

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CONSOLIDATED WATER POWER COMPANY,

ORDER

Plaintiff,

10-cv-397-bbc

v.

0.46 ACRES OF LAND, MORE OR LESS,
IN PORTAGE COUNTY, WISCONSIN,
ROBERT D. MOODIE and UNKNOWN OTHERS,

Defendants.

Plaintiff Consolidated Water Power Company operates the Hydropower Project in Stevens Point, Wisconsin under a license issued by the Federal Energy Regulation Commission. Plaintiff brings a claim under the Federal Power Act, 16 U.S.C. § 814, for “the taking of certain property . . . through the power of eminent domain.” Cpt. ¶ 2, dkt. #1.

Two adjacent parcels of property are at issue. (The .46 acres identified in the caption are a combination of these two parcels.) Defendant Robert Moodie claims ownership of one parcel; plaintiff believes that “unknown others” may claim an interest in the other. Plaintiff “demands judgment in its favor condemning the[se] property interests . . . and awarding possession thereof to plaintiff, for the ascertainment of just compensation for the taking.”

Id. at 3.

Plaintiff's motion for summary judgment is now before the court. Plaintiff argues that it has met the standard under § 814 for obtaining condemnation of both parcels because it is a licensee under the Act, the parcels are a necessary part of the HydroPower Project and it has been unable to obtain the property through contract. However, it argues that just compensation is "\$0.00 because [it] obtained ownership of the Property by adverse possession decades ago." Plt.'s Br., dkt. #12, at 2. In the alternative, plaintiff "seeks . . . summary judgment that it holds a prescriptive easement to use the entire Property in connection with the Project." Id. at 2-3.

Plaintiff's motion raises a number of questions that plaintiff does not answer. First, plaintiff does not acknowledge the tension between its claim for eminent domain and its argument that it has owned the property at issue for decades. Obviously, if plaintiff owns the property, it does not need to have the property condemned. For reasons it does not explain, plaintiff has not included a request for declaratory relief in its complaint that it is the rightful owner of the property or, for that matter, that it holds a prescriptive easement. Instead, plaintiff seems to be bringing in these claims through the back door, by asking the court to eliminate or limit the compensation that defendants may be awarded for the property because defendants do not actually own the property.

Generally, courts may not issue advisory opinions on abstract questions that do not

affect the rights of the parties, Socha v. Pollard, 621 F.3d 667, 670 (7th Cir. 2010); Deveraux v. City of Chicago, 14 F.3d 328, 331 (7th Cir. 1994), but this is what plaintiff is asking the court to do. If plaintiff owns the property, then the question whether plaintiff is entitled to condemn the property cannot have any effect on the rights of the parties.

This would seem to leave plaintiff with a choice. Under one option, plaintiff could seek leave to amend its complaint to include declaratory relief under state law regarding the ownership of the land and ask for condemnation in the alternative. In that case, plaintiff would have to show that this court may exercise jurisdiction over the state law claim under 28 U.S.C. § 1367 or another statute. Under a second option, plaintiff could concede for the purpose of this case that defendants own the land and abandon its argument that defendants are entitled to no compensation because they do not own the land. Choosing either of these options would solve the justiciability problems raised by plaintiff's motion for summary judgment.

A second problem relates to the question whether the "unknown others" have received the notice to which they are entitled. Under Fed. R. Civ. P. 71.1(c)(3), a plaintiff seeking to condemn property through eminent domain "must add as defendants all those persons who have or claim an interest and whose names have become known or can be found by a reasonably diligent search of the records." If the identity of a party cannot be discerned, Rule 71.1(d)(3)(B) outlines the requirements for service by publication. It is not clear

whether plaintiff has made a reasonably diligent search for the unknown parties or, if it has, that it has served those parties by publication. United States v. 14.02 Acres of Land More or Less in Fresno County, 547 F.3d 943, 954 (9th Cir. 2008) (concluding that plaintiff conducted diligent search because it “investigated the title history and current interests in the condemned land, enrolled the services of an outside title investigator and, in the end, even attempted to cooperate with the defendants in an effort to identify all interest owners”). If plaintiff chooses to amend its complaint to seek a declaration that it has acquired the property through adverse possession, then there may be different notice requirements. Fed. R. Civ. P. 4(n)(1) (“Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.”).

ORDER

IT IS ORDERED that

1. Plaintiff Consolidated Water Power Company’s motion for summary judgment, dkt. #11, is DENIED without prejudice.

2. Plaintiff may have until March 15, 2011, to do any one of the following:

(a) file a motion for leave to amend its complaint to include a request for a declaration that it has acquired the property through adverse possession, accompanied by a memorandum showing that this court may exercise jurisdiction over the state law claim; or

(b) file and serve a notice that it is abandoning its argument for the purpose of this case that defendant Robert Moodie and the “unknown others” do not have an interest in the property.

3. Plaintiff may have until March 15, 2011, to show that it has complied with Fed. R. Civ. P. 71.1. and any other applicable rule or statute in providing adequate notice to parties who may have an interest in the property at issue in this case. If plaintiff fails to make that showing, I will dismiss the claim as to the unknown parties and the property related to them.

Entered this 28th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge