UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JOHN RAHL — Case No. 96-12875
Chapter 13

Debtor.

JOHN RAHL,

Plaintiff

-against- — Adv. Proc. No. 99-91180

NEW YORK THRUWAY AUTHORITY and
MFS NETWORK TECHNOLOGIES, INC.

Defendants.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The matters before the court are the causes of action set forth in the amended complaint the Debtor filed in the captioned adversary proceeding. Primarily, he seeks the recovery of estate property. The Debtor also seeks: (1) to enjoin Defendant New York State Thruway Authority ("NYSTA") from trespassing on land owned by him; (2) the removal of a berm and road bed constructed by NYSTA and/or the construction of a structure by NYSTA to facilitate the Debtor's prior uses of the real property; (3) damages from NYSTA in the amount of $10,000,000, plus statutory treble damages due to an alleged trespass; and (4) in the event the berm and road bed remain intact, compensation from NYSTA in the amount of $200,000,000.[1] The court has jurisdiction over the adversary proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(E) and 1334(b).

Facts

Prior to trial, NYSTA filed and served a pretrial statement and expert report in compliance with the court's scheduling order. The court did not receive opposition to either document, and, consistent with the scheduling order's provisions, both became part of the trial record.

NYSTA's expert report was prepared by Thomas F. Gemmiti, a civil engineer employed by NYSTA. In the report, Mr. Gemmiti, using several exhibits he attached to the report, describes the real property NYSTA appropriated in 1984 and the location of a berm and certain fiber optic cables.

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[1]Defendant MFS Network Technologies, Inc. ("MFS") filed a bankruptcy petition after the Debtor commenced his adversary proceeding. Counsel for MFS appeared at trial, but due to the automatic stay, the Debtor is no longer pursuing his causes of action against MFS in this court.

In his report, Mr. Gemmiti depicts the location of the property in question. At trial, after opening remarks by the Debtor,[2] who appeared *pro se*, and attorneys for the Defendants, the parties agreed the matters before the court were legal ones. They stipulated to the admission of several exhibits, some of which the court conditionally received. The findings below reflect which of those exhibits the court has now admitted into the record.

Neither side called any witnesses to testify at trial. NYSTA, however, had brought its expert to testify about the location of the fiber optic cables. (Tr. 119.) The parties agreed to work with the Chapter 13 Trustee in the preparation of a stipulation of facts.

Since the trial, the Debtor has obtained an attorney to represent him. His attorney and counsel for NYSTA filed a stipulation of facts which the court adopts and incorporates herein by reference. It also finds additional facts based largely on the transcript and the exhibits the parties stipulated to at trial.

By order effective January 6, 1982, the Consolidated Railroad Corporation ("Conrail") received permission from the Interstate Commerce Commission ("ICC") to abandon a rail line it owned between Kingston and New Paltz, New York. (Stip. ¶ 10.) That line constituted the Wallkill Valley Railroad Company Branch ("Wallkill Valley Branch"). On August 17, 1984, the New York State Commissioner of Transportation released its preferential rights to the real property the Wallkill Valley Branch line was located on, pursuant to N.Y. TRANSP. L. § 18. (Stip. ¶ 12; Ex. 7.) The paragraph above the signature line provides for the release of preferential rights only; it further provides that it does

[2]The court's findings below include many of the statements the Debtor made during his opening remarks. It considers most of those statements as his oral argument.

not release any right, title or interest of New York State that otherwise existed at that time. (Ex. 7.)

On March 2, 1984, prior to the Commissioner of Transportation abandoning its preferential right, New York State ("State") filed Map 624 and a Notice of Appropriation in the Ulster County Clerk's Office. (Stip. ¶ 11.) The State's "Description and Map for the Acquisition of Property" relative to the appropriation states the reputed owner is the Consolidated Railroad Corporation, the Map No. is 624 and the Parcel No. is 1112; it provides for the appropriation of "[the] fee without right of access to and from abutting property for purposes connected with the Thruway System of the State of New York pursuant to the applicable provisions of ARTICLE XII-A of the Highway Law and Article 2, Title 9 of the Public Authorities Law, and the Eminent Domain Procedure Law." (Ex. B.) Parcel 1112 is marked on Map 624; it is the area of real property under lines labeled "Thruway." (Ex. B.)

On April 24, 1986, four years after the State's appropriation, Conrail entered into a conditional agreement of sale with the Debtor. (Ex. 8.) The sale agreement provides for the Debtor's purchase of premises described in item 21 of an attached rider. Item 21 describes real property only. Item 22, however, provides for additional covenants. One of these covenants provides, "Grantee...agrees that rail service will not be provided to or from said lines of railroad except pursuant to a written agreement between...the parties hereto,...which agreement shall...be subject to the approval of...the Interstate Commerce Commission...." (Ex. 8.) Conrail and the Debtor never entered into an agreement which allowed the Debtor to conduct rail service or that provided for rail service by Conrail to the Debtor.

