COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-869

ROBERT S. YARNELL & another[1]

vs.

CITY OF LYNN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from a judgment of the Land Court dismissing their fifty-one count complaint. We affirm in part and reverse in part.

Background. Accepting the allegations of the complaint and documents attached to the complaint as true, see Burbank Apartments Tenant Ass'n v. Kargman, 474 Mass. 107, 116 (2016), Robert S. Yarnell owns property known as 33 Buchanan Circle in Lynn, which abuts a "right of way 18 feet wide" (ROW). The first deed of Robert's[2] property provided that the property was conveyed "together with a right to use the said [ROW] . . . to and from Buchanan Circle." In the complaint, Robert asserted that this language gave him ownership of the entire fee.

[1] Ann Yarnell.

[2] Because of their common surname, we use the plaintiffs' first names when referring to them individually.

Robert's former wife, plaintiff Ann Yarnell, asserted that she has a lease for life in the property.[3] Ann has lived at the property since 2011. Disputes have arisen between Ann, her neighbors, and the city as to others' rights to use the ROW.

On April 16, 2013, the city recorded an order of taking of an easement in the ROW for use as a public road. On April 19, 2016, the Yarnells commenced this action in the Land Court by filing a complaint. On September 12, 2016, they filed a fifty-one count amended complaint; it is largely disorganized, repetitive, occasionally vague, and generally difficult to follow. Suffice it to say, the Yarnells challenged in many of the counts procedural deficiencies with regard to the order of taking and also sought damages for the taking. In addition, Ann claimed that prior to the taking, city workers deliberately trespassed on the property and caused damage to the property and to Ann, personally. Ann also alleged that certain city entities did not respond appropriately to her complaints. Robert sought to establish title to the entire ROW and sought to compel neighbors to try title to the ROW pursuant to G. L. c. 240, § 1.

[3] The record does not reflect that Ann's claimed "lease for life" has been recorded. After a hearing, the judge advised Ann that the judge would not accept further filings from her unless she established a record interest in the property and, later, the judge denied a motion for reconsideration of this issue. Ann took an interlocutory appeal to a single justice of this court, which ultimately was denied.

The city filed several motions to dismiss advancing different theories. The Land Court judge dismissed all counts asserted by Ann for lack of jurisdiction or because she lacks standing as she has no ownership interest in the property. The judge dismissed all of Robert's claims for failure to state a claim upon which relief may be granted, failure to add necessary and indispensable parties, failure to comply with the statute of limitation, or lack of jurisdiction.

Discussion. "We review the allowance of a motion to dismiss de novo, accepting as true the facts alleged in the plaintiffs' amended complaint and exhibits attached thereto, and favorable inferences that reasonably can be drawn from them." Burbank Apartments, 474 Mass. at 116. "Those alleged facts, and reasonable inferences drawn therefrom, must plausibly suggest an entitlement to relief." Id.

A. Procedural issues. We first address two procedural arguments. The plaintiffs contend that it was improper for the city to file several motions to dismiss, each raising a new theory. See Mass. R. Civ. P. 12 (g), 365 Mass. 754 (1974) (rule 12 [g]). The judge chose to treat the motions as a single motion raising different theories and she issued a single decision. Although rule 12 (g) provides that certain defenses are waived if not raised in an initial motion to dismiss, Mass. R. Civ. P. 12 (h) (2), 365 Mass. 754 (1974), provides that a

defense of failure to state a claim upon which relief can be granted and a defense of failure to join an indispensable party may be raised even as late as at the trial on the merits, and rule 12 (h) (3) provides that the court shall dismiss an action at any time when it appears the court lacks jurisdiction of the subject matter, see Drummer Boy Homes Ass'n, Inc. v. Britton, 474 Mass. 17, 21 n.12 (2016). To the extent a party may waive a statute of limitation defense by not raising it in the initial motion to dismiss, as discussed infra, the city has abandoned its statute of limitation defense on the takings claim. We discern no abuse of discretion in the judge's decision to manage the proceedings as she did.

Additionally, to the extent the Yarnells argue the judge should have conducted additional hearings before granting the motions to dismiss, Rule 6 of the Rules of the Land Court (2005), provides the judge with discretion whether to decide matters on submitted papers without oral argument. The docket reflects that the judge notified the parties that she would determine whether to hold a hearing after receiving the plaintiffs' opposition to the motions to dismiss. We discern no abuse of discretion.

B. Substantive claims. 1. Trespass. The judge dismissed the Yarnells' trespass claims on the ground that the Land Court lacks jurisdiction over trespass claims. So far as appears on

the record, the plaintiffs have not put forth a proper appellate argument countering the judge's decision. Moreover, to the extent Ann Yarnell claims that neighbors committed trespasses or injured her, in addition to the jurisdictional issue, she failed to join the neighbors as defendants. We discern no error in the dismissal of the plaintiffs' trespass claims.

2. Title claims. As to Robert's claim that he owns the fee to the entire ROW, the facts alleged do not support his claim. The complaint asserts that the language granting the right to use the ROW contained in the original conveyance of the property expressly "reserves the fee in the ROW for" Robert's property. It is axiomatic that the grant of a right to use a way does not transfer the fee in the way,[4] and the facts asserted simply do not state a claim upon which relief may be granted. In addition, the complaint failed to name parties who have claimed to have a fee interest in the property. To the extent the complaint may be interpreted to seek a declaration as to Robert's ownership of the entire ROW, there was no error in dismissing that claim.

[4] A right of way is an easement. See M.P.M. Bldrs., LLC v. Dwyer, 442 Mass. 87, 88 (2004). "An easement 'is an interest in land which grants to one person the right to use or enjoy land owned by another.'" Zoning Bd. of Appeals of Groton v. Housing Appeals Comm., 451 Mass. 35, 39 (2008), quoting Commercial Wharf E. Condominium Ass'n v. Waterfront Parking Corp., 407 Mass. 123, 133 (1990).

3. Takings claims. We nonetheless consider Robert's takings claim because in footnote four of the judge's decision, the judge alludes to the fact that abutters to the ROW, including Robert, have ownership rights in portions of the ROW. The plaintiffs' claims seeking damages for the taking were properly dismissed as G. L. c. 79, § 14, provides that a person entitled to damages may petition for the assessment of such damages to the Superior Court. "There is no doubt that, by enacting c. 79, the Legislature meant to fashion an exclusive statutory remedy for takings made thereunder." Whitehouse v. Sherborn, 11 Mass. App. Ct. 668, 673 (1981).

The judge acknowledged, however, that the Land Court has jurisdiction in equity over claims that the city failed to comply with the statutory requirements of or conditions precedent to a taking, see Lichoulas v. Lowell, 78 Mass. App. Ct. 271, 277 (2010), but held that the statute of limitation had expired on the plaintiffs' claims. "A person whose land has been taken by eminent domain [has] three years from the time that the right to damages has vested to contest the lawfulness of a taking under G. L. c. 79, the chapter in the general laws which deals with eminent domain" (footnote omitted). Cumberland Farms, Inc. v. Montague Economic Dev. and Indus. Corp., 38 Mass. App. Ct. 615, 616 (1995). While the order of taking was recorded on April 16, 2013, and the complaint was filed on April

19, 2016, seemingly three days late, the complaint was filed timely because April 16, 2016, was a Saturday, April 17, 2016, was a Sunday, and April 18, 2016, was a legal holiday in the Commonwealth. On appeal, the city withdrew its contention that the statute of limitation was not observed. Accordingly, Robert's claims regarding procedural irregularities related to the taking are not subject to dismissal on statute of limitation grounds.

The city contends that the order of dismissal was nonetheless correct and we should affirm because Robert, in essence, failed to state a claim upon which relief could be granted because he failed to allege specific facts to adequately challenge the validity of the taking. The judge noted, however, that Robert claims that the city failed to sufficiently and accurately describe the property to be taken, failed to award any damages, conducted no appraisal, and made no offer of settlement. We add that Robert contends the city failed to comply with notice requirements as well. In light of these allegations which we must accept as true, whether Robert has stated a claim upon which relief may be granted is an issue the Land Court must address in the first instance on remand should the city choose to raise it. See Lichoulas, 78 Mass. App. Ct. at 277-278. Accordingly, we reverse so much of the judgment

that dismisses those counts in the complaint that challenge the validity of the taking.

4. Ann's taking claims. There was no error in dismissing Ann as a plaintiff with regard to challenging the taking. Though she claimed to have a "lease for life," she failed to present evidence of such when asked to do so by the judge. The judge thus dismissed her claims challenging the taking as she lacked standing. We discern no error. See Riedel v. Plymouth Redev. Auth., 354 Mass. 664 (1968) (party occupying premises under agreement to enter into lease was at most tenant at will and had no interest in premises which would entitle him to damages under c. 79). Contrast G. L. c. 79, § 24 (tenant for life or for years and remainderman or reversioner sustain recoverable damages under c. 79 by taking of their property by eminent domain). Ann's citation to Cohen v. Zoning Bd. of Appeals of Plymouth, 35 Mass. App. Ct. 619 (1993), which examines standing in a zoning case, is unavailing. Ann's failure to demonstrate that she had an enforceable lifetime lease or even a lease for years was fatal to her standing to challenge the taking.

Finally, we agree with the judge that any remaining claims lack a factual basis to defeat a motion to dismiss. We have considered the plaintiffs' remaining arguments and conclude they either fail to rise to the level of adequate appellate argument,

do not pertain to the issues raised in the complaint, or simply are unavailing.

So much of the judgment that dismisses Robert S. Yarnell's claims challenging the validity of the city's April 16, 2013, taking is reversed. The judgment is otherwise affirmed.

By the Court (Hanlon, Lemire & Shin, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: January 10, 2020.

[5] The panelists are listed in order of seniority.