IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Petitioner,

v. Case No. 5D19-3102

GARY M. MAHON D/B/A POKEY'S LAKE GEM CITRUS NURSERY,

Respondent.

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Opinion filed April 9, 2020

Petition for Certiorari Review of Order from the Circuit Court for Orange County, Kevin B. Weiss, Judge.

Shannon P. McKenna, Wesley R. Parsons, and Francisco Ramos, Jr., of Clarke Silverglate P.A., Miami, for Petitioner.

Hala Sandridge, of Buchanan Ingersoll & Rooney P.C., Tampa, for Respondent.

LAMBERT, J.

The Florida Department of Agriculture and Consumer Services ("the Department") petitions for a writ of certiorari seeking relief from a nonfinal order entered by the trial court in an inverse condemnation action brought against it by the respondent, Gary M. Mahon, d/b/a Pokey's Lake Gem Citrus Nursery ("Mahon"). The order in question decided: (1) the parties' burden of proof, and (2) that the Department would have to present its

evidence and argument first at the jury trial where the amount of damages or compensation to be awarded to Mahon is to be determined. For the following reasons, we conclude that the Department has failed to show that this order has caused it to suffer irreparable harm. Therefore, we dismiss the petition.

Mahon sued the Department, alleging that following an inspection of his citrus nursery, the Department placed a "stop sale notice" on his citrus trees, thus preventing him from selling the trees or their fruit. Mahon asserted that the Department, in an effort to protect public health and safety, forced him to destroy the majority of his trees because the trees were not being grown on a site within a protective structure that had been approved by the Department, in violation of section 581.1843, Florida Statutes (2007).[1]

Mahon disputed the Department's conclusion that his trees needed to be destroyed. Instead, he averred that his citrus trees were healthy and that they were not infected with citrus canker or citrus greening. Mahon claimed in his inverse condemnation lawsuit that the destroyed trees had a value in excess of $3.4 million and the Department had not compensated him for their destruction. *See* Art. X, § 6(a), Fla. Const. (providing that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner").

An inverse condemnation action may be brought by a nursery owner when the State, in its exercise of police power to prevent the spread of citrus canker, instead destroys otherwise healthy citrus trees. *See Dep't of Agric. & Consumer Servs. v. Mid-*

[1] Section 581.1843, Florida Statutes, was enacted to prevent a disease called "citrus greening," which is transmitted by an insect called a psyllid.

Fla. Growers, Inc., 521 So. 2d 101, 105 (Fla. 1988) (holding that in an inverse condemnation case, nursery owners must receive "full and just compensation" when the State, pursuant to its police power, destroys healthy trees); *State Plant Bd. v. Smith*, 110 So. 2d 401, 406–07 (Fla. 1959) (same). It essentially is a proceeding "to compel the governmental body to exercise its power of eminent domain and award just compensation to the owner." *Fla. Dep't. of Agric. & Consumer Servs. v. City of Pompano Beach*, 829 So. 2d 928, 931 (Fla. 4th DCA 2002) (quoting *Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 489 (Fla. 1st DCA 1975)). The trial judge is the trier of all issues, legal and factual, in the inverse condemnation suit, except for the question of what amount constitutes just compensation. *Mid-Fla. Growers*, 521 So. 2d at 104 (citing *United States v. Certain Parcels of Land in Monroe Cty.*, 509 F.2d 801, 803 (5th Cir. 1975)).

Here, the trial court held a nonjury trial to determine whether the Department was liable to Mahon for the destruction or "taking" of his citrus trees and fruit. The court entered an order finding in favor of Mahon and thereafter scheduled a jury trial to determine the amount of compensation to be awarded to Mahon.

The dispute that is the subject of this certiorari proceeding arose when the Department filed a motion requesting that one of its experts be permitted in the courtroom during the upcoming jury trial when Mahon was presenting evidence regarding the value of the loss of his trees. *See City of Pompano Beach*, 829 So. 2d at 931 (holding that proper measure of damages in an inverse condemnation action brought by citrus growers seeking compensation for trees that were destroyed in an effort to eradicate citrus canker was replacement cost, not diminution in value of the land). Mahon responded that, much like in an eminent domain proceeding brought by a condemning governmental authority

under either Chapter 73 or Chapter 74[2] of the Florida Statutes, once the trial court finds, as it did here, that a taking has occurred, the Department bears the initial burden of proof at trial regarding the value of the citrus trees destroyed. *See Foster v. City of Gainesville*, 579 So. 2d 774, 776 n.2 (Fla. 1st DCA 1991) (recognizing that in an inverse condemnation proceeding, if the trial court has found a taking by the state, "a jury trial is held wherein the jury determines the amount of compensation to which the property owner is entitled" and that "[t]he valuation proceeding is to be held in accordance with chapters 73 and 74, Florida Statutes, and the process is the same as if the cause were a statutory eminent domain action"); *City of Ft. Lauderdale v. Casino Realty, Inc.*, 313 So. 2d 649, 652 (Fla. 1975) (Overton, J., concurring) (recognizing, in a concurring opinion joined by a majority of the Florida Supreme Court, that in a statutory eminent domain case, the condemning authority bears the initial responsibility to go forward with evidence necessary to establish what land was taken, how it is being taken, and the value of the land actually taken); *accord Wilkerson v. Div. of Admin., State Dep't of Transp.*, 319 So. 2d 585, 585 (Fla. 2d DCA 1975) (holding that the condemning authority has the burden of proof to establish the value of land in a condemnation proceeding (citing *Casino Realty*, 313 So. 2d at 652)). Thus, Mahon reasoned that the Department's motion to allow its expert to observe Mahon's evidence at the jury trial was a non-issue because, similar to an eminent domain trial, the Department would be presenting its evidence first.

The Department responded that an inverse condemnation action should be treated no differently than any other civil case and that, as the plaintiff, Mahon was required to

[2] A Chapter 73 eminent domain proceeding is sometimes referred to as a "slow take" case, while a Chapter 74 eminent domain proceeding is referred to as a "quick take" case.

proceed first at trial because he had the burden to prove his damages. The trial court disagreed. It ordered that the Department would proceed first at the jury trial with voir dire, opening statement, presentation of evidence as to the value of the trees that it had inversely condemned, and closing argument.

From this order, the Department seeks certiorari review. It argues in its petition that this order must be quashed because it violates its "fundamental due process rights" regarding the conduct of a trial, departs from the essential requirements of law, and, if left uncured, will cause a "miscarriage of justice and irreparable harm."

In analyzing whether the Department is entitled to this requested relief, we first recognize that certiorari review of nonfinal orders is "an extraordinary remedy and should not be used to circumvent the interlocutory appeal rule[3] which authorizes appeal from only a few types of non-final orders." *See Jaye v. Royal Saxon, Inc.*, 720 So. 2d 214, 214–15 (Fla. 1998). To obtain a writ of certiorari, a petitioner, such as the Department, must show that the nonfinal order constitutes "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011).

These second and third prongs or elements are sometimes referred to as "irreparable harm," and they are jurisdictional. *Deutsche Bank Nat'l Tr. Co. v. Prevratil*, 120 So. 3d 573, 575 (Fla. 2d DCA 2013). Therefore, prior to our court addressing the merits of the Department's certiorari petition, the threshold question to be decided is whether the injury resulting from the order is material and cannot be remedied on appeal.

[3] Fla. R. App. P. 9.130.

Stated somewhat differently, because irreparable harm is a jurisdictional question, we cannot grant the writ unless the two elements that comprise "irreparable harm" have been established, even if the trial court was clearly wrong in its order. *See Laycock v. TMS Logistics, Inc.*, 209 So. 3d 627, 628–29 (Fla. 1st DCA 2017) (explaining that before an appellate court considers the merits of a certiorari petition, it must first determine the threshold jurisdictional question of whether the petitioner has shown irreparable harm and that an appellate court "cannot grant the writ without such a showing—no matter how wrong the trial court might have been"). Absent such a showing, the petition for writ of certiorari must be dismissed. *See Bared & Co. v. McGuire*, 670 So. 2d 153, 157 (Fla. 4th DCA 1996) (explaining that dismissal, rather than denial, is the proper disposition of petition for writ of certiorari when appellate court determines that there has been an insufficient showing of irreparable harm).

Reduced to its core, the Department's argument is that the trial court committed an extraordinary error by ordering it to proceed as if Mahon's inverse condemnation action was an eminent domain proceeding brought by the Department, as plaintiff, under Chapter 73 or Chapter 74, Florida Statutes. As previously mentioned, in an eminent domain case, even though the landowner sustained the damage as a result of the governmental taking, the condemning authority has the initial burden at the jury trial to present evidence concerning the value of the owner's land taken, subject to the landowner presenting its own valuation evidence, and the condemning authority has the right to give the initial and rebuttal closing argument. *Casino Realty,* 313 So. 2d at 652–53.

Our first task is to determine whether the trial court's requirement that the Department first proceed with the presentation of evidence and argument at the inverse condemnation jury trial, much like it would proceed in an eminent domain trial, will cause it to sustain irreparable harm. Only if we are convinced that such harm has been established would we proceed to the next step of deciding whether the court's order departs from the essential requirements of the law.

As previously alluded to, an inverse condemnation proceeding has been described as an action to essentially compel the governmental entity to bring an eminent domain action to award compensation to the property owner. *City of Pompano Beach*, 829 So. 2d at 931. Applying this observation here, Mahon has sued the Department to compel it to do what it could or should have done initially—bring an eminent domain action to take his citrus trees and fruit and to compensate him for doing so. Had the Department done so, then it would have had the burden of going forward at trial regarding the valuation to be placed on Mahon's destroyed trees. If dissatisfied with the jury's verdict and the subsequent final judgment entered, then, much like in an eminent domain case, the Department would have the right to plenary appeal to seek relief from any reversible error committed.

Viewing the petition before us with this prism, and in light of certiorari review being an extraordinary remedy, we conclude that the Department has not met its jurisdictional threshold of showing irreparable harm[4] by the trial court order. Accordingly, the Department's petition for writ of certiorari is dismissed.

[4] To be clear, by our decision, we have taken no present position on the merits of the trial court's order under review.

PETITION DISMISSED.

ORFINGER and HARRIS, JJ., concur.