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CONDOMINIUMS—CONDOMINIUM PURCHASER IS LIABLE FOR CONDOMINIUM ASSESSMENTS FROM DATE OF FORECLOSURE SALE

CAMPBELL v. COUNCIL OF UNIT OWNERS OF BAYSIDE CONDO.
No. 1187 (Maryland Court of Special Appeals Dec. 1, 2011)

ISSUE: Does the purchaser of a condominium in a foreclosure sale hold legal title to the property as of the date of the sale, thus, rendering her liable for condominium assessments and fees dating from that point?

FACTS: Elizabeth Campbell was the owner of condominium property at 902 Auckland Way in Chester, Md. The property was a unit within the Bayside Condominium Regime, and Campbell became its owner after her successful bid at a trustee's foreclosure sale conducted on Aug. 3, 2009 by the holder of the deed of trust. The terms of the trustee's sale provided in part:

TERMS OF SALE: ... Adjustments on all taxes, public charges and special and regular assessments will be made as of the date of the sale and thereafter assumed by the purchaser. If applicable, condominium and/or homeowner association dues and assessments that may become due after the time of sale will be the responsibility of the purchaser. Title examination, conveyancing, state revenue stamps, transfer taxes, title insurance, and all other costs incident to settlement are to be paid by the purchaser....

The sale was ratified by the trial court on Nov. 25, 2009, and Campbell settled on the property on Dec. 28, 2009. The deed was recorded in the land records of Queen Anne's County on Jan. 7, 2010. Campbell did not pay the condominium fees that had accrued from the date of the foreclosure sale, but instead paid only those condominium fees due from the date of settlement forward.

As a result of her refusal to pay the condominium fees that were due for the interval between the dates of the foreclosure sale and the execution of the deed, counsel for the Council of Unit Owners of Bayside Condominium, the governing body of the condominium regime, sent Campbell a letter notifying her of Bayside's intent to create a condominium lien "with the ultimate intent of foreclosing on [her] property." Campbell responded by suing the Council pursuant to § 14-203(c) of the Maryland Contract Lien Act, Md. Code (1974, 2003 Repl. Vol., 2009 Supp.), § 14-203 of the Real Property Article (Rea. Prop.), seeking to "[d]eny the lien sought by [Bayside]" and for attorney's fees and costs. The trial court determined there was probable cause for the creation of a lien and entered the appropriate order. Campbell appealed.

HELD: Affirmed.

The special appeals court held that Campbell was liable for condominium assessments from the date of the foreclosure sale despite her claim that the Maryland Condominium Act dictated a contrary result:

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Appellant seeks to overturn the circuit court’s ruling, and maintains that her liability for assessments is governed, and limited by, Real Prop. § 11-110(c), which relevantly provides:

(c) A unit owner shall be liable for all assessments, or installments thereof, coming due while he is the owner of a unit. In a voluntary grant the grantee shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor for his share of the common expenses up to the time of the voluntary grant for which a statement of lien is recorded, without prejudice to the rights of the grantee to recover from the grantor the amounts paid by the grantee for such assessments. Liability for assessments may not be avoided by waiver of the use or enjoyment of any common element or by abandonment of the unit for which the assessments are made.

She asserts that because she did not acquire title until December 28, 2009, the date on which the deed was executed, she was not the “owner” of the property until that date, and thus could not be “liable for all assessments, or installments thereof,” prior to December 28. She emphasizes that Bayside’s developer “carefully tracked” this statutory language when crafting the condominium bylaws that governed the “Non-Payment of Assessment.” She concludes that, given the applicable provision of the Maryland Condominium Act and the related bylaw provision, she could not be liable for the assessments at issue in this case because she was not the “owner” during the interval subject to the assessment. Bayside, for its part, maintains that Ms. Campbell, as a foreclosure purchaser, obtained an “inchoate and equitable title” that become complete upon ratification, but then “the ratification retroact[ed]” such that she is recognized as the owner from the date of the sale. We agree with Bayside... .

* * * * *

It is apparent ... that the purchaser at a foreclosure or judicial sale is in a unique position because of the particular nature of those transactions. From the date of the foreclosure sale, Ms. Campbell was the equitable owner of the property, *see Four Star Enterprises Ltd. Partnership v. Council of Unit Owners of Carousel Center Condominium, Inc.*, 132 Md. App. 551, 573-74 (2000) (quoting *Merryman v. Bremmer*, 250 Md. at 8), with her enjoyment of any benefits of that ownership balanced by the obligations of that ownership during that interval. *Cf. Simard v. White*, 383 Md. 257, 323 (2004) (observing that foreclosure purchaser bears risk of property “upon his bid” and should act “to protect the equitable interest that he has received following the foreclosure sale.”) We conclude that the Ms. Campbell is liable for the condominium assessments from the date of the foreclosure sale.

We are not persuaded that the Maryland Condominium Act dictates a contrary result. Certainly, a party becomes liable for condominium assessments “coming due while he is the owner of a unit.” Real Prop. § 11-110(c). Our holding today does no violence to the workings of the Act, because it does not detract from the ordinary definition of the term “owner.” Although the Act defines “unit owner” as a person holding *legal* title, *see* Real Prop. § 11-101(r), given the authorities set forth above, we must conclude that the term “unit owner” embraces a holder of equitable title, whose rights are virtually ironclad so long as she fulfills her obligations under the terms of the foreclosure. In the unique realm of foreclosure or similar purchases, the long-settled view that the purchaser’s title “retroacts” to the date of the sale means, for purposes of the Act, that Ms. Campbell became the “owner” at the time of the foreclosure sale, with the attendant rights and obligations of that status. On this record, we conclude that Ms. Campbell is liable for condominium assessments from the date of the foreclosure sale.

