Touro Law Review

Volume 16 | Number 2 Article 46

2000

Takings

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GOVERNMENT TAKINGS

U.S. Const. amend. V:

[N]or shall private property be taken for public use without just compensation.

N.Y. Const. art. I, § 7:

Private property shall not be taken for public use without just compensation.

SUPREME COURT, APPELLATE DIVISION THIRD DEPARTMENT

Vinciguerra v. New York[1]
(decided June 10, 1999)

Claimants commenced this action against the State of New York seeking damages for trespass,[2] de facto appropriation[3] and prima facie tort[4] after discovering that a state- constructed headwall and

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[1] 693 N.Y.S.2d 634.

[2] *Id.* at 636. BLACK'S LAW DICTIONARY defines trespass as "an unauthorized intrusion or invasion of private premises or land of another." BLACK'S LAW DICTIONARY 1044 (Abridged 6th ed. 1991). For state constitutional takings purposes, there is a mere trespass, and not a taking "where the interference with property rights is only temporary, casual or intermittent, without any permanent use or appropriation or destruction of an existing right...." *See* Stewart v. State of New York, 248 A.D.2d 761, 762, 669 N.Y.S.2d 723, 724 (3d Dep't 1998) (quoting 51 N.Y. JUR. 2D, EMINENT DOMAIN, § 88).

[3] *Vinciguerra,* 693 N.Y.S.2d at 636. "[D]e facto appropriation, in the context of a physical invasion, is based on showing that the government has intruded onto the citizen's property and interfered with the owner's property rights to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from the owner. . . ." O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1160, 445 N.Y.S.2d 687, 689 (1981).

[4] *Vinciguerra,* 693 N.Y.S.2d at 636. BLACK'S LAW DICTIONARY defines prima facie tort as the "infliction of intentional harm, resulting in damage, without

culvert encroached two to two and one-half feet onto their property.[5] The headwall and culvert were constructed in 1948 by the State as part of a drainage system for a nearby roadway.[6] As a result of the drainage system, water was intermittently directed across the claimants' property.[7] Claimants filed suit seeking damages from the State as a result of the State's occupation of and interference with their property.[8] Both Article I, Section 7 of the New York State Constitution[9] and the Fifth Amendment of the United States Constitution[10] bar the state from taking private property for public use without just compensation.[11] Under New York State law, a de facto appropriation of private property by the State constitutes a constitutional taking.[12]

The Court of Claims dismissed the claim for prima facie tort and found that the actions of the state amounted to a de facto appropriation, not a trespass.[13] However, because the Court of Claims found the statute of limitations for de facto appropriation to

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excuse or justification, by an act or series of acts which would otherwise be lawful." BLACK'S LAW DICTIONARY 826 (Abridged 6th ed. 1991).

[5] *Vinciguerra,* 693 N.Y.S.2d at 636.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] N.Y. CONST. art. I, § 7(a). The New York State Constitution states in pertinent part: "Private property shall not be taken for public use without just compensation." *Id.*

[10] U.S. CONST. amend. V. The United States Constitution states in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Id.*

[11] *See supra* note 9 and accompanying text; *see also supra* note 10 and accompanying text.

[12] *See supra* note 4 and accompanying text; *see generally* City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); O'Brien v. City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981); Stewart v. State of New York, 248 A.D.2d 761, 669 N.Y.S.2d 723 (3d Dep't 1998).

[13] *Vinciguerra,* 693 N.Y.S.2d at 636.

be long expired, it dismissed the claimant's action.[14] The Appellate Division affirmed the Court of Claims' dismissal under a different legal and factual analysis.[15] The Appellate Court held that although the head wall and culvert hampered and complicated claimants' development plans, the State's intrusion was not "so egregious as to constitute a constitutional taking."[16]

In contemplation of constructing a strip mall, claimants purchased eight vacant undeveloped plots of land in a series of five transactions between January 1973 and November 1990.[17] In 1989, during excavation of the property, claimants discovered a drainage system, consisting of a culvert and headwall, encroaching upon two to two and one-half feet of their property.[18] Claimants later discovered that these structures were constructed by the State as part of a 1948 drainage project for a nearby roadway.[19] As a result of the drainage, a stream of water was intermittently directed across claimants' land and eventually engulfed the headwall and culvert making the structures difficult to see.[20] After discovering the encroachment, claimants demanded that the state redirect the

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[14] *Id.* The statute of limitations for claims against the state for de facto appropriation is three years. *See* Stewart v. State of New York, 248 A.D.2d 761, 669 N.Y.S.2d 723 (3d Dep't 1998).

[15] *Vinciguerra,* 693 N.Y.S.2d at 636. The Court of Claims found the intrusion upon claimants' property to be a de facto appropriation, but dismissed the claim because the statute of limitations for such appropriation had run. However, the Appellate Division found no de facto appropriation, but instead found the state's actions amounted to a continuing trespass. *Id.* at 637. However, the Appellate Division found that any action claimants may have had under trespass was barred because the state had acquired a prescriptive easement across claimants' property for the drainage system. *Id.* at 638.

[16] *Id.* at 637.

[17] *Id.* at 636.

[18] *Id.*

[19] *Vinciguerra,* 693 N.Y.S.2d at 636.

[20] *Id.* Although claimants contended that they never noticed the headwall and culvert before 1989 because a stream of water flowed over and covered the structures, the court noted that it was undisputed that claimants never surveyed the lots prior to purchase. *Id.* In addition, it was undisputed that claimants were aware of the ditch, dry at the time of their purchase, that the water intermittently flowed through. *Id.*

waters.[21] However, the state declined to do so[22] and claimants commenced an action seeking damages for trespass, de facto appropriation, and prima facie tort.[23] Following a trial, the Court of Claims dismissed the action finding that the State's action amounted to a de facto appropriation for which the statute of limitations had long expired.[24]

After factually assessing whether the Court of Claims' judgment was warranted by the evidence, the Appellate Division concluded that the State's action did not constitute a de facto appropriation.[25] The Appellate Court found that, although the head wall and culvert had encroached upon claimants' property since at least 1948, acting as an intermittent water drainage for a state highway, the structures and their resulting runoff, at most, complicated and hampered their development plans.[26] In the Appellate Court's view, the complications claimants suffered due to the existence of these permanent structures and their resulting runoff did not rise to the level of a constitutional taking.[27] Instead, the Appellate Court found that the two and one-half foot encroachment amounted to a continuing trespass by the State.[28] However, the Appellate Court concluded that the claimants' cause of action for trespass was

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[21] *Id.*

[22] *Id.* The state contended that the "drainage system had been in uninterrupted use since approximately 1908, thereby giving it a prescriptive drainage easement burdening the property." *Id.* In order to establish an easement by prescription, the state would have to show by "clear and convincing evidence the adverse, open and notorious, continued and uninterrupted use of [the claimants] property for the prescriptive period of 10 years." Duke v. Sommer, 205 A.D.2d 1009, 1010, 613 N.Y.S.2d 985, 987 (3d Dep't 1994).

[23] *Vinciguerra,* 693 N.Y.S.2d at 636.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 637.

[27] *Id.*

[28] *Vinciguerra,* 693 N.Y.S.2d at 637. In assessing "whether the intrusion amounted to a continuing trespass," the court concluded that any action for trespass was barred by "expiration of sufficient time to create an easement by prescription" in the state. As a result, claimants' cause of action for continuing trespass had expired. *Id.*

barred because the State had established a prescriptive easement over the property.[29]

The New York State Constitution bars the taking of private property for public use without just compensation.[30] Under New York law, when the State's physical intrusion upon private property amounts to such an aggravated form of trespass as to constitute a de facto appropriation, a constitutional taking has occurred and the State will be required to purchase the property from the private owner.[31] A de facto appropriation is distinguished from a trespass by the egregiousness of the interference with the owner's property rights.[32] Where there is merely a casual or temporary interference, without any permanent use, the resulting appropriation or destruction of private property rights is merely a trespass.[33] However, when the alleged trespasser is the State and the intrusion permanently interferes with the property owner's "'physical use, possession and enjoyment of [the land]', the State's action constitutes a de facto taking."[34] Once there is a finding of

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[29] *Id.* at 638. The court found that the drainage of water and "construction of the headwall and culvert were adverse to the interests of claimants' and both continuous and uninterrupted . . . for the prescriptive period." *Id.* In addition, the fact that the structures were visible during dry periods and inundated with water during wet periods, coupled with the fact that claimants admitted they never thoroughly inspected the ditch, and "did not have the property surveyed before their purchase," supports the conclusion that the State's infringement on the property was open and notorious. *Id.* Therefore, knowledge of the intrusion was imputed to the claimants, resulting in a prescriptive easement. *See id.* at 637-38.

[30] *See supra* note 9 and accompanying text.

[31] *See* O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1160, 445 N.Y.S.2d 687 (1981).

[32] *See* Stewart v. State of New York, 248 A.D.2d 761, 762, 669 N.Y.S.2d 723, 724 (3d Dep't 1998).

[33] *Stewart,* 248 A.D.2d at 762, 669 N.Y.S.2d at 724.

[34] *Id.* (*quoting* Hyland Flying Serv. v. State of New York, 54 A.D.2d 278, 388 N.Y.S.2d 444 (4th Dep't 1976), appeal dismissed 40 N.Y. 2d 809, 360 N.E.2d 1109, 392 N.Y.S.2d 1026 (1977)). In order for the courts to find a de facto taking, there must be a "physical entry by the condemnor, a physical ouster of the owner, a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property." City of Buffalo v. J.W. Clement, 28 N.Y.2d 241, 255, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971).

de facto appropriation, a constitutional taking has occurred and the State must pay just compensation.[35]

Although the Appellate Court did not discuss the Federal Constitutional issue, both the Federal and New York State Constitutions require the government to pay just compensation when private property is taken for public use.[36] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[37] Justice Marshall discussed, in some detail, the United States Supreme Court's interpretation of the "Takings Clause" of the fifth amendment when there has been a physical occupation of private property by the government.[38] Justice Marshall began by tracing the history of physical takings under the U.S. Constitution and pointing out that, as far back as 1872, in *Pumpelly v. Green Bay Co.*,[39] the Supreme Court held that physical occupation of another's property is a constitutional taking.[40] In *Pumpelly*, the Court held, "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having an artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."[41] The *Loretto* court demonstrates that since 1871, the U.S. Supreme Court has considered a physical appropriation of private property to be the most serious interference with a landowner's property rights under the Fifth Amendment of the U.S. Constitution.[42]

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[35] *See O'Brien* 54 N.Y.2d at 357, 429 N.E.2d 1158, 1160, 445 N.Y.S.2d 687, 689 (1981).

[36] *See supra* note 9 and accompanying text; *see also supra* note 10 and accompanying text.

[37] 458 U.S. 419 (1982).

[38] *Id.*

[39] 80 U.S. 166 (1871). Petitioner brought suit against the Green Bay and Mississippi Canal Company for flooding 640 acres of his land due to the construction of a damn, authorized by statute and built in conformity therewith, across the Fox River. *Id.*

[40] *Loretto,* 458 U.S. at 427.

[41] *Pumpelly,* 80 U.S. at 181.

[42] *See Loretto,* 458 U.S. 419, 429 (1982).

Furthermore, Supreme Court cases establish that a taking occurs when the government's actions amount to a permanent physical occupation of the property.[43] The Supreme Court has routinely distinguished between cases where government action causes a physical occupation of the property and cases where the invasion is only temporary in character or is caused by government action beyond the property line that results in consequential damages to the property.[44] Only when the Court determines that a permanent physical occupation has occurred will a constitutional taking be found.[45] Once the Court finds that a physical intrusion of the property has reached the level of a permanent occupation, a taking will be found regardless of how insubstantial the size of the property or of the physical interference with the owner's use and enjoyment of the rest of the land.[46] Consequently, the *Loretto* Court's review of the Supreme Court takings cases revealed that, although a physical taking is subject to a balancing test,[47] it appears that a permanent physical occupation will never be exempt from classification as a taking under the Fifth Amendment of the Federal Constitution.[48]

In conclusion, a takings claim is likely to succeed under the Federal and New York constitutional standards when the government's actions amount to a permanent physical occupation of the claimant's property. Consequently, a temporary or intermittent intrusion upon one's property will not amount to a

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[43] *Id.* at 426 (stating that once "the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but is also determinative.").

[44] *Id.* at 428.

[45] *Id.*

[46] *Id.* (stating "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied").

[47] *Loretto,* 458 U.S. at 432. In resolving whether government action results in a taking the court will weigh the economic impact of the occupation on the property owner, "the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Id. See generally* Penn Central v. City of New York, 438 U.S. 104 (1978).

[48] *Loretto,* 458 U.S. at 432.

constitutional taking under either the Federal or New York State Constitutions.

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