[Cite as *State ex rel. DeFranco v. Geauga Cty. Bd. of Commrs.*, 2015-Ohio-2811.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

STATE OF OHIO ex rel. SYLVIA DEFRANCO, et al.,	:	**PER CURIAM OPINION**
Relators,	:	**CASE NO. 2013-G-3143**
- vs -	:	
GEAUGA COUNTY BOARD OF COMMISSIONERS, et al.,	:	
Respondents.		

Original Action for Writ of Mandamus.

Judgment: Writ denied.

George S. Padgitt and *Philip D. Sever,* Sever Storey LLP, 335 Ridgepoint Drive, Carmel, IN 46032 (For Relators).

Abraham Cantor, Johnnycake Commons, 9930 Johnnycake Ridge Road, Suite #4-F, Concord, OH 44060 (For Respondents).

PER CURIAM.

{¶1} In this original action, relators, Anthony DeFranco, Sylvia DeFranco, and the Sylvia E. DeFranco Revocable Trust Agreement, seek a writ of mandamus to compel respondent, the Geauga County Health District, to file an appropriation proceeding in relation to real property in Chardon, Ohio. Respondent moves for summary judgment arguing that the mandamus claim is barred under the four-year statute of limitations. As the factual basis for its motion, respondent maintains that,

during her deposition, Sylvia admitted specific facts that control the date upon which the statute of limitations began to run. For the following reasons, summary judgment is warranted.

{¶2} Sylvia DeFranco is the mother of Anthony. In 1991, they purchased a ten-acre tract of land on Mayfield Road in Chardon. Their original intent was to use the land for an agricultural business, including raising livestock and growing various plants and trees. Over the first few years of ownership, they made a number of improvements to the property, including construction of five new buildings.

{¶3} In 1996, the DeFrancos received correspondence from Sandra Uecke, an employee of respondent. In the letter, Uecke stated that, during a recent inspection of the Mayfield Road tract, she discovered that the DeFrancos' septic system was not working properly, resulting in the discharge of untreated effluent onto the surface of the land. Although the DeFrancos contested Uecke's statement as to the functioning of the septic system, her allegations formed the basis of a subsequent proceeding in which the Mayfield Road tract was declared a public nuisance. In December 1997, the DeFrancos were ordered to vacate the property unless they replaced the old septic system with an approved sewage disposal system.

{¶4} When no new disposal system was installed, the DeFrancos were unable to use approximately ninety percent of the subject property. Anthony vacated the premises pursuant to court order and the DeFrancos have not used the property for any economical purpose throughout the ensuing years.

{¶5} Before the dispute regarding the septic system began, Sylvia transferred her entire interest in the Mayfield Road tract to the Sylvia E. DeFranco Revocable Trust Agreement. Approximately five years later, Anthony also transferred his entire interest

in the land to the trust. Sylvia is presently the trustee for the trust.

{¶6} Notwithstanding the outcome of the original legal action concerning the Mayfield Road property, Sylvia continued to be involved in litigation relating to the septic system and other issues. Over the years, she hired a number of attorneys to represent her, including Michael T. Judy and Robert E. Zulandt, Jr. In turn, when these attorneys could not obtain the results Sylvia sought, separate actions were brought between her and the attorneys. For example, Attorney Judy instituted a "fee" action against Sylvia in the Chardon Municipal Court.

{¶7} During the course of the multiple proceedings, a dispute arose regarding whether Sandra Uecke or another of respondent's employees had ever actually tested the septic system on the property prior to bringing the "public nuisance" action. According to Sylvia, she asked Attorney Judy and Attorney Zulandt at different times to confirm if a test was conducted in 1996 and what the results of the test had been.

{¶8} The issue concerning the test of the septic system was addressed during a magistrate's hearing in Attorney Judy's "fee" action. While representing herself in this proceeding, Sylvia filed written objections to the magistrate's decision. The objections contained the following statement:

{¶9} "Plaintiff Judy stated at [the] hearing on June 29, 2004, that a test of the septic system had been done by the Geauga County Health Department. I recently contacted Mr. Judy requesting a copy of said test, which he testified, had occurred. On July 20, 2004, I received a reply from the plaintiff who stated 'there isn't any.'"

{¶10} In January 2011, J. David Benenati, the president of the local board of health, told the DeFrancos that no employee of respondent had ever tested the septic system on the Mayfield Road land to determine whether it was working properly, and

that the property should not have been condemned without the performance of a test. Five months later, the lack of any testing was confirmed by Robert Weisdack, president of respondent. As a result of this revelation, Sylvia brought an action in fraud and legal malpractice against Attorneys Judy and Zulandt. Ultimately, the Geauga County Court of Common Pleas granted summary judgment in favor of both attorneys on each of the two claims. In *DeFranco v. Judy*, 11th Dist Geauga Nos. 2012-G-3114 & 2013-G-3135, 2014-Ohio-8, this court affirmed the summary judgment decision in all respects, holding that both claims were barred under the respective statute of limitations for fraud and legal malpractice.

{¶11} While the two appeals were pending before this court, Sylvia and Anthony brought this original action for a writ of mandamus. Sylvia's revocable trust, the present owner of the Mayfield Road property, was added as a third relator during the pendency of the case. In the original petition, the Geauga County Health District and the Geauga County Board of Commissioners were both named as respondents. However, prior to the beginning of discovery, relators voluntarily dismissed the Board of Commissioners, leaving the Health District as the sole respondent.

{¶12} In their amended petition, all three relators maintain that, by forcing Sylvia and Anthony to vacate the Mayfield Road tract without ever performing a proper test of the existing septic system, respondent has interfered with their reasonable investment expectations for their property and deprived them of all economically viable uses of the land. Based upon this, relators assert that respondent's actions, through its employees, have resulted in a governmental taking of the subject property. They further assert that, since respondent has not instituted an eminent domain proceeding to compensate them for the taking of the property, they are entitled to a writ of mandamus to compel the filing

of that proceeding.

{¶13} After taking Sylvia DeFranco's deposition, respondent moved for summary judgment on the sole mandamus claim. Following a three-month delay, relators moved for leave to file a response to the summary judgment motion. As part of an interlocutory judgment granting the motion for leave, this court also granted relators' pending motion to amend their mandamus petition. Despite the fact that the amendment of the petition did not alter the substance of the mandamus claim, respondent immediately filed a new answer and a second summary judgment motion. In the latter submission, respondent has reasserted the basic argument that formed the basis of its first summary judgment motion. In turn, relators have submitted a new timely response. Therefore, this action proceeds on respondent's second motion for summary judgment.

{¶14} In maintaining that the substance of relators' mandamus claim cannot be addressed as a matter of law, respondent argues that the claim is barred under a four-year statute of limitations. According to respondent, since the alleged taking of relators' property is predicated upon the failure to test the septic system prior to the institution of the legal proceeding to declare the land a public nuisance, the running of the governing statute of limitations began when Sylvia DeFranco first became aware that no test was ever conducted. Respondent submits that Sylvia gained knowledge of this fact at some point in July 2004, approximately nine years before this case was brought. In support, respondent cites the statement Sylvia made in her pro se objections during the separate "fee" case before the Chardon Municipal Court.

{¶15} In their response to the summary judgment motion, relators first challenge respondent's interpretation of the statement set forth in Sylvia's objections during the municipal court proceeding. Specifically, relators contend Sylvia's statement does not

constitute an admission that Attorney Judy told her that respondent's employees never conducted any test on the property's septic system. Instead, according to relators, the statement only indicates that Attorney Judy informed Sylvia that he could not obtain the results of such a test. As a separate argument, relators assert that, even if the running of the statute of limitations did begin in July 2004, the four-year limit has still not expired because respondent's actions against their property amounts to a continuing violation, under which the harm to the value of the land is ongoing.

{¶16} Under Ohio law, a mandamus action can be used to compel government officials to bring an appropriation proceeding predicated upon an involuntary taking of private property. *State ex rel. DiNardo v. Chester Twp.*, 11th Dist. Geauga No. 2012-G-3063, 2012-Ohio-5828, ¶8. As to the timing of such a mandamus action, the statute of limitations in R.C. 2305.09(E) is controlling. *Id*. That statute provides that when a claim is based upon a physical or regulatory taking of real property, it must be filed within four years of the claim's accruement.

{¶17} As to the determination of when this type of mandamus claim accrues, the *DiNardo* opinion states, at ¶9:

{¶18} "'A cause of action for injury to real property and relief on the ground of a physical or regulatory taking accrues, and the four-year statute of limitations commences to run, when the injury or taking is first discovered, or through the exercise of reasonable diligence, should have been discovered.' *State ex rel. Stamper v. City of Richmond Heights*, 8th Dist. No. 94721, 2010-Ohio-3884, ¶25; * * *."

{¶19} As previously noted, respondent maintains that the undisputed facts demonstrate that the four-year statute of limitations for relators' claim began to run in July 2004. In conjunction with its summary judgment motion, respondent filed a copy of

Sylvia DeFranco's deposition, taken approximately five months after the institution of this action. During the deposition, respondent's attorney introduced as Exhibit F a copy of a two-page document that Sylvia supposedly filed with the Chardon Municipal Court in the separate legal action brought by Attorney Judy. The document was captioned as Sylvia's objections to a magistrate's decision, and was time-stamped July 21, 2004. As part of her deposition testimony, Sylvia confirmed that Exhibit F was an accurate copy of the objections she filed pro se.

{¶20} In the first paragraph of her objections, Sylvia asserted that, after Attorney Judy testified at an evidentiary hearing that a test of the septic system was performed in 1996, she contacted him later and asked for a copy of that test. According to her, Judy sent her a reply in which he stated: "'there isn't any.'" Respondent interprets the phrase "there isn't any" to be a direct indication that no test was done on the septic system prior to the filing of the "public nuisance" action. Based upon this, respondent argues that, to the extent that the failure to perform the necessary test may have resulted in a taking of a percentage of the Mayfield Road tract, Sylvia was fully aware of the underlying facts as of July 2004.

