

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0995-09T3

NEW JERSEY TURNPIKE AUTHORITY,
a body corporate and politic of
the State of New Jersey,

Plaintiff-Respondent,

v.

RONALD C. WITT and NANCY B. WITT,

Defendants-Respondents,

and

YARDVILLE NATIONAL BANK; COUNTY OF
MIDDLESEX, SWEETWATER CONSTRUCTION
CORPORATION, and EDUCATION CAROUSEL,
INC.,

Defendants,

and

MATRIX OUTDOOR MEDIA, LLC,

Defendant-Appellant.

Argued April 20, 2010 - Decided July 15, 2010

Before Judges Carchman and Lihotz.

On appeal from the Superior Court of New
Jersey, Law Division, Middlesex County,
Docket No. L-5488-09.

Steven M. Richman argued the cause for appellant Lamar Advertising of Penn, LLC, successor in interest to Matrix Outdoor Media, LLC (Duane Morris, LLP, attorneys; George W. Powell, Jr. and Drew K. Kapur, of counsel and on the brief; Michael J. McCalley, on the brief).

Victoria A. Flynn argued the cause for respondent New Jersey Turnpike Authority (DeCotiis, Fitzpatrick & Cole, LLP, attorneys; Michael J. Caccavelli, of counsel; Michael J. Ash, on the brief).

Timothy P. Duggan argued the cause for respondents Ronald C. Witt and Nancy B. Witt (Stark & Stark, P.C., attorneys; Mr. Duggan, of counsel and on the brief; Benjamin E. Widener, on the brief).

PER CURIAM

This appeal requires us to address the issue of whether a billboard located on leased property subject to condemnation is real or personal property under the Eminent Domain Act of 1971, N.J.S.A. 20:3-1 to -50. Assignment Judge Francis in the Law Division concluded that the billboard was personalty, and defendant Lamar Advertising of Penn LLC (Lamar) was not entitled to participate directly in the condemnation proceedings. We agree and affirm.

The facts are not in significant dispute. Defendants Ronald C. Witt and Nancy B. Witt (collectively, the Witts) are the owners of real property located at 269 Prospect Plains Road in Cranbury (the property). The property is contiguous to the

New Jersey Turnpike, and located on the property is a 6,658 square foot office building as well as a double-sided billboard, positioned on the eastern property line. Lamar owns the billboard and leases a portion of the property from the Witts to maintain the billboard.¹

The billboard is forty-three feet above grade and consists, in part, of a steel monopole (wall pipe) that is thirty-six inches in diameter and contains a double-sided sign panel, which measures fourteen feet by forty-eight feet per face. Steel bracing supports the sign and a catwalk provides access to the sign. The monopole sits in a concrete footing that extends eighteen feet and six inches into the ground. The steel footing is supported by a concrete foundation whose measures are twenty feet, six inches by twenty feet, six inches, and extends to a depth of five feet.

Plaintiff the New Jersey Turnpike Authority (NJTA) is a public corporation that operates the New Jersey Turnpike and "facilitate[s] vehicular traffic and remove[s] the present handicaps and hazards on the congested highways in the State [of New Jersey][.]" N.J.S.A. 27:23-1. NJTA, as part of a Turnpike widening program, sought to acquire the Witt's property as part

¹ Lamar is the assignee of Matrix Outdoor Media, LLC (Matrix), the prior tenant on the property.

of the addition of three outer lanes, northbound and southbound, and multiple interchange improvements along approximately thirty-five miles of roadway between Interchange 6 and Interchange 9.

NJTA extended to the Witts a \$1,800,000 offer to purchase the property, memorialized in a June 24, 2008 letter. This offer was based on an April 15, 2008 appraisal report, prepared by the NJTA's appraiser, Patrick B. Ard, MAI. Based on this appraisal, \$400,000 of the \$1,800,000 market value of the property was attributed to the billboard.