COVENANTS—RIGHT OF FIRST REFUSAL TERMINATES ON DEATH OF LAST SURVIVING GRANTOR OF RIGHT

RYAN v. LAWYERS TITLE INS. CORP.
 No. 56A03-1101-PL-75 (Indiana Court of Appeals Dec. 13, 2011)

ISSUE: Are plaintiffs entitled to specific performance of a right of first refusal to purchase property contained in a purchase agreement conveying adjacent property?

FACTS: In December 1972, Russell and Mary Keen sold a 6.56-acre parcel of real property (the Ryan property) to Richard and Elizabeth Ryan pursuant to a purchase agreement dated Nov. 9, 1972. The Keens retained certain property (the Keen property) adjacent to the Ryan property, which Mary Keen owned until her death on Mar. 31, 2006. In June 2006, the personal representative of Mary’s estate obtained an order from the probate court authorizing the sale of the Keen property to Steve and Sandra Hageman. On Dec. 20, 2006, a real estate closing took place at the offices of Agri-Town Agency at which the Keen property was conveyed by deed to the Hagemans.

The Ryans sued the estate for specific performance on the grounds that the terms of the purchase agreement provided the Ryans with a right of first refusal if the Keens ever elected to sell the Keen property. The estate filed a third-party complaint against Agri-Town and Lawyers Title Insurance Corp., the underwriter that issued a title insurance policy to the Hagemans. Agri-Town and Lawyers Title filed a third-party counterclaim alleging that the right of right refusal was invalid as a matter of law. Lawyers Title and Agri-Town then filed motions for summary judgment. Following a hearing, the trial court entered summary judgment in favor of Lawyers Title and Agri-Town. The Ryans appealed.

HELD: Affirmed.

The Indiana Court of Appeals affirmed the grant of summary judgment in favor of the title company and insurer on the ground that the right of first refusal was personal and terminated upon the death of the surviving grantor:

The Indiana Supreme Court has stated that “[a]part from any statutory requirements, restrictions on transfer are to be read, like any other contract, to further the manifest intention of the parties” and that “[b]ecause they are restrictions on alienation and therefore disfavored, the terms in the restrictions are not to be expanded beyond their plain and ordinary meaning.” *F.B.I. Farms, Inc. v. Moore*, 798 N.E.2d 440, 445-446 (Ind.2003) (discussing transfer restrictions related to corporate ownership); *see also Mayer v. BMR Properties L.L.C.*, 830 N.E.2d 971, 979-980 (Ind. Ct. App. 2005) (noting that “we have declared that restrictive covenants are generally disfavored by law and will be strictly construed by the court, which resolves all doubts in favor of the free use of property and against restrictions”).

* * * * *

In this case, we examine the terms and language of the right of first refusal as set forth in the Purchase Agreement. We conclude that the right of first refusal here was personal and terminated upon the death of Mary Keen as the last-surviving grantor of the right. Under the terms the Purchase Agreement, the Ryans’ right arose only if the Keens as the sellers offered the land for sale. The terms did not state, expressly or implicitly, that the right was available if the sellers or their heirs, assigns, or personal representatives offered the Keen Property for sale. The Purchase Agreement expressly provided that the right of first refusal was “not to be construed as a covenant running with the land” and that “[i]n the event *seller* would elect to sell remaining part of this farm, purchaser to have first refusal.” Appellants’ Appendix at 20 (emphasis added). The provision also states that “[s]ellers are presently the owners of a farm ...,” *id.*, which further supports the conclusion that the parties intended for the word “seller” in the first sentence of the provision to refer to the Keens personally and not to their heirs, assigns, or executors as those persons were not owners of the Keen Property farm at the time the Purchase Agreement was executed. Further, while we acknowl-

edge that the general pre-printed provision in the Purchase Agreement provided that the offer would become binding upon “Seller and their respective heirs, executors, administrators, successors, and assigns,” *see* Appellant’s Appendix at 20, we note that “[i]t is well settled that when interpreting a contract, specific terms control over general terms,” *see Burkhart*, 918 N.E.2d at 634, and that the more specific language contained in the paragraphs setting forth the right of first refusal providing that the right was “not to be construed as a covenant running with the land,” *see* Appellant’s Appendix at 20, controls over the more general language in this situation. *See Burkhart*, 918 N.E.2d at 634 (finding that the more specific language of a particular provision in a contract controlled over the more general language in the situation). We are not persuaded that the designated materials and the terms of the Purchase Agreement demonstrate clear evidence of the intent of the parties to the Purchase Agreement that the right of first refusal at issue here was to continue beyond the lifetimes of the Keens as the grantors of the right. If the parties to the Purchase Agreement had intended to bind each others’ heirs or personal representatives in connection with the rights of first refusal, they could easily have so provided. *See Roemhild*, 239 F.2d at 495; *Brauer*, 391 N.W.2d at 486.

Based upon the designated evidence and Purchase Agreement, we conclude that the right of first refusal set forth in the Purchase Agreement was personal and could be exercised by the Ryans only in the event the Keens, and not a subsequent transferee or owner of the Keen Property or the Estate, desired or undertook steps to sell the Keen Property to a third party. Accordingly, the court did not err in granting summary judgment in favor of Lawyers Title and Agri-Town.

EASEMENTS—COURT REJECTS ARGUMENT THAT EXISTENCE OF EXPRESS EASEMENT OVER PORTION OF PROPERTY MAKES USE OF ADDITIONAL PORTION OF PROPERTY PERMISSIVE

TURNER v. BOUCHARD

No. 1573 (Maryland Court of Special Appeals Dec. 2, 2011)

ISSUE: Did a trial court err in holding that the petitioner has a prescriptive easement over a portion of the respondent’s property?

