

ASTON'S MINING LAW CASE REVIEWS™

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Aston's Complimentary Review Case #6

LOUISIANA WASTE DISPOSAL WELL FOUND NOT SUBJECT FOR EXPROPRIATION OF LAND CLAIM

Abstract : In *Mongrue et al , v. Monsanto Company* , 249 F.3d 422 (Fifth Cir. 2001), the issue before the court was whether remand is necessary for the district court to consider a “takings” (expropriation) claim against a private entity under the federal Constitution rather than the Louisiana Constitution. Roland J. Mongrue, Clyde A. Gisclair and Sylvia Gisclair (collectively, "Appellants") originally brought an action in Louisiana state court against Monsanto Company ("Monsanto"). The Appellants had alleged, *inter alia*, that wastewater injected underground by Monsanto pursuant to a permit issued by the Louisiana Commissioner of Conservation had migrated into their subsurface property, thereby constituting a taking without just compensation. Monsanto moved for removal to the federal district court on diversity grounds. The U.S. District Court on October 21, 1999, entered an order granting in part Monsanto's motion for summary judgment. In the order, the district court ruled, *inter alia*, that the Appellants could not establish a claim of unconstitutional taking because Monsanto was not a "private entity authorized by law to expropriate" for a "public and necessary purpose," as required under the Louisiana Constitution. On October 26, 1999, the district court granted the Appellants' motion for leave to dismiss with prejudice to their remaining claim of trespass, thereby rendering the summary judgement order final and appealable. The Appellants subsequently moved for a new trial on the basis that they had claimed takings under both the Louisiana and United States Constitutions. The district court denied this motion. Appellants appeal from both the summary judgement order and the denial of their motion for a new trial.

The Fifth Circuit Court of Appeals upheld the District Court's decision.

Background Facts :

The Appellants and Monsanto own adjacent parcels of land in Luling, St. Charles Parish, Louisiana. On its property, Monsanto operates a plant facility that manufactures herbicides, acetaminophen and water treatment chemicals. Beginning in 1972, Monsanto disposed of chemical wastewater produced in the manufacture of these products by injecting it through underground disposal wells that extended from 2500 to 7000 feet

below the surface. The wells intersect sand layers isolated by impermeable layers of rock, which prevented vertical migration of the wastewater.

It should be noted that the Louisiana's Mineral Code permits disposal through underground injection. (La. Rev. Stat. Ann. § 30:4.1). Permits for the disposal wells were issued to Monsanto after public hearings were held.

In August 1998, Appellants filed in state District Court for the Parish of St. Charles, Louisiana, a suit claiming that Monsanto's injection into two specified Disposal Wells had caused a migration of wastewater into the sand strata approximately 2600 feet beneath their properties. Appellants claimed that the subsurface migration (1) resulted in Monsanto's unjust enrichment, (2) constituted an unlawful trespass, and (3) constituted a violation of constitutional provisions prohibiting takings for public purpose without just compensation. Appellants demanded compensation from Monsanto based on the rental value of their property. [*Mongrue v. Monsanto*, 249 F.3d 422 (Fifth Cir. 2001 @426.)]

In August 1998, Monsanto removed the case to federal district court based on diversity of citizenship pursuant to 28 U.S.C. § 1332. In January 1999, Monsanto filed a motion for judgement on the pleadings, denied by the court denied in April 1999. In October of 1999, Monsanto filed a motion for summary judgement on all three of Appellants' claims. In October 1999, the district court granted summary judgement as to the unjust enrichment and the takings causes of action because the court found that Monsanto was not a "private entity authorized by law to expropriate" as required by the Louisiana Constitution, Art. I, sec 4. The court denied summary judgment with respect to the trespass claim. In October 1999, the court granted Appellants' motion to dismiss the trespass claim with prejudice, thereby enabling Appellants to appeal the partial summary judgement as the final judgement of the case. In November 1999, Appellants filed a motion for new trial on the issue of unconstitutional takings. Appellants argued that the court should have analyzed their takings claim under the Fifth Amendment of the United States Constitution. On December 20, 1999, the district court entered an order denying the motion for new trial on the grounds that (1) the motion was untimely [Appellants were late in filing; a motion for a new trial must be filed no later than 10 days after entry of the judgement (FRCP 59)]; and (2) Appellants were attempting "to relitigate the issue of unconstitutional takings with the new argument that their claim arises under the Fifth Amendment of the United States Constitution." In January 2000, the district court vacated the section of its December 20 order that related to timeliness, but repeated its denial of the Appellants' motion for a new trial on the "relitigating" ground. On January 13, 2000, Appellants filed a notice of appeal to challenge the district court's grant of summary judgement and the denial of its motion for a new trial. (Id. 426)

