



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,)
MIKE HUNTER,)
ATTORNEY GENERAL OF OKLAHOMA,)
)
Plaintiff,)

vs.)

Case No. CJ-2017-816
Judge Thad Balkman

(1) PURDUE PHARMA L.P.;)
(2) PURDUE PHARMA, INC.;)
(3) THE PURDUE FREDERICK COMPANY;)
(4) TEVA PHARMACEUTICALS USA, INC.;)
(5) CEPHALON, INC.;)
(6) JOHNSON & JOHNSON;)
(7) JANSSEN PHARMACEUTICALS, INC;)
(8) ORTHO-MCNEIL-JANSSEN)
PHARMACEUTICALS, INC., n/k/a)
JANSSEN PHARMACEUTICALS;)
(9) JANSSEN PHARMACEUTICA, INC.,)
n/k/a JANSSEN PHARMACEUTICALS, INC.;)
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC,)
f/k/a ACTAVIS, INC., f/k/a WATSON)
PHARMACEUTICALS, INC.;)
(11) WATSON LABORATORIES, INC.;)
(12) ACTAVIS LLC; and)
(13) ACTAVIS PHARMA, INC.,)
f/k/a WATSON PHARMA, INC.,)
)
Defendants.)

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

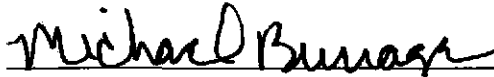
MAR 08 2019

In the office of the
Court Clerk MARILYN WILLIAMS

**THE STATE'S SURREPLY TO DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR A CONTINUANCE**

The statements made in Defendants' Reply in Support of Motion for a Continuance and Motion for a Continuance are demonstrably false and misleading. The State looks forward to addressing this issue in person at 3:30 p.m. today. *See, e.g., Oklahoma Gas & Elec. Co. v. Chez*, 1974 OK 99, ¶ 16, 527 P.2d 165, 167 (attached hereto as Exhibit 1).

Respectfully submitted,



Michael Burrage, OBA No. 1350
Reggie Whitten, OBA No. 9576
WHITTEN BURRAGE
512 N. Broadway Avenue, Suite 300
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: mburrage@whittenburrage.com
rwhitten@whittenburrage.com

Mike Hunter, OBA No. 4503
ATTORNEY GENERAL FOR
THE STATE OF OKLAHOMA
Abby Dillsaver, OBA No. 20675
GENERAL COUNSEL TO
THE ATTORNEY GENERAL
Ethan A. Shaner, OBA No. 30916
DEPUTY GENERAL COUNSEL
313 N.E. 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-6246
Emails: abby.dillsaver@oag.ok.gov
ethan.shaner@oag.ok.gov

Bradley E. Beckworth, OBA No. 19982
Jeffrey J. Angelovich, OBA No. 19981
Trey Duck, OBA No. 33347
Drew Pate, *pro hac vice*
NIX PATTERSON, LLP
512 N. Broadway Avenue, Suite 200
Oklahoma City, OK 73102
Telephone: (405) 516-7800
Facsimile: (405) 516-7859
Emails: bbeckworth@nixlaw.com
jangelovich@nixlaw.com
tduck@nixlaw.com
dpate@nixlaw.com

Glenn Coffee, OBA No. 14563
GLENN COFFEE & ASSOCIATES, PLLC
915 N. Robinson Ave.
Oklahoma City, OK 73102
Telephone: (405) 601-1616
Email: gcoffee@glenncoffee.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was emailed on March 8, 2019, to:

Sanford C. Coats
Joshua D. Burns
CROWE & DUNLEVY, P.C.
Braniff Building
324 N. Robinson Ave., Ste. 100
Oklahoma City, OK 73102

Sheila Birnbaum
Mark S. Cheffo
Hayden A. Coleman
Paul A. Lafata
Jonathan S. Tam
Lindsay N. Zanello
Bert L. Wolff
Marina L. Schwartz
Dechert, LLP
Three Bryant Park
1095 Avenue of Americas
New York, NY 10036-6797

Patrick J. Fitzgerald
R. Ryan Stoll
SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP
155 North Wacker Drive, Suite 2700
Chicago, Illinois 60606

