

IN THE COURT OF APPEALS OF IOWA

No. 2-497 / 01-1770

Filed July 31, 2002

RICHARD B. KIMBERLEY and MARTHA L. KIMBERLEY,
Plaintiff-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION
and JASPER COUNTY, IOWA,
Defendant-Appellee.

Appeal from the Iowa District Court for Jasper County, Glenn E. Pille,
Judge.

The Kimberleys appeal the district court's dismissal of their petition
appealing a condemnation award. **REVERSED AND REMANDED.**

Andrew Howie of Hudson, Mullaney & Schindler, P.C., Des Moines, for
appellant.

Thomas J. Miller, Attorney General, David Ferree, Special Assistant
Attorney General, and Mark Hunacek, Assistant Attorney General, for appellee.

Considered by Mahan, P.J., and Zimmer and Eisenhauer, JJ.

MAHAN, P.J.

Plaintiffs appeal the district court's dismissal of their petition appealing a condemnation award for failure to name an adverse party. Plaintiffs claim the party in question did not have any interest in the condemnation proceedings and was not actually an adverse party. We reverse and remand.

Background Facts and Proceedings. Richard and Martha Kimberley (Kimberleys) own real property in Jasper County, which was subject to a mortgage held by Farm Credit Services of the Midlands (FCS) for \$72,353. The Iowa Department of Transportation initiated proceedings to condemn the property to relocate a road. On May 23, 2001, the compensation commission awarded the Kimberleys, Iowa Regional Utilities Association, FCS, and the Jasper County Treasurer \$293,365 plus attorneys fees for the property. This amount was deposited with the Jasper County Sheriff.

The Kimberleys filed a notice of appeal of the condemnation award in district court on June 6, 2001. The Department and Jasper County were named as defendants. The Department filed a motion to dismiss, asserting the Kimberleys had failed to give notice to adverse parties as required by Iowa Code section 6B.18 (1999). The Department claimed that as a lienholder, FCS should be considered an adverse party and should have been given notice of the appeal.

On June 25, 2001, Dwight Veldhuizen, assistant corporate secretary for FCS, filed an affidavit disclaiming any interest in the appeal. The affidavit stated FCS would be paid in full out of the proceeds of the check held by the sheriff's

department, and also stated "no further involvement is expected by us in any condemnation proceedings other than being paid out of the above set out check" On July 27, 2001, Veldhuizen filed a supplemental affidavit, which stated that FCS has "no interest in the condemnation award."

The district court granted the motion to dismiss, finding FCS was an adverse party who should have received notice of the appeal. The Kimberleys filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court noted it had failed to consider the supplemental affidavit, but found even in light of this affidavit, the notice of appeal should be dismissed. The Kimberleys appeal this ruling.

Standard of Review. We review a district court's ruling on a motion to dismiss a condemnation appeal for correction of errors at law. *Schooler v. Iowa Dep't of Transp.*, 576 N.W.2d 604, 606 (Iowa 1998). A decision to sustain or overrule a motion to dismiss must rest on legal grounds. *Burnham v. City of West Des Moines*, 568 N.W.2d 808, 809 (Iowa 1997). There are "special risks and problems which attend premature attacks on litigation by motions to dismiss." *Cutler v. Klass, Whicher, & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991).

Motion to Dismiss. Pursuant to section 6B.18, after the condemnation committee makes an award, either the condemnor or condemnee may appeal the assessment to the district court. *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000). Section 6B.18 requires the party appealing the condemnation award to "give written notice that the appeal has been taken to the adverse party, or the adverse party's agent or attorney, lienholders, and the sheriff."

To invoke the appellate jurisdiction of the district court the statute must be followed and notice of appeal must be given in substantial compliance with its terms. *Carmichael v. Iowa State Highway Comm'n*, 156 N.W.2d 332, 335 (Iowa 1968). Failure to serve an adverse party within the time provided by section 6B.18 is fatal to the court's jurisdiction. *Id.* The reason for this rule is that an appellate court may not take anything away from a party over whom it has not acquired jurisdiction. *Stalker v. Iowa Dep't of Transp.*, 483 N.W.2d 331, 332-33 (Iowa 1992).

A mortgagee is an adverse party whom must be served with notice of appeal when a condemnation award is appealed to the district court. *Merritt v. Interstate Power Co.*, 261 Iowa 174, 178, 153 N.W.2d 489, 492 (1967). Thus, failure to serve a mortgagee with notice of appeal will prevent the district court from exercising jurisdiction over a condemnation appeal. *Carmichael*, 156 N.W.2d at 340. However, "a party who waives all interest in a condemnation award before a condemnation appeal is not an adverse party for purposes of section 472.18."¹ *Stalker*, 483 N.W.2d at 334. Failure to give notice to a party who has waived its interest does not deprive the district court of jurisdiction. *Id.* The party filing the notice of appeal has the burden to show any unserved parties are not adverse parties. *Id.* at 333.

The issue in the present case then is whether FCS waived its interest in the condemnation award *before* the Kimberleys filed their notice of appeal in the district court. We disagree with the district court's conclusion FCS had not waived its interest in the condemnation award before the appeal was filed. The

¹ In 1993, section 472.18 was renumbered section 6B.18.

record clearly establishes that FCS *waived* their interest in the condemnation award *before* the appeal. A close reading of the Veldhuizen's affidavits suggests such an interpretation. The supplemental affidavit states:

Based upon my independent knowledge of the financial condition of the Kimberley's, we agreed that if we were unable to receive the funds necessary to repay the note from the condemnation proceeds, the Kimberley's would repay the note from their own funds. *We have never relied upon the condemnation proceeds as the way our debt would be repaid.*

The Kimberley's made their May, 2001 payment on the note and this matter went to the condemnation on May 23, 2001. After the condemnation the Kimberley's made their principal and interest payment on June 1, 2001 and after the hearing took place on July 17, 2001 in the Jasper County Courthouse, the attorneys representing Mr. and Mrs. Kimberley could not specify the date upon which the funds would be released. Based on their inability to assure Farm Credit Services of America as to when the funds would be released, the Kimberley's complied with *our earlier agreement* and repaid the note on July 23, 2001.

Our lien is released and, based upon Farm Credit Services' agreement with the Kimberley's and my own conversations with my legal counsel in Omaha, Nebraska (*entered into before condemnation and reaffirmed before the filing of the Notice of Appeal in this case*), *we have no interest in the condemnation award.*

(Emphasis added.) Clearly, FCS waived any rights to the condemnation award.

The Kimberleys repaid the note on July 23, 2001, with their personal funds pursuant to a prior agreement with FCS, not the condemnation award. If the award of the district court turns out to be less than the amount of the FCS's lien, FCS loses nothing. We therefore conclude FCS would not be adversely affected by any change in the condemnation award. As such, we find FCS was not an adverse party at the time of the appeal.

The fact that Veldhuizen's affidavits were filed after the notice of appeal does not affect our conclusion. In *Stalker*, the affidavit relied upon by our supreme court to support their determination that the vendor was not an adverse party was filed sixty days after the notice of appeal. The court found the affidavit clearly demonstrated that the vendor had a prior agreement with the Stalkers before the appeal that waived vendor's interest in the condemnation award. See *id.* As such, the court determined the vendor was not an adverse party at the time of appeal. See *id.* at 334.

The Kimberleys have clearly met their burden to show FCS was not an adverse party at the time the notice of appeal was filed. By following the statutory procedures in all other respects, the Kimberleys properly invoked the jurisdiction of the district court. See *id.* We therefore reverse the decision of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.