FACTS: John Turner and Donald Bouchard own and live on two adjacent properties on Big Bear Lane in Lusby, Md. Turner owns 11730 Big Bear Lane (lot 17) and Bouchard owns 11734 Big Bear Lane (lot 16). The backyards of both lots abut Lake Lariat, a man-made lake used by both parties for recreational purposes. Bouchard has an express easement, granted by a properly recorded deed, over a portion of Turner’s property to serve as a driveway for pedestrian and vehicular ingress and egress to Bouchard’s property. The express easement is a 61 foot, three inch long trapezoid bounded on the south by the property line separating lot 16 from lot 17. At its most intrusive point, the express easement extends northerly into lot 17 eight feet, where it runs parallel to the property line for 28 feet, nine inches. The eastern and western boundaries of the express easement are lines connecting the two parallel sides of the trapezoid at roughly 45 degree angles to the property line.

Lots 16 and 17 share a concrete retaining wall that begins on lot 16, crosses the property line in a north-eastern direction, turns and veers approximately parallel to the property line, and then ends on lot 17. The retaining wall is entirely outside the boundary of the express easement.

Turner and Bouchard disagree over whether there is an easement on a disputed area of land located on lot 17. The western portion of the disputed area is on lot 17 between the retaining wall and the trapezoidal express easement. The eastern portion of the disputed area is a rectangle beginning at the retaining wall and continuing to the lake, which is bordered by the property line with lot 16 and a line parallel thereto. Bouchard uses the western portion of the disputed area as a driveway to access

his house and to park vehicles. In addition, Bouchard uses the eastern portion of the disputed area to store various watercraft, as a picnic area, and as access to the lake.

On Apr. 16, 2007, Bouchard filed a complaint for declaratory judgment on the ground that he had established a prescriptive easement over the disputed area. The circuit court declared that, in addition to the express easement, Bouchard has a prescriptive easement over the disputed portion of lot 17. Turner appealed.

HELD: Judgment affirmed.

The Maryland Court of Special Appeals concluded that the circuit court did not err in holding that the petitioner established a prescriptive easement over a disputed area of land:

Turner argues that the circuit court erred, for two reasons, in not assigning Bouchard the burden of proving that his use of the disputed area was adverse. First, Turner contends that because there is an express easement Bouchard's use of the disputed area was permissive. Therefore, Turner concludes, Bouchard must provide affirmative evidence of a change to an adverse use. Alternatively, Turner argues that lot 17 qualifies for the "woodlands exception," which is recognized in Maryland and would result in a presumption that Bouchard's use of the disputed area was permissive.

* * * * *

Mavromoustakos and *Feldstein*, taken together, refute Turner's argument that there is a heightened burden of proof between neighbors. Instead, the cases stand for the proposition that evidence of a permissive use of the servient estate will not be overcome by allegations of neighborly accommodation. The circuit court interpreted *Feldstein* properly, and declined to view Bouchard's use of the disputed area as a permissive use merely because he had a smaller express easement. The circuit court found no other evidence that Bouchard's use of the disputed area was permissive. Therefore, the circuit court did not err in holding that it was Turner's burden to produce affirmative evidence to the contrary.

Turner argues next that the circuit court erred by not applying the "woodlands exception" to its analysis of the adverse element of a prescriptive easement. This exception, if applied, would lead to the presumption that Bouchard's use of the disputed area was permissive, thus making the burden his to prove that such use was adverse. . . .

* * * * *

To determine whether the woodlands exception applied, the circuit court considered the testimony of witnesses, received photographs of the properties as exhibits, and visited the site to view the disputed area first hand. Our holding in the initial woodlands exception case applies here: "Based on our review of the record, and on our understanding that in a bench trial it is the function of the trial judge to weigh conflicting evidence, we hold that his conclusion was not clearly erroneous." *Forrester*, 98 Md.App. at 489.

* * * * *

Turner argues that because there was an express easement over a portion of his property Bouchard's use of the disputed area was permissive. By that logic, any unauthorized use of a servient estate, even if unrelated to an easement located elsewhere on the property, would be permissive. Absent other evidence that Turner granted permission to Bouchard to use the disputed area, that argument must fail. "The owner of the dominant tenement is entitled to use the easement only in such manner as is fairly contemplated by his grant." *Miller v. Kirkpatrick*, 377 Md. 335, 350 (2003). Bouchard's use of the disputed area was in excess of the use granted by deed, as the deed did not grant use all the way to the retaining wall, or from the retaining wall to the lake. Land the original easement deed did not convey to Bouchard was retained by the Muths, ran with the land, and is now Turner's property. *Millson v.*

Laughlin, 217 Md. 576, 585 (1958). Thus, the disputed area was Turner’s property, and any use of it by Bouchard was adverse rather than permissive.

* * * * *

While the law may disfavor easements by prescription, that policy cannot be twisted to protect landowners who sleep on their rights. The presumption which arises from the unexplained use of the right of way for twenty years that the use was under a claim of right, has not been rebutted by any evidence. *See Cox*, 60 Md. at 79-80. Bouchard’s use of the disputed area satisfied the adverse, exclusive, and continuous for the statutory period requirements of a prescriptive easement. Accordingly, the circuit court did not err in holding that Bouchard established a prescriptive easement over the disputed area. Because neither party challenged the circuit court’s adjudication of their rights and responsibilities regarding the disputed area, we leave that part of the order undisturbed.

EMINENT DOMAIN—DOCTRINE OF CLAIM PRECLUSION INAPPLICABLE WHERE PLAINTIFF SPECIFICALLY RESERVED RIGHT TO ASSERT FEDERAL CLAIMS IN STATE COURT ACTION

R&J HOLDING CO. v. MONTGOMERY COUNTY REDEVELOPMENT AUTH.
No. 10-1047 (Third United States Circuit Court of Appeals Dec. 9, 2011)

ISSUE: Did the district court err in dismissing the plaintiffs’ federal takings claim against the defendants on the ground that the claim was barred by the doctrine of claim preclusion?