On or about June 27, 1986, the Debtor received a quitclaim deed for the real property. (Ex.

9.) The deed's description of the property states it begins at railroad Mile Post 0.4 and Station 2+090 and ends at a point at railroad Mile Post 10.98; it further states the area is indicated by "PS" on Grantor's Case Plan No. 68278, sheets 1 through 7. It also describes the real property as "the railroad right of way" of Conrail.

On page 3, paragraph 10, the deed provides for a covenant similar to the one provided for in the conditional sale agreement in that it provides a written agreement must exist before any railroad activities could occur. Also, the deed specifically provides that the Grantor (i.e., Conrail) shall not operate its trains on the real property or interchange traffic with the Grantee (i.e., Debtor). It also provides that Conrail will not participate in a rail rate relationship with the Debtor, establish or maintain a track connection with him or provide cars or car service to him.

Early in the trial, the Debtor stated, "[A] quitclaim deed is how you buy railroads." (Tr. 23.) Later on, he stated, "A quitclaim deed for railroad purposes reaches out and takes everything in both directions." (Tr. 121.) He did not elaborate on either occasion. NYSTA has stated that in addition to the real property, the Debtor purchased the former right of way of the Wallkill Valley Branch. (Defendant's Post-Trial Memorandum of Law ("NYSTA brief") p. 1.)

During the trial, the Debtor had many things to say about owing a railroad and the land around it. At one point he stated, "[T]o own a railroad, federal definition, is to have a bridge, a line, a float, a lighter or a lease. I have a lease in perpetuity and another lease, too. I have a line. I have a bridge." (Tr. 125.) He did not say, however, where the "federal definition" could be found. He also stated, "The deed from my railroad shows that I went out and bought railroad property for railroad purposes and in doing so, that is operation of the franchise." (Tr. 24.) The Debtor says he "took

various steps to operate the franchise of the Wallkill Valley Railroad Company ("WVRR")[3], and he took various steps to assert his rights in and to the franchise, which included, among other things, applying to the ICC for an operating exemption and for interim use as a federal rail trail (pursuant to the Trails Act, 16 U.S.C. § 247[d][1983])."[4] (Plaintiff's Post-Trial Memorandum of Law ("Debtor's brief"[5]) pp. 3-4.) However, the Debtor failed to address the environmental issues, and he failed to obtain permission to build or operate. The ICC decided the merits of the Debtor's application for an operating exemption and interim use as a federal rail trail. The court considers that determination in the Discussion part of this decision.

The real property at the heart of the controversy here involves the berm and road bed NYSTA constructed beginning in April 1998 and ending in January 2000. (Stip. ¶ 14.) According to the parties, NYSTA's construction caused the filling in of the area under the bridge carrying the Thruway's main line over the right of way of the WVRR at Whiteport Road. (Stip. ¶ 14.) Whether railroad lines existed on the land under the bridge when NYSTA's appropriation occurred, or later when it filled in that area, are still questions of fact. The ICC, however, found Conrail pulled up railroad lines when it abandoned rail service. As stated earlier, that determination is discussed below.

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[3]In footnote 2 of the Debtor's post trial brief, the Debtor begins referring to the Wallkill Valley Railroad Company as "WVRR." For consistency, the court will do the same.

[4]NYSTA has not challenged the accuracy of that statement, however, it has challenged the Debtor's use of the decisions of the ICC. That argument is stated more completely below.

[5]For ease of reading, the court will refer to the post trial brief filed by the Debtor's attorney, Mr. LoPresti, as "Debtor's brief."

WVRR's charter was not admitted into evidence, but the Debtor mentioned his "re-entry" of it on several occasions at trial. (Tr. 20, 24, 25.) At trial, the Debtor stated he still had the "underlying fee and anything above," because when the State took its fee, it took it for highway purposes only. (Tr. 15.) Once again, his words were conclusory; he did not even state what law, if any, exists to support his statement.

Arguments

As stated above, the amended complaint contains many causes of action. In it, the Debtor contends NYSTA violated due process under the Fifth Amendment of the United States Constitution, committed an unlawful taking without just compensation under Article One of the New York State Constitution and denied him rights guaranteed by federal and state statutes, particularly the National Trails System Act and the New York Railroad Law, all of which entitles him to injunctive relief, compensatory damages and statutory damages.

