

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: February 18, 2014 2:43 PM CASE NUMBER: 2012CV2550 Case No.: 12 CV 2550 Div.: 5 Courtroom: 4e
ORDER re: inverse condemnation claims	

The present Order addresses Rule 12 motions which challenge claims of inverse condemnation.

1. Procedural posture of litigation

The events which resulted in the Lower North Fork Fire have been reviewed by the parties many times. For present purposes, the court finds it unnecessary to review these events again.

(a) parties

In its present posture, the parties to this litigation may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their employees, on the other.

Because of the manner in which the present litigation is postured, the formal names of the parties are somewhat confusing.¹ To simplify the present Order, and without prejudice to any party, the court refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities and their agents or employees who are opposing the homeowners as simply “defending parties.”

(b) inverse condemnation claims

Many of the homeowners’ claims are presently being addressed in what the parties have termed the “special master” process. This process involves adjudication of factual matters by arbiters from the Judicial Arbiters’ Group (who are acting as special masters pursuant to Rule 53, C.R.C.P.) and then submission of the adjudicated claims to the legislature.

The special master process will not address all of the claims advanced by the homeowners, and none of the claims advanced by the insurance companies. In previous Orders, the court has referred to the claims which will not be addressed by the JAG arbiters as the “non-JAG” claims. A number of the non-JAG claims are based upon the doctrine of inverse condemnation.

¹ Most of the homeowners, for example, are technically Respondents in Interpleader.

Because of the large number of parties involved in the present litigation, and the volume of pleadings filed by these parties, the court finds that directing the present Order to particular arguments advanced by particular parties is neither necessary nor desirable. The court accordingly addresses the present Order to all of the parties who have advanced claims of inverse condemnation, and to all of the parties who have challenged these claims pursuant to Rule 12, C.R.C.P.

The bases of the defending parties' challenges are Rules 12(b)(1) and 12(b)(5), C.R.C.P. The court addresses these two Rules separately.

2. Applicable law - Rule 12(b)(5), C.R.C.P.

Rule 12(b)(5) motions test the legal sufficiency of a party's claims. These motions do not involve factual matters outside the pleadings. Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 (Colo. 2011) (consideration of Rule 12(b)(5) motions limited to "facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice.").

(a) general

In ruling upon Rule 12(b)(5) motions, the court must accept the factual allegations of the complaint as true, and must view the allegations in the light most favorable to the non-moving party. Denver Post Corp. v. Ritter, *supra*, 255 P.3d at 1088. The court is not to accept as true legal conclusions which the complaint miscasts as factual allegations. Denver Post, *supra* at 1088; Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008). Conclusory language is not sufficient to withstand a Rule 12(b)(5) challenge, and complaints which contain no more than conclusory allegations are subject to dismissal. Bell Atlantic Corp v. Twombly, 550 U.S. 544 (2007).

Viewing the complaint in the manner stated in the preceding paragraph, the court is to test the legal sufficiency of a party's claims by asking whether "it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." Cherokee Metropolitan Dist. v. Upper Black Squirrel, etc., 247 P.3d 567, 573 (Colo. 2011); *see also* Dorman v. Petrol Aspen, Inc. 914 P.2d 909, 911 (Colo.1996). The court is to apply the above-described standard to each element of a challenged cause of action.

(b) elements of inverse condemnation claim

The elements of a cause of action for inverse condemnation were set forth in Scott v. County of Custer, 178 P.3d 1240 (Colo. App. 2007). There the Court wrote:

To establish a claim for inverse condemnation under the Colorado Constitution, a property owner must show that (1) there has been a taking or damaging of a property interest; (2) for a public purpose; (3) without just compensation; (4) by a governmental or public entity that has the power of eminent domain, but which has refused to exercise that power.

178 P.3d 1244 (citation omitted).

3. Analysis - Rule 12(b)(5)

As stated in Cherokee Metropolitan, *supra*, the court asks whether, as to each of the elements identified in sec. 2(b) above, the homeowners have alleged facts which, if true, would entitle them to relief, or whether the homeowners can prove no set of facts which would entitle them to relief.

(a) element #1: taking

In the context of inverse condemnation claims, a “taking” occurs when a governmental agency “substantially deprives a property owner of the use and enjoyment of that property.” Scott, *supra* at 1244. All deprivations of use or enjoyment, however, do not constitute cognizable “takings.” The law is instead as follows:

[T]here is a difference in kind between a taking and simple negligence on the part of a governmental entity. For a governmental action to result in a taking, the consequence of the action which is alleged to be a taking must be at least a direct, natural or probable result of that action. Therefore, the taking must be a reasonably foreseeable consequence of an authorized action. In other words, the government must have the intent to take the property or to do an act which has the natural consequence of taking the property.

