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SJC-12810

FULVIO JOSEPH GENTILI, trustee,¹ and another² vs. TOWN OF STURBRIDGE.

February 24, 2020.

Easement. Adverse Possession and Prescription. Real Property, Easement.

In 2015, the plaintiffs, Fulvio Joseph Gentili and Gina Madore, trustees of the Renato Gentili Trust, commenced an action in the Land Court against the town of Sturbridge (town) and Sturbridge DHC, LLC (Sturbridge DHC), seeking various declarations concerning the town's and Sturbridge DHC's right to discharge water onto trust property (property).³ After a trial, a judge declared that the town had obtained a prescriptive easement to discharge storm water through a town culvert onto and across the property. The trust did not appeal from that decision. Instead, it commenced this action in the Superior Court against the town only, seeking compensation pursuant to G. L. c. 79, §§ 7, 10, 12, and 14, for what it avers was a taking, by the town, of the property. The trust does not contest the existence of the prescriptive easement; rather, it argues that the easement amounts to a taking for which it is

¹ Of the Renato Gentili Trust.

² Gina Madore, as trustee of the Renato Gentili Trust.

³ Sturbridge DHC is a private land owner and an abutter to the trust's property.

entitled to compensation.⁴ After a hearing on the parties' cross motions for summary judgment, a judge allowed the town's motion and denied the trust's motion. The trust appeals, and we transferred the appeal to this court on our own initiative.

Background. Although the existence of the prescriptive easement is not at issue, we briefly set forth the facts underlying the Land Court's decision. In 1987, the town authorized the reconstruction of Hall Road, which runs along one side of the property. The reconstruction work included replacing an old culvert with a new culvert (a corrugated metal culvert that is twenty-four inches in diameter). The new culvert extended into the property. In 1997, the trust inquired of the town's conservation commission (commission) whether the Wetlands Protection Act (act) applied to the property. The commission indicated that the act did not apply, but subsequently, when a second inquiry was made in 2003, the commission indicated that there were wetlands on the property. The trust thereafter attempted to sell the property, without success. Then, in 2015, the trust commenced the Land Court action, seeking various declarations regarding the town's rights, or lack thereof, to discharge water onto the property. On the basis that the town had been discharging storm water onto the property through the new culvert since the culvert's construction in 1987, and because the town had met the other requirements for acquiring a prescriptive easement as well, the judge declared the existence of the easement and dismissed the trust's complaint.

Discussion. As noted, the trust did not appeal from the Land Court judgment declaring the town's prescriptive easement. Rather, the trust took a different tack -- arguing, in its complaint in the Superior Court, that the easement amounts to a taking for which the trust is entitled to compensation from the town. The trust does not argue, nor could it reasonably do so, that the easement amounts to an order of taking pursuant to G. L. c. 79, § 1, which provides for "[t]he taking of real estate or of any interest therein by right of eminent domain" with an actual "order of taking." There has clearly been no such order here. Rather, in the trust's view, the easement amounts to a taking pursuant to G. L. c. 79, § 10.⁵ The town, by

⁴ The trust also sought the return of certain taxes that it had paid pursuant to G. L. c. 79, § 35A.

⁵ General Laws c. 79, § 10, provides in relevant part:

discharging storm water onto the property, has, the argument goes, "taken" the property for public use and the trust has suffered a compensable injury as a result. See Blair v. Department of Conservation & Recreation, 457 Mass. 634, 639 (2010) ("A physical or per se taking . . . requires a permanent physical intrusion on . . . an interest in the property by the government for public use").

The problem with the trust's argument is that the theories and laws of prescriptive easements and takings do not interact in the way that the trust suggests. The town acquired the easement, pursuant to statute, through its "use . . . continued uninterruptedly for twenty years." G. L. c. 187, § 2. The trust, concomitantly, failed during that time to assert any rights against the town either to put a stop to the discharge of water onto the property or to obtain compensation for it as a taking.⁶ It is this failure, rather than any action by the town, that led to the trust's loss of property rights. See Texaco, Inc. v. Short, 454 U.S. 516, 530 (1982) ("It is the owner's failure to make any use of the property -- and not the action of the State -- that causes the lapse of the property right; there is no 'taking' that requires compensation"). Although the Court in the Texaco case was considering a State statute that provided for the extinction of certain rights (in mineral interests) when not exercised for twenty years, see id. at 518, rather than, as

"When the real estate of any person has been taken for the public use or has been damaged by the . . . operation . . . of a public improvement or has been entered for a public purpose, but such taking, entry or damage was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law, or when the personal property of any person has been . . . used for a public purpose, and by such . . . use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter."

⁶ We recognize that the trust did take various actions related to the property between 1997 and 2015 when it filed its declaratory judgment action in the Land Court, but none of those actions -- inquiring about wetlands, leasing the property, attempting to sell the property -- related to stopping the town's discharge of water onto the property or claiming a taking on that basis.

here, a State statute that establishes certain rights (via an easement), the rationale applies equally.

Several other jurisdictions have reached this same conclusion that a prescriptive easement does not, and cannot, amount to a taking. See, e.g., State, ex rel. A.A.A. Invs. v. Columbus, 17 Ohio St. 3d 151, 152 (1985) (court rejected property owner's claim that city streets that had long covered portion of property amounted to taking). "In the case of adverse possession, property is not taken. Rather, once the [relevant statutory period] has expired, the former titleholder has lost his claim of ownership and the adverse possessor is thereafter maintaining its possession, not taking property." Id. Viewed another way, a prescriptive easement is not a means for the government "to take private property without just compensation." Weidner v. State, Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993). "Rather, the prescriptive period . . . requires a private landowner to bring a [takings] action . . . within a specified period of time. At the expiration of the prescriptive period, the landowner's right to bring suit is extinguished." Id. See Stickney v. Saco, 770 A.2d 592, 603 (Me. 2001) (rejecting property owner's claim that city, which had acquired easement over property, had taken property without just compensation).

Inherent in a government's taking of private property is a right in the property that the government has commandeered; there can be no "taking" if there is no right. In the case of a prescriptive easement, the rights the property owner once had are extinguished to the extent of the easement. Such is the circumstance here. The trust had no basis on which to claim a taking by the town because the town acquired the right to use the property (to discharge storm water onto it) via the prescriptive easement, and the trust lost its right to the property in that regard.

Conclusion. The Superior Court judge correctly concluded that the trust has not established a taking or any right to compensation or damages.⁷

Judgment affirmed.

⁷ Because we conclude that no taking occurred, we need not address the trust's remaining arguments regarding the amount of damages or just compensation due to it.

Theresa K. Capobianco for the plaintiffs.
Thomas P. Lane, Jr., for the defendant.