United States District Court
For The District of Wyoming

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION, WYOMING DAKOTA RAILROAD PROPERTIES, INC.,	)	
Plaintiffs,	)	
vs.	)	Case No. 07-CV-143-D
97.943 ACRES OF LAND, MORE OR LESS, LOCATED IN WESTON COUNTY, STATE OF WYOMING; JOSEPH D. SIMMONS AND MICHELE D. SIMMONS,	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' APPLICATION FOR COSTS

This matter comes before the Court on Defendants' Application for Costs [Doc. 224]. The Court, having considered both Defendants' Application and Plaintiffs' Objection thereto, and considering itself otherwise fully advised in the matter, hereby FINDS and ORDERS as follows:

1. This matter was litigated in a two-week trial before the Court in which Defendants vigorously defended Plaintiffs' use of the power of eminent domain. At trial, Defendants argued that Plaintiffs failed to satisfy the requirements to exercise the power of eminent domain set forth in the Wyoming Eminent Domain Act, WYO. STAT.

ANN. § 1-26-501, et seq. In particular, Defendants argued that the proposed condemnation was not necessary within the meaning of WYO. STAT. ANN. § 1-26-504(a) because the proposed project was not economically viable and because Plaintiffs could not provide reasonable assurances that the project would be built in the foreseeable future. Defendants further argued that Plaintiffs failed to negotiate in good faith as required by WYO. STAT. ANN. §§ 1-26-509(a) and 510(a).

2. On August 26, 2009, on the eve of this Court's entry of an order addressing the issue of whether Plaintiffs had satisfied the requirements to exercise eminent domain under Wyoming law, Plaintiffs filed a Notice of Dismissal pursuant to Fed. R. Civ. P. 71.1.

3. Under Rule 71.1(i) of the Federal Rules of Civil Procedure, a plaintiff in a condemnation action may dismiss an action without a court order by filing a notice of dismissal, so long as no compensation hearing has begun and the plaintiff has not acquired title or a lesser interest, or taken possession of the property. At the time the notice was filed, Plaintiffs had not taken possession of Defendants' property, had not acquired title or a lesser interest, and no compensation hearing had begun. Accordingly, pursuant to Fed. R. 71.1(i), this action was dismissed without further Court action.

4. Subdivision (l) of Rule 71.1 provides that "[c]osts are not subject to Rule 54(d)." Fed. R. Civ. P. 54(d) ordinarily governs the imposition of costs in a civil action.

5. The Notes to subdivision (l) explain the reason for this as follows:

> Since the condemnor will normally be the prevailing party and since he should not recover his costs against the property owner, Rule 54(d), which provides generally that costs shall go to the prevailing party, is made inapplicable.

Notes to Subdivision (l) of Fed. R. Civ. P. 71.1. Accordingly, the clear aim of subdivision (l) is to prevent an award of costs against an unsuccessful condemnee.

6. The Notes go on to state:

> Without attempting to state what the rule on costs is, the effect of subdivision (l) is that costs shall be awarded in accordance with the law that has developed in condemnation cases.

Id.

7. Neither Defendants nor Plaintiffs have cited the Court to any law that has developed in condemnation cases on the issue of awarding costs, other than cases in the context of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. *See, e.g., United States v. Gyurman*, 836 F.2d 480 (10th Cir. 1987). Although these cases involve condemnation by the United States or an agency thereof, Defendants argue they nonetheless provide support for an award of fees in this case. Plaintiffs, unlike the United States, have no immunity from an award of costs. Accordingly, Defendants argue that an award of costs is more appropriate in the case of a private condemnor such as Plaintiffs.

8. In addition to cases under the EAJA, the Court notes that at least one Wyoming case provides support for an award of costs where a condemnor has

voluntarily abandoned plans to pursue condemnation. *See Snodgrass v. Rissler & McMurry Co.*, 903 P.2d 1015, 1018 (Wyo. 1995). Unlike the federal statute, however, Wyo. R. Civ. P. 7.1, which the Wyoming Supreme Court applied in *Snodgrass*, provides an express basis for awarding costs. *See* Wyo. R. Civ. P. 7.1(m) ("In any proceeding under [Wyo. R. Civ. P. 7.1] costs may be allowed and apportioned between the parties on the same or adverse sides in the discretion of the court as authorized by statute or by rule of this court."). The Court is bound in this case to apply Fed. R. Civ. P. 7.1. The fact that Wyoming's procedural rule relating to condemnation actions provides for an award of costs does not provide a basis for this Court to award costs under its own applicable rule.