Trinity Broadcasting of Denver, Inc. v. City of Westminster, 848 P.2d 916, 921 (Colo. 1003) (citations omitted).

According to the defending parties, if the conduct of the state employees who started the prescribed burn was culpable at all, it was, at most, negligent. Should that be true, the homeowners’ claims for inverse condemnation would fail. Scott, *supra* at 1243 (“[A] taking cannot result from simple negligence by a governmental entity.”); *see also* Thune v. United States, 41 Fed.Cl. 49 (1998).

According to the homeowners, the conduct of the employees was such that the spread of the prescribed burn beyond its intended boundaries was a “reasonably foreseeable consequence...” of the employees’ willful, reckless, or wanton conduct. The homeowners’ complaints make a number of specific factual allegations which, if true, would support their claim.²

The court finds that, as to the “taking” element of an inverse condemnation claim, the complaints contain specific factual allegations which, if true, would establish that the spread of the fire was foreseeable. The allegations, therefore, are sufficient to withstand a Rule 12(b)(5) challenge to this element of the homeowners’ claims.

(b) element #2: public purpose

In the context of ordinary condemnation claims, the court determines whether a proposed taking is to be made for a “public purpose” by asking whether “the essential purpose of the condemnation is to obtain a public benefit.” Silver Dollar Metropolitan District v. Goltra, 66 P.3d 170, 174 (Colo. App. 2002) (*citing* Denver West Metropolitan

² The homeowners allege, for example, that the employees failed to follow the formal plan by which the fire was to be conducted, and ignored indications (smoke, for example) that the fire was not extinguished.

District v. Geudner, 786 P.2d 434, 436 (Colo. App. 1989)). The court finds that a similar analysis should be used in the context of inverse condemnation claims. Ridge Line, Inc. v. United States, 346 F.3d 1346, 1356 (C.A. Fed. 2003).

There is no dispute that the individual defending parties started the prescribed burn for a public purpose, *viz.*, for the purpose of mitigating the danger of wildfire caused by underbrush. It is also admitted that neither the state employees who started the fire, nor the governmental agencies which employed them, intended that the fire move beyond the boundaries of Denver Water's property. Finally, it goes without saying that the losses caused by the fire after it escaped from the property of Denver Water provided no benefit to the public.

Given the above undisputed facts, the manner in which the Lower North Fork wildfire served a "public purpose," as that term is used in condemnation litigation, is not immediately apparent to the court. The court accordingly looks to the language of the homeowners' pleadings which addresses this element of a claim for inverse condemnation.

(c) allegations of complaints concerning "public purpose"

By the court's count, at least seventeen groups of homeowners or insurance companies have filed claims against one or more of the defending parties on theories of inverse condemnation.

Some of the claims contain no reference to a "public purpose" allegedly served by the Lower North Fork wildfire. *See, e.g.*, Bainbridge Answer and Counterclaims, p. 6-7.

Other claims recognize the "public purpose" element of an inverse condemnation claim, but direct their allegations to the prescribed burn on the property of Denver Water, and not to the wildfire itself. Typical of these allegations are those of the State Farm parties' Answer and Counterclaims, the pertinent portions of which are:

63. The Prescribed Fire was ignited for public purposes, including but not limited to protecting the public, safeguarding Denver's water supply, and enhancing public aesthetics and recreational opportunities.

(quoting here the State Farm parties' Answer and Counterclaims, filed on February 12, 2013). Similar allegations are found in the Answer and Counterclaims of the Kuehster (Scanlan) parties, the pertinent portions of which are:

60. The fire, when started and maintained, was supposedly for a public purpose, including the maintenance of the operations of water facilities and water supplies.

117. The burn on the property of the Denver Water Board that turned into the Lower North Fork fire, was intended to solely benefit the Denver Water Board and was for an alleged public purpose.

(quoting here the Kuehster (Scanlan) Answer and Counterclaims, filed February 25, 2013).

The court has reviewed all of the claims filed against the defending parties which are based upon the theory of inverse condemnation. The court can find no allegations that a public purpose was served, or was intended to be served, by the escape of the fire from the property of Denver Water, or by injury to the lives and property of the homeowners.

(d) theory of “imputed public purpose”

It seems to the court that the claiming parties have alleged, not that the injuries and damages they suffered served a public purpose, but that the public purpose for which the controlled burn was started should somehow be imputed to their injuries and damages.

The court has found no authority for such an “imputed public purpose” theory, and the voluminous pleadings of the parties have identified none. The authorities instead hold to the contrary. Cary v. U.S., 552 F.3d 1373 (C.A.Fed., 2009) (rejecting “public purpose” argument on facts indistinguishable from those now before this court); McNeil v. City of Montague, 268 P.2d 497 (CA 1954) (same).

The court must conclude that the homeowners have alleged, and can prove, no set of facts which would establish that the Lower North Fork wildfire served, or was intended to serve, a public purpose.

(e) element #4: eminent domain power

The final element of an inverse condemnation claim is that the governmental agency responsible for the complained-of taking has the power of eminent domain.

It is not disputed that Denver Water, which contracted with the governmental agencies whose employees started the prescribed burn, has the power of eminent domain. As to the “eminent domain power” element of an inverse condemnation claim, therefore, the court finds that the homeowners’ complaints satisfy the Rule 12(b)(5) standard.

4. Applicable law - Rule 12(b)(1) C.R.C.P.

The defending parties also challenge the homeowners’ inverse condemnation claims pursuant to Rule 12(b)(1), C.R.C.P. This challenge is directed to element #3, “without just compensation.”

(a) general

Rule 12(b)(1) permits a party to challenge the court’s subject matter jurisdiction. A brief explanation of this term is contained in Horton v. Suthers, 43 P.3d 611 (Colo. 2002), where the Court wrote:

Subject-matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment. A court has subject-matter jurisdiction if the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.

43 P.3d 615 (citations and quotation marks omitted).

There are a number of bases on which a party may challenge the court's subject matter jurisdiction. In the present action, several defending parties challenge the court's jurisdiction on grounds that the homeowners' inverse condemnation claims are not ripe.

To place the defending parties' "ripeness" argument in context, the court notes that, at the time that the homeowners filed their inverse condemnation claims, few, if any, had received any compensation from the State of Colorado. All of the homeowners, however, were then involved in administrative or judicial proceedings (or both) for the purpose of obtaining just compensation for their losses.

(b) ripeness; "without just compensation"

A cogent statement of the "ripeness" doctrine is contained in Board of Directors, Metro Wastewater Reclamation District v. National Union Fire, etc., 105 P.3d 653 (Colo. 2005). There the Court wrote:

In the separation of powers design of Colorado government, courts limit their exercise of judicial power through jurisprudential doctrines that include standing, mootness, and ripeness, to establish parameters for the principled exercise of judicial authority. [* * *] Ripeness tests whether the issue is real, immediate, and fit for adjudication. Courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur.

105 P.3d at 656 (citations omitted); *see also* Stell v. Boulder County Department of Social Services, 92 P.3d 910 (Colo. 2004).

Given the homeowners' involvement in the above-described administrative or judicial proceedings, the "ripeness" question before the court is whether an inverse condemnation claim is ripe when (i) a party has arguably been subject to a compensable taking but (ii) the party is engaged in judicial proceedings to obtain compensation for that taking, which proceedings have not yet been completed.

The court believes that the answer to this question is "no." It seems to the court that the basis of an inverse condemnation claim is not simply that a person wronged by a governmental taking has not received compensation for the taking, but that the wronged person has been denied compensation which the person deems to be just. Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) ("[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State..."); *see also* Coles v. Granville, 448 F.3d 853, 860 (C.A. 6 2006) ("A takings claim is not ripe for review unless a property owner is denied just compensation."). In the present posture of this litigation, therefore, it appears to the court that inverse condemnation claims are not ripe, and that this court is accordingly without jurisdiction to adjudicate them.

5. Conclusion

The court recognizes that, upon its determination that the parties' inverse condemnation claims are not ripe, its analysis of the claims should stop.

The court also recognizes, however, that the parties may wish to seek review of the present Order. To enable a reviewing court to consider all of the arguments offered in support of the defending parties' challenges, the court believes that the present Order should address each of the parties' arguments.

The court concludes that the homeowners' claims for inverse condemnation are not yet ripe, and not subject to adjudication by the court.

The court finds that, as to the "public purpose" element of an inverse condemnation claim, the claiming parties have failed to allege facts which, if true, would entitle them to relief. The court also finds that there is no set of facts which can be proven which would entitle the homeowners to relief on their theory of inverse condemnation.

The defending parties' motions to dismiss the claiming parties' inverse condemnation claims pursuant to Rules 12(b)(1) and 12(b)(5) are GRANTED.

Date: February 18, 2014



Judge