

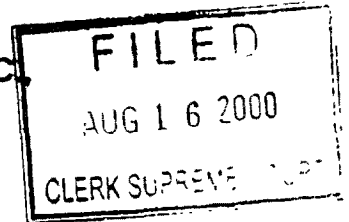
IN THE COURT OF APPEALS OF IOWA

No. 0-397 / 99-0986
Filed August 16, 2000

JOHN W. DULIN, REGISTERED AGENT OF DULIN FARMS, INC.
Plaintiff-Appellant,

vs.

KEOKUK COUNTY, IOWA,
Defendant-Appellee.



Appeal from the Iowa District Court for Keokuk County, Dan F. Morrison,
Judge.

Plaintiff, the property owner's agent, appeals the district court's ruling granting the defendant's motion for summary judgment in an action seeking temporary and permanent injunctive relief from the condemnation of the owner's property. **AFFIRMED.**

Wythe Willey of Willey Law Office, Cedar Rapids, for appellant.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

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VOGEL, P.J.

John W. Dulin, registered agent of Dulin Farms, Inc., appeals the district court's ruling granting the defendant's motion for summary judgment in an action seeking temporary and permanent injunctive relief from the condemnation of Dulin Farms, Inc. property. We affirm the district court.

Background facts. In January 1998, Keokuk County commenced a condemnation action against Dulin Farms, Inc. to take eighty acres of farmland to be used for the Belva Deere Lake public recreation and conservation project. The Compensation Commission awarded \$93,955 in damages to Dulin Farms, Inc. Dulin has appealed this award in a separate action. Dulin now seeks injunctive relief from the condemnation action, alleging Keokuk County used funds obtained illegally to compensate for the governmental taking of his property. Keokuk County moved for a summary judgment, supported by affidavits. After a hearing, the district court granted a partial summary judgment, finding Keokuk County had legal access to the funds necessary to condemn the Dulin property and Dulin has not suffered irreparable harm from the condemnation. Dulin filed a late 179(b) motion and it was denied without comment by the district court.

Subsequent to Congress placing a \$50,000 ceiling on government receipt of Conservation Reserve Program (CRP) payments throughout Iowa, Keokuk County formed a non-profit corporation, Keokuk County Habitat Helpers, to manage the CRP property and receive the CRP payments. Keokuk County Habitat Helpers then gifted these funds to the Keokuk County Conservation

Board. In 1997, the United States Department of Agriculture (USDA) ruled that such non-profit corporations were no longer eligible to receive CRP payments. They further ruled the previously received payments were made in error but were not determined within the applicable time period and the USDA did not, therefore, request the payments be returned. Keokuk County Conservation Board has altered its practice and now cash rents land to individuals who can, in turn, seek CRP payments. Dulin now seeks injunctive relief, alleging the funds used to condemn his property were not obtained through legal means, and he has suffered irreparable harm.

Scope of review. We review a summary judgment ruling for error. *Gerst v. Marshall*, 549 N.W.2d 810, 811 (Iowa 1996). The district court correctly enters summary judgment when the record shows “no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” Iowa R. Civ. P. 237(c). Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995). In considering the record, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Gerst*, 59 N.W.2d at 812.

I. Keokuk County affidavits. Dulin asserts the three affidavits submitted by Keokuk County in support of its motion for summary judgment are improper under Iowa Rule of Civil Procedure 237(e). He argues they contain statements,

which would not be admissible into evidence because they contain hearsay, lack the personal knowledge of the affiant, are conclusory and are not relevant.

Iowa Rule of Civil Procedure 237(e) states:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . .

Dulin's brief contains specific statements from the three affidavits that, he argues, should be stricken under rule 237(e). In reviewing the record, however, we do not see this request for striking language from the affidavits raised to the trial court as we see it here on appeal. The record contains a bare assertion made to the trial court that portions of the affidavits should be stricken with only one detailed reference to an error made in Marilyn Well's affidavit. The record shows Dulin failed to adequately raise these points before the district court, allowing it an opportunity to address them completely, and thereby failed to preserve the issue for our review. *Grefe & Sidney v. Watters*, 525 N.W.2d 821, 825 (Iowa 1994) (holding objection was made in the trial court but was not sufficiently definite to have alerted the trial court of the error claimed so as to have given the court a chance to correct it). Error which is not preserved is waived. *State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). However, even assuming error was preserved, we find the trial court did not abuse its discretion.

