evidence for the purpose of valuation matters is to be heard in the condemnation cases and not this equitable challenge proceeding. S.C. Code Ann. § 28-2-340.

Plaintiffs further argue that they filed this action out of “an abundance of caution” and “are obligated to file this action.” This assertion is incorrect. South Carolina Code section 28-2-280(7) provides that the following language must be included in every condemnation notice:

AN ACTION CHALLENGING THE CONDEMNOR’S RIGHT TO ACQUIRE THE PROPERTY AND RIGHTS DESCRIBED HEREIN MUST BE COMMENCED IN A SEPARATE PROCEEDING IN THE COURT OF COMMON PLEAS WITHIN THIRTY DAYS OF THE SERVICE OF THIS CONDEMNATION NOTICE, OR THE LANDOWNER WILL BE CONSIDERED TO HAVE WAIVED THE CHALLENGE.

The Landowner is in no way obligated to file a separate challenge action; rather, the above language is intended to put the Landowner on notice that failure to file a challenge action results in the waiver of the right to do so.

Finally, Plaintiffs argue that sufficient discovery has not been completed and that the Rule 56 motion, therefore, is premature. Specifically, Plaintiffs assert that SCDOT has not responded to written discovery requests. SCDOT counsel indicated that responses were provided on March 14, 2024. Plaintiffs filed this case on September 28, 2023. Plaintiffs have provided no affidavits to support this challenge action despite ample time to do so. There has been sufficient opportunity for discovery in this case and there are no genuine issues of material fact pertaining to Plaintiffs' claims or Defendant's defenses thereto as discussed herein. Ultimately, Plaintiffs' complaint fails to establish any specific factual basis on which it can stand; accordingly, and pursuant to Rule 56(c), SCRPC summary judgment is mandated.

NOW, THEREFORE,

IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby GRANTED.

IT IS SO ORDERED.

October 10, 2024

The Honorable Diane Goodstein
Orangeburg, South Carolina



Richland Common Pleas

Case Caption: Bush River C Store Llc , plaintiff, et al vs South Carolina Department
Of Transportation
Case Number: 2023CP4005117
Type: Order/Summary Judgment

It is so Ordered!

s/Diane S. Goodstein

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