

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0153

THOMAS ACCARDO

VERSUS

**CHENIER PROPERTY PARTNERS, LLC
AND PARK PROPERTIES, LLC**

Judgment Rendered: JUN 15 2011

**Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket Number 2008-13057**

The Honorable Raymond S. Childress, Judge Presiding

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Thomas Accardo, Marla wife of/and
Robert Lampp, Susan wife of/and
Edward Roberts, Jr., and Rosemarie de
la Tour and Intervenor/Appellee,
Greenleaves Master Association**

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This matter is before us on appeal by plaintiffs, Thomas Accardo, Marla and Robert Lampp, Susan and Edward Roberts, Jr., and Rosemarie de la Tour, from a judgment of the trial court granting a motion for summary judgment in favor of St. Tammany Parish and denying plaintiffs' cross motion for summary judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 9, 2008, plaintiffs herein, residents of Chateau Loire, situated in Greenleaves Subdivision in Mandeville, Louisiana, filed a petition for injunctive relief and damages resulting from the widening and redirecting of a drainage ditch within a servitude encumbering the rear of plaintiffs' properties to accommodate the development of Chenier Apartments, located on U.S. Hwy. 190 immediately adjacent to plaintiffs' properties.¹ Chenier Property Partners, L.L.C. ("Chenier") and Park Properties, L.L.C. ("Park"), developers of the Chenier Apartment Development, were named as defendants therein.² In their petition, plaintiffs contended that in November 2007, Chenier, without authority, began widening and redirecting the drainage servitude and cut down several trees on plaintiffs' properties. Plaintiffs further averred that Chenier diverted waters from its construction site into the drainage servitude causing it to run through plaintiffs' properties.

On July 14, 2008, Chenier and Park filed affirmative defenses and answers to the suit, contending: (1) that the Master Drainage Plan for the Chenier Development has been presented to and approved by the Parish and the City of

¹Although Thomas Accardo was the original named plaintiff, Marla and Robert Lampp, Susan and Edward Roberts, Jr., and Rosemarie de la Tour subsequently petitioned to join as party plaintiffs.

²Greenleaves Master Association ("GMA") filed a petition for intervention, seeking declaratory relief and a finding that the drainage servitude at issue exists in favor of GMA, compensation for any and all damages to its servitude, and restoration of its servitude to its original condition.

Mandeville; (2) that plaintiffs' property is subject to a drainage servitude dedicated to St. Tammany Parish and that the work performed within the servitude was consistent with the purpose of the servitude and was authorized by the Parish; (3) that plaintiffs' claims are barred by prescription, peremption, statutes of limitations, and/or the doctrines of laches and estoppel; and (4) that any trees or shrubs removed from the Parish's drainage servitude was consistent with the use and nature of a drainage servitude and was performed in good faith. Thereafter, plaintiffs amended their petition to include the Parish of St. Tammany (hereinafter "the Parish") as a named defendant.

Chenier and Park filed motions for summary judgment, seeking a determination as to whether plaintiffs' properties were subject to a drainage servitude in favor of the Parish. Plaintiffs and GMA filed a cross-motion for summary judgment on the same issue. By judgment dated July 20, 2009, the trial court granted the motions for summary judgment filed by Chenier and Park, denied the motion for summary judgment filed by plaintiffs and GMA, and determined that "the thirty-foot drainage servitude at issue that runs along the border between Greenleaves Subdivision and the Chenier property was dedicated to St. Tammany Parish and that St. Tammany Parish is the beneficiary of that servitude." The trial court further ordered that Chenier and Park be dismissed from the suit with prejudice. The July 20, 2009 judgment was not appealed.

The Parish then filed a motion for summary judgment on the issue of liability, contending the Parish had no liability to plaintiffs or GMA for the destruction of any trees previously located within the Parish's drainage servitude between Greenleaves Subdivision and the Chenier development. Plaintiffs filed a cross-motion for partial summary judgment, contending they were entitled to compensation from the Parish for the "taking" of their property. The cross-motions for summary judgment were heard before the trial court on October 9,

2009. At the conclusion of the hearing, the trial court granted the Parish's motion for summary judgment and denied plaintiffs' motion for summary judgment.

A judgment was signed on October 28, 2009, dismissing the claims of plaintiffs and GMA against the Parish "for any liability for destruction of any tree previously located within the Parish of St. Tammany's drainage servitude that exists between Greenleaves Subdivision and the Chenier development that occurred during the expansion of the drainage ditch within that servitude as claimed by plaintiffs and intervenor in their petitions." The judgment further provided that plaintiffs' cross-motion for summary judgment, alleging "that they are entitled to compensation from the Parish for the taking and/or damaging of their property," was denied.

Upon request by plaintiffs, written reasons for judgment were issued by the trial court on January 12, 2010, wherein the trial court noted:

At issue is the liability of the "Parish" for its authorization allowing the widening of a ditch along the border of the "plaintiffs'" property in Greenleaves Subdivision, and the Chenier development in Mandeville, Louisiana. The border is subject to a servitude of drainage preexisting the development of Greenleaves. During the course of the Chenier Property construction, the parish authorized widening the drainage ditch by clearing trees within the servitude, which was done predominantly on the Chenier property. "Plaintiffs" urge the court to find that this widening amounts to unauthorized taking of their property by the "Parish[.]" which the court declines to do so.

The court has previously ruled that the servitude of drainage preexisted the development of Greenleaves. Maintenance, tree removal, and expansion of the ditch within the servitude is an accessory right ... to the maintenance of a dedicated servitude. Additionally, when the "Parish" contracted with others for the work to be done, it acted within their discretionary authority, for which it is statutorily immune from suit.

Because it was not clear whether the October 29, 2009 judgment disposed of the entirety of plaintiffs' case, and thus, whether the October 29, 2009 judgment was a final appealable judgment, an appeal taken from that judgment was dismissed and the matter remanded for entry of a proper final judgment. See

Accardo v. Chenier Property Partners, LLC and Park Properties, LLC, 2010-0825 (La. App. 1st Cir. 10/29/10) (unpublished opinion). On November 8, 2010, the trial court signed a judgment, granting the Parish's motion for summary judgment and dismissing, with prejudice, the petition of plaintiffs and the intervention of GMA, and denying plaintiffs' motion for summary judgment with prejudice, thereby disposing of all remaining claims.

The plaintiffs then filed the instant appeal, contending that the trial court erred: (1) in finding that St. Tammany Parish could authorize the removal of trees and the widening of a drainage servitude on the plaintiffs' property, in order to receive waters from an adjacent subdivision that previously flowed through undeveloped land, without paying just compensation to the landowners on whose property the drainage servitude is located; and (2) in concluding that the Parish is immune from suit for the actions described above.

DISCUSSION

Summary Judgment

In the instant case, the trial court was presented with cross-motions for summary judgment. In the November 8, 2010 judgment, the trial court denied plaintiffs' motion for summary judgment, but granted the Parish's motion for summary judgment. Although the denial of a motion for summary judgment is generally non-appealable, see LSA-C.C.P. art. 968, because the same issues lie at the heart of the cross-motions for summary judgment, review of the opposing motions is appropriate. See Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority, 2007-0107 (La. App. 1st Cir. 2/8/08), 984 So. 2d 72, 78, n.1.

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine factual dispute. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1034, writ

denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Summary judgment is favored and “is designed to secure the just, speedy, and inexpensive determination of every action.” LSA-C.C.P. art. 966(A)(2).

The burden of proof on a motion for summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

The initial burden of proof remains with the mover and it is not shifted to the non-moving party until the mover has properly supported the motion and carried the initial burden of proof. Only then must the non-moving party submit evidence showing the existence of specific facts establishing a genuine issue of material fact. See Scott v. McDaniel, 96-1509 (La. App. 1st Cir. 5/9/97), 694 So. 2d 1189, 1191-1192, writ denied, 97-1551 (La. 9/26/97), 701 So. 2d 991. If the non-moving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. LSA-C.C.P. arts. 966 and 967.

In determining whether summary judgment is appropriate, appellate courts review summary judgment *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Sanders v. Ashland Oil, Inc., 696 So. 2d at 1035. Furthermore, an appellate court asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. Guardia v. Lakeview Regional Medical Center, 2008-1369 (La. App. 1st Cir. 5/8/09), 13 So. 3d 625, 627. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority, 2007-0107 (La. App. 1st Cir. 2/8/08), 984 So. 2d 72, 80.