{¶21} In contesting respondent's interpretation of the disputed phrase, relators have attached to their response Sylvia DeFranco's affidavit. Initially, Sylvia avers that when Attorney Judy replied "there isn't any" to her, she took the phrase to mean that he was unable to obtain a copy of the test results. In other words, she did not interpret the phrase to mean that no test was performed. However, Sylvia further avers that, "[f]rom the point of my communication with Mr. Judy in 2004 on, I had a suspicion that no test had been done * * *." Last, Sylvia avers that her suspicion regarding the lack of any test was not confirmed until 2011when she contacted the president of the local board of

health and respondent's president.

{¶22} Given the express reference in Sylvia's affidavit to her "suspicion" that no test was performed, it is not necessary to decide whether the meaning of phrase "there isn't any" is clear and unambiguous from the context of Sylvia's prior objections. Under the cited precedent of this court, a claim for the taking of real property will accrue either when the taking is actually discovered, or when it should have been discovered through the exercise of adequate diligence. *DiNardo*, 2012-Ohio-5828, at ¶9. In light of Sylvia's admitted suspicion that respondent never tested the septic system, she was obligated to investigate the matter further and obtain the necessary information to determine if the governmental taking of the property had already occurred. In her affidavit, Sylvia does not make any averments stating that she tried to investigate the issue immediately after she received Attorney Judy's reply. Instead, her own averments support the conclusion that she did not speak to any public official about her suspicion until 2011. Accordingly, relators have not created a factual dispute as to whether Sylvia exercised due diligence in attempting to discover if the septic system was ever tested prior to respondent's filing of the "public nuisance" action.

{¶23} Pursuant to Sylvia's own averments, Attorney Judy's statement to her was sufficient to raise a suspicion regarding the failure to perform any test on the property's septic system. Since relators have not presented any evidence showing that the lack of any testing could not have been immediately discovered even if Sylvia had acted upon her suspicion within a reasonable time, the running of the four-year statute of limitations began in 2004. Therefore, since relators did not institute this case until April 2013, their mandamus claim was not timely.

{¶24} As an alternative argument, relators state that, even if the four-year statute

of limitations started to run immediately after July 2004, they are still entitled to recover four years of damage to their property because respondent's actions have resulted in a continuing violation of their property rights. In support, they assert that, throughout the years since the property was declared a public nuisance, Sylvia has consistently asked respondent to perform a new test on the property's septic system, and respondent has always refused to do so.

{¶25} In the context of a mandamus case to compel a governmental entity to file an appropriate proceeding, the expiration of the governing statute of limitations will not bar a relator from maintaining the case if the governmental entity is engaging in a "continuing violation" of the relator's property rights. *Painesville Mini Storage, Inc. v. City of Painesville*, 11th Dist. Lake No. 2008-L-092, 2009-Ohio-3656, ¶19, quoting *McNamara v. City of Rittman*, 473 F.3d 633, 639 (6th Cir.2007). As a general proposition, a continuing violation exists when the government's action inflicts accumulating harm. *Id*. In *Painesville Mini Storage*, we held that the relator could not establish a continuing violation when the facts of the case showed that the decrease in the value of the subject property was attributable to only one act of the city. *Id*. at ¶31-33.

{¶26} In this case, according to relators' own factual allegations, the initial taking of their property, i.e., the decrease in its value or economically viable uses, took place when the land was declared a public nuisance despite the fact that the septic system was never tested. Given the nature of this harm, respondent's subsequent refusals to test the system did not result in any additional or accumulating harm to the property. In other words, the degree to which relators' land was "taken" from them did not change as a result of respondent's subsequent acts. Rather, the alleged harm to relators' property

rights was attributable to only one underlying act by respondent. Hence, even when the evidentiary materials before this court are construed in a manner that is most favorable to relators, they can only be found to support the finding that relators' property was not subject to a continuing violation by respondent.

{¶27} To prevail on a motion for summary judgment pursuant to Civ.R. 56(C), the moving party must show: (1) there are no genuine issues of material fact remaining to be litigated; (2) the moving party is entitled to final judgment as a matter of law; and (3) even when the evidence is construed most strongly in favor of the non-moving party, a reasonable person could only reach a conclusion adverse to the non-moving party. *Silvey v. Washington Square Chiropractic Clinic*, 11th Dist. Geauga No. 2012-G-3052, 2013-Ohio-438, ¶27, quoting *Arp v. Geauga Cty. Commrs.*, 11th Dist Geauga No. 2002-G-2474, 2003-Ohio-2837, ¶21. In light of the foregoing, there is no factual dispute that the four-year statute of limitations governing relator's mandamus claim began to run in 2004, and relators did not commence this case until 2013. Because the claim was not asserted timely, it is barred.

{¶28} Respondent's motion for summary judgment is granted. Final judgment is hereby entered in favor of respondent as to relators' entire mandamus petition.

TIMOTHY P. CANNON, P.J., THOMAS R. WRIGHT J., COLLEEN MARY O'TOOLE, J., concur.