The Court's Analysis :

Regarding the Appellants' motion for a new trial, the Appeals Court stated, " If the district court's ruling is predicated on its view of a question of law, it is subject to *de novo* review. Here, the order denying a new trial was based on the conclusion that Appellants had failed to show a mistake of law in the court's summary judgement analysis, or in its application of Louisiana law. The district court found that the Appellants effectively were seeking to relitigate their takings claim under the U.S. Constitution. (A Rule 59 motion

may not be used to relitigate old matters or raise new arguments). The district court reasoned that because Appellants had 'treated their unconstitutional takings claim throughout the litigation as a claim arising under the Louisiana Constitution and not the United States Constitution,' and summary judgement was properly decided under the former suit." (Id @ 427)

The Appeals Court elaborated further on the matter that the plaintiff-appellants had not raised the issue of pleading a "taking" under the U.S. Constitution, thus failing to put either the district court, or the defendant Monsanto on notice that remedies were sought under the federal Constitution. ["An issue must be presented so as to put the opposing party and the court on notice that it is being raised. (*Simon v. U.S.*, 891 F.2d 1154 (5th Cir. 1990)]

"... In the absence of any reference to the Takings Clause of the Fifth Amendment to the United States Constitution, neither the district court, nor Monsanto could have reasonably been on notice that Appellants' petition included a federal claim." The court pointed out that Appellants failed to amend their petition, or to clarify that their claim was actually brought under both the Constitutions of the United States and of Louisiana. Also, Appellants failed to invoke the federal Takings Clause in opposition to Monsanto's motion for summary judgement. (Id. ,427-428)

The Appeals Court found that the district court's ruling "was correctly and properly decided under the Louisiana Constitution based on the Appellants' presentation of the issues."

Review of the District Court's Summary Judgement Order :

The Appeals Court stated, "The district court's analysis is correct under Louisiana law. Under the takings clause of the Louisiana Constitution, "property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation" (La. Const. Art. 1, § 4, cal. 2) The Supreme Court of Louisiana observed that the term "'expropriation,' or eminent domain as it is called in the common law, is the power of the sovereign to take property for public use without the owner's consent.' The Court also noted that the defendant Monsanto did not qualify as a private entity delegated with authority by the State of Louisiana to expropriate private property.

"In its order granting partial summary judgement in favor of Monsanto, the district court ruled that as a matter of law Monsanto cannot be liable under Louisiana law "because it is not a private entity authorized by Louisiana law to expropriate private property for a public and necessary purpose."

Consequently, the Appeals Court held that the District Court's analysis and granting of Summary Judgement to Monsanto was correct under Louisiana law, adding that, "Because there is no evidence of an express delegation of power to expropriate property with respect to the type of injection activity engaged in by Monsanto, either to the Commissioner of Conservation or directly to the private entities operating under a permit,

the district court's summary judgement ruling was proper. Therefore, Appellants may not recover against Monsanto on a claim of unconstitutional takings under the Louisiana Constitution. “

Plaintiffs’ Issue of Trespass:

Although the plaintiffs-appellants alleged that Monsanto's wastewater, in fact, migrated into the substrata under Appellants' surface property and that Appellants do have ownership rights to the sand layers into which the wastewater was injected, “The district court made no finding of such interference, and such interference is disputed insofar as Monsanto filed an expert affidavit disputing the presence of Monsanto's waste under Appellants' surface property.” (Id. @ 429) The court noted that although plaintiffs are barred from a takings claim under Louisiana law, the State Commissioner of Conservation “ does not bar claims of trespass when authorizing the disposal of waste through underground injection wells. Thus, the district court ruled that upon a proper showing of damages, Appellants may recover under a state unlawful trespass claim against Monsanto regardless of the permit allowing for injection.” However, since Appellants agreed to **dismissal with prejudice** (i.e., claimant cannot bring same complaint again) of their trespass claim against Monsanto, they may have forfeited their right to pursue that claim. The Court did not reach that issue.

Appellate Court’s Decision : The Court affirmed the District Court’s grant of summary judgement to Monsanto and Appellant’s motion for a new trial.