9. Further, Defendants' assertion that the voluntary dismissal of this action renders it the "prevailing party," is not supported by Tenth Circuit case law. Defendants argue that where, as here, a condemnor voluntarily dismisses a contested condemnation action, the condemnee may properly be considered the "prevailing party." In support of this proposition, Defendants cite this Court to *United States v. 101.80 Acres of Land, More or Less, in Idaho County, Idaho*, 716 F.2d 714, 722 (9th Cir. 1983), a case under the EAJA.[1] In a discussion of the legislative history of EAJA,

[1] The issue in *101.80 Acres* was whether landowners who prevailed in compensation proceedings and ultimately obtained an award that exceeded the amount originally deposited with the Court by the United States could be deemed "prevailing parties" under the EAJA.

the Ninth Circuit concluded that Congress intended the term "prevailing party" to be applied broadly. In doing so, it referenced a case cited in the House Report accompanying the bill from which the EAJA derived. The referenced case noted that "[a] party may be deemed prevailing . . . if the plaintiff has sought dismissal of a groundless complaint". *See id.* (citing *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575 (9th Cir. 1941).

10. Aside from being the thinnest of threads upon which this Court could weave a basis for awarding costs, this argument is at odds with directly analogous Tenth Circuit case law under Fed. R. Civ. P. 41(a)(1)(A)(i).[2] In *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, (10th Cir. 2010), the Tenth Circuit noted that voluntary dismissal "ordinarily does not create a prevailing party because in order to create a prevailing party there must be a judicially sanctioned change in the legal relationship of the parties." (internal quotation omitted). Like Fed. R. Civ. P. 41(a)(1)(A)(i), under the plain language of Fed. R. Civ. P. 71.1(i), "a plaintiff may dismiss the action without a court order; no judicial sanction is required." *Id.*

11. Here, there can be no question that Plaintiffs' action in dismissing their condemnation case was a complete vindication of the position taken by Defendants before this Court. Defendants asserted that the initiation of this condemnation action

---

[2] Fed. R. Civ. P. 41(a)(1)(A)(i) governs a plaintiff's voluntary dismissal of a civil action outside of the condemnation context.

was premature in that Plaintiffs could not provide the Court with reasonable assurances that the railroad would be built in the foreseeable future. Plaintiffs admitted as much in their Notice of Dismissal, in which they acknowledged that "DM&E cannot say that there is a reasonable probability that it will proceed with its Powder River Basin project in the immediate term." Notice of Dismissal at ¶ 3.

12. This Court may award costs to Defendants, under Fed. R. Civ. P. 71.1, if at all, only if such an award is "in accordance with the law that has developed in condemnation cases." Notes to subdivision (l), Fed. R. Civ. P. 71.1. Defendants have not provided and the Court has not found any development of the law establishing whether a condemnor who voluntarily dismisses a contested condemnation action pursuant to 71.1(i) is liable for costs to the condemnee.

13. The Court is mindful that the amount of costs Defendants seek to recover in this action is only a fraction of the money they actually spent to defend their property rights from what, in the Court's view, was an abuse of the condemnation process. Plaintiffs initiated this condemnation action for a project that was always speculative, at best. By their conduct, Plaintiffs have squandered not only a great deal of the Defendants' hard-earned money, but also a great deal of this Court's time. The Court makes this comment for the benefit of its judicial colleagues in this and other districts, so that they might look at any similar conduct by this railroad with a jaundiced eye.

14. Thankfully, cases such as this are rare. In most instances, the

appropriateness of the exercise of the power of eminent domain itself is not at issue, and instead, the Court's focus in presiding over condemnation matters is ordinarily limited to the amount of the fair compensation due for a taking. In those rare instances, where a condemnor attempts to take land without first satisfying the requirements for the proper use of the power of eminent domain, sound public policy dictates that an award of costs is appropriate. But public policy is the prerogative of the legislature and not a federal trial court. Without a basis in existing law for doing so, this Court, regrettably, cannot award Defendants the relief they seek.

WHEREFORE, for the reasons set forth above, the Defendants' application for costs is **DENIED.**

IT IS SO ORDERED.

DATED this 20th day of July, 2011.

United States District Judge