LAKE COUNTY SANITATION DISTRICT, Plaintiff and Respondent, v. RAYMOND G. CHOY et al., Defendants and Appellants.

A135259

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

2013 Cal. App. Unpub. LEXIS 2367

March 29, 2013, Opinion Filed

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PRIOR HISTORY:
Lake County Super. Ct. No. CV411132.

JUDGES: Margulies, Acting P.J.; Dondero, J., Banke, J. concurred.

OPINION BY: Margulies, Acting P.J.

OPINION

Raymond G. Choy and Lorraine J. Choy appeal from an order for possession of a right-of-way on land they own in Lake County. The order for possession was granted to the Lake County Sanitation District (the District) pursuant to Code of Civil Procedure [1] section 1255.410, in an eminent domain proceeding that is still pending in the trial court. We dismiss the appeal as taken from a nonappealable order.

1 All further statutory references are to the Code of Civil Procedure.

I. BACKGROUND

On January 25, 2012, the District filed a "Complaint in Eminent Domain" seeking to acquire a right-of-way for the construction, maintenance, and operation of a sewer effluent forcemain on the Choys' property. The District determined the right-of-way was necessary for an upgrade of the Southeast Regional Wastewater Collection System pursuant to a California Regional Water Quality Control Board clean-up and abatement order.

On February 2, 2012, the District filed a motion for an order of possession pursuant to section 1255.410, seeking a prejudgment determination it was entitled to take the property and had deposited an amount satisfying statutory requirements. The motion was supported by a notice of deposit and statement of appraisal as required by section 1255.010, subdivisions (a) and (b), and by a declaration of the District's right-of-way agent explaining that (1) the District would suffer a substantial hardship if its application for possession before issuance of a final judgment was denied because the construction work was underway and the District would be required to pay substantial costs to the contractor if the work scheduled on the Choys' parcel was delayed until a final judgment could be obtained; and (2) the hardship to the District outweighed any hardship to Choy or the occupants because the portion of the property subject to the take was only used as a driveway and parking area by the occupant, and the occupant had agreed to a work schedule that would not interfere with his use of the property. The complaint in eminent domain, the motion, and the documents supporting the motion were personally served on Lorraine and Raymond Choy, respectively, on February 8, 2012 and February 11, 2012. The motion was set for hearing on April 23, 2012, and the notice of motion advised that the Choys had a right to oppose the motion by opposition filed within 30 days of service, and that if no defendant served and filed a written opposition, the District would request an immediate order for possession.

On February 22, 2012, the Choys filed a document captioned in relevant part, "Answer to Plaintiff's Complaint in Eminent Domain, Cross-Complaint and Request for Jury Trial." The answer alleged the District's "offer . . . of $4,800.00" for the property was below fair market

value, provided no consideration or relief to the occupant of the property for loss due to business interruption and loss of parking, and did not take into account the environmental impact studies required because of an underground stream on the property that drains into Clear Lake. According to the answer, these required studies would further delay the project, and thereby harm the Choys and their licensee without just compensation. The answer did not refer to the District's motion for an order for possession, or cite any hardship to the Choys that would be caused if the motion were granted.

After the 30 days allowed by section 1255.410, subdivision (c) for the Choys to file their opposition to the motion had lapsed, the District filed an application on March 12, 2012, for an order for possession pursuant to section 1255.410, subdivision (d)(1). After making the findings required by subdivision (d)(1), the trial court approved the order for possession. The written order was entered on March 14, 2012, and served by mail on the Choys on March 16, 2012. The Choys made no appearance on April 23, 2012, at the time originally set for the hearing on the motion, and did not object in any manner to the trial court concerning the order for possession. Since the order for possession had previously been issued, the matter was dropped from the calendar.

On April 23, 2012, the Choys filed a purported notice of appeal from a judgment or order entered on March 14, 2012. The notice described the order being appealed as "Order for Possession-Judgment: Court Default."

II. DISCUSSION

This is an appeal from an order entered pursuant to section 1255.410. As a threshold matter, we agree with the holding in *City of Morgan Hill v. Alberti* (1989) 211 Cal.App.3d 1435 (*Alberti*) that such orders are not appealable.

With the exception of certain collateral orders, the right to appeal in a civil case is conferred exclusively by statute. (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 109.) In the absence of a statute authorizing an appeal, we lack jurisdiction to review a case. (*In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1434.) The primary statute addressing the appealability of judgments and orders in civil cases is section 904.1. (*Samuel v. Stevedoring Services* (1994) 24 Cal.App.4th 414, 417.) Section 904.1 serves to avoid piecemeal litigation by limiting appeals to final judgments, postjudgment orders, and certain enumerated orders. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696-697.) The order for possession in this case is not a final judgment in the eminent domain proceeding, not a postjudgment order since no judgment has yet been entered, and not one of the other orders enumerated in section 904.1. No provision of the Eminent Domain Law (§ 1230.010 et seq.), or other statute, makes orders entered pursuant to section 1255.410 directly appealable. (*Alberti, supra,* 211 Cal.App.3d at pp. 1437-1438.)

The collateral order exception is also not applicable here. "The only exception to the [rule that appealability must be based on statute] is if the judgment or order relates to a final determination of some *collateral matter* distinct and severable from the general subject of the litigation, and if such determination requires the aggrieved party . . . to pay money, or requires the performance . . . of an act by or against such party." (*Draus v. Alfred M. Lewis, Inc.* (1968) 261 Cal.App.2d 485, 489.) Here, the order for possession does not relate to a collateral matter distinct from the subject of the litigation. The litigation encompasses both the right to possession as well as the determination of just compensation. (See §§ 1230.050, 1263.010, subd. (a).)

The Court of Appeal in *Alberti* confirmed the Legislature did not intend orders under section 1255.410 (known as "quick-take" orders) to be appealable: "Although sections 1255.420 and 1255.430 permit the trial court to grant relief from an order of immediate possession, the 'quick-take' order is not appealable. This is evident from the Legislative Committee Comments to section 1255.410 which state: 'Under former statutes, judicial decision held that an appeal may not be taken from an order authorizing or denying possession prior to judgment. Mandamus, prohibition, or certiorari was held to be the appropriate remedy. [Citations omitted.] However, an order for possession following entry of judgment has been held to be an appealable order. [Citation omitted.] *No change is made in these rules as to orders made under Section 1255.410* . . .' (Italics added.)" (*Alberti, supra,* 211 Cal.App.3d at p. 1437; see also *Cent. Contra Costa etc. Dist. v. Superior Ct.* (1950) 34 Cal.2d 845, 848 [noting order denying possession under predecessor statute was not an appealable order].)

Although we have discretion to treat the Choys' appeal from the order for possession as a petition for a writ of mandate, we decline to do so. We find no unusual circumstances warranting the exercise of such discretion. (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) Moreover, the Choys failed to present any opposition to the motion for an order of possession in the trial court despite notice of the consequences of failing to act. Even if we construed their answer to the complaint as opposition to the order for possession, it affords no basis for writ relief. The trial court was not required as a matter of due process to consider the Choys' answer as an opposition for purposes of section 1255.410, subdivision (c). The answer does not in any event contest the District's right to take the prop-

erty by eminent domain or state facts showing a hardship, but solely raises issues going to the amount of just compensation ultimately to be paid to the Choys and the occupant of the property. Those issues have yet to be addressed or resolved in the trial court, and review of them by writ at this stage of the proceedings would be entirely premature. The remaining issues raised by the Choys are meritless, refer to matters outside the record, and afford no basis for treating the appeal as a writ.

III. DISPOSITION

The appeal is dismissed as taken from a nonappealable order.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.