

IN THE SUPREME COURT OF OHIO

ORIGINAL

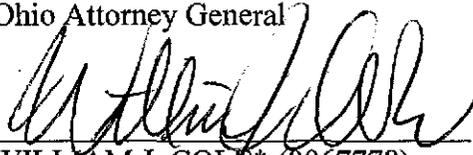
STATE OF OHIO, ex rel. WAYNE T. DONER,:	Case No. 2009-1292
et al.,	:
	:
Relators,	Original Action in Mandamus
	:
	:
v.	:
	:
SEAN D. LOGAN, Director,	:
Ohio Department of Natural Resources, et al.,	:
	:
Respondents.	:

MOTION OF RESPONDENTS TO DISMISS

Pursuant to S. Ct. Prac. R. X(5) and Civ. R. 12(B)(6), Respondents Ohio Department of Natural Resources and Sean D. Logan, Director of the Ohio Department of Natural Resources (collectively, "ODNR"), move to dismiss the complaint for failure to state a claim upon which relief can be granted. A supporting memorandum follows.

Respectfully submitted:

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FILED
AUG 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

I. INTRODUCTION

In Ohio, suits for a governmental taking of private property must be brought within the applicable statute of limitations. In this case, the single event that allegedly resulted in the taking of Relators' properties occurred in 1997, when ODNR replaced a lake spillway to reduce flooding. Almost twelve years later, Relators claim that the replacement spillway permanently increased the lake level, and has increased the flooding on their lands so severely that ODNR has effectively taken their real and personal property. They also allege a continuing taking based on ODNR's "ongoing" failure since 1997 to lower lake levels by not opening the spillway outlets.

Relators' suit against ODNR is untimely. Long before ODNR replaced the spillway, Ohio provided a four-year statute of limitations for actions for the taking of personal property. That law is now codified in R.C. 2305.09(B). In 2004, the General Assembly amended R.C. 2305.09 to include a four-year statute of limitations for relief from a physical or regulatory taking of real property. Applying the amended statute of limitations prospectively does not destroy Relators' rights, if any, against ODNR, but merely shortened their time to sue. The statute of limitations on Relators' cause of action against ODNR expired no later than 2008.

Relators' suit is also untimely under the statute of limitations as it was interpreted by this Court before the 2004 statutory amendment. In 2002, this Court held that a suit for appropriations is an implied contract action that is subject to the six-year statute of limitations in R.C. 2305.07. Applying that holding prospectively likewise does not destroy Relators' rights against ODNR. Although Relators had ample time to enforce their rights, they did not sue ODNR until after six years passed from this Court's holding.

Relators may not avoid operation of the statute of limitations under a “continuing taking” theory. While the federal courts have sometimes applied the continuing violation doctrine, the Ohio state courts have not applied it in takings cases. The statute of limitations for a taking claim in Ohio accrues when the underlying cause occurs. Moreover, the doctrine does not apply where a single governmental act causes a series of effects over time. ODNR’s replacement of the spillway in 1997 was a single, one-time act that, according to Relators, permanently increased the lake level. Relators’ allegation of a continuing taking by ODNR’s “ongoing” lake level management practices (i.e., not opening the spillway outlets to reduce lake levels) since 1997 is unavailing. The government’s failure to subsequently remediate an already-accomplished taking is not itself a taking. Otherwise, litigants could routinely avoid the statute of limitations for a taking by pleading the government’s “ongoing” failure to remediate the circumstances that caused the taking.

Accordingly, Relators’ mandamus suit must be dismissed.

II. STATEMENT OF THE FACTS AND OF THE CASE

According to the complaint,¹ Relators own land in Mercer County that is downstream from the western spillway of Grand Lake St. Marys (“the Lake”). (Complaint ¶ 96.) The Lake is under the authority of ODNR and is dammed. (*Id.* ¶¶ 104, 106.) Before 1997, ODNR periodically lowered lake levels to minimize the frequency and severity of flooding that the Lake could otherwise cause. (*Id.* ¶ 124.) ODNR had also increased lake levels temporarily to increase the Lake’s recreational value by placing stop logs across the spillway. (*Id.* ¶ 123.)

¹ On a motion to dismiss, the Court presumes the truth of all material factual allegations. See, *infra*, part III. Accordingly, the facts referred to in this Motion are, unless indicated otherwise, taken from the allegations in the complaint and supporting affidavits. Nothing in this Motion should be construed as an admission by ODNR to the truth or accuracy of any of these allegations.

Because of concerns about flooding, ODNR decided to replace the Lake's western spillway. (*Id.* ¶¶ 119-121.) ODNR began construction of the replacement spillway in 1996 and finished in 1997. (*Id.* ¶ 122.) The replacement spillway includes two 60-inch diameter outlets that can be opened to lower the Lake's water levels. (*Id.* ¶ 125.) The replacement spillway *permanently* increased the Lake level by four inches. (*Id.* ¶ 123.) Since 1997, ODNR has not opened the outlets to manage the Lake levels. (*Id.* ¶ 126.) As a direct result of the replacement spillway and ODNR's "ongoing" lake level water management practices, Relators allege they have had "continuing, persistent, frequent, and inevitable increased severe flooding" since 1997. (*Id.* ¶¶ 5-93, 127-129, 137-139, 151; Relators' affidavits.) In particular, Relators allege that there has been increased and severe flooding to lands that had never before flooded, and for a longer duration. (Complaint ¶ 127; Relators' affidavits.) The most invasive flood Relators state occurred in 2003. (Relators' affidavits.)

On July 17, 2009, Relators filed a mandamus complaint in this Court to compel ODNR to bring appropriation proceedings for the alleged taking of their property.

III. STANDARD OF REVIEW

S. Ct. Prac. R. X(5) permits the respondent in an original action to file a motion to dismiss within 21 days of service of the summons and complaint. Dismissal is required when "it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in favor of relators, that they are not entitled to the requested extraordinary relief in mandamus." *State ex rel. Crobaugh v. White*, 91 Ohio St.3d 470, 471, 2001-Ohio-102. Because ODNR's motion to dismiss is brought pursuant to Civil Rule 12(B)(6), the Court must decide it on the face of the complaint alone, along with any material incorporated therein. See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569 & fn. 1, 1996-Ohio-459.

IV. ARGUMENT

Mandamus is the appropriate vehicle to compel public authorities to bring appropriation proceedings when an involuntary taking of private property is alleged. *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 62, 2002-Ohio-1627. To be entitled to a writ of mandamus, Relators must show: (1) a clear legal right to the relief sought, (2) that ODNR has a clear legal duty to provide the requested relief, and (3) a lack of an adequate remedy in the ordinary course of law. See *State ex rel. MetroHealth Med. Ctr. v. Sutula*, 110 Ohio St.3d 201, 2006-Ohio-4249 ¶ 8.

For the reasons set forth below, Relators' mandamus suit to compel ODNR to initiate appropriation proceedings for the taking of their property is barred by the four-year statute of limitations in R.C. 2305.09, and/or by the six-year statute of limitations in R.C. 2305.07.²

A. Relators' mandamus suit to compel ODNR to initiate appropriation proceedings is barred because Relators' cause of action expired no later than 2008 under either the four-year statute of limitations in R.C. 2305.09 or the six-year statute of limitations in R.C. 2305.07.

Relators' allegations are clear. Since 1997, as a direct result of ODNR's replacement spillway, Relators' lands have been subjected to and damaged by more frequent and severe flooding. According to them, the increased flooding on their lands, without payment of compensation, is a taking.

Suits in Ohio must be filed before the statute of limitations expires. *Howard v. Allen* (1972), 30 Ohio St.2d 130, 133-34. "[S]tatutes of limitation are remedial in nature and may generally be classified as procedural legislation." *Gregory v. Flowers* (1972), 32 Ohio St.2d 48,

² In their separate memorandum, Relators argue they are entitled to mandamus pursuant to the lower court decisions in *State ex rel. Post v. Speck* (3d Dist.), 2006-Ohio-6339; and *Case Leasing & Rental, Inc. v. Ohio Dept. of Natural Res.* (Ct. Cl.), 2008-Ohio-3411. Neither case, however, addressed the statute of limitations issue raised in this motion to dismiss.

syllabus ¶¶ 1, 3. “Laws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.” *State ex rel. Holdridge v. Indus. Comm.* (1967), 11 Ohio St.2d 175, syllabus ¶ 1. Where a statute of limitations bar is apparent from the face of the complaint, it may be raised by a Civil Rule 12(B)(6) motion. McCormac, *Ohio Civil Rules Practice* (2 Ed.1992), 149, Section 6.20.

1. When applied prospectively, R.C. 2305.09(E) does not destroy Relators’ substantive rights, if any, and it afforded Relators a reasonable time to sue.

