CRC 1.6.20

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

SOUTHERN DIVISION

UNITED STATES OF AMERICA

PLAINTIFF,

VS. CIVIL ACTION

HARRISON COUNTY, MISSISSIPPI, ET AL. NO. 2262

DEFENDANTS.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO ADD ADDITIONAL DEFENDANTS

I

This case is, in its present posture, a claim in specific performance of a contract, and the plaintiff shall, in this memorandum, demonstrate that the additional parties whom the defendants seek to add as additional defendants are neither indispensable nor necessary parties to this suit.

On January 23, 1951, Harrison County, through the Board of Supervisors, entered into a contract with the United States whereby the United States undertook to contribute $1,133,000 toward the repair of the sea wall along the Mississippi Sound between the lighthouse in Biloxi and Henderson Point and the construction of an artificial beach south of this sea wall. The county agreed, among other things, to "Provide at its own expense all the necessary lands, easements and rights-of-way" and "To assure perpetual public use of the beach and its administration for public use only." Under the terms of this agreement the sea wall was repaired and an artificial beach was

constructed. The Federal Government, pursuant to the agreement, has paid Harrison County the sum of $1,133,000 and has performed all of its other obligations. Harrison County, and the Board of Supervisors of Harrison County and the defendant members of the Board of Supervisors have not administered and are not administering the beach so as to insure its access to and use by the general public.

These facts are clearly established by the pleadings. Thus, a cause of action of the plaintiff for specific performance exist provided only that the failure to perform is, in fact, contrary to the terms of the promise.

The contract in issue was entered into pursuant to the provisions of P.L. 727, 79th Cong. 2d Session, 960 (33 U.S.C. 4262-2426h). Mississippi Laws, 1924, chapter 319, Mississippi Code Sections 8499, 8503-8509, 8513 authorize county supervisors to erect protective works including sea walls and sloping beaches to protect coastal highways from erosion. Section 3 of the Act, Mississippi Code Section 8503, gives the supervisors the power of eminent domain to secure "the right-of-way" for necessary sea walls, beaches, etc. Section 5 of the Act, Mississippi Code Section 8507 provides that owners of lands taken may claim damages.

In accordance with the Act of 1924, Harrison County built a sea wall to protect the coastal highway on Mississippi Sound between the lighthouse in Biloxi and Henderson Point. After construction of the wall, the land and beach in front of it washed away. Construction of a protective beach was desirable but

was beyond the financial means of Harrison County. At the county's request such a project was recommended for federal participation by the Beach Erosion Board and the Corps of Engineers -- H. Doc. No. 682, 80th Cong., 2d Session -- and was authorized by the River and Harbor Act of 1948, P.L. 858, 80th Cong. To enable Harrison County to take advantage of this opportunity, the Mississippi Legislature enacted Chapter 334, Mississippi Laws 1948 (Mississippi Code Section 8516.3). The preamble to the 1948 Mississippi Act referred to the report by the Beach Erosion Board and set out in its preamble the conditions required by the Federal Government before federal participation would be possible in the Harrison County beach erosion project.

The Act specifically authorized the County Board of Supervisors to meet and do and grant any request of the United States Beach Erosion Board and to assure the following: (b) "Provide, at the county's own expense, all necessary lands, easements and rights-of-way" and (e) "To assume perpetual public ownership of the beach and its administration for public use only."

On December 22, 1950, shortly before signing the contract with the United States Corps of Engineers for the beach erosion project, the Harrison County Board of Supervisors adopted a resolution dedicating the artificial beach which was to be constructed, perpetually to the public as a public beach.

II.

This Court can find a breach of the agreement of January 23, 1951, and can order the performance by the defendants of the terms of this agreement without it being necessary to add additional party defendants. This Court can rule on the contract and require performance of the contract in a manner which would not affect or impair the interest of those whom the present defendants would seek to bring into this suit.

