Vermont Superior Court
Filed 07/15/24
Essex Unit

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 24-CV-01468

David Ferdinand v. Town of Brighton

DECISION ON MOTION TO DISMISS

Title: Motion to Dismiss
Filer: Stephen F. Coteus
Filed Date: June 14, 2024

In this case, plaintiff David Ferdinand, as trustee of the BGB Trust, alleges that defendant, the Town of Brighton, improperly placed a water drainage system on the Trust's property in Brighton.[1] Plaintiff seeks preliminary and permanent injunctive relief—including removal of the drainage system—and damages. The Town has moved to dismiss the complaint under Rules 12(b)(1) and 12(b)(6). For the reasons set forth below, the Town's motion is granted.

Factual Background

For the purpose of this motion, the court accepts the following facts, drawn from the complaint, as true. *See Coutu v. Town of Cavendish*, 2011 VT 27, ¶ 4, 189 Vt. 336. Plaintiff owns approximately 39 acres of land in Brighton, including a parcel known as "the Meadow." At some point, the Town placed "piping for water drainage and basins" on the Meadow "without first obtaining an easement." Compl. ¶ 3. The drainage system, intended to remedy drainage issues at 145 Railroad Street, has caused water to back up onto the Meadow. Plaintiff characterizes the Town as having installed the drainage system "intentionally and without right." *Id.*, ¶ 3.

Additionally, the court takes judicial notice that—according to public land records submitted by the Town in support of its motion to dismiss—plaintiff acquired an approximately 39-acre parcel of land in Brighton on Meadow Street on October 28, 2022. The court further takes judicial notice—according to select board meeting minutes submitted by the Town—that, at several meetings in 2013, the Town's select board discussed a plan to install a drainage system to remedy pooling water that was occurring at 145 Railroad Street. *See generally* V.R.E. 201.

Legal Standard

In reviewing a motion to dismiss, the "[c]ourt assumes that all well pleaded factual allegations in the complaint are true, as well as all reasonable inferences that may be derived therefrom." *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 7, 186 Vt. 605 (mem.) (quotation

[1] The court refers to Mr. Ferdinand and the BGB Trust interchangeably as "plaintiff."

omitted). The court considers the facts in the light most favorable to the nonmoving party. *Coutu*, 2011 VT 27, ¶ 4. Courts, however, need not accept "conclusory allegations or legal conclusions masquerading as factual conclusions." *Rodrigue v. Illuzzi*, 2022 VT 9, ¶ 33, 216 Vt. 308.

Analysis

I. Trespass

Plaintiff alleges that Town's installation of the drainage system gives rise to a claim for trespass. Liability for trespass arises when one intentionally enters another's land or when one causes something, such as water, to enter another's land. *Nesti v. Vt. Agency of Transp.*, 2023 VT 1, ¶ 24 (citing *Canton v. Graniteville Fire Dist. No. 4*, 171 Vt. 551 (mem.)). "Trespass involves the *unprivileged* entry on to the land in possession of another." *Id.* (quoting *Wild v. Brooks*, 2004 VT 74, ¶ 17, 177 Vt. 171 (emphasis added)). Thus, "[b]y definition, trespass involves conduct that the trespasser has no right to engage in." *Wild*, 2004 VT 74, at ¶ 17.

Plaintiff alleges that the Town "is a Vermont municipality" and "has laid piping for water drainage and basins on the Trust's property." Compl. ¶¶ 2, 3. The complaint unambiguously labels the Town's project as "the Drainage System" and describes its purpose as "solv[ing] water drainage problems on 145 Railroad Street." *See id.*, ¶ 3. The Legislature has expressly granted Vermont municipalities the authority to enter private land and install such systems. 24 V.S.A. §§ 3602 (municipalities may "construct, maintain, operate, and repair a sewage disposal plant and system" and may "enter in and upon any land for the purpose of making surveys" and "may lay pipes and sewers"); 3603 (municipalities may "enter upon and use any land . . . over or through which it may be necessary for pipes or sewer to pass, and . . . thereon at any time [or] place lay and construct such pipes and sewers."); *see also* 24 V.S.A. § 3601 (defining "sewage treatment or disposal plant" to include any "equipment" or "system" needed for the "treatment or disposal" of "stormwater" or "surface water").[2]

Because the Town has the legal right to enter private land and install pipes and other equipment to remedy water drainage issues, plaintiff's trespass claim fails as a matter of law. This is true even if one considers the absence of privilege as an affirmative defense to trespass, rather than an essential element of the tort that must be affirmatively alleged. *See Otter Creek Solar LLC v. Vt. Agency of Nat. Res.*, 2022 VT 60, ¶ 13 (affirmative defense may be considered on a motion to dismiss where allegations in complaint "show on their face that the action is barred" by the defense (citing *Fortier v. Byrnes*, 165 Vt. 189, 193 (1996))).