In 2004, the General Assembly amended the four-year statute of limitations in R.C. 2305.09 to include causes of action “[f]or relief on the grounds of a physical or regulatory taking of real property.” R.C. 2305.09(E). When applying an amended statute of limitations to an existing substantive right, this Court has distinguished “between the operation of an amended statute of limitations which *totally* obliterates an existing substantive right and one which merely shortens the period of time in which the remedy can be realized.” (Emphasis sic.) *Cook v. Matvejs* (1978), 56 Ohio St.2d 234, 237. For the latter, applying an amended statute of limitations is not unlawful “as long as a prospective claimant or litigant . . . is still afforded ‘a reasonable time in which to enforce’ his right.” (Ellipsis added.) *Id.*, quoting *Gregory*, 32 Ohio St.2d at 54. “Reasonable time” is judged by reference to the effective date of the amendment. *Adams v. Sherk* (1983), 4 Ohio St.3d 37, 39.

In this case, applying the amended statute of limitations prospectively would not totally obliterate Relators’ existing substantive rights. Assuming, arguendo, in 2004 Relators had more than four years to sue ODNR for relief from a taking of real property, the operation of R.C. 2305.09(E) merely shortened their time to sue. Therefore, the statute of limitations on Relators’ cause of action against ODNR expired no later than 2008. Relators had ample time (four years)

since 2004 to sue to enforce their rights. Other cases have held shorter durations are reasonable. See, e.g., *Adams*, 4 Ohio St.3d at 40 (one year after discovery of medical malpractice); *Cook*, 56 Ohio St.2d at 237 (two-years after minor reaches majority). Since Relators waited to sue ODNR more than a year after the four-year limitation period expired, their suit is barred.

2. Alternatively, applying R.C. 2305.07 prospectively from this Court's holding in the *R.T.G.* case bars Relators' suit.

Alternatively, Relators' suit is barred by the six-year statute of limitations in R.C. 2305.07, which took effect in 1993. In *State ex rel. R.T.G. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, this Court held that a mandamus suit for appropriations is an action that seeks monetary compensation for real property and damages. *Id.* ¶ 29.³ Noting that neither the appropriations nor mandamus statutes contain a statute of limitations, this Court examined the statutes of limitations in R.C. Chapter 2305. *Id.* ¶ 27. The Court concluded the most appropriate statute of limitations was that found in R.C. 2305.07, which applies to, inter alia, "an action upon a contract not in writing, express or implied." *Id.* ¶¶ 30-31. The Court reasoned that when the State takes property, it impliedly contracts that it will pay the owner just compensation. *Id.* ¶ 31.

Relators' mandamus suit against ODNR would also be barred by R.C. 2305.07 because it was filed more than six years after Relators' cause of action accrued in 1997. Even if the *R.T.G.* statute of limitations holding is applied prospectively, Relators' suit is still barred because it was filed more than six years after *R.T.G.* was issued, and Relators had ample time after the decision to sue to enforce their rights.

³ In so holding, the Court overruled earlier decisions that had applied the 21-year statute of limitations to actions to compel appropriation proceedings. *Id.*

3. Relators' claim for relief based on ODNR's alleged taking of personal property is barred by R.C. 2305.09(B).

A four-year statute of limitations applies to causes of action for the taking of personal property. R.C. 2305.09(B). This law pre-dates ODNR's replacement of the spillway in 1997. Relators' suit, to the extent it seeks recovery for the taking of personal property, is barred because it was filed well-beyond the limitation deadline.

B. Relators do not avoid the statute of limitations under a "continuing taking" theory.

Federal courts have sometimes applied the "continuing violation" doctrine to takings suits attacked on statute of limitations grounds. The doctrine applies where a violation inflicts continuing and accumulating harm. See *Hanover Shoe, Inc. v. United States Mach. Corp.* (1968), 392 U.S. 481, 502 fn. 15 (discussing the government's continuing violation of a company's rights under the Sherman Act). But the doctrine does not apply "where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach." *Boling v. United States* (Fed. Cir. 2000), 220 F.3d 1365, 1373-74 (refusing to apply the continuing violation doctrine to taking claim where a single governmental act allowed waterway erosion to encroach upon the plaintiff's land, even though the erosion took place over time).