II. Genuine issue of material fact. Dulin next argues the trial court erred in finding there was no "genuine issue of material fact" and granting partial summary judgment. "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the litigation, given the applicable

governing law.” *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996). Dulin alleges two material facts are at issue in this case, saving this action from summary judgment. They are whether Dulin suffered irreparable harm from the condemnation of his property necessitating injunctive relief and whether Keokuk County obtained the required funding for the condemnation from a legal source.

Dulin contends he has suffered irreparable harm from the condemnation. The district court found because Dulin was awarded monetary compensation for the taking of his land, he had an adequate remedy and has not suffered irreparable harm. Injunctive relief is an extraordinary remedy. 578 N.W.2d 659, 662 (Iowa 1998). It should only be granted if the requesting party has no adequate relief at law and will incur irreparable damage. *Matlock v. Weets*, 531 N.W.2d 118, 122 (Iowa 1995). Courts should grant an injunction with caution and only when clearly required. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). “An injury is said to be irreparable where there exists no certain pecuniary standard for measuring the damage.” *Miller v. Lawlor*, 245 Iowa 1144, 1156, 66 N.W.2d 267, 274 (1954). “Where only a portion of the property unit is taken, the commission is instructed that the measure of damages is the difference between the fair market value of the property immediately before condemnation and before it has been affected by the proposed public use and the fair market value of what is left after the taking.” *Thompson v. City of Osage*, 421 N.W.2d 529, 532-33 (Iowa 1988).

Dulin received an award of \$93,955 for the governmental taking of his property for public use. This amount was established by the county

compensation board and, if Dulin is unsatisfied with this amount, he has a remedy available in that he can appeal the award. He has already done so in a separate action. Therefore, he has a remedy available to him.

Dulin relies on precedent established by *Scott v. Price Bros. Co.*, 207 Iowa 191, 217 N.W. 75 (1927), which allowed injunctive relief in a condemnation action. The facts of that case, however, distinguish it from the present case because the electric company that initiated the condemnation in *Scott* failed to pay the award granted to the property owner prior to assuming control over the property. *Id.* at 78. Therefore, the property owner did not have an adequate remedy and was entitled to injunctive relief. *Id.* at 78. We affirm the trial court in finding no irreparable harm to Dulin.

B. Keokuk County funding. Dulin further alleges Keokuk County obtained the necessary funding through illegal sources. The trial court found the county received the funds from three sources, including the county general fund, Resource Enhancement and Protection Funds, and the land acquisition fund. In order to obtain injunctive relief, "[t]he landowner must show 'fraud, abuse of discretion, or other gross impropriety' or that 'the owner is in some way illegally deprived of his rights in violation of the constitutional or statutory provisions governing the exercise of the power of eminent domain.'" *Comes v. City of Atlantic*, 601 N.W.2d 93, 96 (Iowa 1999). Dulin interprets this statement to mean that if the county received illegal funding for condemnation, he could assert such to obtain an injunction. However, if the funding was improper, it is not Dulin who would have been defrauded, but the parties to the funding transaction.

However, we need not reach the allegations of fraud or illegality because, as the trial court found, Dulin lacks standing to challenge the gifts from one entity to another. Because he was not a party to the gift transaction, he has no recourse to challenge the action. See generally *Elview Constr. Co., Inc. v. North Scott Community Sch. Dist.*, 373 N.W.2d 138, 141 (Iowa 1985) (holding a plaintiff must allege a sufficient personal stake in the outcome of a controversy in order to have standing); *Krull v. Thermogas Co. of Northwood, Iowa, Div. of Mapco Gas Producers*, 522 N.W.2d 607, 614 (Iowa 1994), (stating a party may not assert the rights of another). Accordingly, we affirm.

AFFIRMED.

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