When addressing legal issues, a reviewing court gives no special weight to the findings of the trial court. Campbell v. Markel American Insurance Company, 2000-1448 (La. App. 1st Cir. 9/21/01), 822 So. 2d 617, 620, writ denied, 2001-2813 (La. 1/4/02), 805 So. 2d 204. After conducting its *de novo* review of questions of law, the reviewing court renders a judgment on the record. Campbell v. Markel American Insurance Company, 822 So. 2d at 620.

ASSIGNMENT OF ERROR NUMBER ONE

In their first assignment of error, plaintiffs contend that the Parish's expansion of the drainage ditch within the Parish's servitude constituted a "taking," for which plaintiffs are entitled to damages for inverse condemnation.

To determine whether property has been "taken" under Louisiana Constitution Article 1, Section 4, which provides that property shall not be "taken or damaged" by the state or its political subdivisions except for public purposes and with just compensation paid to the owner, the court must: (1) determine if a

right with respect to a thing or an object has been affected; (2) if it is determined that property is involved, decide whether the property has been taken or damaged in a constitutional sense; and (3) determine whether the taking or damaging is for a public purpose under Article 1, Section 4. Williams v. City of Baton Rouge, 98-1981 (La. 4/13/99), 731 So. 2d 240, 246. Thus, to establish that they are entitled to damages for a taking, plaintiffs had to first establish that there was such a “taking.”

As previously determined by the trial court in its July 20, 2009 judgment, the thirty-foot drainage servitude at issue that runs along the border between Greenleaves Subdivision and the Chenier property was dedicated to St. Tammany Parish and St. Tammany Parish is the beneficiary of that servitude.³ Thus, in rendering the instant judgment before us on appeal, the trial court obviously rendered its ruling on plaintiffs’ damage claim in accordance with its earlier determination that the Parish possessed the requisite authority to permit maintenance and expansion of the drainage ditch located within its drainage servitude to accommodate growth within the area and to permit the cutting of any trees as necessary to accomplish this as an accessory right of a dedicated servitude.

With reference to the Parish’s authority to regulate draining, LSA-R.S. 33:1236(13) specifically provides that the Parish has the authority:

[t]o construct and maintain drainage, drainage ditches, and drainage canals; to open any and all drains which they may deem necessary and to do and perform all work in connection therewith; to cut and open new drains, ditches and canals, to acquire lands for necessary public purposes, including rights of way, canals and ditches by expropriation, purchase, prescription or by donation; to enter into contracts for the construction of such drainage works, and to purchase

³To the extent that the plaintiffs are attempting, in the instant appeal, to challenge the trial court’s previous finding concerning the existence of the drainage servitude, we again note that the judgment containing this determination by the trial court was not appealed and thus is final. Accordingly, any challenges to that judgment raised in plaintiffs’ arguments herein are pretermitted.

machinery and have the work performed under their own supervision; to allocate, use and expend the general alimony of the parish for any of the above purposes; to incur debt and issue bonds for drainage and drainage canals in the manner provided for by Subtitle II of Title 39; and use such other funds as may be legally expended for such purposes; to levy taxes for the maintenance of said drainage works in the manner provided for and under the authority of Article X, Section 10 of the Constitution of the State of Louisiana, as amended, and to construct any works and do any and all things necessary to effect proper drainage and carry this Paragraph into effect; to enter into contracts or agreements, under such terms and conditions as may be mutually agreeable with the State of Louisiana, through the Department of Public Works for the securing of State aid for the purposes herein authorized; to cooperate and participate in any State or Federal aid program which may now exist or which may hereafter come into effect under any State or Federal law. Police juries shall open all natural drains which they deem necessary in their respective parishes and shall perform all work connected therewith, which they may deem necessary to make the opening of natural drains effective. They may perform all other acts necessary to fully drain all the land in their respective parishes and maintain such drainage when established. This Paragraph is intended to furnish additional means whereby parishes in the State of Louisiana may accomplish the objects and purposes herein referred to, and shall be liberally interpreted.

(Emphasis added; footnotes omitted.)