Robert G. McCampbell
Nicholas Merkley
GABLEGOTWALS
One Leadership Square, 15th Floor
211 North Robinson
Oklahoma City, OK 73102-7255

Steven A. Reed
Harvey Bartle IV
Jeremy A. Menkowitz
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921

Brian M. Ercole
MORGAN, LEWIS & BOCKIUS LLP
200 S. Biscayne Blvd., Suite 5300
Miami, FL 33131

Benjamin H. Odom
John H. Sparks
Michael Ridgeway
David L. Kinney
ODOM, SPARKS & JONES PLLC
HiPoint Office Building
2500 McGee Drive Ste. 140
Oklahoma City, OK 73072

Stephen D. Brody
David Roberts
O'MELVENY & MYERS LLP
1625 Eye Street NW
Washington, DC 20006

Daniel J. Franklin
Ross Galin
O'Melveny & Myers LLP
7 Time Square
New York, NY 10036
Telephone: (212) 326-2000

Robert S. Hoff
Wiggin & Dana, LLP
265 Church Street
New Haven, CT 06510

Britta Erin Stanton
John D. Volney
John Thomas Cox III
Eric Wolf Pinker
LYNN PINKER COX & HURST LLP 2100
Ross Avenue, Suite 2700 Dallas, TX 75201

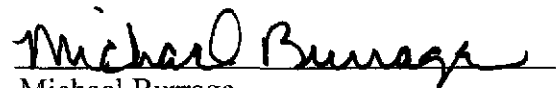
Charles C. Lifland
Jennifer D. Cardelus
Wallace Moore Allan
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071

Larry D. Ottaway
Amy Sherry Fischer
FOLIART, HUFF, OTTAWAY & BOTTOM
201 Robert S. Kerr Ave, 12th Floor
Oklahoma City, OK 73102

Eric W. Snapp
Dechert, LLP
Suite 3400
35 West Wacker Drive
Chicago, IL 60601

Benjamin Franklin McAnaney
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

Amy Riley Lucas
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067


Michael Burrage

527 P.2d 165
Supreme Court of Oklahoma.

OKLAHOMA GAS AND ELECTRIC
COMPANY, a corporation, Appellee,
v.
Jonita Stith CHEZ and Fred E. Chez,
Wife and Husband, Appellants.

No. 46074.

July 23, 1974.

Rehearing Denied Oct. 22, 1974.

Synopsis

Eminent domain proceeding brought by gas and electric company to condemn certain real property owned by defendants. The District Court, Muskogee County, C. F. Bliss, Jr., J., rendered judgment for the company, and defendants appealed. The Supreme Court, Irwin, J., held that the trial court's refusal to require the company to answer certain interrogatories more completely was not reversible error; that the trial court did not abuse its discretion in refusing to grant defendants a continuance, in that defendants did not produce evidence of their due diligence during the period prior to the request for the continuance; and that the trial court did not err in requiring defendants to assume the burden of proof on objection to jurisdiction and necessity of taking.

Affirmed.

West Headnotes (8)

[1] **Pretrial Procedure**

☛ Discretion of court

Discovery rules and statutes contemplate an exercise of discretion and judgment by the trial court, and not a mere automatic granting of a motion.

Cases that cite this headnote

[2] **Appeal and Error**

☛ Abuse of discretion

Appeal and Error

☛ Presumptions and Burdens as to Harmless and Reversible Error

Abuse of discretion by the trial court and prejudice to the rights of defendants will not be presumed on appeal.

2 Cases that cite this headnote

[3] **Eminent Domain**

☛ Harmless error

Where defendants in condemnation proceeding submitted 146 questions in interrogatories to condemning authority, many of which were not material to the issues presented and requested information that defendants already possessed, and where defendants failed to show prejudicial error, trial court's refusal to require condemning authority to answer interrogatories more completely did not constitute reversible error.

2 Cases that cite this headnote

[4] **Pretrial Procedure**

☛ Amendment of pleadings or change of parties

Where defendants in condemnation proceedings knew names and addresses of condemning authority's witnesses for two months prior to the date of scheduled hearing on defendants' objections to the commissioners' report, trial court did not err in failing to grant defendants a continuance to allow more time for discovery.