FACTS: In 1986, the Redevelopment Authority of Montgomery County created a plan with Donald Pulver, Greater Conshohocken Improvement Corp. and TBFA Partners L.P. (collectively, Pulver) to redevelop certain land, including property (the subject property) owned by R&J Holding Co. (owner) and leased to RJ Florig Industrial Co. (the lessee). The parties entered into a series of agreements under which the Authority was to condemn the subject property as blighted and convey it to Pulver. The agreements provided that the Authority could initiate condemnation proceedings against the subject property only when directed to do so by Pulver.

On July 11, 1996, at Pulver’s direction, the Authority filed a declaration of taking for the subject property. The owner opposed the taking on the ground that it was unlawful because the Authority had improperly delegated its eminent domain powers by giving Pulver the power to determine whether and when to initiate condemnation proceedings. The common pleas court approved the taking over the owner’s objection. The owner appealed to the commonwealth court, which reversed on the ground that the Authority’s delegation of eminent domain power was unlawful.

On remand, the owner petitioned for fees and expenses under the Pennsylvania Eminent Domain Code, which provides that an owner who successfully resists a condemnation action is entitled to “reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceeding.” The court awarded the owner \$550,959.

In late 2002, the owner and the lessee filed a § 1983 suit in federal court against the Authority and Pulver asserting a Fifth Amendment takings claim and seeking just compensation. The defendants moved to dismiss. The district court held that the Code allows an aggrieved property owner to seek just compensation under similar circumstances by filing an inverse condemnation action. Because the plaintiffs had not filed an inverse condemnation action seeking just compensation, the district court dismissed the takings claim on ripeness grounds.

The plaintiffs then filed an inverse condemnation action in the state court but reserved their federal claims for federal court. The common pleas court found in favor of the plaintiffs, and the Authority appealed. The commonwealth court reversed on the ground that the Code does not entitle a prevailing

condemnee to compensatory damages (see 31 **Nat'l.Prop.L.Dig.** 22, December 2005). Because the owner had already recovered expenses under the Code, the court concluded that the plaintiffs had received all the relief to which they were entitled. The supreme court declined to review the decision.

The plaintiffs returned to federal court and asserted the same Fifth Amendment takings claim that they had asserted in the first federal lawsuit. The defendants moved to dismiss arguing that the takings claim was barred by the doctrine of claim preclusion. The district court agreed, dismissed the claim and declined to exercise supplemental jurisdiction over the state law claims. The plaintiffs appealed.

HELD: Reversed.

The Third Circuit reversed the district court's decision, holding that the plaintiffs reserved their federal rights in state court and, therefore, are entitled to a federal forum for their federal claims:

Claim preclusion, or *res judicata*, is a defense asserted when a case is essentially identical to one that has previously been adjudicated. In many jurisdictions, claim preclusion extends not only to those claims actually asserted in a previous action, but also to all those claims which *could have been* asserted. Pennsylvania's law of claim preclusion was summarized by the state supreme court in *Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995): "Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. *Res judicata* applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action." For claim preclusion to apply, Pennsylvania requires that the two actions share the following four conditions: (1) the thing sued upon or for; (2) the cause of action; (3) the persons and parties to the action; and (4) the capacity of the parties to sue or be sued. See *Bearoff v. Bearoff Bros. Inc.*, 327 A.2d 72, 74 (Pa. 1974). But we need not consider whether all of these elements are present. Because the Plaintiffs clearly stated their intention to split their state and federal claims during the second state action and the Defendants raised no objections, the Defendants have acquiesced to the Plaintiffs' claim splitting.

As we held in *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3d Cir. 1990), Pennsylvania follows Section 26(1) of the Restatement (Second) of Judgments, which provides that claim preclusion shall not apply where: (a) The parties have agreed in terms or in effect that the plaintiff may split his claim or the defendant has acquiesced therein; or (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action. *Id.* at 1072 (quoting Restatement (Second) of Judgments § 26(1)). We also held in *Bradley*, pursuant to the commentary in the Restatement, that "[t]he failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim." *Id.* (quoting Restatement (Second) of Judgments § 26(1)(a) cmt. a (1982)). We further noted that the Restatement explicitly mentioned cases where "the opposing party may acquiesce in the federal claim being split off and reserved." *Id.* at 1073 (quoting Restatement (Second) of Judgments § 86, cmt. f).

* * * * *

. . . On the very first page of their state complaint, Plaintiffs noted their intent to reserve their federal claims for adjudication in a federal forum. Plaintiffs reiterated their intent to reserve their federal claims in their filings before the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court. Defendants uttered not a word about the reserved federal claims while Plaintiffs prosecuted their state claims all the way to the Pennsylvania Supreme Court. They cannot now benefit from their silence.

EMINENT DOMAIN—WATER DISTRICT CANNOT MAINTAIN TAKINGS CLAIM UNTIL GOVERNMENT INTERFERES WITH ITS BENEFICIAL USE OF WATER

CASITAS MUN. WATER DIST. v. UNITED STATES
No. 05-168 (U.S. Court of Federal Claims Dec. 5, 2011)

ISSUE: Did the operating restrictions placed on a municipal water district's water project pursuant to the Endangered Species Act (ESA) result in a taking of its property?

FACTS: The Casitas Municipal Water District operated the Ventura River Project, a water project that provided water to residential, industrial and agricultural customers in Ventura County, Cal., a community located on the southern coast of California, approximately 60 miles northwest of Los Angeles. Toward that end, Casitas operated the Robles Diversion Dam, a structure used to divert water from the Ventura River into the Robles-Casitas Canal, a 4.5 mile canal which in turn transported the water to a man-made reservoir known as Lake Casitas. Water was stored in Lake Casitas for delivery to Casitas' customers.

Casitas' diversion and use of water was governed by a license granted to it by the State Water Resources Control Board (SWRCB or the Board), the California agency responsible for the issuance of permits and licenses for the appropriation of water in California. In particular, Casitas' license provided that Casitas may divert up to 107,800 acre-feet of water per year from the Ventura River and other tributaries and may put up to 28,500 acre-feet of water per year to beneficial use. In addition, Casitas' operations were originally governed by a set of guidelines, established in 1959 (the 1959 criteria), which required Casitas to bypass the first 20 cubic feet per second (cfs) of river flow for use by downstream senior water-rights holders before diverting any water from the Ventura River. Flows in excess of 20 cfs could be diverted into the Robles-Casitas Canal, subject to the provisions of Casitas' license.