At trial, the Debtor argued his challenge did not concern NYSTA's appropriation of certain properties; he also stated he did not challenge the lines are actually situated on those properties. (Tr. 119.) The Debtor said his challenge involves NYSTA's failure to obtain the railroad's franchise or its right of way. (Tr. 7, 8, 12-14, 16, 119.) He argued he obtained both from Conrail, and when NYSTA blocked the right of way by filling in the land under the bridge, that action caused irreparable harm and damage to the railroad because, according to him, blocking it constitutes a "de facto taking of the entire railroad." (Tr. 13, 16.)

As found above, at trial, the Debtor asserted that when the State took its fee, it took it for highway purposes only, thus, he still had the underlying fee and anything above it. He also argued, "The

deed from my railroad shows that I went out and bought railroad property for railroad purposes and in doing so, that is operation of the franchise." (Tr. 24.)

In his 48-page post trial brief, the Debtor argues three main points. Point I has two parts. In part A, he argues NYSTA violates both the National Trails System Act and the Supremacy Clause of the United States Constitution, by failing to acknowledge what he calls the "ICC's recognition" of his property as a "rail trail" and of the WVRR as a "corporate entity with corporate powers" and by destroying the railroad's right of way. (Debtor's brief pp. 17, 21.)

The Debtor goes into great detail of the history behind the National Trails System Act, discusses several cases involving it, including *Preseault v. ICC*, 494 U.S. 1 (1990), and argues although federal law controls over state law where railroads are concerned, even state law provides for protection of abandoned railroads in N.Y. TRANSP. L. § 18. He also contends the State itself has recognized that status by designating the property as a "rail trail" on its own maps and exceeds the appropriation provisions' scope by destroying the railroad's right of way for its own right of way. He does not cite anything which supports that contention.

In part B of Point I, the Debtor discusses two ICC decisions involving his 1995 construction exemption application and his 1992[6] operation and abandonment application. He contends those decisions show the ICC, the entity who had jurisdiction over railroads at that time, "duly recognized"

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[6]In his post trial brief, the Debtor continuously refers to the decision as the ICC's 1993 decision. The date of the decision, however is December 21, 1992. If a later decision covering the Debtor's application regarding rail trail status exists, he has not cited it. The court's own research has also not uncovered such a decision. Also, the court has not uncovered any matters determined by, or pending before, the Surface Transportation Board involving the Debtor or the WVRR.

his "rights to operate the [WVRR]." (Debtor's brief p. 26.) He also contends the ICC "confirmed" the WVRR's "use of the property as a rail trail, pursuant to the Trails Act." (Debtor's brief p.27.)

The Debtor concludes this part of his brief by arguing a "grandfather clause" of the Interstate Commerce Act includes a provision requiring the ICC to "grant a permit upon application authorizing any carrier to operate over all routes on which it or its predecessor in interest was in bonafide operation on July 1, 1935." (Debtor's brief p. 27.) He contends the WVRR is "endowed" with the grandfather clause; he cites *Andrew G. Nelson, Inc. v. United States*, 355 U.S. 554 (1958).

Point II of his brief also has two parts. In part A, the Debtor argues should the court conclude NYSTA properly acquired the property at issue, he has acquired an easement by necessity. He cites New York case law that discusses how an easement by necessity arises when a grantor conveys land but leaves the retained portion with no access. He also argues, once again, that NYSTA's action in filling in the land under the bridge has completely obstructed the railroad's right of way; thus, NYSTA has exceeded the scope of its appropriation. He further contends NYSTA's action "destroy[ed] the easement by necessity created by operation of the property's designation as a rail trail." (Debtor's brief p. 29.) He cites 16 U.S.C. § 1247(d) as support for his contention.

In part B, Point II of his brief, the Debtor contends he has an easement implied from the use in existence at the time of severance of title. He cites New York case law as support for his position. To him, the railroad right of way, the bridge and the grade constitutes an obvious and apparent use existing at the time of severance of title.

Point III of the Debtor's brief contains two parts and six subparts. The focus of Point III is the primary argument the Debtor made at trial: he has established all rights incident to the franchise and to

WVRR's right of way, and NYSTA has damaged both sets of those rights. In part A, he begins by conceding that even if NYSTA took the property at issue in fee, it could not take the franchise. In subparts 1 and 2 of part A, he discusses, for several pages, New York case law involving franchises and special franchises. The primary case he relies on is *People v. O'Brien*, 111 N.Y. 1 (1888). He also discusses *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

In subpart 3, the Debtor argues a franchise implicates the obligation of contracts and due process protections of the federal constitution. He relies heavily on *Roosevelt Raceway, Inc. v. Monaghan*, 9 N.Y.2d 293 (1961) and *Pa. R.R. Co. v. New York*, 223 N.Y.S.2d 541 (3d Dep't 1962) and argues New York's highest court has acknowledged the creation of corporations with perpetual corporate privileges and powers beyond the legislature. He cites the same New York cases and *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), to support his contention that the grant of corporate charters to railroads creates a binding contract that is protected from impairment by the Constitution. He argues such charters exist in perpetuity, just like his rights in and to the WVRR franchise.