Cases that cite this headnote

[5] **Pretrial Procedure**

☛ Want of preparation

One urging more time to prepare as ground for continuance must produce evidence of his due diligence during the period actually allotted.

3 Cases that cite this headnote

[6] **Pretrial Procedure**

↔ Right to Discovery and Grounds for Allowance or Refusal

Pretrial Procedure

↔ Discretion of court

Right to discovery is not interminable, but within sound discretion of the court.

Cases that cite this headnote

[7] **Eminent Domain**

↔ Evidence as to right to take

Where exhibits attached to condemning authority's answers clearly established that it had made a bona fide offer to purchase prior to filing condemnation action, and had passed a resolution of necessity to take, and condemnees declined to hear witnesses offered by condemning authority to substantiate said exhibits, burden of proof on these issues shifted to condemnees.

1 Cases that cite this headnote

[8] **Eminent Domain**

↔ Evidence as to right to take

Condemnees waived any right to challenge sufficiency of evidence concerning condemning authority's making of a bona fide offer to purchase, and necessity of taking for public use, when condemning authority had witnesses present and offered their testimony on these issues, but condemnees declined to hear witnesses and did not desire to have submitted any evidence.

Cases that cite this headnote

*166 Appeal from the District Court, Muskogee County; C. F. Bliss, Jr., District Judge.

Appellants, defendants in an eminent domain proceeding brought by Appellee, Oklahoma Gas and Electric Company, to condemn certain real property owned by Appellants, appeal from the trial court's adjudication in

favor of Appellee, the question of the right of Appellee to condemn defendants' real property. Judgment affirmed.

Attorneys and Law Firms

Andrew Wilcoxon, Muskogee, Paul Walters, Oklahoma City, Larry D. Patton, Oklahoma City, A. Camp Bonds, Muskogee, for appellee.

Tomerlin & High, Oklahoma City, Bonds, Matthews & Bonds, Muskogee, of counsel; for appellants.

Opinion

IRWIN, Justice:

Oklahoma Gas and Electric Company (O G & E) commenced eminent domain *167 proceedings to condemn certain real property owned by appellants (defendants). Commissioners were appointed and their report was filed. Defendants timely filed their exceptions to the commissioners' report, a motion to dismiss, prayer for a temporary restraining order and objections to jurisdiction. Defendants challenged the court's jurisdiction on the grounds that:

(1) O G & E is not procedurally entitled to institute condemnation proceedings because O G & E failed to make a bona fide offer of purchase.

(2) O G & E is not procedurally entitled to institute condemnation proceedings in that the real property which it seeks to acquire is not reasonably required for the purposes set forth in O G & E's petition.

(3) O G & E seeks to acquire real property far in excess of its present and reasonable permissible requirements.

Defendants also served written interrogatories for O G & E to answer. Thereafter, O G & E filed its answer to the interrogatories and defendants filed a motion requiring O G & E to more fully answer and a motion for continuance.

A hearing was conducted and all issues were adjudicated in favor of O G & E. Defendants filed their appeal under the authority of *Town of Ames v. Wybrant*, 203 Okl. 307, 220 P.2d 693, wherein we held that a trial court's decision in a condemnation proceeding to adjudicating the question of the right to condemn is a final order from which an appeal will lie.

Defendants contend the trial court erred in overruling their objections to O G & E's answers to interrogatories

and not requiring O G & E to make a more complete disclosure.

Defendants submitted 56 interrogatories to O G & E, consisting of several subparagraphs, and, in effect, requested O G & E to answer approximately 146 questions. Many of the questions submitted were not material to the issues presented and requested information that defendants already possessed. O G & E's answers, with the exhibits attached, consisted of 16 pages. The trial court considered each objection to O G & E's answers and overruled defendants' motion to require O G & E to answer more completely the interrogatories.

[1] [2] Our discovery rules and statutes contemplate an exercise of discretion and judgment by the trial court, and not a mere automatic granting of a motion. *Carman v. Fishel*, Okl., 418 P.2d 963. Abuse of discretion by the trial court and prejudice to the rights of defendants will not be presumed on appeal. *Phillips Petroleum Co. v. United States Fidelity & Guaranty Co.* (1968), Okl., 442 P.2d 303. In *Norman Plumbing Supply Company of Oklahoma City, Inc. v. Gilles*, Okl., 512 P.2d 1177, we held that a party on appeal who seeks reversal of a judgment of the trial court for error in sustaining objections to interrogatories has the burden of showing denial of interrogatories constituted prejudicial error. In the case at bar, the burden is upon defendants to show the trial court's refusal to require O G & E to answer the interrogatories constituted prejudicial error.

