

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT
2015 OCT -6 P 11: 03

NEXUS GAS TRANSMISSION, LLC)
)
Plaintiff,)
)
vs.)
)
DONALD R. HOUSTON, et al.)
)
Defendants.)

CASE NO.: 15CIV0636

FILED
DAVID B WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

JUDGE CHRISTOPHER J. COLLIER

**JOURNAL ENTRY WITH
INSTRUCTIONS FOR SERVICE**

This matter came before the Court for oral argument on September 24, 2015, on the Plaintiff NEXUS Gas Transmission, LLC's (hereinafter, "NEXUS") motion for partial summary judgment and the joint response in opposition filed by the Defendants Adele H. Borling, Donald E. Borling, Dorothy J. Morris and Donald R. Houston (hereinafter, the "Defendants"). Attorney James Hughes, III presented arguments on behalf of NEXUS. The Defendants Adele H. Borling, Donald E. Borling and Dorothy J. Morris appeared and were represented by Attorney Gregory Huber. The Defendant Donald R. Houston appeared and was represented by Attorney David A. Mucklow.

I. Standard of Review

Summary judgment is appropriate, pursuant to Civ.R. 56(C), when:

(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Specifically, "the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact." *Dresher v. Burt*, 75 Ohio St.3d 280, 292, 1996 Ohio 107,

662 N.E.2d 264 (1996). The moving party bears the burden of supporting the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.*

If the moving party satisfies this burden, the burden shifts to the non-moving party under Civ.R. 56(E), which states, in pertinent part, that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

When deciding matters of summary judgment, the "judge's function is not to personally weigh the evidence and determine the truth of the matter, but to determine **whether there is a genuine issue of fact for the trial.**" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (emphasis added).

Following the oral argument, the Defendants filed a counter motion for summary judgment, or in the alternative, motion for judgment on the pleadings on September 25, 2015. NEXUS filed its memorandum in opposition to the Defendants' motion on September 28, 2015. By agreement of the parties, the Court will consider both competing motions for summary judgment when rendering its decision. Upon reviewing the evidence allowable and presently before the Court under Civ.R. 56(C), and construing that evidence in a light most favorable to the non-moving party, the Court finds no genuine issues of material fact are present which preclude granting NEXUS' motion for partial summary judgment. As such, and for the reasons more specifically set forth below, NEXUS' motion for partial summary judgment is hereby granted and the Defendants' motion for summary judgment, or in the alternative, motion for judgment on the pleadings is hereby denied.

II. Findings of Fact

NEXUS is a limited liability company organized under the laws of the state of Delaware, with its principal place of business located at 5400 Westheimer Court, Houston, Texas. NEXUS is an interstate natural gas transmission company, and the complaint alleges that NEXUS is “organized for lawful purposes, including transporting natural gas through pipes, conduits, and tubing.”¹ NEXUS intends to construct a new interstate natural gas pipeline system that is designed to transport supplies of natural gas in the Appalachian Basin to natural gas customers in the U.S. and Canada. Specifically, and as part of the aforementioned project, NEXUS plans to construct a 250-mile long, 36-inch diameter pipeline from Columbiana County, Ohio to Washtenaw County, Michigan, extending through Medina County, Ohio. The proposed pipeline, as the proposal exists currently, will affect thirteen (13) counties in Ohio and three (3) counties in Michigan, with a total of approximately three thousand four hundred and seventy-nine (3,479) affected tracts of land.

NEXUS is in the process of seeking and obtaining approval for the project from the Federal Energy Regulatory Commission (hereinafter, “FERC”). NEXUS must obtain a certificate of public convenience and necessity from FERC to construct, operate and maintain the proposed pipeline. NEXUS has commenced the pre-filing process with FERC, but has yet to obtain the required certificate. NEXUS claims that as part of the pre-filing process, NEXUS must complete certain civil, archeological and environmental surveys for each tract of land situated on the proposed project route and submit those findings to FERC. The issue of whether NEXUS is statutorily permitted to enter onto privately-owned tracts of land along the proposed pipeline route, at this point in the FERC filing process, is the sole issue before the Court.

¹ The Court notes that NEXUS’ status as a company “organized for the purpose of transporting natural gas through tubing, pipes, or conduits” is the subject of NEXUS’ request for declaratory judgment in Count I.

The Defendants in this matter own tracts of land along NEXUS' proposed pipeline route through Medina County, Ohio. NEXUS previously contacted landowners along the proposed pipeline route, and while many landowners granted NEXUS permission to conduct the survey activities, many landowners have not granted permission, including the remaining named Defendants in this matter. As previously noted by the Court in the ruling on NEXUS' request for a temporary restraining order, NEXUS maintains that it has the statutory right to enter onto the Defendants' properties without a court order and without the permission of the landowners.

NEXUS is nevertheless concerned due to a written letter from the Medina County Prosecutor's Office to Tom Miller, the Medina County Sheriff, that interprets the statutes at issue in this case and concludes NEXUS "should at this time be considered a trespasser if it attempts to enter property without permission." The Sheriff, Prosecutor's Office and this Court have different functions and different levels of involvement in this matter. The Sheriff, concerned with how to handle landowner complaints of NEXUS' employees on their properties, contacted the Prosecutor's Office for an opinion. The Prosecutor's Office is not a party to this matter. The Prosecutor did not have the benefit the Court had in hearing the arguments of both sides. While the Prosecutor opined that a FERC certificate is necessary to conduct surveys, the Court respectfully disagrees with that opinion based on the plain language of the statutes at issue.

NEXUS does not agree with the Prosecutor's interpretation of the statutes and is seeking declaratory judgment in this matter to ensure the safety of its employees conducting surveying activities and avoid potential trespassing charges in Medina County. According to the Defendants, NEXUS must show that the surveying activities are "necessary" at this time as required by the statutes. It is the Defendants' position that NEXUS is a private, for-profit company that does not acquire a statutory right to survey private property until it acquires a right

to appropriate that property. The Defendants are adamant that they do not want NEXUS employees to conduct survey activities on their properties and ultimately do not wish to have a high-pressure natural gas line on their properties.

III. Conclusions of Law

The Court previously denied NEXUS' motion for a temporary restraining order, but the analysis was much different at that point in this case. The purpose of temporary restraining orders and preliminary injunctions is to maintain the status quo during the pendency of the case and until a decision is issued on the merits. The Court found it necessary to hear the arguments of both sides before issuing a decision. After all, and especially with an issue like the one before the Court, if the Court allowed NEXUS to conduct the survey activities before hearing the arguments of both sides and issuing an informed decision, the Court's ultimate decision would be meaningless. Once NEXUS employees were able to enter the Defendants' properties and conduct the surveys, NEXUS would have obtained, for all intents and purposes, everything it wanted in this case.

By not allowing NEXUS to enter the Defendants' properties until the Court issued a decision on the merits, the Court was able to ensure that if NEXUS was ultimately permitted to conduct the survey activities, it would be after both sides fully presented their arguments and after the Court issued a decision on the merits. While the Court is sympathetic to the Defendants' arguments, the Court is constrained and must consider only the plain language of the statutes at issue in the matter. This matter deals with property rights of private individuals – and the Court recognizes the importance and significance of those rights. This decision is based on statutory interpretation of what the statutes actually say, not what the statutes should say or what is fair and equitable in this instance.

Pursuant to R.C. 2721.02(A):

[C]ourts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for under this chapter. The declaration may be either affirmative or negative in form and effect. The declaration has the effect of a final judgment or decree.

NEXUS filed the second amended verified three-count complaint on August 5, 2015. Count I is a request for the Court to issue a declaratory judgment that under R.C. 1723.01, NEXUS is a company organized for the purposes of transporting natural gas through tubing, pipes, or conduits. Count II is a request for the Court to issue a declaratory judgment that NEXUS has the right to enter onto the Defendants' properties for the purpose of conducting certain surveying activities pursuant to R.C. 1723.01 and R.C. 163.03. Count III is a request for injunctive relief seeking to enjoin the Defendants from further denial of and interference with NEXUS' statutory right to enter onto the Defendants' properties for the purpose of conducting the aforementioned surveying activities. NEXUS' motion for partial summary judgment relates only to Counts I and II, and therefore the Court's ruling does not address Count III.²

R.C. Chapter 1723 is captioned "Appropriation of Property by Certain Corporations."

R.C. 1723.01 states, in pertinent part, that:

If a company is organized for the purpose of ... transporting natural or artificial gas, petroleum, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits, or by means of wires, cables, or conduits; for storing, transporting, or transmitting water, natural or artificial gas, petroleum, or coal or its derivatives, ... then such company may enter upon any private land to examine or survey lines for its tubing, pipes, conduits, poles, and wires, or to examine and survey for a reservoir, dams, canals, raceways, a plant, or a powerhouse, and to ascertain the number of acres overflowed by reason of the construction of such dams, and may appropriate so much of such land, or any right or

² NEXUS states in the September 28, 2015 memorandum in opposition to the Defendants' motion for summary judgment that "once the Court rules on NEXUS' authority under R.C. 1723.01 and R.C. 163.03, the request for injunctive relief will be largely moot – unless, of course, the Defendants refuse to abide by the Court's interpretation of the statutes." NEXUS then goes on to state that "[i]f this Court rules that NEXUS has the ability to conduct Survey Activities under the plain language of the statutes, NEXUS hopes that the Defendants will not require an injunction to comply with the Court's ruling." Nevertheless, the injunctive relief Count remains pending after this Court's ruling and will need to be adjudicated to ultimately dispose of this case.

interest therein, as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant, powerhouse, storage yards, wharves, bridges, workshops, receiving and delivery structures or facilities, pumping stations, and any other buildings, structures, appliances, or facilities necessary to the purposes of such companies, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such lines.

(Emphasis added).

While the Defendants argue that the word necessary applies to both the right to conduct the survey activities and the right to appropriate, that interpretation is not consistent with the plain language of the statute. The word necessary applies to the amount of land to be appropriated. In other words, if a company authorized to appropriate land ultimately does appropriate that land, the company can only appropriate the amount of land that is necessary for the laying down of the tubing, conduits or pipes. The company cannot appropriate more land than is deemed necessary, because doing so would thwart the purpose of eminent domain and appropriation laws. Additionally, and based on practical concerns, the company may not know how much land is necessary to appropriate for a project until certain surveying activities have been completed.

The Court finds that NEXUS is a company that was organized for the purpose of transporting natural gas through pipes, conduits or tubing. As such, R.C. 1723.01 authorizes NEXUS to enter upon to any private land to examine or survey lines for its tubing, pipes or conduits. The Defendants argue the statute could not have contemplated authorizing a private company to enter onto private property to conduct survey activities simply because the company is organized for the purpose of transporting natural gas. While the Court is cognizant of the fact that the statute provides few safeguards for the potential abuse of the right of a private company entering onto private property, the Court must follow the plain language of the statute as drafted by the Ohio Legislature. The statute merely requires NEXUS to be organized for the purpose of

transporting natural gas through tubing, pipes or conduits as a prerequisite for entry onto private property to conduct survey activities. NEXUS meets that definition, and therefore under the statute, has the right to enter private property to conduct the surveys. The statute does not require a FERC certificate or require the present authority to appropriate specific tracts of land as a prerequisite to conduct survey activities.

The Court notes, however, that NEXUS has done more than simply attempt to assert its right to survey solely based on its existence as a natural gas company. NEXUS is in the pre-filing process with FERC to obtain the necessary certificate to commence the pipeline project. The Defendants do not dispute that NEXUS has commenced the pre-filing process with FERC, but instead claim that NEXUS must have the present right to appropriate before it conducts surveying. The Defendants' position, while no doubt predicated on their desire to keep NEXUS off their private property and ultimately stop the construction of the pipeline, would create certain insurmountable hurdles for any private natural gas company seeking to construct a pipeline.

Even if NEXUS was able to obtain the FERC certificate without first conducting the surveys, as opined by the Defendants' expert, the statute does not require a FERC certificate as a prerequisite to survey and this interpretation could result in needless delays. For instance, if NEXUS went through all the steps necessary to obtain a FERC certificate and then conducted the surveys, the findings of the surveys could result in relatively small or potentially drastic changes in the pipeline location. In other words, the survey may reveal that certain properties or certain counties would not accommodate or provide a cost effective location for such a natural gas line. The surveys simply aid in the FERC process by determining whether or not the proposed pipeline location is feasible, which supports the position that NEXUS is statutorily permitted to

conduct survey activities prior to obtaining a FERC certificate and prior to the present authority to appropriate certain property.

NEXUS has repeatedly emphasized that it is not presently seeking to appropriate any property in this lawsuit. NEXUS claims that R.C. 163.03 gives it a separate and independent right to conduct the survey activities. R.C. 163.03 states:

Any agency may, upon the notice prescribed in this section, prior to or subsequent to the filing of a petition pursuant to section 163.05 of the Revised Code, enter upon any lands, waters, and premises for the purpose of making such surveys, soundings, drillings, appraisals, and examinations as are necessary or proper for the purpose of the agency under sections 163.01 to 163.22, inclusive, of the Revised Code, and such entry shall not constitute a trespass. Notice of such proposed entry shall be given to the owner or the person in possession by such means as are reasonably available not less than forty-eight hours nor more than thirty days prior to the date of such entry.

The agency shall make restitution or reimbursement for any actual damage, resulting to such lands, waters, and premises and to improvements or personal property located in, on, along, over, or under such lands, waters, and premises, as a result of such activities. If the parties are unable to agree upon restitution or other settlement, damages are recoverable by civil action to which the state or agency hereby consents.

R.C. 163.03(C) defines an agency as “any public agency or private agency.” R.C. 163.03(B) defines a private agency as “any corporation, firm, partnership, voluntary association, joint-stock association, or company that is not a public agency and that is authorized by law to appropriate property in the courts of this state.” NEXUS argues that the statute does not require NEXUS to have the present right to appropriate, but instead, only that NEXUS could be authorized to appropriate if the requirements of R.C. Chapters 1723 and 163 were met. The Defendants claim that NEXUS does not have the present right to appropriate at this stage of the project and therefore, does not qualify as a private agency. R.C. 1723.01 provides NEXUS the authority to appropriate necessary lands. R.C. 1723.02 states that “[t]he appropriation referred to in section 1732.01 of the Revised Code shall be made in accordance with sections 163.01 to 163.22 of the Revised Code.” In other words, NEXUS may have the right to appropriate even

though there are other requirements in R.C. Chapter 163 outlining the steps necessary to actually appropriate the land. As such, the Court finds that R.C. 163.03 provides NEXUS with separate authority to enter onto the Defendants' properties to conduct surveys, and further provides for notice and restitution/reimbursement for any damages.

IV. Conclusion

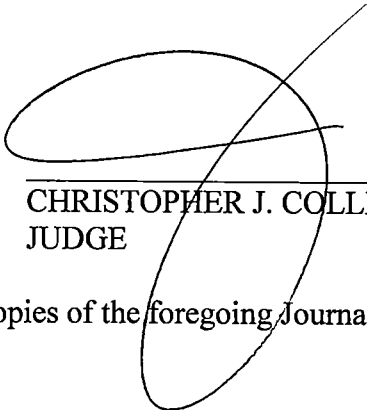
While the Court is sympathetic to the Defendants' arguments in this matter, the Court is constrained by the plain language of the statutes at issue in this matter. The Court cannot alter or re-write the statutory provisions at issue in the matter simply because they are not popular, as that is a matter to be addressed with the Ohio Legislature. NEXUS' motion for partial summary judgment is granted on Counts I and II. The Defendants' motion for summary judgment, or in the alternative, motion for judgment on the pleadings is denied. The Court hereby issues the following declaratory judgment:

- I. NEXUS is a company organized for the purpose of transporting natural gas through pipes, conduits and tubing;
- II. NEXUS sent proper notice as prescribed by R.C. 163.03 to the Defendants notifying them of its intent to enter their property to conduct survey activities;
- III. Pursuant to R.C. 1723.01 and R.C. 163.03, NEXUS has the right to enter onto the Defendants' property without permission for the purpose of conducting survey activities, including soundings, drillings, appraisals, environmental surveys and other examinations as are necessary and proper for the pipeline project; and
- IV. Such access by NEXUS will not constitute a trespass.

While the Court finds that Count III for injunctive relief is still pending, the Court's decision on Counts I and II disposes of the primary issues in this matter. NEXUS' request for

injunctive relief is ripe for adjudication only if the Defendants fail to adhere to this Court's decision. As such, and pursuant to Civ. R. 54(B), the Court hereby designates this Entry a final, appealable order and expressly finds there is no just reason for delay.

IT IS SO ORDERED.


CHRISTOPHER J. COLLIER
JUDGE

The Clerk of Courts is instructed to send copies of the foregoing Journal Entry to the following parties or their counsel of record.

- Atty. Hughes
- Atty. Huber
- Atty. Mucklow

Copies of this Entry were mailed by the Clerk of Courts on 10-6-15.


DEPUTY CLERK OF COURT