In subpart 4, the Debtor argues the WVRR's powers are further augmented by the lease in perpetuity. According to him, the 1899 lease between the WVRR and New York Central and Hudson River Railroad Company "gives the right of re-entry, and re-assignment of the original rights vested, including the name of the WVRR, to the current holder of the property at issue." (Debtor's brief p. 40.) He relies on case law involving leases in perpetuity in this part of his brief. The Debtor asserts he is bound to carry out and perform the public service obligations of the WVRR based upon the lease in perpetuity and the property rights inherent therein, in conjunction with the powers and property vested

in the WVRR. He does not cite any law that requires these duties.

Citing a case he calls *Memphis and Louisville Railroad Co. v. Railroad Commissioners*[7] in subpart 5, the Debtor argues franchises like the WVRR may survive their corporate hosts and may also be renewed. In subpart 6, the Debtor asserts he purchased the WVRR franchise; he points to that language in the quitclaim deed which reads, "ALL THAT PROPERTY situate in the Towns of Rosendale and Ulster, and City of Kingston and County of Ulster and State of New York, being the railroad right of way of Consolidated Rail Corporation (formerly Penn Central Transportation Company) known as the Wallkill Valley Branch identified as Line Code 1435.....together with the Rosendale Bridge and all other bridges and improvements thereon." The Debtor also contends in subpart 6 that corporate existence and the exercise of franchise rights may arise upon the commencement of certain acts or the exercise of such a franchise. Citing 36 AM. JUR.2D, FRANCHISES FROM PUBLIC ENTITIES § 10 (2001), the Debtor contends, "it may be inferred that by operation of constitutional rights in and to property and the exercise of [sic] thereof, plaintiff may assume the operation of the franchise of the WVRR pursuant to New York State's Constitution." (Debtor's brief p. 46.)

Finally, in the second part of Point III, the Debtor argues NYSTA's actions have denied him the reasonable use of his railroad right of way and franchise. He contends such takings are compensable pursuant to the Fifth Amendment of the United States Constitution. On page 47 of his brief, he mentions the case law regarding *de facto* takings and describes how franchises may be

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[7]The name of the case as reported in United States Reports is *Memphis & L.R.R. Co. v. Berry*. Its cite is 112 U.S. 609 (1884).

condemned. Like most of the other parts of his brief, he does not apply the case law to his factual situation.

As mentioned above, NYSTA begins its reply brief by stating the Debtor purchased the former right of way of the Wallkill Valley Branch of the New York Central from Conrail in 1986. (NYSTA brief p. 1.) Its first challenge to the Debtor's brief centers on his use of the ICC decisions that were not admitted into evidence at trial. NYSTA asserts Debtor's counsel should be admonished for his improper and disingenuous reference to those decisions.

NYSTA goes on to contend Debtor's counsel not only improperly used the decisions, he mischaracterized them as well. Referring to the ICC decision concerning the Debtor's application for a rail trail determination, NYSTA argues, "A reading of the order discloses that the ICC disclaimed jurisdiction of the matter before it and dismissed the application without taking any actions." It then turns to what it believes is the only matter before the court: whether it caused compensable damages to the Debtor.

NYSTA believes all of the matters before the court involve a simple matter of trespass. It argues it acquired the real property at issue from Conrail in 1984, by properly using the state's eminent domain powers. To NYSTA, Conrail did not convey that same property to the Debtor in 1986 because, as the Debtor has also argued, Conrail could not convey what it did not own. In this part of its argument, it refers to "Plaintiff's Exhibit 21," a document that is not in the record,[8] and contends it

[8]"Plaintiff's Exhibit 21" was a document attached as part of Exhibit A to the Debtor's motion to reopen the record. Mr. LoPresti had filed the motion on the Debtor's behalf after he was hired. The court heard oral argument on the motion and denied it by order dated June 24, 2002, in effect, ruling the exhibits attached to the motion would not be admitted into evidence. Another exhibit attached to

shows Conrail, prior to the Debtor's purchase, advised him the State was in the process of acquiring part of the abandoned right of way. (NYSTA brief p. 4.) According to NYSTA, since the Debtor did not own the property when the State acquired it in 1984 and since he has presented no evidence to show Conrail assigned him a claim based on the State's taking when he purchased the remaining property in 1986, the Debtor's proceeding must be dismissed for failure to state a cause of action against it.

NYSTA's second point is the Debtor has failed to make a prima facie case of trespass. It repeats that his "Exhibit 21'[9] shows he knew, even before the State acquired the property, that not all of the former right of way would be available for sale to him. To NYSTA, since the State acquired the property first, it could not have interfered with the Debtor's rights because he never had the right to legally possess the property.

Regarding the Debtor's argument that it has violated the Rail Trails Act, NYSTA states it is difficult to violate a law that had not been enacted when the actions complained of occurred. It argues Conrail abandoned the property on January 6, 1982 according to paragraph 10 of the stipulation of facts. It points out the law the Debtor relies on did not become effective until March 28, 1983.

NYSTA contends the Debtor mischaracterizes the *Presault* decision, arguing the Supreme Court did not hold 16 U.S.C. § 1247(d) prohibits abandonment of railroad rights of way. It also contends the Court held a railroad may abandon a line entirely when no agreement is reached between the railroad, the state, a municipality or private group prepared to assume financial and managerial

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that motion was Plaintiff's Exhibit 20, an exhibit the Debtor refers to on page 13 of his post trial brief.

[9]*See* n. 8.

responsibility for the right of way. It argues Conrail already abandoned the line prior to the statute's effective date and Conrail never reached an agreement with anyone regarding the interim use of the right of way as a recreational trail prior to the statute's enactment. It also cites *Conn. Trust for Historic Pres. v. IC.C.*, 841 F.2d 479 (2d Cir. 1988), arguing the ICC, now Surface Transportation Board ("STB"), cannot compel trail use in lieu of abandonment.

As for the Debtor's easement and franchise arguments, NYSTA responds the Debtor has inaccurately stated the law. According to NYSTA, an easement by necessity will not be found if another means of access to the property exists; it cites *Sauchilli v. Fata*, 306 NY 123 (1953), and *In re East 177th Street*, 239 N.Y. 119 (1924) as support for its argument. It argues the doctrine does not apply to the Debtor because he has not shown his property is landlocked. It further contends that once eminent domain occurs, unless specific rights are reserved to the condemnee, the condemnor takes new title and extinguishes all previous rights and cites *A.W. Duckett & Co., Inc. v. United States*, 266 U.S. 149 (1924) and two New York Court of Appeals cases as support for that contention.

NYSTA asserts the Debtor continually interchanges the terms "franchise" and "special franchise." Despite that, NYSTA contends that nothing it or the State has done impinges on the right of the WVRR to exercise its franchise and operate a railroad. It does contend, however, that the Debtor has not shown Conrail conveyed the WVRR franchise to him. It points out the Debtor has stated Conrail opposed the Debtor's applications to the ICC on the ground the franchise no longer existed and the Debtor was not a successor to it; it cites footnote 5 and page 26 of the Debtor's brief. While the deed indicates the Debtor may have bought the WVRR's right of way, NYSTA contends it does

not support a finding that he bought its franchise. NYSTA concludes by contending the only entity the State would have to answer to in damages would be the owner of the franchise at the time of the appropriation. It asserts the Debtor is not entitled to damages because Conrail, the owner at that time, did not challenge the State's appropriation and did not assign any claim or cause of action it may have had against the State to him.

Discussion

The Debtor has the burden of proving his entitlement to the relief he seeks and the damages he claims. The court has attempted to follow his very lengthy, and often repetitious, presentation of facts and argument. To the court, the Debtor's argument rests on three areas of law: rail trail protections under 16 U.S.C. § 1247(d), easements under state law and railroad franchise and right of way provisions. The court has considered all three areas and concludes the Debtor has not proven entitlement to any damages or relief he seeks.

I. Rail Trail (Debtor's brief: Point I, part A)

The court rejects the Debtor's argument that he owns and operates a federal rail trail entitled to certain protections under 16 U.S.C. § 1247(d). Moreover, propounding the notion that the ICC recognized that status in its 1992 decision is sanctionable. Not only did the ICC dismiss WVRR's request, it went into a lengthy discussion of the reasons it had to dismiss it. Those reasons include its lack of jurisdiction over the line due to Conrail removing the track and ceasing service in 1982 and, moreover, because section 1247(d) of the Trails Act had not been enacted when Conrail abandoned the line. *Wallkill Valley R.R. Co. -- Operation Exemption --Finance Docket No. 31909 and Consolidated Rail Corp. -- Abandonment -- Docket No. Ab-167*, 1992 WL 383328 (I.C.C.). The

ICC also wrote,

> Even if the Trails Act were available at that time, [the] Commission does not now have jurisdiction to impose a Trails Act condition on this fully abandoned line. San Mateo. Moreover, Wallkill does not need Commission authority to operate a trail on its property. It allegedly owns the abandoned railroad right-of-way in fee simple and operates it as a trail. Its attempt to use the Trails Act here is beyond the scope of the statute, which is to preserve active rail rights-of-way held by easements or similar property interests where, upon abandonment, the property would revert to adjoining landowners. Wallkill indicates further that even after rail service is resumed, it expects that a portion of the right-of-way would continue to be used as a trail. While the Commission would sanction the resumption of rail service, it would not have to approve continued use of the right-of-way as a trail. In that event, the Trails Act would still not be applicable. *Id*. (footnotes omitted).

