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Vinciguerra v. State of New York, 693 N.Y.S. 2d 634 (1999)

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aqueduct until the matters were resolved. The parties then sought a judicial determination of their rights in order to avoid future conflict and litigation.

The court considered: (1) whether the contractual provisions allowing the City to unilaterally discontinue water delivery were unenforceable and invalid as contrary to public policy; (2) the City's obligations concerning the chlorination of the water in the Croton Aqueduct for United Water's and Briarcliff's use; and (3) whether United Water or Briarcliff was unjustly enriched by discarded water.

The court held that the contract provision allowing the City to unilaterally discontinue delivery of potable water to United Water and Briarcliff was unenforceable and invalid on public policy grounds. The courts will not enforce contracts that injuriously affect the public interest. The court recognized that the City could not deny applications from municipal corporations and water districts to tap into its system, but could establish reasonable rules and regulations governing the means by which the water was taken and the quantity. The court reasoned that because United Water and Briarcliff had limited alternative water sources and water storage capacity, a shortage during the peak demand period could pose severe health and safety risks for the communities served.

The court next considered whether the City was obligated to chlorinate water in the Croton Aqueduct. The court held that the City was not required to chemically treat the water as a condition of the State's delegation of eminent domain power. The court stated that the issue was one of cost, not public policy, and that unlike the obligations to permit access to and delivery of water, the City's obligations to chlorinate was established by the parties in the terms of their contracts.

The court determined that according to United Water's permit, the City was contractually bound to partially chlorinate the water available from the aqueduct. Because of the provision, United Water was not unjustly enriched, and not liable to the City for the cost of water discarded in order to fulfill the City's contractual obligations. Briarcliff, however, had no contractual provision requiring the City to chlorinate the water made available to them. Briarcliff asserted that the City could have provided a reduced volume of potable water without waste. The court remanded to determine whether Briarcliff was liable to the City for discarded water, and if so, how much it owed.

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Vinciguerra v. State of New York, 693 N.Y.S. 2d 634 (1999) (holding that head wall and culvert constructed partially on landowners' property by State was not a de facto appropriation, and resulted in acquisition of a prescriptive drainage easement).

Claimants purchased eight parcels of vacant, undeveloped land

between January 1973 and November 1990. A concrete head wall and culvert, part of a drainage system for a nearby state highway that had been constructed by the State of New York ("State") in 1948, encroached approximately two to two and one-half feet on claimants' land, and directed water across claimants' property.

Claimants did not discover the head wall or culvert until 1989, when they began grading and filling the property for construction of a strip mall. A separate, visible stream flowed across the land and accumulated in an area near the head wall and culvert, thereby covering them when the steam flowed, purportedly the reason that claimants never noticed the head wall and culvert. The claimants never surveyed the property prior to their purchase in 1948, however, they were aware of the ditch that carried the stream of water. Claimants admit that the stream ran intermittently over the property, and was dry at the time of the purchase of the property.

Claimants requested that the State redirect the waters flowing onto the property as a result of the head wall and culvert. The State declined, claiming that since the drainage system had been uninterrupted in use since 1908, a prescriptive drainage easement burdened the claimants' property. Claimants commenced an action seeking damages for trespass, de facto appropriation, and prima facie tort. The Court of Claims dismissed the prima facie tort claim on summary judgment, and found that the State's action constituted a de facto appropriation, not a trespass, for which the statute of limitations had expired. The Court of Claims dismissed the claimants' action, and claimants appealed.

The court addressed two issues: first, whether the State's action was a constitutional taking which constituted a de facto appropriation, and second, whether the State had gained a prescriptive easement, thereby barring a claim for continuous trespass. The court held that the State's actions did not reach the level of a constitutional taking and therefore, was not a de facto appropriation of the claimants' property requiring compensation. The court further ruled that the State established a prescriptive easement for drainage over the claimants' property.

The court first discussed the applicable scope for reviewing Court of Claims holdings. The court stated that the scope was not limited to determining whether the verdict was against the weight of evidence, but that the court could factually assess whether the Court of Claims granted a judgment warranted by the evidence, giving due deference to trial court's decision.

In addressing the first substantive issue, the court stated that to constitute a de facto appropriation, the government's intrusion on the citizen's property and interference with the owner's property rights must reach a degree that amounts to a constitutional taking requiring compensation. The distinction between such a taking and trespass "lies in the egregiousness of the trespass and whether it is of such intensity as to amount to a taking." The court further noted that if the interference with property rights was only temporary, casual, or

intermittent, without permanent use or appropriation or destruction of an existing right, only a mere trespass has occurred.

The court, based on these principles, found that the head wall and culvert, and resulting intermittent surface water runoff from the state highway, at most, hampered and complicated the claimant's development plans, but were not so egregious as to amount to a constitutional taking. Therefore, the State's action did not constitute a *de facto* appropriation.

The court distinguished the impacts on the claimants' property from other cases where the court had held a taking had occurred. These cases involved the redirection of surface water to deprive a litigant's access to thirty-five acres and destroy its value as a trout stream; the appropriation of land for use in conjunction with an adjacent landfill by installation of fencing, a trash compactor, and toll gate, and erection of signs indicating that the property was a town landfill; and placement of a drainage ditch occupying approximately 2.46 acres of claimants' land.

The court then assessed whether the State's action amounted to a continuous trespass that could be barred by creation of a prescriptive easement. The court stated the rule that a prescriptive easement is established through clear and convincing evidence that use of the subject property was adverse, open and notorious, and continuous and uninterrupted for the prescribed period. The court found that the State met this standard.

First, the court held that discharge of the surface water from the highway, and placement of the head wall and culvert were adverse to the claimants, as well as continuous and uninterrupted for the prescriptive period. The prescriptive period in New York is ten years, and the State had completed the head wall and culvert in 1948.

Second, the court ruled that the State's infringement on the claimants' property was both open and notorious. The court found that undisputed testimony revealed that at certain times during claimants' ownership of the property, the stream near the head wall and culvert was dry, making the head wall and culvert visible upon inspection. Additional testimony revealed that when water ran onto the property, the ditch in front of the claimants' property was inundated with water, and a catch basin became openly visible. The court reasoned that these facts, coupled with claimants' admission that they never inspected the ditch and failed to survey the property prior to purchase, supported the open and notorious nature of the State's infringement. The court concluded that the State therefore had a prescriptive drainage easement barring claimants' continuous trespass claim.

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