[3] Considering the discretion which the trial court exercises, the presumption relating to the correctness of the trial court's determination, and defendants' failure to show prejudicial error, we hold that the trial court's refusal to require O G & E to answer certain interrogatories more completely does not constitute reversible error.

[4] Defendants next contend the trial court erred in not granting them a continuance.

In *Teel v. Gates* (1971), Okl., 482 P.2d 602, we held that the granting or refusing of a continuance is within the sound discretion to the trial court and refusal to grant a continuance does not constitute reversible error unless an abuse of discretion is shown.

[5] Defendants argue that the denial of their motion for a continuance deprived them of a proper time to prepare, but one *168 urging more time to prepare must produce evidence of his 'due diligence' during the period actually

allotted. In *re Alteration of School District Boundaries of Dist. No. 42* (1940), 187 Okl. 686, 105 P.2d 536.

The record discloses that on September 12th, the trial court set for hearing on October 2nd (later continued to October 4th) defendants' exceptions to the commissioners' report, motion to dismiss, prayer for a temporary restraining order and objections to jurisdiction. Defendants filed their motion for a continuance and to answer fully the interrogatories on September 29th.

Defendants have not shown that any interrogatories or depositions were denied, outstanding or scheduled prior to the October 4th hearing. Defendants knew the names and addresses of O G & E's appraisers and the name and address of the man who had negotiated the proposed purchase of defendants' property prior to the time the condemnation proceeding was filed. Depositions could have been taken as early as July 30th.

[6] Although the trial court's overruling of defendants' exceptions to the commissioners' report and denial of a continuance were tantamount to cutting off discovery on the issues before the court, the right to discovery is not interminable, but within the sound discretion of the court.

Defendants have failed to show the trial court abused its discretion in refusing to grant a continuance and the trial court's failure to do so does not constitute reversible error.

[7] We will now consider defendants' contention that the trial court erred in requiring them to assume the burden of proof on objection to jurisdiction and necessity of taking. In this connection, defendants argue that there was no evidence to support the trial court's determination relating to necessity to take and that O G & E had made a bona fide offer to purchase prior to filing its condemnation proceedings.

The exhibits attached to O G & E's answers clearly establish that O G & E made a bona fide offer to purchase prior to filing the condemnation action and also attached was O G & E's Resolution of Necessity to take. The following occurred at the hearing:

(Counsel for O G & E), . . . we are prepared, to offer testimony on both the isolated issues that he's now confined himself to. That is the question of whether or not we tried to buy and the question of whether or not the Board of Directors of the Company, in good faith, by

resolution, at a regularly called meeting determined that it was necessary to create and construct this project.

'The Court: Now, Mr. Patton (Counsel for Defendants), do you desire to have any testimony today in reference to those two points?

'Mr. Patton: No, your honor, we do not and we will stand on our—we would object being—

'The Court: (interrupting) You decline that offer? The witnesses are here, and you decline that offer at this time?

'Mr. Patton: I decline to produce any testimony at this time, your honor, until such time as we have had an opportunity to conduct discovery which we contend we're entitled to do under the statutes.

'The Court: All right. Very well. In reference to the announcement about the declining to hear these witnesses who are available at this time, the motion of the defendants to make the answers to the interrogatories more complete and more definite is overruled and exceptions are allowed. * * *'

In Rueb v. Oklahoma City (1967), Okl., 435 P.2d 139, we held the introduction in evidence of a resolution of necessity by a condemning authority establishes a prima facie case, whereupon the burden shifts to the condemnee to show that the taking was not necessary or for a public use.

*169 [8] Defendants waived any right to challenge the sufficiency of the evidence when O G & E had witnesses present and offered their testimony and defendants declined to hear the witnesses and did not desire to have submitted any evidence.

Judgment affirmed.

All the Justices concur.

All Citations

527 P.2d 165, 1974 OK 99