The ICC has conclusively determined the Debtor does not own or operate a rail trail entitled to protection under 16 U.S.C. § 1247(d). In effect, the entity the Debtor has continuously argued has the final word on a railroad's status,[10] and in December 1992 was still designated as the agency permitted to authorize the conversion to recreational trails use of easements granted by private property owners to railroads, has already determined the Debtor's first argument. Given the opinion's soundness, the expertise of the ICC in this particular area of law and the Debtor's active participation in the process, the court finds no reason to overturn that decision; it would have reached the same conclusion had the ICC not decided the matter already. Thus, the protections under 16 U.S.C. § 1247d) are unavailable to the Debtor.[11]

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[10]*E.g.*, Debtor's brief p. 26.

[11]The Debtor's attorney should consider himself admonished for the factual spin and legal analysis of ICC's December 1992 decision. The court also considered conducting a hearing to determine if it should also impose monetary sanctions pursuant to Fed. R. Bankr. P. 9011. It has decided against a hearing, however, Mr. LoPresti should review more carefully the content of any

II. Easements (Debtor's brief: all of Point II)

"Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979). In the absence of an overriding federal interest, bankruptcy courts look to state law provisions when making property determinations of a debtor. *See Id*.; *In re Canney*, 284 F.3d 362 (2d Cir. 2002).

The Debtor believes two easements are available to him under New York law: an easement by necessity and an easement implied from existing use. The court does not agree.

A. Easement by Necessity

Courts will find easements by necessity over land conveyed when the land a grantor retains is landlocked. *Smith v. N.Y. Cent. R.R. Co.*, 257 N.Y.S. 313 (App. Div. 4th Dep't. 1932). However, they will not find such an easement when another means of access to the retained land exists. *Sauchelli v. Fata*, 306 N.Y. 123 (1953); *In re East 177th St*., 239 N.Y. 119 (1924).

Here, the Debtor has not shown his real property is landlocked. Nor does the record he created support a finding that access to his real property can only be achieved if NYSTA "un-digs" the area it filled in over the WVRR's right of way at Whiteport Road. A map admitted into evidence without offering testimony at trial or an explanation in the post trial brief regarding what the four corners of it reveals, carries very little, if any, weight. The Debtor offered neither; thus, his maps do not provide the court with the same kind of evidence NYSTA's maps provided via its expert report, particularly the expert's description of the land involved and explanation of the attached exhibits.

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paper he files in this court in the future.

Since an easement by necessity only exists when the grantor cannot get to or from property he retains, the court does not see how one should be applied here since the only "grant" of land happened in 1986 when Conrail deeded whatever real property interest it had to the Debtor. The Debtor received a quitclaim deed, so he only received what Conrail owned at the time, nothing more and nothing less. By early 1984, the State had already appropriated Parcel 1112, therefore, Conrail could not have conveyed it to the Debtor in 1986.

If the Debtor is arguing that Conrail was the "grantor" in 1984 because it was the entity that owned the land when the State appropriated it, an easement still would not exist. Conrail has never complained of a lack of access to or from the real property it "retained" after the appropriation. Once again, the quitclaim deed the Debtor received in 1986 only conveyed whatever interest Conrail had in the real property after the State's appropriation. As the Debtor puts it, Conrail could not convey what it did not own.

The notice of appropriation the State registered does not contain a reservation of any easement or other property interest by Conrail. The notice specifically refers to the land appropriated. Since the notice and map were filed in the Ulster County Clerk's office the Debtor was certainly on notice of what existed when Conrail "quitclaimed" real property to him in 1986. Furthermore, no one has ever challenged the appropriation.

As for any argument the Debtor was the "grantor" in 1998 when NYSTA began to fill in the real property under the bridge, the court has already found the State appropriated the parcel. Whatever it did to the parcel, including putting dirt on it, appears to be well within its ownership rights. While it is true NYSTA appropriated the real property "for Thruway purposes," the Debtor has not

shown what "other purposes" NYSTA pursues. He has also not provided any law to support his contention that he continues to own "underlying fee and anything above."

Moreover, the Debtor's focus is on the WVRR's right of way.[12] He has never contended his real property is landlocked due to a lack of access to or from the property. For all of these reasons, the court finds an easement by necessity is not available to him.

B. Easement Implied From Existing Use

For all of the reasons above, the court also does not find the Debtor is entitled to an easement implied from existing use. To establish an easement by implication from pre-existing use upon severance of title, three elements must exist: (1) unity and subsequent separation of title; (2) the claimed easement, must have been, prior to separation, so long continued and obvious or manifest as to show it was meant to be permanent; and (3) the use must be necessary for the beneficial enjoyment of the land retained. *Beretz v. Diehl*, 755 N.Y.S.2d 122 (App. Div. 3d Dep't 2003)(quoting *Abbott v. Herring*, 469 N.Y.S.2d 268 (App. Div. 3d Dep't 1983)).

Once again, the Debtor has problems using an easement doctrine since a "grantor" and "retained land" do not exist here. The biggest hurdle he faces, however, is meeting the second prong: showing what the "so long continued" prior use was.

Other than Conrail's abandonment of rail service, the Debtor has not shown what the existing use of the real property was at the time of NYSTA's appropriation in 1984 or when it filled in the area under the bridge beginning in 1998. As best as the court can tell, not only had Conrail abandoned rail

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[12]The Debtor's "Ownership of the WVRR's Right of Way and Franchise" argument is considered below.

service, but according to the ICC decision the Debtor heavily relies on, Conrail had dug up the rail tracks. *Wallkill Valley R.R. Co. -- Operation Exemption --Finance Docket No. 31909 and Consolidated Rail Corp. -- Abandonment -- Docket No. Ab-167,* 1992 WL 383328 (I.C.C.). Also, as found above, the Debtor never received ICC permission to construct or operate because of environmental concerns he failed to address.

The Debtor's argument that "railroad use" is a "valuable and paramount use" of land does not equate to a finding that it was the obvious and apparent use existing at the time. Possible future or restored use does not satisfy the second prong.

The ICC's findings and the Debtor's lack of evidence does not permit the court to find the "existing use" at that time was as a rail line. Furthermore, he has not shown that digging up the area the State filled in is necessary for his beneficial enjoyment of the land he retained, therefore, he does not satisfy the third prong either. Thus, the court concludes an easement implied from existing use is also unavailable to the Debtor.

III. The WVRR Franchise and Right of Way (Debtor's brief: Point I, part B and all of Point III)

The heart of the Debtor's argument, at trial and in his brief, is his contention that he owns the WVRR franchise and right of way and that NYSTA's actions have damaged him and the WVRR. After carefully considering all of his points, the court concludes the Debtor has not met his burden of proving ownership of the railroad franchise, and even if he had, he has not proven his damages with regard to the franchise or the right of way.

A. Ownership of the Franchise

As found above, NYSTA has agreed the Debtor purchased the Wallkill Valley Branch right of way in 1986. Despite that "fact,"[13] the Debtor has not proven his ownership of the WVRR franchise.

At trial, the Debtor mentioned his "re-entry" of the WVRR charter on numerous occasions, but he never produced it. The conditional sale agreement does not provide for the sale of the WVRR charter; it does not even mention a charter. The deed he produced also does not refer to a charter. This is not surprising to the court since the deed conveyed real property only. The Debtor covered much case law in his brief, but he often used the terms "franchise" and "special franchise" interchangeably. Assuming he meant to argue he owned a "special franchise," the case law he relies on does not support his position. In each of those cases, the courts determined, or it was not in contention, that the party claiming special rights and privileges actually owned the franchise. *E.g.*, *New Orleans, Spanish Fort & Lake R.R. Co. v. Delamore*, 114 U.S. 501 (1885); *People v. Brooklyn, Flatbush & Coney Island Ry. Co.*, 89 N.Y. 75 (1882) and *Metz v. Buffalo, Corry & Pittsburgh R.R. Co.*, 58 N.Y. 61 (1874). Here, the court cannot grant the Debtor the same rights and privileges since he has not proven franchise ownership.

The Debtor's reliance on the ICC's determinations do not help him either. Those decisions do not prove anything other than the Debtor's acquisition of the abandoned line. *See Wallkill Valley R.R. Co.-- Construction Exemption -- Finance Docket No. 32230*, 1995 WL 468441, n. 1 (I.C.C.). The Debtor has failed to establish how ownership of the line equates to ownership of the franchise.

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[13]As found above, the conditional sale agreement provided for the sale of a "line of railroad"; it does not mention a "right of way." The deed, however, describes the property as Conrail's "right of way."

As for his argument that by owning the land, he owns the franchise and his reliance on *People v. O'Brien* and *Leo Sheep Co. v. United States* to support that contention, the court notes *O'Brien* involved a grant of a railroad franchise and *Leo Sheep* involved actual ownership of a railroad by successors in interest that existed prior to the government action that was taken. *O'Brien*, 111 N.Y. at 39; *Leo Sheep*, 440 U.S. at 677-678. As determined above, the Debtor has not shown he received a grant of a franchise. He has also not shown actual ownership as a successor in interest to Conrail. Whatever ownership he may have of something, the earliest he obtained it was in 1986, after NYSTA's appropriation in 1984; he did not have ownership prior to the State's appropriation. Thus, both cases are factually distinguishable.