Moreover, with reference to subdivision layout, LSA-R.S. 33:1236(20)

provides that the Parish has the authority:

[t]o pass all ordinances and regulations which they deem necessary to govern and **regulate the laying out of subdivisions, resubdivisions, roads, streets, alleys, ways, subways, viaducts, bridges, parks, parkways, boulevards, playgrounds, community centers and other public buildings, grounds, or improvements, and the location, re-location, widening, removal, vacation or extension or other improvements of such existing public works;** the platting of land into lots, roads, streets, and other dedicated or private ways; the location, re-location, development, routing, and re-routing of transit and transportation lines, which in the opinion of the police jury are in the interest of the systematic planning of the parish.

With reference to the Parish's authority regarding ditches, Parish governing authorities are statutorily empowered to pass all ordinances deemed necessary by said authorities relative to roads, bridges, and ditches, and may impose such penalties to enforce them as the Parish deems proper. See LSA-

R.S. 48:481. Moreover, Louisiana law grants each parish the authority to “drain the public roads of their respective parishes by cutting ditches and canals where necessary through private property. The ditches and drains shall be of sufficient size to drain both the public road and the lands over which they are opened. They shall be located where least injurious to the owner of the property.” See LSA-R.S. 48:483.

In support of its motion for summary judgment, the Parish presented: the affidavit of Paul Carroll, Drainage Engineer for St. Tammany Parish; the affidavit of Joey Lobrano, Right-of-Way Coordinator for the St. Tammany Department of Public Works; and the deposition testimony of Paul Carroll. In opposition to the Parish’s motion for summary judgment and in support of their cross motion for summary judgment, plaintiffs also offered the deposition testimony of drainage engineer Carroll; the affidavit of Robert Lampp, President of Greenleaves Master Association; the affidavit of Tom D. Synder, Jr., counsel for plaintiffs; and various photographs of the drainage ditch. The Parish likewise offered in opposition to plaintiffs’ cross motion for summary judgment numerous photographs depicting the drainage servitude and drainage ditch and their relation to plaintiffs’ properties and Chenier Apartments.

The evidence presented by the Parish reflects that St. Tammany Parish Drainage Engineer, Paul Carroll, approved the master drainage plan submitted by Park to develop the Chenier property. The evidence further shows that Park’s proposal was to widen and deepen the Parish’s drainage canal located within the Parish’s servitude that ran along Greenleaves Subdivision as well as widening the drainage canal between five and ten feet onto the Chenier property. Carroll testified that he inspected the completed work on the drainage servitude and found the work to be in compliance with the plans submitted to him by the developer. The Right-of-Way Coordinator for the St. Tammany Parish Department of Public

Works, Joey Lobrano, confirmed that the drainage ditch located between Greenleaves Subdivision and the Chenier property development is within St. Tammany Parish's selective maintenance system and has been maintained by the Parish in the past. While the Parish acknowledged that the expansion of the drainage ditch in accordance with the approved master drainage plan by the Chenier developers resulted in the cutting down of some trees by the Chenier developers, the Parish noted that those trees were located within the boundaries of the drainage servitude.

Plaintiffs, relying on Simmons v. Board of Commissioners of Bossier Levee District, 25,093, 25,094 (La. App. 2nd Cir. 9/22/93), 624 So. 2d 935, argue that even if the work and activities occurred within the boundaries of the Parish's dedicated drainage servitude, a claim for "taking" will lie when the work and activities exceed ordinary maintenance and damage private property. Here, plaintiffs claim that the excavation and expansion of the Greenleaves ditch was unnecessary for the ditch to accomplish its original and existing purpose and that the redirection of the water directly into the Greenleaves ditch constituted a taking for which plaintiffs are entitled to compensation.

We disagree and find plaintiffs' reliance on Simmons misplaced. In Simmons, plaintiffs sought damages from dredging activities in a canal that, once completed, caused the banks of the newly dredged canal to develop crevices and drop off in large sections into the canal. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 938. The plaintiffs therein claimed that this process continued intermittently for more than six years after the dredging ended. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 938. As a result of the dredging, each plaintiff sustained an estimated loss of around 25-150 trees from the rear of his or her lot due to the bank failures, and an average loss of 3,300 to 13,000 square foot per lot. Additionally, plaintiffs'

homes sustained extensive structural damage, including cracks in walls and fireplaces, separation of molding from walls and ceilings, difficulty in closing inside doors, cracks in or fogging of windows, cracks in and soil subsiding from patios, garages and driveways, a fence pulling away from a house preventing a gate from closing properly, the development of cracks in a swimming pool and tiles missing from the apron surrounding it, and the caving in of the back wall of an oxidation pond. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 945, 949. The expert in Simmons opined that the bank failures had already affected most of the homes and would continue to affect them as long as the banks keep moving and that soil movement would have some effect on every home. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 945. The expert further opined that some of the homes would sustain foundation damage that could not be prevented by repair efforts. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 945-946.

Considering therein the issue of whether a “taking” of the plaintiffs' property had occurred, the court of appeal reasoned that a taking occurs where there is a substantial interference with the free use and enjoyment of property. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 951. It is not necessary to show an actual divestiture of title, the court explained, so long as substantial interference is established. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 951. The appellate court affirmed the trial court's finding that the interference therein was substantial, and thus constituted a “taking.” Accordingly, the appellate court affirmed the trial court's damage awards. Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 951. The Simmons court concluded that the trial court's

finding that a taking had occurred was “unquestionably supported.” Simmons v. Board of Commissioners of Bossier Levee District, 624 So. 2d at 951.

Although Simmons suggests that allegations of soil loss resulting from public dredging activities may support an inverse condemnation claim, the interference with property plaintiffs have alleged in the instant case is distinguishable from interference clearly demonstrated in Simmons. In fact, aside from the widening and expansion of the drainage ditch and tree removal conducted totally within the boundaries of the dedicated drainage servitude, plaintiffs have failed to present any evidence that would establish a substantial interference with the free use and enjoyment of their property or any other damage thereto.

Thus, we reject plaintiffs’ contention that they are entitled to compensation for an inverse condemnation or “taking” of their property. Instead, on *de novo* review, we find that plaintiffs have failed to establish that they are entitled to judgment in their favor as a matter of law for damages for a “taking” by the Parish or for an inverse condemnation claim.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In their second assignment of error, plaintiffs contend that the trial court erred in determining that the Parish is statutorily immune from suit. The trial court found that when the Parish contracted with others to perform the work at issue, the Parish acted within its discretionary authority for which it is statutorily immune from suit.

Given our previous determination that the trial court was correct in granting summary judgment in favor of the Parish as to liability and in rejecting plaintiffs’ claims for damages for a purported taking or inverse condemnation, this assignment of error is seemingly rendered moot.

Nonetheless, to the extent that this assignment of error could be construed to present an issue for review, we note that LSA-R.S. 9:2798.1, entitled, “[p]olicymaking or discretionary acts or omissions of public entities or their officers or employees,” provides as follows:

A. As used in this Section, “public entity” means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, **and political subdivisions** and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.

B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

C. The provisions of Subsection B of this Section are not applicable:

(1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or

(2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

D. The legislature finds and states that the purpose of this Section is not to reestablish any immunity based on the status of sovereignty but rather to clarify the substantive content and parameters of application of such legislatively created codal articles and laws and also to assist in the implementation of Article II of the Constitution of Louisiana.

(Emphasis added.)

Here, the Parish granted the developer permission to perform work on the ditch in accordance with the original plans submitted by the developer. In fact, a supplemental drainage report dated August 13, 2006, was submitted by the developer at the request of the Parish Engineer, Joe Gustafson, who wanted the developer to further demonstrate that there would be no increased flooding due to construction along the ditch. Moreover, once the work was completed, the Parish

inspected the work performed on the drainage servitude and found it to be in compliance with the plans submitted by the developer.

In order to pierce the Parish's statutory immunity from liability, plaintiffs would have to show that any acts or omissions of the Parish were not reasonably related to a legitimate governmental objective or that the acts constituted criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. LSA-R.S. 9:2798.1(C). Plaintiffs have failed to allege or make any such showing.

Accordingly, we find this assignment of error is also meritless.

CONCLUSION

For the above and foregoing reasons, the October 28, 2009 judgment of the trial court is affirmed. Costs of this appeal are assessed against the plaintiffs/appellants, Thomas Accardo, Marla and Robert Lampp, Susan and Edward Roberts, Jr., and Rosemarie de la Tour.

AFFIRMED.