NJTA attempted to negotiate a purchase of the property with the Witts; the negotiations proved unsuccessful, and NJTA filed a Workable Relocation Assistance Plan (WRAP) with the State of New Jersey, Department of Community Affairs (DCA), pursuant to N.J.S.A. 52:31B-1 to -12 and N.J.S.A. 20:4-1 to -22 and the Relocation Assistance Regulations, N.J.A.C. 5:11-1.1 to -9.3 (the Relocation Laws) to acquire the property by eminent domain. The Witts did not oppose the taking. The DCA approved the WRAP in correspondence dated March 12, 2008.

On July 9, 2009, NJTA filed a Verified Complaint in Condemnation and Order to Show Cause seeking to institute condemnation proceedings to obtain the property. On that same day, the trial judge, finding that the NJTA was "entitled to

immediate and exclusive possession of the premises," entered an Order for Payment into Court and For Possession, whereby NJTA was ordered to deposit with the court the \$1,800,000 estimated value of the property for just compensation. On August 4, 2009, the Witts filed a Motion to Withdraw, seeking disbursement of these funds. However, Lamar opposed the taking.

Lamar moved to dismiss the complaint asserting NJTA's failure to value all interests condemned. Lamar claimed that NJTA was legally obligated to engage in negotiations not just with the Witts, but also with Lamar; it further claimed that NJTA had failed to value the billboard or its permit. The judge concluded that Lamar's billboard was personal property and did not qualify for direct compensation under the eminent domain statute.² As bona fide negotiations are only required to take place with the holder of title of record of the property, Lamar had no right to participate in the negotiations between the Witts and NJTA.

On September 1, 2009, Judge Francis entered an Order for Judgment and Appointing of Commissioners, finding that NJTA "is duly vested with and has duly exercised its powers of eminent

² This would not preclude Lamar from participating in an allocation proceeding with the Witts but precluded its direct negotiations and separate compensation from NJTA. As Judge Francis noted: "Lamar can expect to be made whole for damages sustained as a result of the taking" in separate proceedings.

domain to acquire the Property." Lamar filed a Motion for Reconsideration of this order on September 11, 2009. Lamar took issue with the trial court's finding that the billboard did not meet the definition of "property" under the Eminent Domain Act, and that Judge Francis improperly relied upon the Supreme Court's ruling in R.C. Maxwell Co. v. Galloway Twp., 145 N.J. 547 (1996). Lamar argued that the Maxwell's holding was limited to wooden billboard structures. Finally, Lamar also asserted that Judge Francis's rulings were inconsistent in that the court's determination that Lamar's billboard interests were personal property effectively precluded Lamar from claiming the value of its billboard structure in the subsequent commissioners' hearing, trial or allocation proceeding.

In his decision, Judge Francis reached the following conclusions:

1. Lamar's billboard does not meet the definition of "property" as articulated by the [Act].
2. The NJTA complied with the duty to negotiate in good faith with the record owner of the Property in accordance with N.J.S.A. 20:3-6.
3. The proper method of compensation for the billboard is through a determination of relocation costs and benefits.
4. Based on the terms of the lease between Witt and Lamar, the lease terminates as of the date of a taking and therefore [Lamar]

lacks standing to participate in the condemnation of the realty.

Lamar appealed and ultimately, we granted a temporary remand to allow the Law Division to consider Witt's motion to withdraw the deposited funds. The judge granted that motion.

While on appeal, Lamar raises a number of issues, the primary focus is on the question of whether its billboard is real property under the Act. In addition, it claims that under its lease, it has reserved its rights to participate in the condemnation process. To understand the context of these arguments, we explore some basic principles governing the exercise of the power of eminent domain.