Finally, the conditional sale agreement's provision that the Debtor will not provide rail service to or from the lines unless he has a written agreement with Conrail and approval of that agreement by the ICC, and the deed's similar provision together with the clauses regarding Conrail not providing any railroad-related personal property or service to the Debtor, further indicate he does not own the franchise. To the court, all of those provisions establish that Conrail still maintains control over what rail service, if any, may someday be provided using the real property, and whatever remained on it, that it sold to the Debtor in 1986.

B. Damages if Franchise Ownership Existed

If the Debtor does own a special franchise, the court must consider his argument that he is entitled to all of the protections of the federal and state constitutions and various state and federal statutes. The court is not able to do that because the Debtor did not show how NYSTA interfered, or interferes, with WVRR's operations.

The Debtor has never received permission to operate a rail line; he has not even obtained a construction exemption. The significant hurdle the WVRR has yet to overcome is meeting certain environmental requirements. As a result, its exemption applications have not gone beyond the environmental review stage. In 1995, the ICC dismissed the only pending application. *Wallkill Valley R.R. Co. -- Construction Exemption -- Finance Docket 32230* (I.C.C. 1995).

Due to the environmental hurdle and the conditional sale agreement's requirement that the Debtor receive Conrail's permission before he provides rail service, the court cannot conclude that NYSTA's actions or inaction have contributed to the railroad's inability to operate. Because those hurdles are significant and the costs attendant with overcoming them high, the court cannot project what damages, if any, might result if the WVRR ever receives all of the necessary authorizations the Debtor needs to build and/or operate a rail line. In addition, the Debtor has not shown what existed prior to the appropriation or prior to the "filling in" activity of NYSTA. Thus, he has not even shown what the railroad could have achieved had NYSTA not filled in the area under the bridge.

Furthermore, even if it could project damages here, the court would have to overlook the case law where courts have held only the condemnee may pursue a claim or cause of action against the State. *See Van Etten v. City of New York*, 226 N.Y. 483 (1919); *In re Ford*, 313 N.Y.S.2d 42 (App. Div. 3d Dep't 1970). Conrail never challenged the State's appropriation, and its real property sale to the Debtor did not involve a transfer or assignment of any claim or cause of action Conrail might have had against the State based on the eminent domain procedure. From what the court has reviewed in the record, it appears the State's appropriation happened with Conrail's acquiescence, if not its permission. After all, when it happened, Conrail had already abandoned rail service and pulled up rail

tracks. Thus, the Debtor has not shown entitlement to a recovery for damages based on the State's taking of real property via an eminent domain procedure.

As for an argument that NYSTA exceeded its appropriation, the court has already concluded that it has not. All actions it has taken have involved the parcel it appropriated.

C. Ownership of the Right of Way

For the same reasons, the Debtor is not entitled to damages based on his ownership of the WVRR right of way. As found above, NYSTA does not dispute the Debtor purchased the right of way. However, as just discussed, he has not shown what damages NYSTA caused by appropriating the parcel or by filling in the area under the bridge.

D. The "Grandfather Clause"

Relying on a case where the Supreme Court considered the Federal Motor Carrier Act, does not help the Debtor's cause either. Once again, the Debtor relies on a statute unavailable to his situation. The grandfather clause he mentions on page 27 of his brief, the statute he says requires the ICC to grant a permit to the WVRR to operate over all routes its predecessor in interest operated on July 1, 1935, applied to motor carriers when it was in effect. *See Andrew G. Nelson, Inc.*, 355 U.S. 554 (referring to provisions formerly existing under 49 U.S.C.
§ 309(a)(1)). He offers no explanation as to why the grandfather clause of the Federal Motor Carrier Act would apply to the WVRR, an entity he says operates a railroad, not a motor vehicle carrier. The court finds no reason to offer a legal argument for him.

E. Lease in Perpetuity

Finally, despite his knowledge of the contents of the 1899 lease between the WVRR and New York Central, its existence does not support a determination of his entitlement to damages from NYSTA. Although the Debtor has extensive knowledge of the history of the WVRR, New York Central and Conrail, especially their involvement with the Wallkill Valley Branch, he has not shown he is a subsequent lessee entitled to the same rights and protections New York Central once enjoyed. As discussed above, Conrail's inaction indicates, at the very least, acquiescence with the appropriation. Moreover, as concluded above, it did not convey any claim or cause of action it may have had against NYSTA to the Debtor.

Accordingly, it is

ORDERED that the Debtor's amended complaint against NYSTA is dismissed in its entirety.

Dated: May 30, 2003
Albany, NY

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Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge - N.D.N.Y.