BOARD OF PARK COMMISSIONERS OF THE COLUMBUS AND FRANKLIN COUNTY METROPOLITAN PARK DISTRICT, Plaintiff-Appellee

v.

DUDLEY DeBOLT, Jr., et al., Defendants-Appellants

No. 391.

84-LW-0770 (4th)

Court of Appeals of Ohio, Fourth District, Hocking

February 13, 1984

COUNSEL FOR APPELLANTS: John Beringer Banks, 20 South High St., Canal Winchester, Ohio 43110.

COUNSEL FOR APPELLEE: Hugh E. Kirkwood, Jr., 51 North High St. Suite 581, Columbus, Ohio 43215.

OPINION

GREY, J.

This is an appeal from the Hocking County Common Pleas Court. Plaintiff-Appellee, Board of Park Commissioners of the Columbus and Franklin County Metropolitan Park District, filed a complaint to appropriate 40 acres owned by defendants-appellants, Dudley DeBolt, Jr. and his children. Appellants filed an answer and a preliminary hearing was held on certain issues raised in appellant's answer. The trial court resolved all issues in favor of appellee.

A jury trial was held to determine the amount of compensation due appellants. The jury returned a verdict of $58,000.00 as compensation for the land and improvements taken. Appellants have timely appealed, designating one assignment of error.

"The trial court erred in not allowing defendants-appellants to present evidence of the value of the timber crop on the land. In addition to the value of the land and erred in its instruction to the jury on this issue."

At trial, appellant Dudley DeBolt, Jr., testified he believed the fair market value for the land to be $73,970.00 including $32,000.00 for the land at $800.00 an acre, $26,000.00 for the home and $14,000.00 for his profit from the removal of certain timber on the property. The trial court sustained appellee's objection to the $14,000.00 figure, and refused to allow any further evidence of the value of the timber on the property, (tr. pgs 9-10). The trial court instructed the jury they were not to give a separate value to the timber apart from the value of the timber as part of the subject real estate. (tr. pg. 86).

Appellee relies heavily on *Foote v. The L & C Railway Co.* (1901), 27 OCC 319, affirmed without opinion 67 Ohio St. 543, for the proposition that there is no authority for setting market value for trees upon land to be appropriated separate and apart from the value of the land.

Since the *Foote* decision, however, the Ohio Legislature has adopted the Uniform Commercial Code which provides in R.C. 1302.33 as follows:

"(A) A contract for the sale of minerals or the like, including oil and gas, or a structure or its materials to be removed from realty is a contract for the sale of goods within sections 1302.01 to 1302.98 of the Revised Code, if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(B) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in division (A) of this section or of timber to be cut is a contract for the sale of goods within sections 1302.01 to 1302.98 of the Revised Code, whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance."

Simply put a contract for the sale of timber is a contract for the sale of goods. The property appropriated here consisted of real property, the land, and personal property, the contract for sale of the timber. Neither appellant DeBolt, nor his timber cutter Vorhees, were permitted to testify about their contract. However from the testimony presented before the objections were sustained it appears that in the summer of 1981 Vorhees and DeBolt had a contract for cutting timber and had agreed on a price. The exact nature of the contract, or if indeed there was one, does not appear in this record because of the trial court's rulings. Nonetheless, appellant ought to have had the right and opportunity to prove to the jury the existence and value of the timber contract. It was a contract for the sale of goods as defined in R.C. 1302.03. See also *4 ALR 4th*, Sec. 12(A), pgs. 931, 932; and *Columbia Gas Transmission Corp. v. Larry Wright Inc.* (1937), 443 F.Supp. 14. Therefore, appellant had a vested contractural right which was frustrated by appellee's appropriation.

A valid contract is property which is protected against a taking for public use, unless just compensation is made to the owner. 38 O.Jur.3d, *Eminent Domain*, Sec.

123, pg. 180. The contract must be deemed to be part of the res taken. See *Ohio Valley Advertising Corp. v. Lingell* (1957), 107 Ohio App. 351, 152 N.E. 2d 380, aff'd 168 Ohio St. 259, 153 N.E.2d 773.

The dissent in this case argues that "... the trees are a part of the land (emphasis) already included in the fair market valuation of such land," and cites several very good authorities for this proposition. We have no quarrel with the proposition that where the trees are part of the land they are not to be separately valued, but we feel this is not the issue presented here.

Under R.C. 1302.33 quoted above a contract for the sale of timber converts the standing timber from realty to personalty. Once the contract is made, the trees are "goods" under the U.C.C. and, (this is where we differ from the dissent) *no longer a part of the land*. The enactment of the U.C.C. has in our opinion changed the character of standing timber from realty to personalty when there is a contract under R.C. 1302.33. This change must be reflected in appropriation cases, and it was error for the trial court not to consider this issue.

There is no evidence in the record on the issue of whether a contract for the sale of goods (timber) existed, and if it did what was its value, because the trial court refused to admit evidence on the issue. We emphasize that we make no finding on the existence or value of the contract, but only hold that such evidence is admissible.

We therefore find appellant's assignment of error is well taken and sustained.

The judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

JUDGMENT REVERSED AND REMANDED

ABELE, P.J. CONCURS IN JUDGMENT & OPINION

STEPHENSON, J. DISSENTS, WITH ATTACHED DISSENTING OPINION