The United States and New Jersey Constitutions provide that when private property is taken by the government for public use, the government must pay just compensation. U.S. Const. amend. V; N.J. Const. art. I, ¶ 20. The purpose of an eminent domain award is to compensate the property owner for loss of that property. New Jersey Sch. Constr. Corp. v. Lopez, ___ N.J. Super. ___ (App. Div. 2010) (slip op. at 17). It is the property's fair market value on the date of the taking that establishes the general measure of just compensation. N.J.S.A. 20:3-30. "Fair market value is 'determined by what a willing buyer and a willing seller would agree to, neither being under any compulsion to act.'" Lopez, supra, ___ N.J. Super. at 17

(quoting State, by Comm'r of Transp. v. Silver, 92 N.J. 507, 513 (1983)). A property owner is generally unable to be compensated for "damages incidental to the taking, such as loss to or destruction of good will, expense of moving to a new location, profits lost because of business interruption, or inability to relocate." State by State Highway Com. v. Gallant, 42 N.J. 583, 587 (1964). "Denial of such alleged losses has been judicially justified upon the reasoning that they are too difficult, remote and uncertain to measure accurately and their allowance might well result in unfounded and exaggerated awards which could exceed the constitutionally established norm." Ibid.

To be compensable under N.J.S.A. 20:3-2(d), the condemned property must be included in the following definition:

land, or any interest in land, and (1) any building, structure or other improvement imbedded or affixed to land, and any article so affixed or attached to such building, structure or improvement as to be an essential and integral part thereof, (2) any article affixed or attached to such property in such manner that it cannot be removed without material injury to itself or to the property, (3) any article so designed, constructed, or specially adapted to the purpose for which such property is used that (a) it is an essential accessory or part of such property; (b) it is not capable of use elsewhere; and (c) would lose substantially all its value if removed from such property.

As we explained in Montclair by Montclair v. D'Andrea, 138 N.J. Super. 479, 487 (App. Div. 1976):

To be deemed "property" such articles must be viewed in either of two ways: (1) are they attached to the realty in a manner which makes them incapable of removal without material injury to themselves or the realty or its improvements, or (2) are they so designed, constructed or specially adopted to the purpose for which the improved realty is used that (a) they are essential accessories or parts of the improved realty, (b) are not capable of use elsewhere, and (c) would substantially lose all value if removed.

Lamar argues that the billboard is an "improvement imbedded or affixed to the land" as evidenced by a "steel monopole set in a five-foot deep, re-enforced concrete footing and foundation that extends to a depth of over 18 feet into the ground." Lamar asserts that a plain reading of the statute allows for a clear and demonstrable intention to include structures similar to the billboard. We disagree.

Lamar focuses on the fact that the billboard is imbedded; however, the key language is not how the property is affixed to the land but whether it is an "essential and integral part" of the land. As the Witts observe, and we agree, "the billboard is not part and parcel to the Witt property, but merely a trade fixture owned by Lamar that is located on the property." The billboard was one structure located in one area of a sizeable piece of property, which was not used in a similar function or similar business as the billboard. See State by Comm'r of

Transp. v. P. & C. Realty Co., 121 N.J. Super. 554, 557 (Law Div. 1972) (discussing that in the case of whether machinery is compensable property, the proper test requires determining whether the machinery and the building to which it was attached acted as a "functional unit" as opposed to looking merely at the "physical mode of annexation to the freehold"); see also Montclair, supra, 138 N.J. Super. at 486 (stating that that the definition of property outlined by the Act is "essentially a legislative codification . . . of the 'functional unit' rule").

While Lamar takes issue with the trial court's seeming disregard of the physical properties of the billboard, Judge Francis did consider credible evidence of the billboard being "made of steel and bricks," but he nevertheless determined it was "clearly capable of removal" in addition to not being "adopted to the purposes of the realty."

In addition to dissecting the Act both parties also allude to language found in New Jersey's Tax Assessment Law and the New Jersey Department of Transportation (NJDOT) Revised Right of Way Acquisition Manual published in August 2007 in determining whether the billboard is real property. While not dispositive, these sources provide some guidance in considering the issue involved.