1. The landowners whose property fronts along the beach area involved are not parties to the Government's claim of specific performance. They were not parties to the agreement of January 23, 1951. An order of this Court directing performance by the defendants would not infringe upon any interest in property which these landowners may have. As we show infra, only if the county must take property by eminent domain in order to implement its contract will the landowners have any interest which they should be given an opportunity to defend. But, as we shall also show, in no event can the landowners assert such an interest in this action and at this stage of the proceedings. For, as cannot be too strongly emphasized, as to the implementation of the contract it is immaterial who holds the fee title to the land involved. The plaintiff's interest in assuring the maintenance of the beach by the county as a public beach can be assured by this Court without regard to the title question.

2. Submerged land which has been filled in by the State or a county can be impressed with a public

use without there being involved a taking of private property, even though the land itself is held to be owned in fee simple by an adjudging landowner. That this is so is made clear in the opinion of the Supreme Court of Mississippi in Harrison County et al. v. Mrs. Lee Dicks Guice, 140 So. 2d 838 (1962). The court there distinguished two of its earlier decisions in a manner directly applicable here. The first of these was Crary v. State Highway Commission, 219 Miss. 284, 68 So. 2d 468 (1953). There littoral owners sued for damages because construction of a bridge on tidelands in front of their property interfered with the exercise of their statutory exclusive right of planting and gathering oysters and erecting structures within 500 yards of the low water line. Recovery was denied, on the ground that the submerged lands were owned by the State in trust for the people, and that the State could impose an additional public use on them without thereby taking any private property or incurring any liability to the littoral owners.

The second case distinguished in Guice is Xidis v. City of Gulfport, 221 Miss. 79, 72 So. 2d 153 (1954). There a littoral owner sued to enjoin the city and the port commission from filling in tide lands in front of his property as part of a harbor improvement. Again, relief was denied, on the ground that the beds of navigable waters are owned by the State in trust for the public, and that the rights of littoral owners are subject to the State's prior right to impose additional public uses without paying compensation.

Thus, the county, acting under authority of the State, having filled in the tidelands, had power

independently to impose an additional public use, on the area filled, without the concurrence of or liability to the littoral owners. Thus, the legal title to the filled area is immaterial. The sole question is whether the State has the right to impose the additional public use on the filled area. As indicated, the State clearly has that right. Under the terms of the contract, plaintiff is entitled to an order, requiring it to exercise that right.

3. Alternatively, this Court could order that Harrison County acquire title to the filled area by "inverse condemnation." Mississippi law holds that the State or its political subdivisions may take property by eminent domain before paying compensation. Byrd v. Board of Supervisors, 179 Miss. 880, 176 So. 386 (1937); State Highway Commission v. Buchanan, 175 Miss. 158, 166 So. 537 (1936). In the Byrd case the court said:

> "The requirement of just compensation in advance is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment of payment and there is adequate provision for enforcing the pledge."

The procedure for taking land by way of "inverse condemnation," as described in Section 5 of the Act of 1924, supra, was that the Road Protection Commission would publish notice describing their intended project, after which the landowner was allowed 30 days in which to petition the Board for compensation. The validity of this procedure was sustained in Henritzy v. Harrison County, 180 Miss. 675, 178 So. 322 (1938). And the 1924 statute under which Harrison County built the sea wall provided for the taking of property before payment of compensation and it thus provided for precisely

the "inverse condemnation" just described. And Guice itself held that it was by this procedure that the county acquired its 50 foot easement for the sea wall.

Construction of the beach, coupled with resolution dedicating it as a public beach, amounted to the taking of that beach even though there was no publication of notice. In Copiah County v. Lusk, 77 Miss. 136, 24 So. 972 (1899), a county failed to give the statutory notice of laying out a road. Nevertheless, the court held that the landowner could bring a suit against the county for compensation. Cf. City of Water Valley v. Poteete, 203 Miss. 382, 33 So. 2d 794 (1948), a case where the court remitted a landowner to an action at law to recover compensation, where his property was damaged by change of a grade of the ground structure. Accord, Parker v. State Highway Commission, 173 Miss. 213, 162 So. 162 (1935).

By virtue of its undertaking and its construction of the beach, the county must be held to have acquired a sufficient interest in the beach by eminent domain to carry out that undertaking. The landowners, of course, are entitled to compensation by way of a common law action for compensation -- if they have sustained compensable injuries.

4. In the event that the Court finds that the county does not now have a sufficient property interest to carry out its obligation under the contract, it could, and should, order the county now to acquire title by "inverse condemnation." This, too, would not necessitate the addition of the adjoining landowners in this proceeding.

As pointed out supra, the 1924 statute authorizes the county to use the inverse condemnation procedure to acquire necessary property rights for erosion protection projects. The 1948 statute authorizes acquisition of title to protect beaches built as part of such projects. The two statutes relate to the same projects, and must be deemed in pari materia. Thus, the 1924 procedure is available to secure interests authorized to be acquired by the 1948 statute.

Section 2(e) of the 1948 Act authorizes the county "To assume perpetual ownership of any beach construction." The word "assume" has no special meaning in connection with eminent domain law, but its ordinary sense suggests that it authorizes a taking of the beach without prior condemnation procedure. What this means is that the county, pursuant to the terms of the 1948 Act, has been authorized by the State to occupy the beach without bringing a prior condemnation suit. Indeed, until the beach was built there would have

been nothing to condemn, the tidelands being the property of the state. The County should be required to do so.

Section II of the 1948 Act authorizes the county (b) to "Provide at the county's own expense all necessary land, easement and rights-of-way," and (e) "To assume perpetual ownership of any beach construction and its administration for public use only * * *." Under Mississippi law, a condemnor may take whatever title the legislature authorizes (Whelan v. Johnston, 192 Miss. 673, 6 So. 2d 330 (1942), which in this case would, under the terms of the 1948 Act, include the authority even to take fee simple title.

The defendants have authority to take fee title to the beach; certainly there is authority to take whatever interest is necessary to its maintenance as a public beach.

III

This suit is essentially one against the county, to compel it to administer the beach as a public beach, as it has agreed to do, and as it has power to do. Whether it can do this without acquiring title to the beach, as we believe it can, or whether it needs title, and if so whether it has already acquired such title as it needs, are questions that will concern the county in carrying out its obligations, but are not questions that concern the United States, or that should concern the Court in requiring the county to do whatever is necessary to the performance of its obligation. Whatever the necessary means may be, they are within the county's power, and the Court need only direct the county to accomplish the result. The landowners may or may not

be concerned in that accomplishing, but that is wholly a matter between the landowners and the county. Their rights or lack of rights against the county in no way affect the right of the United States or the obligation of the county to the United States. Consequently, they have no proper place in this suit between the county and the United States. Certainly this is not the proper forum for awarding them any compensation that may be due them from the county. Their presence here would greatly delay and encumber this proceeding, and could add nothing to the determination of the Government's rights against the county.

IV

It is respectfully submitted that the many separate owners whose property front the beach area involved are neither indispensable nor necessary party defendants in this suit and that a final decree can be made without affecting or impairing their legal interests. None of the tests set forth by the defendants in their memorandum in support of their motion, when applied to this case, would result in the addition of party defendants. There is neither present legal injury to the absent parties nor the danger of inconsistent decisions nor the rendering of a decision which would not finally settle the controversy before this Court.

V

The parties sought to be brought before this Court, consisting of landowners, mortgagers and lienors would in all probability number in excess of 2,000 individuals. The parties would be so numerous as to make it impractical to bring them all before the court, as the defendants here seek. See Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950); Carter v. School Board,

182 F. 2d 531 (4th Cir. 1950); and Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944). The difficulties of service and fluctuations by deaths, etc., renders the involvement of such large numbers of individuals highly impractical. Any attempt to bring these defendants before the Court could only result in further extended delay in disposing of the merits of the case.

The defendants' Motion should be denied.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served copies of the foregoing plaintiff's Memorandum in Opposition to Defendants' Motion to add Additional Defendants by depositing in the United States mail postage prepaid to:

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