I. Inverse Condemnation

Although the Town has a statutory privilege to enter private land to install a drainage system, the federal and state constitutions require the Town to provide fair compensation if it takes private property for a public purpose. U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation . . .), amend. XIV § 1 (incorporating the Takings Clause as part of due process protections against the States); Vt. Const. ch. I, art. 2

[2] 24 V.S.A. § 3603 has been redesignated and amended, effective July 1, 2024, as 24 V.S.A.§ 3605.

(“That private property ought to be subservient to public uses whenever necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”); *see also Griswold v. Town Sch. Dist. of Weathersfield*, 117 Vt. 224, 227 (1952) (municipal entity’s liability for destroying private water source was “not dependent on negligence but on the taking of private property and this unlawful taking gives the right of action”). Because the government has the right to take private property for a public purpose, the remedy for a takings claim is “just compensation.”

In opposing the motion to dismiss, plaintiff recharacterizes his claim as an “inverse condemnation” takings claim. *See* Pl.’s Opp. to Mot. to Dismiss 2 (“[P]laintiff complains of an inverse taking or condemnation of his property without due process.”). “When the government does not institute condemnation proceedings before taking physical possession of property, the owner must seek just compensation in an inverse-condemnation suit.” *Nesti*, 2023 VT 1, ¶ 12 (citing *United States v. Bedford Assocs.,* 618 F.2d 904, 918 n.28 (2d Cir. 1980)). “Inverse condemnation claims are reserved for instances in which the state should have entered into eminent domain proceedings initially.” *Ondovchik Fam. Ltd. P’ship v. Agency of Transp.*, 2010 VT 35, ¶ 21, 187 Vt. 556.

Critically, the proper plaintiff to bring an inverse condemnation is the property owner “at the time of the taking.” *Dep’t of Forests, Parks & Recreation v. Town of Ludlow Zoning Bd.*, 2004 VT 104, ¶ 7, 177 Vt. 623. The right to receive compensation for a government taking does not run with the land. *Id.*

Here, any alleged taking occurred when the drainage system was installed. *See Ondovchik*, 2010 VT, ¶ 16 (a taking occurs when the government takes “immediate” and “direct” action and does not result from the “incidental or consequential injury inflicted by the action” (citations omitted)); *Florek v. Com., Dep’t of Transp.*, 493 A.2d 133, 136 (Pa. Cmwlth Ct. 1985 (“[I]f a taking did occur, it happened . . . when [the] Township placed the drainage piping on the property then owned by [a prior owner]. The right to damages for a condemnation proceeding belongs solely to the owner of the property and does not pass to a subsequent purchaser.”); *see also Ludlow*, 2004 VT 104, ¶ 6 (“Establishing the takings date is a question of law, not fact.” (citation omitted)).

Although the court cannot and does not determine precisely when the Town installed the drainage system, plaintiff does not allege—and the court cannot reasonably infer based on the pleadings and the facts of which the court has taken judicial notice—that plaintiff owned the property when the drainage system was installed. Accordingly, plaintiff has not stated an inverse condemnation claim against the Town.[3]

[3] Indeed, in his sur-reply to the Town’s motion to dismiss—which the court considers pursuant to Rule 7(b)(4)—plaintiff acknowledges that he acquired his property *after* the Town installed the drainage system. *See* Pls. Sur-reply to Mot. to Dismiss (After purchasing the property, Mr. Ferdinand . . . discovered that the Town had placed drainage pipes across his land without a recorded easement or permits.”). To the extent plaintiff’s sur-reply attempts to recharacterize his claim as being brought under the Clean Water Act or

Order

For the reasons set forth above, plaintiff's complaint is dismissed for failure to state a claim under Rule 12(b)(6). This dismissal is without prejudice.

Electronically signed on: 7/15/2024 pursuant to V.R.E.F. 9(d)

Benjamin D. Battles
Superior Court Judge

other statutes aimed at protecting wetlands, plaintiff has not explained how the allegations in the complaint can support such a claim.