The Sixth Circuit has considered, but not applied, the continuing violation doctrine in takings cases. *Kuhnle Bros., Inc. v. City of Geauga* (6th Cir. 1997), 103 F.3d 516; *McNamara v. City of Rittman* (6th Cir. 2007), 473 F.3d 633, certiorari denied (2007), 128 S.Ct. 67. *Kuhnle* involved a trucking company's suit challenging a county resolution that restricted truck traffic on a road mentioned in a settlement between the trucking company and the county. 103 F.3d at 518. The county attacked the suit on statute of limitations grounds. *Id.* Rejecting the trucking

company's "continuing taking" argument, the Sixth Circuit ruled that if a taking occurred, it occurred when the resolution (i.e., single governmental act) was passed. *Id.* at 521, citing *Levald, Inc. v. City of Palm Desert* (9th Cir. 1993), 998 F.2d 680, 688; and *National Advertising Co. v. City of Raleigh* (4th Cir. 1991), 947 F.2d 1158, 1163-66. *McNamara* cited to *Kuhnle's* analysis, but did not consider the "continuing taking" issue because the issue was not properly raised in the trial court. 473 F.3d at 639-40.

This Court has not applied the continuing violation doctrine to a taking suit. The doctrine was recently discussed, but not applied, by the Eleventh District Court of Appeals in *Painesville Mini Storage, Inc. v. Painesville* (July 24, 2009), No. 2008-L-092, 2009-Ohio-3656. In that case, the landowner sought a writ of mandamus to compel the City of Painesville to initiate appropriation proceedings after the city issued a building permit that extinguished the landowner's easement. *Id.* ¶¶ 2-9. The city moved for judgment on the pleadings based either on the four-year statute of limitations in R.C. 2305.09 or the six-year statute of limitations in R.C. 2305.07. *Id.* ¶ 14. While the landowner admitted that the city's permitting process was completed seven years before the suit was filed, *id.* ¶ 15, it argued a continuing taking, based on *McNamara* and *Kuhnle*, because the construction had an ongoing effect on its ability to use the easement. *Id.* ¶ 11.

The court of appeals ruled that the landowner's taking claim was barred by the statute of limitations because the city's granting of a building permit was a single act and not an ongoing taking of property. *Id.* ¶ 22. The court noted that under the landowner's theory, every taking of private property could be alleged as "ongoing" for statute of limitations purposes until the government's act is vacated or compensation is paid. *Id.* ¶ 33. The court rejected this theory

because it is not supported by case law and would illogically limit situations where a taking claim would be totally barred. *Id.*

1. Ohio law provides that the statute of limitations accrues when the act which causes the taking occurs.

In this case, Relators cannot avoid the statute of limitations bar under a “continuing taking” theory. Under Ohio law, a statute of limitations is generally triggered when the underlying act occurs. *Harris v. Liston*, 86 Ohio St.3d 203, 205, 1999-Ohio-159. Revised Code Section 2305.09 follows this rule except for actions for underground trespass, injury to mines, wrongful taking of personal property, or fraud. (In such cases, the statute expressly provides that the statute of limitation accrues when the wrongdoer or fraud is discovered.) Causes of action under R.C. 2305.07 accrue when actual damage occurs. *State ex rel. Teamsters Local Union 377 v. Youngstown* (1977), 50 Ohio St.2d 200, 203-04.⁴

Ohio state courts have not applied the continuing violation doctrine in takings cases. Under either R.C. 2305.09 or 2305.07, the statute of limitations is triggered when the act that causes the taking of property occurs. The “continuing taking” doctrine was only discussed (and rejected) very recently by one state court of appeals. *Painesville Mini Storage*, *supra*. Therefore, ODNR has no clear legal duty to bring appropriation proceedings, and Relators have no clear legal right to such relief.

The United States Supreme Court’s limited ruling in *United States v. Dickinson* (1947), 331 U.S. 745, is not controlling. In *Dickinson*, the Court ruled that the statute of limitations did not bar a Tucker Act suit against the federal government for a taking by flooding where it was uncertain at what stage the land had become appropriated for public use. *Id.* at 747-48.

⁴ Even under the discovery rule Relators’ suit would be barred as the allegations clearly show that Relators knew since 1997 about the increased flooding.