The NJDOT³ Right of Way Acquisition Procedures Manual Section 3.17 addressing "Advertising Signs" states that "In those cases involving the partial acquisition of real property, signs within the area of the parcel to be acquired, whether owned by the tenants or the property owners, are to be treated as relocation items, unless the circumstances otherwise justify a determination that they constitute part of the realty or are fixtures." The Manual also provides that "Off-premise (billboards/poster panels) sign panels may be relocated. However, the supports and foundation of billboards should be considered realty, and not relocated."

Lamar is critical of the motion judge's reference to R.C. Maxwell Co. v. Galloway Twp., 145 N.J. 547 (1996), which discussed the distinction between personalty and realty for tax purposes, and found that a billboard was not realty. While Lamar contends that the holding was limited to wooden billboards only, a close inspection of the language does not suggest such a narrow holding.⁴ While Maxwell, supra, engages in an extensive

³ NJTA is not bound by the terms of the Manual as it is not a subdivision of the NJDOT; NJTA is an entity independent of the State.

⁴ Maxwell provides a thorough analysis, for tax purposes, of what constitutes realty. It examines the relevant factors, which are substantially similar to those considered in condemnation proceedings, i.e. "material injury to the personalty property" if removed.

discussion of the fact that the billboard in question was comprised of eighty-five percent wood, the Supreme Court never specifically stated that "wooden billboards" are personalty, but merely that "billboards are considered personal property affixed to real property." 145 N.J. at 556.

Maxwell also addressed the issue of removability of the billboard. Whether property can be removed from the realty requires determining whether the billboard would be materially injured. The Division of Taxation defines "material injury" as "physical damage to the personal property sufficient to destroy its utility." N.J.A.C. 18:12-10.1. "The billboard's utility is not destroyed when it is removed. Approximately 80% of a billboard's support structure is salvageable on removal. The advertising face, which is the key component of a billboard, is not damaged by removal and is normally completely reusable." Maxwell, supra, 145 N.J. at 557.

In addition to statutory and other relevant legal authority, the NJTA points to language found in the lease agreement between the Witts and Lamar as evidence tending to show the billboard is merely personal property. NJTA maintains that the lease contains "clear and unambiguous" language that Lamar considered the billboard as "personal property capable of removal from the Property and movable to another location."

The lease states in pertinent part, "Landlord agrees that the Sign shall remain Tenant's personal property, and, at Tenant's option, may be removed by Tenant at any time during the term of the Lease." (Emphasis added). The lease agreement entered into by the parties demonstrates that Lamar never considered the billboard as real property and reserved its right to remove the billboard at any time during the term of the lease. In sum, Lamar, by its assignor, has contractually identified its property as personalty.⁵

⁵ Lamar's reliance on Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973) is misplaced. As stated in Almota,

The improvements are assuredly "private property" that the Government has "taken" and for which it acknowledges it must pay compensation. The only dispute in this case is over how those improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that.

[Id. at 475 n.2, 93 S. Ct. at 795, 35 L. Ed. 2d at 8.]

The footnote cited by Lamar, id. at 478 n.5, 93 S. Ct. at 797, 35 L. Ed. 2d at 10, has no bearing on the issue presented here.

We conclude that the billboard is not realty and any compensation due Lamar will be addressed at the allocation proceeding.

We likewise reject the argument that the lease reserved Lamar's right to participate in the condemnation proceeding.

If there is more than one interest in a property, as is the case when the property in question includes a leasehold interest, New Jersey condemnation procedures follow the "unit rule" which allows only one award to be made for all the separate interests in the property. Jersey City Redev. Agency v. Costello, 252 N.J. Super. 247, 259 (App. Div.), certif. denied, 126 N.J. 332 (1991). A lump sum verdict encompasses all interests in the land; a lessee does not have a right to have his leasehold separately and specifically evaluated in the condemnation award. The lessor is generally compensated upon a division of the fund for his reversionary interest, and the lessee for damages to his leasehold, out of the award, in allocation proceeding, absent contrary provisions in the lease, or based upon their agreement. Wayne Co. v. Newo, Inc., 75 N.J. Super. 100, 104 (App. Div. 1962); N.J. Highway Auth. v. J. & F. Holding Co., 40 N.J. Super. 309, 316 (App. Div. 1956); Iron Mountain Info. Mgmt., Inc. v. City of Newark, 405 N.J. Super. 599, 617 (App. Div. 2008) ("In the absence of a contractual

waiver, a tenant is entitled to an allocation of the value of its leasehold from the award of the value of the fee' simple interest.") (internal quotation marks and citation omitted). As such, even if a lessee is determined to have a compensable interest, the lessee is not afforded the right to participate in the actual condemnation proceedings at which his interest is separately evaluated. It may seek reimbursement at a separate allocation proceeding. "The apportionment of that amount to those persons claiming an interest therein is a matter of no concern to the condemnor." Costello, supra, 252 N.J. Super. at 259-60. See also J&F Holding, supra, 40 N.J. Super. at 314 (discussing how having one award of just compensation is in accord with constitutional and statutory requirements).

While some jurisdictions have recognized exceptions to the unit rule, New Jersey has not. See Sports and Exposition, supra, 137 N.J. Super. at 280-81 (quoting State v. New Jersey Zinc Co., 40 N.J. 560, 574 (1963)).

Generally, in the absence of a contrary stipulation of the parties, the total deprivation of the tenant's possession and enjoyment of the demised premises by condemnation terminates the relationship of landlord and tenant. N.J.S.A. 46:8-7. The termination of the lease does not, however, prevent the tenant

from asserting the value of his lease later, it merely prevents the tenant from participating in the condemnation.

Many leases of business properties include a contractual provision discussing the disposition of a lessee's interest in the face of eminent domain. J. & F. Holding, supra, 40 N.J. Super. at 309 (citing 4 Nichols, Eminent Domain 180, § 12.42(3)). Such contractual agreements are valid and enforceable against both parties. 1 Orgel, Eminent Domain 524, § 121, note 88.

If a valid agreement so provides, a tenant may be able to participate in the condemnation proceedings. However, that is not the case here.

The lease agreement's condemnation provision states:

Condemnation. If any portion of the Property shall be condemned or taken in any manner for any public use or quasi public use and said taking materially affects the ability of Tenant to operate the Sign as anticipated herein, then Landlord agrees to use its best efforts to facilitate the relocation of the sign by Tenant on the Property in a location suitable for the intended use. During the period that the Sign is inoperable, Tenants' obligation to pay rent shall be suspended until such time that the sign is relocated. In the event that the Sign cannot be relocated or if all of the Property Site shall be condemned or taken in any manner for any public use or quasi public use, this Lease shall terminate as of the date of the actual taking and the Rent payable hereunder shall be prorated to the date of such taking. Tenant shall be

entitled to any protections provided by the law.

[(Emphasis added).]

Lamar had contracted away its right to participate in condemnation proceedings, as its tenant relationship and therefore its leasehold interest in the property terminated when NJTA initiated condemnation proceedings.

While Lamar focuses on the last sentence, "[t]enant shall be entitled to any protections provided the law," this generalized provision protects Lamar's right to seek compensation in a separate proceeding, not its right to participate in the condemnation proceedings.

Lamar may be entitled to compensation for its leasehold interest at apportionment proceedings, at which time the parties can address the period of the unexpired term of the lease, the options, if any, therein to renew or of the landlord to terminate, the characteristics of the demised premises and the amount of the rent reserved in determining the just amount. See Hercey v. Bd. of Chosen Freeholders, 99 N.J. Eq. 525 (Ch. 1926). We conclude that Lamar did not reserve any rights to participate directly in this condemnation proceeding.

Since we conclude that the billboard is not real estate and Lamar has no rights under its lease to participate directly in the condemnation proceeding, we conclude that the refusal of the

NJTA to enter into bona fide negotiations with Lamar directly was not a violation of the Act.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION