

COPY

**IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO**

COMMON PLEAS COURT
2016 NOV -7 PM 3:34

NEXUS GAS TRANSMISSION, LLC

Plaintiff,

VS.

JAMES D. HARVEY, Trustee, et al.

Defendants.

CASE NO.: 16CIV0951

JUDGE CHRISTOPHER J. COLLIER

JOURNAL ENTRY WITH INSTRUCTIONS FOR SERVICE

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS
COLLIER

This matter came before the Court for oral hearing on October 28, 2016 on the motion for a preliminary injunction filed by the Plaintiff NEXUS Gas Transmission, LLC (hereinafter, “NEXUS”). Attorney James Hughes, III and Attorney Daniel Gerken appeared on behalf of NEXUS. Attorney Gregory Huber appeared on behalf of Defendant John Douglas Harvey, Jr. James D. Harvey, Trustee appeared pro-se.

Defendant Matthew Lichty filed a motion to quash service of summons. The motion is granted. The remaining Defendants Roger A. Fey, Yvonne M. Fey, and Tina Cauller, have been voluntarily dismissed by the Plaintiff.

The complaint filed by NEXUS in this case requests 1) a declaratory judgment that NEXUS is a company organized for the purpose of transporting natural gas through tubing, pipes or conduits, 2) a declaratory judgment that NEXUS has the right to enter onto the Defendants' property to conduct survey activities pursuant to R.C. 1723.01 and R.C. 163.03, and 3) injunctive relief to permit NEXUS' entry onto the Defendants' property.

According to the complaint, NEXUS alleges that it intends to construct a 250-mile long, 36-inch in diameter pipeline from Columbiana County, Ohio, to Canada, extending through Medina County, Ohio, in the process.

The complaint alleges NEXUS is in the process of seeking and obtaining approval for the project from the Federal Energy Regulatory Commission (hereinafter, "FERC"). According to the complaint, NEXUS, must obtain a certificate of public convenience and necessity from FERC in order to construct, operate and maintain a pipeline pursuant to the federal Natural Gas Act.

The process with FERC has commenced, and that process requires NEXUS to complete certain civil, archaeological, and environmental surveys for each tract of land situated along the proposed Project route. NEXUS has contacted landowners along the proposed pipeline route to obtain permission to conduct the aforementioned survey activities. While many landowners have granted permission to NEXUS, many have not, including the remaining named Defendants in this matter. Consequently, Nexus is seeking injunctive relief alleging it will suffer irreparable harm if it is not granted immediate access to the properties because the delay in surveys will render NEXUS unable to meet its November 1, 2017, in-service date resulting in financial harm.

While Civ.R. 65 does not specifically set forth factors the Court should consider in determining whether or not to grant injunctive relief, Ohio courts have utilized certain substantive factors in making such a determination. Those factors are generally: (1) The moving party has a likelihood of success on the merits; (2) There is an immediate and certain threat of irreparable harm absent such relief; (3) That the injury suffered by the parties enjoined, if any, will not outweigh the potential injury suffered by the moving party absent the relief; and (4) That the public interest will be served by maintaining the status quo between the parties. The aforementioned factors are not a rigid test, but instead are merely factors the Court may utilize and balance in determining whether the requested relief is appropriate and justified.

1. Likelihood of Success on the Merits.

This Court previously held that the plain language of R.C. 1723.01 authorized the surveys at issue. This Court's holding was affirmed by the Ninth District Court of Appeals. However, since that time, new arguments against the application of R.C. 1723.01 have been raised that were not considered by this Court or the Court of Appeals. Some of the arguments that were previously raised now deserve another look as the posture of the case has changed. For example, on July 8, 2016, FERC issued its Draft Environmental Impact Statement. The statement anticipates there may be uncompleted surveys. Uncompleted surveys are not fatal to the project. To the contrary, the Draft Environmental Impact Statement contemplates that NEXUS' remedy for uncompleted surveys is to use the federal right of eminent domain after FERC certification. Accordingly, it cannot be presumed NEXUS will succeed on the merits.

2. Irreparable harm.

NEXUS has entered into contracts (Precedent Agreements) that require the pipeline to be completed to avoid financial penalties. There was testimony that a delay in the completion of surveys will likely result in financial penalties to NEXUS under the terms of the contracts. The evidence regarding the amount of financial harm is speculative. The contracts were not presented as evidence and it isn't even known if there is any type of escape clause built into the contracts. Furthermore, NEXUS negotiated and agreed to the completion dates with anchor suppliers fully aware it was unlikely all landowners would timely consent to survey activity.

Speculative money damages do not rise to the level of irreparable harm. Furthermore, the financial harm NEXUS may incur is a result of its own overly aggressive timetable. The Court finds NEXUS has failed to prove any irreparable harm.

3. The injury suffered by the parties enjoined, if any, will not outweigh the potential injury suffered by the moving party absent the relief.

NEXUS has portrayed the entry onto the properties to be surveyed as minimally intrusive. But NEXUS concedes the surveys involve more than just an actual physical presence on the property. The property is marked with stakes, holes are dug, and brush and small tree limbs are cut to create a line of sight if necessary.

A fundamental principle of the right to own property in this country is the right to exclude others from your property. While the actual physical damage caused by the surveys is usually minimal, the more important aspect of the legal trespass is the diminished property right forcefully imposed on the landowners. The Court cannot find the speculative money damages possibly incurred by NEXUS outweighs the landowners fundamental bundle of rights we all acquire with the right of property ownership.

4. That the public interest will be served by maintaining the status quo between the parties.

Issuing the preliminary injunction will do anything but maintain the status quo between the parties. The status quo during the pendency of this case is the Defendants do not want NEXUS to enter their property. Granting the injunction not only fails to

maintain the status quo, it effectively adjudicates the entire case on the merits in NEXUS' favor.

The Court finds NEXUS' request for a preliminary injunction is DENIED. There are three causes of action set forth in the Plaintiff's complaint. Had this Court granted the Plaintiff's motion for a preliminary injunction, the remaining causes of action would have become moot. Accordingly, the Court finds it is appropriate to expressly determine there is no just reason for delay pursuant to Civil Rule 54. The Court hereby expressly finds there is no just reason for delay and the Clerk of Courts is hereby directed to serve this journal entry as a final appealable order.

Costs are assessed to the Plaintiff.

IT IS SO ORDERED.



CHRISTOPHER J. COLLIER
JUDGE

The Clerk of Courts is instructed to send copies of the foregoing Journal Entry to the following parties or their counsel of record.

Atty. Hughes
Atty. Huber
Atty. Gerken
James D. Harvey, Trustee
Matthew Lichty

Copies of this Entry were mailed by the Clerk of Courts on 11-7-16.



DEPUTY CLERK OF COURT