Casitas operated under the terms of its license from the completion of the water project in 1959 until the late 1990s. In August 1997, however, the National Marine Fisheries Service (NMFS), a federal agency, listed the west coast steelhead trout as an endangered species under the ESA, concluding in the final listing that the primary cause of the decline of the southern California steelhead is "extensive loss of steelhead habitat due to water development, including impassable dams and dewatering." As a result of this listing, Casitas, its officers and the U.S. Bureau of Reclamation (BOR) (the federal agency that owned the water project) faced possible civil and criminal liability if the continued operation of the water project resulted in harm to the steelhead trout.

Casitas worked with the BOR to design a fish passage facility and associated minimum flow requirements. Ultimately, the NMFS issued a biological opinion indicating that the construction and operation of BOR's proposed fish passage facility at Casitas' diversion would not jeopardize the continued existence of the steelhead, but might result in the incidental take of steelhead. The biological opinion therefore included a set of nondiscretionary measures designed to minimize the incidental take of steelhead. The biological opinion increased Casitas' bypass obligation to 50 cfs at specified times, and maintained the 20 cfs bypass requirement the remainder of the calendar year.

On Jan. 26, 2005, Casitas brought an action asserting the United States, in imposing the biological opinion operating criteria, had breached its contract with BOR for the construction and operation of the water project or, in the alternative, had taken Casitas' property without compensation in violation of the Fifth Amendment to the U.S. Constitution. Casitas accordingly sought reimbursement of the approximately \$9.5 million it had spent to construct the fish passage facility (under the contract theory) and just compensation for the water it had lost (under the takings theory).

A trial was then held to determine the compensation, if any, owed to plaintiff under the Fifth Amendment for the taking of its property. In an earlier round of litigation in this case, the Federal Circuit ruled that operating restrictions on Casitas' water project imposed by the NMFS pursuant to the ESA should be analyzed as a physical taking where the plaintiff was required to reroute a portion of the

water it had diverted for its own use through a fish passageway and thus return the water to the river channel. In so holding, the Federal Circuit reversed a decision by federal claims court in which it had ruled that such a restriction on water use constituted a regulatory taking of Casitas' property.

HELD: So ordered.

The Federal Claims Court held that Casitas' takings claim was not yet ripe because the government's action had not yet interfered with its beneficial use of water:

At the heart of this case is a fundamental dispute over the nature and scope of plaintiff's property right. In the most basic terms, plaintiff believes that it is entitled to divert, store, and use water pursuant to the terms of its license and that it must be compensated for water that, as a result of the biological opinion, it was unable to divert. Defendant, by contrast, defines plaintiff's property interest more narrowly, arguing that plaintiff's only compensable right under California law is to the water it can beneficially use (and not to water it has merely diverted or stored), and only if that use complies with various state common-law doctrines. This core difference underpins the parties' respective approaches to both liability and damages.

* * * * *

... The determination of whether background principles of state law inhere in a plaintiff's title and limit the uses to which the plaintiff can put its property is a multi-step process. [cite]. First, plaintiff must demonstrate that it possesses a property interest; second, defendant must identify background principles of state property or nuisance law that would limit plaintiff's proposed use of that property; and third, defendant must connect the state law to the facts of the case to demonstrate that the government's action does no more than duplicate the result that could have been achieved in the courts under background principles of state law. [cite]. Only on this showing, can defendant succeed in its defense that it owes no compensation for physically taking a portion of plaintiff's water supply.

* * * * *

... we conclude that the only compensable right under California water law is a right to beneficial use. The holder of an appropriated water right, in other words, receives nothing more than this right to beneficial use and possesses no legal entitlement to water that is diverted but never beneficially used. Indeed, by the very terms of its water license, Casitas is limited to the beneficial use of 28,500 acre-feet of water per year. Accordingly, we hold that plaintiff must demonstrate an interference with that beneficial use in order to establish a Fifth Amendment taking of its property.

* * * * *

... While the government has interfered with plaintiff's ability to divert water—and has done so since the opening of the fish passage facility necessitated by the steelheads' ESA listing—it remains to be seen whether the government's actions will subsequently interfere with Casitas's beneficial use of its water. Absent such a present, compensable injury, Casitas's takings claim is simply not ripe.

* * * * *

... several factors could affect the accrual of plaintiff's takings claim. As an initial matter, the State Water Resources Control Board could at any time revisit the terms of Casitas's license (the Board has in fact retained jurisdiction over Cal Trout's petition to alter Casitas's license pending the outcome of this action). Should the SWRCB ultimately find that flows of 50 cfs or more are necessary to protect the steelhead, then any prospect plaintiff may have had for pursuing a takings claim in this court will be eliminated. ...

In addition, the accrual of plaintiff's takings claim may be forestalled by the implementation of the drought protection measures set forth in the biological opinion. Under the biological opinion, the fish release criteria may be relaxed if Lake Casitas's storage level falls below 100,000 acre-feet, may be revisited if the storage level falls below 65,000 acre-feet, and may be suspended entirely if the storage level falls below 17,000 acre-feet. Despite the mitigating impact such measures are intended to have on Casitas's water supply (and thus on Casitas's ability to deliver water to its customers), that contingency is reflected in neither party's estimates of water loss. ...In our view, however, such uncertainty merely underscores our conclusion that there is no injury-and thus no accrual of plaintiff's takings claim-until plaintiff suffers an actual reduction in beneficial use. ...

EMINENT DOMAIN—TAXATION DISTRICT NEGOTIATED IN GOOD FAITH PRIOR TO FILING ITS CONDEMNATION COMPLAINT

FOREST PRESERVE DIST. OF DuPAGE COUNTY v. FIRST NAT'L BANK OF FRANKLIN PARK
Nos. 110759, 110760 (Illinois Supreme Court Dec. 1, 2011)

ISSUE: Did a taxation district negotiate in good faith before filing a condemnation complaint to acquire property that comprised landowners' golf course and a surrounding parcel?

FACTS: In 1978, Naper Venture, in which Robert Krilich held a dominant interest, applied for the annexation into Naperville, Ill., of a 456-acre planned unit development (PUD) to be called Country Lakes. The PUD was approved as a special use in connection with the annexation agreement. The PUD contained an existing 150-acre public golf course. Around the golf course were seven areas that were to be developed as residential areas of varying density. Area 1 was already developed at the time of the annexation agreement. By December 1999, areas 2 through 5 had been developed or were in the process of being developed. Areas 6 and 7, which consisted of approximately 54 total acres, had not been developed, and the Summit Development Corp. had a contract pending to purchase these areas (the Summit parcel) for development.

In November 1999, the Forest Preserve District of Du Page County (the District) decided to acquire the 204 acres comprising the golf course and the Summit parcel. On Nov. 23, 1999, the District's board of commissioners approved an ordinance authorizing the District to negotiate acquisition of the property. The District then sent letters to the two trusts it determined owned the property, offering the trustees a total of \$9.27 million and giving them 10 business days to respond before pursuing condemnation proceedings. After a meeting between the two sides, the owners, including Krilich, who was the majority beneficiary under both trusts, rejected the District's offer, but did not make a counteroffer.

The District's board of commissioners then met on Dec. 7, 1999, and considered the negotiations for the property. Noting that neither side had made any further offers or counteroffers since the offer letters on Nov. 23, 1999, the board of commissioners adopted an ordinance finding an inability to agree, revoking authority to negotiate further, and authorizing condemnation of the property. The District sent letters to the two trustees and Summit, enclosing a copy of the December 7 ordinance.

Then, on Dec. 21, 1999, the District brought an action against the landowners to condemn the property. At that time, § 7-121 of the Eminent Domain Act provided that the date of filing the complaint was to be considered the valuation date for purposes of determining just compensation. At a trial held Dec. 12, 2007, nearly eight years after the case was filed, a jury determined the fair market value of the property on Dec. 21, 1999, was \$10.725 million. The trial court entered judgment on the jury's award for that amount. The appellate court affirmed in part, but vacated the jury's verdict as to the value of the property and remanded for further proceedings to determine if the current value of the property was materially different from the amount of the jury's verdict so that it could be said

that the verdict did not reflect just compensation as of the actual date of taking. The District and the attorney general, who intervened, appealed. The defendants cross-appealed.

HELD: Affirmed; cause remanded.

The supreme court upheld the trial court’s judgment regarding good faith negotiation as the negotiation process was not unreasonable:

Defendants ... argue that the appellate court erred in affirming the trial court’s grant of summary judgment, finding that the District engaged in good-faith negotiations prior to filing suit. Specifically, defendants argue that the District’s offer was not supported by reasonable evidence of value, and its negotiations were therefore not conducted in good faith.

* * * * *

The Eminent Domain Act provided at the time of the negotiations at issue here that a governmental body may exercise the power of eminent domain through a condemnation proceeding only where, among other things, “the compensation to be paid for or in respect of the property sought to be appropriated * * * cannot be agreed upon by the parties interested.” 735 ILCS 5/7-102 (West 1998). This provision has been interpreted by this court as requiring the condemnor to negotiate with the landowner in good faith over the amount of compensation to be paid as a “condition precedent” before it initiates proceedings to take the landowners property through eminent domain. *Department of Transportation ex rel. People v. 151 Interstate Road Corp.*, 209 Ill.2d 471, 480 (2004). An offer made by a governmental body based on the advice of an experienced appraisal consultant is normally sufficient to establish a good-faith attempt to agree. See *151 Interstate*, 209 Ill.2d at 489-90; *Blue Island*, 49 Ill.2d at 413-14.

* * * * *

... we find that the District’s negotiations were clearly conducted in good faith and that there was an inability of the parties to agree on an acceptable purchase price. Thus, the District’s filing of the condemnation action in this case was allowable.

* * * * *

Defendants make two additional arguments related to good faith. They argue that the District’s lack of good faith is shown by its failure to attach an appraisal to its offer letters and by setting a limit of 10 days for negotiations. The appellate court correctly found that neither of these actions violated any constraints placed on condemning bodies. See 401 Ill.App.3d at 975. Under section 7-102.1 of the Act, the condemning authority’s offer letter to the landowner must include “[t]he amount of compensation for the taking of the property proposed by the agency, and the basis for computing it.” 735 ILCS 5/7-102.1(d)(1) (West 1998). No Illinois court has ever held that including “the basis for computing” the amount of compensation means that the condemning authority must actually tender its own appraisal to the landowner. Because plaintiff was not required by law to attach an appraisal to its offer letter, we decline to find that the failure to do so constitutes a lack of good faith. Similarly, we conclude that a condemning body is not legally constrained to provide more than 10 days for negotiations in order to satisfy the good-faith requirement. See *Blue Island*, 49 Ill.2d at 410, 414; *County Board of School Trustees v. Batchelder*, 7 Ill.2d 178, 180-82 (1955).

* * * * *

... The appellate court also correctly vacated the jury’s verdict as to the value of the property, subject to a possible reinstatement by the trial court following a hearing on just compensation using the current value of the property. The cause is remanded to the circuit court of Du Page County for further proceedings consistent with this opinion.

HOMESTEAD EXEMPTION—JUNIOR LIENHOLDER WHO REDEEMED PROPERTY PURSUANT TO FORECLOSURE OF A DEED OF TRUST TAKES PROPERTY FREE OF HOMESTEAD RIGHTS

JANICEK v. OBSIDEO L.L.C.

No. 10CA1853 (Colorado Court of Appeals Dec. 8, 2011)

ISSUE: Did a trial court err in holding that homeowners are not entitled to homestead rights and the right to receive excess proceeds where a junior lienholder redeems the property following a public trustee foreclosure sale?

FACTS: Anthony and Pamela Janicek (the homeowners) executed a first deed of trust on their home for the benefit of a lender, which contained a waiver of their statutory homestead exemption rights. The homeowners also executed a second deed of trust for the benefit of Snavelly Development Co. The second deed of trust did not include a waiver of their statutory homestead exemption rights.

The lender holding the first deed of trust foreclosed. The day before the public trustee sale, Snavelly sold the note securing the second deed of trust to Obsideo L.L.C. and 1502 Forrestral L.L.C. (collectively, Obsideo). At the sale, Obsideo was outbid by the winning bidder and the proceeds from the public trustee sale exceeding the bid submitted by the foreclosing lender totaled \$24,769.71 (the excess proceeds).

Shortly thereafter, the homeowners filed a petition for declaration of homestead rights and a temporary restraining order alleging that, because they negotiated to keep their homestead rights in the second deed of trust, they should receive the excess proceeds. The trial court entered a temporary restraining order and an order to show cause why homeowners' homestead rights were not valid.

After the case was filed, Obsideo sought to redeem by tendering payment to the public trustee on the last day of the redemption period. However, Obsideo failed to include two days of per diem interest in the amount of \$99.56, which it paid to the public trustee two days after the redemption deadline. The public trustee remitted the money paid by Obsideo to the winning bidder, who accepted it and issued a certificate of redemption to Obsideo. Pursuant to the trial court's temporary restraining order, the public trustee held the excess proceeds and did not issue a trustee's deed pending further orders from the court.

The homeowners filed a motion to strike the certificate of redemption arguing that in failing to pay the \$99.56 of interest by the redemption deadline, Obsideo did not strictly comply with the redemption statute and that the public trustee could not extend the redemption period absent fraud. The homeowners sought an order requiring the public trustee to convey the property to the winning bidder and disburse the excess proceeds to the homeowners. After a hearing, the trial court held that the homeowners waived their homestead rights in the first deed of trust and, therefore, were not entitled to claim a homestead exemption in the foreclosure proceedings. Accordingly, the court determined that Obsideo was entitled to acquire the property free of any homestead rights because it redeemed pursuant to foreclosure of the first deed of trust. The court further held that the homeowners had no standing to challenge Obsideo's redemption because, if the court were to strike the certificate of redemption, the property would pass to the winning bidder rather than the homeowners. Accordingly, the trial court vacated the temporary restraining order and held that Obsideo was entitled to the excess proceeds up to the amount of the note secured by the second deed of trust. The homeowners appealed.

HELD: Affirmed.

The court of appeals concluded that the trial court did not err in finding that the homeowners were precluded from asserting homestead rights against a junior lienholder who redeemed pursuant to a deed of trust, which contained an express waiver of the homeowners' homestead rights:

... a contractual waiver of homestead rights in a deed of trust constitutes a waiver as to all junior lienholders, and any junior lienholder redeeming the property takes it free and clear of any homestead rights. Thus, section 38-41-212(1) effectively abrogated *Frank* on this issue.

The trial court here found, and we agree, that section 38-41-212(1) plainly applies in this case. Because homeowners waived their homestead rights in the first deed of trust, any junior lienholder, like Obsideo, redeeming pursuant to foreclosure of the first deed of trust would be entitled to take the property free of any homestead rights. Moreover, redemption is not an execution procedure for the purposes of the homestead exemption statute. See *Howell v. Farrish*, 725 P.2d 9, 10-11 (Colo. App. 1986) (a junior lienholder may redeem from a public trustee's sale without complying with the homestead exemption statute because the only party executing on the property was the foreclosing senior lienholder); see also *City Ctr. Nat'l Bank v. Barone*, 807 P.2d 1251, 1252 (Colo. App. 1991) ("Junior lien creditors may redeem from a public trustee's sale without complying with the homestead exemption because redemptive rights are not in the nature of execution.").

* * * * *

We conclude that the plain language of the deed of trust unambiguously expresses the parties' intentions concerning homeowners' homestead rights. The second deed of trust clearly does not contain a waiver of homestead rights. Homeowners, therefore, did not waive them. By its terms, however, the document is silent on the subject of exemptions, other than to state that there is no provision dealing with the waiver of exemptions. We therefore look to the applicable statutes and case law to determine how the homestead exemption should be applied.

Had Obsideo foreclosed pursuant to the second deed of trust, homeowners would have received the benefit of the homestead exemption. See § 38-41-206, C.R.S.2011. However, nothing in the second deed of trust provides that section 38-41-212(1) would not apply in the event of a foreclosure under the first deed of trust and a redemption by the second deed of trust holder. We therefore decline to consider parol evidence concerning the parties' negotiations.

Accordingly, the second deed of trust did not waive or nullify the application of section 38-41-212(1), and homeowners are precluded from asserting a claim to homestead rights against a junior lienholder who redeemed pursuant to the first deed of trust. The trial court therefore did not err in holding that homeowners were not entitled to homestead rights under these facts and that they were not entitled to receive the excess proceeds.

* * * * *

Here, the winning bidder could have asserted a right to refuse Obsideo's deficient payment if he was unwilling to accept Obsideo's late payment of the per diem interest, but he accepted the late payment. Homeowners, however, had no stake in the redemption process and were not prejudiced by Obsideo's late payment. If Obsideo's redemption had been voided, the public trustee would have been obligated to disburse the overbid funds to Obsideo as the next junior lienholder. See § 38-38-111(2), C.R.S.2011. Accordingly, we conclude that the trial court did not err in holding that homeowners lacked standing to challenge Obsideo's redemption.

TITLE—DESPITE PHRASE “LESS . . . TRACT OF LAND RESERVED FOR RAILROAD RIGHT-OF-WAY,” DEED CONVEYED ALL INTEREST IN PROPERTY INCLUDING RIGHT-OF-WAY

BOULANGER v. WASTE MGMT. OF TEXAS INC.

No. 01-10-01002 (Texas Court of Appeal Dec. 15, 2011) *unpublished*

ISSUE: Did a trial court err in granting the defendant’s motion for partial summary judgment in a trespass action and holding that a deed transferred title to a railroad right of way?

FACTS: The Sam Houston Recycling Center in Houston, Tex., consists of a main tract of approximately 3.6406 acres and a panhandle tract of approximately 2.117 acres. A 40-foot-wide railroad right-of-way runs in a north-south direction between the main tract and the panhandle tract.

The main tract and the panhandle tract originally were part of a 142 acre tract of land owned by C.P. Lumpkin. Lumpkin split the 142 acres into various parcels. The main tract and the panhandle tract were included in one parcel, which consisted of 14.177 acres. In 1955, Lumpkin conveyed 13.697 acres of the parcel, including the main and panhandle tracts, by deed to Cramerus Realty Co. (the Cramerus deed). The Cramerus deed identified the property conveyed by metes and bounds description and stated that it was “LESS the following tract of land reserved for railroad right-of-way.”

Through a series of subsequent conveyances, Waste Management of Texas Inc., Waste Management Inc. and USA Waste Landfill Operations and Transfer Inc. (collectively, Waste Management) acquired the right-of-way. In 1991, separate grantors conveyed both the main and panhandle tracts by deed to Waste Management’s corporate predecessor (the Waste Management deeds), which then established a recycling center. According to Waste Management, it has used the right-of-way to operate the recycling center and to cross between the main and panhandle tracts for more than 15 years, and there is no alternate route between the main and panhandle tracts. The right-of-way was abandoned by the railroad in 1999.

Mike Boulanger, as trustee on behalf of the Westlum Trust, contends that Lumpkin retained the right-of-way in the Cramerus deed and that Boulanger later purchased the right-of-way as part of the 0.7175 acres he acquired from Lumpkin’s heirs in 2005. Boulanger sued Waste Management for trespass and unjust enrichment. Waste Management filed counterclaims for trespass to try title and suit to quiet title. Waste Management filed a motion for partial summary judgment asserting that Boulanger had no evidence of the ownership element of his trespass claim or that Waste Management had conclusively negated that element. The trial court granted Waste Management’s motion. Boulanger appealed.

HELD: Affirmed.

The court of appeal affirmed the trial court’s order granting the defendants’ motion for partial summary judgment:

A single word gives rise to the parties’ differing opinion as to the legal effect of Lumpkin’s conveyance: “LESS.” The Cramerus Deed conveys certain property “LESS the [described] tract of land reserved for railroad right-of-way.” Using dictionaries to define “less” as commonly meaning “devoid of,” Boulanger contends the Cramerus Deed excluded the right of way from the conveyance of the Main and Panhandle Tracts. Waste Management disagrees that “LESS” excludes the right-of-way and suggests a different construction of the term—namely, one having the effect of conveying fee title to all the land described while notifying Cramerus that the grant is burdened by the railroad right-of-way and reserving the railroad’s right to continue using that land.

Recognizing that “separate ownership of long narrow strips of land, distinct from the land adjoining on each side, is a fruitful source of litigation and disputes,” the Texas Supreme Court developed a rule with respect to the legal construction of conveyances like Lumpkin’s to

Cramerus: “[I]t is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved.” *Cantley v. Gulf Prod. Co.*, 143 S.W.2d 912, 915 (Tex. 1940) (presuming that language “keeping” thirty-foot-wide road easement did not reserve title to strip of land underlying easement in absence of evidence of clear intention to do so). Stated differently, “[w]hen an instrument conveys land definitely described in the instrument and then excepts from the conveyance a road, railroad right-of-way or canal right-of-way occupying an easement on, over or across the land conveyed, the instrument conveys the fee to the entire tract, subject to such right-of-way, unless the deed clearly indicates that the grantor intended to reserve the strip.” *Moore v. Rotello*, 719 S.W.2d 372, 375-76 (Tex. App.-Houston [14th Dist.] 1986, writ ref’d n.r.e.) (concluding that “save and except” language in deed was not express reservation of interest in property, it had no other effect than to say that grant was burdened with railroad right-of-way, and deed conveyed fee title to entire tract of land).

There is no disagreement that the railroad right-of-way at issue here is a forty-foot-wide strip of land that adjoins and separates the Main and Panhandle Tracts conveyed in the Cramerus Deed. And, we see no reason why “LESS” should have a different legal effect than “keeping” or “save and effect,” as those terms have given rise to the presumption stated above in *Cantley and Moore*. See *Cantley*, 143 S.W.2d at 915; *Moore*, 719 S.W.2d at 375-76. Applying that presumption, the Cramerus Deed would be reasonably susceptible to only one construction—i.e., the construction urged by Waste Management—unless Boulanger presented summary judgment evidence that clearly indicated Lumpkin intended to retain an interest in the right-of-way. He did not.

* * * * *

In the absence of evidence that Lumpkin “clearly reserved” title to the right-of-way, we conclude that the Cramerus Deed unambiguously conveyed fee title to all of the land described therein, including the Main Tract, the Panhandle Tract, and the right-of-way. The property description that follows the word “LESS” merely served to notify Cramerus that the grant was burdened by the railroad right-of-way. Boulanger concedes that, if the Cramerus Deed conveyed fee title to the right-of-way, then Waste Management acquired that title under the Waste Management Deeds in 1991, so we need not consider whether the Waste Management Deeds are valid or whether Waste Management’s chain of title is complete. ... Instead, we conclude only that the trial court did not err in granting summary judgment for Waste Management.

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