However, while the right to compensation for a taking is a federal (and state) constitutional right, state law governs the application and tolling of the statute of limitations. Cf. *Wilson v. Garcia* (1985), 471 U.S. 261, 269 (holding that while federal law governs which state statute of limitations applies to Section 1983 suits, state law governs “the length of the limitations period, and closely related questions of tolling and application.”). Ohio law provides that the statute of limitations accrues when the act that causes the taking occurs. Accordingly, this Court should not apply *Dickinson* because Ohio state law applies. See *Peterson v. Putnam Cty.*, 2006 Tenn. App. Lexis 677 at *22-23 (rejecting the *Dickinson* rule because Tennessee law provides that the statute of limitations for an inverse taking cause of action accrues when the plaintiff realizes or should realize that his or her property is permanently damaged).

Even under *Dickinson*, Relators’ suit is barred. According to Relators, the most invasive flood occurred in 2003, which is more than four years before they sued. (Relators’ affidavits.)

2. ODNR’s replacement of the spillway was a single act, and its “ongoing” failure to remediate the flooding is not itself a taking.

Even if this Court recognizes the “continuing taking” doctrine, it does not apply here. ODNR’s replacement of the spillway in 1997 was a single, one-time governmental act that, according to Relators, permanently increased the Lake level. (*Id.* ¶ 123.) Relators do not allege that ODNR subsequently changed the spillway. Nor do they claim that the new spillway caused multiple, separate temporary takings of their properties. Thus, the ODNR action that allegedly flooded Relators’ properties was completed—and the taking was thereby accomplished—in 1997. See *Boling v. United States* (Fed. Cir. 2000), 220 F.3d 1365, 1373-74.

Relators also allege that their property has been taken by ODNR’s “ongoing” lake level management practices after completion of the replacement spillway. That claim is unavailing. The only factual basis alleged for that claim is set forth in the complaint as follows:

125. The redesigned spillway includes two 60-inch diameter outlets . . . *which can be opened to lower the level* of [the Lake] by releasing water

126. Since 1997, however, despite its continued control of lake water levels, ODNR *has not opened* the 60-inch diameter outlets for management of lake levels.

(Emphases added.) Relators do not allege facts showing that subsequent ODNR acts caused a taking, but that ODNR failed to act subsequently to remediate an already-accomplished taking. There is no allegation that ODNR's failure to subsequently open the spillway outlets exacerbated the flooding already caused by the spillway modification in 1997. A government's failure to remediate existing flooding is not a taking. *Nicholson v. United States* (2007), 77 Fed. Cl. 605, 620; *Hayashi v. Alameda Cty. Flood Control & Water Conservation Dist.* (Cal. App. 1959), 334 P.2d 1048, 1053. Otherwise, litigants could routinely evade the statute of limitations in takings cases simply by pleading the government's "ongoing" failure to subsequently remediate the circumstances that caused the taking.

For these reasons, Relators cannot avoid the statute of limitations bar.

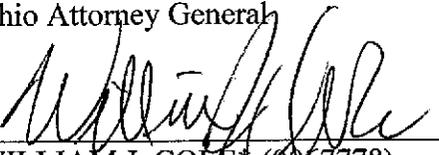
V. CONCLUSION

For these reasons, Relators' mandamus suit is barred by the statute of limitations. ODNR has no clear legal duty to initiate appropriation proceedings, and Relators have no clear legal right to such relief.⁵ Accordingly, this Court must dismiss the mandamus complaint.

⁵ In addition, Relators are not entitled to attorneys' fees under 42 U.S.C. 1983. (See Complaint ¶ 159.) A litigant cannot sue for an unconstitutional taking under Section 1983 until he or she has unsuccessfully tried to obtain compensation through reasonable, certain, and adequate state procedures. *Eberwine v. Proctor* (S.D. Ohio), 2001 U.S. Dist. Lexis 26196 at *8, citing *Williamson Cty. Regional Planning Comm. v. Hamilton Bank* (1985), 473 U.S. 172, 195. Ohio's mandamus procedure to compel appropriation proceedings is a reasonable, certain, and adequate state procedure. *Coles v. Granville* (6th Cir. 2006), 448 F.3d 853, 864. Therefore, to the extent Relators seek relief under Section 1983, their claim is not ripe for adjudication.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Motion of Respondents to Dismiss* has been sent by regular mail on August 10, 2009 to Bruce L. Ingram, Joseph R. Miller, Thomas H. Fusonie, and Kristi Kress Wilhelmy, VORYS, SATER, SEYMOUR AND PEASE LLP, 52 E. Gay St., P.O. Box 1008, Columbus, OH 43216-1008.


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